



FOCUS - 28 of 44 DOCUMENTS

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ARTICLE: ARGUING AND BARGAINING IN TWO CONSTITUENT ASSEMBLIES *

* The basis for this Article, the Storrs Lectures at Yale Law School in 1991, was published as an article in French. Jon Elster, *Argumenter et Negocier dans Deux Assemblees Constituantes*, 44 *Revue Francaise de Science Politique* 187 (1994). The present version is somewhat modified and updated. It does not, however, amount to a fully reworked analysis, which I hope to present on some later occasion.

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LEXISNEXIS SUMMARY:

... In this Article I discuss the process of constitution-making at the Federal Convention in Philadelphia and at the Assemblée Constituante in Paris from 1789 to 1791. ... Voting in the Convention was by majority vote, each state having one vote. ... The voting procedure at the Convention, however, increased their bargaining power for logrolling purposes. ... In defending the absolute veto for the King, Mirabeau argued that the assembly could always overrule the veto by the threat of refusing to vote in favor of taxes. ... To see this, we may note that the interests of constituencies may affect a delegate in two ways. ... The members of the constituent assembly were suspended, as I said, between the King's troops and the Parisian crowd. ... Mirabeau's replies to the King's challenge were, however, subject to the threatwarning ambiguity. ... Although two of the New York delegates left because they thought the Convention was exceeding its mandate, they never used the threat to leave as a bargaining ploy. ... Next, I discussed overt self-interest at work in threat-based bargaining. ... Let me begin with the most basic question: why argue at all? Why not simply adopt a bargaining stance, or demand an immediate vote without prior debate? I can think of four answers, but there may be others. ...

TEXT:

[*345]

I. Introduction

In this Article I discuss the process of constitution-making at the Federal Convention in Philadelphiaⁿ¹ and at the Assemblée Constituante in Paris from 1789 to 1791.ⁿ² In doing so, I shall be guided by three objectives. In increasing order of abstraction and, I hope, of competence, they are: historical, sociological and conceptual.

First, the comparison between the two eighteenth-century assemblies can improve our understanding of each, by suggesting lines of investigation that might otherwise not have occurred to us. A couple of examples, more fully discussed in Part IV below, will indicate what I have in mind. In view of the generally dismal view of human nature at the Federal Convention, we might ask whether similar skeptical ideas can be identified in the French Assembly. When the debates are read with this question in mind, we find that the delegates in Paris were less concerned with the greed and self-interest of future legislators than with their vanity and pride. Also, without this comparison I probably would not have grasped the importance of procedural precommitment in the two assemblies.

[*346] Second, the comparison can provide the beginning of an understanding of the constitution-making enterprise more generally. When I first began working on these issues, a wave of revolutions was sweeping across Eastern Europe.ⁿ³ As I followed the Round Table Talks and later the constitutional debates in these countries, I was struck time and again by the similarities with the eighteenth-century processes. In Poland and Hungary, for instance, the Round Table Talks that took place under the twin threats of Soviet tanks and mass demonstrations, brought to mind the deliberations at Versailles in July 1789, which were similarly suspended between the King's troops and the crowds in Paris. Current events in the former Soviet Union and Czechoslovakia remind us of similar efforts of federation two hundred years ago.

The eighteenth-century constituent assemblies were convened because of general crises of confidence. The current wave of East European constitution-making followed upon the fall of communist regimes. Other such waves have occurred in the wake of the revolutionary movement of 1848, the creation of new states after World War I, the collapse of fascist regimes after World War II, the liberation of African and Asian states from colonial rule, and the fall of the South European dictatorships in the mid-1970s.ⁿ⁴ Nevertheless, a comparative study of constitution-making is virtually non-existent. Comparative constitutional law is, of course, an established discipline. The comparative study of ordinary lawmaking is a central field of political science. The comparative study of revolutions has a long history. But the literature on constitution-making from a general comparative perspective is minuscule.ⁿ⁵ The gap is puzzling, but it appears to be undeniable. In the present Article, I cannot go very far towards filling it. The body of the text will be exclusively devoted to the two eighteenth-century assemblies. In the footnotes, [*347] however, I shall occasionally suggest a broader perspective.

Third, at a yet higher level of generality, the process of constitution-making can illuminate the two types of speech acts I shall refer to as arguing and bargaining.ⁿ⁶ To understand constitutional proceedings, we can benefit from Jürgen Habermasⁿ⁷ no less than from Thomas Schelling.ⁿ⁸ The analysis of these two types of speech acts and the relation between them is the main topic of this Article. Although my illustrations will be taken mainly from the two constituent assemblies, much of what I shall have to say applies more broadly to ordinary legislatures, committees and similar bodies.

Constituent assemblies are privileged, however, in that they often exhibit both arguing and bargaining in their most striking forms. Compared to other assemblies and committees, they differ both in their goal and in their setting. On the one hand, the matters that have to be decided are far removed from petty, self-interested, routine politics. Because the goal is to create a legal framework for the indefinite future, the requirement of impartial argument is very strong. Interest-group pluralism does not work when some of the parties are generations as yet unborn. The special setting works in the opposite direction. Constitutions are often written in times of crises that invite extraordinary and dramatic measures. In Philadelphia, many of the states threatened to leave the union unless they got their way on specific issues, such as the maintenance of the slave trade or proportional representation of all states in the Senate. The first threat was successful; the second was not. In Paris, the deliberations of the assembly were conducted under the shadow of threats,

based in an early stage on the King's troops and, in a later stage, on the crowds in Paris. (The latter threat was successful; the former was not.) n9

[*348] Hence, constituent assemblies are often more polarized than ordinary law-making bodies. They are not engaged in politics as usual, but oscillate between what Bruce Ackerman calls "higher law-making" n10 and sheer appeal to force. As Tocqueville said, in times of crises the political actors either rise above the normal or fall below it. n11 This is one reason for considering the Records of the Federal Convention rather than The Federalist Papers. The latter document shows no trace of the overt or covert threats that figured prominently at the Convention itself.

In exploring the role of rational argument and threat-based bargaining in collective decision-making I also try to correct an imbalance. I believe that social choice theory and public choice theory have created an excessive focus on voting and agenda-making in the study of assembly behavior. n12 I am not denying, of course, that these theories have had an enormous and, in the main, beneficial impact. In fact, a social-choice theoretic analysis of the Federal Convention has proved very fruitful. n13 I am simply claiming that these analyses are far from capturing all that goes on in an assembly. Now, it might seem that public choice theory already incorporates elements of bargaining by the analysis of logrolling and vote-trading. However, threats and promises made in this context are based mainly on resources (e.g., votes) created within the legislative system. In this Article, I am more concerned with bargaining on the basis of extra-parliamentary resources, such as manpower and money.

Yet this extension remains firmly within the public choice perspective. It is based on the assumption that the actors are moved by rational self-interest, and that there are no penalties attached to the expression of self-interest. By insisting on the role of rational argument in collective decision-making, I deliberately abandon that assumption. On the one hand, I [*349] believe that in the two constituent assemblies some of the actors were genuinely moved by impartial considerations of the common good. On the other hand, and this may be the more important part of my argument, I claim that even the actors whose concerns were purely self-interested may have been forced or induced to substitute the language of impartial argument for the language of self-interest. I claim, moreover, that this substitution mattered for the outcomes, because of what we may think of as the civilizing force of hypocrisy.

An overview of what follows may be useful. Part II offers a brief survey of the main constitutional issues at stake in Paris and Philadelphia. Part III looks at some problems and paradoxes created by the constitution and self-constitution of the constituent assemblies. Part IV considers various aspects of constitutional arguing in the two assemblies. Part V discusses the role of bargaining in the constitutional context. In Part VI, the distinction between arguing and bargaining is partially transcended in a discussion of the strategic uses of rational argument. In other words, these three core Parts of the Article (Parts IV-VI) discuss, respectively, the role of reason, overt self-interest, and covert self-interest in constitutional debates. Part VII offers a brief conclusion.

II. Constitutional Issues

The topic of this Article being the process of constitution-making rather than the substantive contents of the documents that emerged, I shall not go deeply into issues of constitutional doctrine. Nevertheless, a brief survey of the main questions is required to prepare the ground for the more process-oriented analyses that follow.

Generally speaking, a constitution contains three main kinds of clauses governing first, the machinery of government, second, the assignment of rights, and third, the procedures for amending the constitution itself. n14 I discuss these in turn.

In both eighteenth-century assemblies, the main debates over the machinery of government concerned the organization of the legislature and the relation between the legislative and the executive powers. n15 Yet this general similarity obscures [*350] the fact that in each assembly the most burning debates were over issues that had no analogue in the other. America was a federally organized country; France was not. Hence, the debate in Philadelphia over the representation of the small states in the Senate had no direct analogue in France. n16 Also, the representation

of slaveholding territories, although the object of several discussions in the French assembly, n17 was much less central than at the Convention. France was a monarchy and was universally expected - at least at the time when the assembly debated the royal veto - to remain one. America was not a monarchy and, Hamilton's proposal for an elective monarch aside, n18 nobody at the Convention argued that it should become one. Hence the French debate over the King's veto, including his veto over the constitution itself, could have no American analogue. Moreover, the idea of an absolute veto for the executive - the object of heated debates in Paris - was summarily dismissed in Philadelphia. n19 Also, in Philadelphia there were few objections to the principle of bicameralism, n20 which in Paris was hotly debated and, in the end, rejected.

In England, in the Seventeenth Century, and in America and France in the Eighteenth Century, we can observe a three-stage sequence. In the first stage, there is a strong monarchy which is perceived as arbitrary and tyrannical. In the second stage, this monarchy is replaced by a parliamentary regime. In the third stage, when it is discovered that parliament can be just as tyrannical and arbitrary as the king, some form of checks and balances is introduced. In 1787, the Americans went from the second to the third stage. In 1789, the French went from the first to the second stage. The pathologies of the second stage, and the transition to the third stage, came later. This provides the main reason for the difference in tenor in the two debates. The Americans were concerned with protecting themselves against the solution which the French were just in the process of inventing (or re- [*351] inventing). n21

Today, the inclusion of a bill of rights in constitutions is a matter of course. n22 The American and French framers thought differently. Some of the American delegates thought a bill of rights would be dangerous, as it might suggest that every right not included in the enumeration could be freely violated by the government. Because the Constitution restricted the powers of the government by enumerating them, it was felt that enumerating the rights might similarly be viewed as restrictive. n23 Delegates from the Southern States had a different objection: "[A bill of rights] generally begins with declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace, when a large part of our property consists in men who are actually born slaves." n24 In the end, the arguments against the bill of rights carried the day. At the *Assemblée Constituante* voices were raised against adopting a bill of rights before the constitution as a whole was written. However, their motive was fear of granting too many rights rather than too few. Two of the most prominent moderates, Lally-Tolendal n25 and Malouet, n26 argued that a bill of rights might give the people exaggerated, confused, and dangerous ideas about their liberties, and argued for a postponement. In the atmosphere that reigned at the time, they were sitting ducks for Target's assertion that "the truth can never be dangerous." n27

Over and above the issue of specific rights, two more general questions were important in the Eighteenth-Century assemblies. One was whether rights attach only to individuals, or whether a collectivity can also be the bearer of rights. In Philadelphia the strongest opponent of states' rights was James Wilson: "can we forget for whom we are forming a Government? Is it for men or for the imaginary beings called [*352] States?" n28 Advocates of individual rights argued that states ought to be represented in the federal assembly proportionally to their population, whereas those who believed in the rights of states argued for equal representation. In such cases, where right stands against right, the outcome is usually either breakdown or compromise. In the United States the compromise was equal representation in the upper house and proportional in the lower. At the Federal Convention proposals were also made to strike a compromise within the Senate itself, by which the representation of the smaller states would go beyond proportionality but fall short of equality. n29

The other question concerned the conditions for granting political rights, notably the right to vote and to be elected. At the time, such rights were perceived not as unconditional, but as contingent on contribution to one's country. The idea was not only "no taxation without representation," but equally "no representation without taxation." Sieyes, for instance, made an influential distinction between active and passive citizens: n30 women, children and others who did not contribute to the maintenance of the public establishment should not have the right to influence policy. n31 "Although all should be able to enjoy the benefits of living in society, only those who make a contribution to the public establishment form the real shareholders in the great social enterprise." n32 Contribution includes not only paying taxes, but also defending one's country. n33 In Philadelphia, Benjamin Franklin insisted strongly on this idea: "in time

of war a country owed much to the lower class of citizens. Our late war was an instance of what they could suffer and perform. If denied the right of suffrage it would debase their spirit and detach them from the interest of the country." n34 In Paris, Clermont-Tonnerre made a brief reference to the fact that Jews served in the national militia, to refute one of several arguments for denying them citizenship and, a fortiori, the right to vote. n35

This conception of society as a joint venture for mutual [*353] advantage goes back at least to classical Athens, where citizens were disenfranchised for cowardice in war and for unpaid debts to the state. n36 It falls short of the fully impartial view that underlies the bills of rights in modern constitutions. n37 A Twentieth-Century constitution may have clauses imposing the duty to do military service and pay taxes and another clause granting the right to vote, but we do not find clauses that make rights conditional upon the fulfillment of duties. We should note, however, that the conditionality sometimes pertained to collectivities rather than to individuals. In the Massachusetts Constitution of 1780, for instance, membership in the Senate was proportioned to districts in accordance with the amount of public taxes paid by the inhabitants. That arrangement might, of course, be seen as reflecting the interests of property rather than a collective right based on collective contribution. The latter motivation, however, is explicit in Thouret's proposal in the Assemblée Constituante for the organization of the electoral system. He stipulated that representation would be based in equal parts on territory, population and tax payments, justifying the last criterion by arguing that "it is just that the region which contributes most to the needs and the support of the public establishment should have a proportionally larger part in the governance of that establishment." n38 Thouret added that while relative contributions should not define individual rights, since this may lead to the emergence of an aristocracy of wealth, there was no such danger if the amount of contributions was considered in the aggregate. n39

Finally, the constituent assembly has to choose a procedure for amending the constitution. The harder it is to change the constitution, the more people tend to view it as a given framework for policy rather than as a tool for policy. Of course, they may also come to see it as an intolerable prison, hence the need for an optimal rigidity of the constitution. As Lally-Tolendal said in the Assemblée Constituante, [*354] "it must be neither easy nor impossible to change it." n40 On the one hand, "constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy." n41 On the other hand, we should keep in mind a dictum of constitutional lawyers, ascribed to Justice Robert Jackson: the Constitution is not a suicide pact. n42 It must be possible to unbind oneself in an emergency. Society must not be confined too tightly. n43

To strike the right balance between rigidity and flexibility a number of devices can be used, singly or in combination. First, one can require qualified majorities for changes in the constitution. The purpose is to guard against instability, so that the constitution remains unaffected even when majorities fluctuate between forty-nine and fifty-one percent. Second, one can impose delaying or "cooling" devices, for instance by requiring changes to be passed or proposed by several successive parliaments. This was the solution adopted in the French Constitution of 1791. Delays protect society against itself, by forcing passionate majorities, whether simple or qualified, to cool down and reconsider. Third, federally organized countries can require that any changes be passed by all, or a qualified majority, of the republics. This was the solution adopted at the Federal Convention, to protect the states against the federal government. This solution may also serve as a delaying device. Finally, one can write periodic revisions of the constitution into the document itself, to protect later generations from the tyranny of their predecessors and provide the necessary time for constitutional arrangements to work themselves out, in order to [*355] ensure that they will not be discarded prematurely. This solution was discussed at length in the French assembly. n44 To meet the objection that fixed revisions would create unrest among the citizens, n45 the proposal was floated to introduce a random element by linking constitutional conventions to the death of the monarch. n46

Earlier I said that I focus on process rather than substance. That assertion can be made more precise. I am trying to construct a framework for understanding the events that lead up to the adoption of a constitution. The further fate of that document falls outside the scope of this Article. I am concerned with the upstream causes of the constitution, not with its downstream consequences. (I shall, however, be concerned with anticipated downstream effects). Specifically, I shall not explain why the American Constitution succeeded whereas the French did not. Furthermore, it is not clear what one means by success in this connection. Minimally, it must imply that the constitution matters. For this to be the case, three

conditions must exist. The constitutions must have precise, enforceable implications for behavior. Those implications must in fact be enforced. And this enforcement must be causally linked to the existence of the constitution. More ambitiously, one could demand that the constitution must work. It must prevent actors or institutions from usurping power and enable the political system to make decisions and stick to them. It must prevent tyranny as well as deadlock and vacillation. Finally, we may require of a successful constitution that it should last for some substantial period of time, in the sense that any constitutional changes are made according to rules laid down in the constitution itself. It is a logical truth that a constitution that works will also matter, and a plausible causal proposition that it will also endure. However, constitutions can last even if they do not matter, as evidenced by the 1936 constitution of the Soviet Union, which lasted for 45 years. n47 They can last and matter even if they do not work very well, as shown by the [*356] Third French Republic, which lasted for 65 years. For purposes of positive analysis, the best working definition of success is to require that the constitution endure and matter, as the notion of what works is inevitably value-laden. To explain why some constitutions succeed and others don't, one can focus either on ex ante conditions of adoption n48 or on ex post events, such as exogenous political struggles n49 or the presence of exceptional personalities. n50

Although I shall not pursue this explanatory question, a closely related issue is germane to my argument. I shall assume, namely, that constitution-makers aim at producing a document that will work, matter and endure. There are two possible exceptions to this assertion. Some framers may not care whether the constitution matters; and some may want it not to last. The first exception arises with regard to statements of intentions that have mainly symbolic value and no enforceable content. n51 Although their advocates usually argue that these clauses may have an impact by changing the values and priorities of the citizens, such effects are largely a matter of faith. n52 The second exception is more relevant in the present context. It arises with regard to "constitution-wreckers", members of the old regime who want the constitution to fail so as to create the conditions for a restoration. n53 In the Assemblée Constituante, the moderate faction (the "monarchists") believed that the nobility and upper clergy were practicing a policy of crisis maximization; specifically, [*357] that their vote against an upper chamber in the legislature was grounded in a fear that this institution would stabilize the new regime. n54 An alternative, perhaps more plausible explanation involves feelings of envy and jealousy: the nobility did not want to see the creation of a new aristocracy that would not be recruited from their ranks. n55

Be this as it may, the large majority of framers in the two assemblies were preoccupied with the durability and effectiveness of the document they were writing. Although there were voices at the Federal Convention who argued for the adoption of a temporary or incomplete constitution, on the grounds that it could always be improved later, the idea was firmly rebutted by the two most influential framers. Madison argued that in other countries it had been difficult to reform constitutions even when they were acknowledged to be defective. He claimed that "the fear of Innovation, and the Hue & Cry in favor of the Liberty of the people will prevent the necessary Reforms..." n56 Hamilton, similarly, claimed that the present occasion was a chance not to be missed: "It is a miracle that we were now here exercising our tranquil & free deliberations on the subject. It would be madness to trust to future miracles." n57

The French framers were no less insistent on the unique nature of their assembly. Mounier, for instance, argued that the strong unicameral assembly that was necessary to create the constitution would be inappropriate for ordinary law-making. n58 Similarly, Mirabeau argued that the King should have veto power in the constitution, but not over the constitution itself. n59 Although created by the King, and creating a legislature that would be subject to the King, the Constituent [*358] Assembly itself could not be bound by anyone. Summarizing both points, Clermont-Tonnerre observed that the "three-headed hydra" - king, first chamber and second chamber - created by the constitution could not itself have created a constitution. n60 For him, the privileged character of the Constituent Assembly, by virtue of which it could be a law unto itself, derived from the extraordinary circumstances in which it operated. n61 "Anarchy is a frightening but necessary transitional stage; the only moment in which a new order of things can be created. It is not in calm times that one can take uniform measures." n62 The next Part elaborates on this argument.

III. The Constitution of the Constituent Assembly n63

I now consider the convocation and organization of the two constituent assemblies. In a process of this kind, a number

of decisions have to be made. First, the assembly has to be convoked. Second, a procedure for selecting or electing delegates has to be adopted. Third, the mandate of the assembly and of the delegates has to be defined in terms of constraints on what must be included and what cannot be included in the final document. Fourth, once the delegates meet, their credentials have to be verified so that the assembly can be formally constituted. Fifth, an internal decision-making procedure of the assembly has to be specified. Finally, a mode of ratifying the constitution has to be laid down.

These decisions may flow either from an outside authority or from the assembly itself. The first two decisions must clearly be taken by outside sources. The decision to convene the assembly must be made by a preexisting authority. In our two cases, this authority was found in the Continental Congress and the King of France. n64 The mechanism by which [*359] delegates are elected or selected must also be in existence prior to the assembly itself. In the cases that concern me here, and in most others of interest, these two outside authorities do not coincide. n65 Although Louis XVI decided the convocation of the Estates General, he could not pick the delegates. When he tried to obtain the power to verify their credentials, he was rebuffed. Whereas the Continental Congress made the decision to convene the Federal Convention, the state legislatures chose the delegates. n66

The assembly is obviously incapable of deciding the initial convocation and delegation. It can, however, arrogate to itself the power over all other decisions. To varying degrees this is what happened in the two Eighteenth-Century assemblies. They verified their own credentials and set many of their own rules, sometimes overruling their instructions, sometimes supplementing them. The tension between the assemblies and their conveners - between the creature and its creator - was at the heart of both processes. In Philadelphia, the state legislatures, which were the source of the authority of the delegates, were also perceived by many as a major obstacle to their efforts. In Paris, there was a somewhat similar relationship between the King and the assembly. The general form of the paradox is simple. On the one hand, it seems to be a general principle that if X brings Y into being, then X has an authority superior to that of Y. n67 On the other hand, if Y is brought into being to regulate, among other things, the activities of X, Y would seem to be the superior instance. The paradox can also be summarized in two opposing slogans, "Let the kingmaker beware of the king" versus "Let the king beware of the kingmaker." These relationships obtain both between the assembly and its convener and between the delegates and their constituencies. Collectively, the delegates owe their existence to one institution; individually, to another. These facts are crucial for understanding the debates in both assemblies.

