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THE INTERNATIONAL MIGRATION OF CONSTITUTIONAL NORMS IN THE NEW WORLD ORDER

CONSTITUTIONAL POLITICS AND TEXT IN THE NEW IRAQ: AN EXPERIMENT IN ISLAMIC DEMOCRACY*

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INTRODUCTION

On October 15, 2005, nearly ten million Iraqis cast ballots in a national referendum on a new constitution. The charter had been prepared in the wake of the American-led campaign to depose Saddam Hussein from power, and in the midst of a raging insurgency. The final draft was extremely controversial, especially with the minority Sunni Arab community, which feared that the draft's version of federalism would threaten the unity of Iraq. Over widespread Sunni opposition in the referendum, however, the constitution won the approval of over seventy-eight percent of Iraqi voters nationwide. It entered into effect two months later, with the election of a new National Assembly under its auspices.[1]

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1. Dexter Filkins, *Iraqis, Including Sunnis, Vote in Large Numbers on Calm Day*, N.Y. Times, Dec. 16, 2005, at A1.

For all the conflict surrounding its preparation, Iraq's new constitution is a document of substantial historical significance. Although it was prepared while U.S. troops remained in the country, democratic principles governed the process by which it was written (by a directly elected Parliament) and approved (by a national referendum). Such principles also figure prominently in the charter's substantive provisions. Largely because of the democratic character of the drafting and ratification process, the constitution also reflects the strongly Islamic character of Iraqi electoral and grass-roots politics in the post-invasion period. Indeed, it is fair to say that the charter self-consciously aims to integrate Islamic values into the country's political life while retaining the separation of powers, checks and balances, and human-rights guarantees that are the hallmark of secular and democratic constitutions around the world.

This essay seeks to examine the role of Islam and Islamic politics in Iraq's emerging constitutional order. Focusing on the question of Islam in particular, it provides the most detailed account of the drafting process published to date. It also advances three major structural-historical claims that have not been acknowledged in the growing literature on the topic. The first is that the earliest origins of the Iraqi constitution of 2005 are to be found in the Iraqi opposition politics that took place in the decade-and-a-half beginning in the early 1990s. In this period, a core group of Iraqis, most of whom were based in the Kurdistan region of Northern Iraq, Europe, and the United States, sought to develop a common framework of opposition to the Ba'thist regime. Democracy, Islam, federalism, pluralism, and human rights—the cardinal values of the final constitution—all achieved prominence in Iraqi political discussions during this period. In an important sense, then, the constitution bears the imprint of the opposition politics that preceded its drafting.

The second claim advanced in this essay is that, as the constitutional process became increasingly participatory and democratic in the period from the fall of Saddam Hussein to ratification, the constitution itself became increasingly Islamic in orientation and detail. The antecedent ideas present in the Iraqi opposition's earliest constitutional plans were largely retained, but popular politics and the engagement with post-invasion political reality altered the balance in favor of more explicit and powerful provisions oriented to Islamic law. This balance changed in a series of steps, each corresponding to a greater degree of majoritarianism in the constitutional process. To put it simply, more democracy meant more Islam.

The third claim is that while the final constitution sets the parameters for the relationship between Islam and democracy in Iraq's political order, the text alone is unlikely to determine the balance once and for all. For a variety of reasons—including the ongoing insurgency, the constitution's own textual ambiguities, and rapidly shifting ethnic and sectarian alliances—the final balance between Islam and democracy in Iraq will depend as much on everyday political practice as on specific constitutional

provisions. In this sense, the Iraqi constitutional process continues, even after ratification of the document itself.

Part I of this essay sets out a preliminary narrative of Iraq's constitutional process, broadly understood to encompass the period from the early 1990s (with the birth of the modern Iraqi opposition-in-exile) through the present day. It argues that the basic political principles undergirding Iraqi constitutionalism—Islam, democracy, federalism, pluralism, and human rights—were shaped by the same Iraqi politicians who would rise to power after the fall of Saddam Hussein. These figures, operating under a constitutional process shaped first and foremost by the Iraqi Shi'i cleric 'Ali al-Sistani, would later draw upon on these principles when drafting the interim constitution in 2004 and the permanent charter the following year.

Part II, which addresses the role of Islam, individual rights, separation of powers, federalism, and judicial review in the final constitutional text, examines the key provisions through which Iraqi leaders sought to balance Islamic and democratic values.[2] These provisions embody compromises between Shi'i Islamists seeking to maximize the document's Islamic and majoritarian aspects on the one hand, and, on the other, a loose coalition of Kurds, secular nationalists, and the United States urging greater protection of individual liberties and minority rights. Ultimately, all sides made concessions, but the final constitution reflects the dominant political strength of the Shi'i Islamists.

Part III completes the essay by drawing some necessarily tentative conclusions about the Iraqi constitutional process overall. It stresses that Iraqi politics remains in a state of flux, and that the relationship between Islam and democracy will evolve over time. It is likely to be shaped, but not fully determined, by Iraq's constitutional text.

One caveat is appropriate. Although this essay focuses on the interaction between Islamic and democratic principles in the Iraqi constitutional process, it is a striking fact that this interaction was not the major source of controversy among domestic political actors inside Iraq as the drafting unfolded. Federalism, not religion, proved the most contentious issue of all in Iraqi constitutional negotiations.[3] From the beginning, most Iraqi politicians agreed that their new regime would embrace Islam, democracy, and human rights simultaneously. The only serious differences on these issues concerned precisely how to balance these commitments within the constitutional text. The Iraqi drafting debates over this balance were often fierce, and competing attitudes over Islamic politics have fueled many of the most passionate arguments over specific constitutional provisions.

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2. Except where otherwise noted, this essay relies upon the unofficial English translation of the permanent Iraqi constitution made publicly available by the Independent Electoral Commission of Iraq at http://www.ieciraq.org/final%20cand/Constitution_Eng_UNs-13.pdf.

3. This article examines the Iraqi constitution's approach to federalism only to the extent that the federalism settlement may impact the role of Islam in Iraq's emerging political and constitutional order.

I. PROCESS

Formally, Iraq's constitutional process lasted just over six months, from the inauguration of the first elected Parliament on March 16, 2005, through the successful referendum on October 15 of that year. Broadly understood, however, the process began much earlier, in the wake of the Gulf war of 1990-91, with the efforts of the Iraqi opposition-in-exile to hammer out political principles that would govern a post-Saddam Iraq. The main political players in this opposition were the same men who would write Iraq's interim and permanent constitutions nearly fifteen years later. From the start, the opposition's basic political vision for Iraq aimed to provide simultaneously for democracy, Islamic values, federalism, pluralism, and human rights. Over time, there would be considerable evolution in the relative weight given to each of these principles, particularly as political power shifted toward the Shi'i Islamists in the years immediately following the war. But the core elements would remain the same and, with the exception of federalism, would never be seriously challenged inside Iraq.[4]

A. *Opposition*

The modern Iraqi opposition sprung to life in a series of meetings that took place in 1992 in Vienna and Salah ad-Din, a Kurdish city north of the no-fly zone established by the United States in the wake of the Kuwait war.[5] For opponents of Saddam Hussein, the Kuwait war ended in great disappointment. Having called for an uprising, the United States stood by as the Iraqi regime crushed Shi'i and Kurdish rebellions. In the wake of the uprising's failure, Iraqi opposition members of varying ethnic, religious, and political backgrounds joined together with U.S. support to form the Iraqi National Congress (INC), a loose umbrella organization which would unite the disparate parties opposed to Saddam Hussein's rule. The INC never became a particularly effective institutional force to fight the Ba'thist dictatorship inside Iraq. It did, however, provide a framework for a series of political meetings in which leading figures from each of Iraq's major communities came together to discuss Iraq's future.[6] The political diversity of these meetings was significant, and they helped to develop a shared consensus around a core set of key constitutional principles which the major

4. The only major opposition to this basic political vision has come from the Iraqi insurgency, which has utterly failed to put forward a positive political program of its own.

5. For a good overview of the development of the Iraqi opposition in the context of the tendentious U.S.-Iraqi international standoff in the 1990s, see Andrew Cockburn & Patrick Cockburn, Saddam Hussein: An American Obsession 44-57, 164-90, 211-50, 278-81 (2002); Kenneth M. Pollack, The Threatening Storm: The Case for Invading Iraq 55-108 (2002); David Wurmser, Tyranny's Ally: America's Failure to Defeat Saddam Hussein 9-41 (1999); Laurie Mylroie, *The United States and the Iraqi National Congress*, Middle E. Intelligence Bull., Apr. 2001, http://www.meib.org/articles/0104_ir1.htm.

6. These meetings largely took place outside Iraq, but were also occasionally held in the Iraqi Kurdistan region, in areas outside Saddam Hussein's control.

opposition figures would later seek to implement following the American invasion.

The most important among the Shi'i Islamist opposition groups were the Da'wa Party and the Supreme Council for the Islamic Revolution in Iraq (SCIRI).[7] Da'wa was founded inside Iraq in the late 1950s, under the influence of the leading Shi'i cleric Muhammad Baqir al-Sadr, who would be murdered by Saddam's security services in 1980.[8] Known for its blend of Iraqi nationalism and Islamic values, Da'wa would leave the INC in 1995 over growing objections to the Kurdish demand for federalism.[9] The party eventually splintered, with varying factions being led from London, Tehran, and inside Iraq. Following the war, two of its senior figures, Ibrahim Jaafari and Nuri al-Maliki would successively lead elected Iraqi governments as Prime Minister.

SCIRI was founded in 1982 in Tehran by the prominent Shi'i cleric Ayatollah Muhammad Baqir al-Hakim with the funding and assistance of the Iranian government.[10] Its party militia, the Badr Corps, was trained by Iran to conduct periodic raids into Iraq during the Iran-Iraq war. The scion of a family of prominent Najafi clerics, Hakim never fully set forth his political vision for post-Saddam Iraq. Though at one point he had expressed support for Khomeini's doctrine of the rule of the jurist, *wilayat al-faqih* (a position that deviated from that of the traditionally quietist Najaf clergy), he had also publicly embraced democracy as the preferred regime for post-war Iraq.[11] Muhammad Baqir al-Hakim was assassinated in Najaf

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7. For more background on the Shi'i religious parties, see Juan Cole, *The Iraqi Shiites: On the History of America's Would-Be Allies*, Boston Rev., Oct.-Nov. 2003, at 21, *available at* http://www.bostonreview.net/BR28.5/cole.html.

8. Fouad Ajami, The Foreigner's Gift: The Americans, the Arabs, and the Iraqis in Iraq 93, 225 (2006).

9. For the best examination of the range of religious Shi'i opinions on federalism before the war, see Reidar Visser, *Shi'i Perspectives on a Federal Iraq: Territory, Community, and Ideology in Conceptions of a New Iraqi Polity*, *in* Oil in the Gulf: Obstacles to Democracy and Development 125 (Daniel Heradstveit & Helge Hveem eds., 2004).

10. For a profile of Ayatollah Muhammad Baqir al-Hakim, and a broader pre-war account of the Shi'i Islamist opposition, see Jon Lee Anderson, *Dreaming of Baghdad: An Opposition Leader Waits for War*, New Yorker, Feb. 10, 2003, at 58.

11. The democratic bonafides of the Supreme Council for the Islamic Revolution in Iraq (SCIRI) have been repeatedly called into question by some commentators, in part due to Hakim's alleged support for Iranian-style theocratic rule. *See* Cole *supra* note 7; *see also Iraq Transition—The Way Ahead (Part II): Hearing Before the S. Comm. on Foreign Rel.*, 108th Cong. (2004) (testimony of Larry Diamond, Senior Fellow, Hoover Inst., Stanford Univ.), *available at* http://www.senate.gov/~foreign/testimony/2004/DiamondTestimony040519.pdf. But it is important to recognize that until the 2003 war, Hakim operated from Tehran under the protection of the Iranian government. From the time he returned to Iraq in May 2003 until his death in August 2003, he expressed support for democracy in Iraq, and since then SCIRI has consistently pursued a democratic political platform (albeit while retaining the Badr Corps as an armed militia force independent of democratic control). Indeed, it is hard to imagine why SCIRI would have permitted Iraq's democratic constitution to be so difficult to amend if, as some allege, the party's long-term

in August 2003, leaving his brother 'Abd al-'Aziz to assume leadership of SCIRI.[12] The younger brother would follow a pragmatic course throughout the post-war period, participating fully in Iraq's political transition and playing the lead role in representing Shi'i Islamist interests in the constitutional discussions.

Also central to the Iraqi opposition were the two main Kurdish political organizations, the Kurdistan Democratic Party (KDP) led by Mas'ud Barzani and the Patriotic Union of Kurdistan (PUK) led by Jalal Talabani. Following the Gulf War, these leaders began constructing a quasi-autonomous regional government in Northern Iraq, funded by oil revenues administered by the United Nations and protected by American airpower. The KDP and PUK were bitter rivals, and despite their INC membership, they fought an internal Kurdish civil war between 1994 and 1996. In the post-invasion constitutional discussions, however, Barzani and Talabani presented a powerful and united front in defense of federalism and other Kurdish interests. They also provided a consistent voice in favor of secularism, fearing the rise of a Shi'i Islamist dictatorship to replace Saddam's secular tyranny.

