

NOTES IN DEFENSE OF THE IRAQ CONSTITUTION

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I. ON THE NECESSITY OF CONSTITUTIONAL CHANGE

This paper is a defense of sorts of the Iraqi constitution, arguing that the language used in it was wisely designed to allow some level of flexibility, such that the constitution could evolve as social and political circumstances necessitated. The point is more than a theoretical one. Enormous changes in the political landscape and understandings of popular will *have occurred*, and due to the flexibility of the language, the Constitution has not only survived them, but *has had its own legitimacy considerably broadened as a result*.

Such thoughts seem tantamount to a form of academic heresy. Offering kind words on the Iraq constitution is not often done in our current academic and media environment. From its very inception, the constitution has been dismissed as shamelessly imposed upon an unwilling identitarian community—the Arab Sunnis—¹ conceived in a “veritable pathology of legality”² and likely to bring about, as the title of one work put it, “The End of Iraq.”³ The latter view in particular has been all but proven demonstrably wrong: Iraq’s Constitution has passed its half decade mark, and Iraq is, by all accounts, far more secure, centralized, and confident in its position as a nation state than it was when the Constitution was drafted. Ethnic and sectarian

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¹ Feisal Istrabadi, *A Constitution without Constitutionalism: Reflections on Iraq’s Failed Constitutional Process*, 87 TEX. L. REV. 1627, 1628–29 (2008).

² Andrew Arato, *Post-Sovereign Constitution Making and Its Pathology in Iraq*, 51 N.Y.L.S. REV. 535, 551 (2007).

³ See PETER GALBRAITH, *THE END OF IRAQ* 206 (2006) (indicating that there will be “little reason to mourn Iraq’s passing”).

violence no longer reigns on Iraq's streets as they once did.⁴ Foreign investment has become less of a theoretical possibility and more of an emerging reality.⁵ All identitarian communities participate fully in electoral events, the threat of boycotts seems to have disappeared entirely.⁶

Despite these several not insignificant gains,⁷ characterizations of the Constitution that served as the founding document of the nation during the relevant period have hardly grown any more charitable. Through my participation at the September 2010 Conference on Rule of Law Reform in Iraq and Afghanistan at the University of Pennsylvania Law School ("Penn Conference"), I heard denunciations of provisions of the Constitution that might in some but not all cases be characterized as strident. Had they been made by those ignorant of Iraq's history, law, or politics, they might well be disregarded. When made, as they were, by individuals whose knowledge of and dedication to Iraq, over the course of decades in some cases, has been nothing short of remarkable, I feel compelled to stake my ground, offering the bases my respectful dissent from the groupthink with care and due reverence for their considerable achievements although their views do not accord with my own.

From Jason Gluck, I learned that the Constitution's flaws include an inability of the central government to tax,⁸ a point repeated by Rend Al-Rahim.⁹ Al-Rahim and Ambassador Feisal Istrabadi seemed exercised about the broad powers of Iraq's provinces vis-à-vis the central government in Baghdad.¹⁰ Al-Rahim and Gluck both mentioned the danger that Iraq's existing provinces might become near independent regions as permitted by the Constitution.¹¹ The young, energetic and intellectually formidable Sabah Al-Bawi, the Head of the Division of Legislative Drafting at the Council of Representative's Research Directorate, while far more sanguine respecting the Constitution, criticized the vagueness of some of its provisions, and hoped that

⁴ Sam Dagher, *Iraqis Face Uncertain Future as U.S. Ends Combat Mission*, WALL ST. J., Aug. 27, 2010, <http://online.wsj.com/article/SB10001424052748704913704575453303215595156.html>.

⁵ Zainab Fattah, *Lafarge to Raise Iraq Cement Capacity by 2 million tons by 2013*, BLOOMBERG, Nov. 30, 2010, <http://www.bloomberg.com/news/2010-11-30/lafarge-to-raise-iraq-cement-capacity-by-2-million-tons-by-2013.html>.

⁶ Radio Free Europe/Radio Liberty, *Iraqi Sunni Leaders Urge Participation in Next Election*, GLOBAL SECURITY, July 14, 2005, <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EVIU-6EAH27?OpenDocument&rc=3&cc=irq>; Anthony Shadid, *Sunnis go to Polls, This Time, to Retain a Voice*, N.Y. TIMES, Mar. 8, 2010, at A1, available at <http://www.nytimes.com/2010/03/08/world/middleeast/08sunnis.html>.

⁷ To be clear, I do not deny and acknowledge as valid any criticism that Iraq continues to suffer from problems ranging from appalling infrastructure to endemic levels of corruption that border on the pathological. My point, however, is that *on balance*, Iraq has seen its fortunes improve under this Constitution.

⁸ Jason Gluck, Sr. Rule of Law Adv., U.S. Inst. of Peace, at the University of Pennsylvania Conference on Rule of Law Reform in Iraq and Afghanistan (Sept. 24, 2010) [hereinafter Gluck Remarks]. Gluck has since clarified in a conversation with me, indicating that while the central government might have the power to tax, fully formed regions could freely overrule such legislation in a manner described subsequently, and that this would starve the central government of resources should regions additional to Kurdistan be formed. My own view, as described in the main text, is that the possibility of region formation is sufficiently remote that this need not be considered a present danger.

⁹ Rend Al-Rahim, Exec. Dir., Iraq Found., at the University of Pennsylvania Conference on Rule of Law Reform in Iraq and Afghanistan (Sept. 24, 2010) [hereinafter Al-Rahim Remarks].

¹⁰ *Id.*; Amb. Feisal Amin Rasoul Istrabadi, Univ. Scholar in Int'l Law & Diplomacy and Dir., Ctr. for the Study of the Middle East, Maurer School of Law, Indiana University (Bloomington) (Sept. 24, 2010) [hereinafter Istrabadi Remarks].

¹¹ Al-Rahim Remarks, *supra* note 9; Gluck Remarks, *supra* note 8.

amendments might provide further clarity.¹²

Throughout the learned and well-considered remarks, one theme was preponderant: the Constitution required amendment, sooner rather than later, or danger loomed, primarily in the form of national division. We could well have been in 2005, listening to the prognostications on the imminent “End of Iraq” described above. Somehow, despite all good that has transpired in terms of security gains and broad electoral participation—undertaken under the rule of the current Constitution—the prevailing belief seems to be that the founding document *still* places the nation on the precipice of national disaster, and amendment is the only cure.

