

# THE POLITICAL PSYCHOLOGY OF CONSTITUTION-MAKING

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## *I. Introduction*

The topic of this paper – the psychology of constitution making – includes all stages of a constituent process: the convening of a constituent assembly, the selection of delegates, or *framers*, the drafting and adoption of a constitution by the assembly, and sometimes the ratification by the people, an executive, or an elected body. To explain the outcome of this process - or, more modestly, to identify explanatory variables - is a difficult task. Making a constitution involves more than politics as usual, and the explanation of constitution making differs in many respects from the explanation of ordinary legislation. In constitution making, everything that happens once the constituent body meets is endogenous. Although upstream actors – conveners and selectors - may try to impose their procedural or substantive preferences, they rarely succeed. Legislators are constrained by the constitution, which is obviously not the case of those who make it. Also, the external circumstances of constitution making tend to be more dramatic, as will be abundantly illustrated below.

In this article I focus on the motivations (desires, preferences) of the framers and, more briefly, on their beliefs. To explain individual decisions, the desire-belief model is usually adequate, although many issues remain controversial. The case of collective decision-making is vastly more complex. Each framer can be assumed to have fundamental preferences over *ends* and beliefs about the appropriate *means* of realizing them. The ends jointly with the beliefs about the means induce a *policy preference*. The step from the many individual preferences and beliefs to a collective decision is much more complex, however, than the step from an individual's preferences and beliefs to his or her choice. Because of the paradoxes of aggregation discovered by Condorcet in 1785 and by Poisson in 1837, collective preferences and beliefs may not be well defined, and the collective decision may depend more on agenda control than on what framers want and think. More important, perhaps, the aggregation procedure may create an incentive for framers to misrepresent their preferences

and beliefs, creating a risk that the decision deviates from the one that would have been taken by framers speaking and voting sincerely.

I shall not pursue these issues, which I have discussed elsewhere.<sup>1</sup> My purpose is to analyze some mechanisms of *individual* preference formation and belief formation in constituent assemblies, without proposing an account of how these individual attitudes mesh to bring about a collective decision. It seems likely that for given rules, whether endogenous or exogenous, processes of aggregation are broadly similar in constituent bodies and in ordinary legislatures. There are some differences, notably that vote trading is harder to enforce and probably occurs less frequently in constituent assemblies, notably in “pure” assemblies which meet only for the purpose of writing a constitution and then disband.<sup>2</sup> At the Federal Convention, one component of the “Great Compromise” broke down when the framers reneged on the exclusive right of the lower house to issue money bills that had been worked out in committee.<sup>3</sup> In the West German assembly of 1948-49, “the Minister President of Bavaria [...] persuaded the SPD to vote for [the institution of] a Bundesrat in exchange for a momentary advantage and concessions which were subsequently all but abandoned”.<sup>4</sup> Yet I believe that the micro-mechanisms of constitution making and legislation differ much more than the corresponding macro-mechanisms. Be this as it may, my focus is on the former.

I shall not dwell on the nature of constitutions, but assume familiarity with their basic features: allocation of apportionment, eligibility, and suffrage; sometimes but not always an electoral law; the separation of powers and mechanisms of checks and balance; a bill of rights or at least an enumeration of rights; and finally rules for amending all the preceding elements. In federal systems, the allocation of powers and rights between the central government and the state governments, as well as the system of transfers among the states, are key issues.

The empirical basis of the paper is limited to Western countries. I shall mainly refer to the Federal Convention (1787), six French constituent assemblies (1789, 1795, 1814, 1848, 1852, 1946), three German assemblies (1848, 1919, 1949), three Nordic assemblies (Norway 1814, Sweden 1969/1974, Iceland 2010), six post-Communist assemblies (Poland 1989, Hungary 1989-1990, Bulgaria 1991, Romania 1991, the Czech Republic 1992, Slovakia

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<sup>1</sup> Elster (2013), Ch. I.

<sup>2</sup> In mixed constituent-legislative assemblies, where members can expect to cooperate at the post-constitutional stage, tit-for-tat reasoning may sustain vote trading.

<sup>3</sup> *Ibid.*, p. 254, note 48.

<sup>4</sup> Merkl (1963), p. 69.

1992), two Canadian constitution-making efforts (1990, 1992), and sundry others (Poland 1921, Spain 1931). In addition, I include proto- or quasi-constituent assemblies, such as the Continental Congress, the Round Table Talks in Eastern Europe<sup>5</sup> and the Consultative Constitutional Committee that, in spite of its lack of formal powers of decision, had a non-negligible influence on the 1958 French Constitution.<sup>6</sup> Occasionally, I shall also refer to American state constitutional conventions.

Drawing on the French moralists, I propose a trichotomy of *reason*, *interest*, and *passion* as the main motivational types<sup>7</sup>, and provide examples of their causal efficacy in the constitution-making process. With some exceptions<sup>8</sup>, constitutional scholars have focused on the first two motivations, frequently spelled out as “ideas versus interests”.<sup>9</sup> Because passion – emotion – has been more neglected - I consider this motivation at greater length than the other two. I shall also, more briefly, consider *prejudice* - a motivation that the moralists neglected. Next I consider some aspects of belief formation in the constituent process. A brief conclusion follows.

## *II. Reason and constitution making*

Reason can be understood as the rational pursuit of the long-term public interest.<sup>10</sup> Madison embraced this definition, when he referred to “the mild voice of reason, pleading the cause of an enlarged [i.e. not selfish] and permanent [i.e. not shortsighted] interest” (*Federalist* no. 42). This statement is too starkly consequentialist, however. It should be supplemented by another statement of Madison’s, referring to “the rights of another” and “the good of the whole” as the two values (*Federalist* no. 10) that need to be protected from

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<sup>5</sup> Elster, ed. (1996).

<sup>6</sup> Volumes I-III of DPS (1988) offer an unusually rich verbatim source of constitutional debates, at several institutional levels. The debates were not, however, shrouded in the secrecy that makes Madison’s notes from the Federal Convention (Farrand 1966, vols. I and II), published several decades later, so invaluable.

<sup>7</sup> Elster (1999), Ch. II.2, Ch. V.

<sup>8</sup> Such as Rubinfeld (2001) and Sajó (2010).

<sup>9</sup> Rakove (1987), Jillson (1988). Although White (1987), Chapter 7-8 adopts the trichotomy of the French moralists in his study of the American constitution, he is exclusively concerned with the way the framers expected those motives to affect the *future* agents whose behavior the constitution should regulate. He did not try to analyze the motives of the framers themselves.

<sup>10</sup> In Elster (2013), Chapter 1.VII and *passim* I propose a procedural and purely negative conception of reason, as the absence of distorting influences – self-interest, passion, prejudice and cognitive bias – on the decision-makers. Here, I adopt a substantive and positive definition because it is probably closer to how decision-makers think about their task.

interest, and presumably from passion too. Reason, then, has both a consequentialist and a non-consequentialist side. In constitution making, the first aspect is paramount in designing the machinery of government, whereas the second is central in elaborating the bill of rights.<sup>11</sup> In its consequentialist form, reason also requires cognitive *rationality*, that is, a well-grounded belief about the *means* by which the long-term public interest can be realized.<sup>12</sup>

Often, agents have very different conceptions of what reason requires – different ends as well as different beliefs about means. While some differences may be due to some agents holding irrational beliefs, that is by no means always the explanation. Framers may, for instance, attach different weights to liberty, equality, and fraternity, or to justice and efficiency. For some, the constitution should first and foremost be a bulwark against tyranny; for others, against anarchy. Some view the constitution as mainly a constraint on the pursuit of self-interest by future political agents, while others see it as tool for restraining their passions. When writing a constitution for a federally organized country, framers may disagree over the degree of centralization of power. When engineering the electoral system, some may be more concerned with achieving representativeness, others with ensuring governability. These examples mostly involve disagreements over ends. To cite one example of disagreement over means, among those who want the constitution to ensure governability some may argue that proportional elections with a high threshold is preferable, others that a majoritarian system is better. For another, we may consider the debate at the Federal Convention over whether the Congressional majority to overturn a presidential veto should be 2/3 or 3/4. Generally speaking, none of these differences can be ascribed to irrational beliefs.

What *all* conceptions of reason have in common is the striving for *impartiality*. Constitutions should be designed neither to *favor the interests* nor *reflect the prejudices* of any particular group, including the framers themselves.<sup>13</sup> Reflecting a maxim by La Bruyère, "To think only of oneself and of the present time is a source of error in politics", framers should strive for impartiality over time as well as across persons. Since constitutions are intended to endure for the indefinite future, they should not reflect the interests or values of the framing generation only. This statement obviously implies that the founding generation

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<sup>11</sup> This is only a rough correlation. The machinery of government is to some extent constrained by civil and political rights. Also, since *implementing* rights can be costly (Holmes and Sunstein 2000), they are to some extent constrained by consequentialist considerations.

<sup>12</sup> See Elster (2009a) for the relation between reason and rationality.

<sup>13</sup> They may favor group interests indirectly, by "disparate impact" rather than by "disparate intent". In that case, amending the constitution can be a remedy.

should not enable itself to deplete the natural resources of the nation. Another implication is less obvious, but more relevant: framers should allow for relatively easy amendment of the constitution.

To what extent is actual constitution making governed by reason thus understood? One answer is that framers are motivated by “ideas” if and only if “interest” has no purchase on the issue at hand.<sup>14</sup> The “if” part of this biconditional would be invalidated by cases in which interest has no purchase, but passion rather than reason dictates the choices of the framers. I offer some examples in the later discussion of the passions. The “if only” part would be invalidated by cases in which interest does have a purchase, but the choices are nevertheless dictated by reason. Framers do, in fact, sometimes disregard their particular interests in favor of the common good or general interest, as the following examples will suggest.