Finally, the original INC coalition also included a series of secular parties and independents. Most prominent among these was Ahmad Chalabi, who was chosen to lead the INC's Executive Council.[13] Born into a prominent Baghdad merchant family, Chalabi fled Iraq in the wake of the military coup of 1958 as a young teenager.[14] A mathematician by training and banker by profession, Chalabi would become a brilliant if opportunistic political strategist and dealmaker.[15] A secular democrat and by identity a Shi'i, he balanced his appeal to American officials with efforts to cultivate ties to Iran and the Shi'i religious parties. Chalabi's main rival among secular exiles was Iyad 'Allawi, a reputed former Ba'thist intelligence agent who had turned against Saddam Hussein in the 1970s.[16] Also a Shi'i Arab, 'Allawi boasted credibility with Sunnis disaffected with the regime; he also provided extensive contacts in Iraqi military and intelligence circles. 'Allawi's Sunni connections were of considerable value, given the overall imbalance of the INC in favor of Kurds and Shi'is. Both men would later assume leading roles in the post-Saddam political structures, and from June

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aim is to transform Iraq into an Islamic theocracy. On the amendment process, see Iraq Const. art. 122.

12. For the consequences of the assassination, see Noah Feldman, What We Owe Iraq: War and the Ethics of Nation Building 38-39 (2004). For a profile of the younger Hakim, see Jon Lee Anderson, *The Candidate*, New Yorker, Feb. 2, 2004, at 50.

13. For a profile of AhmadChalabi, see Jane Mayer, *The Manipulator*, New Yorker, June 7, 2004, at 58. On his role in promoting the overthrow of Saddam Hussein, see Peter W. Galbraith, The End of Iraq: How American Incompetence Created a War Without End 84-87 (2006).

14. *See* Mayer, *supra* note 13, at 62.

15. *See id.*

16. For a profile of Iyad 'Allawi, see Jon Lee Anderson, *A Man of the Shadows*, New Yorker, Jan. 24, 2005, at 56.

2004 through March 2005 'Allawi would serve as Prime Minister of the appointed Iraqi Interim Government.

The purpose of the Iraqi opposition, of course, was to promote the downfall of Saddam Hussein and his Ba'thist regime in Baghdad, using whatever political, military, intelligence, propaganda, and other means at their disposal. The INC announced its political vision for a post-Saddam Hussein Iraq following its initial 1992 meeting at Salah ad-Din, when the leading parties adopted a series of principles enshrined in the initial INC Articles of Association.[17] The Articles called for building "a system of government that respects human rights and [is] democratic, federal, pluralistic, and parliamentary in the context of constitutional institutions within the rule of law and an independent judiciary."[18] They pledged to "be guided by all that is noble and humane in the history of mankind and civilization especially the tenets of Islam and its compassionate and benevolent values; Islam is the religion of the State."[19] The Articles further emphasized the importance of "cultural and political pluralism," and reinforced the group's commitment to "[t]he ballot box" as the "arbiter of legitimacy in any future government or regime through free, direct and honest elections conducted through secret ballot."[20]

These core ideas—democracy, Islam, federalism, pluralism, and human rights—constituted the stated program of the Iraqi opposition parties, both before and after the invasion of Iraq in 2003. In developing them, the opposition was encouraged and supported by the U.S. government, especially after the terrorist attacks of September 11, 2001. From late 2001 through early 2003, as the U.S. government moved towards war against Saddam Hussein, it also increased its outreach to the opposition, sponsoring a series of formal political meetings and smaller roundtable discussions for opponents of the regime. The Americans hoped not only to stimulate thinking on post-war political reconstruction, but also to show that Iraq's liberation would be a joint operation supported by the Iraqi people themselves, and that it would serve the interests of democracy.[21] The INC's core political principles were repeatedly reaffirmed (albeit in slightly different language) in the main political statements issued by the Iraqi opposition in the run-up to the war.[22]

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17. *See* Iraqi Nat'l Cong. (INC), The Articles of Association of the Iraqi National Congress, (Oct. 31, 1992) [hereinafter INC Articles of Association], *available at* http://inciraq.com/English/INC/1992%20INC%20Articles%20of%20Association_En.htm (unofficial translation).

18. *Id.* art. 1.

19. *Id.*

20. *Id.*

21. For a personal account of U.S. efforts to cultivate the Iraqi opposition before the war, see David L. Phillips, Losing Iraq: Inside the Postwar Reconstruction Fiasco (2005).

22. *See, e.g., Political Statement of the Iraqi Opposition Conference in London,* Kurdistan Observer, Dec. 19., 2002, *available at* http://home.cogeco.ca/~konews/20-12-02-political-statement-london-conference.html; Final Statement, Meeting of the Coordination and Follow-Up Committee Held in Salahaddin, 26 February-1 March, 2003, http://www.wadinet.de/news/dokus/final_statement.htm (last visited Aug. 24, 2006). One

Despite its best efforts, the Iraqi opposition never developed into an effective political or military tool against the regime. A series of failed military coups and the Kurdish in-fighting of the mid-1990s ended any serious hope for an opposition-led regime change in Baghdad. It was only the events of September 11—and the personal ties that Chalabi had developed with leading American neoconservatives, by then firmly ensconced in the Bush Administration—that would raise the Iraqi opposition's profile as a potential partner in an American effort to replace the Ba'thist dictatorship. Thus, despite lacking any ability to topple the regime on its own, the opposition would be given the chance to implement its core political principles in the constitutional process to take place in post-Saddam Hussein Iraq.

B. *Occupation*

Baghdad fell to Coalition forces on April 9, 2003.[23] Some three months later, with the blessing and assistance of the United Nations, the American-led Coalition Provisional Authority (CPA) formally established the Iraqi Governing Council (IGC), which would serve alongside the CPA as the chief Iraqi political entity throughout the period of formal occupation.[24] All of the major opposition parties and personalities from before the war—including SCIRI's 'Abd al-'Aziz al-Hakim, Da'wa's Jaafari, Chalabi, 'Allawi, and the Kurdish leaders Barzani and Talabani—were named to leading roles.[25] Also joining the IGC were several Sunni Arabs who had been wary of involvement with the opposition movement before the war.

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possible counterexample to this trend was the Final Report of the Democratic Principles Working Group, a group of Iraqi oppositionists organized by the U.S. State Department to consider issues relating to a democratic transition in Iraq. The report's strikingly secular outlook is most likely due to the influence of its primary author, the Iraqi writer Kanan Makiya. It was never given the formal blessing of the Iraqi political parties. *See* Democratic Principles Working Group, U.S. Dep't of State, Final Report on the Transition to Democracy in Iraq, (Nov. 2002), *available at* http://www.wadinet.de/news/dokus/transition_to_democracy.pdf; *see also* George Packer, The Assassins' Gate: America in Iraq 66-99 (2005); Phillips, *supra* note 21, at 77-87, 94-95.

23. Patrick E. Tyler, *U.S. Forces Take Control in Baghdad; Bush Elated; Some Resistance Remains*, N.Y. Times, Apr. 10, 2003, at A1.

24. Several days after it was established, the Iraqi Governing Council (IGC) released a "Political Statement" which again reaffirmed the substantive constitutional principles that had been embraced by the opposition in exile. *See* IGC, Political Statement (July 2003) (on file with the Fordham Law Review). The Council wrote that among its key objectives were the following:

> Laying down the foundation for a pluralistic federal democratic system that insures public liberties, freedom of opinion and expression, respect of human rights, respect for the Islamic identity of the majority of the Iraqi people, respect for women['s] rights and enhancement of the judiciary and guaranteeing its independence; and above all to launch the democratic process to adopt a permanent constitution for the country.

Id.

25. On the IGC, see Feldman, *supra* note 12, at 108-12. On the international legal basis for the IGC, see S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003); S.C. Res. 1500, ¶ 1, U.N. Doc. S/RES/1500 (Aug. 14, 2003).

Most prominent among them were Adnan Pachachi, an elder statesman who had served as Iraq's Foreign Minister in the 1960s, and Muhsin 'Abd al-Hamid, the Secretary General of the Iraqi Islamic Party, a Sunni group that had been operating inside Iraq. The twenty-five members of the IGC chose these figures (together with the respected Shi'i cleric Muhammad Bahr al-'Ulum) to serve as their rotating, nine-man presidential council.

As it began its work, the most pressing task facing the IGC was to establish a process for drafting a new Iraqi constitution and holding elections. There was never any question that a new constitution would need to be written from scratch.[26] Under the leadership of U.S. Ambassador L. Paul Bremer, the CPA initially envisioned that a representative assembly of Iraqis from around the country would write a new constitution, which would subsequently be ratified in a national referendum. Elections would then be held pursuant to the new constitution, after which the CPA would dissolve and power would be transferred to the elected Iraqi government.[27] At the time, some of the newly named IGC members objected that delaying the transfer of formal authority to an elected government until after the new constitution had been approved and elections held would take too long. They did not, however, initially object to the notion of an unelected body actually performing the drafting.

On June 30, however, two weeks before the formation of the IGC, the CPA's constitutional plan came under direct challenge from outside the group of former exiles and others who would comprise the IGC. Grand Ayatollah 'Ali al-Sistani, the most prominent Shi'i cleric in Iraq, issued a *fatwa* declaring that any constitution not drafted by a democratically elected body would be "unacceptable."[28] The *fatwa* signaled a new era of Shi'i

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26. The IGC members deemed the Ba'thist "provisional constitution" of 1970, which was still in effect with amendments proposed by Saddam Hussein in 1990, as clearly beyond the pale, and no serious consideration was given to readopting Iraq's monarchical constitution of 1925 (or, for that matter, its military constitution of 1958). For an overview of Iraq's troubled constitutional history, see Nathan J. Brown, *Constitutionalism, Authoritarianism, and Imperialism in Iraq*, 53 Drake L. Rev. 923 (2005).

27. Since well before the war, the Bush Administration's political planning had always assumed that the new constitution would be written before holding elections, which would take far too long to organize. From the start, L. Paul Bremer operated on this assumption, especially after an extensive assessment conducted by the United Nations in the summer of 2003 confirmed that it would take close to a year to prepare for elections. *See* L. Paul Bremer III, *Iraq's Path to Sovereignty*, Wash. Post, Sept. 8, 2003, at A21. This CPA plan was generally consistent with the constitutional process proposed by the report of the State Department-organized Future of Iraq Project, in particular in its decision to hold national elections only after a new constitution had been written. *See* Democratic Principles Working Group, *supra* note 22, at 13-14.

28. The relevant portion of the *fatwa* read as follows:

> Those forces [the Coalition] have no jurisdiction whatsoever to appoint members of the Constitution preparation assembly. Also there is no guarantee either that this assembly will prepare a constitution that serves the best interests of the Iraqi people or express their national identity whose backbone is sound Islamic religion and noble social values. The said plan is unacceptable from the outset. First of all there must be a general election so that every Iraqi citizen—who is eligible to vote—can choose someone to represent him in a foundational Constitution

religious influence in Iraq's transitional political process.[29] Motivated in part by the concern that the United States would impose a constitution as it had in post-war Japan in the 1940s, Sistani sought to prevent the use of this tactic in Iraq.[30] He also wanted to ensure that the drafting body would reflect Iraq's demographics and, most important of all, its majority-Shi'i population.[31] Sistani worded his pronouncement brilliantly, in democratic language devoid of sectarianism. It essentially hoisted the Americans by their own petard, putting them in the uncomfortable position of seeming to oppose elections, despite having purportedly launched the war to advance democratic principles.

It also reflected an important step in the gradual development of Sistani's unique brand of political theory.[32] The quietism that had been his hallmark while Iraq was ruled by Saddam Hussein began to give way to a more activist approach, in which the authority of the *marja' at-taqlid*, or senior authoritative Shi'i jurist, could be invoked with respect to questions of constitutional structure. This kind of intervention fell very far short of the rule by the jurist envisioned under Khomeini's theories and embodied to a greater or lesser extent in various versions of the Iranian constitution. Sistani was in no way dictating ordinary policy nor purporting to review political decisions. He was, however, offering a binding legal opinion, couched in democratic theory, on the legitimate structures of constitution making. This degree of involvement in constitutional politics would cast a long shadow over subsequent constitutional negotiations.

> preparation assembly. Then the drafted Constitution can be put to a referendum. All believers must insist on the accomplishment of this crucial matter and contribute to achieving it in the best way possible.

Letter from Grand Ayatollah Sayyid Ali Al-Husseini Al-Sistani to a Group of Believers (June 26, 2003), *available at* http://www.sistani.org/messages/eng/ir5.htm.

29. *See* Noah Feldman, *The Democratic Fatwa: Islam and Democracy in the Realm of Constitutional Politics*, 58 Okla. L. Rev. 1, 1-9 (2005).

