

## **Iraq's Constitution of 2005: Liberal consociation as political prescription**

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*Democracies have two basic choices for managing ethnic, national, and religious diversity. They may seek to construct a single all-embracing public identity through “integration” or try to accommodate dual or multiple public identities through “consociation.” These are the two dominant, broad-based prescriptions that are offered for addressing the conflict in Iraq. In this article, we argue that Iraq's new Constitution, ratified in 2005, reflects a “liberal” form of consociation that accommodates Iraq's democratically mobilized communities. We examine in detail the Constitution's provisions for both self-government and for shared government, and argue that these provisions represent a reasonable way forward for all of Iraq's citizens and peoples. The Constitution is defended against integrationist criticisms.*

### **Introduction**

When it comes to managing national and religious diversity, democracies have two broad choices—integration or accommodation.

Integrationist states seek to construct a single overarching public identity. Integrationists believe conflict results from group-based partisanship and recommend a state that is impartial, meritocratic, and that promotes equal citizenship through a bill of individual rights. They frown on ethnic political parties or civic associations and praise parties that stand for nonethnic or cross-ethnic agendas, such as the Republican and Democratic parties in the U.S., or Labour and the Conservatives in the U.K. They reject proportional electoral systems, which facilitate segmental appeals, and support those that discourage the mobilization of cultural differences and require winners to achieve majority or plurality broad-based support. Integrationists back executive systems that favor candidates who rise above religious, linguistic, and ethnic factions.

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They favor a unitary centralized state, or a federation that is constructed on nonethnic criteria, and they frown on any form of autonomy, territorial or nonterritorial, that is based on groups.<sup>1</sup> Integration is the preferred approach of most democratic states and international organizations. It is associated with dominant communities within states, as well as with small, dispersed minorities, such as immigrant communities, or “middlemen” minorities – as petit bourgeois communities whose members are neither present in security institutions nor protected by trade unions are known to sociologists.

Accommodationist democratic states recognize dual or multiple public identities through consociation.<sup>2</sup> Consociation accommodates groups: (a) by involving all sizable communities in executive institutions provided they wish to participate; (b) by promoting proportionality throughout the public sector, not just in the executive and legislature but also in the bureaucracy, including the army and the police; (c) through autonomy of either the territorial or nonterritorial variety; and (d) through minority vetoes, at least in those domains the minority communities consider important. While integrationists mostly believe that identities are

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<sup>1</sup> For examples of integrationist thinking, see BRIAN BARRY, *CULTURE AND INEQUALITY* (Polity Press 2000); PAUL BRASS, *ETHNICITY AND NATIONALISM: THEORY AND COMPARISON* (Sage 1991); DONALD HOROWITZ, *A DEMOCRATIC SOUTH AFRICA? CONSTITUTIONAL ENGINEERING IN A DIVIDED SOCIETY* (Univ. Calif. Press 1991); BENJAMIN REILLY, *DEMOCRACY IN DIVIDED SOCIETIES: ELECTORAL ENGINEERING FOR CONFLICT MANAGEMENT* (Cambridge Univ. Press 2001); Philip G. Roeder, *Soviet Federalism and Ethnic Mobilization*, 43 *WORLD POL.* 196 (1991).

<sup>2</sup> Consociational theory is most closely associated with the work of Arend Lijphart. *See, e.g.*, AREND LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (Univ. Calif. Press 1968); AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (Yale Univ. Press 1977); Arend Lijphart, *Self-Determination versus Pre-Determination of Ethnic Minorities in Power-Sharing Systems*, in *THE RIGHTS OF MINORITY CULTURES* 275 (Will Kymlicka ed., Oxford Univ. Press 1995) [hereinafter Lijphart, *Self-Determination*]; Arend Lijphart,); *The Wave of Power-Sharing Democracy*, in *THE ARCHITECTURE OF DEMOCRACY: CONSTITUTIONAL DESIGN, CONFLICT MANAGEMENT AND DEMOCRACY* 37 (Andrew Reynolds ed., Oxford Univ. Press 2002). For other instances of consociational thinking, see ERIC NORDLINGER, *CONFLICT REGULATION IN DIVIDED SOCIETIES* (Occasional Papers in Int'l Aff., Ctr for Int'l Aff., Harvard Univ. 1972); Brendan O'Leary, *Debating Consociation: Normative and Explanatory Arguments*, in *FROM POWER-SHARING TO DEMOCRACY: POST-CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES* 3 (Sid J. R. Noel ed., McGill-Queens Univ. Press 2005); JOHN MCGARRY & BRENDAN O'LEARY, *THE NORTHERN IRELAND CONFLICT: CONSOCIATIONAL ENGAGEMENTS* (Oxford Univ. Press 2004); KENNETH DOUGLAS MCRAE, *CONSOCIATIONAL DEMOCRACY IN SEGMENTED SOCIETIES* (McClelland & Stewart 1974).

malleable, transformable, soft, or fluid, consociationalists think that—in certain contexts—they may be resilient, durable, and hard.<sup>3</sup> From the latter’s perspective, political prudence and morality require considering the special interests, needs, and fears of groups so that they regard the state as fit for them. Accommodating groups through consociation is less popular with states than integration, but it is more popular among minorities, particularly sizable and territorially clustered minorities.<sup>4</sup>

These are the democratic institutional choices facing divided polities everywhere, from Bosnia-Herzegovina to Lebanon, from Northern Ireland to Sri Lanka and Sudan. Additionally, integration and accommodation are the dominant and broad prescriptions offered for addressing the conflict in Iraq, even when these specific vocabularies are not employed. Those who favor integration for Iraq stress the commonalities Iraqis share and argue for “nation-building”. They call for a strong, centralized, and ethnically impartial Iraqi state, which they see as necessary for multiple reasons: to end the current insurgency (or, properly, insurgencies); to combat crime; hold the country together; promote a civic national identity against ethnocentric and sectarian elites; defend the state against its neighbors; prevent Iraq from becoming a haven for the export of international *jihadism*; and to allow the U.S.-led coalition to withdraw its troops.

Integrationists see Iraq’s current problems as based on sectarianism and ethnocentrism, usually of recent origin, rather than rooted in established or age-old hatreds. The sources of discord are often seen to stem from the invasion of 2003, though it is recognized that they were

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<sup>3</sup> For an example of the former view, see DAVID MILLER, *MARKET, STATE AND COMMUNITY: THE FOUNDATIONS OF MARKET SOCIALISM* 237 (Oxford Univ. Press 1989). For an example of the latter view, see John McGarry, *Political Settlements in Northern Ireland and South Africa*, 46 *POL. STUD.* 853 (1998).

<sup>4</sup> Here, we treat accommodation and consociation as synonyms, but this decision is slightly misleading. Elsewhere we have divided accommodation strategies into three categories: (a) territorial pluralism (meaningful territorial self-government for communities as well as power sharing in the federal or union government); (b) consociation (executive power sharing, self-government, proportionality and minority vetoes); and (c) credible multiculturalism (proportionality and self-government). See John McGarry, Brendan O’Leary & Richard Simeon, *Integration or Accommodation? The Enduring Debate in Conflict Regulation*, in *CONSTITUTIONAL DESIGNS FOR DIVIDED SOCIETIES* (Sujit Choudhry ed., Oxford Univ. Press, forthcoming 2008).

exacerbated by Saddam's privileging of sectarian and tribal loyalties. The U.S.-led coalition, from this perspective, came to Iraq with a superficial 'tribal' and atavistic reading of the country, one that downplayed the cross-cutting ties that bound Iraqis together..<sup>5</sup> The coalition thus provided an advantage to sectarian and ethnocentric leaders, who exploited these interpretations, and the descent into civil war began. In the integrationist account, these leaders negotiated a sectarian, decentralized, and unfair Constitution in 2005 that has further polarized matters.<sup>6</sup> The integrationists insist that if the decentralizing provisions in this Constitution, particularly its provisions on natural resources, are not radically changed, they will break Iraq apart, plunge the region into war, and provide a boon to international terrorism.<sup>7</sup> "Rather than being the glue that binds the country together," warns a report of the International Crisis Group—a Brussels-based non-governmental organization—the Constitution "has become both the prescription and the blueprint for its dissolution."<sup>8</sup>

Broad integrationist sentiment is dominant among Iraq's small, centrist secular parties and is popular among Sunni Arabs, at least among those who have given up on a return to the status

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<sup>5</sup> For examples of this view, see Yahia Said, *Federal Choices Needed*, AL-AHRAM WEEKLY, (Mar. 2–8, 2006, Issue 784), [weekly.ahram.org.eg/2006/784/sc6.htm](http://weekly.ahram.org.eg/2006/784/sc6.htm) (last visited on May 28, 2007); <http://weekly.ahram.org.eg/2006/784/sc6.htm> on May 28 2007; Tulin Daloglu, *End Sectarian Violence*, WASH. TIMES, Apr. 17, 2006 at A17; Int'l Crisis Group, *The Next Iraqi War? Sectarianism and Civil Conflict* (Middle East Report No. 52, Feb. 27, 2006), available at [www.crisisgroup.org/library/documents/middle\\_east\\_north\\_africa/iraq\\_iran\\_gulf/52\\_the\\_next\\_iraqi\\_war\\_sectarianism\\_and\\_civil\\_conflict.pdf](http://www.crisisgroup.org/library/documents/middle_east_north_africa/iraq_iran_gulf/52_the_next_iraqi_war_sectarianism_and_civil_conflict.pdf)

<sup>6</sup> According to Yahia Said, "international actors have not been innocent bystanders. They have contributed to sectarianism in many ways, including by subscribing to a 'realist' narrative that argues that Iraq is an artificial state; that the groups comprising it were only held together by tyranny, and that disintegration is a byproduct of liberation from authoritarianism. This narrative, which is antithetical to nation-building, has been embraced by sectarian politicians in Iraq and has found its reflection in post-invasion policies, including the dissolution of the army and the new constitution." Said, *supra* note 5. See also Daloglu, *supra* note 5 (accusing the United States of enforcing an "ethnic and sectarian calculus onto the infrastructure of the Iraqi Governing Council"); and Int'l Crisis Group, at i and 23 (arguing that the US-led coalition prized "communal identities over national-political platforms.").