In the debates on the Presidency at the Federal Convention, Madison at one point considered the option of direct election of the president by the people, which “with all its imperfections he liked . . . best,” and went on to consider and answer some objections to this idea. Although direct election would be disadvantageous to the South since slaves would not count, he thought that “local considerations must give way to the general interest. As an individual from the [southern] states he was willing to make the sacrifice.”<sup>15</sup> In 1919, the German Social Democrats knowingly disregarded their electoral interests when they wrote female suffrage into the Weimar constitution.<sup>16</sup> In the Constitutional Committee of the Polish parliament after 1989, “some groups expressed [a preference for proportional representation] despite a potential party interest to the contrary.”<sup>17</sup> In 1990, Vaclav Havel imposed a similarly counterinterested proportional system, to allow a place for his former Communist enemies in the constituent assembly.<sup>18</sup> One of Havel’s close associates told me in 1993 that “this decision will be seen either as the glory or the weakness of the November [1989] revolution: we were winners that accepted a degree of self-limitation.”

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<sup>14</sup> This view is explicitly articulated for the Federal Convention by Jilson (1988), pp. 14-17. I suspect but cannot demonstrate that it is a tacit premise for many other discussions.

<sup>15</sup> Farrand (1966), vol. II, p. 111.

<sup>16</sup> Evans (1980), p. 550.

<sup>17</sup> Rapaczynski (1991), p. 617. He explains this fact by a general preference for ideology over Realpolitik among the Polish framers.

<sup>18</sup> Elster (1995).

Two complications arise, however. First, a choice or a position may be *dictated by reason*, yet *correspond to the interest* of the relevant agents. The views of the suffragettes provide an example. In their case, nobody to my knowledge has claimed that their demand for female suffrage could be reduced to interest group politics. Other cases can be more ambiguous. In Norway, there is a consensus that sparsely populated peripheral districts should have a more-than-proportional number of seats in parliament. Although this apportionment is definitely in the interest of these districts, allowing them to build more roads and bridges than they could otherwise do, the general support for the policy is due to a belief that it is also in the *national* interest, broadly construed. In Iceland, by contrast, the (much greater) overrepresentation of the rural districts in parliament is widely seen as unacceptable and interest-driven, as reflected in the fact that the parliament rejected the proposal for a new constitution that would remove this imbalance.

Second, the choice may be *dictated by interest* yet *correspond to (some conception of) reason*.<sup>19</sup> As I have argued, the general idea of reason as impartiality can be spelled out in many different ways. This fact creates an *opportunity* for self-interested framers to present their proposals as motivated by reason. They also have a *motivation* to misrepresent their real motives, because of the opprobrium that attaches to brute arguments from self-interest. Thus large parties may be motivated to propose a majoritarian electoral system because it's good for large parties, but argue in public that it should be adopted because it promotes governability. Small parties may be motivated to propose a proportional system because it's good for small parties, but argue in public that it should be adopted because it promotes representativeness. Innumerable other examples could be cited to illustrate the basic fact of politics that agents, including framers, tend to present interest-driven proposals as motivated by the public good.

There are four checks on this tendency. First, some agents are genuinely motivated by the common good, as they understand it. Second, even those who are not so motivated cannot adopt disinterested arguments in a completely opportunistic way. Once they have made a principled argument in one context, they are stuck with it on future occasions as well, even when it is contrary to their interest (a "consistency constraint"). Third, principled arguments that fit the agent's interest *too* well may not be credible. Rather than proposing a measure tailor-made to the interest of her group, an agent may substitute a measure that benefits a few

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<sup>19</sup> For an elaboration of the ideas in the following paragraphs, see Chapter V of Elster (1999), further developed in Chapter II of Elster (2103) and in Chapter 24 of Elster (forthcoming).

members of other groups and most but not all members of her own (an “imperfection constraint”). Finally, for some interest-driven proposals there may not exist *any* public-good argument, not even an imperfect one. Red-haired individuals would be happy if the constitution accorded them special pension rights, but it is hard to imagine a facially impartial argument for this claim.<sup>20</sup>

Hence the causal efficacy of reason can be direct or indirect, depending on whether it serves as a motivation or as a constraint. The German, Polish, and Czechoslovak examples illustrate the direct effect. For an example of the indirect effect, consider the use of literacy as a criterion for the right to vote and to be elected. Many framers on various occasions have wanted to impose economic qualifications on suffrage and eligibility, yet been reluctant to propose a system that would blatantly be in the interest of the wealthy. Use of the literacy criterion makes the proposal acceptable by diluting it, since, despite an overall correlation, some rich individuals are illiterate and some literate individuals are not rich.

### *III. Interest and constitution making*

In the discussion so far I have relied on an intuitive notion of interest. It is time to be slightly more precise. The idea will be understood as the pursuit of advantage at a scale smaller than that of the relevant collectivity as a whole, and further subdivided into personal interest, group interest, and institutional interest. By “advantage” I mean ultimately personal welfare, but also the means to achieve it, notably money and power. Now, strictly speaking, since groups are not actors, they cannot pursue anything. Yet group *members* may for reasons of their own seek to promote the advantage of the larger entity to which they belong. If a framer expects to stand for office in the first ordinary legislature, he has an interest in an electoral system that will work to the benefit of his political party. This indirect effect of personal interest is distinct from direct effects, such as the interest of the same framer in a system of government that favors the legislature at the expense of the executive. He has an interest in the institution to which he aspires to belong being a powerful one, even though the public interest may be better served by a more even-handed arrangement. However, as we

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<sup>20</sup> Strictly speaking, this obstacle could be overcome by stating a number of facially impartial criteria that, as it happens, are jointly satisfied by all red-haired individuals and only by them. I cite a famous American case of this kind in Elster (1999), p. 379. I do not know, however, of any examples from the context of constitution making.

shall see later, he may also have a self-aggrandizing tendency to believe that an institution to which he belongs serves the public interest.

By and large, *group interest*, notably party interest and the interest of the states in federal systems, is more important than the direct personal interest of the framers. Parties want to win elections, and states to obtain a large share of the national pie. Constitutions can affect their ability to achieve these aims. I have already noted how large and small parties may have different interests in designing the electoral system. The balance of these interests at the constitution making level will often shape the system that is adopted. Similarly, if the constitution of a federal system shapes the system of financial transfers among the states, it will induce different interests in wealthy and poor states. Some federal constitutions (Germany, Canada, and India, among others) impose equalizing transfers, while others do not. I have not been able to verify whether the federal constitutions that lack equalizing clauses were shaped by the stronger bargaining power of the rich states.<sup>21</sup>

*Institutional interest*, that is, the interests of the members of an institution that participates in the constitution making process, can also serve as input to the process. I shall give four examples, all related to the institutional interest of an upper house in the legislature. After Napoleon's defeat in 1814, when the allies debated the nature of the successor regime, Talleyrand persuaded Napoleon's senate to express a wish for the return of the Bourbons, since the allies would not accept any solution that could not be presented as desired by the French nation. The senate used the bargaining power conferred on them by this situation to offer, on April 6, a constitutional draft that, among other things, stipulated strong political powers and extravagant economic privileges for the existing senators. It turned out that the senators had overreached themselves. Their self-serving draft created so much public indignation that Louis XVIII was able to defeat their ambitions.<sup>22</sup> Regarding the Consultative Constitutional Committee that debated the drafts of the 1958 French constitution, an observer commented that "it would not be wrong to say that the members of the committee who were also senators thought of themselves as essentially representing the Senate, whereas the members who were also deputies [in the lower house] tended to see themselves as

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<sup>21</sup> Neither of two comprehensive comparative works on fiscal federalism (Shah 2007, Boadway and Shah 2009) raises this issue.

<sup>22</sup> For details and references, see Elster (2004), pp. 25-27.



representing their respective parties”.<sup>23</sup> In 1992, the Czech senators in the Czechoslovak parliament made a successful bargain. As a condition for stepping down when the federation broke up, they demanded and obtained the creation of an upper house in the newly created Czech Republic, whose seats would be filled by themselves.<sup>24</sup> Finally, institutional interest formed an obstacle, which was eventually overcome, to the abolition in 1969 of the bicameral system in Sweden. Regardless of party affiliation, members of the to-be-abolished upper house tended to be against its abolition.<sup>25</sup>

To show how *personal interest* can shape constitution making, I shall first cite two examples from the making of the post-1989 constitutions in Eastern Europe. They spring from the interaction between constitution making and measures of transitional justice, notably punishment of leaders of the earlier regime and confiscation of their ill-gotten gains. During the Round Table Talks in Hungary in 1989, Communist leaders insisted on the creation of a strong Constitutional Court as a back-up protection in case they did not win a majority in the first free elections.<sup>26</sup> They predicted, correctly as it turned out, that if they lost the elections, parliament would enact strict retributive legislation, but that the Court would strike it down. Art. 41.7 of the Romanian constitution says that “Property is presumed to have been acquired legally”, which is an unusual sort of provision. To make sense of it, we may look to a decision by the Czechoslovak government on 26 September 1991, that future bidders for state-owned businesses would have to prove where their money came from. The measure was intended to block the use of “dirty money” that had been illegally accumulated by members of the former nomenklatura. The law created a presumption of guilt: the government did not have to show that the funds had an illegal pedigree. Instead, citizens had to prove that their money was clean. It is likely that the Romanian clause was intended to preempt such measures. In these cases, Communist or ex-Communist framers acted on their direct personal interest in avoiding prosecution or confiscation.

The role of personal financial interest in the making of the American constitution has been the object of much discussion. As holders of state or federal war bonds and speculators in the Western lands, some of the framers had clear interests in specific institutional

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<sup>23</sup> François Goguel in DSP vol. II, p. 676. Gicquel (1988), p. 783 cites the discredit into which the National Assembly had fallen as an explanation of the lack of influence of the deputies. As noted above, if the convener is part of a flawed regime that has to be reformed, why should the assembly respect its instructions?

<sup>24</sup> Pehe (1993).

<sup>25</sup> Stjernquist (1996), p. 290.