30. L. Paul Bremer III with Malcolm McConnell, My Year in Iraq: The Struggle to Build a Future of Hope 94 (2006).

31. Indeed, it is virtually impossible to overestimate the vehemence with which the Shi'i political and clerical leadership insisted on obtaining a numerical majority in virtually all of Iraq's transitional institutions—from the IGC (and its nine-man Presidential Council), to the initial cabinet, to the Iraqi Interim Government appointed in June 2004. Many commentators have blamed the CPA for imposing ethnic and sectarian quotas on the Iraqi people (and hence enflaming intercommunal tensions), but this criticism misses the fact that allocating posts roughly in proportion to estimated demographic realities was, quite simply, a political necessity. For an example of this criticism, see Kenneth M. Pollack et al., The Saban Ctr. for Middle E. Policy at the Brookings Inst., Analysis Paper No. 7, A Switch in Time: A New Strategy for America in Iraq 54 (Feb. 2006), *available at* http://www.brookings.edu/fp/saban/analysis/20060215_iraqreport.pdf.

32. For more on Sistani's political thought, Iraq's homegrown Shi'i clergy, and their relationship to the Shi'i political parties, see Ajami, *supra* note 8, at 87-108; Reuel Marc Gerecht, The Islamic Paradox: Shiite Clerics, Sunni Fundamentalists, and the Coming of Arab Democracy 17-43 (2004); Juan Cole, *The United States and Shi'ite Religious Factions in Post-Ba'athist Iraq*, 57 Middle East J. 543 (2003); Reidar Visser, Norweigan Inst. of Int'l Affairs, Paper No. 700, Sistani, the United States and Politics in Iraq: From Quietism to Machiavellianism? (Mar. 2006), *available at* http://www.nupi.no/IPS/filestore/700.pdf.

For the Americans, the *fatwa* posed an acute practical problem. It seemed likely to delay the start of the constitutional process by nine to twelve months, the period U.N. experts estimated it would take to organize and hold national elections.[33] Meeting Sistani's demand, while holding to the CPA's proposed sequence of transitional events (constitution first, then referendum and elections, and finally transfer of authority to a sovereign Iraqi government) would result in a formal occupation lasting nearly two years.[34] For American officials eager to transfer authority to an Iraqi government that would be formally recognized as legitimate and sovereign by the international community, this was far too long to wait.

As a result, for nearly six months, the IGC and CPA desperately—and, in retrospect, mistakenly—sought to craft an alternative to direct elections that would satisfy the terms of Sistani's *fatwa* while allowing the constitutional drafting process to begin immediately. Even the Shi'i Islamist members of the IGC closest to Sistani sought a solution short of direct elections. They too hoped to end the American occupation on as short a timetable as possible.[35]

At the root of the decision not to comply immediately with the *fatwa* was a fundamental lack of appreciation, among both Americans and Iraqi leaders, of the popular influence wielded by the Shi'i clerical leadership, and by Sistani in particular. For decades in Iraq, dictatorial, Sunni-dominated regimes had brutally suppressed the country's Shi'i clerics, forcing them to keep quiet and depriving them of any role in Iraqi political life.[36] Before the war, U.S. officials (along with many, though not all, outside experts) had failed to grasp the extent to which large segments of Iraqi society would look to the clerical hierarchy for guidance in the power vacuum that followed Saddam Hussein's rule. U.S. officials believed that Iraq was far more secular than the Iranian theocracy, and that in any case the traditionally quietist Iraqi clergy would choose to remain outside the political sphere.[37] Bush Administration officials advocated the growth of a

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33. Bremer with McConnell, *supra* note 30, at 164.

34. *Id.*

35. Indeed, for months after the *fatwa*, prominent members of SCIRI along with key Shi'i politicians with ties to Sistani, including Mowaffaq al-Rubaiee and Ahmed Chalabi, repeatedly proposed options for forming a constitutional convention that were well short of meeting Sistani's demand for direct, national elections.

36. *See* Ajami, *supra* note 8, at 87-108.

37. On this general point, see Feldman, *supra* note 12, at 79; Noah Feldman, *Imposed Constitutionalism*, 37 Conn. L. Rev. 857, 865-68, 875-78 (2005). For examples of American officials and experts underestimating the importance of Islam and the clerical leadership, see Pollack, *supra* note 5, at 400-02; Wurmser, *supra* note 5, at 70-79; Daniel L. Byman and Kenneth M. Pollack, *Democracy in Iraq?*, Wash. Q., Summer 2003, at 122; Interview by Melissa Block, Nat'l Pub. Radio, with Paul Wolfowitz, Deputy Sec'y of Def. (Feb. 19, 2003), *available at* http://www.defenselink.mil/transcripts/2003/t02202003_t0219npr.html. A leading neoconservative statement of the case for war did not even mention the importance of the Shi'i clergy at all. *See* Lawrence F. Kaplan & William Kristol, The War Over Iraq: Saddam's Tyranny and America's Mission (2003). Finally, it is worth noting that the news media also failed to grasp the significance of the Shi'i clergy before the war. A search of the Lexis-Nexis English language news database, for example, reveals that in the

democracy in Muslim Iraq, but hoped and expected it to resemble the Turkish model of state secularism.[38] Secular and westernized Iraqi opposition leaders, particularly Ahmad Chalabi, also encouraged this view among American leaders and experts.

Ultimately, despite the entreaties of Iraqis and Americans alike, Sistani refused to budge from his constitutional *fatwa*.[39] The debate came to a head in November 2003, when the CPA and Iraqi political leaders finally concluded that Sistani's demands would simply be impossible to circumvent. Together, they produced a new plan consistent with the *fatwa*, and IGC officials consulted with Najaf to ensure that the new proposals would be acceptable. At the time, Sistani gave his private endorsement to the plan (though he would later raise a new series of objections to a number of its key elements).[40] On November 15, 2003, the CPA and IGC formally announced the new constitutional process.[41] The most important change was to the sequence of events. According to the new transition timetable, the IGC would write an interim constitution by March 2004. This interim constitution would go into effect following the establishment of a sovereign Iraqi government in June 2004. It would guarantee a federal, democratic, and pluralistic Iraq that respected human rights.[42] National elections would

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year before the war—a time in which there was great interest in and discussion of Iraqi politics, culture, and society—a grand total of thirty-three news articles made any mention of Sistani (in contrast to 1195 mentioning Ahmad Chalabi in the same period, and 15,895 articles mentioning Sistani in the two years following the invasion).

38. On Turkey as a possible model for Muslim democracy, see Douglas Jehl & David E. Sanger, *U.S. Tells Iran Not to Interfere in Iraq Efforts*, N.Y. Times, Apr. 24, 2003, at A1 (quoting White House Press Secretary Ari Fleischer); Interview by Turkish TV with Sec'y of State, Colin L. Powell, in Ankara, Turkey (Apr. 2, 2003), *available at* http://www.state.gov/secretary/former/powell/remarks/2003/19364.htm; Dr. Condoleezza Rice, Nat'l Sec. Advisor, Briefing in Washington, D.C. (May 14, 2003), *available at* http://fpc.state.gov/fpc/20558.htm; Paul Wolfowitz, Deputy Sec'y of Def., Remarks in Arundel House, London, England (Dec. 2, 2002), *available at* http://www.defenselink.mil/speeches/2002/s20021202-depsecdef.html.

39. Iraqi political leaders routinely traveled to Najaf to meet with Sistani and discuss constitutional matters. Despite numerous initiatives by the CPA, Sistani never met directly with American officials, though he and Bremer did exchange oral and written messages on a relatively frequent basis. *See* Bremer with McConnell, *supra* note 30, at 166-67, 271-73, 301-04, 364, 380-82.

40. *Id.* at 229. CPA officials were understandably frustrated with the new round of Sistani objections, which included a demand that the transitional government to take power in June 2004 be directly elected, instead of being chosen through a decentralized process of provincial caucuses. This demand was entirely new, as the original *fatwa* had only concerned the selection mechanism for the constitutional drafting body. *See id.* at 240. His complaints about the unelected nature of the transitional government would ultimately be assuaged by a high-level delegation from the United Nations led by former Algerian Foreign Minister Lakdhar Brahimi.

41. *See id.* at 231-33, 243; Agreement on Political Process between Coalition Provisional Authority and Governing Council of Iraq (Nov. 15, 2003), *available at* http://www.al-bab.com/arab/docs/iraq/cpa03a.htm.

42. It is striking that the political principles set forth in the November 15 agreement—unlike the various opposition statements before the war, and the IGC's own political statement issued in July—did not include any mention of Islam or Islamic values. This was an accidental oversight, and was objected to by Shi'i Islamists in the days following the

be held as soon as possible, and the elected assembly would proceed to draft a new permanent constitution.

Shortly after signing the November 15 agreement, the IGC established a drafting committee to begin work on the interim constitution, or, as it was formally called to avoid breaching Sistani's *fatwa*, the Transitional Administrative Law (TAL).[43] Adnan Pachachi, who had been chosen to chair the committee, and KDP representatives immediately tabled rival drafts of the document. Both versions proved problematic, however, and neither would serve as the basis for the final TAL. Soon, discussions in the committee became bogged down over the issue of federalism—in no small part due to the hard-line demands of its Kurdish members, whose inflexible drive for maximum autonomy in Northern Iraq was anathema to virtually all of the ethnic Arabs on the IGC.

In early January, the drafting committee adjourned for several weeks. At the urging of Iraqis on all sides of the political spectrum, Bremer began a series of side discussions with the Kurds to prepare draft TAL language on federalism, for subsequent consideration by the IGC.[44] Separately, Pachachi's chief aide on the constitutional process, an Iraqi-American lawyer named Feisal Amin al-Istrabadi, initiated a set of small, informal consultations together with Salem Chalabi (Ahmad Chalabi's nephew and principal deputy on constitutional matters) and CPA officials to prepare a "Chairman's Draft" of the document essentially from scratch.[45] Pachachi hoped to introduce this draft to the full IGC with CPA backing. Istrabadi's discussions focused primarily on nuts-and-bolts issues that were not deemed politically contentious—mechanisms for government formation, phrasing on human rights guarantees, structure of the judiciary, etc. Ultimately, both sets of discussions proved successful. By mid-February, Pachachi circulated a sixty-four article draft constitution incorporating Bremer's agreement with the Kurds (which had already been vetted with IGC Arabs) and the more technical provisions worked out by Istrabadi's staff-level discussions.

In the final two weeks of February, the Governing Council worked day and night to finish the TAL on schedule. As the February 28 deadline

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agreement (despite the fact that none of them had proposed such language when negotiating the document). Bremer made clear to the Islamists that there could indeed be a formal place for Islam in the Transitional Administrative Law (TAL), and on December 2, 2003, he sent a secret letter to Sistani highlighting and confirming this point.

43. No definitive account of the TAL drafting process has yet been written. Thus far, the best discussions of the TAL can be found in Bremer with McConnell, *supra* note 30, at 286-308; Larry Diamond, Squandered Victory: The American Occupation and the Bungled Effort to Bring Democracy to Iraq 140-78 (2005); Feisal Amin al-Istrabadi, *Reviving Constitutionalism in Iraq: Key Provisions of the Transitional Administrative Law*, 50 N.Y.L. Sch. L. Rev. 269 (2006).

44. For more details on the Bremer-Kurd deal, see Diamond, *supra* note 43, at 161-71; Int'l Crisis Group, *Iraq's Kurds: Towards an Historic Compromise?*, Middle East Rep., Apr. 8, 2004.

45. On these talks, see Diamond, *supra* note 43, at 144-61.

approached, the Council hammered out compromises on the dozen or so remaining contentious issues, including the structure and powers of the executive branch, the role of Islam, and the procedures for ratifying the permanent constitution. It was in this late phase of the negotiations that the Shi'i Islamist parties, led by SCIRI, began pressing hard for a series of demands that would enhance the TAL's commitment to Islam and strengthen its majoritarian bent. This effort bore fruit, as the Shi'i bloc won many key substantive changes to the draft. The modifications included a prohibition on laws contravening Islam, a stronger role for the National Assembly (which would undoubtedly include a Shi'i majority), and assurances that any agreement on federalism would not preclude the future formation of additional regions in Shi'i areas of the country.

The TAL process ended in the early morning hours of March 1, when an exhausted Iraqi Governing Council unanimously agreed on a final draft. At SCIRI's insistence, all decisions throughout the TAL negotiations had been made by consensus. The vote to approve the document was literally the only vote taken throughout the entire process. Despite the agreement, in the days that followed, Sistani once again raised a new set of objections to the TAL. His central complaint was a TAL provision, added at the last minute, which granted the Kurds (or any group of three Iraqi provinces) the right to block adoption of a permanent constitution if two-thirds of their populations voted to reject the document in the ratification referendum.[46] This time, the Shi'i Islamists resisted Sistani's demand. After flocking to Najaf, they won Sistani's grudging agreement that they could sign the document, albeit with "reservations."

The IGC formally signed the TAL on March 8, in a ceremony at the Baghdad Convention Center. The final document enacted—at least on an interim basis—the political vision of the prewar Iraqi opposition. It was fundamentally democratic, while also making clear the prominence of Islam in Iraqi politics and society. It protected human rights, while establishing institutional mechanisms that created the separation of powers and multiple checks and balances. The TAL also set forth a proto-settlement on federalism in which the Kurds would generally retain their existing autonomy, while acknowledging exclusive central authority over national finance, foreign and defense policy, and natural resources.