<sup>7</sup> See, e.g., Kanan Makiya, *Present at the Disintegration*, N.Y. TIMES, Dec. 11, 2005, at 13, §4 (Constitution must be "overhauled"); Donald Horowitz, *The Sunni Moment*, WALL ST. J., Dec. 14, 2005, at A20 (must be "fundamentally changed"); Int'l Crisis Group, *supra* note 5, at 11 (calling for Constitution to be "totally revised").

<sup>8</sup> Int'l Crisis Group, *supra* note 5, at 11.

quo ante. It is the preferred public position of all the surrounding Arab states and of Turkey, where it is associated with the founding philosophy of the Turkish state. Integration, in this sense, is arguably the most popular prescription in the West, among supporters of the 2003 invasion, in the Bush administration and elsewhere, as well as among the invasion's critics, in the Democratic Party in the U.S., and among a broad swathe of European political opinion.<sup>9</sup> Nonetheless, many integrationists apparently see themselves as losing the battle to the forces of sectarian and ethnic division.<sup>10</sup>

The second approach, which is consociational, focuses on the accommodation of Iraq's different communities. It is labeled by its integrationist critics as "primordialist," "tribalist," "atavistic," "sectarian," "ethnocentric," and "partitionist," but by its supporters as "realist" or "pluralist."<sup>11</sup> The consociational approach tacitly underlay the decision by the Coalition Provisional Authority (CPA) to appoint the broad-based Interim Governing Council (IGC) in the summer of 2003, and was more prominent in the 2005 Constitution, which confirmed autonomy for the region of Kurdistan and offered other protections to Iraq's diverse communities.<sup>12</sup> The consociational approach has also informed proposals both to partition Iraq into three states—for its Kurdish, Shi'a Arab, and Sunni Arab communities respectively—and, more recently, to decentralize the government of Iraq along these same ethnic lines. Prescriptions of this sort have

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<sup>9</sup> The latest integrationist blueprint, emblematic of the conventional wisdom, is the bipartisan report of the U.S. Iraq Study Group: JAMES A. BAKER III & LEE H. HAMILTON, *THE IRAQ STUDY GROUP REPORT: THE WAY FORWARD—A NEW APPROACH* (Vintage Books 2006). For a critique of the report, see Brendan O'Leary, *Iraq's Future 101: The Failings of the Baker-Hamilton Report*, 6 STRATEGIC INSIGHTS (electronic journal Mar. 2007 Issue 2), [www.ccc.nps.navy.mil/si/2007/Mar/o%27learyMar07.pdf](http://www.ccc.nps.navy.mil/si/2007/Mar/o%27learyMar07.pdf) (last visited on May 28, 2007).

<sup>10</sup> This is the message conveyed generally by Horowitz, *supra* note 7, Daloglu, *supra* note 5, and the International Crisis Group, *supra* note 5. See also Toby Dodge, *State Collapse and the Rise of Identity Politics*, in IRAQ: PREVENTING A NEW GENERATION OF CONFLICT 23 (Markus E. Bouillon, David M. Malone & Ben Rowswell eds., Lynne Rienner 2007).

<sup>11</sup> For examples of the consociational approach applied to Iraq, see generally *THE FUTURE OF KURDISTAN IN IRAQ* (Brendan O'Leary, John McGarry & Khaled Salih eds., Univ. of Pa. Press 2005), particularly 47–142.

<sup>12</sup> IRAQ CONST. art. 113 (guaranteeing autonomy for Kurdistan); IRAQ CONST. arts. 116–117 (defining the powers of an autonomous region); IRAQ CONST. arts. 118–119, 121 (defining protections for smaller communities).

been put forward by, among others, U.S. senator Joseph Biden, Leslie Gelb (the former chair of the Council of Foreign Relations),<sup>13</sup> Peter Galbraith (former U.S. ambassador to Croatia),<sup>14</sup> and Michael O’Hanlon (of the Brookings Institution).<sup>15</sup>

These contrasting prescriptions for regulating Iraq’s conflict have produced a vigorous debate. Integrationists accuse consociationalists of exaggerating the monolithic nature of Iraq’s communal and ethnic groups and of downplaying an Iraqi identity coterminous with the state.<sup>16</sup> In giving power to the very ethnic and sectarian politicians responsible for the conflict and by reifying identities that are fluid and contingent, consociationalists are said to have made matters worse. Group-based thinking in Iraq, it is argued, “is a static caricature that does great damage to a complex, historically grounded, reality”<sup>17</sup> or betrays a “sublime artificiality” and ignorance of the historical record.<sup>18</sup> By contrast, consociationalists see the current civil war, and recent election and referendum results, as evidence that Iraq is deeply divided, with a divided past.<sup>19</sup> They believe that these divisions cannot be overcome easily in the near future, and that there is a need, therefore, for accommodation, extensive territorial autonomy, or partition. Consociationalists criticize integrationists for ignoring the reality of divisions on the ground and for exaggerating the basis for

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<sup>13</sup> Leslie Gelb, *The Three State Solution*, N.Y. TIMES, 25 November Nov. 25, 2003, at A27 (late edition). *See also* Joseph Biden & Leslie Gelb, *Unity through Autonomy in Iraq*, N.Y. TIMES, May 1, 2006, at A19 (late edition).

<sup>14</sup> PETER W. GALBRAITH, *THE END OF IRAQ: HOW AMERICAN INCOMPETENCE CREATED A WAR WITHOUT END* (New York: Simon and Schuster 2006).

<sup>15</sup> Michael E. O’Hanlon, *Voluntary Ethnic Re-location in Iraq*, L.A. TIMES, Aug. 27, 2006, reprinted at <http://www.mafhoum.com/press9/285S23.htm>.

<sup>16</sup> *See* Dodge, *supra* note 10, at 25; Int’l Crisis Group, *supra* note 5; *see also* Reidar Visser, *Iraq’s Partition Fantasy*, Open Democracy (May 19, 2006), [www.opendemocracy.net/conflict-iraq/partition\\_3565.jsp](http://www.opendemocracy.net/conflict-iraq/partition_3565.jsp) (last visited on Jun. 1, 2007).

<sup>17</sup> *See* Dodge, *supra* note 10, at 25.

<sup>18</sup> *See* Visser, *supra* note 16.

<sup>19</sup> Brendan O’Leary, *Power-Sharing, Pluralist Federation, and Federacy*, in *THE FUTURE OF KURDISTAN IN IRAQ* 47 (Brendan O’Leary, John McGarry & Khaled Salih eds., Univ. of Pa. Press 2005); GALBRAITH, *supra* note 14; Biden & Gelb, *supra* note 13, at A19.

unity. They think that integrationist prescriptions will produce the very disasters that integrationists seek to avoid.

In this paper, we argue that the integrationist prescriptions have deep flaws, and that Iraq's integrationists, ironically enough, exaggerate the monolithic nature of consociational approaches. While some consociationalists are guilty of the errors the integrationists describe, not all are. The main division in consociational approaches is between those who favor a "corporate consociation" and those who favor a "liberal consociation,"<sup>20</sup> or, differently put, between those who prefer "predetermination" and those who prefer "self-determination."<sup>21</sup> A corporate or predetermined consociation accommodates groups according to ascriptive criteria, such as ethnicity or religion, on the assumption that group identities are fixed and that groups are both internally homogeneous and externally bounded.<sup>22</sup> This thinking indeed privileges such identities at the expense of those group identities that are not accommodated, and/or at the expense of intragroup or transgroup identities. Politicians associated with these unprivileged categories find it more difficult to thrive.<sup>23</sup> A liberal or self-determined consociation, by contrast, rewards whatever salient political identities emerge in democratic elections, whether these are based on ethnic or religious groups, or on subgroup or transgroup identities. Liberal consociations also take care to ensure that the rights of individuals as well as groups are protected. While academic consociationalists are invariably

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<sup>20</sup> Brendan O'Leary, *Debating Consociation: Normative and Explanatory Arguments*, in FROM POWER-SHARING TO DEMOCRACY: POST-CONFLICT INSTITUTIONS IN ETHNICALLY DIVIDED SOCIETIES 3, 15–16 (Sid Noel ed., McGill-Queens Univ. Press 2005).

<sup>21</sup> See Lijphart, *Self-Determination*, *supra* note 2, [which Lijphart source in note 2? There are four- Read note 2 carefully! The particular source is clearly identified here. If we do not have the proper footnote style, please change]

<sup>22</sup> For an integrationist criticism of this approach, see ROGERS BRUBAKER, *ETHNICITY WITHOUT GROUPS* (Harvard Univ. Press 2006).

<sup>23</sup> Lebanon is an example of a corporate consociation. It currently allocates three of its most important political offices—the presidency, premiership, and speaker of the legislature—to a Christian, Sunni Muslim, and Shi'a Muslim, respectively. This creates a hierarchy among the three communities, as the offices to which they are entitled are not equal in stature, but it also creates a hierarchy between the three communities and communities that are not accommodated, such as Lebanon's Druze, or the various crosscutting communities (environmentalists, socialists, feminists) who prefer to stress a programmatic politics rather than one based on religion.

exponents of liberal consociation,<sup>24</sup> integrationists and other critics of consociation almost always identify consociation with its corporate form.

Important parts of Iraq's new Constitution are consistent with liberal consociational principles, and we shall argue that if Iraq is to have a future as a democratic and united state, the 2005 Constitution will need to be defended and, particularly where it is incomplete or vague, developed in a liberal consociational direction.

## **1. Iraq's Constitution: Self-rule and shared rule**

Iraq's new Constitution creates a federation. Federations incorporate elements of self-rule in the sense that their component units enjoy a certain degree of autonomy vis-à-vis the federal government even as they share in the control of that government.