<sup>26</sup> Schiemann (2001), p. 29.

arrangements, such as the assumption of the war debts by the federal government and the terms on which future states would be admitted to the Union. A substantial number of delegates who held either federal or state debts voted against their interest regarding their assumption, while others voted for proposals tailor-made to their interests.<sup>27</sup> (It may be worth while noting that the interpretation of Charles Beard’s “economic interpretation” of the constitution as a claim that the framers were motivated by their economic interest is manifestly false.<sup>28</sup>) Overall, the interests of the states counted much more heavily than the personal interests of the framers. The interests of the slaveholder states were also to some extent promulgated by delegates from non-slaveholding states, who feared that the constitution might fail to be ratified in the required number of states if it were too hostile to slavery. From an impartial point of view, a constitution flawed by interest may be better than no constitution.

#### *IV. Passion and constitution making*

I shall understand passion as mainly including emotions such as anger, fear, enthusiasm and pridefulness.<sup>29</sup> Except for the last, these emotions are episodic, usually triggered by events such as war, revolution, or a financial crisis. In this respect they differ from prejudices (racism, xenophobia, misogyny), which are permanent features of an agent.

I shall defend and illustrate six factual and causal propositions about the role of passion in constitution making.

- (1) Constitutions tend to be made in times of crisis
- (2) Crises tend to go together with strong passions
- (3) Strong passions tend to undermine rational belief formation
- (4) Only strong passions can generate the political will needed for constitution making
- (5) Therefore, constitution making tends to be flawed
- (6) Therefore, constitutions tend to be flawed.

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<sup>27</sup> McDonald (1992), p. 106.

<sup>28</sup> *Ibid.*, p. 12-13; Elster (2013), p. 225-26.

<sup>29</sup> Other “hot” states, such as intoxication, may also be at work. It has been claimed, for instance, that the decrees adopted by the French constituent assembly on August 4 1789 were due, in part, to the fact that many framers were not only “drunk with disinterestedness”, but also drunk in a more literal sense, after a good dinner (Kessel 1969, p. 193).

Propositions (1) – (5) express strong tendencies, or mechanisms.<sup>30</sup> They are not universally true, but exceptions are few. Proposition (6) expresses a weaker tendency.

*Proposition (1): Constitutions tend to be made in times of crisis.* Let me begin by citing an editorial, “The fuse under the Fifth Republic”, in the *Financial Times* of August 16, 2014:

France’s national crisis expresses itself in multiple ways. It is about poor economic growth, rising public debt and high unemployment. It is about the smouldering anger of France’s ex-colonial minorities. It is about discredited political parties: the left trapped in anti-capitalist platitudes that its reformist wing is unable to squash, the right overwhelmed by scandals and factional disputes. More and more, however, France’s crisis is about the presidential system of government and the Fifth Republic itself. [...]

The notion of a Sixth Republic, less presidential in nature, was a theme in the 2007 campaign of Ségolène Royal, the Socialist candidate. [...] She lost, but the idea remains alive. True, fundamental constitutional change tends not to occur smoothly in France. Each of the earlier four French republics expired – in 1804, 1851, 1940 and 1958 – in a coup or a war. But the fuses under the Fifth Republic’s presidential system are burning. Politicians must waste no more time before giving new life to French democracy.

One can restate these facts from the perspective of the birth rather than the demise of the republics. The first Republic was established in August 1793, in the context of war and internal massacres; the second in 1848, as the result of revolution; the third in 1871, in the aftermath of the Franco-Prussian war; the fourth in 1946, after the defeat of the Vichy regime; and the fifth in 1958, under the pressure from generals in Algeria.

The French historical record also includes other constitutions that were made in times of crisis. The constitution of 1791 was the outcome of an acute general financial crisis, as well as violence in Paris and in the countryside; that of 1795 marked the end of the Terror; those of 1799, 1802 and 1804 represented successive stages in Napoleon’s ascent to absolute power; the Charters of 1814 and 1815 marked the restoration of the monarchy; the Charter of 1830 came about through a revolution; and that of 1852 by a coup d’état. Compared to these epochal moments, today’s French crisis does not seem very deep, which is not to exclude

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<sup>30</sup> Elster (1999), Ch. 1.

that things could get so bad that a movement for radical constitutional change becomes irresistible.

Empirically, the link between crisis and constitution making is shown in the table below:

		IS THERE A CRISIS?	
		YES	NO
IS THERE SUCCESSFUL CONSTITUTION MAKING?	YES	US 1787 France 1789 Many others	Sweden 1969/1974
	NO	Iceland 2010?	Canada 1990, 1992

The “many others” include virtually all the processes that I listed in the Introduction. The two Canadian failed attempts to write a constitution in the absence of a crisis also support Proposition (1). According to Peter Russell, “the present generation of Canadians will not try again to reach an accord on a broad package of constitutional changes designed to prevent a unity crisis. If in the near future Canada plunges once again into the constitutional maelstrom, it will be because there is *an actual, not an apprehended crisis* of national unity”.<sup>31</sup> The Icelandic case is not yet settled, but it seems that the popular outrage that was caused by the 2008 financial crisis and was strong enough to set the constituent process in motion, lost strength as the economy recovered. The Swedish reform of 1969/1974 provides a strong counterexample to Proposition (1). It has in fact been called “institutional change”

<sup>31</sup> Russell (1993), p. 190; my italics.

rather than “constitutional change” because of the routine manner in which was carried out.<sup>32</sup> There may be other such cases of constitution making “à froid”, but I do not know of any. Partial *amendments*, to be sure, are often adopted without any preceding crisis, but not wholly new constitutions.<sup>33</sup>

*Proposition (2): Crises tend to go together with strong passions.* In the crisis-generated constituent processes I have studied, the proposition seems to hold pretty universally. It may not, of course, apply to every single framer. In France in 1789, the cautious Breton Thouret tried in vain to stem the tide of enthusiasm on several occasions. In Norway in 1814, the members of the Union party kept a cool head and refused to embrace the exalted mood of the Independence party. (These were not parties in the modern sense, but fluid groupings.) The Independence party got its way.

*Fear*, a common emotion triggered in constitutional moments, can arise in several ways. In *revolutionary* constitution making, the leaders of the regime may use or threaten to use force against the opposition. In December 1989, the Bulgarian president Mladenov was caught on camera saying “Let the tanks come” when crowds outside Parliament protested against the delay in amending the article in the constitution that proclaimed the “leading role” of the Communist party. He had to step down. Two centuries earlier, Louis XVI tried, equally ineptly, to scare the French *constituants* by calling in soldiers from the provinces.<sup>34</sup> He managed only to anger the citizens of Paris, not to scare them.

In *counterrevolutionary* constitution making, rulers or elites fear the people rather than the other way around. In my opinion (a minority one), this fear explains both the decision to convene the Federal Convention and some of the decisions taken by that body.<sup>35</sup> Shays’ rebellion in particular scared the Eastern elites. In the famous “Tree of Liberty” letter to William Smith on November 13, 1787, Thomas Jefferson wrote that “Our Convention has been too much impressed by the insurrection of Massachusetts: and in the spur of the moment they are setting up a kite [a hawk] to keep the hen-yard in order. I hope in God this article will be rectified before the new constitution is accepted”. I do not know which article he had in mind. Various articles cite “rebellion” (Art. I.9), “domestic violence” (Art. IV.4), and

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<sup>32</sup> Immergut (2002), p. 243.

<sup>33</sup> To see the importance of the word “partial” is important, we may note that the post-Communist constitution in Hungary was adopted by a series of amendments to the existing Communist constitution that, taken together, left little more than the name of the country.

<sup>34</sup> For details and references see Elster (2013), p. 218.

<sup>35</sup> Elster (2012).

“insurrection” (Art. I.8). It is clear, however, that he thought the framers had adopted the article in question under the influence of a sudden panic, “in the spur of the moment”.

With important nuances, the Prussian constitution of 1850 and the French constitution of 1852 can be seen in this perspective. Both were imposed after a short period of democracy, marked by the institution of universal suffrage. Both inaugurated regimes that were more autocratic than the pre-democratic regimes had been. Measured on the dimension of popular participation in government, they represented two steps backward after the one step forward that both countries had taken in 1848. In one summary, “a decisive element in the success of revolution was ineffective crisis management and a loss of confidence on the part of political leaders. Collapse at the center demobilized both state agencies – bureaucracy and army – and social elites. Recovery [that is, counterrevolution] would be engendered by social fear.”<sup>36</sup>

Fear can also originate from other sources. Even though the French framers of 1789 stood up to Louis XVI, they were scared by the anti-seigneurial measures – looting of castles, burning of records, and in some cases killing of nobles – that took place in the French countryside over the summer of 1789. Their reaction to these events went from “fight” to “flee” in 24 hours. After an initial decision to crush the uprising, they virtually abolished feudalism overnight on August 4.<sup>37</sup> Subsequently, the important decisions by the constituent assembly to give the king a suspensive veto only and to reject bicameralism were caused, in part, by fear that the crowds in Paris might injure or kill those who voted against these popular measures.<sup>38</sup>

As a last example of how fear can trigger a process of constitution-making as well as shaping specific clauses in the constitution, we may consider the birth of the Fifth French Republic. Under the pressure of events in Algeria, the parliamentarians of the Fourth Republic granted (virtually) unconstrained constitution-making powers to de Gaulle on June 1, 1958. As he said later, in inimitable telescoping, “I had a problem of conscience. I could just let things take their course: the paratroopers in Paris, the parliamentarians in the Seine, the general strike, the government of the Americans: it was written on the wall. Finally a moment would have arrived when everybody would have come looking for de Gaulle, but at what price? Thus I decided to intervene in time to prevent the drama”.<sup>39</sup> It makes sense to

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<sup>36</sup> Price (2000),

<sup>37</sup> Kessel (1969); Elster (2007, 2011, 2012).

<sup>38</sup> Elster and Le Pillouer (forthcoming).