[*360] In both cases, the assemblies got the upper hand against their creators. The delegates at the Federal Convention succeeded in replacing the state legislatures with special conventions as the ratifying bodies. Also, they tacitly overruled Congress when they demanded ratification by nine out of the thirteen states instead of the unanimity that governed changes in the Articles of Confederation. The French delegates turned the King's veto in the constitution into a merely suspensive one, and his veto over the constitution into a mere formality. n68 Also, they ignored the instructions of their constituents on a number of crucial issues. This outcome should not be surprising. Almost by definition, the old regime is part of the problem that a constituent assembly has to solve. But if the regime is flawed, why should the assembly respect its instructions?

I now turn to a more systematic analysis of the six steps: convocation, selection of delegates, specifying the mandate, verifying the credentials of the delegates, defining procedural rules, and choosing a mode of ratification.

In both countries, the assemblies were convoked during and because of a general crisis in the country. As I argue in Part V below, this fact is important not only in understanding the origin of the assemblies, but also in trying to explain the nature of the document they produced. In a crisis, time is at a premium. The urgent need to reach agreement has the effect of equalizing bargaining power. I shall draw on this fact in the analysis of the bargaining between the small and the large states over the representation in the Senate.

With regard to France in 1789, the assertion of a crisis is a truism. n69 The finances of the kingdom were in a shambles [*361] because of military over-commitments. The last harvest had been disastrous, and the winter cruel. Moreover, these acute pressures emerged from a background of chronic anomie. The hierarchies were crumbling. All

classes harbored intense resentments against each other or against the royal administration. Intellectual criticism was rampant. Although the direct object for calling the Estates General was to raise revenue, they were ineluctably transformed into a general attack on privilege.

With regard to America in 1787, the assertion of a general crisis is more controversial. n70 Although the economy was prosperous, there was a widespread belief that the country was badly governed. n71 The state legislatures, according to this perception, acted on partisan and myopic motives, and Congress was too weak to restrain or coordinate its behavior. Moreover, many believed that this political misbehavior was having dire economic consequences, such as the printing of paper money, the cancellation of debts and the confiscation of property. For the purpose of explaining behavior at the Convention, the existence of these beliefs is more important than their accuracy.

From this comparison between the two countries we can draw the following implication. In France, the stage was set for a revolution from below, against privilege and royal power. In America, the constituent assembly carried out what amounted to a revolution from above against unfettered deocracy and radical republicanism. n72 While their opponents came from opposite ends of the political spectrum, the French and the American framers shared the same ideal, that of a deliberative and representative mode of government. In the American context, the implementation of this ideal was perceived by many as a step backward. In France, it was not only one but several steps forward. I shall have more to say about the ideal itself in Part IV below.

I now turn to the mode of selecting delegates. In the Assemblée Constituante, delegates were selected both from regions and from the three estates. On three points related to this procedure, Jacques Necker played a crucial role in persuading [*362] the King to deviate from the stipulations laid down by the Assembly of Notables that had met in November 1788. n73 First, he got acceptance for the principle that the Third Estate should have twice as many delegates as each of the other orders. Second, he ensured that the number of deputies would be proportional to the population and tax contribution of the electoral districts, whereas the notables wanted equal representation for all districts, although they varied in size from 6000 to 600,000. Third, he made it possible for electoral assemblies of the Third Estate to choose as delegates members of the other two orders. Both Mirabeau and Sieyes owed their presence in the assembly to this innovation. The Provincial assembly of the Dauphine, which spearheaded the transformation of the Estates General into a national assembly, went even further and adopted a kind of converse of the last principle, such that delegates from each estate were elected by votes from members of all three estates. n74 On a national scale, however, little is known about the elections of the 1200 delegates to the French assembly. n75 Although case studies of the elections in the Dauphine, n76 Brittany, n77 and Burgundy n78 demonstrate considerable strategic manipulation, no synoptic view is available.

The delegates to the Federal Convention were elected indirectly, by the state legislatures rather than by the voters. n79 Although there were voices for having the delegates appointed by conventions called expressly for that purpose, n80 the idea did not make its way. As a consequence, the debates at the Convention remained, to some extent, under the shadow of the state legislatures. A further consequence of this mode of election was that the delegates were certain to be part of the power establishment, deeply familiar with politics at the state and confederate levels. Whether the outcome would have been similar had they been chosen at specially called conventions [*363] is, of course, hard to tell.

The constituent assembly is made up of individuals. In some assemblies, this logical truth also reflects a political reality. In the Assemblée Constituante, the majority of the delegates actually voted as individuals, because they did not want to be captured by any of the organized groups in the assembly. n81 This fact explains the fluid, volatile and unpredictable character of the proceedings. Later, I shall explain how Mounier refused to strike a deal with the patriots over the issues of bicameralism, veto, and the right to dissolve parliament. One of several possible explanations is that he did not trust the ability of his opponents to deliver. The delegates were at nobody's beck and call. I am not implying that they were sturdy individualists who preferred to make up their own minds. They were volatile individually, as well as collectively, and were highly susceptible to the eloquence of a Mirabeau or a Robespierre, to moods and fashions, and to rumors and apprehensions. However, they could not be rounded up and delivered as a bloc of votes. Anyone who has ever tried to gather together the mercury from a shattered thermometer will know what I mean.

At the Federal Convention, the delegates represented their states and voted as a single bloc. The delegates from a given state, however, were not always of a single mind. It has been calculated that among them, the states that sent delegates to the Convention contained approximately three dozen well-defined political factions, all but a few of which were represented. n82 Although only 3% of the estimated 5000 votes cast at the Convention were recorded as "divided", meaning that the delegation split its vote evenly, n83 many more must have fallen short of unanimity. To be sure, the terms "fluid" and "volatile" apply here as well, but for another reason. In Philadelphia we observe the coming together and breaking up of five coalitions, n84 rather than the operation of crowd psychology. Coalitions can shift even if individual preferences remain the same.

Consider next the mandate of the assemblies and of the delegates. Earlier, I noted that there are two sources of outside [*364] authority, one responsible for the convocation of the assembly and the other for the election of delegates. Each of these creators will predictably try to constrain their creatures, to ensure that certain questions are not raised, or that certain solutions are chosen. The convener will try to limit the collective mandate of the assembly, and the electors will try to limit the individual mandates of the delegates. Equally predictably, the creature will rebel against the creators and, as I suggested, the rebel will typically succeed.

Following a distinction made by Talleyrand-Perigord in the *Assemblée Constituante*, n85 we may distinguish between three kinds of bound mandates: instructions about how to vote on specific issues, instructions to refuse to debate specific issues, and instructions to withdraw from the assembly in case certain decisions are made. These are all attempts to bind individual delegates. In addition, it was argued, both in Paris and in Philadelphia, that the assembly itself had a limited mandate, in that certain institutions or issues were out of bounds for discussion.

In the French assembly, individual mandates were invoked by way of three instructions: to vote by order or by head, to refuse consent to a loan before the constitution had been adopted, and to support the royal veto. On all three counts, most delegates eventually decided to ignore their instructions. The main question concerning the collective mandate of the assembly arose, as I indicated earlier, in the debate over the royal veto in and over the constitution. For many, it was self-evidently true that the assembly had no mandate to destroy or limit its creator. For others, it was equally evident that the assembly could do anything it wanted, being the embodiment of the will of the nation.

At the Federal Convention, the delegation from Delaware came with instructions not to accept anything short of equality of votes for all states in the new union. n86 Although the instructions themselves did not amount to more than bound mandates of the first kind, the threat to withdraw was nevertheless made at the outset of the Convention. n87 Delegates from the slaveholding states also threatened to withdraw unless they got their way over the slave trade, n88 but they never [*365] referred to any mandate of the first or the third kind. n89 The relevance of this distinction will be further explained later; suffice it to say here that threats are more credible if backed by instructions from a superior body.

The Delaware instructions were the only case of individual mandates at the Federal Convention. Far more important was the question whether the Convention itself had a mandate to propose sweeping changes in the Constitution. Some delegates to the Federal Convention claimed that their instructions did not extend to the kind of wide-ranging reform that was emerging. n90 (They did not, however, threaten to withdraw on this account). The advocates for a radical change had two replies. James Wilson said, lamely, that "he conceived himself authorized to conclude nothing, but to be at liberty to propose any thing." n91 George Mason argued more robustly that "in certain seasons of public danger it is commendable to exceed power." n92 Randolph, similarly, "was not scrupulous on the point of power." n93 Bootstrap-pulling can be justified by external circumstances. This kind of statement was also frequent in the French assembly. The exceptional conditions that create the call for a constituent assembly also justify arrogations of power that would appear illegal under normal circumstances. In the constitution-making process the kingmaker should beware of the king.

Once the delegates have met, their credentials must be verified so that the assembly can start working. In Philadelphia, this potentially tricky step caused no problems. The delegates met, read their credentials, and went on with

their business. In Paris, the verification debates turned out to be a crucial stage in the self-transformation of the Estates General into the National Assembly. n94 Two issues were at stake. First, the nobility wanted each order to verify the powers of its own delegates, whereas the Third Estate wanted the verification to take place in a joint session of all three orders. n95 [*366] (The clergy said from the beginning that they would go along with any agreement reached by the other two orders.) Second, when the nobility saw that they were not getting their way, they accepted a proposal that the King be made the arbiter of contested cases. This, too, was unacceptable to the third estate.

The first issue was to a large extent a red herring. Behind it was the much more important question of whether the assembly should vote by order or by head. The nobility thought that a joint verification procedure would create a prejudice in favor of the vote by head. n96 Although the Third Estate strenuously denied this implication n97 and even claimed (not implausibly) that voting by order would make common verification even more necessary, n98 there is little doubt that they used this issue to drive in a wedge for the more crucial demand for voting by head. In fact, the ultimate resolution of the crisis came when the Third Estate unilaterally transformed itself into the National Assembly, and invited delegates from the other orders to join.

Before that happened, however, the committee had examined the compromise proposal to refer contested cases to the King. The King's commissaries argued n99 that having called the Assembly into being, the King also had the right to verify the credentials of the delegates in cases of disagreement between the orders. n100 The spokesmen for the Third Estate clearly recognized the nature of the dilemma. n101 On the one hand, it was unacceptable that the credentials of the assembly should be judged by an external power. In the limit, this practice might amount to the King selecting the delegates. On the other hand, self-verification created a vicious circle: how could the assembly verify the credentials without being constituted, and how could it be constituted without a prior verification of the credentials? Their answer to the dilemma was purely pragmatic: "It is impossible to believe that the majority of those who present themselves as delegates should not have valid credentials." n102 In the end, as I said, the Third [*367] Estate cut the Gordian knot by simply declaring itself constituted.

The next aspect of the constitution of the constituent assembly concerns its internal procedural rules. The following issues can arise. The assembly may set a time limit for its proceedings. If it also serves as legislative assembly, it must decide on the allocation of its time between law-making and constitution-making. It may decide to create one or several subcommittees to prepare a draft of the constitution or to discuss special issues. It must decide whether to proceed in closed sessions or open the debates to the public. If the sessions are closed, it must decide whether to inform the public about the proceedings or keep them secret. It must decide on the quorum, on the method of voting (by roll call, show of hands, etc.), and on the procedure for transforming votes into decisions.

The effect of such procedural rules can be profound for several reasons. As we know from social choice theory, the process of aggregating given preferences into a final decision is deeply affected by procedural rules. Also, the setting of the debates may affect those preferences themselves, or at least the preferences that the delegates choose to express. In sum, procedure affects the transformation, expression and aggregation of preferences in ways that can be crucial for the final outcome. Here I shall survey some aspects of preference aggregation. The impact of the setting on the transformation of preferences is discussed in Part IV. The impact on the expression of preferences is analyzed in Part VI.

In both countries, the assembly had to come to grips with the fact of a preexisting partition of the nation into groups of unequal size. In America these groups were geographically defined states, whereas in France they were socially defined orders. In both cases, the question arose whether the assembly should proceed on the principle "one man, one vote" or "one group, one vote." (In Philadelphia the question arose not only for the constituent assembly itself, but also - and mainly - for future legislatures.) The question was, as we shall see, resolved differently in the two countries.

In the *Assemblée Constituante*, the burning issue was whether the estates would vote by order or by head. Necker failed in his attempt to constrain the assembly on this point. "He asserted categorically that the traditional method of deliberation [*368] and vote by order could not be changed except by the agreement of each of the three orders and the

approval of the king." n103 When the assembly met, however, the Third Estate unilaterally imposed common deliberation and voting by head, using, as I said, the debate over the verification of credentials as a wedge. This outcome, to be sure, was clearly the result Necker intended. Doubling the votes of the Third Estate would make little difference and little sense if the voting were to be by order. He had hoped, however, that it would be reached by compromise and negotiation. To that end, he fought, unsuccessfully, against electoral assemblies that instructed their delegates to vote for or against voting by head.

Voting in the Convention was by majority vote, each state having one vote. Although the Pennsylvanians wanted to refuse the smaller states an equal vote, their proposal was never put on the table. n104 When a committee was formed to forge a compromise on the upper house, James Wilson "objected to the Committee, because it would decide according to that very rule of voting which was opposed on one side," n105 but to no avail. Yet equality of votes at the Convention could not in itself ensure that the outcome would be equal representation in the Senate, as decisions were taken by majority vote among the states and the small states formed a minority. The large states failed, but not because the rules of voting in the Convention made equal representation a foregone conclusion. Later, I discuss other possible explanations for their failure.

The American case, on closer inspection, involves three stages. In the first stage we have the convocation of the assembly by Congress. In the second stage we have the adoption of a voting procedure to be used at the Convention. In the third stage we have the adoption of a voting procedure for the future Senate. In all three stages, the principle "one state, one vote" was followed. It is tempting to read a causal connection into this fact. The Convention adopted the principle for its own proceedings because it was used by the institution that had created it. Further, it proposed the principle for the future because the smaller states at the Convention benefited from the disproportionate strength they derived from its use at that stage. As I said, the principle cannot by itself explain [*369] the final decision of having equal representation in the Senate, but it may have been a contributing, perhaps even pivotal, factor.

There are two mechanisms that could be at work here. On the one hand, there is the sheer force of precedence. As Samuel Patterson asked at the Convention, "if a proportional representation be right, why do we not vote so here?" n106 On the other hand, the equality of votes at the Convention increased the voting power of the small states. Since the small states were in a minority, this could not by itself ensure their victory. The voting procedure at the Convention, however, increased their bargaining power for logrolling purposes. Whatever the mechanism, we observe a deep continuity in the American proceedings. The Articles of Confederation shaped the Convention. Through the Convention, they also shaped the Constitution that was finally adopted. The French assembly made a much cleaner break with the past. Once the Third Estate had obtained the vote by head, there was nothing to stop them. n107

The final decision I shall discuss concerns the mode of ratification of the constitution. This act is intended to confer downstream legitimacy on the constitution, to be distinguished from the upstream legitimacy derived from the authorities that call the assembly into being. Whereas ordinary laws need no legitimacy beyond that of having been adopted by a lawfully elected assembly, the constitution may seem to require a second scrutiny. For one thing, the constitution regulates the most basic aspects of political life. For another, it is deliberately constructed so as to be difficult to change. For both reasons, one might want to have an opportunity to overrule the decision of the constituent assembly itself. Moreover, the knowledge of that possibility will keep the framers within bounds. Not wanting to be overruled, they will anticipate and feel constrained by the possible censure.

It would seem axiomatic that the authorities that call the constituent assembly into being would also want the right to veto the final document. However, the framers themselves might not accept the authority of their creator, especially if they have already gone beyond their mandate. Instead, they might define themselves as the final and sovereign authority, doing away with any need for ratification. Alternatively, they [*370] might appeal directly to the people or to special conventions. These are the outcomes that were observed in, respectively, the French and the American cases.

In France, the right of the King to veto the constitution was a thorny issue, especially in the wake of the decree of August 4 1789 that abolished all feudal dues. As the King hesitated to give his sanction to the decree, the question arose

whether his assent was needed at all. Both the King and the assembly tended to see the other as its creature, invested with powers only through its actions. Mounier argued that since the King had created the assembly, he must also have the right to veto its decision. n108 In reply, Target argued that a royal veto over the constitution would be absurd, as if "the constituent power had to ask the permission of the constituted power." n109 When the issue came up again in the last days of the assembly, the King was left formally free to refuse the constitution. n110 Although some of his advisers urged him to strike a bargain, he opted for unconditional acceptance. n111 It is fair to say that by that time - after the flight to Varennes that undermined his authority - he had no other choice. Reading the debates, it is clear that they did not take place under the shadow of future ratification.

That shadow, by contrast, was very much present at the Federal Convention. Although no ratification procedure was laid down in the convocation of the Convention, many assumed that the Constitution would eventually have to be ratified by the state legislatures. Reasoning from that premise, they argued that the Constitution ought to be tailored so as to be acceptable to those bodies. Charles Pinkney asserted, for instance, that "the Legislatures would be less likely to promote the adoption of the new Government, if they were to be excluded from all share in it." n112 Ellsworth argued in similar terms that "if we are jealous of the State [Governments], they will be so of us." n113 The Constitution would not receive their approval "if on going home I tell them we gave the [General Government] such powers because we could not trust you." n114 Others turned the argument on its head: if the state legislatures had an institutional interest in the outcome, they ought not to be judge in their own cause. Rufus King, [*371] for instance, argued for ratification by special conventions on the grounds that "the Legislatures also being to lose power, will be most likely to raise objections." n115 In the end, the latter view was adopted. The Convention decided that the Constitution had to be approved by conventions in nine of the thirteen states. This procedure involved a double break with the Articles of Confederation, which demanded unanimous ratification by the state legislatures for all alterations.

Later I shall have more to say about the nature and strength of the constraints that the need for ratification placed on the debates at the Convention. In particular, I shall emphasize that the institutional interests of the legislatures was not their only or even their main concern. Much more important was the need to accommodate the material interests of the states, an issue that would have come up regardless of the mode of state ratification. This downstream concern is closely linked to the upstream obligation of the delegates to represent the interests of their constituencies. There is however, the following difference. Whereas delegates from all states are concerned about the ratification by any given state, only the delegates from that state have an obligation to represent its interests. The shared concern provides grounds for rational argument. The partisan interest, by contrast, yields only raw material for strategic bargaining.

IV. Constitutional Arguing

Delegates to constituent assemblies usually do not take up arms against each other. Their aim is to reach agreement by talk, not victory by fight. Yet there are many kinds of talk, many types of speech acts. Constitutional speech acts, I shall argue, are of two basic types: arguing and bargaining. n116 [*372] Rational argumentation on the one hand, threats and promises on the other, are the main vehicles by which the parties seek to reach agreement. The former is subject to criteria of validity, the latter to criteria of credibility. Although my claim extends beyond constituent assemblies to ordinary legislatures and committees, I derive my examples from the two eighteenth century assemblies.

Reaching agreement is not the only way of making decisions. In theory, the delegates could just get together, cast their votes, record the majority outcome, and then disperse, without any communication. This, in fact, was Rousseau's ideal of political decision-making. Communication among the voters, he thought, invited rhetoric and demagoguery. By contrast, "if, when the people, being furnished with adequate information, held its deliberations, the citizens had no communication one with another, the grand total of the small differences would always give the general will...." n117 This view is hard to take seriously, because of the implausible premise that the citizens could obtain information without communicating with each other. In theory, communication may not be a necessary part of collective decision-making. In practice, however, we cannot imagine the latter without the former.

I need not assume, however, that communication is sufficient for a decision to be made. Bargaining may lead to an

impasse, e.g. if the parties verbally precommit themselves to incompatible positions. In addition, arguments may fail to yield a decision, even when supplemented by voting, e.g. if only 60% of eligible voters support a proposal that requires a two-thirds majority to be adopted. Even in such cases, however, communication may partly explain why no decision was made. And when a decision is reached, communication may be part of the explanation of why that decision, rather than another, was made.

My analysis in this Part relies on recent work by Habermas. He argues that a speaker who aims at achieving understanding rather than success is committed to three validity claims: propositional truth, normative rightness, and truthfulness. n118 [*373] It follows that a speaker who wants to appear as aiming at understanding must also appear to be committed to these claims. In Part VI, therefore, I shall discuss the conditions under which a speaker who is really aiming at success will find it in his interest to appear to be aiming at understanding. In this Part, however, I consistently take appearances at face value.

The idea that a speaker who makes factual claims is committed to propositional truth is hardly controversial. Nor can it be disputed that many debates in assemblies, conventions and legislatures are directed to purely factual matters. In principle, such debates are constrained by the normal rules of scientific argument. At the Federal Convention, in particular, many delegates saw themselves as political scientists, concerned with tracing causal connections between institutions and outcomes. Illustrative examples are cited below.

The idea of normative rightness is difficult and controversial. First, let us distinguish between individual rationality and social justice. Both are normative conceptions that lend themselves to disagreement and, I think, argument. For instance, framers may have identical (e.g. utilitarian) values and identical factual beliefs and yet disagree over what should be done if they differ in their degree of risk-aversion, their rate of time discounting, or their more or less pessimistic approaches to decision-making under uncertainty. Although some claim that such differences are brute tastes that do not lend themselves to rational discussion, I believe a case can be made for the opposite view. Here, however, I leave these issues on the side.