### **1.1. Federal self-rule**

Self-rule rests on the resolution of two important questions, namely, what is the nature of the *self*, or community, to be given self-rule, and how much *rule* should this community enjoy? In answering the first question, integrationists favor partly autonomous provinces founded on administrative or territorial principles, not on ethnic or religious principles. In Iraq, several integrationists have argued for a federation based on the existing eighteen governorates.<sup>25</sup> The governorate boundaries are preferred because they are purely administrative entities, rather than the focus of historic or ethnic loyalties, and, indeed, this had been the rationale for establishing and redrawing them—even under Saddam. It is believed that internal boundaries based on governorates would be more consistent with Iraqi nation building because they would stress citizenship over

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<sup>24</sup> See Lijphart, *Self-Determination*, supra note 2 [which Lijphart source in note 2? There are four. See my comments in footnote 21], O'Leary, supra note 2, MCGARRY & O'LEARY, supra note 2.

<sup>25</sup> Makiya, supra note 7; Aeed Dawisha & Karen Dawisha, *How to Build a Democratic Iraq*, 82 FOREIGN AFF. 36 (2003); Dawn Brancati, *Is Federalism a Panacea for Post-Saddam Iraq?*, 25 WASH. Q. 14 (2004); Andreas Wimmer, *Democracy and Ethno-Religious Conflict in Iraq*, 45 SURVIVAL 124 (2003).



ethnicity or communalism and because they would politically fragment communal and ethnic groups spread across different provinces, giving rise to intragroup divisions and cross-cutting loyalties. Integrationists also argue that it is virtually impossible to create ethnically homogeneous federal units in Iraq, and that an ethnically based federalism would inevitably condemn local ethnic or nonethnic minorities to discrimination and second-class citizenship and thus would be a source of injustice as well as instability.<sup>26</sup>

Iraq's recently enacted Constitution deviates from the model of eighteen governorates by recognizing Kurdistan, which comprises three governorates at present as well as fragments of others, as an established federal region. Integrationists have generally come to accept this as an immovable fact, though hardly enthusiastically.<sup>27</sup> They continue, however, to object to two other parts of the Constitution, which also break with the model of administrative federation: the provision that allows Kirkuk to join Kurdistan, should a majority of its population decide to do so in a plebiscite to be held by December 2007;<sup>28</sup> and the provision that allows all governorates, except Baghdad, to amalgamate to form "regions, following a referendum in each governorate."<sup>29</sup> The concern is that these provisions will promote an ethnic or communal federation, with associated dangers of ethnocentrism/sectarianism and dissolution.<sup>30</sup>

For corporate consociationalists, the internal boundaries of Iraq's federation should be organized ascriptively. There should be a tripartite federation of Kurds, Sunni Arabs, and Shi'a

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<sup>26</sup> See Wimmer, *supra* note 25, at 123: "federalization may heighten, rather than reduce the risks of gross human rights violations, especially for members of ethnic minorities living under the rule of the majority government in a federal unit." See also Imad Salamey & Frederic Pearson, *The Crisis of Federalism and Electoral Strategies in Iraq*, 6 INT'L STUD. PERSP. 190 (2005).

<sup>27</sup> See Makiya, *supra* note 7; Int'l Crisis Group Middle East Report No. 52, *supra* note 5, at ii.

<sup>28</sup> IRAQ CONST. art. 140.

<sup>29</sup> *Id.* art. 119.

<sup>30</sup> BAKER & HAMILTON, *supra* note 9 (arguing that the referendum on Kirkuk be postponed); for comments, see O'Leary, *supra* note 9.

Arabs. This approach has been advocated by Senator Joseph Biden and Leslie Gelb.<sup>31</sup> A similar arrangement, they point out, was tried by the United States in Bosnia-Herzegovina under the Dayton Accords, when separate units of self-government were established for Bosniaks, Croats, and Serbs, respectively.<sup>32</sup> The result was a decade of relative peace and, now that memories of civil war are fading, Bosnians are beginning to rebuild their federal government.<sup>33</sup>

Both approaches have flaws. The main problem with adopting an integrationist (administrative) federation in Iraq is that it would prevent communities that want to enjoy collective self-government from doing so. Such an approach would not promote unity or peace and is undemocratic. Kurdistan's authorities and parties would never have accepted a federation based on the eighteen governorates, since this would not have recognized Kurdistan. Given the attachment of Kurds to Kirkuk and to other disputed territories, any attempt to prevent their union with Kurdistan, after an affirmative plebiscite, or to prevent such a plebiscite from being held, would likely provoke more violence, rather than peace. The difficulty with the corporate consociational approach, on the other hand, is that it requires ascriptive communities to adopt collective self-government in advance of clear evidence that all of the relevant communities seek it. It is not yet unambiguously clear that Iraq is divided into three parts, like Caesar's Gaul, or Bosnia-Herzegovina. While there is "near unanimity" among Kurdish political leaders and much of the populace on a Kurdish identity and, accordingly, on the need for Kurdish collective autonomy, the same cannot be said with respect to Shi'a and, in particular, Sunni Arabs.<sup>34</sup> There

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<sup>31</sup> Biden & Gelb, *supra* note 13, at A19.

<sup>32</sup> Technically, the Dayton Accords divided Bosnia-Herzegovina into two federal units, the Federation of Bosnia-Herzegovina and Republika Srpska, respectively. However, the former is divided into Croat and Bosniak-controlled cantons: the Dayton Peace Accords on Bosnia (1995), *available at* [www.state.gov/www/regions/eur/bosnia/bosagree.html](http://www.state.gov/www/regions/eur/bosnia/bosagree.html).

<sup>33</sup> Biden & Gelb, *supra* note 13, at A19.

<sup>34</sup> See Phebe Marr, *Iraq's Identity Crisis*, in *IRAQ: PREVENTING A NEW GENERATION OF CONFLICT* 41 (Markus E. Bouillon, David M. Malone & Ben Rowswell eds., Lynne Rienner 2007), at 45-9.

are divisions among the Shi'a—between those with primarily a Shi'a identity, particularly supporters of the Supreme Iraqi Islamic Council (SIIC), previously known as the Supreme Council for the Islamic Revolution in Iraq (SCIRI),<sup>35</sup> and those who claim to have more of an Iraqi identity, predominantly, the Sadrists and *Da'wa*. Among the Shi'a, there is a minority that is more centralist than decentralist; there are, in addition, well-known divisions on the question of a Shi'a super-region in the south.<sup>36</sup> It may be that Sunni Arabs will come to embrace the notion of collective self-government, but they have not done so yet, as their support for the eighteen-governorate model suggests.

Given these facts, a liberal consociational approach—one that leaves it to local democratic constituencies to decide if they want to amalgamate into federal regions or not—seems both prudent and democratic. This is the approach of the 2005 Constitution.<sup>37</sup> The Kirkuk governorate, after normalization (the restoration of its expelled people, the rectification of boundaries, and incentives paid to settlers to return to their places of origin), can choose to join Kurdistan if its valid electorate wants to do so.<sup>38</sup> Governorates in other parts of the country—with the exception of Baghdad, which may not aggregate with any other governorate—are permitted to unite, forming

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<sup>35</sup> The name change occurred in May 2007, and was explained by the party as reflecting the successful revolutionary overthrow of the Ba'athist regime. It may have also reflected a wish on the part of its leadership to distance the party from its formation in, and past sponsorship by, Ayatollah Khomeini's Iran.

<sup>36</sup> Integrationists often point to intragroup divisions in order to criticize consociationalism, and, in Iraq, they point to internal divisions among both Kurds and Shi'a Arabs. However, while the Kurds clearly have internal party-based divisions, these exist alongside a consensus on collective self-government. The Kurdish perspective is that internal divisions can be managed within a self-governing Kurdistan. There is not yet a similar consensus on collective self-government among Shi'a Arabs.

<sup>37</sup> As a constitutional adviser to the Kurdistan Regional Government in the making of Iraq's Constitution, and, therefore, as someone privileged to see both public and private texts, O'Leary attributes the emergence of this approach to a memorandum written by the UN specialist South African professor Nicholas Haysom, which resembled some of the features of the Spanish Constitution.

<sup>38</sup> IRAQ CONST. art. 140.

regions, if there is democratic support in each governorate.<sup>39</sup> A twin democratic threshold is proposed by the Constitution before aggregation: a vote within a governorate's assembly and a referendum. It is, therefore, possible under the Constitution for much of Biden and Gelb's tripartite solution to be implemented, if there is support for it, though it is not mandatory.<sup>40</sup> The one exception is Baghdad, which may form a region of its own but may not be part of any other region. It is also possible for Shi'a-dominated governorates that do not accept SIIC/SCIRI's vision to retain their original status, and, indeed for any governorate that may be, or may become, dominated by secularists, to avoid inclusion in what they might fear will be a *Shari'a*-ruled Shi'astan or Sunnistan.

There is another reason why the Constitution's provisions on self-rule may be more conducive to stability apart from the fact that they are more consistent with democratic preferences. Federations that have only two or three regions are less stable than those with many.<sup>41</sup> Two-region federations especially are prone to collapse, as the experience of Czechoslovakia, pre-1971 Pakistan, and, more recently, Serbia and Montenegro suggests, because there are few opportunities for shifting alliances and the two units tend to be pitted against each other on every issue. But three-unit federations are also fragile, since opportunities for shifting coalitions are still limited, notwithstanding the instance of Bosnia-Herzegovina's survival, which we judge to be an outcome of the will of the international community, specifically, the European Union and the U.S. It is, therefore, an advantage of Iraq's Constitution that it allows for the possibility of multiple federal units, without mandating it.

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<sup>39</sup> The Iraqi Constitution provides for a referendum if there is "a request by one-third of the council members of each governorate intending to form a region" or "a request by one-tenth of the voters in each of the governorates intending to form a region." *id.* art. 119.

<sup>40</sup> See Biden & Gelb, *supra* note 13, at A19 for tripartite solution.

<sup>41</sup> RONALD L. WATTS, *COMPARING FEDERAL SYSTEMS* 113–114 (McGill-Queen's Univ. Press 1999).