Misguided as I believe them to be, the abovementioned views of Al-Rahim, Gluck, Istrabadi and Al-Bawi are based on some set of acknowledged fact, as indeed they would have to be to emanate from such keen and knowledgeable minds. The problem is not that these erudite scholars and activists are unaware of the changes that have taken place within Iraq over the past several years—each of them is admittedly passionately and admirably dedicated to Iraq and its progress. The problem is their implicit adoption of a *rigid and formalistic model of legal and constitutional change*, wherein constitutional language necessarily dictates one possible set of outcomes, that which is commonly attached to it at drafting, and wherein any change subsequent thereto must be achieved by formal amendment. The only exception, it seems, is where, as Dr. Al-Bawi put it, the text itself is poorly drafted, or “vague,”¹³ a flaw that likewise requires correction through formal amendment.

This model would be subject to rather serious challenge if applied in the American context. Recent work has tended to emphasize the importance of constitutional change without formal amendment. I might begin with Bruce Ackerman’s well-known analysis of American constitutional history, arguing that constitutional meaning is shifting profoundly, even in the absence of formal amendment, during certain seminal “constitutional moments.”¹⁴ More recent work has tended to downplay the notion of change during particular periods, providing in its place a narrative of continual evolution of constitutional meaning. Barry Friedman’s formidable *The Will of the People* is a broad history of United States Supreme Court jurisprudence, which demonstrates that Supreme Court opinion tracks the popular will as concerns constitutional meaning.¹⁵ There are even originalists, albeit less orthodox ones, who emphasize the possibility of constitutional change within the limits of what the semantic content of the words might offer. Most compellingly to this author, Jack Balkin has famously suggested that while the constitution’s words, in their *original meaning*, necessarily provide a constraint on future legislative action, the *original expected application* of the founders is not necessarily binding.¹⁶

¹² Dr. Sabah Al-Bawi, Head, Div. of Legislative Drafting, Res. Directorate of the Council of Representatives Iraq, at the University of Pennsylvania Conference on Rule of Law Reform in Iraq & Afghanistan (Sept. 24, 2010).

¹³ *Id.*

¹⁴ See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 44–50 (1991).

¹⁵ BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* 9 (Ill. ed. 2009).

¹⁶ Jack Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 552 (2009). A similar distinction was also advanced earlier by Mark Greenberg and Harry Litman between “original meaning” and “original expectation.” Mark Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L. J. 569, 573–74 (1998). More broadly, Balkin’s work draws on the considerable achievements of such luminaries as Randy Barnett, Larry Solum, and Keith Whittington. See Randy Barnett, *Restoring the Lost Constitution, Not the Constitution in Exile*, 75 FORDHAM L. REV. 669 (2004); Larry Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. L. ISSUES 409 (2009); Keith Whittington, *Constructing a New American Constitution*, 27 CONST. COMMENT. 119 (2010). Another important

Thus, for example, the right to an abortion might well be defended on originalist grounds as being necessitated by the equality provisions of the Constitution, even if the drafters would not have expected such a result.¹⁷ The changing applications derive from the ability of political and social movements (more specifically, the feminist movement, in the case of the right to an abortion) to change understandings of how particular provisions of the Fourteenth Amendment may ultimately be applied.¹⁸ The semantic meaning of the words of the Fourteenth Amendment does not thus change, only its expected application.¹⁹ More broadly, I would maintain that this semantic constraint combined with a capacity for change has worked well in the American context, permitting the constitution to remain relevant to the very legal and political system it is supposed to limit. The same might be said of Iraq inasmuch as the various manifestations of federalism, criticized above as being improperly handled by the Iraqi Constitution, are concerned.

In questions following my own remarks outlining these ideas at the Penn Conference, Al-Rahim criticized my somewhat liberal use of comparative methodologies to describe the Iraq constitution. She suggested that there lies a chasm of difference between a state with two hundred years of constitutional history and a deeply venerated judiciary with a constitutional state barely that is barely half a decade old whose judiciary is comparatively untested. I might reply by suggesting that her characterization of the American judiciary is, at least as a historical matter, more sympathetic than is warranted, even as her characterization of the Iraqi judiciary is more critical than I would accept. Nonetheless, this is not in fact the meat of the matter, as Rahim is surely correct that America's judiciary is more deeply venerated than Iraq's, and enjoys considerable historical respect that is absent in the Iraqi context.²⁰ The more central, and fatal, problem with Al-Rahim's objection is that the need for constitutional flexibility *exists irrespective of the strength of the judiciary or the history of the constitutional state*. Whether a nation's judiciary is weak or strong, and whether its constitution is two centuries old or has lasted barely six years, *social and political changes occur, and require language sufficiently capacious to address them*.

Empirical research seems to bear out this conclusion. The remarkable work by Elkins, Ginsburg and Melton on the endurance of national constitutions has shown that flexibility is one of three central factors in determining constitutional longevity.²¹ *Their work encompasses nearly all national constitutions written since 1789*, which would include necessarily weak states and strong ones, those with comparatively powerful judiciaries and those whose judges are incapable of confronting the state.²² Yet, overall, the authors conclude that the more flexible constitutions endured.

The conclusion, empirically supported as it is, appears logical enough. To use as an

early adopter of a similar approach, and one who, like this author, sought to reconcile the monumental insights of American Legal Realism with interpretive constraints offered by original understanding, was Robert Clinton. See Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of 'This Constitution'*, 72 IOWA L. REV. 1177, 1265 (1987).

¹⁷ Jack Balkin, *Abortion and Original Meaning*, 24 CONST. COMM. 291, 319–21 (2007).

¹⁸ *Id.* at 321.

¹⁹ *Id.* at 322.

²⁰ I have explored these ideas at length in a draft article soon to be published in the Utah Law Review. See Haider Ala Hamoudi, *The Will of the (Iraqi) People*, 2011 UTAH L. REV. 45–61 (2011), available at <http://epubs.utah.edu/index.php/ulr/article/view/543/404>.

²¹ ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 81–82 (2009).