In the wake of its final approval, Sistani continued to signal his unhappiness with the interim charter. In June, he intervened to prevent its incorporation in the U.N. Security Council Resolution formally recognizing

46. Law of Administration for the State of Iraq for the Transitional Period (TAL) art. 61(C). This article relies on the English translation of the TAL produced by the Coalition Provisional Authority, which is available at http://www.cpa-iraq.org/government/TAL.html. Sistani was entirely unsympathetic to Kurdish demands for constitutional safeguards, as evidenced in a strongly worded message he passed to Bremer on March 5. *See* Bremer with McConnell, *supra* note 30, at 303-04.

the sovereign Iraqi government established in June 2004.[47] Nonetheless, that government formally supported and upheld the TAL, as did the subsequent Iraqi government elected in 2005. In this respect, the TAL served its purpose of providing a legal framework for Iraq's political transition. It would also prove to be a baseline and starting point for negotiations over the permanent constitution the following year.

C. *Sovereignty*

After the establishment of a sovereign Iraqi government in June 2004, the next major step in Iraq's constitutional process was the election of a Transitional National Assembly (TNA) on January 30, 2005. Under the procedures established in the TAL, the TNA would prepare a draft of the permanent constitution by August 15; the draft would then be presented for popular ratification in a national referendum by October 15.[48] The outcome of the election was therefore critical; it would define a new political balance of power that would shape the permanent constitutional negotiations.

On February 17, 2005, the Iraqi electoral commission certified the final results of the January 30 election. The Unified Iraqi Alliance (UIA), a fractious coalition of Shi'i religious parties (including SCIRI, Da'wa, and representatives of the radical cleric Muqtada al-Sadr) that had been cobbled together under the general guidance of Sistani and his advisors, won over half of the 275 total seats. A joint KDP-PUK Kurdish bloc took the second largest grouping of seventy seats. Secular liberals had made a far more disappointing showing, as incumbent Prime Minister Iyad 'Allawi won only forty (and incumbent President Ghazi al-Yawer only five) delegates to the Parliament. The most problematic feature of the results, however, was the near-total absence of Sunni Arab delegates in the TNA. The Sunni community had essentially boycotted the election—an action that would leave it without credible voices at the constitutional negotiating table over the months to come.[49]

On May 10, 2005, the TNA established a fifty-five member Constitutional Drafting Committee to begin work on the document.[50] To chair the Committee, which included delegates from all political parties, the UIA proposed SCIRI official Humam al-Hammudi, a Shi'i cleric who had

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47. *See* Letter from Office of Ayatollah 'Ali al-Sistani to President, U.N. Sec'y Council (June 6, 2004), *available at* http://www.sistani.org/messages/eng/bay8.htm; Dexter Filkins, *Kurds Threaten to Walk Away from Iraqi State*, N.Y. Times, June 9, 2004, at A1.

48. *See* TAL art. 61(A)-(B).

49. *See* Jonathan Morrow, U.S. Inst. of Peace, Special Report No. 155, Iraq's Constitutional Process II: An Opportunity Lost 6 (Nov. 2005).

50. As with the TAL, no comprehensive account of the Iraqi constitutional drafting process has yet appeared. For some early fragmentary overviews, see Int'l Crisis Group, Middle East Briefing No. 19, Unmaking Iraq: A Constitutional Process Gone Awry (Sept. 26, 2005), *available at* http://www.crisisgroup.org/home/index.cfm?id=3703&l=1 (Web site registration required for a PDF of the full report); Morrow, *supra* note 49.

been actively involved in the prewar opposition abroad.[51] Before the January election, Shi'i and Kurdish leaders had announced their intent to incorporate Sunni representatives in the drafting process, regardless of whether they participated in the vote. After the committee was formed, the United States pressured them to fulfill their promise. Following weeks of negotiation, on June 16 Iraqi leaders announced that fifteen Sunni representatives from outside the Parliament would join the committee, with full voting rights.[52]

The substantive constitutional negotiations that continued throughout the summer of 2005 replayed many of the same debates that had come before. Once again, the basic, core principles embraced by the Iraqi opposition and enshrined in the TAL—Islam, democracy, federalism, pluralism, and human rights—continued to garner support, especially from the UIA and Kurdish leaders who dominated the drafting process.[53] Nonetheless, the participants thoroughly reargued the ways in which these basic principles would be reflected in the text. Shi'i leaders pushed again to strengthen Islam's formal role in Iraqi governance; they also sought to add language recognizing the exalted place of Shi'i leaders and holy sites. Unsurprisingly, these efforts provoked strong resistance from the Kurds, liberals, and secular nationalists. For its part, the United States lobbied negotiators to ensure that a larger role for Islam would not impinge upon religious freedom, women's rights, or an independent Iraqi judiciary.

Islam was by no means the most contentious issue in the constitutional talks. The strongest disagreements concerned the status and evolution of Iraqi federalism, and, in particular, the creation of new federal regions outside of Iraqi Kurdistan. In a marked shift from their relative ambivalence toward federalism during the TAL negotiations, Shi'i leaders (with Kurdish support) now publicly insisted on the right to form new federal regions of their own in Southern Iraq. This created a direct confrontation with the Sunni representatives and with nationalists like Iyad 'Allawi, who argued that creating oil-rich federal regions in Southern Iraq would leave the Sunni-dominated center without natural resources of its own. Further regionalization, the nationalists feared, would lead to the ultimate disintegration of a unified Iraqi state.[54]

Inexperienced, unelected, internally divided, and politically unrealistic in their own positions, the Sunnis on the drafting body quickly alienated their Shi'i and Kurdish colleagues. Unlike the other leading drafters, the Sunnis had participated in neither the TAL process nor the talks of the prewar Iraqi

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51. Indeed, Hammudi had served as Deputy President of the INC's Executive Council in the early 1990s.

52. *See* Morrow, *supra* note 49, at 2.

53. Indeed, one element of the Shi'i-Kurd agreement to form a national-unity government following the January 30 election was a decision to base the permanent constitution on the principles and institutional mechanisms set forth in the TAL.

54. For an elaboration of the Sunni position, see Int'l Crisis Group, *supra* note 50, at 6-9.

opposition. They were both newcomers and outsiders; and worse, their consent was not necessary to reaching a deal. Lacking democratic legitimacy and a hierarchical structure capable of making commitments on behalf of their community, the unelected Sunnis were generally kept at arm's length during the substantive drafting. Indeed, to the extent Sunni influence played any role in the process, it came through the mediation efforts of U.S. Ambassador Zalmay Khalilzad.[55]

In early August 2005, Hammudi circulated a unified first draft of the constitution, which compiled different sections prepared by various subgroups of the larger committee.[56] Despite the existence of a full draft, many key issues remained outstanding, including those relating to Islam and federalism. Meanwhile, the August 15 drafting deadline was rapidly approaching. With strong encouragement from Khalilzad, Iraqi leaders opted not to extend the deadline by six months, which the TAL allowed if necessary.[57] Instead, the senior Iraqi leadership agreed to press forward with the talks, deciding that if extra time was needed, they would take advantage of ambiguous phrasing in the TAL to institute a short delay.[58] As time grew short, the Iraqis bypassed the TNA drafting committee in favor of smaller, ad hoc gatherings of Shi'i and Kurdish leaders. With Khalilzad's facilitation, the leading factions gradually worked out a series of compromises on key outstanding issues. In order to complete their work,

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55. Khalilzad played an active role in brokering compromises in the constitutional talks, beginning shortly after his initial arrival in Baghdad in late July 2005.

56. This essay makes reference to two drafts put forward in early August by the Shi'i-dominated drafting committee led by Humam al-Hammudi. *See* Humam al-Hammudi, et al., Draft Constitution (Aug. 7, 2005) [hereinafter Hammudi Draft Const. (Aug. 7, 2005)] (on file with the Fordham Law Review); Humam al-Hammudi, et al., Draft Constitution (Aug. 8, 2005) [hereinafter Hammudi Draft Const. (Aug. 8, 2005)] (on file with the Fordham Law Review). These drafts were significant because they pre-dated the serious, senior-level constitutional bargaining outside the committee. As such, they reflect the strong influence of the Shi'i Islamist parties, which were able to control the drafting process within the committee.

57. *See* TAL art. 61(F).

58. Both Jonathan Morrow and the International Crisis Group have criticized the U.S. government for its effort to keep Iraqis to the August 15 deadline. In their view, the deadline should have been extended for several months in the beginning of August 2005. *See* Morrow, *supra* note 49, at 8-15; Int'l Crisis Group, *supra* note 50, at 1-5. One of the authors of this essay publicly agreed with the criticism. *See* Noah Feldman, *Agreeing to Disagree in Iraq*, N.Y. Times, Aug. 30, 2005, at A19. At the time, senior U.S. officials believed that extending the deadline would have simply postponed the serious senior-level political negotiations that only began in earnest in the second week of August. Moreover, the extension would have lengthened the period of Sunni exclusion from the democratic political process (by requiring postponement of the December 2005 parliamentary election until after completion of the constitution), without providing any guarantee that time would yield a compromise acceptable to the Sunnis. Indeed, to the extent that Sunni opposition to the constitution was premised on Shi'i demands concerning federalism, there was virtually zero chance for a mutually acceptable compromise, since these demands reflected a clear Shi'i redline in the discussions. Instead of invoking a lengthy formal delay under TAL Article 61(F), American officials encouraged short, de facto delays by supporting continued debate and discussion well beyond the August 15 deadline. Indeed, as noted below, final amendments to the draft were negotiated until just before the October 15 referendum.

the TNA leadership relied upon a variety of legislative maneuvers allowing for a series of short postponements of the deadline.

On August 28, Iraqi leaders announced the completion of a final constitution.[59] While some important concessions had been made to Sunni leaders (largely at the urging of the United States), the core of the document reflected a political deal between the Shi'is and Kurds. On federalism, the most important issue of all, the document accepted the basic Shi'i demand to allow for future regionalization.[60] Sunni leaders accordingly denounced the charter, launching a public campaign to encourage its defeat in the referendum scheduled for October 15. In protest, some Sunnis even talked of boycotting the referendum, along with the next set of parliamentary elections that would follow in December.

In the weeks between the release of the final draft and the referendum, Khalilzad met repeatedly with leaders from all factions in order to broker a last-ditch agreement. His goal was to convince the Sunnis not to end their participation in the very political process that they had only recently joined. Days before the vote, the Iraqis announced a new compromise, in which they agreed to form the Constitutional Review Commission within the first Parliament to be elected under the new constitution.[61] The Commission would have the right to prepare proposals for constitutional amendments which could subsequently be adopted under a simplified, expedited ratification procedure. Ultimately, the last-minute deal allowed secular liberals and some Sunnis to support the constitution's passage.

Despite the agreement, the final constitution only barely won approval under the ratification procedures set forth in the TAL. In the Sunni-dominated provinces of Anbar and Salah ad-Din, it was overwhelmingly rejected (by over ninety-six percent and eighty-one percent of voters, respectively).[62] In Ninewa, too, it was rejected by forty-five percent of those voting—but not by the two-thirds margin that, under TAL Article 61(C),[63] would have meant the constitution's failure overall.[64] On December 15, two months after the referendum, Iraq held its next set of elections. Despite their disappointment over the constitution, Sunni Arabs participated in record numbers. Overall turnout was seventy-six percent,

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59. *See* Int'l Crisis Group, *supra* note 50, at 2.

60. *See* Iraq Const. art. 112-17.

61. Robert F. Worth, *Leaders in Iraq Agree to Change in Constitution*, N.Y. Times, Oct. 12, 2005, at A1.

62. *See* Indep. Electoral Comm'n of Iraq, Certificate of the Constitutional Referendum Final Results (Oct. 25, 2005), *available at* http://ieciraq.org/English/Frameset_english.htm.

63. *See* TAL art. 61(C).

64. *See* Indep. Electoral Comm'n of Iraq, Certificate of the Constitutional Referendum Final Results (Oct. 25, 2005), *available at* http://ieciraq.org/English/Frameset_english.htm. A shift of 83,283 additional votes against the constitution in Ninewa would have led to its rejection under Article 61(C) of the TAL. Some have argued that the last-minute agreement to add the Constitutional Review Commission was decisive in ensuring passage of the constitution by avoiding its defeat by the requisite two-thirds margin in Ninewa. For official results in the constitutional referendum, see *id.*

and Sunni political parties won close to sixty of a total 275 seats.[65] As of this writing, the Constitutional Review Commission has not yet begun its work.

II. THE TEXT

Iraq's constitutional text embraces the basic principles of Islam, democracy, human rights, pluralism, and federalism. These ideas were at the core of a political consensus among the leading parties of the Iraqi opposition, the Governing Council, and eventually the Transitional National Assembly. Despite this general agreement among Iraqi leaders, however, the precise constitutional phrasing, institutional mechanisms, and other tradeoffs across the basic principles were the subject of hard political bargaining and debate. On most substantive areas of the constitution—particularly those relating to the role of Islam and the strength of Islamic political trends—the discussions pitted Shi'i Islamist politicians against a loose coalition of the Kurdish parties and more secular Arabs.[66] For their part, American diplomats generally supported this latter group, but above all sought to facilitate agreements across the factions and bring the negotiations to completion on schedule.[67] The final settlement reflected the considerable strength of the Islamists, who led the constitutional drafting effort following their victory in the December 2005 elections.[68]

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65. Indep. Electoral Comm'n of Iraq, Certification of the Council of Representatives Elections Final Results 1 (Feb. 10, 2006), *available at* http://www.ieciraq.org/final%20cand/IECI_Decision_Certified_ResultsofCoR_elections_En.pdf; *see also* Robert F. Worth, *Top Coalitions Fall Just Short in Iraq Voting*, N.Y. Times, Jan. 21, 2006, at A1.