The second important question on self-rule concerns its extent, that is, how decentralized should Iraq's federation be? Integrationists' chief criticism of the new Constitution is that, as Donald Horowitz writes, it has established "probably the weakest federation in the world."<sup>42</sup> They insist that only a centralized government with a strong "capacity" can perform vital nation-building tasks; hold the country's fissiparous regions together; defeat the insurgency; fend off avaricious neighbors, particularly Iran; and protect minorities throughout the state.<sup>43</sup> They argue that this is not only desirable but politically popular. Reidar Visser describes the situation in Iraq as involving a "dualism" of weak regional identities combined with a "quite robust Iraqi nationalism."<sup>44</sup> Toby Dodge maintains that there is a "widespread wish for a strong unitary state centered on Baghdad" and claims that a collective appreciation of the state's administrative capacity would contribute to a "collective sense of identity that can rival or even replace sub-state, centrifugal political mobilization."<sup>45</sup>

Those who argue that the Iraq federation is weak (that is, decentralized) usually point to the Constitution's provisions on natural resources; they argue, correctly, that Baghdad's control over the country's natural resources is a *sine qua non* for centralization. The Constitution makes clear that natural resources are not an exclusive competence of the federal government.<sup>46</sup> Article 111, which states that "oil and gas are owned by all the people of Iraq," is deliberately not a subclause of the preceding article 110, which specifies precisely the exclusive competences of

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<sup>42</sup> Horowitz, *supra* note 7.

<sup>43</sup> See Dodge, *supra* note 10, at 35.

<sup>44</sup> Visser, *supra* note 16, He claims that Iraqi nationalism remains "flourishing" and that "even today, in a climate of growing sectarian terrorism calculated to obliterate the idea of coexistence, many Iraqis stubbornly refuse to reveal their ethno-religious identity when interrogated by western journalists. Many simply say they are Iraqis." There are, of course, good reasons why Iraqis may refuse to reveal their identities to foreigners and other Iraqis.

<sup>45</sup> See Dodge, *supra* note 10, at 29.

<sup>46</sup> For a more detailed construction and defense of the constitution's clauses on natural resources, see Brendan O'Leary, *Federalizing Natural Resources* in IRAQ: PREVENTING A NEW GENERATION OF CONFLICT 189 (Markus E. Bouillon, David M. Malone & Ben Rowswell eds., Lynne Rienner 2007).

the federal government.<sup>47</sup> Article 111 should also be read in conjunction with article 115, which states that all powers not exclusively federal competences belong to the regions (and governorates not organized into a region), and that where competences are shared and there is a clash then the regional laws prevail.<sup>48</sup> Article 111 should be read, too, in conjunction with article 121, which establishes that the regions have a general power of nullification outside the domain of exclusive federal competences.<sup>49</sup>

Article 112, the second important constitutional article dealing with oil and gas, states that the “federal government, with the producing governorates and regional governments shall undertake the *management* of oil and gas extracted from *present fields*,” and that “the federal government, with the producing regional and governorate governments, shall *together* formulate the necessary strategic policies to develop the oil and gas wealth in a way that achieves the highest benefit to the Iraqi people.”<sup>50</sup> Article 112 is also subject to articles 115 and 121, which authorize regional legal supremacy.<sup>51</sup> Together, these clauses make it plain that the federal government’s constitutional role in control of oil and gas is prescribed and delimited in a number of ways; it is managerial, shared with the regions and governorates; subordinate to the regions and governorates in the event of clashes; and confined to current fields.<sup>52</sup> Nothing in these

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<sup>47</sup> IRAQ CONST. art. 110—111.

<sup>48</sup> *Id.* art 111 & 115.

<sup>49</sup> *Id.* art 111 & 121.

<sup>50</sup> *Id.* art 112 (italics added).

<sup>51</sup> *Id.* art 115 & 121.

<sup>52</sup> Some supporters of a centralized Iraq, in which Baghdad would control natural resources, argue with breathtaking early revisionism that the Constitution actually mandates their preferred world. This appears to be the curious position of the oil minister, Hussain al-Shahristani, appointed in 2006, who claimed on assuming office that the federal government’s (alleged) control over exploration extended to all oil fields in the country, including those that are not yet in production: Steve Negus, *Iraq faces clash with Kurds over oil deals*, FIN. TIMES (U.K.), May 2324, 2006, available at [www.ft.com/cms/s/3d56aa60-ea7c-11da-9566-0000779e2340.html](http://www.ft.com/cms/s/3d56aa60-ea7c-11da-9566-0000779e2340.html)). The Turkish government has taken a similar line, seeking through its official spokesmen to play down the extent to which Iraq’s Constitution gives any control over oil to Iraq’s regions: *Turkey wary of Iraqi-Kurd plans to export oil*, DEUTSCHE PRESSE-AGENTUR (F.R.G.), Jun. 27, 2007, reprinted at [www.pukonline.com/eng/modules.php?name=News&file=article&sid=1182](http://www.pukonline.com/eng/modules.php?name=News&file=article&sid=1182) [cannot find official electronic

provisions, however, prevents the Iraqi federal government—in concert with its regions—from agreeing on cooperative arrangements that resemble those proposed in some versions of the draft federal oil bill.

From the integrationist perspective, the Constitution’s treatment of oil and natural gas is not just decentralist but partisan, allegedly privileging Shi’a and Kurdish regions while collectively punishing Sunni Arabs for the sins of the Ba’athists. It is said to underlie Sunni Arab grievances and to have fueled the insurgency. Kanan Makiya has described the Constitution as a “punitive” document that penalizes Sunnis “for living in regions without oil.”<sup>53</sup> The Constitution suggests, according to him, that the “state owes the Sunnis of the resource-poor western provinces less than it does the Shiites and Kurds.”<sup>54</sup> Yahia Said, another centralist, writes that the Constitution means that “Baghdad and the non-oil-producing regions will be at the mercy of the oil-producing ones.”<sup>55</sup> The International Crisis Group has warned that if Shi’a Arabs construct a nine-province Shi’a region, as permitted by the Constitution, it would “leave the Sunni Arab community landlocked and without oil.”<sup>56</sup> Horowitz, explaining Sunni alarm at the Constitution, traces that fear to the stipulation in article 112, which restricts the federal government’s role to “present fields,” and claims that this “seems to tie the distribution of future oil revenues to the location of the resource in one region or another. Iraq’s oil is in the Kurdish north and Shiite south.”<sup>57</sup> Many who believe this conventional wisdom see control over natural resources at the heart of the struggle for Kirkuk. Why else, the argument goes, does Kurdistan want to

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version Suggest you try again. I found it first time]. This position is vigorously contested by the Kurdistan Regional Government. Telephone interview by Brendan O’Leary with Khaled Salih, official spokesman, Kurdistan Regional Government .(May 30, 2007).

<sup>53</sup> Makiya, *supra* note 7.

<sup>54</sup> *Id.*

<sup>55</sup> Said, *supra* note 5.

<sup>56</sup> Int’l Crisis Group, *supra* note 5, at ii.

<sup>57</sup> Horowitz, *supra* note 7, at A20.

incorporate Kirkuk, if not for the fact that it sits atop of some of the world's largest oilfields?<sup>58</sup>

When integrationists talk about the need for the Constitution to be revised, it is most often the provisions regarding natural resources that are singled out. Typical of such criticism is the International Crisis Group's call for a "total revision of key articles concerning the nature of federalism and the distribution of proceeds from oil sales."<sup>59</sup> This organization argues further that revenues from natural resources must be "centrally controlled."<sup>60</sup> Other defenders of centralism in Iraq advocate placing natural resources under central control because they believe that this is the way it is arranged in all federations.<sup>61</sup>

Those who take a corporate consociational view take a contrary position, arguing for decentralization. Thus, Gelb and Biden extol the virtues of the Dayton Accords,<sup>62</sup> which provided for a very decentralized federation in Bosnia-Herzegovina, and even allowed "Muslims, Croats and Serbs to retain separate armies."<sup>63</sup> This is seen as the most effective way to prevent sectarian violence and, paradoxically, to maintain a united Iraq. Decentralization, in Biden and Gelb's view, is consistent with a fair sharing of revenues, though the details on how to achieve this are not spelled out.

There are problems with both positions, but particularly with the first. It is odd that a centralized Iraq is marketed by some integrationists, including those in the U.S. administration, as important for regional stability, given that the last centralized Iraq launched aggressive wars

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<sup>58</sup> E.g., Joost Hilterman of the International Crisis Group alleges that "the Kurds are using the historic opportunity of rolling back Arab domination to sue for independence through the acquisition of Kirkuk and its oil wealth.": Joost R. Hiltermann, "Kirkuk and the Kurds: A Difficult Choice Ahead," ASSYRIAN INT'L NEWS AGENCY, May 22, 2007, reprinted at [www.aina.org/news/200705229921.htm](http://www.aina.org/news/200705229921.htm). However, he has no stated sources for this view; it is mere surmise—though widely shared among critics of the Kurds.

<sup>59</sup> Int'l Crisis Group, *supra* note 5, at ii.

<sup>60</sup> *Id.*

<sup>61</sup> Dawisha & Dawisha, *supra* note 25, at 38.

<sup>62</sup> The Dayton Peace Accords on Bosnia, *supra* note 32.

<sup>63</sup> Biden & Gelb, *supra* note 13, at A19. Bosnia-Herzegovina now has a single army, with ethnically homogeneous units.



against two of its neighbors, Iran and Kuwait, and attacked Israel with missiles while funding the families of Palestinian suicide bombers. Moreover, there is also considerable evidence that important constituencies in Iraq oppose centralization and have, as well, a weak or nonexistent Iraqi identity. Dodge's contention that there is "widespread" support for a Baghdad-centered unitary state arguably misrepresents Iraq's "complex reality" far more than the claim that it is based on three major communities.

Support for decentralization is strongest among the Kurds. Not only did they suffer terribly from the last strong state in Baghdad, but they have enjoyed unprecedented stability and prosperity in their autonomous zone since 1991. In two elections in 2005, almost all Kurds and the other residents of Kurdistan gave their support to parties that called for the preservation or possible expansion of Kurdish self-government.<sup>64</sup> In the October 2005 referendum on the Constitution, which by the integrationists' own admission provided for extensive decentralization, the three Kurdish-dominated provinces voted overwhelmingly in favor (Dahuk, 99.13 percent; Sulaimaniya, 98.96 percent; Irbil, 99.36 percent).<sup>65</sup> To the extent that the Kurdish community is divided on the issue of decentralization, the fault line is between a younger generation that wants independence and an older one that also prefers independence but believes it more prudent to try to operate within an Iraqi federation. This is why balanced integrationists like Makiya generally preface their remarks regarding the need for a centralized Iraq, with "except for Kurdistan."<sup>66</sup> Such qualifications are missing from Dodge's account. Kurdish support for decentralization means that

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<sup>64</sup> Independent Electoral Commission of Iraq, [http://www.ieciraq.org/English/Frameset\\_english.htm](http://www.ieciraq.org/English/Frameset_english.htm) (for results of December 15 election, follow "December 15 Results" hyperlink; for January 30 election, follow "30 January Results" hyperlink).