Many authors claim that normative rightness, understood as social justice, must involve some minimal idea of impartiality. n119 This is also the idea I shall be exploring in the following. The texts, however, do not always lend themselves to this reading. In the committee debates over the verification of credentials in the *Assemblée Constituante*, appeals to precedent were frequent, and regularly opposed to the giving of reasons. On one occasion, precedent was evoked merely as a tie-breaker. n120 Because there were (impartial) reasons on both sides, one should follow the procedures adopted in 1614. The nobility tended, however, to offer precedent as a decisive consideration, although they also went out of their way to show that their proposal was (uniquely) supported by reason. The [*374] opposite characterization applies to the Third Estate. The striking fact, for my purposes, is that nobody offered an impartial argument for the appeal to precedent, or suggested that precedent could itself be a reason. What has been called the "normative power of the factual" was, somehow, just taken for granted. Again, I cannot deal with this issue in the detail it would deserve.

The ideal of impartiality asserts that people should not be treated differently simply because they live at a particular time and place or belong to a particular sex, race or profession. Any differential treatment of such groups must be grounded in properties that could in principle apply to anyone. It was precisely at the time of the two assemblies that these ideas of impartiality and universality became generally recognized as the basis for political life. In the French assembly, they were memorably expressed in Clermont-Tonnerre's plea for recognizing Jews, actors and executioners as full citizens. n121 The refusal of the right to vote for women might appear to be an exception. In Sieyès' argument, however, the refusal was grounded in women's lack of a universal property, namely that of "contributing to the public establishment." n122 In fact, those who argued against full citizenship for Jews similarly referred to their lack of a universal property, namely that of doing military service. n123 Nobody claimed that Jews had to be excluded simply because of their race. As these examples show, this notion of impartiality is indeed a minimal one. For the present purposes, however, I shall not try to go beyond it. n124

Prejudice is one antonym of impartiality. Selfishness is another. n125 However, one need not always oppose impartiality and self-interest. Instead, one may offer an argument from self-interest for impartiality. This is the structure of a veil-of-ignorance argument that was used repeatedly at the Federal [*375] Convention, most strikingly in Madison's account of an intervention by George Mason:

We ought to attend to the rights of every class of... people. He had often wondered at the indifference of the superior classes of society to this dictate of humanity & policy, considering that however affluent their circumstances, or elevated their situations, might be, the course of a few years, not only might but certainly would, distribute their posteriority throughout the lowest classes of Society. Every selfish motive therefore, every family attachment, ought to recommend such a system of policy as would provide no less carefully for the rights... and happiness of the lowest than of the highest orders of Citizens. n126

Veil-of-ignorance arguments n127 were also used in other contexts. Thus Gouverneur Morris argued that

State attachments, and State importance have been the bane of this Country. We cannot annihilate; but we may perhaps take out the teeth of the serpents. He wished our ideas to be enlarged to the true interest of man, instead of being circumscribed within the narrow compass of a particular Spot. And after all how little can be the motive yielded by selfishness for such a policy. Who can say whether he himself, much less whether his children, will the next year be an inhabitant of this or that State. n128

This argument refers to the thirteen states then in existence, but it was also used to cover the accession of future states. Against Gerry's proposal to "limit the number of new States to be admitted into the Union, in such a manner, that they should never be able to outnumber the Atlantic States," n129 Sherman replied that "we are providing for our posterity, for our children [and] our grand children, who would be as likely to be citizens of new Western States as of the old States." n130 These arguments should not be confused with genuine appeals to impartiality, as in Mason's argument for granting new states equal status:

Strong objections had been drawn from the danger to the Atlantic interests from new Western States. Ought we to sacrifice what we know to be right in itself, lest it should prove favorable to States which are not yet in existence. If the Western States are to be admitted into the Union as they arise, they must, he [would] repeat, be treated as equals, and subjected to no degrading discriminations. n131

[*376] As a further instance of a genuine impartial argument, I shall cite what in my opinion was the intellectual high point at the Federal Convention: Madison's argument that an upper house serves

first to protect the people agst. their rulers: secondly to protect (the people) agst. the transient impressions into which they themselves might be led. A people deliberating in a temperate moment, and with the experience of other nations before them, on the plan of Govt. most likely to secure their happiness, would first be aware, that those chargd. with the public happiness, might betray their trust. An obvious precaution agst. this danger wd. be to divide the trust between different bodies of men, who might watch & check each other... It wd. next occur to such a people, that they themselves were liable to temporary errors, thro' want of information as to their true interest, and that men chosen for a short term, & employed but a small portion of that in public affairs, might err from the same cause... Another reflection equally becoming a people on such an occasion, wd. be that they themselves, as well as a numerous body of Representatives,

were liable to err also, from fickleness and passion... It ought finally to occur to a people deliberating on a Govt. for themselves, that as different interests necessarily result from the liberty meant to be secured, the major interest might under sudden impulses be tempted to commit injustice on the minority. n132

The argument is very much like that usually adduced for stringent amendment clauses. Deliberating in a temperate moment, a people might anticipate that on certain occasions in the future it might be less temperate, and so create an institutional machinery that would be an obstacle to sudden impulses and passions. Madison is not implying that the Convention incarnated the people in a deliberate moment. As is clear from the wording of his argument, he is constructing an original position occupied by rational, temperate agents who have to create an institutional response to certain facts about human nature. n133

[*377] Finally, the pursuit of understanding is also constrained by a commitment to truthfulness or sincerity, that is, meaning what one says. As Habermas notes, the outward form of truthfulness is consistency. n134 A participant who is seen as choosing normative arguments a la carte, and discarding them whenever they work against him, will often be viewed as insincere. n135 However, change of mind need not be a sign of opportunism. People often modify their views by exposure to an argument. Indeed, as I show below, framers in both assemblies believed that a major virtue of rational deliberation was that of allowing this to happen. Nevertheless, genuine changes of mind can often be distinguished from opportunism. Explicit disavowal of one's earlier views, and attempts to remedy earlier decisions, would be one criterion. Claiming to be persuaded by normative arguments that are counter to one's self-interest would be another. Although neither criterion is infallible, both can be helpful.

In the committee proceedings on the verification of credentials in the Assemblée Constituante, charges of inconsistency played a major role in the attacks of the Third Estate on the nobility's argument from precedent. In arguing for separate verification for each order, the nobility appealed to the precedent of the Estates General of 1614. The Third Estate countered by pointing to several other features from that occasion that the nobility did not want to preserve, telling them in effect that they could not have it both ways. n136 The pattern is: if you claim A, you must also admit B. When the nobility went beyond the immediate precedent of 1614 to the Estates of 1588, the Third Estate countered by going even further back, to 1483. The pattern is: if you claim A, you must allow us to claim B. n137

In the Assemblée Constituante itself, the mercurial Mirabeau lent himself especially well to the charge of inconsistency. On some occasions he argued that the King was superior to the assembly and on others that the assembly was sovereign; n138 in some debates he claimed that bound mandates could be ignored and in others that they had to be respected. n139 [*378] On one occasion Mirabeau's arch-reactionary younger brother perfidiously used his own words from an earlier occasion against him. n140 His erratic behavior may have nurtured the suspicion, later proved to be correct, that he was in the pay of the King. Yet his inconsistencies did not prevent him from having an enormous influence in the Assembly. n141 At the Federal Convention Madison n142 and George Mason n143 made charges of inconsistency against, respectively, Gouverneur Morris and James Wilson, accusing them of vacillating between confidence and distrust in their attitude toward future legislatures. To be sure, such accusations are not always made in good faith. The contexts in which the allegedly inconsistent statements are made may be so different that no real contradiction exists. Yet to the extent that they are perceived as valid, their effect can be devastating.

In constitutional debates, as elsewhere, arguments tend to be either consequentialist or deontological. Roughly speaking, the framers appealed to overall efficiency or to individual rights. This is what Madison does in The Federalist No.10, for instance, when he refers to "the rights of another or the good of the whole" as the two values that have to be preserved from the corrupting influence of factions. n144 In the constituent assemblies, speakers made constant references to these two values. Both respect the constraint of impartiality. Rights-based arguments are impartial because (and to the extent that) the rights are assigned to everybody, either unconditionally or conditionally upon some performance accessible to all. It would be a violation of impartiality, for instance, if women were denied the right to vote on the grounds that they do not perform military service, while also being disallowed to do so. It is not, or not in an equally obvious sense, a violation of impartiality if only tax-payers are allowed to vote, assuming that everybody is allowed to have gainful employment. n145 Many arguments based on the public good [*379] are also impartial,

notably those which rely on some version of utilitarianism. "Each to count for one and nobody for more than one" is a clear statement of the impartial ideal.

It is important to my thesis in Part VI that there are many ways of spelling out the ideal of impartiality. Arguments from rights and from the public good can take many different forms. Rights can be imputed to individuals or to collectivities, and yield radically different conclusions in the two applications. Utilitarianism can be explicated in ways that allow or prohibit interpersonal comparisons of utility. Norms of distribution according to need, desert or contribution are impartial, as are norms of equal distribution or distribution by lot. The idea that social arrangements ought to reflect what rational individuals would choose behind a veil of uncertainty (a notion that can be spelled out in several different ways) also reflects an ideal of impartiality. In this Part, however, I shall limit myself to rights-based arguments and arguments from the common good.

I begin with (and shall have most to say about) consequentialist arguments, based on some conception of efficiency, the public interest or the common good. While assuming that framers are motivated by these impartial concerns, I shall discuss different assumptions which they can make about the future generations of voters, politicians, and administrators for whom the constitution is made. n146 These assumptions fall into three categories. Future generations can be assumed to be motivated by passion, by interest or, like the framers themselves, by impartial reason. n147 In the [*380] third case, I emphasize that the framers can try to promote impartial argument, whereas in the first two cases their task is mainly one of damage-limitation with respect to given motives. Institutions, that is, can be designed either to encourage virtue or to contain vice. In Parts V and VI, I entertain the idea that the framers themselves may be swayed by one of the first two motives. Even in this Part, however, I give some concessions to the human frailty of the founding generation, by discussing the case of imperfectly rational framers.

First, the constitution-making process can be viewed as one in which rational, impartial framers try to contain the passions of future generations. This idea has two aspects which are related, respectively, to the machinery of constitutional amendment and the ordinary machinery of legislation. By making it hard to amend the constitution, framers can restrain passionate majorities who might want to suppress the rights of minorities. By slowing down the ordinary legislative process, through bicameralism and executive veto, the constitution can reduce the dangers of reckless and fickle majority legislation. Madison's argument, cited above, that the Senate is needed to protect the people against its predictable "fickleness and passion" falls into this category.

By and large, the records from the Federal Convention give little evidence that the Framers were concerned with the passions of future generations. They were much more concerned with future generations' tendency to pursue myopic or partisan interests. n148 The Framers assumed, by and large, that motives are always and everywhere self-interested. This assumption was probably adopted for prudential reasons, and not because it was believed to be literally true. According to Hume, "it is... a just political maxim, that every man must be supposed to be a knave; though, at the same time, it appears somewhat strange, that a maxim should be true in politics which is false in fact." n149 Steeped as they were in Humean thinking, the Framers naturally adopted the same outlook. n150

In the *Assemblée Constituante*, the assumptions made [*381] about human nature were both nastier and loftier than the ones adopted at the Federal Convention. Although Hume's assumption of universal knavishness is often thought to represent a worst-case scenario, there are worse things than self-interest. n151 Foremost among them are envy, spite, pride and vanity. Although there were a couple of arguments at the Federal Convention that may be read as if the Framers imputed envy on those for whom they were legislating, n152 the passages are ambiguous and atypical. In the *Assemblée Constituante*, however, arguments from pride and vanity, *amour-propre*, played a considerable role. Twenty-five years later, Benjamin Constant remained concerned with "the problem of... *amour-propre*, a peculiarly French flaw," n153 and argued that "institutional devices" were needed to counter it. n154 He advocated, for instance, for the British system that forbade written speeches in Parliament. n155 Tocqueville, too, constantly emphasized this character trait of the French, explaining how as the Foreign Minister of Louis Napoleon he got his way by flattering the *amour-propre* of his opponents while riding rough-shod over their interests. n156

In the Assemblée Constituante, Bergasse repeatedly argued the need to accommodate the vanity or pride of the agents whose behavior will be regulated by the constitution. n157 The prosecutor, he says, should not also serve as judge, because if the functions are combined, the amour-propre of the magistrate might bias him towards the guilt of the accused. n158 If the legislature accuses a minister of misconduct, he should not be judged by an ordinary court, as it might make this an occasion to "humiliate the pride" of the legislative body. n159 A suspensive veto for the King will not have the intended effect of making the assembly reconsider, because its amour-propre will prevent it from backing down. n160 Malouet discussed a similar argument that had been advanced against the proposal [*382] to give a veto to the senate which could only be overruled by a two thirds majority in the lower house. n161 In his reply, Malouet did not deny the operation of amour-propre, but argued that it would be limited to those who had initiated the law, and would not extend to everybody who voted for it. n162

A subtle instance of such reasoning arose over the duration of the suspensive veto of the King. Could the next legislature overrule him, or could the veto be repeated until a third legislature? In his letter to the assembly, Necker argued that the King's right to two consecutive vetoes was essential, as it allowed him to yield to the assembly's wishes in the second legislature without appearing to be forced to do so. n163 Only in this way could the King's dignity and majesty, according to Necker, be upheld. Arguing for the same proposal (which was eventually adopted), Clermont-Tonnerre also referred to the need to conserve the royal dignity. n164 Although dignity is hardly the same as amour-propre, they belong to the same family of motives. It is hard to imagine a similar argument being made about the presidency at the Federal Convention.

Second, the process can be viewed as the framers trying to control and harness the self-interest of future legislators. Public choice theory was well represented at the Federal Convention, where the Framers constantly based their arguments on the incentive effects of various schemes. Let me cite three examples, all from Madison.

Madison was worried about requiring landed property for members of Congress. Looking back, he observed that "it had often happened that men who had acquired landed property on credit, got into the Legislatures with a view of promoting an unjust protection agst. their Creditors." n165 Another instance of incentive-effect reasoning occurred in his comments on a proposal that in voting for the president, each elector should have two votes, at least one of which should be cast for a candidate not from his own state. Madison

[*383]

thought something valuable might be made of the suggestion... The only objection which occurred was that each Citizen after havg. given his vote for his favorite fellow Citizen wd. throw away his second on some obscure Citizen of another State, in order to ensure the object of his first choice." n166

A final argument is less convincing. Arguing against selection of the executive by the legislature, Madison asserted that "the candidate would intrigue with the Legislature, would derive his appointment from the predominant faction, and be apt to render his administration subservient to its views." n167 But it is not clear that a candidate's promise to favor his electors would be credible. Unless the executive can stand for reelection, one would expect the legislature to become subservient to its creature. n168 The kingmaker, in fact, should beware of the king. n169

The last example raises a more general issue. As we shall see in Part V, constitutional bargaining turns crucially on the credibility of threats and promises. In legislating impartially for the future, constitution-makers might also take account of the possibility of threat-based bargaining in later legislatures, and discourage or encourage it by acting on the elements that lend credibility to the threats. n170 At the Federal Convention, Gouverneur Morris applied such reasoning on two occasions. First, arguing against the proposal that all bills for raising money should originate in the first branch, he referred to the following scenario: "suppose an enemy at the door, and money instantly & absolutely necessary for repelling him, may not the popular branch avail itself of this duress, to extort concessions from the Senate destructive of the Constitution itself?" n171 The argument is dubious because the threat of [*384] the popular branch to withhold money would hardly be credible. On a later occasion a proposal was made to have a census at regular

intervals for the purposes of adjusting representation. According to Madison's notes, "Mr. Govr. Morris opposed it as fettering the Legislature too much. Advantage may be taken of in time of war or the apprehension of it, by new States to extort particular favors." n172 This argument also seems implausible, for similar reasons.

The argument that the assembly could derive bargaining clout from its power to withhold taxes was also discussed in the Assemblée Constituante. In defending the absolute veto for the King, Mirabeau argued that the assembly could always overrule the veto by the threat of refusing to vote in favor of taxes. n173 A number of delegates then responded that in refusing to vote for taxes, the assembly would be cutting off its nose to spite its face. "To cease payment of taxes, would be like cutting one's throat in order to heal a wound in the leg." n174 The threat, in other words, would not be credible.

Third, rational framers can try to create the conditions under which future legislatures will be able to exercise their reasoning powers. At the Federal Convention, this idea was never mentioned. In the French assembly, it was central. In some respects, as I said, the members of the Assemblée Constituante thought more highly of their successors than did their American counterparts. They believed that an assembly existed to effectuate the transformation of preferences through rational discussion, going well beyond a simple process of aggregation. n175 In the best-known statement of this [*385] view Sieyes argued that the "voeu national," the desire of the nation, could not be determined by consulting the cahiers of complaints and wishes that the delegates had brought with them to Versailles. n176 Bound mandates, similarly, could not be viewed as expressions of the national will. Even in a democracy (a term that was used pejoratively at the time), Sieyes said, people do not decide by forming their opinions at home, bringing them to the voting booth and, if no majority emerges, going back home to reconsider their views, once again isolated from one another. A fortiori, he said, this procedure would be absurd in a representative legislature. n177 This procedure for forming a common will, Sieyes claimed, is absurd because it lacks the element of deliberation and discussion: "it is not a question of a democratic election, but of proposing, listening, concerting, changing one's opinion, in order to form in common a common will." n178 In the debates over the revision of the constitution, d'Andre and Barnave similarly claimed that the idea of constitutional convention with bound mandates n179 from primary assemblies would be a betrayal of the representative system in favor of democracy. In Barnave's view, "a personal wish or the wish of a faction, which is not illuminated by a common deliberation, is not a real wish (un voeu veritable)." n180

This view had several other implications. Although he was opposed to bicameralism, Sieyes believed that for purposes of discussion the assembly might usefully be divided into two or even three chambers. n181 After separate discussions and votes, the outcome would be decided by adding up the votes in all three chambers. In this way, according to Sieyes, one would achieve the benefits of rational discussion while avoiding "error, haste or oratory seduction" stemming from a common cause. n182 As observed by Condorcet, however, the argument is specious. If the sections of the assembly were large, there would still be room for eloquence and demagogy in each of them, perhaps in favor of opposite opinions. n183

[*386] A more compelling application was made by Mirabeau in a discussion of the voting rules in the assembly. n184 Replying to a proposal that the quorum should be set at half of the total number of the delegates, he said that this would amount to giving a veto to the absent. n185 "However, this kind of veto is the most fearsome and the most certain. While one can hope to influence and convince individuals who are present, by the use of reasons, what influence can one have on those who reply by not appearing?" n186 One cannot argue with the absent.

Turning finally to the motives of the framers themselves, we may consider the possibility of an imperfectly rational concern with the public good. Imperfect rationality - being weak, and knowing it - can induce actors to take steps to forestall predictable, undesirable behavior in the future. n187 The members of a constituent assembly can seek to structure their own proceedings so as to minimize the scope of passion and self-interest. Both eighteenth-century assemblies created institutional devices for this purpose.

At the Federal Convention, the sessions were closed and secret. As Madison said later,

had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument. n188

Presumably, the fear was that the pride and vanity of the delegates, as well as pressure from their constituencies, might prevent them from backing down from an opinion once they had expressed it. However, Sparks did not consider another effect of secrecy - that of pushing the debates away from argument and towards bargaining. I return to this dilemma in Part VI.

Unlike the Federal Convention, the *Assemblée Constituante* functioned also as an ordinary legislature. That arrangement, however, may be undesirable. A main task of a constituent assembly is to strike the proper balance of power between the legislative and the executive branches of government. To assign that task to an assembly that also serves [*387] as a legislative body would be to ask it to act as judge in its own cause. A constitution written by a legislative assembly might be expected to give excessive powers to the legislature. n189 In the abstract, this problem could be solved by means similar to the ones used in legislative bodies, by checks and balances. A royal veto over the constitution might, for instance, have kept the legislative tendency to self-aggrandizement in check. The *Assemblée Constituante* adopted another solution by voting its members ineligible to the first ordinary legislature. It was Robespierre, in his first great speech, n190 who won the assembly for this "self-denying ordinance." n191

Although sometimes viewed by posterity as a disastrous piece of populist overkill, n192 Robespierre's solution did correspond to a genuine problem. If framers have both the motive and the opportunity to write a special place for themselves into the constitution, they will do so. n193 At the Federal Convention, the motive may have been lacking. Although the Framers were guided by the idea that future voters and politicians had to be assumed to be knaves (see above), they viewed themselves as moved by loftier motives. n194 More importantly, perhaps, the opportunity was lacking. It was a given fact, outside the control of the delegates, that the Convention would be dissolved forever once the constitution had been written. In the *Assemblée Constituante*, by contrast, the founders had to take active steps to remove the opportunity to give themselves a privileged place in the constitution. n195

[*388] In Parts V and VI I move on to discuss, respectively, overt and covert expressions of self-interest among the Framers. This is the place, however, to make the point that apparently self-interested behavior may in reality be guided by impartial concerns. n196 In studies of the Federal Convention, it has been found that the votes cast were correlated both with the economic interests of the Framers and with those of their constituents. n197 As I am here assuming, for the sake of argument, that the framers were motivated exclusively by impartial concerns, I shall ignore the first correlation. The second correlation, however, is fully compatible with that assumption. To see this, we may note that the interests of constituencies may affect a delegate in two ways. On the one hand, he may seek to represent these interests as well as possible, whether out of duty or out of self-interest (he might lose his political standing if he does less than his very best). On the other hand, he may view the interests of his constituency as a constraint, rather than as an end to be promoted, believing that unless those interests are minimally satisfied the constitution will not be ratified. There is no point in proposing a constitution that is a perfect embodiment of impartial ideals if one can predict with confidence that it will fail to be adopted. For that reason, even the most impartially motivated framer may have to take account of partial interests.