²² See *id.* at ix.

example a matter of some debate within Iraqi society about which I will have precious little to say in these pages, the Iraqi constitution's provisions on Islam and the state are wisely flexible in their drafting. They neither require all law to conform to the dictates of *shari'a* as determined exclusively by a council of scholars, as some Islamist groups would have preferred,²³ nor do they suggest the absence of any role for Islam in legislation, as is the preference of others (Ambassador Istrabadi included on the basis of his own remarks at the Penn Conference).²⁴ Rather, the provisions indicate that Islam is a "foundational source" of legislation, that no law may be enacted that violates the "settled rulings" of Islam or the rights and freedoms set forth in the Constitution, and that the state has some responsibility to "guarantee the protection" of the Muslim identity of the majority of Iraq's citizens.²⁵

Leaving aside how the Iraqi constitution's provisions on Islam and the state have evolved, the language is capacious enough to accommodate the positions of both Ambassador Istrabadi and the more religious of Iraq's political elites given the elasticity of phrases such as "settled rulings", "protection" of Muslim identity and "foundational source." The language could mean nothing more than some form of robust free exercise, prohibiting the state from enacting laws banning the headscarf, for example, a conclusion I cannot imagine any secularists interested in a political future in Iraq would find controversial in the slightest. On the other hand, it could mean active and engaged *shari'a* review by a court with some juristic influence. The matter of *constitutional construction* on the basis of this framework text is left to those succeeding the drafters.

Imagine, however, if such flexibility were absent—if, that is to say, on account of Al-Rahim's genuine concern on the state of the Iraqi judiciary or the weakness of the rising Iraqi state, we were to demand amendment of these provisions of the Iraq constitution to provide greater clarity on the issue of Islam and its interaction with the state. It seems to me that there would be one of two possible results. In the first possibility the constitution would be subject to such frequent amendment based on who happened to win the previous set of elections that its role as a unifying fundamental bargain would be destroyed. It is true that the secularist parties performed quite well in the national elections held in 2010, though some Islamist parties, notably the Sadrists, managed quite well to hold their own.²⁶ It would be dangerously naïve to suggest that using this electoral momentum to demand further changes to the Iraq constitution in the

²³ Haider Ala Hamoudi, *Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution*, 8 ST. THOM. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698447&download=yes, at 8.

²⁴ Istrabadi Remarks, *supra* note 10.

²⁵ Article 2, Dustour Jamhuriat al-Iraq [The Constitution of the Republic of Iraq] of 2005. There are other provisions of the Constitution that involve Islam and the state, most famously Article 41, which relates to matters of family law. Article 41, Dustour Jamhuriat al-Iraq [The Constitution of the Republic of Iraq] of 2005. It is not my purpose to provide in this brief aside a comprehensive review of the relevant provisions of Iraq's constitution as they concern Islam and the state and what they might mean in terms of future construction. This I leave to an upcoming book I am writing on the Iraq Constitution to be published with the University of Chicago Press. Rather, I focus on the general (and extensively negotiated) provisions of Article 2 as an example of capacious language from which various constructions might be drawn.

²⁶ Rania El Gamal & Muhanad Mohammed, *Iraq's Allawi Says Open to All in Coalition Talks*, REUTERS, Mar. 27, 2010, available at <http://www.reuters.com/article/idUSTRE62P42T20100327>; Anthony Shadid, *Followers of Sadr Emerge Stronger After Iraq Elections*, N.Y. TIMES, Mar. 17, 2010, at A1, available at http://www.nytimes.com/2010/03/17/world/middleeast/17sadr.html?_r=2.

direction of secularization²⁷ would not inspire Islamist resistance and determination to reverse such changes in the future. Assuming, that is, Islamist parties enjoy a future resurgence, a matter I consider a near certainty for no reason other than that cyclical politics are what they are, and one must assume the fortunes of competing political movements will rise and fall as they have over the past decade in Iraq. However, given the rather onerous amendment rules of the Iraq constitution,²⁸ frequent amendment is unlikely.

The second possible result of demanding near absolute precision from the Iraqi constitution's provisions on Islam and the state would be some form of semi-permanent impasse respecting the role of religion in the state. An impasse is likely because permanent agreement is not possible. In fact, some have decried, for good enough reason in certain contexts, the seeming unwillingness of Iraq's political elites to reach much by way of compromise on any number of questions.²⁹ Thus, the idea that Iraq's political forces would come together on a matter of such historic contention as religion and the state to the extent necessary to draft language that is *not* capacious, *not* capable of developing various constructions within the confines of flexible framework text, seems wildly unrealistic. Our own national debates respecting the role of religion in the state should amply demonstrate the sensitivities and controversies engendered by such matters. Flexibility, it seems, is the only route available to ensure broad and lasting fidelity to constitutional text on the part of rising and falling political movements.

Yet while Islam and the state might well be a salient example of the *need* for constitutional flexibility, none of the formidable critics, with whom I had the pleasure of a fruitful engagement at the Penn Conference, engaged this particular matter in much detail. Even Ambassador Istrabadi's comments on the role of *shari'a* came in response to a question from an audience member. Rather, the panelists' real concerns, and the related demands for clarity, arose out of the *federalism* provisions of the Iraq constitution. Specifically, the core issues were the central government's powers, the powers of the provinces, and the ability of provinces to turn themselves into semi-autonomous regions. In sharp contradistinction to my colleagues, I find these particular provisions, for the most part and with one significant exception set forth below, well-drafted and commendable in their use of capacious language that establishes a sensible framework upon which future construction might be built.

I therefore take up the challenge implicit in the broad criticisms made at the Penn Conference. Specifically, I shall demonstrate *first* that the constitutional language is more flexible than the critics maintain, and is capable of alternative readings that are more centralist in their nature; *second*, that such alternative readings have been operationally deployed, meaning they are the very constructions that Iraqi decision makers have developed in practice, and *third*,

²⁷ Technically, Article 126(2) prohibits changes to Article 2 until two electoral cycles have passed, which would not occur until the year 2014. Article 126 § 2, Dustour Jamhouri al-Iraq [The Constitution of the Republic of Iraq] of 2005. My point, however, does not relate to the precise date that amendment might first be initiated, but rather the costs associated with attempted frequent amendment to what is supposed to be a permanent, consensual compact.

²⁸ The regular amendment procedures set forth in Article 126 of the Iraq Constitution require a two thirds vote of the Council of Representatives and approval of a majority of those voting in a general referendum. Article 126, Dustour Jamhouri al-Iraq [The Constitution of the Republic of Iraq] of 2005. There are special onetime amendment procedures set forth in Article 142 which are less cumbersome, but these procedures are not relevant for these purposes, first, because they may only be used once, and second, they must be used within the first session of the Council of Representatives, which has already ended. Article 142, Dustour Jamhouri al-Iraq [The Constitution of the Republic of Iraq] of 2005.