<sup>39</sup> Peyrefitte 1994, p. 262

assume that some parliamentarians feared for their lives and that their visceral fear affected their decision to abdicate from power. A crucial event that led credibility to their fear, beyond what mere rumors could do, was the landing on May 24 in Corsica of paratroopers from Algeria, who ruled over the island through a Committee of Public Safety. The parliamentarians authorized de Gaulle to create a constitution with a strong executive power, hoping that he would solve the Algerian problem and then, like Cincinnatus, retire to his homestead. Their first expectation was fulfilled, but not the second.

Very importantly, we have to note the semantic ambiguity of “fear”.<sup>40</sup> *Prudential fear*, as when we say “He took an umbrella because he feared it might rain”, is simply a belief-desire complex. No emotion is involved. *Visceral fear*, as when we say “He ran away from the snake on the path because he feared it would bite him”, is a gut feeling that can even arise before explicit cognition. In the political context, it can be difficult to distinguish between visceral panic and rational prudence. Tell-tale signs of viscosity are reactions that are disproportionate to the threat as well as irrational belief formation (see comments on Proposition 3).

*Enthusiasm*, unlike fear, has not occupied the attention of emotion theorists. Scholars do not even acknowledge its existence, except in trivialized forms. Since the concept is up for grabs, let me propose a characterization. Enthusiasm is triggered by the belief that the public interest or a moral value can be realized by individual or collective action in the face of organized opposition or other obstacles.<sup>41</sup> We can most easily recognize it by its behavioral effects: supernormal energy, subnormal need for food and sleep, and, crucially, lower risk aversion (or more optimistic risk assessments). A striking example is found in the behavior of the Norwegian framers in 1814. According to one historian, they were characterized by “an incredibly vitality and restless activity” – “enthusiasm was their normal state of mind.”<sup>42</sup> Although a more cool-headed member of the assembly dismissed their attitude as sentimental (*Schwärmerei*),<sup>43</sup> their behavior did not fit Oscar Wilde’s definition of sentimentality: the desire “to have the luxury of an emotion without paying for it.” They were exalted, but they

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<sup>40</sup> Gordon (1987), p. 77.

<sup>41</sup> This definition is broadly consistent with that of the *Oxford English Dictionary*, according to which the principal current sense of the word is “Rapturous intensity of feeling in favour of a person, principle, cause, etc.; passionate eagerness in any pursuit, proceeding from an intense conviction of the worthiness of the object”.

<sup>42</sup> Steen (1951), p. 143-44.

<sup>43</sup> Aall (1859), pp. 359, 361, 422

*acted* on their emotion. They knew they might fail, although they underestimated the risks (see below).

In France, the decisions on August 4, 1789, were, as Tocqueville says, “the combined result, in doses that are impossible to determine, of fear and enthusiasm”.<sup>44</sup> Although the renouncement of feudal privileges may initially have been triggered mainly by fear, a wildfire of enthusiasm then swept the assembly. On May 16 1791, enthusiasm also made the framers declare themselves ineligible to the first ordinary legislature. In the words of the biographer of one of them, the framers were “drunk with disinterestedness”.<sup>45</sup> On both occasions, the actual motivational mix was more complex. Vanity, malice, vengeance, self-interest and a desire to derail the revolution also motivated some of the framers. Yet to deny any role of enthusiasm would be excessive.

Enthusiasm and fear also went together in the making of the 1848 French constitution. The process took place in a context of popular violence, the workers of Paris rising up on three occasions. On February 22, their rebellion brought down the reign of Louis Philippe and led to elections of a constituent assembly; on May 15, they invaded the assembly to protest against the government’s lack of solidarity with the oppressed Polish people; on June 23, they took to arms and raised barricades in protest against the closing of the National Workshops. By June 27, the insurrection had been violently crushed. The Committee of the Constitution began its work on May 19, delivered its first report on June 19 and its final report on August 30. Whereas the first report reflected a visceral fear of offering too little to the workers, the second was inspired by a visceral fear of offering too much. Tocqueville, a member of the Committee, characterized the atmosphere in which it worked as follows:

[The] nation had a sort of frenzied desire to see the work of constitution making finished and to see authority established. [...] The Assembly shared this longing and was constantly goading us, though there was hardly any need to do so, for memories of the 15<sup>th</sup> May and apprehensions of the days of June, combined with the sight of a divided, weak and incapable government in charge of affairs, were enough to drive us on. But the thing that most effectively deprived the Committee of its freedom of mind was [...] *fear of outside events and the enthusiasm (entraînement) of the moment*. It is difficult to appreciate how much this pressure of revolutionary ideas affected even

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<sup>44</sup> Tocqueville 1953, p. 214.

<sup>45</sup> Lebègue (1910), p. 261.



those minds least subject to such influence, and how it almost unconsciously drove them farther than they meant to go, and sometimes even in a different direction.”<sup>46</sup>

*Anger*, too, may shape constitution making. This emotion seems, for instance, to have been an important motive behind the Icelandic constitution-making process that began in 2010. As a leading reformer has written, “When countries crash, a natural thing for their inhabitants to do, *inter alia*, is inspect their legal and constitutional foundations to look for latent flaws and to fix them. This was, in fact, one of the demands of the ‘Pots-and-pan’ revolution’ that shook Iceland after the country’s spectacular financial crash in October 2008”.<sup>47</sup> In the words of another observer, “the public *outrage*, which after the economic collapse was directed at the government, converged on the issue of writing a new constitution”.<sup>48</sup> More generally, social uprisings, whether or not they lead to a new constitution, are often fueled by anger, triggered, for instance, by a stolen election or an unkept promise of reform. *Grievances*, by themselves, may not be enough: a government is less likely to be overthrown if it does not hold elections or does not promise reform than if it steals the election or does not keep a promise it has made. Anger, like many other emotions, is triggered by an *event*, not by a standing condition. Until the 1760s, the American colonies patiently endured the long-standing Navigation Acts and other discriminatory measures, but rebelled after the (by comparison) relatively mild attempts by Great Britain to tax them. The taxes then transformed the latent grievances into conscious resentment.<sup>49</sup>

Enthusiasm and anger can go together, as can also be illustrated by the American Revolutionary wars. An insightful observer describes its inception as follows:

The revenues of Britain were immense, and her people were habituated to the payment of large sums in every form which contributions to government have assumed; but the American colonies possessed neither money nor funds, nor were their people accustomed to taxes equal to the exigencies of the war. The contest having begun

<sup>46</sup> Tocqueville (1987), p. 169; my italics. The word “entraînement” is polysemic, but one of its meanings (at Tocqueville’s time of writing) is “enthusiasm”.

<sup>47</sup> Gylfason (2012), referring to how Icelanders took to the streets banging pots and pans in protest against the government.

<sup>48</sup> Ólafsson (2011); my italics. It is usually assumed that the action tendency of anger is to *punish* the offenders, not to prevent them from doing harm in the future. In Iceland, the demand for a new constitution did in fact go together with a demand for punishment of those who were held responsible for the crisis. Since the new constitution could be expected to remove some deputies or officials from public office, the first demand probably also had a punitive component.

<sup>49</sup> Ramsay (1789), vol. 1, p. 75-76. He cites (*ibid.*, p. 118) British politicians who claimed that things were the other way around: “though the duty on tea was the pretence, the restrictions on their commerce, and the hope of throwing them off, were the real motives of their disobedience”. I believe Ramsay’s Tocquevillian interpretation is more plausible.

about taxation, to have raised money by taxes for carrying it on would have been impolitic. The temper of the times precluded the necessity of attempting the dangerous expedient; for such was *the enthusiasm of the day*, that the colonists gave up both their personal services and their property to the public, on the vague promise that they should at a future time be reimbursed. [...] Though the colonists [...] had neither gold nor silver, they possessed a mine in *the enthusiasm of their people*.<sup>50</sup>

*Pridefulness*, finally, can also motivate framers. Whereas ordinary language and dictionaries do not distinguish sharply between pridefulness and pride, psychologists make a distinction that parallels the one between shame and guilt.<sup>51</sup> Shame and pridefulness are triggered by the agent's belief that she has a bad or a good *character*, whereas guilt and pride reflect the belief that she has performed a bad or a good *action*. Pridefulness is close to egocentricity, or amour-propre, the tendency to believe that my possessions are good because they are *mine*, that my choices are good because *I* made them, or that an institution is good because *I* belong to it. In the words of an eighteenth-century English reformer, John Jebb, “[one] maxim, which will be found to predominate, more or less, in the minds of individuals in every corporation, consists, in an overweening opinion and extravagant zeal for the interest of that body, to which, as it is often expressed, they ‘have the honor to belong.’”<sup>52</sup> This statement applies with particular force to members of constituent assemblies, who are often extremely conscious of their historical role. This statement is illustrated by Marx's devastating comment on the French framers of 1848: trying to model themselves on the revolutionaries of 1789, they replayed the tragedy as farce.<sup>53</sup>

*Proposition (3). Strong passions tend to undermine rational belief formation.* This proposition, though hardly novel, is sometimes contested. Although emotions can provide knowledge about oneself – I didn't know I could be envious until I felt envy – I do not

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<sup>50</sup> Ibid, p. 255-56; my italics; see also Ramsay (1789), vol. 2, p. 84. It may seem surprising that the colonists were averse to taxing *themselves* merely because their rebellion was triggered by taxation *by the British*, but the claim is confirmed by the foremost historian of the finances of the war (Ferguson 1961, p. 30). It casts an interesting light on the psychology of the founding generation.

<sup>51</sup> Tangney (1990) refers to them as respectively alpha pride and beta pride, and Lewis (1992, p. 79-80) as hybris and pride.

<sup>52</sup> Cited after Langford (1991), p. 210.