This argument might generate two opposite reactions. One might respond that it is inappropriate for framers to internalize political obstacles in this way. Rather, they should write what they perceive as the best constitution and then try to persuade their constituents to adopt it. The strategy of the federalists at the Federal Convention and afterwards is often cited as an example. Or one might argue that the political constraints tend to be so strong as to remove any scope for impartiality. Both responses are implausible. Some constraints are so strong that no amount of persuasion will remove them. At the Federal Convention, there may have been a majority for abolishing the slave trade, yet the need for ratification [*389] made any proposal to that effect impossible. As Charles Cotesworth Pinkney said, even "if himself

& all his colleagues were to sign the Constitution & use their personal influence, it would be of no avail towards obtaining the assent of their Constituents" to the prohibition of the slave trade. n198 Conversely, framers can play on transaction costs as well as uncertainty to carve out a space for impartiality. If time is of the essence, constituents may accept a minimally satisfactory proposal rather than send the delegates back to a new convention. Also, there may be considerable uncertainty as to what arrangement would be optimal from the point of view of the constituents.

I conclude this Part with a brief discussion of rights-based arguments. I shall first introduce an issue that will be more thoroughly canvassed in Parts V and VI, viz. the debate at the Federal Convention over the representation of the states in the Senate. n199 We shall observe that both small and large states resorted to arguing as well as bargaining to get their way.

In Part V I show how representatives of the large states invoked the difference between 1776 and 1787 as a bargaining argument in their favor. That contrast was also stated in terms of justice and rights rather than of bargaining power. According to Sherman, the time had now come to undo the inequality created at the birth of the republic. n200 As James Wilson noted,

that the great states acceded to the confederation, and that they in the hour of danger, made a sacrifice of their interest to the lesser states is true. Like the wisdom of Solomon in adjudging the child to its true mother, from tenderness to it, the greater states well knew that the loss of a limb was fatal to the confederation - they too, through tenderness sacrificed their dearest rights to preserve the whole. But the time is come, when justice will be done to their claims... n201

Patterson turned the argument on its head.

It was observed... that the larger State gave up the point, not because it was right, but because the circumstances of the moment urged the concession. Be it so. Are they for that reason at liberty to take it back. Can the donor resume his gift Without the consent of the donee. n202

[*390] For some, justice requires contracts to be binding even if they are unfair. For others, justice requires contracts to be undone if they are unfair. n203

A second impartial argument also turns on opposing conceptions of justice, as well as on the opposition between justice and efficiency. John Dickinson argued that any scheme that would give some states no representation in the Senate would be "unfair". n204 Madison argued that any deviation from proportional representation was "unjust". n205 To reconcile these two claims from justice, the smallest state could be given one representative, and the larger ones a proportionally larger number. That solution would, however, create a very large Senate, which would, in Madison's eyes, be "inexpedient". n206 One way of characterizing the system that was finally chosen would be to say that expediency or efficiency, together with Dickinson's conception of justice, won out against Madison's conception.

The debates over suffrage in the two assemblies were similarly concerned both with rights and efficiency. On the one hand, there was a concern for outcomes, i.e. with good decision-making. In both assemblies, property restrictions on suffrage were justified by various consequentialist arguments. In his speech on the suffrage, Barnave argued for property qualifications on the grounds that they tend to promote "enlightenment, interest in public affairs, and financial independence." n207 At the Federal Convention, Gouverneur Morris similarly argued that property rather than tax-paying should be the criterion for the right to vote. n208 If the poor had the vote, the rich would buy their votes, and an aristocracy of wealth would be set up. n209

On the other hand, as we have seen, there was a concern with the (conditional) right to participate. Various voting

[*391] schemes can be seen as attempting to incorporate all of these elements, instrumental as well as rights-based. Thus on August 28, 1791, the Constituent Assembly set up a three-tiered system that was designed to ensure universal participation as well as quality of decision-making. At the lowest level, there were weak tax-paying qualifications for being an active citizen, including the right to vote in the primary assemblies. These assemblies elected a corps of electors who in turn chose the deputies to the national assembly. Eligibility as an elector required relatively strong income qualifications. Eligibility as a deputy, however, only required satisfaction of the weak qualification. Here, the (conditional) right to participate is embodied in the first and third stages, and the instrumentalist requirements of competence at the second stage. In Philadelphia, a similar system was advocated by Madison, who "concurred with Mr. Govr. Morris in thinking that qualifications in the Electors would be much more effectual than in the elected. The former would discriminate between real & ostensible property in the latter...." n210 In this way, one would not see people elected who want to pass laws against their creditors. n211

More generally, when rights and efficiency point in the same direction, they are more powerful than an argument of either kind opposed by an argument of the other kind. n212 Framers can go to great lengths to make it appear that a measure whose real justification is obviously utilitarian can also be defended in terms of rights. They may even substitute a rights-based argument for a utilitarian one, if the latter for some reason is thought to be unacceptable. n213 An instance of such substitution was found in the debates in the Assemblée Constituante over the confiscation of Church property.

In the earlier stage of the French assembly, the delegates were more reluctant to argue in terms of the "salut public" than they came to be later. Thus in their attempts to justify the confiscation of the Church goods, both the opportunistic Mirabeau and the hypocritical Talleyrand argued that these goods belonged to the nation, not that financial crisis made confiscation necessary. The argument, unbelievably bad as it was, went as follows. If the Church had not, on the basis of its income and property, provided religious services and assistance [*392] to the poor, the State would have had to do so. Therefore, the State is the real owner of that property. n214 The best reply to this specious argument came from Clermont-Tonnerre, based on a deep and modern understanding of the rights of corporate actors. n215 But we can also follow Camus and proceed by analogy. A father has the obligation to provide a dowry for his daughter. Assume that a friend or a relative is willing to provide it instead, thereby discharging the father of his obligation. Should we imply that he thereby becomes the owner of the dowry offered to his daughter? n216

V. Constitutional Bargaining

I now consider another aspect of "how to do things with words." Rational discussion is supposed to be based only on "the power of the better argument." Constitutional bargaining, by contrast, rests on resources that can be used to make threats (and promises) credible. I shall focus on extra-political resources, such as money, manpower, and foreign allies. These sources of bargaining power exist independently of the political system. In addition, however, constitutional bargaining may be based on resources created in the assembly itself. Logrolling, further considered below, is an important example in the constitutional context. The strategic use of bound mandates from one's constituents is another (although, as we shall see, more fragile) strategy of this kind. In legislative settings, the government can threaten to resign or to dissolve parliament unless its proposal is adopted. If the rules of the institutions allow it, legislators can threaten to filibuster unless the government withdraws a bill.

These contrasts can be summarized as follows. On the one hand, we may distinguish between intra-political and extra-political bargaining, depending on whether the resources used in bargaining are created by the political system itself or not. On the other hand, we can distinguish between horizontal bargaining among legislators and vertical bargaining among government and legislators. Of the four ensuing cases, the only one not considered below is that of vertical, intra-political bargaining. In the two constituent assemblies, such government-legislator bargaining as took place (notably between Louis XVI and the Assemblée Constituante) was based on extra-political resources.

[*393] The notion of credibility is at the core of the analysis of bargaining. n217 Usually, carrying out a threat is costly. Moreover, to do so is usually pointless, because the very fact that one has to carry it out means that the threat has

failed to work and that the harm it was supposed to prevent is already done. A rational actor would never carry out an act that involves some costs and no benefits. Other rational actors, being aware of this fact, will take no account of a threat if nevertheless made. n218 In this respect, there is an important distinction between threats and promises. n219 By the very fact of uttering a promise to do something that it will not be in his interest to do, a speaker makes a binding normative commitment to the promisee. In the case of threats, no such bond is created. The addressee will certainly not hold the threatener to his threat, as a promisee will hold the promiser to his promise. In certain cultures, however, third parties will punish those who make empty threats. Such costs can make it rational to carry out the threat if necessary and, in consequence, rational both to make it and to yield to it.

Consider first bargaining based on resources that arise within the assembly itself, specifically vote-trading or logrolling. n220 To illustrate, assume that there are two proposals, X and Y, on different issues. There are three parties, A, B and C. A and B form a majority against X, B and C a majority against Y. However, both A and C prefer the package (X, Y) to no legislation at all. With separate voting on the two proposals, both will fail. If A and C trade votes, both will pass.

Logrolling in the constituent assembly usually differs from that in a legislative assembly in two respects. First, there is [*394] no indefinitely continuing interaction that can force the parties to stick to their promises through fear of losing their reputation. n221 Second, voting on the separate issues that are being traded off against each other is not really separate and successive, because the assembly concludes its task by adopting the constitution as a whole. In theory, the two differences should offset each other, but in practice they may not. As the assembly and its committees work their way through the issues, compromises may be reached that are hard to undo, even should one of the parties renege on their promises. n222 Such practices are probably best seen as a form of extra-constitutional bargaining. One party may act on the assumption that the other will be unwilling to be seen as responsible for breaking off negotiations, or that the other has more to lose by having to start all over again. n223

At the Federal Convention, the best-known piece of logrolling took place between the slaveholding states and the commercial states. As in the cases of logrolling in the Assemblée Constituante that I discuss below, this one took place against the background of extra-political bargaining. The two strands are in fact hard to separate from each other. At the surface the proposal that was adopted involved an exchange in which the South made a concession on the Navigation Acts while the North compromised on the slave trade. n224 However, the initial report from the Committee of Detail n225 had essentially given the Southerners all they wanted, n226 presumably [*395] based on the perception of a credible threat that otherwise the Southern states would leave the Union. Compared to this baseline, the later compromise may be seen as a retraction by the South as the North called their bluff.

In the Assemblée Constituante, the most famous piece of logrolling took place in the last days of August 1789, when the assembly was about to debate the basic institutions of the state. n227 In three meetings between Mounier on the one hand and the "triumvirate," Barnave, Duport and Alexandre Lameth, on the other, the three came up with the following proposal. They would offer Mounier both an absolute veto for the King and bicameralism, if he in return would accept (i) that the King gave up his right to dissolve the assembly; (ii) that the upper chamber would have a suspensive veto only; and (iii) that there would be periodical conventions for the revision of the constitution. n228 Mounier refused outright. According to his own account, he did not think it right to make concessions on a matter of principle; also he may have been in doubt about the ability of the three to deliver on their promise. According to Mathiez, he refused because he was so confident that the assembly was on his side that no concessions were needed. n229

Prior to the adoption of the suspensive veto another piece of horsetrading, involving Barnave and the King's ministers, had taken place. n230 The question was whether the royal veto should apply to the decisions of the Assemblée Constituante itself or only to later legislatures. On the former hypothesis, it was feared that the King would refuse to give his sanction to the abolition of feudal dues decided on August 4th. At this point, Barnave apparently took it for granted that the King could at most obtain a suspensive veto; hence he proposed and obtained a deal that would ensure this veto in return for a promise that it would not be applied to the constituent assembly. However, once the

suspensive veto had been accepted, the ministers reneged on their promise. The King called in a regiment from Flanders for a show of force, thus starting the countdown to the events on October 5 and 6 that would force him to move to Paris.

In the dealings I have just described, the presence of extra-political elements is evident. The members of the constituent assembly were suspended, as I said, between the [*396] King's troops and the Parisian crowd. n231 At the Federal Convention we find several references to such extra-political elements, notably in the debates over the representation of the small states in the Senate. The small states wielded the threat of an alliance with foreign powers, and the large states countered with reference to their own might.

On June 30, 1789, Bedford asserted that

the Large States dare not dissolve the confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice. He did not mean by this to intimidate or alarm. It was a natural consequence; which ought to be avoided by Enlarging the federal powers not annihilating the federal system. n232

On July 5, Gouverneur Morris counterattacked:

Let us suppose that the larger States shall agree; and that the smaller refuse: and let us trace the consequences. The opponents of the system in the smaller States will no doubt make a party, and a noise for a time, but the ties of interest, of kindred & of common habits which connect them with the other States will be too strong to be easily broken. In N. Jersey particularly he was sure a great many would follow the sentiments of Pena. & N. York. This Country must be united. If persuasion does not unite it, the sword will. He begged that this consideration might have its due weight. The scenes of horror attending civil commotion can not be described, and the conclusion of them will be worse than the term of their continuance. The stronger party will then make traytors of the weaker; and the Gallows & Halter will finish the work of the sword. How far foreign powers would be ready to take part in the confusions he would not say. Threats that they will be invited have it seems been thrown out. n233

We should note for future reference that both statements are somewhat ambiguous. n234 They can be read as threats (telling the addressee what the speaker and those he represents will do unless he complies) or as warnings (telling the addressee what will happen unless he complies). In the French context, there was no ambiguity at all with respect to what the King was doing. When, in the first days of July, he reinforced the presence of troops near Versailles, the implied threat to the assembly escaped nobody. Mirabeau's replies to the King's challenge were, however, subject to the threat- [*397] warning ambiguity. In his first speech on the subject he spoke in quite general terms: "How could the people not become upset when their only remaining hope [i.e., the assembly] is in danger?" n235 In his second speech he became more specific. The troops "may forget that they are soldiers by contract, and remember that by nature they are men." n236 Furthermore, the assembly cannot even trust itself to act responsibly: "Passionate movements are contagious: we are only men, nous ne sommes que des hommes, our fear of appearing to be weak may carry us too far in the opposite direction." n237

In his brief intervention in the same debate, Sieyes mentioned that in all deliberative assemblies, notably in the Estates of Brittany, the assembly refused to deliberate if troops were located closer than twenty-five miles from where it was sitting. n238 However, when the assembly asked for the removal of the troops, the King in his response pretended that they had been brought to control Paris rather than to terrorize the assembly. If the assembly objected to the presence of troops in the vicinity of Paris, he would have been perfectly happy to move the assembly to Noyon or Soisson, and to move himself to Compiègne in order to facilitate communication between them. n239 However, the assembly could not accept a proposal that would deprive them of the threat potential of Paris. It was therefore decided to send a

delegation to the King, asking him to recall the troops "whose presence adds to the desperation of the people (dont la presence irrite le desespoir du peuple)." n240 If the King agreed, the assembly would send a delegation to Paris "to tell the good news and contribute to a return of order." n241 There was no need to say what they would do if he failed to accommodate them. The next day the Bastille fell, and the King agreed to send the troops away.

As the balance of power shifted, the moderates came to believe that the main threats to the assembly were the radical sections of the Paris Commune rather than the troops of the King. On August 31, Clermont-Tonnerre proposed that the assembly leave Versailles for some other place in case the [*398] authorities in Paris were unable to keep the peace. "You did not give in to armed despotism; will you now yield to popular effervescence?" n242 A few days later the other moderates and the nobility joined him, the former believing that the move would save the assembly, the latter hoping that it would destroy it. n243 Inexplicably, the King refused. Instead, as I said, he called in the regiment from Flanders, a decision that in the end brought both King and assembly to Paris.

I shall now return to the Federal Convention, and take a second look at the bargaining that took place over the representation of the small states in the Senate. Earlier, I referred to the disguised threats of civil war and the intervention of foreign powers. n244 In addition, delegates from the large states threatened that, unless they got their way, they would form a separate confederation that would exclude the small states. I shall now consider the credibility of this threat. n245

To address this issue it is necessary to first say something about bargaining theory in general. Bargaining concerns the division of the benefits from cooperation, compared to a permanent breakdown of cooperation. In the case of bargaining among separate states, this alternative is merely the ordinary international order (or anarchy). In the case of bargaining among estates, among political parties, between civil and military institutions or between civil and religious institutions, the non-cooperative alternative is harder to specify. For reasons that will become clear later, this difficulty does not necessarily matter for bargaining theory, as its most important requirement is that we are able to specify what will happen during a temporary breakdown of cooperation. On that basis, the theory attempts to predict whether an efficient [*399] agreement, that is, an outcome on the Pareto-frontier, will be realized and, if so, which of the many Pareto-optimal outcomes will be realized. n246

Bargaining theory has two distinct branches. The most developed is two-person bargaining theory, as applied, for instance, to wage bargaining between capital and labor. In the following, I shall limit myself to this theory, and ignore the more adequate but less tractable n-person theory. We can, however, use two-person theory to throw some light on the n-person case. In analyzing the Federal Convention, we may to some extent talk as if the large states formed one actor and the small states another, and use two-person theory to understand the nature of the bargaining between them. There were, however, other cross-cutting divisions among the states that rivaled with the size issue as potential foci for coalition formation. n247 Hence, a more adequate account would have to specify the payoff structure for all possible subcoalitions of the states, and propose a theory that, on the basis of these payoffs, predicts that the grand coalition will form and the terms on which it will form. The first task is impossible for practical reasons, and the second is at present unresolved.

Let us assume that the parties to the bargaining are rational and, more specifically, that they act to maximize some set of tangible rewards. In that case, the outcome of bargaining is largely shaped by two factors. On the one hand, the outcome is constrained by the outside options of the parties, i.e. by the rewards they would obtain if the bargaining broke down and a permanent state of non-cooperation was obtained. A rational agent will not accept an outcome that is worse than his outside option. In classical (pre-1980) bargaining theory, these outside options were seen as the exclusive determinants of the outcome. n248 In addition to serving as a floor on the outcome, these options, according to the classical theory, also determine where on the Pareto frontier the outcome will be found. Modern, post-1980 bargaining theory asserts that the outcome, although constrained by the outside [*400] options, will be determined by the inside options of the parties, i.e. by the resources available to them while the negotiations are going on. n249 Both outside and inside options matter for the credibility of threats. An agent can credibly threaten to break off cooperation (forever) if he can get more on his own than the other offers him. And he can credibly threaten to suspend cooperation

(temporarily) if he can afford to hold out for a better offer.

Rather than elaborate on the formal definitions, let me explain the idea of outside and inside options by an illustration from wage bargaining. For the workers, the outside option is set by the wage they could obtain elsewhere or the level of unemployment benefits. Their inside option is set by the size of their strike fund and what other support they might receive during a strike. The outside option of the firm is set by the resale value of the plant, while its inside option is determined by fixed costs, inventory size and the like. Outside options constrain the wage agreement: neither the workers nor the firm will accept an outcome that is inferior to what they could get on their own. Inside options determine the credibility of strike or lockout threats if they do not get a certain amount over and above their outside options. n250

The last proposition throws light on James Wilson's argument that the equality of states in the Confederation was due to "the urgent circumstances of the time" n251 or to "necessity", n252 and that the Convention ought to adopt proportional representation since "the situation of things is now a little altered." n253 In a time of national danger, time is of the essence. No single state can better afford to hold out than any other; hence bargaining power is equalized. n254 In periods of comparative calm, the larger and more self-sufficient states regain their natural bargaining advantage.

Madison suggested a different argument for the same conclusion. [*401] He addressed the smaller states who wanted equal representation:

He begged them to consider the situation in which they would remain in case their pertinacious adherence to an inadmissible plan, should prevent the adoption of any plan. The contemplation of such an event was painful; but it would be prudent to submit to the task of examining it at a distance, that the means of escaping it might be the more readily embraced. Let the union of the States be dissolved and one of two consequences must happen. Either the States must remain individually independent & sovereign; or two or more Confederacies must be formed among them. In the first event would the small States be more secure agst. the ambition & power of their larger neighbours, than they would be under a general Government pervading with equal energy every part of the Empire, and having an equal interest in protecting every part agst. every other part? In the second, can the smaller expect that their larger neighbours would confederate with them on the principle of the present confederacy, which gives to each member, an equal suffrage; or that they would exact less severe concessions from the smaller States, than are proposed in the scheme [of proportional representation]? n255

Here, Madison is characterizing various outside options of the small states, without explicitly mentioning those of the larger states. Nathaniel Gorham supplemented the argument in this respect:

The States as now confederated have no doubt a right to refuse to be consolidated, or to be formed into any new system. But he wished the small States which seemed most ready to object, to consider which are to give up most, they or the larger ones. He conceived that a rupture of the Union wd. be an event unhappy for all, but surely the large States would be least unable to take care of themselves, and to make connections with one another. The weak therefore were most interested in establishing some general system for maintaining order. n256

These statements, taken together, imply that the small states are in a weaker bargaining position since they would have more to lose if the union broke down. However, both the small and the large states would be better off under either scheme - equal and proportional representation - than they would be on their own. n257 The outside options do not, therefore, [*402] lend credibility to the threat of the large states to form a separate confederacy, because, to repeat, they would be worse off on their own than they would be in a union organized along the lines demanded by the small

states. Madison and Gorham were simply using the wrong model of bargaining. Wilson used the correct model, based on inside options, in his reference to urgency and necessity. He claimed that the large states had an edge in 1787 because they could afford to hold out longer than the small states.

