

IRAQI CONSTITUTION: A FEDERAL DEMOCRATIC HEAVEN OR HELL?

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In accordance with the “Law of Administration for the State of Iraq for the Transitional Period,” (simply referred to as TAL) articles 2 and 61 the Iraqi Transitional Government and the National Assembly had drawn up a permanent Constitution for Iraq by August 2005, (though tinkering with it continued into early October 2005 and could only be stopped with US and UN interventions). Finally, the Iraqi people participated in the constitutional referendum on October 15, 2005. Now that Iraq has a nationally accepted constitution, a brief analysis of the political characteristics and prospects of it is warranted.

One of the most important features of the Iraqi constitution of 2005 is its federal democratic structure. This is a genuine novelty in a land that has been ruled by a central authority located in Baghdad for centuries. The new political regime of Iraq provides for a severe and sudden rupture with a highly institutionalized practice of centralized governance. The Iraqi Constitution of 2005 also suggests a democratic form of government, which should also be legitimately considered as a major innovation for not only Iraq but also the rest of the Arab world. How would we expect these developments to fare? What do they imply for Iraqi development and stability in the near future?

Federalism at Work

Federal constitutions emerge in divided societies. They provide for devolution of power from the center to the regions, states, cantons, land, or provinces. The center often plays a focused and specific role concerning defense, security and related foreign relations of the state, macro economic policy, and some social welfare functions, which often requires a distributive

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capacity only possessed by the central governments. A large number of policy areas from education to healthcare are entrusted with the regional or even lower level local echelons of the state. Distinct cultural differences often characterize and separate the regions or cantons of the country. The impetus to keep such a culturally diverse and separate union together rests either with a common history shaped by fear of a perceived common threat, or some form of peace settlement and regional deal or adjustment, which may even coincide with some form of conquest or acquisition. For example, Switzerland was established through the alliance and eventual cooptation of the independent states (cantons) of Uri, Schwyz, and Unterwalden in alliance through a treaty in 1291 against a common threat and foreign oppression.¹ United States seemed to have a bit of everything, that is, the alliance of states in the Northeast, conquest in the south and the west, peaceful acquisition of land (Louisiana Purchase) in the south, etc.² Germany was more or less imposed upon a federal decentralized political system, so that the likes of Hitler and totalitarianism could be prevented from ascending to power in the aftermath of World War II. In short, there is no single path to federalism. Spontaneous and gradual development of federalism seemed not to have provided any advantage in creating national solidarity. Both Switzerland (1847) and the United States (1865) waged civil war to save their political union, and Germany has not, at least not yet. It is therefore not warranted to argue that federalism is the panacea for preserving national unity in culturally plural societies.

The Iraqi situation is also *sui generis*, in the sense that it was precipitated by military intervention, though the Constitution seems to be drawn out mostly by the indigenous political forces of Iraq. The cultural mix of Iraq is also somewhat complicated, and so are the attitudes toward foreign intervention. There is no hiding of the fact that one major community (Sunni Arabs) have been dead set against any federal design in the new Iraqi constitution, which they perceive as foreign machination. They have also been waging armed resistance to foreign occupation and to the imminent federal political regime in the making. Nevertheless, the Iraqi "... constitution's embrace of federalism seems to destroy any illusions of a

1. D. G. Kousoulas, *On Government and Politics* (Monterey, California: Brooks/Cole, 1982), p. 45.

2. Thomas R. Dye and L. Harmon Zeigler, *The Irony of Democracy* (North Scituate, Massachusetts: Duzbury, 1978), p. 64.

strong, centralized government emerging in Baghdad.”³ Under the circumstances, at least one major characteristic of the Iraqi constitution seems to be intact, that Iraq will have a relatively decentralized system, in which, on constitutional grounds the power of the center (Baghdad) will be considerably diminished.