66. This section refers repeatedly to these political groupings. The most important Shi'i Islamists engaged in the discussions were the senior leaders of the Unified Iraqi Alliance (UIA), including 'Abd al-'Aziz al-Hakim, Vice President Adil 'Abd al-Mahdi, and Humam Hammudi of SCIRI; Prime Minister Ibrahim Jaafari and Nuri al-Maliki of Da'wa; Nadim al-Jabiry of the Fadilah Party; Deputy Prime Minister Ahmad Chalabi; Transitional National Authority (TNA) Deputy Speaker Hussein al-Shahristani; National Security Advisor Mowaffaq al-Rubaiee; and various representatives of Moktada al-Sadr. The key Kurdish negotiators included Iraqi President Jalal Talabani, Kurdistan Democratic Party (KDP) leader Mas'ud Barzani, Deputy Prime Minister Rowsch Shaways, Minister of Planning Barham Salih, Minister of Foreign Affairs Hoshyar Zebari, and Constitutional Drafting Committee Deputy Chairman Fouad Masoum. As for the more secular Arabs, the leading figures were former Prime Minister Iyad 'Allawi, President Ghazi al-Yawer, TNA Speaker Hachem al-Hassani, Drafting Committee Deputy Chairman Adnan Janabi, and Adnan Pachachi. As previously noted, the Sunni Arab bloc of representatives added to the Drafting Committee from outside the National Assembly were not especially significant in shaping constitutional outcomes outside of the federalism discussion. The leading Sunni negotiators included Saleh Mutlaq and 'Abd al-Nasir al-Janabi of the National Dialogue Council, Tariq al-Hashimi and Ayad al-Sammarae of the Iraqi Islamic Party, Mahmoud al-Mashhadani, and Adnan Dulaimi.

67. On the ethics of American diplomatic engagement on Iraqi constitutional issues, see Feldman, *supra* note 12.

68. Consider that beyond the Preamble, fourteen of the constitution's 139 total articles make direct or indirect reference to Islam or religious values. Iraq Const. pmbl. & arts. 2, 3, 7, 10, 12, 14, 29, 35, 39, 40, 41, 43, 48, 89.

This section analyzes the key constitutional provisions which will shape the role of Islamic law, values, and politics in Iraq's developing constitutional order.[69] In doing so, it examines the final text against the backdrop of both the TAL (which provided a more limited role for Islam than the permanent charter) and original proposals put forward by the religious Shi'i parties.[70] Ultimately, the text reflects a series of compromises establishing the basic structures of an Islamic democracy while also allowing for the emergence of a wide range of interpretations and practice. The constitutional text alone does not precisely or fully define the relationship between Islam and democracy; this relationship will accordingly develop over time, and is likely to be shaped as much by subsequent political developments as by the text itself.

A. *State and Religion*

The most contentious debate over Islam's place in the Iraqi constitution concerned the precise phrasing of Article 2, dealing with the formal relationship between Islam and the state. The relevant section reads as follows:

> *First*: Islam is the official religion of the State and it is a fundamental source of legislation.
>
> A. No law that contradicts the established provisions of Islam may be established.
>
> B. No law that contradicts the principles of democracy may be established.
>
> C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.
>
> *Second*: This Constitution guarantees the Islamic identity of the majority of the Iraqi people . . . .[71]

As a general matter, this language parallels TAL Article 7, with some subtle changes strengthening Islam's prominence in the constitution.[72] This shift reflects the more powerful hand of the Shi'i Islamist parties in the constitutional discussions. Nonetheless, it does not establish clear

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69. For article-by-article examinations of the permanent constitution, see Nathan J. Brown, Carnegie Endowment for Int'l Peace, The Final Draft of the Iraqi Constitution: Analysis and Commentary (Sept. 16, 2005) *available at* http://www.carnegieendowment.org/files/FinalDraftSept16.pdf and U.S. Comm'n on Int'l Religious Freedom (USCIRF), Iraq's Permanent Constitution: Analysis & Recommendations (Mar. 2006), *available at* http://www.uscirf.gov/countries/region/middleast/iraq/03212006_iraq.html.

70. The best article-by-article examinations of the TAL can be found in Istrabadi, *supra* note 43, and Nathan J. Brown, Transitional Administrative Law: Commentary and Analysis (Mar. 7-8, 2004), *available at* http://www.geocities.com/nathanbrown1/interimiraqiconstitution.html

71. Iraq Const. art. 2.

72. *See* TAL art. 7. On the negotiations over this provision in the TAL, see Bremer with McConnell, *supra* note 30, at 292, 298-99.

guidelines on precisely how the Iraqi regime will rely upon Islam and Islamic values in everyday governance. Several particular features of Article 2 deserve elaboration.

First, like the Iraqi constitutions of 1925, 1958, and 1970 before it—and indeed, like virtually every other Arab constitution—Iraq's charter formally makes Islam the state religion.[73] This decision was entirely uncontroversial in the negotiations. Indeed, the Iraqi opposition had accepted this principle years earlier, at the Salah ad-Din conference in 1992, and the IGC had incorporated it without sustained comment or debate in the TAL.[74]

Second, Article 2 identifies Islam as "a fundamental source" of legislation.[75] This language goes a half-step beyond the TAL (in which Islam was merely "a source" of legislation),[76] but not as far as the original Shi'i demand that Islam be "the source" of legislation.[77] The importance of this provision may well be chiefly symbolic, as it will lend moral support to Iraqi politicians who wish to make explicitly religious arguments in favor of proposed legislation.[78] The compromise formulation is designed to avoid any implication, however, that Islam is the only source of law.

Third, Article 2 contains a noncontradiction clause barring laws which contravene Islam's "established provisions."[79] The TAL contained a similar clause, which the Shi'i Islamists demanded at the time in exchange for changing "the source" to "a source" in the previous sentence.[80] In the debate over the permanent constitution, the Islamists sought to strengthen the language beyond the TAL formulation. They did so by replacing the TAL's restriction on laws violating the "provisions of Islam on which there is consensus" (*thawabit al-islam al-mujma' 'alayha*) with one barring laws violating "the provisions of the principles of Islam" (*thawabit ahkam al-*

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73. Nathan J. Brown, Carnegie Endowment for Int'l Peace, Debating Islam in Post-Baathist Iraq 2 (Mar. 2005), *available at* http://www.carnegieendowment.org/files/PO13.Brown.FINAL2.pdf.

74. *INC Articles of Association*, *supra* note 17, art. 1; TAL art. 7.

75. Iraq Const. art. 2.

76. TAL art. 7(A).

77. *See* Hammudi Draft Const. (Aug. 7, 2005), *supra* note 56, at 1.

78. *See* Brown, *supra* note 73, at 3-4.

79. Iraq Const. art. 2.

80. Istrabadi, *supra* note 43, at 277. The evolution of this language during the TAL negotiations may have been influenced by U.S. acquiescence to similar language in the Afghan Constitution. *See* Afg. Const. art. 3 (2004), *available at* http://www.jemb.org/eng/Legal%20Framework/Legislation%20of%20Reference/Constitution/Constitution%20(English).pdf (unofficial English translation). In December, the TAL drafting committee (including its Shi'i Islamist members) tentatively agreed to language on Islam that did not include a noncontradiction clause. Meanwhile, on January 4, the Afghan *loya jirga* formally approved a new constitution, which included the statement, "No law shall contradict the tenets and provisions of the holy religion of Islam in Afghanistan." *Id.* The Afghan constitution was formally signed and enacted into law by President Hamid Karzai on January 26, 2004. Several days later, Shi'i Islamists on the drafting committee began discussing the possible addition of a noncontradiction clause to the TAL, and SCIRI put it forward as a formal demand on February 21. Ironically enough, the lead U.S. diplomat involved in the Afghan constitutional discussions was Ambassador Zalmay Khalilzad, who would subsequently play the same role in the Iraqi constitutional process the following year.

islam).[81] With its reference to *ahkam*—which may be rendered as "judgments" as well as "principles"—the new language has stronger legal connotations than did its predecessor.[82] It may therefore be more easily invoked by the Federal Supreme Court in striking down statutes deemed incompatible with Islam, or by legislators arguing against such laws in Parliament. Overall, however, the noncontradiction clause is highly indeterminate. There is, needless to say, no clear shared understanding of what constitutes "the provisions of the principles of Islam."

Paralleling Article 2's noncontradiction clause on Islam are two other non-contradiction clauses, barring laws which violate the "principles of democracy" and "the rights and basic freedoms stipulated in this constitution."[83] Elsewhere, the constitution makes clear that it is supreme over ordinary federal or local statutes.[84] The liberal drafters of these provisions sought to emphasize that democracy and human rights are as fundamental to the constitution as Islam. Indeed, the parallel noncontradiction clauses in this provision were a core part of the political compromise on the role of Islam in the TAL.[85] The Kurds and secular Arabs—with backing from the United States—managed to head off Shi'i Islamist attempts to remove these parallel clauses from the permanent constitution.[86] As a practical matter, these clauses raise the possibility that future interpretations of the Islamic noncontradiction clause would be influenced by the principles of democracy, whatever these may be defined to constitute. In any case, it cannot be maintained that the text of the constitution privileges Islam over basic rights or democratic principles, however uneasily they might sit beside each other under certain circumstances.

Finally, Article 2 "guarantees the Islamic identity of the majority of the Iraqi people."[87] This language is also an adaptation of the TAL, which had established "respect" for Iraq's Muslim majority.[88] The change in verb from "respect" to "guarantee" reflects the stronger hand of the Shi'i Islamist

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81. *Compare* TAL art. 7(A), *with* Iraq Const. art. 2(1)(A). The translation here is the authors' and differs slightly from the English translations of these documents cited elsewhere. The CPA translation of TAL Article 7(a) makes reference to the "universally agreed tenets of Islam," and the Independent Electoral Commission of Iraq (IECI) translation of Article 2(1)(a) in the permanent constitution refers to "the established provisions of Islam." *See* TAL art. 7(A), *available at* http://www.cpa-iraq.org/government/TAL.html; Iraq Const. art. 2(1)(A), *available at* http://www.ieciraq.org/final%20cand/Constitution_Eng_UNs-13.pdf.

82. *See* Brown, *supra* note 69, at 3.

83. Iraq Const. art. 2(1)(B)-(C).

84. *Id.* art. 13.

85. *See* TAL art. 7(A); Bremer with McConnell, *supra* note 30, at 299.

86. *See* Hammudi Draft Const. (Aug. 7, 2005), *supra* note 56, at 1. The Shi'i Islamists did, however, succeed in splitting the three noncontradiction clauses into separate subsections of Article 2(1), instead of retaining the clauses in a single sentence, as in the TAL. *Compare* Iraq Const. art. 2(1), *with* TAL art. 7.

87. Iraq Const. art. 2(2).

88. TAL art. 7(A).

parties in the negotiations and arguably enhances the constitution's symbolic embrace of Islam.

Beyond Article 2, the most contentious constitutional provision directly relating to Islam's formal status in Iraqi law is Article 39, which states that "Iraqis are free in their commitment to their personal status according to their religions, sects, beliefs, or choices and that shall be regulated by law."[89] The provision is not clearly worded, but its intent was to change Iraq's approach to laws governing personal status (governing marriage, divorce, inheritance, etc.). In 1959, a newly installed Iraqi military regime enacted a new personal-status law, drawing eclectically from a variety of Sunni and Shi'i schools of Islamic jurisprudence, which would apply to all Iraqis via the civil courts.[90] The law was then—and remains—enormously controversial, in particular among leading Shi'i clerics. The critics have objected to its patchwork embrace of disparate elements of different jurisprudential traditions, its multiple departures from Islamic *shari'a*, and its reliance on a Sunni-dominated judiciary for enforcement.

In December 2003, the Iraqi Governing Council (under the monthly rotating presidency of SCIRI leader 'Abd al-'Aziz al-Hakim) passed a resolution purporting to abolish the 1959 personal-status law and replace it with *shari'a*.[91] This initiative was controversial inside Iraq, particularly with women who preferred the 1959 law's relatively progressive approach to divorce and inheritance. At the time, Bremer refused to give the IGC resolution any legal force. Several months later, the IGC voted to repeal its decision.[92] The original law remained in effect, and the Shi'i Islamists did not attempt to incorporate Islamic personal-status law in the TAL.

In 2005, the Shi'i Islamists again sought to replace the 1959 code with *shari'a*, this time through the new constitution. The religious parties were politically much stronger than before, and the Kurds and Iyad 'Allawi proved unsuccessful in their bid to keep personal-status issues outside of the constitution entirely. The final language of Article 39, however, did reflect an important compromise. Instead of merely replacing the 1959 code with *shari'a*, as originally proposed by the Islamists, the provision emphasized that every Iraqi would have freedom to choose their personal-status law in accordance with "their religions, sects, beliefs, or choices."[93] This phrasing

89. Iraq Const. art. 39.

90. On the history of personal-status law in Iraq and the controversy sparked by the new 1959 law, see Feldman, *supra* note 12, at 108-11; Kristen A. Stilt, *Islamic Law and the Making and Remaking of the Iraqi Legal System*, 36 Geo. Wash. Int'l L. Rev. 695, 748-54 (2004); Brown, *supra* note 73, at 4-7.