<sup>53</sup> I do not think *shame* and *guilt* are prominent emotions in constitution making. Let me mention, however, a possible example. On two occasions in the late 18<sup>th</sup> century, framers wrote into the constitution a narrower franchise than the one under which they had been elected (Morrison 1917, p. 26; Troper 2006, p. 89). In 1848, however, the awkward character of this procedure seems to have struck the German framers: “An assembly elected at least in considerable part by manhood suffrage was *uneasy* about the exclusion of large portions of the labouring classes [...] as proposed by the Constitutional Committee” (Eyck 1968, p. 368; my italics). Possibly, cognitive dissonance is a better description of their uneasiness than either anticipated guilt or shame.

believe they can enhance our knowledge about the world. This is not the place, however, to defend this controversial claim.

I shall discuss three ways in which emotions can undermine rational belief formation: by motivated belief formation, by urgency, and by a hot-cold empathy gap. Before I proceed, I should point out that emotions can also affect the formation of desires or preferences. The action tendency of an emotion may be seen as a temporary motivational change, such as the desire to retaliate against an offense. The temporary character of the preference change follows from the fact that emotions typically have a “short half-life” (after “counting to ten” the desire may abate). Little if anything is known about the rate of decay or about the shape – convex, concave, or linear - of the decay curve. The fact that these preferences are temporary does not, of course, imply that they are irrational. Indeed, with irrelevant exceptions the very idea of irrational preferences is meaningless.

Emotions can also affect risk preferences, an effect that can be hard to distinguish from the impact on beliefs.<sup>54</sup> Thus one study found that fear made people more pessimistic and more risk averse, whereas anger had the opposite effect on both dimensions.<sup>55</sup> I conjecture (and shall assume) that enthusiasm is like anger in both respects.<sup>56</sup> In practice (outside the laboratory), it is probably impossible to determine when the impact of these emotions on behavior is mediated by irrational belief formation and when it is due to changing risk attitudes, or both. I shall refer, therefore, to irrational belief formation even when the real cause could be a change in risk attitudes.

To illustrate how emotions can induce motivated belief formation, I can cite a verse by La Fontaine: “Each believes easily what he fears and what he hopes”. The tendency to believe what one hopes – wishful thinking – is well-known, and easily understandable in terms of something like Freud’s Pleasure Principle. Counterwishful thinking - believing what one fears, against the preponderance of the evidence *and* against one’s desires - is more puzzling. The numerous fear-inspired rumors in recorded history are conclusive proof of the existence of the phenomenon<sup>57</sup>. Panics with no evidential basis, such as the Great Fear of 1789 or rumors of the return of Napoleon I caused great distress and, crucially, were used as

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<sup>54</sup> Below, I note that a similar problem arises when trying to distinguish between *time attitudes*: how can we tell whether present-oriented behavior is due to a high degree of time discounting or to an insufficient ability to imagine that the future might differ from the present?

<sup>55</sup> Lerner and Keltner (2001).

<sup>56</sup> I am gratified that Jennifer Lerner, an expert in these matters, agrees with my hunch.

<sup>57</sup> Elster (forthcoming), Chapter 22.

the basis for action, e.g. in both cases cutting the grain before it was ripe. Panics based on unfounded rumors in financial markets are also well known. However, a convincing explanation is lacking.

The proto-constitutional actions of the American revolutionaries were largely based on wishful thinking or, perhaps, on motivated ignorance. A contemporary observer wrote that “the [colonists’] ignorance of the military art, *prevented their weighing* the chances of war with that exactness of calculation, which, if indulged in, might have damped their hopes”. They were “buoyed above the fear of consequences by an ardent military *enthusiasm*, unabated by calculations”.<sup>58</sup> Concerning the use of paper money to fund the war, he wrote that although it inevitably led to “a general wreck of property”, a “happy ignorance of future events, combined with the ardor of the times, *prevented many reflections* on this subject, and gave credit and circulation to these bills of credit”.<sup>59</sup>

The strong emotions of the night of August 4 1789 induced a temporary preference change in many deputies. Did they also induce irrational belief formation? One may argue that the intended effect of calming the peasantry by these concessions was based on wishful thinking. Commenting on the Revolution generally, Tocqueville argued that such concessions can be counterproductive: “The evil that one endures patiently because it seems inevitable becomes unbearable the moment its elimination becomes conceivable. Then, every abuse that is eliminated seems only to reveal the others that remain, and makes their sting that much more painful. The ill has diminished, to be sure, but sensitivity to it has increased”.<sup>60</sup> Commenting specifically on the decrees of August 1789, Jean Jaurès wrote that: “Not only did the nobles think that the abolition of the tithe without compensation would increase their income from land, but they believed above all that this immediate satisfaction obtained at the expense of the clergy would make the peasantry less eager to pursue the abolition of the feudal dues: they hoped to divert the storm towards the goods of the church. *What a poor calculation!* Quite to the contrary, the peasants were all the more unlikely to accept the need for compensation with regard to the feudal dues as they had been dispensed with compensation for the tithe.”<sup>61</sup> The phrase I have italicized may be read as

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<sup>58</sup> Ramsay (1789), vol. 1, p. 146; my italics.

<sup>59</sup> *Ibid.*, p. 283.

<sup>60</sup> Tocqueville (2011), p. 157. In addition to their effect on preferences, concessions may also shape beliefs, by supporting an inference that those in power are weak and that further demands will also be granted.

<sup>61</sup> Jaurès (1968), p. 469.

saying that the nobles were wrong, but not necessarily irrationally so, or as affirming that they were indeed irrational. Whatever Jaurès had in mind, I opt for the second idea. When ruling classes ignore the fact that reactive concessions (as distinct from preemptive ones) tend to generate demands for more concessions, they are subject to irrational wishful thinking.

The making of a constitution for an independent Norway was an exercise in wishful thinking that, like the American movement for independence, proved successful. Rational observers of the international situation after the Kiel Treaty (January 1814), which transferred sovereignty over Norway from Denmark to Sweden, knew that the chances of independence were nil. Deputies belonging to the Union Party knew it as well. Yet in their enthusiasm, framers affiliated with the Independence Party refused to test the international waters. On May 17 1814, while the Swedish crown prince and de facto ruler Bernadotte was busy on the continent in the end-stage of the Napoleonic wars, they blithely proceeded to elect the Danish crown prince as king of an independent Norway and adopted the most liberal constitution in Europe. Remarkably, once the realities of international politics and the return of Bernadotte forced the Norwegians to accept subordination to Sweden, they managed to retain virtually all the clauses of the constitution that did not have a direct link to the issue of sovereignty. Contemporaries and historians all agree that a negotiated constitution based on a sober assessment of the situation would have been much more unfavorable to Norwegian interests. Fortunately for the Norwegians, their enthusiasm did not last long enough to make them wage war against Sweden, which would inevitably have led to defeat and an imposed and much inferior constitution.<sup>62</sup>

The elections to the French constituent assembly of 1848 also illustrate the role of wishful thinking. As Tocqueville notes, in establishing universal suffrage in the elections to the constituent assembly, the revolutionary leaders “gullibly imagined that to summon people to political life was enough to attach them to their cause; and that, if they gave the people rights but no advantages, it was enough to make the Republic popular”.<sup>63</sup> As noted, in 1919 the German Socialists were more realistic: they did not expect women to vote for them when they established female suffrage in the elections to the Weimar constituent assembly.<sup>64</sup> (In 1945, Churchill discovered that *gratitude* is not an important emotion in politics.) In France,

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<sup>62</sup> I owe this observation to Øystein Sørensen.

<sup>63</sup> Tocqueville (1987), p. 97.

<sup>64</sup> (1980), p. 550.

the *constituants* of 1848 also showed massive wishful thinking, or perhaps amour-propre (fear of appearing to be afraid), when they ignored the fact that the overwhelmingly likely outcome of having the President chosen in direct elections would be the choice of Napoleon Bonaparte, whom most of them detested.<sup>65</sup>

Pridefulness, or amour-propre, can lead framers to make decisions based on an exaggerated belief in their own importance, a form of wishful thinking. The two illustrations I shall offer are mostly speculative and a priori, but with some empirical basis.

First, members of mixed constituent/legislative assemblies may be tempted to write a very important role for the legislature into the constitution, with few checks on its activities. They will, therefore, tend to be opposed to bicameralism, executive veto, and judicial review. These tendencies were realized in the French constitutions of 1848 and 1946, and the Polish constitution of 1921. Pure constituent assemblies, such as the Federal Convention, the Norwegian assembly of 1814, and the German assembly of 1948-49, are less likely to have this legislative-centric bias.<sup>66</sup>

Second, the belief of the framers in the excellence of their constitution may induce a preference for strict amendment clauses, to prevent lesser mortals in the future from tampering with it. I shall cite at some length, partly for its amusing language, a passage in which Bentham heaps ridicule on the attempt by the writers of the French constitution of 1791 to make revision of their document virtually impossible:

Twelve hundred infallible persons [the number of deputies to the *Constituante*] deriving their infallibility like the Brahmins from birth, like the Popes from election, or like the Grand Lama from something between both, to all this I am ready to subscribe without difficulty. But an assembly of the same number of men brought into the world without a miracle, subject to human infirmities and passions, selected by their fellow citizens it is true, but taken out of the general mass, from the moment of their taking their seats doubting, disputing, changing, struggling, wrangling, sometimes one man's notions prevailing, sometimes another, that all this heterogeneous mass after a ferment of two years and a half, should all of a sudden at a certain hour of a certain day have *worked itself up into infallibility*, each man resolved that the whole nation, that a nation of 25 millions, shall instantly become and to the end of time continue satisfied with the whole and very part of a composition with which taken in its totality not a single one

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<sup>65</sup> A good summary of the debates is Bastid (1945), vol. I, pp. 105-22.