Federalism as a constitutional design stresses spatial or territorial division of power between the center and regions in such a way that each kind of government has some activities, on which it makes final decisions.⁴ Indeed, such a system seems to be developing in Iraq. However, in theory and practice several other characteristics are also incorporated in federalism. Lijphart suggests that a bicameral legislature with a strong upper/federal chamber to represent the constituent regions, a written constitution that is difficult to amend, and a supreme or special constitutional court that can protect the constitution also serve to protect the basic federal division of power between the center and the regions are integral to federalism.⁵ Lijphart also goes on to argue, à la Daniel J. Elazar, that federalism also requires will of the polity for a federal constitution to work as a democracy.⁶ It is small wonder that Lijphart was able to find only nine states that are federal, among thirty-six well-established democracies he included in his analysis; and curiously, three of them are “centralized federalisms”.⁷ Therefore, if we accept non-centralism as a basis for defining federalism there are only six federal systems among the consolidated democracies of the world, and they are Austria, Canada, Germany, Switzerland, United States, and since 1993 Belgium. Now, Iraq seems to be prepared as a new entry to this small list.

Lijphart's study provides us with a comprehensive conceptualization to assess the proposed federal constitution of Iraq. Unfortunately, Iraq has no record of federal practice to compare with the above-mentioned list of federal democracies, thus we can only focus on the document of the constitution for comparison. We also can only point to imminent difficulties or opportunities that Iraq is to encounter, and even risk being speculative at times.

3. Adam Wolfe, “The Implications of Iraq's Proposed Constitution,” 31 August 2005, p. 1, available at <<http://www.pinr.com>>

4. William H. Riker cf. Arend Lijphart, *Patterns of Democracy* (New Haven, London: Yale University Press, 1999), p. 186.

5. Lijphart, *Patterns of Democracy*, p. 187-188.

6. *Ibid.*, p. 188.

7. *Ibid.*, p. 189.

Iraqi Federalism: Implications and Potentialities

First and foremost, as understood from the unfolding of recent events that there is no clear will of the polity toward establishing and running a federal system of government in Iraq. The three most numerous sectarian and ethnic groups in Iraq are the Shi'ite (Marsh) Arabs, Sunni Arabs, and the Kurds. They seemed to have given mixed signals and blessings for a federal Iraq. Sunni Arabs have repeatedly declared their lack of desire or allegiance to a federal constitution of Iraq.⁸ They had even rejected the TAL and its government, and mainly abstained from participation in the election of that government. Thus, they also bowed out of being represented in the National Assembly, which drew up the constitution. However, through various back room deals some Sunni Arabs were brought into the committee that drew up the constitution. However, even then their support for a federal Iraq was much less than forthcoming. The Shi'ite Arabs and the Kurds seemed to be vying for some form of autonomy, and only unenthusiastically yielded to accept a form of federalism that comes closer to confederacy, that is, for a design that would enable them to secede from the union.⁹ Kurds and Shi'ite Arabs have deep misgivings about the central government and the national army of Iraq. They seem to be most inclined to hang on to their communal armed forces (*Badr* militia, *peshmerga*) even after the establishment of a national Iraqi army. The Sunni Arabs seem to promote the idea of a unitary Iraqi system, with strong powers of Baghdad (center), where, as they had done for centuries, continue to play a major role. Under these circumstances there seem to be a plenitude of political wills of the Iraqi people, and among them one for confederacy, and the other for unitary system seem to be emerging. The federalist constitution seems to be more of a foreign imposition than a reflection of the popular will.

The constitution making process was thus mired with dissent over the central issue of division of power between the central and regional

8. Ofra Bengio, "A Constitution for Iraq: Does it matter?," *Telaviv Notes*, No. 145 (August 30, 2005), p.1.

9. Karl Deutsch outlined four differences between federal and confederal constitutions. First, a federal government is stronger in regard to organization, personnel, budget, and jurisdiction than the government of any of its constituent states. Second, while federal states directly act upon individuals in all matters within the scope of the national government, confederacy deals with its individual citizens only indirectly. Third, states often may secede from confederacy, whereas such secession is not permitted in a federal union. Fourth, federal jurisdiction prevails over those of the states, and the state governments are expected to obey them and carry them out. In a confederacy, the law of a confederal authority becomes valid in a state only if the state government endorses it. See, Karl W. Deutsch, *Politics and Government: How People Decide Their Fate* (Boston: Houghton Mifflin, 1974), pp. 211-212.)

administrations in Iraq. A murky text of the written constitution of Iraq seemed to have emerged, and was tinkered with until the very fortnight before the constitutional referendum. The text of the constitution makes various references to federalism, and defines some of the powers of the central and regional administration, yet leaves a number of above-mentioned characteristics in the dark, to which we turn now.