<sup>65</sup> *Iraqi Voters Back New Constitution*, BBC NEWS, Oct. 25, 2005, [news.bbc.co.uk/2/hi/middle\\_east/4374822.stm#map](http://news.bbc.co.uk/2/hi/middle_east/4374822.stm#map) (last visited on Jun. 29, 2007).  
[http://news.bbc.co.uk/2/hi/middle\\_east/4374822.stm#map](http://news.bbc.co.uk/2/hi/middle_east/4374822.stm#map).

<sup>66</sup> Reidar Visser also acknowledges that the Kurdish desire for autonomy is more widespread than elsewhere but argues that there are intra-Kurdish divisions on the question. *See* Visser, *supra* note 18.

centralization cannot happen, at least not within the constitutional order. This is because the Kurds possess an effective veto over any constitutional change that is against their perceived interests.<sup>67</sup>

The evidence suggests that most Shi'a also oppose a strong centralized state. Many in this community, like the Kurds, have bad memories of Iraq's last unitary state, and their worst nightmare is a strong Baghdad-centered state once again falling under Sunni Arab or Ba'athist control. If there is such widespread support for centralization, as Dodge and Visser maintain, why did the ten Shi'a-dominated governorates, including Baghdad, support Iraq's Constitution in the recent referendum, with levels of support averaging more than 90 percent, and why was the Constitution supported by 79 percent of Iraqis overall?<sup>68</sup>

Another important problem with the integrationist position on centralization is that it assumes that centralization will involve an impartial central government—promoting what Dodge describes as a “shared vision of the future.”<sup>69</sup> However, there is important comparative experience to suggest that this is not the only form a centralized Iraq might take, or even the most likely one. When Eastern Europe democratized in the 1990s, the dominant pattern was for the leading community in each state to seek to “nationalize” the state in its own image and to exclude others.<sup>70</sup> This pattern resulted in ethnically based discrimination; policies of coercive assimilation; the abolition of previously existing arrangements for self-government; and, in some cases, including

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<sup>67</sup> Article 126(4) of the Iraq Constitution states that it may not be amended “if such amendments take away from the powers of the regions” except with the approval of the concerned region’s legislature and its people voting in a referendum: IRAQ CONST. art. 126(4). Article 142, which suspends article 126 for the transitional period, states that constitutional change requires the support of a majority of voters and must not be rejected by two-thirds of the voters in three or more governorates: IRAQ CONST. arts. 142, 126. As the Kurds make up the overwhelming majority of voters in three governorates, this translates into a Kurdish veto.

<sup>68</sup> One integrationist response from a leading Iraqi integrationist is that Iraqi voters did not read the Constitution and, therefore, did not know what they were voting for: (response from Rend Rahim al-Francke, President, Iraq Foundation, response to question by John McGarry at “Advancing Rights in the New Iraq” conference, in Ottawa, Can., (Mar. 2, 2006). In our view, Iraqis may not have read the text but they broadly knew what they were doing when they followed the guidance of their political leaders as to how to cast their ballots.

<sup>69</sup> See Dodge, *supra* note 10, at 35.

<sup>70</sup> See generally Jack Snyder, FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT (W.W. Norton 2000); Rogers Brubaker, NATIONALISM REFRAMED (Cambridge Univ. Press 1995).

Bosnia-Herzegovina and Kosovo, ethnic cleansing. There followed what Rogers Brubaker has described, following Lord Curzon, as an “un-mixing of peoples,” that is, the migration of several million people from minority groups seeking more hospitable havens in other states; a considerable number of civil wars;<sup>71</sup> and the de facto secession of several regions.<sup>72</sup>

In Iraq, support for the impartial and secular vision championed by integrationists is concentrated in the centrist parties, including that led by Ayad Allawi. However, these parties are overwhelmingly Arab in composition and support. They are also, at the moment, politically marginalized. Centrist parties won less than 10 percent of the vote in the elections of December 2005. They have, in historian Phebe Marr’s words, “too little support to play much of a role in the political dynamics of the future.”<sup>73</sup> The most enthusiastic and numerous supporters of a centralized Iraq are not the liberal centrists, but the parties rooted in Iraq’s Sunni Arab community. However, support for centralization, here, is mostly ethnocentric in nature and based on nostalgia for the Iraq that Sunni Arabs controlled since its creation. It also appears related to the belief among Sunni Arabs—widespread, until recently—that they represent a majority of Iraq’s population, as high as 60 percent in some estimates.<sup>74</sup> Even Sunni Arabs’ calls for a government based on technocracy and for a “professional” army are not as impartial and civic as they might seem, since Sunni Arabs dominated both the technocratic and army officer class under Saddam.

What of the Shi’a centralizers associated with Muqtada al-Sadr and the *Da’wa* party? Much of their support for centralization reflects the thinking likely to be present in a majority group under conditions of democratization—as seen in Eastern Europe. Some Shi’a centralizers aspire to

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<sup>71</sup> *E.g.*, in Croatia, Bosnia, Macedonia, Moldova, Georgia, Russia, and Azerbaijan.

<sup>72</sup> *E.g.*, Trans-Dniestria; Abkhazia; South Ossetia; Nagorno-Karabakh; and, before its forced reincorporation into Russia, Chechnya.

<sup>73</sup> See Marr, *supra* note 34, at 51.

<sup>74</sup> Int’l Crisis Group, *supra* note 5 at 32. It may be hoped that this myth has been shattered by recent election results, which should eventually force a Sunni Arab rethink on the merits of centralization.

control a centralized Iraq and use it to promulgate Shi'a religious values—values that Sunni Arabs, Kurds, and secularists would find difficult to live with, to put it mildly.<sup>75</sup> It is hardly an exaggeration, then, to argue that there is no guarantee that a centralized Iraq would evolve in the benign, neutral way envisaged or implied in integrationist accounts, even if there were widespread support for it, which we doubt for the reasons just given.

Given the dangers of a centralized Iraq, and the opposition it would engender, we should be wary of calls to place natural resources under the control and ownership of Iraq's federal government.<sup>76</sup> But are the current constitutional provisions governing natural resources unfair, as critics maintain? According to the Constitution, revenues from current fields are “to be distributed in a fair manner in proportion to the population distribution in all parts of the country, specifying an allotment for a specified period for the damaged regions which were unjustly deprived of them by the former regime, and the regions that were damaged afterwards in a way that ensures balanced development in different areas of the country, and this shall be regulated by a law.”<sup>77</sup> There is, therefore, a constitutional obligation to ensure the just allocation of revenues from current fields, as well as an obligation to redress past misallocations, in a time-limited fashion and in a way that is consistent with a “balanced” development strategy. Also, as this constitutional provision makes clear, the territorial status of the Kirkuk governorate has been decoupled from the oil revenues that flow from its oilfields. As Kirkuk's oil comes from currently exploited fields, its revenues are to be redistributed across the state regardless of whether Kirkuk joins Kurdistan or not. This fact needs to be clearly understood: it is a major constitutional compromise.

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<sup>75</sup> See also Marr, *supra* note 34, at 48.

<sup>76</sup> Dawisha & Dawisha, *supra* note 25 at 38. In spite of Aeed and Karen Dawisha's argument, it is not the case that natural resources in federations are always under the control of federal authorities, as the examples of Canada and the U.S. show.

<sup>77</sup> IRAQ CONST. art. 112.1.

Revenue from current fields, it is reasonable to project, will constitute the lion's share of oil revenues for some time to come: 100 percent in 2007, 90 percent in 2017, and 80 percent in 2027. The gradualism of these arrangements will enable appropriate development strategies, for both future resource-rich and resource-poor regions, wherever these will be. Well-run governorates and regions will plan according to their respective anticipated futures, tailoring their cloths appropriately—economic diversification planning should start now. There will also be opportunities for exploration *throughout* Iraq, because all three major communities predominate in some territory where there are good prospects of new fields. Allah in his infinite generosity has blessed Anbar as well as Basra and Kirkuk.<sup>78</sup> Baghdad, which should become a region unto itself, also straddles some good prospects. Indeed, the conventional wisdom that Sunni Arab regions have only sand but no oil or gas is incorrect, though it is difficult to explore for oil and gas during an insurgency. Finally, the Constitution does not prevent the regions—those that will control revenue from future fields—from agreeing to share revenues from these fields with the rest of Iraq on a per capita basis. That is not merely a hypothetical statement: such provisions for sharing are already part of the draft federal oil law that has been agreed to by Kurdistan, though it has reservations about proposed licensing arrangements. Taken together, these arrangements for oil and gas are fair; the integrationist critique is simply based on factual errors about the Constitution. Moreover, the provisions on natural resources are in line with a constitutional order that will help prevent the type of overcentralized rentier oil state, which led Iraq to disaster.

The corporate consociational or three-regions approach, associated with Biden and Gelb and others, also has the virtue of being much closer to existing political opinion in Iraq; after all, the referendum and election results suggest that there is widespread support for decentralization,

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<sup>78</sup> See, e.g., James Glanz, *Iraqi Sunni Lands Show New Oil and Gas Promise*, N.Y. TIMES, Feb. 19, 2007, at A1 (with “Iraqi Sunni” referring to Arabs). This is an article that brings U.S. readers up to date on what has been well known by the informed for a long time.

not centralization.<sup>79</sup> However, while integrationists, who believe there is a strong Iraqi identity, seek to impose a one-size-fits-all centralized system on the whole country, these corporate consociationalists appear to want a one-size-fits-all decentralized model. This mode of thinking cannot currently accommodate Sunni Arabs, who embrace a vision of Arab or Iraqi nationalism, or those Shi'a Arabs who reject regionalism. This criticism of the corporate approach is suggested by integrationists who argue that the Constitution represents a "Kurdish agenda to which Shiites signed on,"<sup>80</sup> that is, its provisions for decentralization reflect primarily Kurdish preferences. Indeed, it would be unfair if all of Iraq was decentralized to the extent sought by the Kurds for Kurdistan, just as it would be unfair if all of the U.K. was decentralized to the extent sought by the Scots for Scotland, or Canada's federal government was weakened throughout the country just because the Québécois sought a weak federal presence in Quebec.