<sup>66</sup> Ginsburg, Elkins and Blount (2009), p. 213 do not find this tendency in their constitutional data set. I question, however, the validity of their classification. They include, for instance 33 constitutions of the Dominican Republic, 4 of them enacted by the dictator Trujillo.

of them is so much as satisfied himself, a measure of inconsistency and presumption like this is almost too much to believe.<sup>67</sup>

Although Bentham does not explicitly attribute the presumption of the French framers to their amour-propre, the passage is certainly consistent with this view. The same comment applies to a passage where Tocqueville decries the strict amendment clause of the 1848 constitution, which could be revised only by a new constituent assembly if the national assembly voted to do so with a majority of three quarters. Commenting on this clause (and mistakenly asserting that a four-fifths majority would be needed), Tocqueville wrote that it “made any regular amendment practically impossible. [...] I have long thought that, instead of *trying to make our forms of government eternal*, we should pay attention to making methodical change an easy matter. All things considered, I find that less dangerous than the opposite alternative. I thought one should treat the French people like those lunatics whom one is careful not to bind lest they become infuriated by the constraint.”<sup>68</sup>

Fear-induced counterwishful thinking in constitution making can have several sources. Revolutionaries may overestimate the ruthlessness and the capacity of rulers (or would-be rulers), and rulers overestimate the same qualities in the people. The constitutional transitions in Eastern Europe in 1989 may perhaps illustrate the first case. Although it is clear in hindsight that the fears of a Soviet invasion were groundless, the proposition that the oppositional forces were needlessly fearful, given what was known at the time, is hard to prove. Perhaps the best evidence comes from Hungary. Here, the older generation, having experienced the crushing of the 1956 uprising, tended to be more cautious and make less radical demands than younger people.<sup>69</sup> The second case can be illustrated by counterrevolutionary constitutions that are so harsh that that they generate more hatred than fear, thus working against their purpose. I cannot cite, however, any unambiguous historical instances.

*Urgency* is an important feature of emotions. By this term I understand a preference for immediate over delayed *action*, as distinct, at least analytically, from a preference for

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<sup>67</sup> Bentham (2002), p. 278-9; my italics.

<sup>68</sup> Tocqueville (1987), p. 181; my italics. The reason he offers against very tight amendment rules is somewhat eccentric. A more general argument is that if the constitution makes it impossible to adopt measures that are consistently favored by a large majority of the citizens, they may take extra-constitutional, revolutionary action.

<sup>69</sup> Schiemann (2005), pp. 41-49 emphasizes the risk-averse attitude of the older generation, but, as I noted in the text, their cautious behavior could also be explained by a pessimistic cognitive bias.

immediate over delayed *reward*.<sup>70</sup> Urgency may also be characterized as a form of *inaction-aversion*. In situations that do not require immediate action, urgency can be a source of suboptimal investment in information, as illustrated by the saying, “Marry in haste, repent at leisure”. The repentance may be due to the short half-life of the emotion, but also to the agent devoting insufficient time to find out whether the other person might have some undesirable properties. (In some societies, the norm of a long engagement period counteracts both effects.) Also, urgency may prevent the agent from gathering information that might correct her wishful thinking, which is, after all, somewhat constrained by facts<sup>71</sup>. In a constitution making context, urgency can make an assembly ignore its own rules about proceeding slowly, for instance by a rule that a motion cannot be adopted on the day it is proposed. In 1814, the Norwegian framers a proposal made on April 16 that was adopted on the same day, although several speakers objected that the rules adopted on April 12 prevented discussion of a subject that had not been announced the previous day.<sup>72</sup> The rules were swept away by the very emotions they were supposed to contain, just as anger may cause one to ignore the rule of counting to ten before acting in anger.

Earlier, the French *constituants* behaved in the same manner. Many of them were familiar with the British system of requiring several readings of a parliamentary bill to prevent impulsive decisions. Following that model, the Règlement that the Constituent Assembly adopted on July 28 1789 contained two delay clauses. Art. IV.4 says that “No proposal can be discussed on the day of the session in which it has been proposed, except if the matter is urgent and the assembly decides that the proposal should be discussed immediately.” As acts of self-binding go, this is not very constraining. An addition to Art. IV says that “Any proposal in legislative or constitutional matters must be brought to discussion on three different days”. Almost from the beginning, and certainly on August 4, the assembly ignored this rule. In a letter to his constituency, the Comte d’Antraigues complains that in order to “engage the [...] assembly to consent to all the decrees of August 4 one had to [...] destroy the wisest rules of the assembly itself, which put a brake on hasty deliberations”. Having tried to stem the tide on August 4, the Marquis de Foucauld also referred to the violation of the rules in a speech on August 6. In response, those who wanted immediate action said that “an élan of patriotism does not need three days” and “since one cannot vary

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<sup>70</sup> Elster (2009 b).

<sup>71</sup> Klein and Kunda (1992).

<sup>72</sup> Aal (1859), p. 410; see also p. 413.



in such sentiments, the three days would be a pointless waste of time”.<sup>73</sup> The first statement reflects urgency, the second the hot-cold empathy gap (see below).

The recent Icelandic constitution making process was shaped in part by anger-induced urgency, or inaction-aversion. It is at least arguable that the urgency led to flawed cognition. The crisis created an enormous impetus to *do something*, and the prospect of making a new constitution provided an outlet for the urge. If the organizers had taken the time to reflect more deeply on the causes of the crisis, it is not clear that constitutional flaws would have been among the most important. The Icelandic banks were victims of the hubristic overstretching that was observed in many other countries, where few if any groups blamed the constitution for the disaster. The Icelandic constitution *was* flawed, and Iceland *did* have a crisis, and in the urgency of the moment the causal link from the first fact to the second may have seemed obvious.

The *hot-cold empathy gap* refers to the fact that “when in a ‘hot’ state (i.e. craving, angry, jealous, sad, etc.) people have difficulty imagining themselves in a cold state, and thus miscalculate the speed with which such a state will dissipate”.<sup>74</sup> This failure to recognize that emotions have a short half-life is a form of irrationality. In the Norwegian and French examples just cited, the framers may have been willing to waive the rules because they were certain that they would never waver about *this* decision, even though a few days earlier they had recognized the abstract possibility of impulsive decision making. Yet although urgency and an empathy gap often go together, they are analytically distinct. Sometimes, people say, “Let’s punish now, while we’re still angry”.

*Proposition (4). Only strong passions can generate the political will needed for constitution making.* Whereas propositions (2) and (3) imply only a claim that constitution making and passion tend to go together, Proposition (4) asserts that constitution making *requires* passion to succeed. As an example, consider the redrawing of the map of France during the Revolution. Although the inefficiencies and pathologies of the old divisions of the

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<sup>73</sup> Kessel (1969), pp. 127, 200.

<sup>74</sup> Loewenstein (2000), p. 428. He also identifies a “cold-hot” empathy gap: “when in a ‘cold’ state (i.e., not hungry, angry, in pain, etc.), it is difficult to imagine what it would feel like to be in a ‘hot’ state or to imagine how one might behave in such a state” (*ibid.*). It may also be difficult to imagine how *others* would behave: In 1779, “the British supposing the Americans, to be influenced, by the considerations which bias men in the languid scenes of tranquil life, and not reflecting on the sacrifices which enthusiastic patriotism is willing to make”, thought they could bring the colonies to their knees by devastating their possessions (Ramsay 1789, vol.2, p. 68). Americans who should have known better made the same mistake in the Vietnam war (MacMaster 1997, p. 163).

country into provinces and other subunits were widely recognized, any reform was blocked by the vested interests of one privileged group or another. On October 19, 1789, when the constituent assembly debated the new division of the country into *départements*, the *constituant* Clermont-Tonnerre, said that “Anarchy is a frightening yet necessary passage, and the only moment one can establish a new order of things. It is not in calm times that one can take uniform measures.”

Quite generally, a major obstacle to a political reform arises when it hurts powerful and concentrated interests, which are usually better organized than the more numerous and more diffuse beneficiaries. To overcome these interests, passion is needed. In a famous maxim, La Bruyère said that “Nothing is easier for passion than to overcome reason; its great triumph is to conquer interest.” One might add, as a corollary, that nothing is easier for interest than to overcome reason, except when reason allies itself with passion. Enthusiasm embodies this alliance. Kant asserted that without this emotion, “nothing great in the world has even been done”.<sup>75</sup> He added, consistently with Proposition (3), that while enthusiasts may choose the right ends, they are incapable of determining the right means. For them, the best easily becomes the enemy of the good.

Emotions of anger or fear can also overcome entrenched interests. The divergent interests of the thirteen American states would have created an insuperable obstacle to collective action in 1774, as they did in the 1760s after the end of the war, were it not for the anger against Great Britain that united them. Tocqueville claimed that the only reason why the Paris bourgeoisie managed to crush the worker insurrection of June 1848 was the acute character of the danger: “If the rebellion had been less radical and seemed less fierce, probably most of the bourgeoisie would have stayed at home”.<sup>76</sup>

*Proposition (5). Constitution making tends to be flawed.* If it is true (a) that the adoption of a constitution requires passion and (b) that passion undermines rational belief formation, there will be a tendency for the constitution making process to be flawed, that is, to be based on irrational cognitions. As this proposition is a logical consequence of two earlier ones, I need not adduce evidence for it.

*Proposition (6). Constitutions tend (weakly) to be flawed.* That a process tends to be flawed does not imply that the constitution it produces is flawed. The fact that the conveners

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<sup>75</sup> For references, see Elster (2013), p. 90, note 267.

<sup>76</sup> Tocqueville (1987), p. 144.

of the 1848 constituent assembly in France indulged in the wishful belief that the newly enfranchised electorate would vote for them out of gratitude did not predict that the constitution itself would rest on irrational premises. In Norway, urgency and wishful thinking affected the process, but (apart from the claim to independence) not the substance of the document. Yet in some cases the constitution itself suffered from the flaws of the process, as I discuss in the following paragraphs.