Criteria of Federalism and the Iraqi Constitution

First and foremost among them is the state of the bicameral legislature of the federal political system. Federalism requires a bicameral legislative system where the lower chamber is composed of popularly elected deputies, and in the upper/federal chamber the representatives of different regions represented to vie for the interests of their territories. The lower chamber should be composed of the representatives of the people, and thus its deputies need to be elected by means of an electoral system that applies proportional representation. The upper/federal chamber is designed to represent not the people, but regional territories, and thus it is usually designed to host equal number of representatives per region, or province. Federalism requires that both chambers to exercise genuine power, and thus, insinuates strong bicameralism.¹⁰ Sartori, who stresses this point, also admits that in a parliamentary regime federalism runs into severe problems and even risks chances of recurring paralysis, when two different parties or groups of parties control the two chambers.¹¹ When we examine the Iraqi constitution we observe that there is a bicameral legislature in a parliamentary system in the making, however, membership in the upper chamber, its powers and operating principles are far from being clear, (see article 63). Furthermore, such issues are not only postponed indefinitely, but the National Assembly (lower chamber) is entrusted with making the necessary decision (law) about the powers of the upper chamber (art. 63). Therefore, it is plausible to assume that the Iraqi federalism will work through a weak bicameral legislature, and in practice as a unicameral legislature for an indefinite period of time. Under those circumstances how the interests of various

10. Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes* (Washington Square, New York: New York University Press, 1997), p. 188.

11. *Ibid.*, pp. 188-189.

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regions can be protected against the encroachments of the majority and of central administration remains to be a mystery for the time being.

If such a unicameral design persists either in structure or in style of rule, another great problem will emerge over the distribution of national, (in the Iraqi case this means oil), wealth. The Constitution declares oil as the national wealth of Iraq (art.109). Its management is put under the authority of the federal government Iraq, which is to govern the oil wealth through an independent commission of the federal state (article 104). Under practical unicameralism such a government will be a government of the Shi'ite majority, which also controls the bulk of Iraqi oil production zones. A central administration that comes under the rule of the majority will not be trusted by those Sunni Arabs who live to the north, center, and west of the country, devoid of any oil wells and wealth.¹² A countervailing power of the federal (upper) chamber in Iraq would have provided the Sunni Arabs with some leverage within the democratic federalism, and could have provided them with some veto power over the policies and measures they perceive to be less than fair. Now that the Iraqi constitution fails to provide them with any apparent institutional resistance capability within the legislative system, some of the potential attractiveness of the Constitution for the Sunni Arabs seems to have diminished. Finally, it seems as if the status of Kirkuk is postponed to the end of 2007.¹³ Therefore, the issue of the northern oil wealth in Kirkuk is neither solved, nor even address at any length in the constitution (article 110). However, with the hindsight of the Kurdish demands for the possession of Kirkuk, it is not too difficult to imagine that the Sunni Arabs feel doubly excluded from oil wealth of the country.

Secondly, although Iraq has a written constitution, issues concerning the division of power between the center and the periphery (regions), Iraqi "identity, character and structure of state and regime, the distribution of resources, and Iraq's political orientation"¹⁴ seem to be in a state of limbo. The lack of clarity on all those matters tends to belittle the virtue of having a written constitution for the federal system of Iraq. The main function of a

12. Ofra Bengio, "A Constitution for Iraq: Does it matter?," p. 2 and Ibrahim al-Marashi, "Iraqi Constitutional Debate," *MERIA*, Vol. 9, No. 3 (September 2005), p. 16.