91. One of the most vocal Shi'i critics of the 1959 law, the cleric Mohammed Bahr al-Ulum, who had published a searing critique in 1963, was a member of the IGC at the time.

92. This repeal came at an unexpected moment to most IGC members and the CPA—in the midst of the final, tense days of the TAL negotiations. *See* Bremer with McConnell, *supra* note 30, at 293.

93. Iraq Const. art. 39. The Hammudi Draft Constitution circulated on August 7 stipulated that "the followers of every religion or sect are free in . . . their commitment to their personal status in accordance with their religious and sectarian beliefs." Hammudi

sought explicitly to ensure not only that Shi'is, Sunnis, and Christians would be able to follow their own faith traditions, but that secular Iraqis would retain the option of following the 1959 civil code on matters of personal status. Article 39 also declared that the provision would require implementing legislation,[94] thereby providing an additional check on the modalities by which Islamic personal-status law will be incorporated and applied.

As with other key provisions dealing with the role of Islam, it remains to be seen how Article 39 will be implemented in practice. The most obvious danger is that the freedom to choose one's own personal-status legal regime will remain illusory, especially for women who are intimidated into "choosing" *shari'a* and thereby casting aside important protections of the 1959 code. That said, a wide range of interpretations of the provision are possible, as it contains no clear statement of what version(s) of *shari'a* will be applied, how, and by whom, nor what would happen in case of conflict between couples over which law ought to be applied.[95] Here again, the constitutional text does not definitively determine the relationship between Islam and the Iraqi state.

In addition to Articles 2 and 39, there are numerous other constitutional provisions reaffirming the important role of religion in Iraqi society. Such provisions—acknowledging "God's due over us,"[96] recognizing the importance of national religious leaders,[97] affirming Iraq's membership in the Islamic world,[98] and giving affirmative protection to holy shrines and religious sites[99]—were absent from the TAL. Most were included in the permanent text at the initiative of the Shi'i Islamist political parties. While all factions agreed to the final language, early proposals reflected a clear sectarian Shi'i bent. At one point, for example, the Shi'i Islamist parties had drafted language referring to Iraq's "Shi'i majority" and to the importance of the Shi'i "marja'iyya" in Najaf.[100] Unsurprisingly, these provisions were strongly opposed by Sunni and Kurdish members of the Constitutional Drafting Committee. In the end, the Shi'i Islamists agreed to drop these demands, reportedly following consultations with Sistani himself. The symbolic provisions that remain in the constitution may or may not have any practical significance. In any event, they reflect the deep

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Draft Const. (Aug. 7, 2005), *supra* note 56, at 9. This language was intended to impose *shari'a* on Muslims. *See id.*

94. Iraq Const. art. 39. Indeed, as Nathan Brown has pointed out, Article 39 leaves open whether (for those choosing the *shari'a* option), the law will be applied by civil courts, religious courts, or some combination of both. *See* Brown, *supra* note 69, at 7.

95. *See* Isobel Coleman, *Women, Islam, and the New Iraq*, 85 Foreign Aff. 24, 24-38 (2006)

96. Iraq Const. pmbl.

97. *Id.*

98. *Id.* art. 3.

99. *Id.* art. 10.

100. Hammudi Draft Const. (Aug. 7, 2005), *supra* note 56, at 1-2.

desire of Iraq's Shi'i leaders to emphasize the integration of religious commitments and values into the country's political order.

B. *Rights and Duties*

Section two of Iraq's constitution sets forth an extensive list of "Rights and Liberties," covering civil, political, economic, cultural, and social freedoms.[101] This section of the constitution was not a source of major controversy during the negotiations.[102] However, three important issues did prove contentious—the individual right to freedom of religion, the scope of women's rights, and the recognition of Iraq's obligations under international human-rights treaties. Islamist politics played the key role in shaping the debate on these issues. In each area, Shi'i Islamists sought to cut back on the breadth of freedoms guaranteed by the TAL. Ultimately, the Islamists failed in this effort, largely due to the strong opposition of the Kurds and secular Arabs (backed strongly by the United States). Yet, while the final constitution contains strong protections for individual rights across the board, it remains to be seen how these rights will be enforced in practice—especially if they are perceived as conflicting with Article 2's embrace of Islamic values.

All Iraqis engaged in the constitutional negotiations believed in the importance of protecting group rights to religious freedom. All recognized that the Ba'thist dictatorship had unjustly persecuted and manipulated various religious communities (including, above all, the Iraqi Shi'i community), and all agreed that the constitution should prevent future governments from interfering with any group's right to affirmatively practice its particular religious tradition. The constitution includes multiple, redundant guarantees of such rights.[103]

The individual right to religious freedom, by contrast, was much more controversial. Such an individual right implies the right not to be religious at all—or, even more problematic from an Islamic perspective, the right to convert from Islam to other faiths. The Shi'i Islamists sought to scale back the TAL's fairly extensive protection of individual religious freedom. Whereas TAL Article 7 had guaranteed the full rights "of all individuals" to freedom of religious belief and practice,[104] the Islamists proposed changing the parallel clause in the permanent constitution to protect the right "of

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101. Iraq Const. arts. 14-44.

102. Indeed, the rights protected in section two largely mirror those enshrined in the TAL. *See* TAL arts. 10-23. The only difference, as some commentators have noted, is the addition of language in the permanent constitution which appears to exercise the condition of certain rights on their compatibility with "public morals," and also the requirement of implementing legislation. *See, e.g.*, Iraq Const. arts. 15-17, 22-24, 27, 30-32, 36; Brown, *supra* note 69, at 5-6. The danger that these qualifications may limit the scope of individual liberties is mitigated, however, by article 44 of the constitution, which makes clear that such legislation may not "violate the essence of the right or the freedom" at issue. Iraq Const. art. 44.

103. *See, e.g.*, Iraq Const. arts. 2, 7, 41(1), 41(2).

104. *See* TAL art. 7.

all . . . religions" to freedom of belief and practice.[105] Moreover, while retaining the TAL ban on religious coercion of individuals, the Islamists also proposed eliminating the individual right to "freedom of thought, conscience, and religious belief and practice."[106]

These efforts ultimately failed, as Iraq's Kurdish and secular parties effectively resisted the Shi'i Islamist proposals. The United States also played an important role in urging the Shi'is to compromise on these demands. President Bush personally called SCIRI leader 'Abd al-'Aziz al-Hakim—the one time he personally intervened in the constitutional negotiations—in part to register his own hope that the new constitution would not restrict religious freedom.[107] The final constitution restored the TAL language protecting "the full religious rights of all individuals to freedom of religious belief and practice."[108] It also included a clear statement that "[e]ach individual shall have the freedom of thought, conscience and belief."[109]

A second contentious set of issues concerned the scope of women's rights. Both the TAL and Iraq's final constitution contain general guarantees of full equality for women.[110] In neither case were these equality provisions controversial among the Iraqi drafters. Initially, however, the Shi'i Islamist parties did resist incorporating one of the TAL's central innovations on women's rights—the requirement that the electoral law "shall aim to achieve the goal of having women constitute no less than one-quarter of the members of the National Assembly"[111]—in the permanent constitution. Adnan Pachachi and the Kurdish parties had insisted on including this provision in the TAL;[112] it resulted in an Iraqi Parliament containing eighty-six women (out of 275 total members). The Islamists originally sought to remove the requirement altogether.[113] When the Kurds and secularists objected, the Islamists then sought to phase out the quota after the first two election cycles.[114] This too failed. Finally, the Islamists relented, agreeing to incorporate the quota, word-for-word from the TAL, in Article 47 of the final constitution.[115]

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105. Hammudi Draft Const. (Aug. 7, 2005), *supra* note 56, at 1-2.

106. *Compare* TAL art. 13(F), *with* Hammudi Draft Const. (Aug. 7, 2005), *supra* note 56, at 1-2.

107. *See* Dexter Filkins & James Glanz, *Shiites and Kurds Halt Charter Talks with Sunnis*, N.Y. Times, Aug. 27, 2005, at A1.

108. Iraq Const. art. 2.

109. *Id.* art. 40.

110. *See* TAL art. 12; Iraq Const. art. 14.

111. TAL art. 30(C).

112. Diamond, *supra* note 43, at 156; Istrabadi, *supra* note 43, at 294. The Iraqi electoral law implementing the quota requirement specified that at least every third candidate on each political entity's candidate list be a woman. The overall distribution of seats across the various lists ultimately resulted in a Parliament comprised of thirty-one percent women, thereby surpassing the twenty-five percent target. *See* Istrabadi, *supra* note 43, at 295.

113. *See* Hammudi Draft Const. (Aug. 7, 2005), *supra* note 56.

114. *See* Hammudi Draft Const. (Aug. 8, 2005), *supra* note 56, at 40.

115. *See* Iraq Const. art. 47.

In early drafts of the constitution, the Shi'i Islamists also introduced a provision addressing the public and private role of women in Iraqi society.[116] As originally phrased, it read as follows:

> The State shall guarantee reconciliation between [a] woman's role towards her family and her work in society, and her equality with men in the life fields of politics, social affairs, culture, and economics in a way that does not contradict the fundamental principles of this constitution.[117]

Iraqi liberals objected overwhelmingly to this provision, which they feared would condition women's equality on its compatibility with Islamic law. The United States echoed these objections. Ultimately, the Islamists dropped the provision from the text entirely.

A final area of contention in the constitution's treatment of individual freedom was the extent to which the charter would commit Iraq to respecting international human-rights conventions. As various scholars have noted, many newly drafted constitutions have strengthened the domestic status of human rights by referencing international law and treaty obligations.[118] International human-rights advocates have enthusiastically embraced this strategy, which also helps transitioning countries position themselves as responsible members of the international community.[119] The TAL itself had taken this approach, declaring that the Iraqi people enjoyed "the rights stipulated in international treaties and agreements, other instruments of international law that Iraq has signed and to which it has acceded, and others that are deemed binding on it."[120] These treaties included both the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[121]

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116. Hammudi Draft Const. (Aug. 7, 2005), *supra* note 56, at 5.

117. *Id.*

118. *See, e.g.*, Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 Colum. J. Transnat'l L. 211, 214-15 (1998); *cf.* Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int'l Org. 217, 217-20 (2000).

119. Feldman, *supra* note 37, at 867-75.

120. TAL art. 23. In addition, the TAL preamble affirmed the Iraqi people's "respect for international law" and highlighted Iraq's participation in founding the United Nations. *Id.* at pmbl. The preamble was drafted by Pachachi aide Feisel Istrabadi, who would later serve as Iraq's Deputy Representative to the United Nations. Pachachi himself is a committed internationalist, and had served as Iraq's Representative to the U.N. in the 1960s. On the TAL's embrace of international law, see Diamond, *supra* note 43, at 146, and Istrabadi, *supra* note 43, at 289.

121. Iraq ratified the International Covenant on Civil and Political Rights (ICCPR) on March 23, 1976, without submitting any reservations or declarations. It ratified the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) on August 13, 1986, but submitted several reservations seeking to protect the role of *shari'a*, in spite of the treaty provisions mandating gender equality. *See* Office of the U.N. High Comm'r for Human Rights, Status of Ratifications of the Principal International Human Rights Treaties (June 9, 2004), *available at* http://www.unhcr.ch/pdf/report.pdf; USCIRF, *supra* note 69, at 1-2, 4-5.

In the debate over the permanent constitution, however, the Shi'i Islamists sought to limit the scope of Iraq's international human-rights commitments. Initially, they proposed narrowing the TAL provision to apply only to human-rights treaties and agreements "that Iraq has ratified," and not to international law more broadly.[122] Moreover, the proposed revision incorporated only those rights "that do not contradict the principles and rulings of this constitution."[123] These changes aimed to subordinate international human rights to Article 2's elevation of Islam.[124] At the last minute, however, the Iraqis dropped the revised provision from the text entirely. Nonetheless, Article 8 retained weaker, more generic language declaring that "Iraq shall . . . respect its international obligations."[125] This formulation presumably extends to the international rights treaties that Iraq has signed.

In each of the areas examined above—religious freedom, women's rights, and international human rights—Shi'i Islamists made concerted efforts to restrict or qualify the protection of individual liberties, largely out of a desire to ensure the primacy of Islamic values. In each case, they were largely unsuccessful. Nonetheless, Article 2's noncontradiction clause (and, more generally, its embrace of Islam as a source of law) are potentially in tension with the constitution's sweeping guarantees of individual freedom. The constitutional text does not explicitly resolve this tension, which will be left to Iraqi legislators and judges to address in the future.