To identify the fallacy behind the Madison-Gorham argument, consider Fig. 1:

[SEE FIGURE IN ORIGINAL]

Here, the area enclosed by the two axes and the curve represents the set of feasible agreements, measured in utility terms. The points $d[su'1]$ and $d[su'2]$ represent the outside options of the parties under two different arrangements. Consider first the bargaining situation in which $d[su'1]$ is the outside option. Classical bargaining theories pretend to be able to predict (or prescribe) the solution on the basis of the feasible set and the location of the outside option. One of these theories (chosen here because it lends itself to easy diagrammatic exposition) asserts that the solution will be the point on the Pareto-frontier that will ensure for each party a gain (compared to the outside option) that is proportional with his best possible outcome, constrained only by the need to offer the other party [*403] no less than his outside option. n258 In Fig.1, the best possible outcome for I is at C, and the best possible outcome for II is at A. The theory then asserts that the solution will be found at the point x where the diagonal $d[su'1]B$ in the rectangle $d[su'1]ABC$ intersects the Pareto-frontier. Assume now that the disagreement point shifts to $d[su'2]$, so as to improve the outside option for I. The theory then asserts that the outcome in the new game will be y , which is also more favorable for I. Better outside options yield better outcomes. This is also the intuition underlying the Madison-Gorham argument: the more you have to lose by failing to reach agreement, the less favorable for you the agreement that is reached. According to modern bargaining theory, however, the intuition is correct only to the extent that the outside options constrain the solution by providing a floor below which it cannot fall, which is not the case in Fig.1. As the first solution x still yields a better outcome for I than the new disagreement point $d[su'2]$, the shift of disagreement point should not induce a shift in the solution. To assert that it does is to assume an "action at a distance" that cannot be supported by the theory of rational behavior.

I asserted earlier that, in contrast to the Madison-Gorham argument from outside options, Wilson's argument for the same conclusion from inside options was formally valid. Yet, as we know, the large states did not get their way. One possible explanation is that Wilson was wrong about his facts, so that the situation was in fact perceived to be more urgent than he made it out to be. As I said earlier, the degree of crisis in the Confederation in 1787 is an issue of some controversy. Although the solution adopted at the Convention cannot provide evidence on the objective degree of urgency, it may perhaps indicate the urgency as perceived by the framers. Needless to say, I do not claim that the outcome - equal representation of all states in the Senate - can be fully explained by bargaining theory. The enhanced log-rolling power that the small states obtained by virtue of the voting rules at the Convention might also be part of the explanation. The normative, rights-based arguments discussed above may also have had some impact. I am not, however, trying to explain what happened at the Convention, a task for which I have no competence. Rather, I am trying to identify a mechanism that may or may not have been at work at the Convention, but that certainly belongs to the repertoire of patterns one might [*404] expect to observe in constitutional settings.

In both constituent assemblies, as I have explained, delegates came with bound mandates. These belong to an important set of credibility-enhancing techniques usually referred to as strategies of precommitment. Burning one's ships or bridges, cutting off lines of communication, constructing a Doomsday machine and, for that matter, adopting a constitution are other examples of such strategic self-binding. To see how bound mandates might serve this purpose, consider first wage bargaining between a union and one branch of a multiplant company. The trade union leader may ask his members to instruct him to consult them before he accepts any offer made by the management. The delay created by the need for consultation will then give him an edge in bargaining. Although plant management may ask company headquarters to be bound in a similar manner, the slowness of union balloting compared to company approval is, once again, to the advantage of the union. The clumsier and more inefficient the organization of the union, the stronger its bargaining power. n259

At the Federal Convention, the delegates from Delaware came, as I said earlier, with instructions to insist on equal representation of all states in the Senate. In fact, George Read, one of the leading figures in his delegation, had specifically requested the Delaware legislature to give them this mandate. n260 Also, some delegates argued that the Convention as a whole had a limited mandate. Patterson claimed, for instance, that "if the confederacy was radically wrong, let us return to our States, and obtain larger powers, not assume them of ourselves." n261 The statement may or may not have been a bargaining ploy, in the sense previously explained. If it was, there is no indication that it succeeded. Although two of the New York delegates left because they thought the Convention was exceeding its mandate, they never used the threat to leave as a bargaining ploy.

At the Assemblée Constituante, a large number of the delegates came with bound mandates. Although many wanted to go back to their constituencies to be released from their promise to vote by order rather than by head, there is no evidence that they were trying to exploit the strategic advantages of delay. If the assembly had agreed on the necessity of a formal release from the instructions, the potential for [*405] such behavior would, however, have been present. Given the urgency of the situation, some of the moderates might then have been willing to accept the vote by order rather than suffer the delay. However, even while the wish to go back to the constituencies was being expressed, the assembly had already decided to go ahead under its own, self-made rules.

This difference between the trade union case and the Assemblée Constituante illustrates a more general point. Parties that bargain within a pre-existing institutional framework can use it for strategic purposes. n262 However, in times of crisis - which are often the setting in which constitutions are written - the framework may not be inviolable. What has variously been called "revolutionary redefinition of the rules of the game," n263 "self-created authority" n264 and "revolutionary self-authorization" n265 is, in fact, at the core of constitution-making, as distinct from mere amendments. As shown in Part III above, the two assemblies did, to a large extent, define their own rules in clear violation of the instructions or expectations of those who had called them into being. In general, therefore, precommitment is not a viable strategy in the constitutional context. Although the constitution itself may be seen as a form of precommitment, it cannot be shaped by that technique.

VI. Strategic Uses of Argument n266

In Parts IV and V I have been concerned with two polar cases. First, I considered genuinely impartial reasoning, moved by a concern for individual rights or the common good. Next, I discussed overt self-interest at work in threat-based bargaining. Although it is important to understand these pure cases, an argument could perhaps be made that most actual debates represent an intermediate category. I shall not, however, attempt to make that argument. Instead, I shall try to define that category as sharply as I can, and to show that it was instantiated in the two assemblies.

Consider again the two Habermasian commitments to truth and impartiality. Although speakers in constituent assemblies (and elsewhere) may not be genuinely committed to these values, they may find it in their interest to appear to be [*406] so committed. They engage, that is, in strategic uses of purportedly non-strategic argument. On the one hand, bargainers often try to present their threats as warnings. n267 Instead of uttering a threat, they substitute a factual equivalent of a threat. On the other hand, self-interested actors often try to ground their claims in principle. Their self-interest tells them to appeal to an impartial equivalent of self-interest. In this Part, I consider the constraints on these substitutions, the reasons for making them, and the consequences of doing so.

I first consider the strategic use of impartial arguments. Consider a group whose interest leads it to favor proposal A. The question then arises whether the group can appeal to an impartial equivalent of its self-interest, if for some reason (see below) it does not want to strike a purely self-interested stance. Is there, in other words, an impartial argument for A? Suppose there is not. We can then ask what impartial argument will favor a proposal as close as possible to A. In the first case, we have a perfect fit between partial interest and impartial arguments, and, in the second case, a maximal fit. It is quite likely, however, that neither a perfect fit (if one exists) nor a maximal fit will be optimal from the point of view of the group. An impartial argument that coincides too well with the interests of those who deploy it tends to arouse suspicion. If the well-off advocate tax breaks for all and only the well-off, the impartial

argument that such policies will benefit all by a trickle-down effect is probably not optimal. If, however, an impartial argument is made that supports a diluted conclusion, with tax breaks for most, but not all, who are well-off and for some of the badly off as well, it is more likely to be accepted. An argument that offers tax breaks only for the badly off may also have a good chance of being accepted, but would not be optimal from the point of view of the well-off. The well-off need an argument that deviates enough from their self-interest to be accepted by others, while not deviating so much that nothing is gained if it is accepted. n268

[*407] Some examples may be useful at this point. In the 1920's, Yale College wanted to limit the admission of Jews. n269 Following a recent scandal at Harvard, they did not, however, want to use explicit quotas. Instead, they adopted a policy of geographical diversity, ostensibly as a goal in its own right, but in reality as a measure taken to reduce the number of enrollments from the predominantly Jewish pool of applicants from New York City. The beauty of this last strategy, from the point of view of publicity-conscious admissions officers, was that it could be presented as unbiased.

Though many individual Jews (concentrated in the northeast region from which Yale received most of its applications) would be affected by this principle, it was not an innately anti-Jewish principle. A geographical policy applied without regard to religion that would help an individual Milwaukee Jew or Duluth Catholic as much as it would hurt a New York atheist or Hoboken Protestant could not appropriately be termed religiously biased. n270

The impartial criterion of geographical diversity served as a diluted and therefore more acceptable equivalent of religion.

Another example concerns restrictions on the right to vote. In many societies, property has been used as a criterion for suffrage. One may, to be sure, offer impartial arguments for this principle. At the Federal Convention, Madison argued that the stringent property qualifications for the Senate, rather than protecting the privileged against the people, were a device for protecting the people against itself. n271 But, as I said, there is something inherently suspicious about such arguments. They coincide too well with the self-interest of the rich. It may then be useful to turn to literacy, as an impartial criterion that is highly, but imperfectly, correlated with property. At various stages in American history, literacy has also served as a legitimizing proxy for other partial goals, such as the desire to keep blacks or Catholics out of politics. n272

The strategic use of impartial arguments is a well-known fact of political life. n273 We know less, however, about the reasons [*408] why individuals find it in their self-interest to substitute an impartial argument for their self-interest, and even less about the consequences of such substitution strategies. Let me begin with the most basic question: why argue at all? Why not simply adopt a bargaining stance, or demand an immediate vote without prior debate? I can think of four answers, but there may be others.

First, if others believe that one is truly arguing from principle, they may be more willing to back down. The belief that a person is arguing from principle and is willing to suffer a loss rather than accept a compromise will make other, self-interested actors yield. n274 In this respect, adopting a principle is a form of precommitment. This strategy is especially likely to be adopted by actors who otherwise have little bargaining power. When the strong bargain from strength, the weak argue from principles.

Second, Jonathan Macey has argued that legislative coalitions tend to use public-regarding language as a "subterfuge" for what is in reality a deal among special interests. n275

The reason special interest legislation is so often drafted with a public-regarding gloss is because this gloss raises the

costs to the public and to rival groups of discovering the true effect of the legislation. This, in turn, minimizes the major cost to the legislator of supporting narrow interest group legislation - the loss of support from groups that are harmed by the legislation... n276

Third, by citing a general reason one might actually be able to persuade others. Assume (contrary to what I believe to be the case) that speakers will listen to impartial argument if and only if their self-interest is not at stake. n277 In an assembly, some speakers will favor a given proposal on the basis of their self-interest, others will oppose it, and some will be neutral. It is in the self-interest of the parties involved to [*409] argue for their view in non-self-interested terms, to persuade the neutrals to agree with them. This strategy is fully compatible with the third party knowing that the others are moved purely by their interest. Moreover, the strategy is also compatible with opportunistic and inconsistent use of impartial arguments. Consistency is required only for the purpose of deceiving others, not for the purpose of persuading them.

Finally, in a very different line of reasoning, James Coleman argues that if "members [of an assembly] appear hesitant to bring up self-interests and sometimes express disapproval when another member does so," it is because there is a social norm "that says that no one should take a position that cannot be justified in terms of benefits to the collectivity...." n278 Moreover, that social norm is not accidental. "Since such a norm is in the interest of all members of the collectivity, it can be expected to emerge and to have some strength." n279 This is not intended to be a purely functionalist argument, although it sounds like one. Coleman argues that collectively beneficial norms emerge through individually rational behavior. Each individual finds it in his interest to give up some of his rights to control his own actions in exchange for the right to control the actions of others. n280 In my opinion, the argument fails to go through. I agree that there is a norm of the type he describes, but I do not think it can be reduced to individual self-interest. The individual framer might follow the norm out of self-interest, however, if the sanctions imposed on violators are sufficiently strong.

An important common feature of these four reasons should be noted. Although I am assuming that the actors who make the impartial arguments are really moved by self-interest, all four reasons for doing so are parasitic on genuinely impartial actors in the system. One cannot pretend commitment to principle unless there is common knowledge that some individuals are so motivated, and unless there is uncertainty as to which individuals these are. There is no reason to try to persuade others by impartial arguments if one believes that everybody is moved by self-interest all the time. Even if those who obey the norm against invoking self-interest do so out of self-interest and fear of sanctions, those who impose sanctions must ultimately do so for non-self-interested reasons. n281 Impartiality is logically prior to the attempt to exploit it (or the need to respect it) for self-interested [*410] purposes. This is not to say, however, that impartial concerns are necessarily widespread. We know from other contexts that it may take only a tiny proportion of cooperators in a population to induce everybody to behave as if they were cooperators. n282 Similarly, a small group of impartially minded individuals might induce large numbers to mimic their impartiality out of self-interest. n283

The strength of these reasons will vary with the context. The norm against self-interested claims can be expected to be stronger in constituent assemblies than in ordinary legislatures. The system of checks and balances is intended to ensure that the interest of one group in the legislature will be set up against the interests of other groups, so that the outcome may approximate the common interest. However, future generations have no spokesmen in the constituent assembly. Although the Federal Convention saw some blatant attempts to bias the constitution in favor of the founding states, n284 intertemporally impartial arguments that allowed future states equal influence won the day. n285 Also, the norm against expression of self-interest will be stronger in public settings than if the debates are conducted behind closed doors. A public setting will also encourage the use of precommitment through principle, with the larger audience serving as a resonance board for the claim and making it more difficult to back down.

From the reasons for adopting impartial disguises for self-interest, I now turn to the consequences of this practice. Because these effects are heavily mediated by the setting of the debates - closed versus open, or private versus public - I shall first characterize the two assemblies in this respect.

At the Convention, the sessions were closed and the deliberations subject to a rule of secrecy respected by all. n286 There was little risk, therefore, of being prematurely locked into one opinion, and correspondingly few opportunities and temptations to exploit such lock-in devices for strategic purposes. The trick of transforming the Convention into the "committee [*411] of the whole" also made it possible to have preliminary votes that did not commit the delegates to premature decisions. n287

In the Assemblée Constituante, the debates were not only open to the public, but constantly interrupted by the public. It was initially envisaged that the assembly would meet two days a week, and work in subcommittees on the other days. n288 However, the moderates and the patriots had very different opinions on these two modes of proceeding. For Mounier, leader of the moderates, the committees favored "cool reason and experience," by detaching the members from everything that could stimulate their vanity and fear of disapproval. n289 For the patriot Bouche, committees tended to weaken the revolutionary fervor. He preferred the large assemblies, where "souls become strong and electrified, and where names, ranks and distinctions count for nothing." n290 On his proposal, it was decided that the assembly would sit in plenum each morning and meet in committee in the afternoon. Soon there were only plenary sessions. The importance of this move, which constituted the beginning of the end for the moderates, was perfectly understood at the time. n291 It was reinforced by the move to voting by roll call, a procedure that enabled members or spectators to identify those who opposed radical measures, and to circulate lists with their names in Paris.

This difference between the two assemblies is reflected in the debates. Many of the debates at the Federal Convention were of high quality: remarkably free from cant and remarkably grounded in rational argument. By contrast, the discussions in the Assemblée Constituante were heavily tainted by rhetoric, demagoguery and overbidding. At the same time, the Convention was also a place where many hard bargains were driven, notably the deal between the slaveholding and the commercial states. The delegates from the Southern States did not really try to argue that slavery was morally acceptable, with the exception of a lame remark by Charles Pinkney to the effect that "if slavery be wrong, it is [*412] justified by the example of all the world." n292 Instead, they simply stated their position, using as leverage either the threat to leave the Union or a warning that a constitution unfavorable to the slave states might not be ratified. If the proceedings had been held in public, they might have been forced to pull their punches.

Turning now to a more systematic assessment of the strategic uses of impartial argument, in terms of the impact on efficiency and equity, I shall first compare strategic impartiality and naked bargaining along the efficiency dimension. We know that bargaining is vulnerable to the problem of misrepresentation of preferences: for a given bargaining mechanism, the parties may have an incentive to report false preferences that yield Pareto-inferior outcomes in terms of their real preferences. n293 In addition, bargaining may be inefficient because of the difficulty of making credible promises that, if believed and respected, would benefit all parties. n294 Mutual precommitment to incompatible positions is a third source of inefficiency. n295

The strategic use of impartiality is also vulnerable to the problem of mutual precommitment. When both sides appeal to principle, neither may feel able to back down. There is no analogue to the first source of inefficiency in bargaining; and the second problem is also less likely to arise because the very same motives that make speakers adopt the arguing, rather than the bargaining, attitude will also induce them to keep their promises. However, public debates introduce an additional source of inefficiency, through the autonomous dynamics of political life. The need to demarcate oneself ideologically from the opponent, even when there is no real disagreement, can lead to false polarization and thus create an impasse. The attempt by the opponent to avoid this trap can lead to false consensus, yielding a decision that is inferior in the eyes of both sides. n296 The Assemblée Constituante of 1789-91 showed many striking instances of radical and egalitarian overbidding by which the parties became locked [*413] into attitudes that had originally been adopted merely for tactical purposes.

It follows, I think, that neither bargaining nor strategic use of impartial reasoning is unambiguously more efficient than the other. By contrast, I believe we can assert that argument - even when purely strategic and based on self-interest - tends to yield more equitable outcomes than bargaining. For the reasons mentioned above, argument - especially in a public setting - will prevent the strong from using their bargaining power to the hilt. The optimal impartial equivalent

will be one that dilutes their self-interest by taking some account of the interest of the weak. On the average, this will yield more equitable outcomes. n297 This is the effect I referred to earlier as the civilizing force of hypocrisy.

The preceding remarks are already pretty speculative, perhaps too much so for some readers. I want to go further in the same direction, by offering some conjectures about the overall effects of arguing and bargaining in private and public settings. By "overall effects" I have in mind some criterion that somehow takes account both of efficiency and equity. According to this criterion private settings are always better than public settings, for a given mode of communication; and arguing is always better than bargaining, for a given setting. Roughly speaking, arguing is better than bargaining because of the civilizing force of hypocrisy, and private settings better than public settings because they leave less room for precommitment and overbidding. n298

[*414]

[SEE FIGURE IN ORIGINAL]

Figure 2 ranks the possible cases according to the mixed criterion. Note that the claims that arguing is superior to bargaining, and secrecy to publicity (*ceteris paribus*), are compatible both with secret bargaining being superior to public argument and with the opposite ranking. If the two dimensions were independent of each other, this ambiguity would not matter, since one would always go for the first-best arrangement of arguing in private. However, as indicated by the arrows (and explained above), secrecy tends to induce bargaining, and publicity to induce argument. n299 The real choice, therefore, may be between the second-best and the third-best options.

I have tried to show how strategic actors may find it in their interest to substitute an impartial argument for a direct statement of their interest. They may also find it useful to substitute truth claims for credibility claims. Instead of making a threat whose efficacy depends on its perceived [*415] credibility, they may utter a warning that serves the same purpose and avoids the difficulties associated with threats.

One difficulty is that of making the threat appear credible. Following Schelling, many authors have discussed various ways of overcoming this problem. n300 Here I shall discuss strategies that amount to substituting warnings for the threats, thus making the issue one of truth rather than credibility. The terminology on this point is not settled. n301 I use "warning" to denote utterances about events that are not within the control of the actors and "threat" to denote utterances about those that are. Threats are statements about what the speaker will do, warnings about what will (or may) happen, independently of any actions taken by the speaker. Thus understood, warnings are factual statements that are subject to the normal rules of truth-oriented communication. Disregarding a warning is more like disbelieving a statement about the past than it is like calling a bluff.

The idea of substituting warnings for threats can be illustrated by a look at wage negotiations. Sometimes, a union leader will say things like, "if you don't give us what we ask for, I won't be able to stop my members from going on strike," or, "if you don't give us what we ask for, the morale of my members will fall and productivity will suffer." Formally, these are warnings rather than threats. Needless to say, managers will not always take them at face value. They may suspect that the effects cited in the warnings are actually within the control of the union boss. At the same time, they cannot be sure that the leader does not have access to information which they lack. Perhaps his members are in fact as recalcitrant as he makes them out to be. Perhaps he has made sure, before coming to the bargaining table, that they are so heated up that he will not be able to stop them, turning them in effect into a "Doomsday Machine". Note the difference between the latter strategy and other pre-bargaining ploys. Often, unions invest in the credibility of threats, e.g. by building up a strike fund. Alternatively, they can invest in the truth of warnings, e.g. by irreversibly stirring up discontent [*416] among the members.

The distinction can also be illustrated by some of the episodes from the two assemblies that I discussed in Part V above. The statement by Bedford cited earlier is most plausibly seen as a threat, with the reference to the "natural consequence" serving to underline its credibility. n302 At the very least, the reply by Gouverneur Morris shows that he

understood (or appeared to understand) it as a threat rather than a warning. n303 Morris' counterattack is perhaps more ambiguous. However, some of the other delegates certainly took him as making a threat, as indicated by the following retreat by Williamson on his behalf: "He did not conceive that (Mr. Govr. Morris) meant that the sword ought to be drawn agst. the smaller states. He only pointed out the probable consequences of anarchy in the U.S." n304 In other words, Williamson sought to make it clear that Morris had been uttering a warning, not making a threat. On the same day, Bedford also retreated, by making it clear that

he did not mean that the small States would court the aid & interposition of foreign powers. He meant that they would not consider the federal compact as dissolved until it should be so by the acts of the large States. In this case the consequence of the breach of faith on their part, and the readiness of the small States to fulfill their engagements, would be that foreign nations having demands on this Country would find it in their interest to take the small States by the hand, in order to do themselves justice. n305

Again, what was initially made (or understood) as a threat, is restated as a warning. In a moment I shall discuss the reasons speakers may have for making such restatements. First, however, I want to reconsider some of the French debates in this new perspective. In the speeches cited above, Mirabeau referred successively to the people, to the soldiers, and to the assembly members themselves to suggest the dangers to the King of his provocative behavior. n306 The reference to the people is perhaps most plausibly seen as a warning. The reference to the troops is closer to a threat. Although overtly Mirabeau is simply reminding the King that the soldiers are men by nature, he was probably understood as saying that he might help nature along by stirring fermentation [*417] among the troops. And in the reference to the delegates themselves, the threat is hardly disguised at all. Here, Mirabeau presents himself, and his fellow delegates, as subject to a psychic causality not within their own control. If the King provokes them, they might respond irrationally and violently. Formally, this is a mere warning. In reality, nobody could ignore that it was a threat. n307

We may also reconsider the tractations between Mounier and the triumvirate. In their last meeting, the three responded by threatening to mobilize public opinion against him. Their statement was probably neither meant nor understood as a threat to mobilize Paris against the Assembly. n308 Nevertheless, the defeat of bicameralism on September 10 and the adoption of a merely suspensive veto for the King on September 11 were in large part due to the fact that some delegates feared for their lives. n309 We may reasonably ask, therefore, whether the patriots in Versailles, through their contacts with journalists and pamphleteers in Paris, deliberately sought to raise the temperature so that they could say to the moderates, truthfully, that their lives were in danger if they voted for bicameralism and the absolute veto. The views of the actors and of later historians differ on this issue. n310 My own opinion, for what it is worth, is that it is hard to believe that the thought of acting in this way did not cross somebody's mind. And if some members of the Assemblée Constituante were indeed stirring up things in Paris, we may also ask, in retrospect, whether they were not playing the sorcerer's apprentice.