²⁹ See, e.g., ANDREW ARATO, CONSTITUTION MAKING UNDER OCCUPATION 226–27 (2009) (describing the collapse of multi-party negotiations during the constitutional drafting process).

that this has helped to bring about a broad and lasting consensus that was heretofore absent. Put differently, the Iraqi constitution may have not originated as a consensual document but was cleverly designed so as to evolve into one, and it has so evolved.

Part Two of this Paper introduces the relevant constitutional provisions, outlines the expectations of the drafting parties, and suggests alternative readings that are entirely plausible on the basis of the text. Part Three demonstrates how those alternative approaches came to be employed, largely because popular will demanded them. Part Four notes precisely why in light of this, formal amendment to address these particular matters would probably be a mistake. Part Five concludes on a note of concession, and re-characterizes the dispute between my colleagues and me as not so much strict formalism on their part, nor unqualified anti-formalism on mine, but rather the relative emphasis each of us tends to place on the *extent and importance of flexibility* in constitutional provisions.

II. FEDERALISM AS FRAMEWORK TEXT

A. *The Power to Tax*

Among the most frequent criticisms of the Iraq Constitution is that it grants the central government far too limited power in Article 110 of the Constitution.³⁰ To use the most salient example, the central government, it is frequently maintained, does not even have the power to tax.³¹ What self-respecting sovereign government in the modern world, the point seems to be, cannot even raise revenue to finance its own activities?

A review of the negotiating history of Article 110, which lists the central government's enumerated powers, could certainly support this conclusion.³² The debate lay largely between, on the one hand, Kurdish negotiators and some of the more federalist Shi'a parties within the broader Shi'a Coalition, most notably the Islamic Supreme Council of Iraq ("ISCI") and, on the other, more centralist Shi'a, most notably Da'wa and the Sadrists, along with, when they were part of the negotiating process, the Sunni representatives.³³ The Kurds and federalist Shi'a argued that the enumerated powers should be limited by adding the term "*hasran*" or (as they understood it) "solely" to the end of the introductory phrase "The central government shall exercise the following competencies," meaning that the enumerated powers that followed the introductory

³⁰ Article 110, *Dustour Jamhouriat al-Iraq* [The Constitution of the Republic of Iraq] of 2005.

³¹ Gluck Remarks, *supra* note 8; Al-Rahim Remarks, *supra* note 9. As described subsequently in the text, this is a position also adopted by Peter Galbraith, an adviser to the Kurds during constitutional negotiations. GALBRAITH, *supra* note 3, at 199.

³² See Notes on Iraqi Constitutional Negotiation Documents (Jan. 25, 2010) (on file with the author) [hereinafter Constitutional Notes] (recounting the contents of the constitutional negotiation documents in the possession of Sh. Humam Hamoudi, the author's paternal uncle and the chair of the constitutional drafting committee, appointed by Iraq's interim legislature at the time, the Transitional National Assembly). The Constitutional Notes are cited in lieu of the actual constitutional negotiation documents due to conditions of access placed on the author.

³³ The positions of the various parties toward a federal arrangement for Iraq are well documented. See ALI A. ALLAWI, *THE OCCUPATION OF IRAQ* 409 (2007) (providing a carefully and thoughtfully rendered review of the Sunni position); GALBRAITH, *supra* note 3, at 165–67 (describing the Kurdish position in some detail); Istrabadi, *supra* note 1, at 1647–48 (providing excellent background on the fissures within the Shi'a coalition on the subject). As Allawi reports, Sunni involvement in constitutional drafting was late in coming, and ultimately the Sunnis rejected the final product although it was imposed upon them anyway. *Id.* at 405, 415.

phrase would then be the sole powers of the central government.³⁴ The centralists wanted, in the words of one negotiator, to list particular powers, but not to limit the central government solely to the exercise of those powers.³⁵ In the end, the federalists succeeded in describing the powers of the central government as “*al-sultat al-hasriya*,” or the limited powers, and they are indeed extraordinarily narrow and do not include, at least explicitly, a power to tax.³⁶

Yet a more careful linguistic analysis plainly makes another reading plausible from the framework text. The term *hasriya*, from the Arabic *hasara*, meaning to encircle, encompass or surround,³⁷ could as easily mean “exclusive” as it does “limited.” It is frequently so used in modern Arabic, to describe an “exclusive interview” on an Arabic language satellite channel, for example, as any Arabic speaker familiar with Arabic television programming (myself included) would know the term to mean “exclusive.” This interpretation suggests that the central government powers described in Article 110 are *exclusive but not limited*, meaning that sub-national units may not legislate as to the exclusive areas, but the jurisdiction is concurrent as to matters beyond those contained in Article 110.

It should be noted that this reading was not unnoticed even by commentators at the time. While Galbraith maintained contemporaneously that the document was clear in containing no power to tax, and indeed credits his own “quick thinking” abilities as helping to ensure this result,³⁸ Deeks and Burton, perhaps in a less “quick thinking” fashion, but certainly giving the matter *more careful, rigorous and engaged* thought, pointed out the alternative possibility, and provide a rather persuasive textual basis for that alternative.³⁹

It is fair to ask why the ambiguity was allowed to remain when the drafters could have easily foreclosed any argument respecting residual federal power simply by adding a phrase explicitly prohibiting the exercise of any jurisdiction beyond that specified in Article 110 of the Constitution. While it is hard to know for certain, the opposition of the centralist Shi’a to the more extreme federalist vision of Iraq must have played a role. The possibility of later placating the Sunni representatives, who ultimately abandoned the constitutional negotiations, was in all likelihood in the drafters’ minds as well.⁴⁰ Whatever the reason, it suffices to say that the language is flexible and capable of at least two alternative constructions, and that the matter was effectively left to resolution at a later time.

B. Asymmetric Federalism

Whether at the Penn Conference or elsewhere, rare is the objection to the *fact* of broad Kurdish autonomy, with most disputes being over the borders of the Kurdish semi-autonomous region rather than its existence.⁴¹ This seems natural enough, the Kurds have enjoyed a state of *de*

³⁴ Constitutional Notes, *supra* note 32.

³⁵ *Id.*

³⁶ See Article 110, Dustour Jamhouriyyat al-Iraq [The Constitution of the Republic of Iraq] of 2005 (lacking any mention of taxation in the enumerated powers of the federal government).