Urgency can prevent framers from taking the time to examine whether their document is coherent and whether clauses that appear innocuous in isolation might have undesirable effects when taken together. The Weimar constitution offers an example. It was adopted after the assembly had deliberated for six months, serving both as a legislative and a constituent body, in a context of domestic violence and international pressures. If the assembly had been able to deliberate calmly and methodically, it might have detected the anomaly arising from the conjunction of two clauses. Article 48 said that “In case public safety is seriously threatened or disturbed, the Reich President may take the measures necessary to reestablish law and order, if necessary using armed force. [...] The Reich President has to inform Reichstag immediately about all measures undertaken which are based on paragraphs 1 and 2 of this article. The measures have to be suspended immediately if Reichstag demands so.” The last clause was presumably intended to provide a check on presidential discretion. It was undermined, however, by Article 25: “The Reich president has the right to dissolve the Reichstag, but only once for the same reason. New elections, at the latest, are held 60 days after the dissolution.” Using Article 25, the President could (and did) threaten to dissolve the Reichstag should it vote to annul any measures taken under Article 48. This mechanism opened the way to power for Hitler.

Wishful thinking can induce an illusory sense of security. As noted earlier, the French assembly of 1848 adopted election of the president by direct popular vote. Many framers had misgivings, anticipating that the choice would fall upon Napoleon Bonaparte and fearing that he might stage a coup. On the very last day of the debates, they adopted a parchment barrier (see Chapter 1) against this eventuality: “Any measure by which the president of the Republic dissolves the national Assembly, prorogues it, or creates an obstacle to the exercise of its mandate, constitutes high treason. By this very fact, the president is ousted from his office; the citizens are obliged to refuse to obey him; the executive power passes automatically to the national Assembly” (Article 68). In the words of the foremost historian of the 2<sup>nd</sup> Republic, this last-minute change “testifies [...] to the fact that the Assembly was haunted by the fear of

a coup d'État by the President directed against itself. One is astonished that these precise and manifest worries led to nothing but tragically illusory precautions.”<sup>77</sup> By their wishful thinking, the framers opened the way to power for Napoleon Bonaparte.

The American constitution was flawed, I believe, because of its origin in the elites' unfounded and visceral fears of the people. Specifically, the fears of agrarian laws, paper money, and debtor relief rested on an irrational failure to understand the special character of war and post-war conditions. The unrest and violence that occurred in some states in the 1780s were due not to the democratic nature of their constitutions, but to the blatant injustice of speculators seeking to redeem at full value, and at the expense of the taxpayers, wartime bonds bought at bargain-basement prices. Although Madison justified the profits as a reward to risk, that argument loses its force when we take account of the fact that the original sales of war bonds were often bargains of desperation.<sup>78</sup> In addition to authorizing money and troops for repressing rebellions, the constitution created two veto points on popular representation: the Senate and the Presidency. According to some scholars, the third veto point of judicial review of federal legislation, although not mentioned in the constitution or in *The Federalist*, was implicit in these documents. These veto points burdened posterity with an excessively counter-majoritarian constitution.<sup>79</sup>

#### *V. Prejudice in constitution making*

The phenomenon of prejudice defies easy analysis. As I shall understand it, it always involves an unjustified belief by a member of one group about the inferior cognitive capacities or dangerous behavioral propensities of the members of another group. Prejudice may be “cold”, as in Lord Chesterfield's condescending observations on women in letters to his son, or “hot”, as in alarmist claims about papists, Jews, or gypsies. In the latter form, prejudice may trigger emotions of contempt, hatred, and visceral fear.<sup>80</sup> With some exceptions, prejudice is based on ascribed rather than on achieved features. Its object is what

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<sup>77</sup> Bastid (1945), vol. II, p. 147-8.

<sup>78</sup> For discussion and references see Elster (2012). Once again, I underline that I am in a minority position on this issue, a position made particularly fragile by the fact that I am not a professional historian.

<sup>79</sup> Today, filibustering in the Senate and the Hastert Rule in the House of Representatives constitute two further counter-majoritarian practices. As far as I know, though, these were not motivated by fear of popular demands.

<sup>80</sup> I treat emotions and prejudice separately, however, because I want to focus on episodic rather than on standing or permanent emotions, and because some forms of prejudice, as noted, do not trigger emotions. This is merely a book keeping arrangement, with no substantive implications.

the prejudiced person perceives as intrinsic, permanent features of the target group. Gender, age, race/ethnicity, and membership in a lower caste or estate are prominent examples, and religion an important counterexample. Yet even if religion is in principle an object of choice, in practice it is usually a lifelong commitment of the individual, and perceived as such by others. By contrast, in societies with some degree of social mobility, the exercise of an occupation does not lend itself easily to prejudice against the person who exercises it.

In the context of constitution making, the main tendency of prejudice is to exclude members of the targeted group from participating in politics, as voters or deputies. The effect of prejudice can also extend to the denial of civil rights, such as the right to own property or to exercise certain professions. Historically, the overwhelmingly most important example is the exclusion of women from politics and the denial of their civil rights. The word “exclusion” may be too strong, however, if taken to imply a deliberate decision. For centuries or millennia, the prejudice against women was so deep-seated as not even to be an object of reflection or discussion. For most of the time, it was a paradigmatic cold prejudice, based on a tacit belief about the inferior cognitive capacities of women rather than about any dangerous behavioral propensities. Yet even though misogyny has led to the exclusion of women, it has not been its only cause. Female suffrage was delayed in many countries because radical politicians feared, often with some justification, that women would vote conservatively. This (prudential) fear explains, for instance, why French women got the right to vote only in 1946. It also explains why Spanish women did not get the right to vote in the 1931 elections to the constituent assembly, while the lack of fear may explain why women got the right to be elected to the assembly. There was a risk that women might vote for conservatives, but conservative women were unlikely to stand for office.

As far as I can tell, the very common practice of excluding individuals from the suffrage on economic grounds has not reflected prejudice, but either a belief that only those who contribute to the public funds have a right to dispose of them (“no representation without taxation”) or a belief that were the poor given the right to vote they would either use it to dispossess the rich or sell their votes to them. Although some rich have always talked about the poor in contemptuous terms, their feelings have been much less virulent than, say, the contempt that nobles felt for commoners in the French ancien régime.

By contrast, exclusion from politics or citizenship on religious and ethnic grounds has very often been based on prejudice. Earlier, I referred to the Norwegian constitution of 1814 as the most liberal of its time. Although I believe the statement is overall correct, one must

nevertheless note the following clause in the constitution: “The Jesuits and monastic orders are prohibited. Jews are still not allowed to settle in the state.” Remarkably, this seems to have been a cold prejudice.<sup>81</sup> There were no Jews or Jesuits in Norway at the time. The framers based their decision on free-floating European clichés, which did not reflect any personal experience with either group. Their prejudices may have induced an unfounded prudential fear, but no visceral fear. By contrast, the Spanish constitution of 1931, which severely restricted the activities of the church and prohibited religious orders from engaging in education, may have been based on a “hot” Republican prejudice against Catholics. (I know too little about Spanish politics in the period to affirm with confidence that the extreme Republican beliefs were unjustified.) Here, too, Jesuits were a particular target.

Ethnic or racial prejudices can shape constitution making if a majority of framers belong to one ethnic or racial group and use their power to restrict the rights and liberties of other citizens, often but not necessarily a minority. In the nineteenth century, many American state constitutions denied the suffrage to free blacks,<sup>82</sup> a practice that was overdetermined by interest and prejudice. In modern constitution making, majorities have denied minorities the right to vote, to form political parties, to be educated in their own language and to have it recognized as an official medium in the courts and the administration. Some examples from constitutions of former Communist countries may be cited.<sup>83</sup> In several Baltic states, the large Russian-speaking minorities have been deprived of the right to vote or to stand for office. In Bulgaria, the Turkish minority was prohibited from forming its own political party. In Slovakia, the language rights of the Hungarian minority were severely curtailed. In the Bulgarian case, prejudice, as I have characterized it, was certainly at work. I am agnostic about its role in the other cases.

#### *VI. Belief formation in constitution making*

Motivations, by themselves, do not determine choices. To return to an example from the earlier discussion, risk preferences do not by themselves generate choices: risk assessments, that is, *beliefs* about the magnitude of the risk, are also needed. As we have seen, the constitution making process itself can generate irrational beliefs, through wishful

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<sup>81</sup> Equally remarkably, the clause banning Jesuits was not abolished until 1956. The clause banning Jews was abolished in 1851.

<sup>82</sup> Keyssar (2000), pp. 54-59.

<sup>83</sup> For details, see Zielonka (2001) and Zielonka and Pravda (2001).

thinking, counterwishful thinking, urgency, and a hot-cold empathy gap. I shall not discuss these any further. Urgency-generated beliefs may also be rational, however. I give some examples shortly.

I shall distinguish two sets of beliefs.

First, framers form beliefs that concern the process itself, up to the final adoption of the constitution. The rules of order and the division of labor between committee work and plenary debates reflect beliefs about the arrangements most conducive to the (partial or impartial) goals of the framers. Framers need to form beliefs about the motivations and beliefs of other framers and, if need be, those of the ratifiers. When designing the electoral system, framers will often try to form beliefs about voter preferences, to maximize the number of seats of their party in the first ordinary legislature.

Second, framers may try to form beliefs about the post-constitutional politics that the constitution shall regulate. Given that the constitution, unlike ordinary legislation, cannot be easily updated to reflect demographic trends and economic development, framers may need to form some beliefs about these matters. At the Federal Convention, some framers wanted to base the constitution on the premise that America would remain frozen in time. Elbridge Gerry, for instance, said that “[the] people have two great interests, the landed interest, and the commercial including the stockholders”.<sup>84</sup> He used this premise to argue for elections to the Senate by the state legislatures, to protect the commercial against the landed interest. This was the class conflict behind Shays’ rebellion: bondholders versus taxpayers/farmers. Gouverneur Morris, however, was more farsighted: “We should not confine our attention to the present moment. The time is not distant when this Country will abound with mechanics & manufacturers who will receive their bread from their employers. Will such men be the secure & faithful Guardians of liberty?”<sup>85</sup> Framers may also need to form beliefs about the motivations of future political agents, including the voters, and about how to neutralize motivations that, according to their beliefs, will represent a danger to the (partial or impartial) goals of the framers.