However, Iraq's Constitution actually eschews both the one-size-fits-all preference of the integrationists and the inclination of the three-regions advocates, in favor of a bespoke, flexible, or voluntarily asymmetrical federation tailored to whatever (legitimate) preferences exist, or come to exist, among Iraq's democratic constituencies. In this respect, the Constitution takes a liberal consociational approach that is focused on democratic preferences rather than on predetermined ethnic or communal categories. At least four parts of the Constitution are relevant here.

First, while the Constitution allows governorates to become regions, which have more authority and power, it does not require them to do so. Nor is changing from a governorate into a region simply a decision to be made by the governorate's politicians, who arguably might have a vested interest in assuming more powers; for such a change to occur, article 119 requires a local referendum and leaves open the possibility of other hurdles to be decided later by Iraq's federal

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<sup>79</sup> Biden & Gelb, *supra* note 13, at A19.

<sup>80</sup> HorowitzHorowitz, *supra* note 7, at A20.

legislature.<sup>81</sup> Second, article 121 gives regional authorities the right to alter how federal legislation is applied within that region, if this legislation is outside the exclusive authority of the federal government.<sup>82</sup> This also means, conversely, that a region is free to accept federal legislation in areas of shared jurisdiction. Third, article 126 provides that any region, with the consent of its legislative assembly and the majority of its citizens in a referendum, may surrender some or all of its powers to the federal authorities by constitutional amendment.<sup>83</sup> Finally, while article 115 of the Constitution gives legal supremacy to regional (and governorate) governments in disputes with the federal government over shared powers, a governorate or region could decide to accept a federal intrusion rather than to dispute it.<sup>84</sup>

There are, thus, several channels in the Constitution that permit any part of Iraq to defer to the government in Baghdad if it chooses. Governorates can retain their status as governorates rather than become regions; regions or governorates can accept federal legislation in areas of shared jurisdiction; and both can consent to the transfer of some of their constitutional powers to the federal government. Thus, governorates that are dominated by Shi'a Arab and Kurdish regionalists can have what they want, while those Shi'a Arab or Sunni Arab-dominated governorates that want to be governed from Baghdad may also have their preferences met. Should all of Arab Iraq decide to be ruled centrally from Baghdad, that is quite possible under the

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<sup>81</sup> IRAQ CONST. art. 119.

<sup>82</sup> *Id.* art. 121.

<sup>83</sup> *Id.* art. 126.

<sup>84</sup> *Id.* art 115. It may appear unthinkable that politicians would ever surrender jurisdictional responsibilities or miss the opportunity to acquire more, but there is evidence to the contrary from comparative experience. In Canada, only Quebec has opted to take up its own pension plan, and all other Canadian provinces have been happy with the federal plan. . See [An Act respecting the Québec Pension Plan, R.S.Q. 1965 \(1st sess.\), c. 24, §10](#). There are many other examples, under Canada's practice of asymmetrical federalism, of Quebec being the only province to exercise a degree of autonomy that is available to all provinces.

constitutional order.<sup>85</sup> What is ruled out is the imposition of a centralized Iraq on a community that rejects it (the dirigiste, integrationist preference popular among Sunni Arabs cannot be imposed on the Kurds)<sup>86</sup> or the imposition of a weakened relationship with Baghdad on a community that rejects this (this option, as implied by the three-regions approach, cannot be imposed on Sunni Arabs). Moreover, the Constitution allows decisions regarding both decentralization and centralization to be taken now or later. Sunni Arab-dominated Iraq can choose centralization now and opt for more autonomy later, should it find that centralization means unacceptable intrusions from Shi'a-controlled security services or a Shi'a-Kurdish-dominated army. Such flexible asymmetry is desirable, and particularly so in contexts, as in a Sunni Arab and Shi'a Arab-dominated Iraq, where, arguably, there has not been enough experience of democratic politics to test long-run preferences, and when it is not certain how a decentralized or centralized Iraq will evolve.<sup>87</sup>

One common and important integrationist objection to decentralization that allows regions to be dominated by particular communal or ethnic communities, is that such arrangements will contribute to the abuse of regional minorities. The liberal consociational response is twofold: first, minorities would also exist under the integrationists' preferred institutional arrangements, whether in a federation with internal boundaries organized on administrative or territorial principles, or in a unitary state. There is no compelling comparative evidence, particularly from Iraq or the

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<sup>85</sup> This is one reason why Laith Kubba supports the Constitution. He believes it provides for a centralized Arab Iraq linked to a decentralized federacy of Kurdistan: Interview with Laith Kubba, Personal Advisor to former Prime Minister Ibrahim al-Ja'afari, at the "Iraq: Preventing another Generation of Conflict" conference, in Ottawa, Can. (May 11–12, 2006).

<sup>86</sup> Our point, here, is that each of Iraq's communities has the right to choose how it should be governed, but not the right to choose how others should be governed. The current preference of many Sunni Arabs is for all of Iraq, including Kurdistan and the Shi'a South, to be ruled from Baghdad. This is an illegitimate preference, as it would entail imposing centralization on communities that do not want it.

<sup>87</sup> Integrationists should like flexible arrangements for asymmetrical decentralization, as it seems suited to their view that identities, and associated political aspirations, are fluid.



surrounding region, that minorities are better protected in territorial federations or unitary states. Second, the abuse of regional minorities can and should be prevented through the promotion of liberal consociational principles at the regional level, and through the promotion of regional and federal bills of rights.

Iraq's Constitution offers some protection to regional minorities, but it is incomplete. The Constitution provides for a wide-ranging Bill of Rights with possible statewide effect, which, among other points, outlaws discrimination on the basis of ethnicity or religion.<sup>88</sup> Small minorities that are unlikely to be able to control governorates or regions, such as the Turkmen, Assyrians, and Armenians, have the right to educate their children in their mother tongue in "governmental educational institutions."<sup>89</sup> The Turkmen and Syriac languages are also given official status in the "administrative units in which they constitute density of population."<sup>90</sup> The Constitution, under the chapter heading "Local Administrations," guarantees "the administrative, political, cultural, and educational rights of the various nationalities, such as Turkomen, Chaldeans, Assyrians and all other constituents."<sup>91</sup>

These constitutional protections for local minorities are poorly or vaguely worded and should be detailed and strengthened, at least in the enabling legislation, if not in the Constitution itself, or in the constitutions of the relevant regions. As we shall see the likely weakness of the Supreme Court has implications for the likely strength of the federal bill of rights. Indeed, it will be particularly crucial, given the extensive provisions for decentralization in Iraq's Constitution, that local minorities are protected, not just in Iraq's Constitution but, most emphatically, within the regional constitutions. The promotion of the rights of regional minorities is an area where outsiders

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<sup>88</sup> IRAQ CONST. art. 14.

<sup>89</sup> *Id.* art. 4.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* art. 125.

can help. Encouragement and incentives should be given to the governments of regions and governorates to incorporate generous provisions for their minorities, including Turkmen and Arabs in Kirkuk, and Kurds in Mosul, and numerous communities in Baghdad. Such protections should provide guarantees of local self-government where minorities are territorially concentrated, local-level power-sharing in mixed areas, and institutions that provide for cultural autonomy, including school boards that are controlled by linguistic minorities.

## **2. Iraq's Constitution and federal shared rule**

The main debate concerning Iraq's political institutions has focused on the question of centralization versus decentralization. Neither integrationists nor those who prefer a corporate consociational approach have given as much attention to the institutional arrangements *within* the federal level of government. Yet a federation involves shared rule as well as self-rule, and how Iraq's different communities and regions share power within institutions at the federal level will determine, arguably, whether loyalty to the federation can be developed and if the state will survive intact.

When integrationists consider federal institutions, they usually insist that the federal government be "strong," possess "capacity," and be able to act "decisively." Makiya criticizes not just the Constitution's division of powers between the federal government and the regions, but also the separation of powers at the federal level between the president, prime minister, and legislature, which he sees as contributing to conflict and indecisiveness.<sup>92</sup> Others call for a "technocratic" government, that is, one which is professional, isolated from sectarian passions and corruption. Before the Constitution's adoption, some suggested the need for a strong executive presidency on the American model, which would be capable of both stabilizing and unifying the

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<sup>92</sup> Makiya, *supra* note 7.

state.<sup>93</sup> Other integrationists have criticized the proportional electoral system used in Iraq's federal elections for facilitating ethnic and communal fragmentation.<sup>94</sup> When considered along with their views on centralization, Iraq's integrationists appear to endorse a majoritarian federation – one that Alfred Stepan calls 'demos-enabling', albeit one that is impartial among its different constituencies, that is, a federation that both concentrates power at, and within, the federal level of government.<sup>95</sup>

Corporate consociationalists, by contrast, favor federal institutions that share power proportionately among ascriptive, or predetermined, communities. This is the model implicit in Biden and Gelb's belief that Iraq has much to learn from the Dayton Accords.<sup>96</sup> The Dayton Accords not only divided Bosnia-Herzegovina into autonomous units, dominated by Bosniaks, Croats, and Serbs, respectively, but also created corporate consociational institutions within Bosnia-Herzegovina's federal government. The latter government is presided over by a rotating presidency based on one Bosniak and one Croat from the Federation of Bosnia-Herzegovina and one Serb from Republika Srpska.<sup>97</sup> The indirectly elected upper chamber of the federal legislature comprises five Bosniaks and five Croats from the Federation of Bosnia-Herzegovina and five Serbs from the National Assembly of Republika Srpska.

Again there are limits to both approaches. Because Iraq's current political leadership is overwhelmingly based on communal or ethnic groups, there is a danger that strong majoritarian institutions of the sort recommended by integrationists would exclude minorities, such as the Kurds, Sunni Arabs, and other smaller minorities. Any attempt to prevent ethnically based

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<sup>93</sup> Brancati, *supra* note 25, at 18.