There are two reasons why a speaker might find it to his advantage to substitute warnings for threats. First, he does not have to worry as much about credibility. Even though his adversaries know that the events referred to in the warning may in fact be within his control, they must also take account of the possibility that he may have access to relevant private information. It is not unreasonable to think that the union leader knows more than the management about the state of mind of his members. Similarly, Mirabeau might be expected to know more than the King about the psychology of the delegates to the Assembly. Second, warnings are factual statements that belong to the realm of argument and hence enable [*418] the speaker to avoid the opprobrium associated with naked appeals to bargaining power. At the Federal Convention, the restatement of threats as warnings allowed the proceedings to stay within the rules of the debating game. Similarly, Mirabeau could warn the King about his soldiers without risking the accusations of seditious talk that would have been made had he threatened to stir up unrest among the troops. n311

Among the consequences of this substitutional strategy, two stand out. First, it can shift the balance of power,

because not all actors may have available to them plausible warning-equivalents of their natural threats. Whereas union leaders can and do warn about the unruly behavior of their members, management cannot similarly disguise their threat of a lockout as a warning. If the King claims that he cannot control his soldiers, that is a sign of weakness, not of strength. By contrast, a revolutionary leader who claims that he may not be able to contain his followers does not thereby lose his legitimacy. Second, the substitution induces the risk, already cited, of setting in motion a process that goes further than its instigators intended. If a leader stirs up unrest and discontent among his followers for the purpose of being able to make true warnings about what will happen if their wishes are not heeded, he may get more than he bargained for. The action of a crowd does not lend itself to fine tuning.

Earlier I argued that the effects of substituting impartial arguments for self-interest were, on the whole, beneficial. I cannot make a similar claim about the consequences of substituting warnings for threats. If anything, the overall effect can be expected to be negative. In general, there is no reason to think that the shift in balance of power caused by unequal availability of warning-equivalents will lead to more equitable outcomes. And when both sides can, and do, invest in the truth of their warnings, efficiency will suffer. Moreover, the tendency for induced popular fermentation to get out of hand can easily lead to outcomes that nobody had intended or desired.

VII. Conclusion

In the Introduction, I cited three objectives that have guided this Article. I shall try to say something about the [*419] extent to which, and in which respects, they have been satisfied.

The historical objective has certainly been the least ambitious. I have cited constitutional debates and decisions mainly to illustrate ideas derived from the more theoretical objectives, not because I think these ideas can provide complete explanations of these episodes. However, I am not sure that complete explanations will ever be forthcoming. Explanations in the social sciences should, in my opinion, be organized around (partial) mechanisms rather than around (general) theories. n312 By lowering the explanatory ambitions of the social sciences in general, I can also raise my own compared to that more modest ideal. The self-undermining of the convening authorities, the technique of procedural precommitment, the reliance on inside rather than outside options as sources of bargaining power, the substitution of impartial claims for self-interested ones, and the substitution of warnings for threats - these are mechanisms that have some potential for shedding light on the behavior of the eighteenth-century framers. I can at most claim to have shown their intelligibility and, I hope, their consistency with the historical record. To show their applicability - to take the step from just-so stories to actual explanations - would require competence that I cannot even begin to claim.

The sociological objective has been to contribute to the comparative study of constitution-making. Not, for the reasons just stated, to a "general theory of constitution-making", but to a better understanding of the situations in which constitutional conventions are called into being, their internal dynamics, and their relation with the extra-constitutional environment. Because my focus has been on a very limited subset of constitution-making episodes, I cannot claim to have progressed very far in this task. There are a number of issues that simply did not arise in Paris and Philadelphia. I have not touched on the question of constitutional borrowing, in time and space, that was acutely important in the recent East European constitution-making processes. I have not considered constitution-making under tutelage, as in Germany or Japan after World War II. I have not discussed constitution-making that takes place simultaneously with the settling of accounts with the old regime, and the complex interaction between forward-looking and backward-looking considerations.

Instead of accumulating more negatives, let me mention [*420] some possible positive accomplishments. Throughout the Article I have been predominantly concerned with process. In Part III I tried to identify the main stages in the constitution and self-constitution of the two conventions. I believe these are stages that, with some variations, will be found in most other cases. Moreover, I also suggested some tentative generalizations concerning the relation between the old and the new regimes. Both assemblies, most notably the French one, exceeded their mandate. For the reasons given, I believe this to hold true quite generally. However, the American case also demonstrates a different mechanism:

the procedure by which the Convention was called into being left its imprint on the assembly itself and ultimately on the constitution that it produced. In Parts IV through VI, I have tried to identify some mechanisms that can help explain the internal dynamics of the assemblies once they have constituted themselves. These mechanisms are quite general, in the sense that they also operate in non-constitutional settings. However, the pressure on speakers to produce impartial arguments may be especially strong in the constitutional setting, compared to ordinary legislatures. At the same time, the tendency towards extra-political bargaining may also be stronger. This makes for polarization and a heightened sense of drama.

What I called the conceptual objective - sorting out the relationship between arguing and bargaining - has been the most important. In this exploration, my starting point was Habermas's distinction between strategic and communicative behavior. For years I had been fascinated, attracted, puzzled, and frustrated by his account of the norms governing communicative behavior. On the one hand, his account of these norms seemed obviously (but not trivially) correct. On the other hand, the sense in which they actually govern communicative behavior proved very elusive. Actual political behavior, an extreme but not atypical case of which is described in Robert Caro's biography of Robert Moses, n313 did not seem to live up to the ideals of rightness and truthfulness. Yet it would be wrong to say that politics, even at its most savage, had no relation to the norms identified by Habermas.

I found the resolution of these tensions and puzzles in the idea of strategic uses of argument. Basically, this is an elaboration of La Rochefoucauld: "Hypocrisy is the homage that vice pays to virtue." n314 Even Robert Moses was to some [*421] extent forced to pay lip service to the ideals he despised. Whether or not this seriously limited his powers, there are cases in which the outcome is different because the actors have to pull some of their punches. This is perhaps the weakest point of my argument. I cannot see how anyone can dispute the simple fact of political life that self-interest is often dressed up in impartial garb. What is more contestable, is whether this will ever make anyone make different substantive claims than they would otherwise have made. My argument for the claim that the garb matters is based on two premises. First, there are real penalties attached to naked assertions of self-interest. Second, impartial claims that correspond perfectly to self-interest will in fact be perceived as naked assertions of self-interest. Because it may be difficult to decide whether a claim corresponds perfectly or imperfectly to self-interest, the second premise is necessarily more shaky. It is also more shaky because people know that even perfect correspondence need not be a sign of bad faith. n315 I believe, nevertheless, that the premise is sufficiently robust to justify at least a weak conclusion: sometimes the need to adopt an arguing rather than a bargaining stance makes a difference. Even Richard Posner agrees that "to the extent that legislators use Aesopian language to deceive political opponents of the interest groups behind legislation, they may fool the courts as well and thereby limit the political power of those interest groups." n316

Legal Topics:

For related research and practice materials, see the following legal topics:

Constitutional Law Bill of Rights Fundamental Rights General Overview Governments Legislation Enactment

FOOTNOTES:

n1. For accounts of the American proceedings, see *The Records of the Federal Convention of 1787* (Max Farrand rev. ed., 1937) [hereinafter Farrand].

n2. References to the French proceedings are taken from *Archives Parlementaires de 1787 a 1860 Premiere Serie (1789 a 1799) (1875-1888)* [hereinafter *Archives Parlementaires*], and will be supplemented with material taken from *Orateurs de la Revolution Francaise: Les Constituants* (Francoise Furet & Ran Halevi eds., 1989) [hereinafter [hereinafter *Orateurs*]]. Important aspects of the committee debates on the verification of credentials are illuminated in *Proces-Verbal des Conferences sur la Verification des Pouvoirs (1789)*

[Hereinafter[hereinafter Proces-Verbal].

n3. See Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 *U. Chi. L. Rev.* 447 (1991) (citing some preliminary findings).

n4. See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 *Duke L. J.* 364, 368-69 (1995) (surveying other countries' constitution-making efforts).

n5. A useful discussion is found in Markku Suksi, *Making a Constitution* (1995). The discussion in Chapter 8 of Andrea Bonime-Blanc, *Spain's Transition to Democracy: The Politics of Constitution-Making* 135-61 (1987), is limited to transitions from authoritarianism to democracy and does not, for instance, cover such constitution-making episodes as the Federal Convention. *Constitution -Makers on Constitution -Making: The Experience of Eight Nations* (Robert A. Goldwin & Art Kaufman & A. Kaufman eds., 1988) describes individual constitution-making episodes, with no comparative or theoretical perspectives, except for the fact that the contributors were asked to address the same issues. Patrick A. Fafard & Darrel R. Reid, *Constituent Assemblies: A Comparative Survey* (1991), while useful, is mainly descriptive (and to some extent prescriptive).

n6. See generally Kent. Greenawalt, *Speech, Crime, and the Uses of Language* (1989); see generally John R. Searle, *Expression and Meaning: Studies in the Theory of Speech Acts* (1979); John R. Searle, *Speech Acts* (1969); John R. Searle, .

n7. See, e.g., Jürgen Habermas, *Between Facts and Norms* 338-41 (1996) [hereinafter Habermas, *Between Facts and Norms*]; Jürgen Habermas, *Discourse Ethics*, in *Moral Consciousness and Communicative Action* 43-115 (Christian Lenhardt & Shierry Weber Nicholsen trans., MIT Press 1990) (1983) [hereinafter Habermas, *Moral Consciousness/Discourse Ethics*]; Jürgen Habermas, *The Theory of Communicative Action/Reason and the Rationalization of Society* (Thomas McCarthy trans., Beacon Press 1987) (1981) [hereinafter 2 Habermas]; Jürgen Habermas, *The Theory of Communicative Action/Reason and the Rationalization of Society* (Thomas McCarthy trans., Beacon Press 1984) (1981) [hereinafter 1 Habermas]. Habermas comments on the lectures that form the basis of the present article in Habermas, *Between Facts and Norms*, supra.

n8. See, e.g., Thomas C. Schelling, *The Strategy of Conflict* (1960).

n9. Among recent episodes, the Canadian one strikingly embodies the horse-trading aspects of constitution-making. See generally Andrew Cohen, *A Deal Undone* (1991).

n10. Bruce Ackerman, *We the People: Foundations* 266-94 (1991).

n11. Alexis de Tocqueville, *Democracy in America* 199 (Henry Reeve J.P. Mayer ed. & George Lawrence trans., Anchor Books/Harper Collins 1969/1988) (1835).

n12. See, e.g. generally, W.H. Riker, *Liberalism Versus Populism* (1982) Dennis C. Mueller, *Public Choice II* (1989); William H. Riker, *Liberalism Against Populism* (1982). A partial exception to this characterization can be seen in Evelyn Carol Fink, *Political Rhetoric and Strategic Choice in the Ratification Conventions on the*

U.S. Constitution (1987) (unpublished Ph.D. Dissertation, University of Rochester) (on file with the Harvard University Library). In her attempt to carve out a place for rhetoric, persuasion and argument in political assemblies, Fink does not, however, pay attention to the element of impartiality that is crucial to the present analysis.

n13. See William H. Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787*, with Comments on Determinism and Rational Choice, 78 *Am. Pol. Sci. Rev.* 11-16 (1984).

n14. Bernard Manin has impressed upon me the importance of clauses that govern the suspension of a constitution. As the issue of emergency powers played no role in the two assemblies, I shall ignore it here. For some brief comments, see Chapter II of Jon Elster, *Ulysses Unbound* Ch. II (forthcoming May 2000).

n15. For the French debates and their background, I rely heavily on Jean Egret, *La Revolution des Notables* (1950), Robert D. Harris, *Necker and the Revolution of 1789* (1986), and Andre Castaldo, *Les Methodes de Travail de la Constituante* (1989). For the American debates and their background I have mainly consulted Thornton Anderson, *Creating the Constitution* (1993), Calvin C. Jillson, *Constitution Making: Conflict and Consensus in the Federal Convention of 1787* (1988), Cathy D. Matson & Peter S. Onuf, *A Union of Interest* (1990), and Gordon Wood, *The Creation of the American Republic 1776-1787* (1969).

n16. Later I note, however, that at an abstract level the French discussion of voting by order or by head can be seen as analogous to this debate.

n17. See generally 8 *Archives Parlementaires*, supra note 2, at 164-69, 186-88; 26 *Archives Parlementaires*, supra note 2, at 636; 27 *Archives Parlementaires*, supra note 2, at 12-19.

n18. See 1 *Farrand*, supra note 1, at 288-89.

n19. See *id.* at 200.

n20. See *id.* at 336; Wood, supra note 15, at 553.

n21. According to M.J.C. Vile, "the use of the power of Parliament by one group of its supporters to threaten other groups had shown to men who had previously seen only the royal power as a danger, that a parliament could be as tyrannical as a king." M.J.C. Vile, *Constitutionalism and the Separation of Powers* 43 (1998). This statement, although made about England after 1648, is also valid for the United States after 1776 and France after 1791.

n22. All constitutions or draft constitutions in post-1989 Eastern Europe, for instance, include a bill of rights.

n23. See Wood, supra note 15, at 537; see also 3 *Farrand*, supra note 1, at 143-44 (citing a similar statement along these lines by James Wilson in the Pennsylvania Convention). The Ninth Amendment reflects this concern.

n24. 3 Farrand, *supra* note 1, at 256 (statement of C.C. Pinckney in the South Carolina House of Representatives).

n25. See 8 Archives Parlementaires, *supra* note 2, at 222-23.

n26. See 8 Archives Parlementaires*id.*, *supra* note 2, at 322-23.

n27. See 8 Archives Parlementaires*id.*, *supra* note 2, at 320.

n28. 1 Farrand, *supra* note 1, at 483.

n29. See 1 Farrand, *supra* note 1, *id.* at 405-06, 488, 489-91, 510-11; 2 Farrand, *supra* note 1, at 5-6. A system of this kind was adopted in the West German constitution of 1949. See Grundgesetz [Constitution] [GG] art. 51.2 (F.R.G.).

n30. For an account of this distinction and its fate, see Jean-Denis Bredin, *Sieyes: La Cle de la Revolution Francaise*, 159-66 (1988).

n31. *Id.* at 60.

n32. I Orateurs, *supra* note 2, at 1014.

n33. *Id.*

n34. 2 Farrand, *supra* note 1, at 210.

n35. 10 Archives Parlementaires, *supra* note 2, at 755-56.

n36. See D.M. MacDowell, *The Law in Classical Athens* 160, 165 (1978).

n37. See generally 1 Brian M. Barry, *A Treatise on Social Justice: Theories of Justice* (1989) (discussing extensively both classical and modern conceptions of society).

n38. 9 Archives Parlementaires, *supra* note 2, at 203.

n39. See 9 Archives Parlementaires, *supra* note 2, *id.* at 204. Thouret's proposal did, however, stipulate that only those who paid annual taxes equal to three days' salary would have the right to vote. See *id.* What he excludes is a system of plural voting that would give, for instance, to each individual a number of votes proportional to his tax payment. Tax payment, in his proposal, served as a threshold in the determination of who should vote and as a proportionality factor in the determination of the number of delegates they could elect.

n40. 8 Archives Parlementaires, supra note 2, at 517.

n41. John E. Finn, *Constitutions in Crisis* 5 (1991) (quoting John Potter Stockton in the congressional debates over the Ku Klux Klan Act of 1871). The author discusses the general theme of constitution-making as self-binding in Chapter 2 of his work Jon Elster, *Ulysses Unbound* (forthcoming May 2000) (revising his previous assertions in Chapter II.8 of Jon Elster, *Ulysses and Sirens* 88-103 (1984)).

n42. See *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (warning that the Court's decision may have moved far enough toward embracing civil liberties so as to turn the Bill of Rights into a "suicide pact").

n43. Tocqueville warned against the excessively stringent amendment procedures proposed for the constitution.

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.

Alexis de Tocqueville, *Recollections: The French Revolution of 1848*, at 181 (J.P. Mayer & A.P. Kerr eds. & George Lawrence trans., Transaction Publishers 1987/1990) (1893) [hereinafter *Tocqueville, Recollections*]. The implication, whether intended or not, is that by making change easier one reduces the desire for change. Needless to say, there could also be more rational motives for loosening the ties.

n44. See 31 Archives Parlementaires, supra note 2, at 36, 39, 67.

n45. Madison made the same objection to Jefferson's proposal of periodical constitutional conventions in the United States. See Stephen. Holmes, *Precommitment and the Paradox of Democracy*, in *Constitutionalism and Democracy* 195, 217-18 (Jon Elster & Rune. Slagstad eds., 1988) (citing Letter of James Madison's letter of (February 4, 1790), in 13 *The Papers of James Madison* 22 (Charles Hobson & Robert Rutland eds., 1981)). That proposal was not put at on the table at the Convention, however.

n46. See 30 Archives Parlementaires, supra note 2, at 97.

n47. The 1968 Czechoslovak constitution is paradoxical in this respect. Although it never mattered during the Communist period, its provisions profoundly shaped and constrained the post-Communist constitutional developments. It came alive, as it were, only after its death.

n48. According to W. Riker, "near unanimous [constitutional] conventions are more successful than politically divided ones because those who thoroughly agree are better able to write a coherent document than whose [sic] who do not." William H.. Riker, *The Lessons of 1787*, 55 *Pub. Choice* 5, 9 (1987); see also Adam.

Przeworski, *Democracy and the Market* 81 (1991) (distinguishing among cases in which the balance of forces is (i) known and uneven, (ii) known and balanced, and (iii) unknown, arguing that the first is the least and the third the most favorable to constitutional stability).

n49. Without the split of the Second International, the Weimar Constitution might have proved more durable.

n50. In the period between the First and Second World Wars, one may cite President Masaryk of Czechoslovakia or President Pilsudski of Poland as two such personalities.

n51. Statements of positive rights, such as the right to work, illustrate this case. It is somewhat inaccurate to say that those who advocate such rights do not care whether the constitution works. Rather, they want the constitution to work in other respects, so that their favored clause can benefit from the prestige that efficiency confers on the constitution as a whole. Of course, each additional free-rider clause of this kind may detract from the prestige one is trying to exploit.

n52. See, e.g., Gary. B. Melton & Michael. J. Saks, *The Laws as an Instrument of Socialization and Social Structure*, in *The Law as a Behavioral Instrument* 235 (Gary. B. Melton ed., 1986).

n53. The role of the former Communists in the constituent assemblies of Eastern Europe might be worth examining in this perspective.

n54. See Egret, *supra* note 15, at 152.

n55. *Id.* See *id.*

n56. See 1 Farrand, *supra* note 1, at 478.

n57. 1 Farrand, *supra* note 1, *Id.* at 467. An additional argument against a temporary constitution is that if it failed one could never be sure whether the failure was due to inherent defects or to the fact that it was known to be temporary. See Jon Elster, *Solomonic Judgements* 192 (1989). With regard to West Germany in 1948, it has been argued that agreement on the constitution was facilitated by its provisional nature, "because vested interests could anticipate an early revision favoring issues which they considered vital." Peter H. Merkl, *The Origin of the West German Republic* 84 (1963). In fact, Merkl goes on to claim that the provisional nature of the constitution facilitated not only its adoption but its survival: "Nothing is as lasting as an improvisation." *Id.* I doubt whether this last generalization would stand up to scrutiny, however. Tocqueville's analysis of the French constitution-making process in 1848 suggests the opposite and more plausible view, that make-shift documents tend to contain gaps and inconsistencies that make them unworkable. See Tocqueville, *Recollections*, *supra* note 43, at 167-83.

n58. See 8 Archives Parlementaires, *supra* note 2, at 555.

n59. See *id.* at 538.

n60. See *id.* at 574 (514?).

n61. See *id.*

n62. 9 Archives Parlementaires, *supra* note 2, at 461.

n63. For a fuller discussion of some of the issues raised in this Part, see generally Jon Elster, Constitutional Bootstrapping in Paris and Philadelphia, *14 Cardozo L. Rev.* 549 (1993) (discussing some of the issues raised in this section more fully); Bruce Ackerman & Neal Katyal, Our Unconventional Founding, *62 Univ. Chi. L. Rev.* 475 (1995) (discussing the American case founding specifically).

n64. That authority could be the constitution itself, if it calls for periodical constitutional conventions; an occupying power, as in Japan or West Germany after World War II; a provisional government, as in France in 1848; or Round Table Talks between the old regime and the opposition, as in Poland, Hungary and Bulgaria in 1989-90. Although a self-convening assembly is a logical impossibility, the Frankfurt Parliament of 1848 does to some extent fit that description. On March 5 1848, fifty-one self-selected leaders of the public met in Heidelberg to discuss Germany's future. They convened a Vorparlament that met in Frankfurt on March 31 March. That body voted for elections to a constituent assembly and set up a committee to help administer them. The assembly then met on May 18 of the same year. See H.W. Koch, *A Constitutional History of Germany* 52-58 (1984).

n65. Such coincidence would indicate that we are dealing with a mere puppet assembly, with no will of its own. An example would be the body of 66 men convened in China by Yuan Shikai in 1914 to give his rule a semblance of legality through a "constitutional compact.". See Ch'ien Tuan-Sheng, *The Government and politics of China 1912-1949*, at 61-64 (1950).

n66. I am not denying the close ties between the legislatures and Congress. However, the legislatures acting collectively through Congress to call a convention should not be confused with their individual power to select delegates.

n67. This principle, however, gives rise to a paradox if the amending clause of a constitution is used to amend itself. See generally Peter Suber, *The Paradox of Self-Amendment* (1990).

n68. This kind of outcome occurs quite frequently. Whenever the assembly is more than a mere puppet body the convoking authorities rarely succeed in imposing their will on it. The Japanese constitution Constitution of 1946 is the only clear case that comes to mind. See generally S. Koseki Shoichi, *The Birth of Japan's Postwar Constitution* (Ray A. Moore ed. & trans., Westview Press 1997). The Western occupying powers had some influence on the West German constitution Constitution of 1949, but substantially less than they had hoped for. According to Merkl,

the French Foreign Secretary, Robert Schumann, declared in a speech that only a federal system of considerable decentralization of German governmental powers was consistent with peace and acceptable to his government. The third draft of the Basic Law, however, contained elements he considered conducive to a centralistic trend.