³⁷ THE HANS WEHR DICTIONARY OF MODERN WRITTEN ARABIC 212 (J.M. Cowan ed., 4th ed. 1994).

³⁸ GALBRAITH, *supra* note 3, at 199.

³⁹ See Ashley S. Deeks & Matthew D. Burton, *Iraq’s Constitution: A Drafting History*, 40 CORNELL INT’L L. J. 1, 70–71 (2007) (discussing that the constitution leaves many powers to “law” and inclusive in “law” will likely be “federal law”).

⁴⁰ ARATO, *supra* note 29, at 227; ALLAWI, *supra* note 33, at 404–05, 415.

⁴¹ See, e.g., *id.* at 410 (describing the strong, centralist Sunnis as having “grudgingly” accepted the

facto autonomy since 1991,⁴² and the notion that meaningful central control could be exercised over them without dramatic loss of life seems fanciful and dangerously delusional.

As a result, what centralists decry in the context of Iraq's constitution is not so much the idea of federalism vis a vis the Kurdish region, but rather a broader form of federalism that encompasses any other part of Iraq.⁴³ The resulting criticism of the Iraq constitution from the Penn Conference, on the basis of the remarks of Gluck, Al-Rahim and Istrabadi in particular, is thus twofold. First, it grants far too much power to Iraq's provinces. Second, a particular concern of Gluck, it permits the provinces to form semiautonomous regions.⁴⁴ In other words, centralists call for a form of *asymmetric federalism*, pursuant to which there is a single Kurdish region, which alone enjoys substantial autonomy. I deal with each of these criticisms in light of the relevant provisions below, pointing out how particular constructions that make this result clearly possible.

1. The Powers of the Provinces

In fact, the Iraqi Constitution does clearly distinguish between provinces and regions, and grant considerably greater autonomy to the regions. Article 121(2), for example, permits a region to limit the applicability of national legislation,⁴⁵ and no similar power is given to a province. A region is explicitly given the right to enact a constitution, and to exercise legislative, executive and judicial powers in Articles 120 and 121(1),⁴⁶ whereas a province is not. In fact, while a province is supposed to enjoy "broad administrative and financial authorities", these are, under Article 122(2), to be defined *by a law enacted by the national legislature*.⁴⁷ These provisions, it should be emphasized, were plainly negotiated by centralist forces, as even the most ardent centralist would in all likelihood not object strenuously to permitting some level of *administrative and financial decentralization*, in a manner to be determined by the national legislature.

The sole federalist concession respecting provinces, however, creates rampant confusion. Specifically, Article 115 seems to grant priority to provincial legislation over that of the national legislature in the event of a conflict between them.⁴⁸ The problem is that, as described above, *the provinces enjoy no constitutional power to enact a local constitution, or to exercise legislative power pursuant thereto*. To the contrary, the wide "administrative and financial powers" they are supposed to exercise come to realization through the enactment of national law, and precisely how national law can define a power which could then used to supersede the very law that gave

reality of the Kurds' "semi-independent" status).

⁴² *Id.* at 73.

⁴³ Istrabadi, *supra* note 1, at 1630–31.

⁴⁴ Al-Rahim Remarks, *supra* note 9; Istrabadi Remarks, *supra* note 10.

⁴⁵ See Article 121 § 2, Dustour Jamhouriat al-Iraq [The Constitution of the Republic of Iraq] of 2005 ("It is a right for the power of a region, to modify the implementation of a federal law in the region if there is exists a conflict or contradiction as between it and the law of a region, as for matters that do not intrude upon the exclusive competencies of the federal government.") (author translation).

⁴⁶ *Id.* art. 120; 121 § 2.

⁴⁷ *Id.* art. 122 § 2 ("[T]he provinces not formed into a region enjoy broad administrative and financial authorities, so that they may organize their affairs in accordance with the principle of decentralization, and this shall be organized by law.") (author translation).

⁴⁸ *Id.* art. 115.

rise to it is confounding and unworkable.

I offer no defense to this particular provision, no doubt meant as a concession to federalists and designed to create the same type of flexibility described above with respect to central government jurisdiction or Islam and the state, but done in a far less satisfying manner given the impossible contradiction. Gluck is quick to point this out to demonstrate that the Constitution may be flexible, but it is not well drafted nor is its flexibility due to wise design, foresight or anything other than fortuitous happenstance. While I do not agree, for reasons explored at length throughout this Essay, the criticism has some force here. Suffice it to say, however, despite the poor design, it is plain that any number of constructions might arise from this rather perplexing arrangement, some of which favor centralist visions for Iraq and some of which favor federalists.

2. Right of Provinces to Form Regions

Though a concern, the more divisive matter was not provincial power, where, as noted above, the federalists granted broad concessions with one area of confusion, but rather the creation of regions beyond that of Iraqi Kurdistan. The concern was, again, based in fact. ISCI had publicly announced the creation of a Shi'i super-region *before constitutional negotiations had come to an end*.⁴⁹ One of ISCI's chief negotiators responsible for the section of the constitution addressing provinces and regions called for the complete removal of any references to provinces in the constitution, because the state should be composed of a capital and near-autonomous regions.⁵⁰ The chief Kurdish negotiator for the same section advanced the same proposition.⁵¹

This federalist aspiration was a centralist nightmare. The provisions of the Constitution respecting broad regional autonomy, *to the extent they applied solely to the Kurdish region*, were for the most part uncontroversial, or at least met with grudging acceptance. To the extent they applied elsewhere, an insurmountable division arose. Such broader provisions were, for the federalists, uncompromisingly essential, and for the centralists, deeply objectionable, so much so that the most hardened centralists, by and large the Arab Sunnis, abandoned the negotiations rather than engage so much as the possibility of a regionalized Iraq.⁵²

In the end, the constitution offered what, to my mind, is the only reasonable compromise that could have been achieved—democratic decision-making on a province and province basis. The process involved three steps. The first step was the enactment of a law by Iraq's legislature respecting the formation of regions.⁵³ The second step was that one third of the representatives of the relevant provincial legislatures, or one tenth of the population of the relevant provinces, needed to petition for a referendum to form a region.⁵⁴ Finally, a referendum would be held to decide the matter for the relevant province or provinces.⁵⁵

⁴⁹ ALLAWI, *supra* note 33, at 408.

⁵⁰ Constitutional Notes, *supra* note 32.