<sup>94</sup> See Salamey & Pearson, *supra* note 26.

<sup>95</sup> For an explanation of 'demos-enabling' federations, see Al C. Stepan, *Federalism and Democracy: Beyond the U.S. Model*, 10(4) J. DEMOCRACY 19 (1999).

<sup>96</sup> The Dayton Peace Accords on Bosnia (1995), *supra* note 32; Biden & Gelb, *supra* note 13, at A19.

<sup>97</sup> CONST. 1995, art. V. (Bosn. & Herz).

majoritarianism by privileging “centrist” politicians—through elaborate electoral distributive requirements—would be unacceptable to the currently dominant political leadership and would, therefore, encounter a serious implementation problem. Also, it would not be as ethnically neutral as integrationists tend to assume, because very few Kurds, in particular, support either centrist or Iraq-wide parties.

Corporate consociational arrangements would be unfair and unstable in Iraq as well, but for different reasons. They would be unfair because they privilege certain ascriptive identities and exclude those who hold other group identities or no group identity. Thus, in the case of Bosnia-Herzegovina, citizens who are not Bosniak, Croat, or Serb—or who do not want to define themselves ethnically—are barred from the highest offices of the state. The original institutions also turned into second-class citizens the Serbs who live in the Federation of Bosnia-Herzegovina, and the Bosniaks and Croats who live in Republika Srpska, as they could not become members of the rotating presidency or win seats in its upper chamber.<sup>98</sup> Corporate consociational institutions are unstable, not just because they cause resentment among the excluded but because they are not flexible enough to accommodate demographic shifts even among the included.

This latter problem was particularly obvious in Lebanon, the experience of which is often cited to counsel against consociation in Iraq. Lebanon had corporate consociational features in its legislature, which, after 1943, awarded seats to Christians on a 6:5 ratio, regardless of their actual share of the population. By convention, the president is also a Christian. As it became increasingly clear that Christians were a declining minority, these privileged arrangements contributed to resentment among non-Christians, the Shi’a in particular, and also the Druze. The Ta’if Accord of

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<sup>98</sup> These arrangements also work at cross-purposes with the international community’s expressed aim of encouraging Bosnia-Herzegovina’s ethnically cleansed to return home. *See also* text accompanying note 23.

1989,<sup>99</sup> which accompanied the end of the Lebanese civil war, dealt with this problem rather unsatisfactorily; it failed to remove these corporate features from Lebanon's consociation, and simply reduced the Christians share to a still-inflated 50 percent, while downgrading the powers of the presidency.<sup>100</sup>

Liberal consociation avoids the problems of both integration and corporate consociation. It circumvents the danger of majoritarian exclusion associated with integration by ensuring that federal institutions are more broadly based than what is required by majoritarian rules. It is based on elites who possess democratic mandates, rather than on centrists who lack them. Liberal consociation avoids, as well, the dangers of corporatism by accommodating leaders who are based on democratically mobilized parties, rather than ascriptive (ethnic or religious) communities. It avoids privileging certain "group" identities while remaining responsive to demographic shifts that register electorally. Liberal consociationalists value consensus and stability over decisiveness in divided societies because they believe that decisiveness without consensus can lead to disaster.

The provisions of Iraq's Constitution relating to shared rule have a liberal consociational flavor. Its federal executive is a hybrid presidential-parliamentary executive, although most executive authority is held by the Council of Ministers, headed by a prime minister. During the transitional period, there is a three-person Presidential Council, with a president and two vice

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<sup>99</sup> The Ta'if Accord, 1989, pt. II, § A(4) & pt. II, § B (Leb.).

<sup>100</sup> See Brendan O'Leary, *Foreword*, in MICHAEL KERR, *IMPOSING POWER-SHARING: CONFLICT AND COEXISTENCE IN NORTHERN IRELAND AND LEBANON passim*, (Irish Acad. Press 2006). Although critics of consociation everywhere cite the example of Lebanon to buttress their arguments, it is not at all clear that the Lebanese precedent supports their interpretation. Consociation maintained peace in Lebanon for most of the period between 1943 and the outbreak of civil war in 1975, and it is instructive that the Ta'if Accord went back to (modified) consociational arrangements. The weaknesses of Lebanon's consociation had something to do with its corporate features, and the civil war was largely a result of the destabilizing influence of the Israeli-Palestinian conflict, which produced a significant influx of Palestinian refugees, rather than consociation. Lebanon's current problems (as of June 2007) appear related to the same cause; arguably, what Lebanon needs is liberal consociation rather than no consociation.

presidents, elected by a two-thirds majority in the Council of Representatives.<sup>101</sup> This weighted majority has the effect of making it likely that the Presidential Council will be broadly representative, though it does not require that any member of the Presidential Council come from a particular ethnic or religious group. The Presidential Council then charges the nominee of the largest party in the Council of Representatives with forming the Council of Ministers, which must be approved by majority vote.<sup>102</sup> Although this rule suggests a majoritarian cabinet,<sup>103</sup> the fact that the prime minister cannot be appointed until the Presidential Council is elected means that any party or parties with more than one-third of the votes in the Council of Representatives has leverage in the negotiations that lead to cabinet composition. The clout of smaller parties is also helped by the fact that certain types of legislation require weighted majorities. Hence, if a government is to pursue successfully its entire legislative agenda, it will have to be more broadly representative than the majoritarian rule that applies to the cabinet's composition would suggest.

Other features of Iraq's political system point in the same direction. Its proportional representation-party list electoral system makes it unlikely that there can be a one-party government, or that a majority in the legislature (Council of Representatives) can be artificially constructed from a plurality in the electorate, as happens in countries with plurality electoral systems, including the United States, Canada, and the U.K., or with double-ballot majoritarian systems such as those in operation in France.<sup>104</sup> Proportional representation is criticized by

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<sup>101</sup> IRAQ CONST. art. 138.

<sup>102</sup> *Id.* art. 76.

<sup>103</sup> The majoritarian decision making rule for cabinet composition does not represent the triumph of integrationist principles of nonpartisanship. Rather, it reflects the preference of the Shi'a majority for an executive that it could control.

<sup>104</sup> The electoral system is not a part of the Iraqi Constitution, but the Constitution stipulates that any election should provide for the "representation of all components of the Iraqi people," which suggests a proportional representation system, as does the provision mandating that at least one in four Iraqi assembly members must be women—which obliges a proportional representation system because single gender districts or constituencies would violate the constitutional mandate for equality between the sexes: IRAQ CONST. art. 49. Any electoral system that is not based on proportional representation, such as the single-member plurality or alternative-vote

integrationists in Iraq for promoting national fragmentation.<sup>105</sup> However, insofar as it provides for the fair democratic expression of whatever constituencies exist in a state, it may be considered more conducive to fairness, stability, and democratic inclusiveness.<sup>106</sup> Ironically, proportional representation is far more likely to facilitate the election of nonsectarian (secular) political parties in Iraq's current circumstances than the rival plurality or majoritarian electoral systems associated with integration. It is also more likely to promote intraethnic or intrareligious group divisions through party fragmentation, another integrationist goal.

The likelihood that the federal government will want to enjoy reasonable relations with the regions, given the number of shared jurisdictional responsibilities and the fact that there is regional paramountcy in cases of dispute, also creates incentives for an executive that is responsive to different regional constituencies. The effect of these various institutional provisions is apparent already. The Presidential Council is currently made up of a Kurdish president, and Sunni and Shi'a Arab vice presidents. The prime minister is a Shi'a Arab, while his two deputies are Kurdish and Sunni Arab. The cabinet roughly reflects the country's diversity.<sup>107</sup> A "decisive" majoritarian executive of the sort advocated by some integrationists would not as easily permit this sharing of the spoils, and in our view would be more divisive than decisive.

Indeed, if Iraq's executive arrangements are problematic, it may be because they are insufficiently consociational. They do not, after all, offer guarantees of inclusiveness, as many consociational systems do, including those in Belgium, Bosnia-Herzegovina, and Northern

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systems that are favored by integrationists, would have the effect of under-representing minorities, particularly small minorities, and could be subject to court challenges.

<sup>105</sup> Salamey & Pearson, *supra* note 26.

<sup>106</sup> See O'Leary, *supra* note 19.

<sup>107</sup> The cabinet's thirty-six members include nineteen Shi'a Arabs, eight Sunni Arabs, eight Kurds and one Christian.

Ireland.<sup>108</sup> Iraq's Constitution allows for the possibility of a federal cabinet drawn entirely from its Arab majority, or even its Shi'a majority.<sup>109</sup> This possibility is arguably more likely after the four-year transitional period, when the Presidential Council is to be replaced by a single-person presidency, which can be established by a simple majority vote in the assembly if two-thirds support is not available.<sup>110</sup> This means both that the presidency will no longer be able roughly to mirror Iraq's diversity, as it will consist of one person rather than three, and that the legislative threshold necessary to start executive formation will be lowered.<sup>111</sup> These arrangements are consistent with a recent argument in the academic literature that while special antimajoritarian devices may be called for during transitional periods, they are both unnecessary and undesirable afterward.<sup>112</sup> But one cannot know in advance when Iraq will have made the transition to a stable polity, and, at this point, four years to stability seems like a rather optimistic projection. Extending the existing arrangements would in our view be a wise amendment to the Constitution.

There are other executive models that Iraqis might have considered, or might still consider. One of these, as just suggested, is to retain the three-person Presidential Council, as well as the two-thirds rule required for its establishment, beyond the transitional period. This would be a relatively easy change. More radically, and less likely, Iraqis could opt for a more powerful, and possibly larger, executive Presidency Council, which would replace the current hybrid

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<sup>108</sup> BELG. CONST. art. 99 (guaranteeing that there be as many French speaking members as Dutch speaking members in the Council of Ministers, with the possible exception of the prime minister); CONST. 1995, art. V.1(a) (Bosn. & Herz) (providing that the presidency be comprised of one Croat and one Bosniac, each elected from the territory of the Federation of Bosnia-Herzegovina, and one Serb, elected from the territory of Republika Srpska); Northern Ireland Act, 1998, §§16–18 (Guaranteeing ministerial representation to members of all significant parties in the legislature that wish to avail of the opportunity to join the cabinet, and guaranteeing that the First and Deputy First Ministerships be shared between representatives of the nationalist and unionist communities).