This was, perhaps, the first time in the history of modern constitutionalism that a victorious power attempted to secure itself against revenge or aggression by "'constitutional engineering'engineering". Such a policy presupposes a naive belief in the restraining force of constitutional clauses imposed by a foreign power on a defeated nation.

Merkel, *supra* note 57, at 120-21 (citation omitted); see also *id.* at 103, 117, 123. When the assembly is convened by an internal authority, as distinct from a foreign power, it is even less likely to listen to dictates.

n69. A marvellous introduction to the pre-revolutionary situation is found in Alexis de Tocqueville, *The Old Regime and the French Revolution* (Stuart Gilbert trans., Doubleday Anchor Books 1955) (1858). The best modern overview is Pierre. Goubert & Daniel. Roche, *Les Francais et l'Ancien Regime* (1984).

n70. A recent overview can be found in Cathy D. Matson & Peter S. Onuf, *A Union of Interests* (1990).

n71. See Wood, *supra* note 15, at 393-429 *The Creation of the American Republic*, *supra* note 15, at Ch.X; see also Calvin C. Jillson, *Constitution Making*, *supra* note 15, at 23-24 (stating that the existing political situation was believed to be "peculiarly critical") (citation omitted).

n72. See text accompanying also *supra* note 15 and accompanying text.

n73. The following draws on Chapter 9 of Robert D. Harris, *Necker and the Revolution of 1789*, at 297-337 (1986), and on Andre Castaldo, *Les Methodes de Travail de la Constituante* (1989).

n74. Jean. Egret, *Les Derniers Etats de Dauphine* 153 (1942).

n75. Francois F. Furet, *La Revolution de Turgot a Jules Ferry 1770-1870*, at 75 (1988).

n76. See generally Egret, *Les derniers Etats de Dauphine* (1942) *supra* note 74 .

n77. See generally A. Cochin, *Les Societes de Pensee et la Democratie* 211-31 (1912).

n78. *Id.* See *id.* at 235-82.

n79. See Jillson, *supra* note 15, at 208 n.2 ("Voting in the Convention was by state delegation, rather than by individual delegate....").

n80. See 1 *The Founder's Constitution* 188 (Philip B. Kurland & Ralph Lerner eds., 1987) (quoting John Jay that in Congress' opinion, "it would be expedient for the people of the States... to appoint State Conventions... with the sole and express power of appointing deputies Deputies....").

n81. A. Mathiez, *Etude Critique sur les Journees des 5 & 6 Octobre 1789, Part I*, 67 *Revue Historique* 41, 269 (1898).

n82. See Jillson, *supra* note 15, at 4 (quoting Forrest McDonald, *We the People: The Economic Origins of the Constitution* 37 (1958) ("Thirty-one of the thirty-four major factions in twelve states were represented by delegates.")).

n83. See *id.* at 208 n.2 ("There were only 146 occasions upon which delegations... divided their votes evenly.").

n84. See *id.* at 200 fig.10.1 *passim* (illustrating the "cleavage lines active during the Convention.").

n85. See 8 *Archives Parlementaires*, *supra* note 2, at 201.

n86. See 3 Farrand, *supra* note 1, at 18, 173, 574 (stating that Delaware delegates should "agree to no system, which should take away from the states that equality of suffrage secured by the original articles of confederation.").

n87. See 1 Farrand, *supra* note 1, at 37 ("Deputies from Delaware were restrained... from assenting to any change of the rule of suffrage... [or] it might become their duty to retire from the Convention.").

n88. See 2 Farrand, *supra* note 1, at 364 ("South Carolina can never receive the plan if it prohibits the slave trade.").

n89. Two delegates from New York State (Lansing and Yates) actually did withdraw from the Convention. This, however, did not amount to withdrawal of the New York delegation.

n90. See 1 Farrand, *supra* note 1, at 34, 249-50.

n91. See *id.* at 253.

n92. See *id.* at 346.

n93. See *id.* at 255.

n94. After initial plenary sessions, these debates took place in a small committee with delegates from the three orders. The transcripts from the debates are relatively full, but do not permit us to identify speakers except by their membership in one of the orders. See generally *ProcesROC<grav E>S-VerbalERBAL*, *supra* note 2, at .

n95. See *id.* at 39. In this joint session, each delegate would have one vote. A compromise suggested by the clergy, to have the credentials verified in a vote by order, so that any two estates could block the credentials of a

delegate from the third one, was not seriously discussed. See *id.* See PROC<grav E>S-VERBAL, *supra* note 2, at 39.

n96. See *Proces-Verbal*, *supra* note 2, at 8.

n97. See *Proces-Verbal*, *supra* note 2, *id.* at 9, 95.

n98. See *id.* *Proces-Verbal*, *supra* note 2, at 117.

n99. See *id.* *Proces-Verbal*, *supra* note 2, at 87.

n100. See *id.* *Proces-Verbal*, *supra* note 2, at 161 (explaining that the delegates actually presented this as a concession because in the last Estates General in 1614 the King had the right to decide in cases of disagreement within each order).

n101. See *Proces-Verbal*, *supra* note 2, at 75, 86-87.

n102. See *Proces-Verbal*, *supra* note 2, at 86-87. Even admitting this premise, the dilemma persists. Assume that the assembly has 100 delegates, that three of the credentials are contested, and that the uncontested delegates are divided 49-48 over the validity of the contested credentials. If in the vote over one contested case, the other contested cases vote with the minority, the contested credentials will be approved.

n103. See *Harris*, *supra* note 15, at 326.

n104. See 1 *farrand* *Farrand*, *supra* note 1, at 10 n.4 * (stating that members from Virginia feared that there would be fatal altercations between small and large states, and that for this, as well as other reasons, they "discouraged [and] stifled the project.").

n105. See *id.* at 515.

n106. See 1 *farrand* *Farrand*, *supra* note 1, at 250.

n107. The question of continuity versus discontinuity must be distinguished from the question of respecting versus violating the upstream instructions from conveners and electors. The impact of the past on the present may actually be less effective when it takes the form of explicit instructions than when it is channeled past may shape the present in several ways. The attempt to do so by explicit instructions may be less effective than the influence that is channeled through the focal-point quality of the past.

n108. See 8 *Archives Parlementaires*, *supra* note 2, at 587.

n109. See *id.* at 603.

n110. See 30 Archives Parlementaires, *supra* note 2, at 127-45.

n111. See Norman Hampson, *Prelude to Terror* 128 77-78 (1988). Actually, a bargain had been struck earlier. See *infra* Part V.

n112. 1 Farrand, *supra* note 1, at 132.

n113. *Id.* at 374.

n114. *Id.*

n115. *Id.* at 123.

n116. A third type of speech acts, rhetorical statements aiming at persuasion, are also important in assembly discussions. See Chaim Ch. Perelman & Lucie Olbrechts-Tyteca, *The New Rhetoric and the Humanities* (William Kluback trans., Robert S. Cohen et al. eds., D. Reidel Publishing Company, 1979). For an application to constitutional debates, see Evelyn Carol Fink, *Political Rhetoric and Strategic Choice in the Ratification Conventions on the U.S. Constitution* (1987) (unpublished Ph.D. dissertation, University of Rochester) (on file with the Harvard University Library). I am uncertain about the proper analytical characterization of such techniques. Later, I distinguish among reason, passion and interest as motives of speakers in constitutional or legislative assemblies. See *infra*, Part IV. Applying the same distinction to the motives imputed by the speakers to their audience, rhetoric may perhaps be defined by the feature that its practitioners appeal to the passions of their audience rather than to their reason or self-interest. The question needs much further exploration. In some debates, reason speaks to reason; in others, interest to interest; in still others, passion to passion. But other constellations also occur. Moreover, constitutional debates usually involve a third party, i.e., the future generations for whom the constitution is written. Hence, a typical constitutional speech act is one in which an orator (speaking from specific motives) addresses an audience (whom he assumes to have specific motives) about the proper institutional response to the specific motives he imputes to future legislators. In this Article, I touch only on some of the possible combinations.

n117. See Jean-Jacques Rousseau, *The Social Contract and Discourses* (Book II, ch.3) 27 (G.D.H. Cole trans., Everymans Library E.P. Dutton and Company, Inc. 1950) (1762); see also Bernard. Manin, *Volonte generale ou deliberation? Esquisse d' une theorie de la deliberation politique*, 33 *le Le Debat* 72 (1985).

n118. See 1 Habermas, *supra* note 145, at 75; Habermas, *Discourse Ethics Moral Consciousness*, *supra* note 145, at 58.

n119. See, e.g., Brian Barry, *Justice as Impartiality* (1995).

n120. See *ProcesROC<grav E>S-VerbalERBAL*, *supra* note 2, at 22.

n121. See 10 Archives Parlementaires, *supra* note 2, at 754.

n122. 1 *Orateurs*, supra note 2, at 1014.

n123. See 10 *Archives Parlementaires*, supra note 2, at 757.

n124. See infra note 145 and accompanying text for further discussion of impartiality.

n125. See infra note 146 and accompanying text for a more general discussion of interest, reason and passion (which includes, but is not limited to, prejudice). I take this occasion to indicate that references here and below to self-interest must be understood in a wide sense that also includes the interest of the group to which the speaker belongs, as long as that group is a proper subset of society as a whole. When an actor seeks to promote group interest he may do so out of (narrowly construed) self-interest, because the group will penalize him if he fails to do so, but he may also act out of genuine identification with the group. For my purposes this distinction is immaterial. However, it is important that both these cases differ from that in which group interest is a constraint on the actor rather than a maximand. See infra note 195 and accompanying text for further discussion of self-interested behavior.

n126. 1 *Farrand*, supra note 1, at 49.

n127. The arguments invoke a real veil of ignorance, not the hypothetical veil that is used to define "the original position" in John Rawls, *Theory of Justice* 12, 19, 138 (1971).

n128. 1 *Farrand*, supra note 1, at 530-31.

n129. 2 *Farrand*, supra note 1, at 3.

n130. *Id.*

n131. 1 *Farrand*, supra note 1, at 578-79.

n132. *Id.* at 421-22.

n133. True, one may also detect an element of hypocrisy, see Gordon Wood, *The Creation of the American Republic* supra note 15, at 562 (1969), in assertions like Madison's statement that "democratic communities may be unsteady, and be led to action by the impulse of the moment. - Like individuals they may be sensible of their own weakness, and may desire the counsels and checks of friends to guard them against the turbulency and violence of unruly passions." 1 *Farrand*, supra note 1, at 430-31 (emphasis added). The Senate embodied the desire of the upper class to protect itself against the lower class - not the desire of the people to protect itself against itself. However, the two views are not incompatible. On similar grounds it has been argued that "[a] majority groups, say, the workers, who control the policy might rationally choose to have a constitution which limits their power, say, to expropriate the wealth of the capitalist class." Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optional Plans*, 85 *J. Pol. Econ.* 473, 486 (1977). Moreover, even in the absence of an explicit choice, one may argue that this is what rational workers and rational members of the lower class would choose in the original position. Obviously, one has to be careful in assessing such

arguments, for the reasons explained in Part VI below *infra*. But they cannot be dismissed out of hand.

n134. See 1 Habermas, *supra* note 145, at 303; Habermas, *Discourse Ethics Moral Consciousness*, *supra* note 145, at 59.

n135. See *infra* Part IV.

n136. See *Proces-Verbal ROC <grav E>S-VERBAL*, *supra* note 2, at 10, 31, 79-80, 201.

n137. See *Proces-Verbal PROC <grav E>S-VERBAL*, *supra* note 2, at 13, 29.

n138. For this charge, see I 1 *Orateurs*, *supra* note 2, at 945.

n139. See Harris, *supra* note 15, at 633.

n140. Compare 8 *Archives Parlementaires*, *supra* note 2, at 213, with 9 *Archives Parlementaires*, *supra* note 2, at 383.

n141. Rhetoric, as distinct from argument, may have been at work here. See *supra* note 102 and accompanying text.

n142. See 1 Farrand, *supra* note 1, at 584.

n143. See 2 Farrand, *supra* note 1, at 31.

n144. Cite to *The Federalist No. 10*, at 80 (James Madison) (Clinton Rossiter ed., 1961).

n145. The previous statements assume that "accessibility" means the absence of legal obstacles. Of course, earning an income is also inaccessible for many of the severely handicapped, regardless of their freedom to seek gainful employment. Today, such handicaps would not constitute grounds for the denial of voting rights. Some conditional rights remain even today, however, such as the registration requirement for voters. In this Article, as I said, I am concerned with a minimal notion of impartiality that excludes only rights that are legally inaccessible (directly or indirectly, through unfulfillable requirements) to a subset of the population.

n146. For a fuller discussion, see Jon Elster, *Limiting Majority Rule: Alternatives to Judicial Review in the Revolutionary Epoch*, in *Constitutional Justice under Old Constitutions* 3-21 (E. Smith ed., 1995).

n147. For a general discussion of this trio of motives, see Jon Elster, *Alchemies of the Mind* 332-402 (1999) [hereinafter *Elster, Alchemies*] (arguing that the motivations behind people's actions can be ranked in terms of how acceptable they are to the actor or to other people). For references by the American founders, see Morton Gabriel White, *Philosophy, The Federalist, and the Constitution* 102 (1987). For a discussion in a different

constitutional setting, see Reg Whitaker, Reason, Passion and Interest: Pierre Trudeau's Eternal Liberal Triangle, in *A Sovereign Idea* 132-16464 (1992). More frequently, the ideas are opposed to each other in pairwise fashion. David Hume, when addressing the relation between passion and reason, argued that the latter was, and ought only to be, the slave of the former. See David Hume, *A Treatise of Human Nature*, 415 (L.A. Selby-Bigge ed., 2d ed. 1978) (1888). Roughly speaking, he meant that there could be no rational deliberation about ends, only about means. Albert Hirschman has considered the changing attitudes towards passions and interests in the eighteenth century, arguing that the dominance of interest over passion in a commercial society constituted "a political argument for capitalism before its triumph." Albert O. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph* (1977). In many discussions of the debates at the Federal Convention, reason and interest are believed to exhaust the motives of the framers. See Jillson, *supra* note 15, at 193-94 (citing Madison, Hamilton and Tocqueville to the same effect); see also Jack N. Rakove, *The Great Compromise: Ideas, Interests, and the Politics of Constitution Making*, 44 *Wm. & Mary Q.* 424 (1987).

n148. Myopic attitudes form a borderline case between interests and passions. An agent's interest, as perceived by himself, may well involve some discounting of the future. Going against one's own well-considered judgment because of a sudden impulse would, however, be a case of interest yielding to passion.

n149. David Hume, *Essays: Moral, Political and Literary* 42 (1963).

n150. For the influence of Hume on the framers, see generally White, *supra* note 147, at 13-22, 87-88, 187-88.

n151. See generally Albert O. Hirschman, *The Passions and the Interests* (1977); Stephen Holmes, *The Secret History of Self-Interest*, in *Beyond Self-Interest* 267 (Jane J. Mansbridge ed., 1990).

n152. See 1 Farrand, *supra* note 1, at 176.

n153. Stephen Holmes, *Benjamin Constant and the Making of Modern Liberalism* 139 (1984).

n154. *Id.* See *id.* at 140 (citing Benjamin Constant, *Reflexions sur les Constitutions, la Distribution des Pouvoirs et les Garanties dans une Monarchie Constitutionnelle*, in 1 *Cours de Politique Constitutionnelle ou Collection des Ouvrages Publies sur la Gouvernement Representatif*, 224-25 (Edouard Laboulaye ed., 1872)).

n155. *Id.* at 140 (noting that the British rule was meant to create a "majorite silencieuse" in the Assembly and thus force politicians to "take refuge in reason as a last resort").

n156. See Tocqueville, *Recollections*, *supra* note 43, at 233.

n157. See 9 *Archives Parlementaires*, *supra* note 2, at 115.

n158. See 8 *Archives Parlementaires*, *supra* note 2, at 443.

n159. See 9 Archives Parlementaires, supra note 2, at 111.

n160. See id. at 116.

n161. See 8 Archives Parlementaires, supra note 2, at 591.

n162. See id.

n163. See 8 Archives Parlementaires, supra note 2, at 612. An alliance between the partisans of an absolute veto and the patriots who disliked any ministerial interference blocked the reading of the letter to the assembly. See Jean Egret, *La Revolution des Notables*, supra note 15, at 154-55. Necker's preference ranking was (i) suspensive veto for two periods, (ii) absolute veto and (iii) suspensive veto for one period. Neither (ii) nor (iii) would ever be used (although for different reasons), but (ii) would at least leave the King with the appearance of majesty. See 9 8 Archives Parlementaires, supra note 2, at 615.

n164. See 9 Archives Parlementaires, supra note 2, at 59.

n165. 2 Farrand, supra note 1, at 123.

n166. Id. at 114.

n167. Id. at 109.

n168. This was apparently the typical outcome in the power struggles between the Roman Senate and the Emperor it elected. See Paul. Veyne, *Le pain Pain et le cirque Cirque 714* (1976). Although the elected Polish kings were more tightly constrained, they were bound not by electoral promises (except for the election in 1576) but by standing constitutional rules. 1 Norman Davies, *God's Playground: A History of Poland* 331 (1982) (explaining how the Pacta Conventa served as the "ultimate check on the conduct of the king").

n169. This is not to deny that the executive will tend to be weaker if elected by the legislature than if chosen by popular ballot. For one thing, the legislature may deliberately choose a weak candidate. Alternatively, a popularly elected executive will enjoy greater legitimacy on which he can draw in his power struggles with the legislature.

n170. This might be a reason, for example, to keep the right to secession out of the constitution in federally organized states. See Cass R. Sunstein, *Constitutionalism and Secession*, 58 *U. Chi. L. Rev.* 633, 647-48 (1991) (noting that one drawback to the right to secession is that subunits of a nation could always use the threat of secession to push their particular agendas).

n171. 1 Farrand, supra note 1, at 545.

n172. Id. at 571.

n173. See 8 Archives Parlementaires, supra note 2, at 539.

n174. See 8 Archives Parlementaires, supra note 2, id. at 547, 588.

n175. When denying the presence of this argument in the American constitutional debates, I refer exclusively to what was said at the Federal Convention itself. As Cass Sunstein has pointed out, other Framers on later occasions expressed arguments close to those put forth by Sieyès and Barnave cited in the text, specifically arguments against bound mandates on the grounds that they would impair the deliberative quality of the proceedings. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 *Yale L.J.* 1539, 1559 (1988) (noting that a representative's task required deliberation, which was inconsistent with a proposed amendment that would have entitled constituents the right to "'instruct' their representatives about how to vote"); Cass R. Sunstein, *Government Control of Information*, 74 *Cal. L. Rev.* 889, 895 (1986) (arguing that at times secrecy during decision making is necessary because if bargaining positions are revealed to the public "views will may harden, and the participants will be less likely to arrive at a mutually acceptable accommodation"). Sunstein cites Madison to the effect that a large republic is more likely to produce "a chosen body of citizens, whose wisdom may best discern the true interest of their country," taking this as a statement of the deliberative view of politics. Cass R. Sunstein, *Constitutions and Democracies: An Epilogue*, in *Constitutionalism and Democracy* 327, 331-32 (Jon Elster & Rune Slagstad eds., 1988). I believe, however, that Madison's concern here is with wisdom per se, not with deliberation. No doubt wise men will often deliberate. However, in from a less elitist perspective, collective deliberation can also be seen as a substitute for individual wisdom.

n176. See 8 Archives Parlementaires, supra note 2, at 595.

n177. See id. Recall that the procedure described here was this was Rousseau's ideal of political decision-making. See Rousseau, supra note 117, and accompanying text.