⁵¹ *Id.*

⁵² ALLAWI, *supra* note 33, at 409–11.

⁵³ This step was a result of a phone call placed by President Bush to Shi'i leader Abdul Aziz Al Hakim, urging the latter to offer more concessions to the Sunni centralist forces. Robert H. Reid, Associated Press, *Constitution Heading to Parliament*, BOSTON GLOBE (Aug. 27, 2005); *see also* Constitutional Notes, *supra* note 32 (demonstrating the concessions on the date following President Bush's call).

⁵⁴ Article 119, Dustour Jamhouriat al-Iraq [Constitution of the Republic of Iraq] of 2005.

⁵⁵ *Id.*

Admittedly, the process for regional formation was comparatively simple. Supermajorities were not required; in fact, only one third of the provincial legislature *or* one-tenth of the relevant voting population would need to support the measure in order to proceed to referendum. Nevertheless, the constitution did not foreclose a relatively centralized state with a single federal region (as the centralists wanted) or a highly federalized one with three or more regions (as the federalists desired). Instead, it left the matter to be determined by subsequent legal action or by a form of post-enactment constitutional construction, to use Balkin's term.

III. FEDERALISM AS CONSTRUCTED

Notwithstanding the criticisms of the constitution from my colleagues at the Penn Conference, it is clear that in post-enactment constructions, the centralists have prevailed mightily in imposing their construction of an asymmetrical federal state onto the constitution's framework text. They have been so successful that the most centralist forces, the Arab Sunnis, originally disenchanted with the Constitution, have come to accept and *even promote it* as the fundamental bargain upon which the state is built. The Iraqiya list, which enjoyed broad Sunni support in the March 2010 elections, has seen many of its leaders, Sunni and Shi'i, advance its position that it had the right to form the government *on the basis of constitutional text*.⁵⁶ Far from decrying the Constitution, the chosen representatives of the Sunni Arabs have defended and legitimized it, and indeed accused their adversaries of violating it.⁵⁷ The reason for this broad acceptance, by the very forces that once voted against the constitution, is clear.⁵⁸ On every relevant question regarding constitutional construction, the centralists have won. Even more importantly for our purposes, *they won by virtue of having the benefit of a wisely drafted, sufficiently flexible, framework text upon which they could establish their constructions.*

The reason for this dramatic post election centralist triumph is simple enough and draws on Friedman's insights respecting the primary agent of constitutional change: popular will.⁵⁹ There was simply no appetite for a federal Iraq among Iraq's Shi'a population. The regionalization effort was particularly telling. The national legislature managed to pass a law permitting regional formation, but just barely, with 140 representatives attending the vote, just two above quorum, because of a large parliamentary boycott in protest.⁶⁰ Beyond this, the regionalization initiative proved to be an abject failure. An effort was made to gather petitions to

⁵⁶ To provide a few representative examples, the leader of the Iraqiya list, the secular Shi'i Ayad Allawi, described efforts designed to prevent him from first opportunity to form a government as "a confiscation of the will of the Iraqi people and our constitution. . . ." Ned Parkers, *Ex-Premier Demands New Election In Iraq*, L.A. TIMES, Apr. 29, 2010, at A5. Another Iraqi leader, former Vice President and leading Sunni Tariq al-Hashimi was reported in May of 2010 to have "restated" the Iraqiya position that it be given the first opportunity to form the government, pursuant to constitutional mandate. Stephen Lee Myers, *Iraqi Politicians Break Bread, But Not Their Standoff*, N.Y. TIMES, May 21, 2010, at A11. Finally, Hashimi had earlier described his use of a presidential veto as necessary because required by "the constitution and the principles of justice." *World Briefing: Iraq*, L.A. TIMES, Nov. 16, 2009, <http://articles.latimes.com/2009/nov/16/world/fg-briefs16.S1>.

⁵⁷ *Id.*

⁵⁸ ALLAWI, *supra* note 33, at 415–16.

⁵⁹ FRIEDMAN, *supra* note 15, at 9.

⁶⁰ Kirk Semple, *In Victory for Shiite Leader, Iraqi Parliament Approves Creating Autonomous Regions*, N.Y. TIMES, Oct. 12, 2006, at A12; Amit R. Paley, *Parliament Approves Measure Allowing Autonomous Regions*, WASH. POST, Oct. 12, 2006 (citing Qassim Abdul Zahra & Lee Keath, *Iraq Parliament Passes Law to Allow Setting Up Federal Regions*, ASSOCIATED PRESS, Oct. 12, 2006)).

allow Basra to put the question of region formation on the ballot, on the assumption that Basra was by far the most sympathetic to federalist interests. The 10% threshold was not reached, even in this supposedly sympathetic province.⁶¹ During this time, federalist factions within the Shi'a base, most notably ISCI, suffered dramatic electoral defeats to centralist forces, led by current Prime Minister Nouri Al Maliki, causing them to quietly shelve their regionalization plans, seemingly abandoned by the end of 2010.⁶²

From this success, other constructions followed. As to the matter of provinces, the Federal Supreme Court of Iraq in an advisory opinion dealt with the incompatibility of Articles 115 and 122(2) by ignoring Article 115, emphasizing that the province has no legislative capacity except that which the national government chooses to give to it.⁶³ This had the result of rendering national law supreme over provincial law. Though the Court has hardly held to any level of consistency in the matter,⁶⁴ the legislature soon thereafter enacted the Law of Provinces Not Formed into a Region, No. 21 of 2008, in which national law supremacy is described in quite certain terms through permitting the enactment of local law on matters of administration and finance, *but only to the extent that such local laws do not violate national law*.⁶⁵ Furthermore, while the law grants substantial other authorities to the province, among them the power to impeach an unpopular governor⁶⁶ and to remove Baghdad appointed high Ministry officials responsible for the relevant province,⁶⁷ it would be properly described more as modest decentralization than the type of confederal arrangement enjoyed by the Kurds.

Although the law remains a new one, it is constantly subject to challenge and is a source of competition between center and state. Interestingly, however, such conflict does not generally lie with respect to the matter of conflicting laws and its national law supremacy provisions.⁶⁸ The provincial councils seem to have accepted with some level of equanimity Baghdad's supreme authority as concerns such matters, and instead raise challenges on issues such as the

⁶¹ Istrabadi, *supra* note 1, at 1631–32.