13. Ibrahim al-Marashi, "Iraqi Constitutional Debate," p.18.

14. Ofra Bengio, "A Constitution for Iraq: Does it matter?," p. 2.

written constitution for a federal system seems to be its contribution to the clarity in the management of national resources and wealth of the country through revenue sharing ideas and schemes, and the precision with which spheres of authority of the federal and regional governments are defined. It is exactly on those matters that the Iraqi constitution seems to lack lucidity. There is no spelling out of the formula for revenue sharing, or how, for example, the oil resources of Kirkuk are to be distributed across all Iraqi communities and regions. The Shi'a in the south seem to be insisting on oil shares in strict correspondence to the sizes of each community in Iraq, with the Shi'ite Arabs getting the lion's share of 60 percent, which the Sunni Arabs find unacceptable.¹⁵

Thirdly, the Iraqi constitution contains three articles (articles 90 - 92) defining the status of a federal supreme court, which shall oversee constitutional matters (art. 91). Article 90 states that the Federal Supreme Court (FSC) will enjoy administrative and financial autonomy yet consists of a few (undetermined number of) jurors, and experts of Islamic law. It will be up to the two thirds of the members of the National Assembly to determine how many secular and Islamic judges serve on the bench of the FSC (art. 90.2). The Constitution is relatively elaborate on the duties of the FSC, whereby article 91 enumerates eight functions that are expected of the Court. Finally, article 92 states that the decisions of the FSC are to be binding for all branches of government, and they will be final. The reading of article 91.4 and 5 gives the impression that the FSC is endowed with authority to resolve conflicts between the regions and the federal state of Iraq, and thus protect federalism in the country.

It is not too difficult to imagine that the FSC, with as many experts of Islamic law as the National Assembly sees fit, risks becoming a higher authority on Islamic law, and thus promote, protect, and develop an Islamic state, rather than a federal state in Iraq.¹⁶ It is also uncertain whether the Islamic experts of the FSC apply Shi'a or Sunni Islamic principles in their jurisdiction. It is also unknown what will happen if the Islamic experts fail to agree upon which of the different traditions of Islamic law they will base their decision on. A conflict among the experts of the Supreme Court seems

15. Ibrahim al-Marashi, "Iraqi Constitutional Debate," p.16-17.

16. *Ibid.*, p. 19.

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to be irreconcilable within the current realm of the Iraqi constitution. If the judges of the Court fall apart or manage to develop a state of paralysis over a relatively large set of decisions, it is not at all clear from the Constitution what sort of authority is capable of sorting out such a mess. It is also plausible to assume that over such sensitive areas as women's rights the secular and Islamic experts of the Court can easily disagree, and the principles of democracy and Islamic law can be at odds. No acceptable or popular decision may emerge from the Federal Supreme Court under those circumstances. Consequently, the politicians and intellectuals can start calling the very authority and legitimacy of the Court into question. It can easily be mired in heated political debate and be accordingly perceived as just another party to political conflict in the country, rather than a Supreme arbiter in resolving conflict. Under the circumstances, the Federal Supreme Court will be contributing to the very intensification of political conflict, instead of its solution. Eventually, it may lose any chance of protecting and maintaining the federal and democratic nature of the state in Iraq.

The fourth and the final criterion of federalism also seems to be addressed in the Constitution. The Iraqi constitution incorporates references to division of power between the federal and regional governments. Article 112 of the Constitution clearly states that all of those functions not specified in the Constitution are automatically assigned to the regions and provinces. Thus, all power belongs to the regions and provinces, and only as much power as they consider appropriate are to be devolved from the regions to the federal government of Iraq. That is a very essential characteristic of federalism. Article 108 goes on to elaborate nine functions that belong to the federal government, and articles 109 and 110 also stress the need and principle of revenue sharing for the oil wealth of the country. However, article 111 introduces a domain of uncertainty, which can create a serious realm of conflict between the federal and regional government. Customs, development, electricity distribution, etc. are suggested as areas of shared responsibility for the federal and regional governments of Iraq. However, it is quite uncertain how and how much coordination and cooperation will be at hand between the different echelons of government of Iraq on those issues in the constitution. Clarity on such matters is definitely left for the domain and practice of policy implementation and legislation. Many battles are to be fought over such issues between the central and regional governments in

Iraq, and the demarcating principles and traditions will emerge over time. The difficulty is the risk of ripping the country apart in an incongruent federal system,¹⁷ while attempting to establish the lines of demarcation between center and the regional and provincial governments.