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<sup>84</sup> Farrand (1966), vol. I, p. 152. Paralleling the distinction between risk assessments and risk preferences, one might ask, however, whether Gerry *believed* that the American class structure would remain unchanged or whether he only *cared* about his own generation – that is, whether he was subject to cognitive or to motivational myopia.

<sup>85</sup> *Ibid.*, vol. II, p. 202. Madison made the same point (*ibid.*).

My overall assessment is that these processes of belief formation are quite fragile. The sheer urgency of the situation can make it impossible to gather the information that would be needed. At the proto-constitutional First Continental Congress in 1774, for instance, the state delegations had to decide how they were to decide in the future: should each state have one vote or should votes be proportioned to population and/or wealth? The Congress adopted the first procedure and “Resolved, That in determining questions in this Congress, *each Colony or Province shall have one Vote*. The Congress not being possess'd of, or at present able to procure proper materials for ascertaining the importance of each Colony”. It would have been irrational, given the urgency of the situation, to try to gather reliable information for a proportional system. In 1814, the urgent need for the Norwegian framers to finish the constitution before the return of Bernadotte prevented them from gathering information about the international situation. As noted, wishful thinking may also have led them to underestimate the need for information.

When a constitution marks the transition from an autocratic to a democratic regime, it can be hard to form rational beliefs about the likely outcome of the first free elections. In the Polish and Hungarian transitions of 1989-1990, Communists, members of the opposition, and external observers all overestimated the electoral attraction of the Communist Party. If the Communist leaders in Poland had been able to anticipate the outcome of the first (partly) free elections, they would not have agreed to the compromises made in the Round Table Talks. In Hungary, the Communist party accepted, as a compromise, a mixed majoritarian-proportional system, believing that their candidates would be favored by the majoritarian component. As it turned out, their successes came mostly from the proportional component on which their opponents had insisted.

As these examples show, framers do not always have rational expectations. The point is confirmed by the fact that in the 1960s and the 1970s, several several American state constitutions were rejected in popular referenda, in some cases by large majorities.<sup>86</sup> It would be imprudent, nevertheless, to generalize on this point. In Bulgaria, the expectation of the Communist leaders that their preferred electoral system would give them a majority in the first constituent assembly was confirmed. In many cases, constitutions subjected to popular ratification are accepted, or rejected only by a narrow majority. Framers sometimes get it right. Yet the basic fact that constitution making differs from politics as usual implies that

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<sup>86</sup> Lenowitz (2007).



anticipations based on ordinary political behavior may be unreliable. The reason why the Canadian Charlottetown accord and some of the American state constitutional proposals were rejected in referenda may have been precisely that the voters objected to the framers behaving in the mode of politics as usual, striking deals in the proverbial smoke-filled back rooms.

Framers may also be unable to anticipate how the constitution will work in practice. In addition to the example from the Weimar constitution already cited, I can mention two examples from the 1958 French constitution. Michel Debré, de Gaulle's main legal advisor, asserted that (what became) Article 49 (3), which allows the government to stake its existence on the adoption of a law, would be used only in exceptional circumstances.<sup>87</sup> In the same debate, Paul Reynaud asserted that the clause would be a "paper wall" with no effect.<sup>88</sup> They were both proven wrong: the Article became a central legislative tool of the government. The constitution asserts that the vote of deputies should be "personal", that is, allowing only limited votes by proxy. In practice, the parliamentarians of the Fifth Republic managed to work around this encumbering clause. In the words of James Bryce, it is hard "to keep even a written and rigid constitution from bending and warping under the actual forces of politics".<sup>89</sup> This statement applies with particular force to the rights-clauses in the constitution. The members of Congress who adopted the 2<sup>nd</sup> amendment to the American constitution would have been surprised to see it used to justify individuals carrying concealed handguns.

Framers may also form *beliefs about the motivations and beliefs* of future political agents. I shall ignore "beliefs about beliefs", which are probably of marginal importance. By and large, and speaking very generally, there seems to be a divide between framers who believe that future agents will be dominated by their interests and passions (prejudice is rarely mentioned) and who seek to reduce that influence through constitutional engineering, and those who put their faith in the reason (virtue) of future voters and elected officials.<sup>90</sup> Virtue, too, in the latter view, may be the subject of engineering, for instance by limiting suffrage and eligibility to persons who have observable properties believed to be correlated with the unobservable property of virtue. The numerous early constitutions that imposed public voting

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<sup>87</sup> DPS (1988), vol. II, p. 505-6.

<sup>88</sup> *Ibid.*, p. 303.

<sup>89</sup> Bryce (1995), p. 90.

<sup>90</sup> See notably Troper (2006), p. 78. He makes this observation in the context of the French constitution of 1795, but I believe it has a wide application.

in national elections may, at least in part, have rested on the assumption that the need to defend one's vote before others would induce a more impartial attitude. John Stuart Mill certainly thought so.<sup>91</sup> The fact that most constitutions leave the choice whether to vote or to abstain up to the individual indicates that their framers had at least a minimal belief in the virtue (or perhaps in the irrationality?) of the citizens.

As these brief remarks suggest, the exact mix of interest, passion, and reason in the motivations of future political agents is an elusive matter, about which it is hard to form robust beliefs. Hume argued, though, that framers do not need to form beliefs, but can rely on maxims. "It is [...] a just *political* maxim, *that every man must be supposed a knave*: Though at the same time, it appears somewhat strange, that a maxim should be true in *politics*, which is false in *fact*."<sup>92</sup> In other words, framers should act on the worst-case assumption that future political agents will be relentlessly self-interested. That argument gives too much weight, however, to the merely possible, and not enough to the probable or the plausible.<sup>93</sup>

In any case, self-interest is *not* the worst case: passions can be far more destructive. When designing political institutions, framers often pay as much attention to the task of neutralizing passion as they do to the task of neutralizing partisan interest. To cite only one example, it is a constitutional cliché that bicameralism will have the dual effect of preventing passions from arising and of giving them time to cool down. By requiring members of the upper house and their electors to satisfy higher age requirements and stricter economic qualifications, one will supposedly create a more reflective and less impulsive body than a lower house with less stringent eligibility requirements. At the same time, the slowing-down of decision-making inherent in any bicameral system, even one in which the upper house is a mere carbon copy of the lower, will also lead to a cooling-down of passion. Although these claims have often been made in constitutional debates, there is little evidence that they are valid. The idea that income and wealth are reliable proxies for intellectual and moral qualities is very fragile. There is little evidence that the American Senate is more panic-resistant than the House of Representatives.<sup>94</sup> Yet the belief seems to persist.

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<sup>91</sup> Buchstein (forthcoming).

<sup>92</sup> Hume (1742).

<sup>93</sup> For the dangers of possibilistic reasoning in politics, see Elster (2013), p. 46-47 and Vermeule (2102).

<sup>94</sup> In 1964, the Resolution of the Gulf of Tonkin passed the House by 416 votes to 0, and the Senate by 88 votes to 2. In 2001, The Patriot Act passed 98 votes to 1 in the Senate and 357 to 66 in the House of Representatives. The "Authorization for Use of Military Force Against Iraq Resolution of 2002" passed the House by 297 votes to 133 and the Senate by 77 votes to 23. In none of these cases did the Senate show much resistance to the

Finally, framers will often form beliefs about the main causes of structural regime failure, and design institutions to prevent them. As suggested by the literature on the availability heuristic<sup>95</sup>, their attention will often be focused on recent, salient breakdowns. Constitution making is sometimes *reactive*, in the sense that framers try to address the flaws of the previous regime regardless of whether the problems are likely to recur. The constructive vote of no confidence that the Germans adopted in 1949 was largely a reaction to the coalition of extremes - Nazis and Communists - that had brought down governments of the Weimar Republic. The situation in Germany in 1948-49 did not in itself justify that measure. De Gaulle's obsession with the negative role of political parties during the 3<sup>rd</sup> and the 4<sup>th</sup> Republics caused him to neglect their essential democratic function. Examples could probably be multiplied.

### *VII. Conclusion*

According to a common conception to which I have unfortunately contributed<sup>96</sup>, framers are in the role of *Peter when sober legislating for Peter when drunk*. This idea is based on faulty conceptual and empirical assumptions. In fact, the opposite statement, while also inaccurate, would be closer to the truth: framers behave like *Peter when drunk legislating for Peter when sober*.<sup>97</sup>

*Conceptually*, “soberness” or dispassionateness does not imply a concern with the public interest. If passion and reason were the only motivations of political actors, that implication would hold, but since they may also be motivated by sober interest, it does not.

*Empirically*, as I have tried to show, the Peter-when-sober paradigm does not stand up to the historical record. In the large majority of cases, framers have been “drunk” - under the influence of passion – rather than dispassionate. Moreover, they will often assume that future political actors will act out of interest rather than from passion. To the extent that these statements hold, constitution-making is indeed a case of Peter when drunk legislating for Peter when sober.

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whipped-up atmosphere of hysteria. For similarly skeptical comments, see Mueller (1996), p. 192-3, who also cites the Gulf of Tonkin episode.

<sup>95</sup> Tversky and Kahneman (1974).

<sup>96</sup> Elster (1984), Ch. II. 7, corrected in Elster (2000), Ch., II.

<sup>97</sup> Rubenfeld (2001), pp.129, 130; see also Sajó (2011).

I have emphasized how passions may induce flawed cognitions in constitution makers, and sometimes flaws in the documents they produce. It is not clear, perhaps, what to understand by a “flawed constitution”. One can understand the expression as pointing to an intrinsic instability of the system of checks and balances, as illustrated by the French constitution of 1848 and the Weimar constitution. One might also understand it along normative lines, if the constitution creates a narrow suffrage or eligibility, a skewed apportionment, or a regressive tax system. Although the presence of these flaws may also destabilize the constitution, that fact is not the only reason why they are flaws. Whether or not they have a destabilizing effect, such constitutions are flawed because they fail the test of impartiality.

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