⁶² The results of the provincial elections held in April 2008 are available on a variety of reputable and publicly available websites. See, e.g., Kholoud Ramzi, *Final Election Results*, NIQASH: BRIEFINGS FROM INSIDE AND ACROSS IRAQ (Feb. 25, 2009), <http://www.niqash.org/content.php?contentTypeID=75&id=2395&lang=0> (providing election results for 14 of 18 provinces).

⁶³ Federal Supreme Court (Iraq), Advisory Opinion 9 of 2007.

⁶⁴ Around the same time that it issued advisory opinion 9, it also around the same time issued another ruling, Decision No. 13 of 2007, which indicated something of the opposite respecting lawmaking powers. The Provincial Council of Basra, confused as to the Court's position, asked for clarification respecting this contrast, but referred to a conflict as between Decisions 13 and 16 rather than Opinion 9 and Decision 13. Rather than provide any clarification to the Basra Provincial Council and the balance of the Iraqi legal community, the Court only pointed out in Decision 21 of 2010 that there was no conflict as between Decisions 13 and 16, thereby refusing to answer the question because of a mistaken cross reference. Advisory Opinion 9 of 2007 has since been removed from the Iraq Supreme Court's website, as the case listings were reorganized, though clearly, as the Basra example shows, the earlier opinion has not been forgotten.

⁶⁵ Law of Provinces Not Formed into a Region No. 21 of 2008 (Iraq), art. 2, *available at* <http://www.niqash.org/content.php?contentTypeID=227&id=2159&lang=0>.

⁶⁶ *Id.* art. 8.

⁶⁷ *Id.* art. 9.

⁶⁸ Questions respecting reverse supremacy are raised sporadically before the court. There is Decision 20 of 2010, respecting the applicability of national health regulations. In addition, in Decision 6 of 2009, the provincial council of Babylon asked whether or not reverse supremacy exists in Article 115 of the Constitution, and the Court decided unhelpfully that it did. However, the number of such cases is miniscule relative to the litigation concerning other aspects of the Provinces Law.

impeachment of governors or the means by which they are elected.⁶⁹ The disputes, that is to say, are well within the orbit of those one would expect in a generally centralized state enjoying modest decentralization.

Naturally, given the centralist successes, it should come as no surprise that irrespective of what Al-Rahim, Istrabadi and Galbraith have at varying times professed, the central government does have powers beyond those set forth in Article 110. Praxis bears out this conclusion; *the national legislature has without noticeable objection from any faction, including the federalist Kurds, enacted legislation that lies well beyond the purview of Article 110 on repeated occasions.* These include laws on nongovernmental organizations,⁷⁰ consumer protection,⁷¹ the environment,⁷² and competition,⁷³ to name but a few. The Council of Representatives has even exercised the power to tax through amending a tax law.⁷⁴ Having worked on some of these laws when produced by the relevant committees, not once did I observe any sort of jurisdictional objection respecting any one of them. Certainly nothing that the Federal Supreme Court has issued has ever suggested that these laws are unconstitutional because beyond the jurisdiction of the central government. The matter, it seems, is settled rather conclusively for the moment; and, attendant concerns about the national government's power to tax, or exercise other competencies beyond those set forth in Article 110, seem misplaced.

IV. ON THE PROBLEM OF FORMAL AMENDMENT

In light of the resolutions reached above, the criticisms of my colleagues to the constitution appear particularly confounding in some ways. Why does it matter that the central government's power to tax is capable of alternative constructions from the framework text, if the one broadly adopted without controversy is the one that gives the central government such power? What danger will materialize if there is a dissolution of province from center via Article 115 under circumstances where one branch of government, the judiciary, has declared that provision effectively meaningless as against the provinces (at least on occasion), and another branch, the legislature, has enacted legislation to that effect, which legislation has received broad acceptance in province and center alike? Is it not clear from the dismal failure to gather the support of even 10% of Basra's voting population that the efforts at regionalization have been abandoned? Or, put more broadly into a single question, *why must we talk about the constitution being the source of national dissolution when every conceivable construction of the constitution's framework text has been established in precisely the opposite direction?*

I am perfectly happy to concede that Iraq's constitution *could* have been constructed in a fashion that would have made Iraq a very loose confederation of semi-independent regions with little uniting them beyond geographic proximity. There is no doubt that this could have led ultimately to national dissolution, a point that Gluck emphasizes and I accept as correct. I am

⁶⁹ See Federal Supreme Court (Iraq), Decision 58 of 2009 (upholding provincial council dismissal of Salahuddin Province); see also Federal Supreme Court (Iraq) Decision No. 20 of 2009; Federal Supreme Court (Iraq) Decision No. 24 of 2009; Federal Supreme Court (Iraq) Decision No. 35 of 2009 (dismissing all questions regarding the election of governors for lack of jurisdiction).

⁷⁰ Law on Nongovernmental Organizations, No. 12 of 2010 (Iraq).

⁷¹ Consumer Protection Law, No. 1 of 2010 (Iraq).

⁷² Protection of Wild Animals Law, No. 17 of 2010 (Iraq).

⁷³ Competition Law, No. 14 of 2010 (Iraq).

⁷⁴ Law Amending the Property Tax Law No. 162 of 1959, No. 1 of 2009 (Iraq).

further happy to concede that it is at least possible that some political forces more powerful during drafting than at present might have found such a result satisfying. None of that changes the fact that current social and political realities have layered onto the constitution an alternative construction, one far more centralist in character, rendering such dangers exceedingly remote. Why then the concern?

Several possibilities present themselves. The first, and most likely, is some form of reflexive formalism. That is, figures as intelligent and deeply involved in Iraq as Istrabadi and Al-Rahim are aware of the considerable changes that have taken place in Iraq since the adoption of the Constitution in 2005. As a result, we would likely not debate long on the *reality* of those changes. But one more enamored of formalism, perhaps more reflexively than as a chosen intellectual position, would not dismiss as readily as I have the milieu in which the constitution was drafted, by which I mean they would pay much less attention to *subsequent construction and interpretation* than I might. I can only characterize this as a mistake, one that if applied in the American context could lead one to worry about the possibility of segregation,⁷⁵ the permissibility of social security and a prohibition on paper money.⁷⁶ Needless to say, I know very few American lawyers or political actors so concerned that such rulings are imminent.