Identity, Community and Federalism in Iraq

The Iraqi constitution exhibits the characteristics of an uneasy compromise between opposing parties of a dire conflict. Some parts of Constitution sound as if it is a text that promotes confederacy, while others seem to indicate strong federalism. Certain regions and areas, such as Kirkuk in the north, seem to be getting special treatment, to the detriment of others. There seems to be very little agreement on what is collectively shared in Iraq. There is some stress on Islam, some on Arab solidarity, some on multiplicity of ethnic identities, and some on secularism.¹⁸ One does not get an impression that it is at all clear what “being an Iraqi citizen” means to all Iraqis. Indeed, the debates over the defining concepts of Iraqi identity exemplified the discord and confusion over what Iraq consisted of. Until early August the negotiating parties could not even agree upon the name of the country. Some wanted to call the country “the Islamic Republic of Iraq”, some desired to call it “the Arab Republic of Iraq”, and yet others preferred “the Democratic Republic of Iraq”. Finally, the National Assembly seemed to have settled for “Republic of Iraq” (article 1). References to Arab solidarity during the debates seemed to have led to rebuttals and objections from mainly the Kurds and other non-Arab communities. Similar references to Shi'a Islam had been received with consternation by the Sunni Arabs, as a sign of Shi'ite proclivity to gang up with Iran, and thus split the country into two or more states.

17. For a comprehensive treatment of congruent versus incongruent federations see Arendt Lijphart, *Democracies* (New Haven and London: Yale University Press, 1984), 179 -182.

18. One recent analysis identifies the key issues that the new constitution fails to treat as follows: “i. defining federalism, the relative power of the federal regions versus the national government, and demarcating any ethnic and sectarian zones with “fracture” lines in areas like Kirkuk, Basra, Mosul, etc.; ii. allocating oil revenues for existing and future fields, and deciding on the future of oil development; iii. deciding who has the power to tax; iv. defining the power of the national government relative to provincial and local government; v. Deciding on the role of religion in the state; vi. deciding on the relative balance of religious and secular law and the power of national versus local courts and law enforcement; vii. deciding who really has power over the police, whether the security forces will become nation, and whether the prohibition of militias will actually be enforced; viii. interpreting the meaning of the human rights provisions of the constitution.” Antony H. Cordesman, “The Meaning of the Referendum on the Iraqi Constitution,” *CSIS*, October 17, 2005, p. 2 available at <http://www.csis.org/press/wf_2005_1017.pdf>.

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The insistence of the Kurds that Kirkuk is a Kurdish town, and similar stress on autonomy of the Kurdish areas to an extent of being virtually independent, had also caused doubt and deep suspicions among the Sunni Arabs of the true feelings of the Kurds of Iraq. The Sunni Arabs seemed to have gotten the impression that Kurds want to grab Kirkuk and split from the Iraqi union. In the mayhem the very interface between the citizens of Iraq and their state seemed to have grown increasingly hazy. The very meaning of being an Iraqi citizen began to appear rather hollow.

In the meantime, the Iraqi constitution seemed to stress territorial federalism. Such an emphasis seems to have precipitated the emergence of a strategy of land grabbing. The Kurds in the north and the Shi'a in the south began to unfold plans to control larger swaths of Iraqi territory as their own. However, such a proclivity created new communal zones in which multiple communities reside for the time being. However, we know from the federal history of other states, such as the former Soviet Union that even the administrative boundaries of regions can gain national vehemence and sensibility over time. A border that was drawn between Georgia and Armenia, and Tajikistan and Uzbekistan, which carries no historical or cultural relevance, began to be internalized as a line of demarcation for the homeland of an ethnic community by the 1980s. People began to fight over them and sacrifice their lives. Interestingly enough, demographic pictures of those regions began to change over time to accommodate more and more of the dominant cultural community residing in it. Cultural and demographic homogeneity of the regions increased with leaps and bounds over time. By the time the Soviet Union dissolved, Georgians had become the dominant community in Georgia, and Armenians in Armenia, so on and so forth.¹⁹ There is little reason not to assume something similar seems to have begun to unfold in Iraq. The northern regions are already becoming more densely populated by the Kurds and the southern regions by the Shi'ite Arabs. Over the years these regions risk becoming safe havens for only some religious or ethnic communities but not others. Such a development will undermine the development of an Iraq of multiple ethnic and religious communities living in a state of pluralism and democracy. It will create more or less three