C. *Separation of Powers*

The debate over the institutional structure of the federal government—and, in particular, the balance of authority between the President, Prime Minister, and National Assembly—did not explicitly address the role of Islam. Nonetheless, the constitutional settlement in this area was profoundly influenced by the politics of religion and denomination. Indeed, the central question in the debate was the extent to which the Shi'i Islamist political parties would be constrained, within Iraq's emerging democratic constitutional framework, by counter-majoritarian checks and balances. Shi'i Islamists pushed for strong parliamentary supremacy, with few institutional restraints. The Kurds and secular Arabs, meanwhile, argued for a strong President to counter the Prime Minister and for institutional mechanisms that would balance against Shi'i Islamist majoritarianism. Ultimately, the Islamists were generally successful in their efforts, but only

122. Hammudi Draft Const. (Aug. 7, 2005), *supra* note 56, at 10.

123. *Id.*

124. Indeed, one Islamist politician told U.S. officials he was concerned that without the changes, Iraq's international treaty obligations could force the country to legalize homosexuality, in violation of Islamic law.

125. Iraq Const. art. 8.

after making important concessions concerning institutional arrangements in the short term.

From the beginning, all Iraqi factions agreed that Iraq's new government would derive its authority directly from the people. The constitution declares this principle multiple times in its opening provisions. Even before Article 2's recognition of the importance of Islam, Article 1 asserts Iraq's "republican, representative (Parliamentary), democratic and federal" character.[126] Article 5 goes on to declare that "[t]he law is sovereign," and that in Iraq "[t]he people are the source of authorities and its legitimacy, which the people shall exercise in a direct general secret ballot and through their constitutional institutions."[127] To stress the point further, Article 6 adds that the "[t]ransfer of authority shall be made peacefully through democratic means."[128] More practically, the constitution later lodges the overwhelming bulk of political authority in the elected National Assembly.[129]

At the same time as they embraced democracy, however, Iraqi leaders also recognized the need to balance majority rule with institutional and structural protections for minorities. The INC political statement from 1992 had stressed the importance of pluralism alongside democracy, and indeed the INC's formal leadership structure called for a three-man Office of the Presidency, including a President and two Vice Presidents, that would include representatives from each of Iraq's major communities.[130] The IGC's rotating nine-man presidency (five Shi'is, two Sunnis, and two Kurds) also reflected this commitment to pluralism, as did its decision to require unanimity and consensus during the TAL drafting process. Throughout both the TAL and permanent constitutional discussions, moreover, there was a virtually unquestioned assumption that Iraq would have a largely ceremonial President, a more powerful Prime Minister, and that both of these offices would be chosen by an elected Parliament. The assumption among Iraqi political leaders was that these posts—together with the Speakership of the National Assembly—would be divided among the major communities, to ensure representation for each at the most senior levels of the Iraqi government.

Within these broad outlines, however, there was considerable room for disagreement over specifics. The most important of these debates concerned the structure of the Presidency, the process by which the President and Prime Minister would be selected, and the relative authorities of each office. Here again, it is useful to examine the final constitutional

126. Iraq Const. art. 1.
127. *Id.* art. 5.
128. *Id.* art. 6.
129. *See id.* arts. 46-62.
130. *See INC Articles of Association*, *supra* note 17, arts. 11, 20; *see also id.* arts. 1 (on the value of pluralism), 16 (establishing a President and three Vice Presidents to lead the Executive Council).

settlement in light of the TAL and early proposals for the permanent charter.

The TAL executive framework established a Presidency Council, consisting of a President and two Deputy Presidents, that would be chosen on a unified ticket by a two-thirds supermajority of the National Assembly.[131] In addition to performing general ceremonial duties, the Presidency Council had the right to veto proposed legislation (subject to a two-thirds override by the National Assembly) and to appoint members of the Federal Supreme Court (subject to the recommendation of judicial experts on Iraq's Higher Juridical Council).[132] Perhaps most importantly, however, the Presidency Council would appoint Iraq's Prime Minister, the most powerful figure in the government.[133] This arrangement ensured that the leadership posts—including the Presidency Council and Prime Minister—would be negotiated as a package, and would effectively be subject to the same two-thirds majority requirement for approval. All Presidency Council decisions, including those noted above, would be made unanimously.[134] Overall, the TAL executive structure embedded the principle of cross-communal consensus in Iraq's transitional political order.

Chafing at these constraints on their parliamentary majority, the Shi'i Islamist parties sought to eliminate many of these institutional checks and balances when negotiating the permanent constitution. In particular, they sought to replace the Presidency Council with a single President, to be elected by majority vote of the Parliament.[135] They hoped to weaken the already weak presidential authorities set forth in the TAL even further, by eliminating its veto power and role in appointing members of the Supreme Court. They also sought to limit the President to a single term in office.[136] Most importantly, they denied the President any discretion in naming the Prime Minister, who would be constitutionally required to come from the largest electoral bloc within the Parliament.[137] These proposed changes would have marked a clear departure from the pluralist, consensual model established in the TAL. Effectively, they would have ensured that the slimmest of parliamentary majorities—such as the one the Shi'i Islamists enjoyed in the Transitional National Assembly—would be able to rule Iraq with few formal institutional constraints.

Unsurprisingly, the Kurds and secular Arabs resisted Shi'i Islamist efforts in the arena of executive structure. Ultimately, the final constitution arrived at a unique compromise. It created two separate frameworks for

131. *See* TAL, art. 36(A).
132. *Id.* arts. 37, 39(B), 39(C), 44(E).
133. *Id.* art. 38(A).
134. *Id.* art. 36(C). If the Presidency Council failed to agree unanimously on a PM candidate within two weeks, however, the National Assembly would have the right to choose a Prime Minister, albeit by a two-thirds supermajority. *Id.* at art. 38(A).
135. *See* Hammudi Draft Const. (Aug. 7, 2005), *supra* note 56, at 20.
136. *Id.*
137. *Id.* at 22.

addressing the structure of the executive—one to be in effect for the first full four-year term of the elected Parliament, and another to govern subsequently.[138]

Under the first framework, the TAL's tripartite Presidency Council remained intact. It would still be chosen by the two-thirds majority of Parliament and make all decisions on the basis of unanimity.[139] The Presidency Council's veto power also survived, although it could now be overridden by a three-fifths, instead of two-thirds, majority.[140] There was no specified presidential role, however, in appointing Supreme Court judges.[141] The National Assembly would still choose the Presidency Council, but the Presidency was required to approve the nominee of the largest parliamentary bloc as Prime Minister.[142] While this provision eliminated the discretion in choosing the Prime Minister existing under the TAL, it was nonetheless widely expected that the Presidency Council and Prime Minister would be negotiated as a package, with the two-thirds requirement for choosing the Presidency effectively giving all communities leverage over the nomination of the Prime Minister by the largest political bloc.[143]

In the second framework, which will take effect beginning in 2010, the constitution abolishes the Presidency Council in favor of a single President (and a Vice President with virtually no constitutional authority of his own).[144] The President in this framework is truly a figurehead, without veto power or any authority over appointments. While the constitution stipulates that the President must be chosen by a two-thirds majority, it also declares that if no candidate receives such a majority in the first ballot, a simple majority vote of the National Assembly is sufficient to put him in office.[145] This provision, coupled with the requirement that the President charge the nominee of the largest parliamentary bloc with the task of forming a government as Prime Minister, effectively takes away the

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138. *See* Iraq Const. arts. 63-72, 134. While the underlying political dynamic (Shi'i Islamists versus Kurds, secular Arabs, and others) drove this compromise, there is no doubt that it also had much to do with the personalities involved. In particular, Iraqi President Jalal Talabani, a Kurd who was widely expected to retain his post under the permanent constitution, refused to accept too severe a diminution of the presidential role set forth in the TAL. Talabani, who at the time was in his early seventies, only expected to serve a single term as President under the permanent constitution.

139. *See id.* art. 134(2) & (4).

140. *Id.* art. 134(5).

141. *See id.* arts. 89 & 134(1).

142. *Id.* arts. 67, 73, 134(1).

143. This is in fact how the negotiations developed following Iraq's second set of elections on December 15, 2005. After the UIA renominated Ibrahim Jaafari as Prime Minister, Kurdish and Sunni representatives refused to approve his appointment. Without their support, Jaafari failed to build the necessary support of two-thirds of the National Assembly, and the UIA was forced to replace him with Nuri al-Maliki, a compromise candidate acceptable to the other factions.

144. Iraq Const. arts. 63, 66.

145. *Id.* art. 67.

supermajority requirements for government formation that had permeated both the TAL and the first executive framework.[146]

The constitutional settlement on executive structure is extremely important, as it marks significant progress towards the Shi'i Islamist objective of majoritarian, parliamentary supremacy. By taking away the formidable leverage in the government formation negotiations now enjoyed by the Kurds, Sunni Arabs and other minority blocs, it has significant potential to enhance the power of the Shi'i Islamist parties—so long as they continue to win a majority of votes in national elections.

D. *Federalism*

The most contentious feature of the Iraqi constitutional deliberations concerned federalism. The TAL had recognized the long-standing reality of Kurdish quasi-autonomy in Northern Iraq, formally legitimating the Kurdistan Regional Government (KRG) as the local authority governing the northern provinces of Arbil, Sulaimaniya, and Dohuk.[147] The TAL had also ensured that while the KRG could exercise significant local authority, the national government would retain full control over foreign and defense policy, fiscal and monetary policy, and oil resources.[148] At the time, the TAL settlement was accepted by IGC members who had come to sympathize with Kurdish demands for autonomy in the opposition period before the war, and who in many cases had begun to advocate decentralization for the rest of Iraq.[149] It was viewed with much greater skepticism, however, by the broader Iraqi society—much of which saw federalism as an effort by the Kurds to promote the disintegration of the Iraqi state.[150]

By the summer of 2005, however, the battle lines on federalism had changed considerably. The official position of the Shi'i Islamists had shifted from passive acquiescence to the status quo regarding Kurdistan to an affirmative desire to create quasi-autonomous federal regions of their own. The most striking evidence of this new outlook was the aggressive position taken by SCIRI leader 'Abd al-'Aziz al-Hakim, who publicly called for the creation of a nine-province Shi'i region in Southern Iraq on August 11.[151] Many of Hakim's Shi'i coalition partners remained highly skeptical of federalism; nonetheless, they went along with Hakim's call for the Iraqi constitution to allow for the development of new regional

146. *Id.* art. 73(1).

147. TAL art. 53.

148. *Id.* art. 25, 54.

149. *See, e.g.*, Visser, *supra* note 9, at 140-44; Democratic Principles Working Group, *supra* note 22, at 91-94; Iraq Found., Declaration of the Shi'i of Iraq (July 15, 2002), http://www.iraqfoundation.org/news/2002/gjuly/15_declaration_english.html.

150. On the broader Arab opposition to federalism, see Int'l Crisis Group, *supra* note 44, at 17-22.

151. Liz Sly, *Shiite Wants Autonomous Region*, Chi. Trib., Aug. 12, 2005, at 8.

governments outside of Kurdistan.[152] The Shi'i embrace of federalism and the proposal to create new regions outraged the Sunni Arab members of the Constitutional Drafting Committee. Indeed, the Sunnis spent virtually all of their limited political capital in the negotiations on trying to resist the Shi'i push for federalism, which they feared would lead to a de facto partition of Iraq and leave Sunni-dominated areas of the country without oil resources.

In the end, the Iraqi constitution established the right of individual governorates to combine with one another to form new federal regions, which in turn could exercise expansive authorities equivalent to those of the Kurdistan Regional Government.[153] This was a clear defeat for the Sunni negotiators and probably formed the basis for widespread Sunni rejection of the constitution in the subsequent referendum.[154]

The federalism settlement relates to the role of Islam in Iraq's constitutional order in two important ways. First, support for federalism was a core element of the broader Shi'i-Kurd understanding that drove Iraq's constitutional discussions from the early 1990s through the adoption of the permanent constitution in 2005. For the Kurds, federalism is the sine qua non of participation in a unified Iraqi state. Any Shi'i effort to roll back Kurdish autonomy in Northern Iraq would have unraveled the political consensus that had united the Iraqi opposition and enabled the passage of the TAL. Instead, the Shi'is and Kurds struck a strategic bargain in which Shi'i concessions to Kurdish autonomy were matched by a Kurdish willingness to allow the Islamists a freer hand outside of Northern Iraq. While this arrangement did not preclude tough bargaining between Shi'i Islamists and Kurds on all the issues discussed above, it also provided a general set of parameters constraining the debate and range of possible outcomes. Ultimately, the Shi'i-Kurd understanding on federalism allowed a larger role for Islam at the national level than might otherwise have been possible.

The federalism provisions of the final constitution also have the potential to channel Islamist political energy towards regional and local levels of government. If one or more new regional governments are formed in the

152. For a broader examination of the diversity in Shi'i clerical and political views towards federalism, see generally Visser, *supra* note 9. It is likely that unified Shi'i support for Hakim's general demands (if not for his specific proposal for a nine-province Shi'i region) stemmed from a larger sense of Shi'i solidarity, especially vis-à-vis the other factions. Throughout the negotiations, SCIRI leaders explained their demands in terms of the need to reach parity with the Kurds (i.e., the right to form self-governing regions with expansive authorities) and to prevent the Sunnis from vetoing legitimate Shi'i demands. Indeed, given the historical opposition to federalism of such key Shi'i factions as the Da'wa Party and the Sadrist movement, both of which were heavily represented in the UIA, it is somewhat mystifying that they never sought to make common cause with the Sunni Arabs, with whom they shared a negative attitude toward federalism.