A second possible objection relates to some form of an aesthetic preference. If the Iraqi central government has the power to tax, that is, then it simply seems to be better technical drafting, and more satisfying, to see this reflected clearly and without ambiguity in the text. This is not necessarily because consequences attach, but because good writing is clear, and the constitution on such matters is anything but. I cannot imagine any one of my colleagues adhering to such a preposterous position and so, to be absolutely clear, I do not ascribe it to them. Nonetheless, as I think others might raise such matters, I dispense with it readily enough. As Ackerman and Nou have pointed out, any constitutional lawyer knows that formal amendment is the avenue by which constitutional meaning is changed only when no other options present themselves.⁷⁷ Amendment is costly, cumbersome and difficult to achieve. It engenders resistance, and it opens wounds previously sealed by consensual text. It raises the possibility of profound, lasting and dangerous disagreement on core matters. The notion that such a daunting undertaking should be initiated for no reason other than that the product looks better that way is utterly misguided.

Finally, and this much wiser objection I can well attribute to Al-Rahim and Gluck, who raised the matter in the Penn Conference, there is the concern of future reversal. It is true, Al-

⁷⁵ General scholarly consensus is that explicit racial segregation was not considered to be objectionable by the drafters of the Fourteenth Amendment. See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 11 (1996) ("Even a judge who believes that abstract justice requires economic equality cannot interpret the equal protection clause as making equality of wealth or collective ownership of productive resources . . ."); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication* 88 COLUM. L. REV. 723, 728 (1988) ("[T]he argument that the framers had two relevant and contradictory sets of intentions lacks any historical foundation."); but see Michael McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1282 (1997) ("[T]he principle of equality in the Fourteenth Amendment is 'something more robust' than the requirement that laws be enforced in accordance with their terms.").

⁷⁶ See John McGinnis and Michael Rappaport, *Reconciling Originalism and Precedent*, 103 Nw. U. L. REV. 803, 836 (2009) (pointing out that the authority to enact social security or issue paper money under the U.S. Constitution is subject to challenge).

⁷⁷ Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 Nw. U. L. REV. 63, 67 (2009).

Rahim and Gluck both indicated in their objections to my presentation, that *to date*, the provinces have shown no desire to regionalize. There is no guarantee, however, that at some point they will decide they have had enough of Baghdad's incompetence and seek regionalization. Only formal amendment could prevent such a process.

This is the most salient reason to seek formal amendment, albeit insufficient. Here, my colleagues would certainly be correct to criticize any attempted comparison on my part to the American context as facile, as plainly the possibility of America reinstating segregation given the long, painful history of the civil rights movement is exceedingly remote and cannot credibly be compared to a reconsideration of central government powers in Iraq respecting tax, for example. To do so would be to trivialize the civil rights movement and its enormous social and political achievements. As such, I will refrain from making such comparisons.

I will say, however, that to the extent that more federalist conceptions were at one point earlier in Iraq's very young constitutional history possible, or even likely, they are considerably less so today. Constructions have staying power. The actors who have adopted them have grown comfortable with them, and wholesale abandonment will not be undertaken lightly even though adjustments will certainly be made as time goes on (in particular, over the nature and scope of the administrative and financial decentralization granted to the provinces under the Law of Provinces). This is particularly because any such change will require significant shifts in attitudes among the Arab population to the very state they imagine Iraq to be: a centralized Arab one with a proud history that is prominent and an important part of the broader region.

I do not mean to suggest that the matter of regionalization is impossible. I suppose Al-Rahim is correct that regionalization and confederalization is possible, though to my mind, it would require much more than prolonged central incompetence on the part of Baghdad. *It would require an accompanying disenchantment with Iraq as nation* such that Iraq's Arab citizens look upon themselves as being from the people of Basra, Mosul, or Nasiriya rather than Iraq. In addition, I imagine that such an important change in attitudes and preconceptions would require a set of circumstances so dire that, to my mind, the constitutional flexibility enabling this would be a matter to be welcomed. I cannot see what is gained by insisting that Basra follow Baghdad's dictate under (hypothetical) circumstances where Baghdad has underfunded Basra and, more importantly, Basra's citizens no longer view the very conception of Iraq with any sort of deep affinity, in a manner characteristic perhaps of Iraq's Kurds. Such rigidity under such circumstances, it seems, would only lead to the constitution's premature death, if the trends highlighted by Melton, Elkins and Ginsburg⁷⁸ are sustained in the Iraqi context.

V. CONCLUSION

I have related the dispute between my colleagues and me in rather Manichean terms, and I hope that I have not mischaracterized their valuable opinions or reduced them to caricature in doing so. In the interests of ensuring that no such mistake was made, this conclusion offers me an opportunity to qualify my above remarks, and perhaps walk back my claims to the extent that they have been overstated.

While I do not share the view that there is no formalist-realist divide in our academy, I would certainly concede that the respective positions are made to appear more extreme than they in fact are. To that end, I should make clear that I know that my colleagues do not deny the

⁷⁸ See discussion and sources cited *supra* note 21 (respecting endurance of national constitutions when sufficiently flexible).

possibility of constitutional construction, nor do they necessarily demand *absolute clarity* in constitutional language. Gluck in particular has made clear that flexibility at times is desirable and can be made to work. Similarly, while I have emphasized post-enactment construction, my embrace of Balkin's originalist model should, I believe, make rather clear to the casual reader that the words of the constitution as originally drafted mean *something*. To return to my earlier example respecting Islam and the state, the constitutional language, while being flexible, does *not* support the vesting of any sort of political authority in a jurist determined by whatever process to be Supreme Leader. The notion that language may be capacious so as to address evolving social, political and economic needs is not equivalent to saying that language may mean anything.

In the end, our disagreement is perhaps less about category than about extent—that is, they feel, perhaps to differing extents, that the constitution offers *too much* flexibility, that its formal language is *insufficiently constraining*, that post ratification constructions, while undeniable, are *not strong enough* to overcome what they view as textual flaws and, in Gluck's case, severe problems in design caused by hasty drafting. Needless to say, as I have outlined at some length, while I would not advance the notion that the constitution is by any means flawless, in general its flexibility is salutary, and has been proven so by post ratification events and constructions. Our exchange at the Penn Conference was fruitful, and extraordinarily edifying as a result. I will not deny that it has allowed me to better defend some of my positions, and reconsider and adjust others in the favor of formal text. I can only hope that I might have been able to do the same for my valued colleagues. More importantly than this, I hope that this will not be our last opportunity for engagement on this matter.