19. See Stephen F. Jones, "Georgia: the Trauma of Statehood," in Ian Bremmer and Ray Taras (eds.) *New States, New Politics: Building the Post-Soviet Nations* (Cambridge, England: Cambridge University Press, 1997), p. 507; and Nora Dudwick, "Armenia: Paradise Regained or Lost?," in Bremmer and Taras (eds.) *New States, New Politics*, p. 478.

distinctly separate and internally homogeneous regions with very little commonalities. Then, the ground will be set for a centrifugal drive to separate Iraq into three different states or Kurds in the north, Shi'ite Arabs in the south, and the Sunni Arabs in the middle. What seems to await Iraq is a form of incongruent federalism based upon territory. Such an environment would be most fruitful for the eruption of some kind of civil war, which may even kindle new conflicts between the neighbors of Iraq and even precipitate regional wars between Arabs, Iranians, and Turks.

Another model of federal constitution is one that espouses corporate federalism,²⁰ rather than territorial federalism for Iraq, more in line with the Estonian federalism of the 1920s, Cyprus of the 1960s, and the current Belgium would probably have been less centrifugal for Iraq. Under those circumstances, cultural rights would have emphasized individual rights, and not communal rights and territorial claims of communities. The "... key idea was that each individual should be able to declare to which nationality he or she wished to belong, and that these nationalities should then become autonomous non-territorial cultural entities".²¹ Under those circumstances, a citizen of Iraq would have asked the authorities to recognize whatever religious or ethnic affiliation s/he would have preferred, irrespective of where s/he lived. Thus, individuals would have requested certain educational, health, cultural, theological services, and guidance without having to reside with a certain community and in a certain territory, but wherever one chose to live in the country. The demographic composition of the regions would have been less pronounced and the cultural plurality of Iraq could have enjoyed a higher chance of being preserved. However, such corporate federalism seems not to have been considered by the Iraqi political elite for the time being. Therefore, for the time being Iraq will be set to implement territorial federalism, and experience all the risks and opportunities, including civil war, that such a model presents.

20. Lijphart, *Patterns of Democracy*, pp. 34-4.

21. Lijphart, *Democracies*, p. 183.

Conclusion

The Iraqi constitution of 2005 seems to have erected a highly rudimentary infrastructure for a federal democratic system in Iraq. Iraqi constitution seems to refer to democracy, Islamic law and principles as a source for legislation, secularism, and regional government as the fount of all legitimate political authority, as if those characteristics are fully compatible and reconcilable. Under the circumstances any contradiction between Islamic principles and human rights cannot be resolved through secular procedures. Women can now be strictly restricted in Iraq on the grounds of religious law, which not only risks democratic rights of women, but also secularism.

Iraqi federalism also possesses some deficiencies. Although there is a written constitution, it is full of blurry and hazy procedures, categories, which beg definition and elaboration, and undetermined federal structures, such as the upper chamber of the Iraqi legislature.

Secondly, the constitution stipulates a bicameral legislature, in practice until the National Assembly (lower chamber) agrees upon the details it is unknown how the upper chamber is to be constructed and run. Thus, in practice the Iraqi legislature will function as a unicameral structure, which is a serious deficiency for a federal system.

Thirdly, the division of power between the center and the regions leaves many areas yet undefined and poorly demarcated. In practice much haggling is likely to occur between the center and the regions. The basic structures and principles of coordination and cooperation will probably be determined in practice, while electrical power is generated and distributed, and national revenue accrued from oil is shared. In due course, Iraq can easily continue to fail to produce electricity if such cooperation and coordination fail. A similar lack of capability in revenue sharing will easily trigger the uprisings of those who believe that they acquire less than fair share of the national wealth, and thus risk civil strife or even civil war. The lack of agreement over the status of Kirkuk bodes further ill under the circumstances.

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Now the onus is on the government of Iraq, and most specifically on the Iraqi National Assembly to make this “half-baked” federal constitution, which is more of an artifact of discord between the Sunni Arabs and other religious and ethnic communities of Iraq, to work. What could not be compromised in the writing of the constitution may miraculously work in practice. However, such an outcome will be less of a success of the federal Constitution and more of politics and sheer luck.