153. Iraq Const. arts. 112-17.

154. Sunni hopes for rectifying the final settlement now lie with the Constitutional Review Commission to be formed by the new Iraqi Parliament, which they hope will place significant restrictions on the evolution of the federal system, in part by providing for a more equitable division of revenues from Iraq's oil wealth.

Shi'i South, they are likely to reflect a more Islamist, sectarian outlook than the federal authority in Baghdad. At the national level, as we have seen, the influence of the Shi'i Islamists is significantly counterbalanced by the Kurds and secular Arabs; Sunni Islamists can also restrain Shi'i sectarian impulses. The local demographics are sharply different, however, and southern regions dominated by Shi'i Islamists would be far less constrained by institutional mechanisms requiring cross-communal consensus.[155]

E. *Judicial Review*

The foregoing discussion makes clear that, while the Iraqi constitution aims to synthesize Islamic, democratic, and liberal values, it does not provide clear and specific guidelines for resolving potential conflicts among them. The text constrains the range of possible constitutional interpretations, but is not sufficiently precise to answer each and every question for all time. In many cases, the imprecision of the final text was not the result of sloppy drafting or carelessness, but rather the product of conscious strategies by competing drafters to defer certain contentious political issues for resolution in the future.

For this reason, the mechanisms for formal constitutional interpretation are especially important. The Iraqi constitution creates a Federal Supreme Court to serve as the supreme arbiter of constitutional matters.[156] The Court's right to strike down legislation is implicit in a host of key constitutional provisions, including Article 2 (prohibiting laws contradicting the principles of Islam, democracy, or rights and basic freedoms), Article 13 (establishing the supremacy of the constitution over all federal and regional law), and Article 90 (giving the Court itself the right to oversee the constitutionality of statutes, interpret the constitution, and settle disputes concerning federalism).[157] The establishment of an independent Supreme Court, appointed by the political authorities and subject to the law, was never controversial among Iraqi leaders. The Iraqi opposition before the war had embraced the concept of an independent judiciary,[158] and the TAL had created an independent Supreme Court with the right to exercise judicial review.[159]

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155. That said, they would still be restrained by the constitution's human-rights guarantees. Peter Galbraith has argued, incorrectly, that regional law has primacy over these federal human-rights protections, due to constitutional provisions allowing regional law to displace federal law in areas outside of the "exclusive" powers of the federal government. His reading overlooks both the constitution's supremacy clause and the fact that while the constitution permits regional law to displace "national legislation" in certain areas, it does not declare that such law may supercede the constitution itself. *See* Galbraith, *supra* note 13, at 200; *see also* Iraq Const. arts. 13, 117.

156. Iraq Const. arts. 89-91.

157. *Id.* arts. 2, 13, 90.

158. *See INC Articles of Association*, *supra* note 17, art. 1.

159. *See* TAL art. 44. Indeed, the TAL marked the first time in Iraqi history that judicial independence had been constitutionally protected. Istrabadi, *supra* note 43, at 297.

What did provoke controversy—at least in the debate over the permanent constitution—was the composition of the Supreme Court, and the mechanism for selecting judges. The TAL provisions concerning the Supreme Court had been deliberately crafted (by Adnan Pachachi, his chief aide Feisal Amin al-Istrabadi, and Salem Chalabi) to ensure the Court's moderation, and to preclude its manipulation by political factions.[160] The Shi'i Islamists chose not to engage actively in the TAL discussions over the Court, perhaps because they sensed that it would not have time to make substantive decisions during the period the TAL would be in effect. According to TAL Article 44, the Higher Juridical Council (a largely secular body drawn from Iraq's leading civil jurists) would nominate three judges for every Supreme Court vacancy.[161] The three-person Presidency Council would then unanimously fill each vacancy from the nominees.[162] This approach, which bypassed the National Assembly entirely, biased the selection process in favor of experienced civil law judges capable of winning consensus approval across each of Iraq's major communities.

In contrast to their passivity during the TAL judiciary debates, the Shi'i Islamists were extremely active in shaping the judicial branch established in the permanent constitution. Initially, they proposed a separate Constitutional Council to sit above the Federal Supreme Court and concern itself exclusively with constitutional review.[163] Moreover, recognizing that the Article 2 noncontradiction clause created a constitutional basis for striking down laws based on their incompatibility with Islamic values, the Shi'i bloc demanded that at least four of the Court's eleven seats be filled by *shari'a* experts.[164] They also sought to strengthen the Parliament's role in shaping the Court, both by giving it the right to appoint judges and by including a new, vague provision declaring that the Court would be "answerable before the National Assembly."[165] Most of these initiatives were resisted by the same coalition of Kurds, secular Arabs, and the United States, all of whom recognized that the Shi'i proposals were aimed at promoting greater Islamic and clerical influence over the process of constitutional interpretation.

As the constitutional talks approached the late summer deadline, Iraqi negotiators agreed to postpone some of the most vexing issues concerning the Court. They decided that there would be no separate Constitutional Council, but that the Supreme Court members would include "experts in Islamic jurisprudence" alongside judges and other legal experts.[166] They also agreed, however, that the size of the court and the precise mechanisms for appointing its members would be determined in a special law to be

160. Diamond, *supra* note 43, at 148-50.
161. TAL art. 44(E).
162. *Id.*
163. Hammudi Draft Const. (Aug. 8, 2005), *supra* note 56, at 33.
164. *Id.*
165. *Id.*
166. *See* Iraq Const. art. 89(2).

enacted by a two-thirds supermajority of the National Assembly.[167] This compromise gave the Shi'i Islamists a symbolic victory—explicit recognition of the need for Islamic experts on the Court—while granting other factions influence and leverage over the implementing legislation that would ultimately shape the Court's composition.

III. CONCLUSION

It is too early to tell, as of this writing, whether Iraq's formally democratic constitutional order will take root, much less prosper. The legacy of dictatorship, the difficulties of building an Iraqi political identity that bridges ethnic and sectarian divides, and the challenge of defeating a vicious insurgency and averting civil war all loom large. Nonetheless, it is not too soon to draw some tentative conclusions about the Iraqi constitutional process as it has evolved thus far. Four points stand out in particular.

First, the Iraqi constitution is a product of a political bargain struck before the war among the leading parties of the Iraqi opposition. These parties agreed (albeit at a high level of generality) that a new Iraqi regime would embrace Islam, democracy, pluralism, federalism, and human rights. After the war, the former Iraqi oppositionists returned home to their country, and proceeded to implement their political vision.[168] They were only able to do so, however, because the program devised in exile was generally amenable to the broad mass of Iraqi society, which was eager to replace the brutal dictatorship of Saddam Hussein with a more moderate and democratic regime. Above all, however, their vision was supported by the Shi'i clerical leadership, and in particular Grand Ayatollah Sistani,

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167. *Id.*

168. Some have argued that the formerly exiled Iraqi oppositionists are somehow devoid of democratic political legitimacy by virtue of the long periods of time many spent outside the country. While this argument may have been plausible in March 2003, that is no longer the case today. Indeed, the former exiles have now triumphed in two sets of democratic elections, and have drafted a constitution that won the approval of seventy-eight percent of Iraqi voters. Former exiles—and especially Hakim, Jaafari, and 'Allawi—consistently receive high ratings in Iraqi opinion polls, and the Islamist exiles in particular have enjoyed such public support since the very beginning of the post-Saddam Hussein era. As tempting as it may be for some international commentators to dismiss Iraq's leading Shi'i politicians as "out of touch with popular sentiment," *see* Int'l Crisis Group, *supra* note 50, at 11, these assessments simply fly in the face of virtually any fair measure of Iraqi public opinion. For criticisms along these lines, see *id.* at 11; Pollack, *supra* note 31, at 54-55. For a sampling of the public opinion polls, see Robin Wright, *Religious Leaders Ahead in Iraq Poll*, Wash. Post, Oct. 22, 2004, at A1; Int'l Republican Inst., Survey of Iraqi Public Opinion 18, 25-26 (July 2005), *available at* http://www.iri.org/pdfs/08-10-05-Iraq%20poll%20presentation.ppt; Int'l Republican Inst., Survey of Iraqi Public Opinion 23 (Jan. 2005), *available at* http://www.iri.org/pdfs/1-29-05%20poll%20presentation.ppt; Office of Research Opinion Analysis, Dep't of State, Iraqi Public Has Wide-Ranging Preferences for a Future Political System, (Oct. 21, 2003), *available at* http://www.cpa-iraq.org/government/political_poll.pdf. For a defense of the legitimacy of the Iraqi political class, see Galbraith, *supra* note 13, at 122-24.

whose democratic *fatwa* in June 2004 powerfully endorsed the compatibility of Islam and democracy.

Second, despite consensus on overarching political principles, Iraqi politicians engaged in a series of tough debates concerning the implementation of these ideas—both in the TAL and permanent constitution. These debates pitted a united Shi'i Islamist bloc against a looser coalition of Kurds, secular Arab nationalists, and the United States. As the constitutional process became more democratic—particularly following the historic Iraqi election of January 30, 2005—the Shi'i Islamists grew stronger, and were able to tilt constitutional outcomes in their favor. That said, no single group was capable of dominating the process unilaterally, and all sides made important concessions and compromises in the course of the negotiations. The intensity of the debates, however, makes clear that—while there may now be a constitutional agreement—there is not yet a fundamental consensus on the extent to which Islamic politics will play a role in Iraq's emerging democratic order.

Third, there is no question that the United States played an important role in Iraq's constitutional process. Beyond the American military role in deposing Saddam Hussein, U.S. diplomats were also instrumental in defining the procedures and mechanisms for adopting a permanent charter, shaping the TAL, and helping to broker agreements on difficult issues in the final negotiations. Nonetheless, it is important not to overstate American influence in shaping the substantive constitutional outcome, particularly regarding the role of Islam.[169] For the most part, the U.S. role was in facilitating, not imposing, constitutional compromises—usually at the initiative of the Iraqi players themselves. While it is true that America's stated goals in Iraq included the construction of a democratic regime, it is no less true that this goal was shared by the Iraqi political class and the vast majority of Iraqi citizens. And when American objectives differed from those of the Iraqis with regard to constitutional outcomes—most obviously with regard to the role of religion—the Iraqi consensus was ultimately dispositive. Indeed, if before the war the Bush Administration had been told that the final Iraqi constitution would formally prohibit any law contradicting Islam (or rehabilitate *shari'a* as an option for personal-status law, or require Islamic experts to serve on Iraq's Supreme Court), it would have been very surprised indeed.[170]

Finally, it is important to recognize that Iraq's constitutional process is not yet over, despite the formal ratification of a final text in October 2005. The Iraqi constitution allows for a wide range of interpretations and

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169. For examples of such overstatements, *see* Galbraith, *supra* note 13, at 139-40; William R. Polk, Understanding Iraq: The Whole Sweep of Iraqi History from Genghis Khan's Mongols to the Ottoman Turks to the British Mandate to the American Occupation 180-81 (2005); Andrew Arato, *Interim Imposition*, 18 Ethics & Int'l Aff. 25, 25-50 (2004).

170. One of the authors, writing in the prewar period, emphasized the likelihood of Islamic democracy emerging in any Arab state undergoing rapid democratization. *See* Noah Feldman, After Jihad: America and the Struggle for Islamic Democracy (2003).

political outcomes. Its provisions are frequently indeterminate, containing numerous points of internal tension and ambiguity, especially in its approach to integrating Islamic values with liberal provisions on equality and human rights. The text also allows for considerable constitutional development through ordinary legislation, the composition of the Federal Supreme Court, and the evolution of Iraq's federal system. Moreover, it is possible that the Constitutional Review Commission, originally proposed in an effort to blunt Sunni opposition to the constitution, will also allow for substantive adjustments or clarifications of various provisions relating to Islam.

While the constitutional text takes important steps toward determining the relationship between Islam and the state, that relationship will also be shaped by the evolution of Iraq's political party system. Simply put, Iraqi politics remains in flux. It is not clear whether the postwar rise of ethnic and sectarian identity politics will continue, or whether cross-confessional nationalist parties will emerge and gain traction over time. Nor is it clear whether the Shi'i Islamist parties will continue to look beyond their internal rivalries and disagreements and present a unified front at the national level. Their unity to date, a considerable achievement largely attributable to Sistani's leadership, was critical to increasing the prominence of Islam in the constitution. And then there is the emerging class of democratically elected Sunni Arab leaders. It remains to be seen how they will fit into the Iraqi political spectrum—and, in particular, whether they will back Shi'i Islamist efforts to enhance the role of religion in politics or make common cause with the Kurds and secular Arabs against Shi'i sectarianism. All of these political developments will have important ramifications for Islam's ultimate place within Iraq's constitutional system.

In short, the Iraqi constitutional process continues, even after the successful referendum in October 2005. Iraq's historic effort to synthesize Islam and democracy will be shaped as much by evolving political conditions as by the strictures of the constitutional text. Its success or failure will also depend on the Iraqi government's ability to stabilize and secure the country in the face of the ongoing insurgency and sectarian violence. This is not to minimize the significance of Iraq's constitution—only to recognize that the document itself marks not the end, or even the beginning of the end, but perhaps the end of the beginning, of Iraq's democratic development.