<sup>109</sup> IRAQ CONST. art. 76.

<sup>110</sup> *Id.* art.70.

<sup>111</sup> The two deputy premierships also disappear after the transitional period.

<sup>112</sup> Donald Rothchild, *Reassuring Weaker Parties after Civil Wars: The Benefits and Costs of Executive Power-Sharing Systems in Africa*, 4 ETHNOPOL. 247 (2005); Ian O'Flynn & David Russell, *POWER-SHARING: NEW CHALLENGES FOR DIVIDED SOCIETIES* (Pluto Press 2005).



presidential-parliamentary executive, and, instead, draw its membership from the different *regions* of the country. This was the model that operated in Yugoslavia under Tito, and it was the attempt by Serbia to take over Yugoslavia's collective presidency (the Federal Council) that helped to foment the country's breakup. It was not the existence of a collective presidency per se that broke Yugoslavia apart, as an integrationist might argue, but the fact that it became unrepresentative of Yugoslavia's diversity. Switzerland, the world's longest-running federation to have avoided civil conflict and war since its formation, also has a representative (seven-person) presidential council.

Another option would be a fully inclusive parliamentary executive that is automatically drawn from the legislature by a mechanical rule, such as d'Hondt.<sup>113</sup> Under this model, all significant parties in the legislature would be entitled to a proportional share of seats in the cabinet. One advantage of d'Hondt, in addition to guaranteeing an inclusive executive, is that it would have avoided the political squabbling over executive formation that led, in early 2006, to a three-month delay in the establishment of Iraq's government. D'Hondt would also create obstacles to a dominant party's monopolizing a number of strategic portfolios. This is because it permits the largest party to pick the first cabinet portfolio, but then allows all smaller parties entitled to portfolios to have their first pick, before allowing the largest party its second pick.<sup>114</sup> This feature would help to deal with Sunni Arab concerns about both the key Interior and Defense ministries falling into the hands of the United Iraqi Alliance.<sup>115</sup> Neither Iraq's current arrangements for appointing its federal executive nor the changes suggested here privilege particular identity groups. These arrangements are open, in principle, to ministers from any such groups and those identified

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<sup>113</sup> Invented in 1878 by Belgian mathematician and lawyer Victor d'Hondt, the d'Hondt method is a highest-averages formula for allocating seats in party-list proportional representation. See Brendan O'Leary, Bernard Grofman & Jorgen Elklit, *Divisor Methods for Sequential Portfolio Allocation in Multi-Party Executive Bodies: Evidence from Northern Ireland and Denmark*, 49 AM. J. POL. SCI. 198. (2005)

<sup>114</sup> *Ibid.*

<sup>115</sup> The D'Hondt method would have to be supplemented by a rule that prevents opportunistic party fragmentation aimed at seizing key portfolios

with no group and are more likely in practice—in contemporary Iraq—to reward secular parties than the majoritarian alternatives promoted by integrationists. The existing provisions are therefore not subject to some of the most serious and common charges that are leveled against consociational arrangements.

Another complementary way to protect Iraq’s minorities would be to ensure the proper design of two important federal institutions that are named in the Constitution but not yet established: the Federation Council and the Supreme Court.<sup>116</sup> Both institutions typically perform in federations what Al Stepan has described as a “demos-constraining” function, that is, they prevent the state’s federal demos, or dominant community, from riding roughshod over its various demoi.<sup>117</sup>

A Federation Council, or federal second chamber, performs just such a function because it is based typically on regional rather than popular representation, and because it has antimajoritarian decision-making rules, at least for some purposes. One way for Iraq to proceed would be to allow the Federation Council to be appointed by the regional (or governorate) governments or even, as in Germany, to consist of members of those governments. This would both give the regions a stake in the center and help make the Federation Council the locus for negotiations among the regional governments and between the regional governments and the center. There is no other mechanism for intergovernmental relations in the current Constitution, and if the Federation Council does not perform this role some other institution will do so. The Federation Council, in addition to possessing a role in passing legislation and constitutional amendments, could be given some voice in appointments to federal institutions, including the Supreme Court.

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<sup>116</sup> The Federation Council is referred to in article 62 65, whereas the Supreme Court is referred to in arts. 92–94: IRAQ CONST. arts. 62, 92–94.

<sup>117</sup> Stepan, *supra* note 95.

The Supreme Court is given three functions that may make it a pivotal institution for protecting Iraq's diverse communities and individuals.<sup>118</sup> First, it is tasked with "interpreting the provisions of the constitution," including its various minority-protection provisions. Second, it will umpire disputes between the government of the federal demos and those of the regional demoi. Third, it is responsible for "overseeing the constitutionality of laws and regulations,"<sup>119</sup> that is, it will decide if legislation of the federal and regional legislatures complies with the Constitution's rights-protection clauses. The rules governing the court's operations and rules of appointment have yet to be decided, though the rules will require legislation with the support of two-thirds of the representatives in Iraq's National Assembly. It is exceptionally unlikely that Kurdistan will allow the Supreme Court to have strong powers or permit an integrationist approach to its composition.

The best liberal consociational approach to Supreme Court appointments is to ensure that they are regionally (not ethnically) representative, and that the appointment power is spread across the state's constituencies. One way to proceed here would be to adopt one Canadian practice while rejecting another. The practice to emulate is that part of Canada's Supreme Court Act stipulating that three of its nine Supreme Court justices come from Quebec.<sup>120</sup> In Iraq, it would make sense for one quarter of Iraq's top court to come from Kurdistan and the rest to come, proportionately, from other regions, with perhaps one fifth coming from the four Sunni Arab-dominated or plurality governorates. (After the unification of Kirkuk and the disputed territories with the existing KRG the likely population of the KRG will reach at least one fifth of Iraq's population – especially as it is presently the favored internal destination of displaced people). The practice to avoid is Canada's

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<sup>118</sup> IRAQ CONST. art. 93; it is Brendan O'Leary's view, shared by Peter Galbraith (GALBRAITH, *supra* note 14) that because the federal Bill of Rights is not specified as an exclusive competence of the federal Supreme Court, legal supremacy over the Bill of Rights belongs to any established region. Consequently, it is to regional constitutions that we must look—where regions are established—for the best protections of minorities.

<sup>119</sup> IRAQ CONST. art. 90

<sup>120</sup> Supreme Court Act, R.S.C., ch. S-19, § 6 (1985).

unusual tradition of concentrating the appointment power in the hands of the federal government, which is tantamount to allowing one side to a conflict to pick the referee. The alternative is to give the Federation Council input into Supreme Court appointments or, failing that, the regional governments directly.

### **3. Conclusion**

What lessons can be derived from Iraq's experience for other seriously divided polities, such as Sri Lanka or Sudan, that have yet to undergo a transition from autocracy to democracy or from war to peace? First, and obviously, transitions are extremely difficult and may fail as a result of civil war, spoilers, and external interventions. Second, Iraq's recent politics suggest that it is very unlikely that victims of state policies of ethnocentrism, discrimination, ethnic expulsion, and genocide will accept the integrationist model championed by well-meaning liberals. Large, territorially concentrated minorities like the Kurds are much more likely to prefer independence to any form of integrationist inclusion in a state that has abused them. Their situation is roughly analogous to those of Sri Lanka's Tamils, Cyprus's Turkish-Cypriots, and Sudan's southern (Black, Christian, and animist) communities.

Third, dominant, or formerly dominant, communities, like Iraq's Sunni Arabs, are much more likely to embrace an integrated and centralized state. However, this is not generally because they have been converted to the values of civic impartiality but, rather, because of their nostalgia for how such a state promoted their community's interests in the past, and the hope that it will do so again in the future.<sup>121</sup> Formerly dominated communities normally—and accurately—interpret the support of dominant groups for integration in the same way, which, of

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<sup>121</sup> Formerly dominated communities in severely divided polities may embrace integration for ethnocentric purposes if they come to see themselves as potentially dominant. This is how we understand Moqtada al-Sadr's support for a centralized Iraq.

course, steels their resolve to resist it. It is usually only small or dispersed minorities, like Iraq's Turkmen or Assyrians, who are likely to champion the idea of an integrated and impartial state, because their numbers or territorial concentration make it difficult for them to aspire to accommodation strategies, and because the alternative to impartial integration is the one-sided ethnocentric variety.

Fourth, the way forward in such situations, if state reconstruction rather than destruction is the priority, usually lies in splitting the difference between the options of secession and integration. Settling for their respective second preferences will point community decision makers toward consociational and federal arrangements, provided they have abandoned the goal of domination. We have argued in this paper that progress in Iraq requires the maintenance—and extension—of the principles of liberal consociation already present in Iraq's federation: executive power sharing, proportionality throughout the public sector, community self-government, and veto rights over constitutional amendments. So long as one community cannot impose its will on the others, the foregoing principles are the only ones likely to win all-around support, though this realization may take time. This is as likely to be as true for Sri Lanka, Sudan, and Cyprus, as it is for Iraq.

Fifth, constitutions, even fair ones, like Iraq's 2005 Constitution, cannot guarantee peace. In fact, Iraq's Constitution coexists with multiple insurgencies that threaten to tear the country apart. Peace requires not just a balanced constitutional order but a disposition on the part of all sizable communities to accept compromise. For this to happen, all sides must perceive that there is, as William Zartman has put it, a "hurting stalemate."<sup>122</sup> The key problem within Iraq is that

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<sup>122</sup> I. William Zartman, *The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments*, 1 GLOBAL REV. ETHNOPOL. 8 (2001).

important elements within the Sunni Arab community remain wedded to a vision of the past in which it was hegemonic. Ironically, calls from Western governments and academics for an integrated, centralized Iraq, one that has no chance of winning significant support among Kurds and Shia Arabs, who represent approximately 80 percent of Iraq's population, sustain such wishful thinking and stand in the way of an inclusive, effective and stable settlement.