n178. See id. 8 Archives Parlementaires, supra note 2, at 595.

n179. See 30 Archives Parlementaires, supra note 2, at 68, 115. These would be bound mandates limiting the set of issues to be discussed, but not instructing the delegates how to vote.

n180. Id. at 115.

n181. See 8 Archives Parlementaires, supra note 2, at 597.

n182. Id.

n183. Condorcet, *Examen sur Cette Question: Est-il Utile de Diviser une Assemblée Nationale en Plusieurs Chambres?*, in 9 *Oeuvres de Condorcet* 333, 345 (1847).

n184. See 8 Archives Parlementaires, supra note 2, at 299.

n185. See id.

n186. Id.

n187. For a discussion of the notion of imperfect rationality, see chapter II of Jon Elster, *Ulysses Unbound* (forthcoming May 2000) (discussing the place of precommitment in constitution-making).

n188. 3 Farrand, *supra* note 1, at 479 (Madison as reported by Jared Sparks).

n189. An analogous problem arose in recent debates over the role of the senate in the Polish Constitution. That body, which was created as part of the Round Table Talks compromise, had little justification after the fall of communism. However, as the senate will have a vote on the new constitution, it cannot be expected to abolish itself. See Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 *U. Chi. L. Rev.* 595, 615 (1991).

n190. See 26 *Archives Parlementaires*, *supra* note 2, at 124.

n191. J.M. Thompson, *Robespierre* 134-35 (1988).

n192. Francois. Furet, *supra* note 75, at 104.

n193. As shown in White, *supra* note 147, at Ch. 9-10131-75, the motive-opportunity distinction was central in the arguments of the *The Federalist*. To ensure checks and balances, one ought to deny the branches of government either the motive or the opportunity to extend their sphere. At the same time, they should have both the motive and the opportunity to resist encroachments. With respect to the prevention of factious majorities, large electoral districts will prevent both the formation of factious motives and the opportunity to act on such motives. For a discussion of similar arguments in Tocqueville, see Jon Elster, *Psychologie Politique* Ch. IV135-86 (1990). For a more general analysis, see Jon Elster, *Nuts and Bolts for the Social Sciences* Ch. II13-21 (1989).

n194. See White, *supra* note 147, at 114, 249; (citing Arthur O. Lovejoy, *Reflections on Human Nature* 51-52 (1961)).

n195. In addition, Robespierre (26, p.124) used the standard argument in the *Assemblée Constituante* that the assembly not only had to be pure, but had to be seen as pure. See 26 *Archives Parlementaires*, *supra* note 2, at 124.

n196. See *infra* Part IV for a lengthy discussion of the converse point.

n197. See generally Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (1986) (stating that the Framers were moved by their personal self-interests); Robert A. McGuire, *Constitution Making: A Rational Choice Model of the Federal Convention of 1787*, 32 *Am. J. Pol. Sci.* 483 (1988) (finding that the economic interests of the constituencies of the various delegates have more power to explain voting patterns at the convention than the economic interests of the Framers themselves, although the latter are not negligible. He fails to distinguish, though, between interests as maximands and interests as constraints.).

n198. 2 Farrand, *supra* note 1, at 371.

n199. See also Jon Elster, *Equal or Proportional? Arguing and Bargaining over the Senate at the Federal Convention*, in *Explaining Social Institutions* 145-60 (Jack Knight & Itai Sened eds., 1995).

n200. See 1 Farrand, *supra* note 1, at 348.

n201. *Id.*

n202. 1 Farrand, *supra* note 1 *Id.*, at 250-51.

n203. Although one may argue that contracts made under duress are not binding if the force is exercised by one party over the other, see Jules Coleman & Charles Silver, *Justice in Settlements*, 4 *Soc. Phil. & Pol'y* Autumn 1986, at 102 (1986), it is much less clear that the same argument applies if the duress is due to external circumstances that affect both parties equally, thus undoing any natural inequalities that may exist. On this point, therefore, I believe Patterson had the better argument. I am quite prepared to believe, though, that it was made largely on opportunistic grounds. See *infra* Part VI.

n204. 1 Farrand, *supra* note 1, at 159.

n205. *Id.* at 151.

n206. *Id.*

n207. 29 *Archives Parlementaires*, *supra* note 2, at 366.

n208. See 2 Farrand, *supra* note 1, at 202.

n209. Although property and tax-paying are correlated, and each can be used as a proxy for the other, the arguments for basing the right to vote on the one or the other are quite different. One is supposed to have good consequences, the other to reflect prior rights.

n210. 2 Farrand, *supra* note 1, at 124.

n211. See also Wood, *supra* note 15, at 214.

n212. For an elaboration of this theme, see Jon Elster, *Local Justice* (1992).

n213. Such substitutions have obvious similarities with the "strategic uses of argument" discussed in Part VI. However, my focus in that later discussion is the substitution of impartial arguments for self-interested ones. Here, I consider the substitution of one impartial argument for another.

n214. For Mirabeau's the most explicit statements, see 9 Archives Parlementaires, *supra* note 2, at 639-45.

n215. See *id.* at 496.

n216. See *id.* at 416.

n217. The pioneering studies were made in Thomas C. Schelling, *The Strategy of Conflict* (1960). More recently, non-cooperative game theory has allowed the construction of a rich formal theory of credibility. For a superb non-technical exposition, see David M. Kreps, *Game Theory and Economic Modelling* (1990). Recent surveys in the spirit of Schelling are Avinash Dixit & Barry Nalebuff, *Making Strategies Credible*, in *Strategy and Choice* 161 (Richard J. Zeckhauser ed., 1991), and Jon Elster, *The Cement of Society* 272-87 (1989).

n218. I simplify. If A makes a non-credible threat to B, the latter may respond in one of several ways. He may conclude that A is stupid (or believes B to be stupid), e.g., that he fails to understand that B will understand that the threat will not be carried out. Or he may conclude that A is irrational. In that case, however, B should contemplate the possibility that the threat might actually be carried out. Or he may contemplate the possibility that A, being neither stupid nor irrational, wants to sow the seed of suspicion in B's mind that he is irrational. For further discussion along these lines, see David Kreps & Robert Wilson, *Reputation and Imperfect Information*, 27 *J. Econ. Theory* 253 (1982).

n219. In the theory of speech acts, promises have been studied quite intensively. See Searle, *supra* note 6, at 58-75. Threats (and warnings) have been discussed much more cursorily, with little attention to conceptual nuances.

n220. For an useful introduction, see Mueller, *supra* note 12, at 82-94.

n221. For this aspect of logrolling, see Douglass C. North, *Institutions and a Transaction-Costs Theory of Exchange*, in *Perspectives on Positive Political Economy* 182, 190-91 (James E. Alt & Kenneth A. Shepsle eds., 1990).

n222. See Martin Diamond et al., *The Founding of the Democratic Republic* 58-59 (2d ed. 1981) (1970), which summarizes the process as follows:

complex political struggles often come down to a single issue in which all the passions, all the forces find their focus. When that single issue is settled it is as if all the passions and forces are spent. Both sides seem somehow obliged fully to accept the outcome and matters move quickly thereafter. This emotional dynamic will be an obstacle to going back to an issue if some more or less clearly stated promise fails to be kept.

Id.

n223. In the West German assembly of 1948, "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." Peter H. Merkl, *The Origin of the West German Republic* 69 (1963). During the debates over the Spanish constitution in 1978, the Union of the Democratic Center was accused "of breaking a painstakingly negotiated set of compromises," leading to the withdrawal of the Socialist member on the subcommittee." Bonime-Blanc, *supra* note 5, at 56.

n224. See 2 Farrand, *supra* note 1, at 396.

n225. See 2 Farrand, *supra* note 1, *id.* at 176.

n226. See Paul. Finkleman, *Slavery and the Constitutional Convention: Making a Covenant with Death, in Beyond Confederation: Origins of the Constitution and American National Identity* 188, 211 (Richard Beeman et al. eds., 1987).

n227. See 1 Orateurs, *supra* note 2, at 933.

n228. See *id.*

n229. See Mathiez, *supra* note 81, at 268.

n230. The following draws on Mathiez, *supra* note 81, at 268.

n231. In the Spanish transition to democracy in 1978, the army and the military branch of the Basque movement were a permanent presence during the constitutional debates. The Round Table talks in Hungary and Poland were similarly suspended between fear of Soviet intervention and the risk of mass demonstrations. After the fall of Communism, many of the East European countries were suspended between popular nationalism and opposition to foreign ownership on the one hand, and various international organizations on the other hand. If they did not write a full set of human rights into their constitution they would not get membership in the Council of Europe, which in turn is a *de facto* condition for economic aid from the Economic Community. If they did not write strong guarantees for property and contract into their constitutions, they might not get help from the International Monetary Fund. [interview with?].

n232. 1 Farrand, *supra* note 1, at 492.

n233. 1 Farrand, *supra* note 1, at 530.

n234. See *infra* part IV.

n235. 8 Archives Parlementaires, *supra* note 2, at 209.

n236. *Id.* at 213.

n237. Id.

n238. Id. See id. at 210. These passages, too, are further dissected in Part VI. The constitution adopted on September 3, 1991 contained a clause that forbade troops to come closer than 37 miles to the assembly. La Constitution [Const.] art. 3, 3, cl. 1.5 (Fr.). [clause 3.3.1.5 - how do you cite it?].

n239. See id. at 219.

n240. Id. at 229.

n241. Id. at 229.

n242. Id. at 513.

n243. Mathiez, *supra* note 81, at 272.

n244. See *supra* note 233, and accompanying text.

n245. A similar problem arose in constitutional debates in Czechoslovakia, before the dissolution of the federation, when Slovakia was able to obtain parity of power in many parts of the federal system as well as considerable autonomy for the republic. One cause, among several, may be that the Slovaks backed their demands with a threat of secession. Some political leaders in Slovakia had in fact genuinely been working for secession. See Jiri Pehe, *Growing Slovak Demands Seen as Threat to Federation*, Rep. on E. Eur., Mar. 22, 1991, at 1. Other and more responsible politicians, who did not share this goal, nevertheless and with some success used the threat of secession as a bargaining chip. See Jiri Pehe, *Power-Sharing Law Approved by Federal Assembly*, Rep. on E. Eur., December Dec. 21, 1990, at 6. In light of what I said earlier, it is possible that the former were the unwitting tools of the latter. The Slovak leaders, that is, who negotiated with the Czech and federal governments may have been issuing warnings rather than threats: unless you give in to our demands the nationalist drive for secession will become irresistible. This hypothesis seems to make better sense than the threat hypothesis, as it is hard to see how a threat of secession would be credible.

n246. To my knowledge, the only attempt to apply bargaining theory to the constitutional process is that of Douglas D. Heckathorn & Stephen Steven M. Maser, *Bargaining and Constitutional Contracts*, 31 Am. J. Pol. Sci. 142 (1987). The article is valuable in its insistence that constitution-making must be seen as a bargaining issue rather than as a collective action problem with a single Pareto-optimal outcome. It relies, however, mainly on classical bargaining theory and hence does not confront the problem of the credibility of threats or the problem of "action at a distance."

n247. See generally Jillson, *supra* note 15.

n248. For a non-technical exposition, see Jon Elster, *The Cement of Society* 54-68 (1989) [hereinafter Elster, *Cement*]. For a full exposition, see Alvin E. Roth, *Axiomatic Models of Bargaining* (1979).

n249. For a non-technical exposition, see Elster, *Cement*, supra note 248, at 68-82. For a semi-technical exposition, see John Sutton, *Non-Cooperative Bargaining Theory: An Introduction*, 53 *Rev. Econ. Studies* Stud. 709 (1986).

n250. The exact way in which inside options determine the outcome is analyzed by a formal technique known as "backward induction." Crucial parameters include the order in which offers and counteroffers are made, the delay between the offers, the rate of time discounting of the parties, their degree of risk aversion, any fixed costs incurred during the bargaining period, and the probability that the potential benefits from cooperation might be destroyed by exogenous events.

n251. 1 Farrand, supra note 1, at 179.

n252. *Id.* at 343.

n253. *Id.*

n254. The following analogy may be useful. The bargaining power of trade unions is often restricted by their limited strike funds. If, however, the state imposes compulsory arbitration after two weeks of strike, their bargaining power is enhanced.

n255. 1 Farrand, supra note 1, at 320-21.

n256. *Id.* at 462.

n257. It is possible, however, that some of the states would be better off on their own than as part of the Confederation. The opening debates of the Convention, in which the issue was the strengthening of the national government, may well have taken place under the implicit and credible threat by some states to leave the Confederation.

n258. For the original statement of this theory, see Ehud Kalai & Meir Smorodinsky, *Other Solutions to Nash's Bargaining Problem*, 43 *Econometrica* 513, 513-18 (1975). For a non-technical discussion, see generally Elster, *Cement*, supra note 248.

n259. See Erling Barth, *Institute for Social Research, Oslo, Strategic Delays and Bargaining Power in Wage Bargaining* 20 (198890).

n260. See Jillson, supra note 15, at 53.

n261. 1 Farrand, supra note 1, at 250.

n262. However, the protocol must be in existence prior to the negotiations. If the union leader says that he will consult his members without being obliged by his rules to do so, the threat has no credibility.

n263. Ackerman, *supra* note 10, at 168.

n264. Peter Suber, *The Paradox of Self-Amendment* 254 (1990).

n265. Simon Schama, *Citizens* 353 (1989).

n266. For a fuller discussion, see Jon Elster, *Alchemies* Elster, *supra* note 147, at 332-403. *Alchemies of the Mind* 332-403 (1999)

n267. In the following, 'threats' should be read as 'threats and promises.' Similarly, 'warnings' must be understood as covering the factual equivalents of both threats and promises. It is an interesting fact about the English language that it has no word that stands to 'promise' in the same relation as 'warning' does to 'threat'. See Albert O. Hirschman, *Shifting Involvements* 13 (1982) (noting that neither English nor any other language has a single word for the positive analogue of a disappointment; instead, a circumlocution such as 'a pleasant surprise' has to be used).

n268. Similarly, Marxists have argued that it is in the interest of the capitalist class to have a state apparatus or an ideological system that does not in each and every respect promote the immediate interest of that class. See Jon Elster, *Making Sense of Marx* 411, 472 (1985). These arguments fail because no plausible mechanism is suggested to bring about the optimal deviation from immediate class interest. At the level of an individual individual, however, the deviation can be explained in terms of simple cost-benefit calculations level, however, a simple intentional explanation suffices.

n269. See Dan A. Oren, *Joining the Club: A History of Jews and Yale* 198 (1985); see also Jon Elster, *Local Justice* 113-35 (1992) (discussing further this case and similar ones).

n270. Oren, *supra* note 269, at 198.

n271. See 1 Farrand, *supra* note 1, at 421-23.

n272. Ingrid Creppell, *Democracy and Literacy: The Role of Culture in Political Life*, 30 *Archives Europeennes de Sociologie* 22, 26-36 (1989).

n273. In debates over electoral systems for instance, the following pattern is found over and over again. Small parties argue for proportional representation on the grounds that it is more respectful of democratic rights (and not because it improves the chances of small parties). Large parties argue for single-member districts, on the grounds that this system enhances governmental efficiency (and not because it improves the chances of large parties). But see Rapaczynski, *supra* note 189, at 617 (claiming that the constitutional committee of the Sejm approached the matter of electoral laws through philosophical discussion rather than in the spirit of Realpolitik). In fact, Rapaczynski concluded that some groups expressed a preference for proportional representation "despite a potential party interest to the contrary." *Id.* at 617 An even more striking example of "counter-interested" choice of electoral laws occurred when Vaclav Havel abstained from pursuing the electoral interest of Civic Forum because he thought a Communist presence in parliament was necessary for national reconciliation.

n274. See Daniel. Kahneman et al., *Fairness and the Assumptions of Economics*, 59 *J. Bus.* S285-300 (Supp. 1986); see generally Jon Elster, *The Cement of Society* 231-44 (1989); Robert H. Frank, *Passions within Reason* (1988).

n275. See Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest-Group Model*, 86 *Colum. L. Rev.* 223, [pinpoint - 51?]250-56 (1986).

n276. *Id.* at 251 (citation omitted).

n277. See Jillson, *supra* note 15, at 16.

n278. James Samuel S. Coleman, *Foundations of Social Theory* 3893 (1990).

n279. *Id.* at 394384.

n280. *Id.* See *id.* at 241-300.

n281. See Jon Elster, *The Cement of Society* 132-33 (1989).

n282. See generally David M. Kreps et al., *Rational Cooperation in the Finitely Repeated Prisoners' Dilemma*, 27 *J. Econ. Theory* 245 (1982).

n283. This is mere speculation. Whereas Kreps and his co-authors offer a rigorous proof (based, however, on somewhat artificial assumptions) for a large multiplier effect of cooperation, I have no idea whether a similar argument would go through in the present case. However, no proof is needed to assert a small multiplier effect.

n284. See 2 farrandFarrand, *supra* note 1, at 3.

n285. See 1 farrandFarrand, *supra* note 1, at 578.

n286. The small number of delegates must have been an important factor. Had there been 1200 delegates at the Convention, as there were in the *Assemblée Constituante*, it is virtually certain that the proceedings would have leaked out.

n287. The paralyzing scrutiny and attention given to the committee to discuss the verification of credentials in the *Assemblée Constituante* form an instructive contrast. Moving from a plenary assembly to a small committee will not eliminate the problems created by publicity unless there is a real willingness to keep things secret.

n288. Great care was taken to form the subcommittees so as to prevent the emergence of factions. They were essentially formed randomly (using an alphabetical order) and renewed each month so that the same

deputies would never remain together.

n289. See 1 Orateurs, *supra* note 2, at 926.

n290. 8 Archives Parlementaires, *supra* note 2, at 307.

n291. Egret, *supra* note 15, at 120. Later, Mounier strongly reproached himself for his inactivity on this occasion. See 1 Orateurs, *supra* note 2, at 927.

n292. 2 farrandFarrand, *supra* note 1, at 371.

n293. See Joel Sobel, Distortion of Utilities and the Bargaining Problem, 49 *Econometrica* 597 (1981) (arguing that inefficiency arises only in the case of bargaining over multi-dimensional goods).

n294. See Jon Elster, *The Cement of Society* 272-73 (1989).

n295. See Vincent P. Crawford, A Theory of Disagreement in Bargaining, 50 *Econometrica* 607 (1982).

n296. Here I draw on Tocqueville's analysis of assembly life under the July Monarchy: "one constantly finds one party exaggerating sentiments it does feel in order to embarrass its opponents, while the latter feigns sentiments it does not feel in order to avoid the trap." Tocqueville, *Recollections*, *supra* note 43, at 99.

n297. To be sure, one may think of exceptions to this tendency. If the initial endowments, although unequal, have a clean pedigree, there is nothing objectionable in an unequal outcome of bargaining. If the better-endowed adopt the optimal impartial argument they may get less than their fair share. I believe, however, that in most actual cases greater initial endowments are due to luck or unfair exploitation rather than to hard work, saving or risk-taking. Needless to say, this is not a statement for which proof can be offered. It is based on a rough overall assessment of historical trends, not on quantifiable analysis.

n298. Recall that in this Part, I am consistently assuming self-interested motives. However, the setting of the debates - secret versus open, private versus public - can also affect the quality of the debates among impartial framers. In Part IV, I showed how imperfectly rational framers may be negatively affected by publicity, because their vanity will not allow them to say that they were mistaken. An example from Tocqueville will show that a similar argument applies to genuinely impartial, fully rational framers. Before the insurrection of June 1848, but apprehensive of its coming, he felt that "what was needed was not so much a good constitution as some constitution or other." Alexis de Tocqueville, *Souvenirs*, in Alexis de Tocqueville 729, 826 (Robert Laffont ed., 1986) (omitting sentence omitted in English translation). Acting under time pressure, he was "more concerned with putting a powerful leader quickly at the head of the Republic than with drafting a perfect republican Constitution." Tocqueville, *Recollections*, *supra* note 43, at 178. After the June days he stood by this proposal, but now for the reason that "having announced to the nation that this ardently desired right would be granted, it was no longer possible to refuse it." *Id.* Similarly, the announcement of the radical measures taken on the night of August 4th 1789 made it impossible to go back. In a wonderful contemporary phrase: "The people are penetrated by the benefits they have been promised; they will not let themselves be de-penetrated." Mathiez, *supra* note 81, at 265 n.4. When the debates are open to the public, announcements may be irreversible.

n299. This phenomenon is often referred to as "pseudo dominance." See David Kahneman & Amos Tversky, *Psychological Barriers to Conflict Resolution*, in *Barriers to Conflict Resolution* 53 (K. Arrow et al. eds., 1995).

n300. See 8 *Archives Parlementaires*, supra note 2, at 587.110.

n301. See Kent Greenawalt, *Speech, Crime and the Uses of Language* 251 (1992) (referring to "warning threats" as if an utterance could be both a warning and a threat). Other writers use the distinction between warning and threat to differentiate between cases in which the actor has an incentive to carry out the announced action and those in which he does not. See, e.g., Schelling, supra note 8, at 123 & n.5; Robert Nozick, *Coercion*, in *Philosophy, Science and Method* 440 (Sidney. Morgenbesser et al. eds., 1969). To tell a burglar that I will call the police unless he goes away is to warn him; to tell a girl that I will commit suicide if she does not consent to marry me is to make a threat.

n302. See 1 Farrand, supra note 1, at 492. The statement, that is, may be taken as a warning in the sense of Schelling, but not in the sense used here. See Schelling, supra note 8, at 123 & n.5.

n303. See discussion supra part IV.

n304. 1 Farrand, supra note 1, at 532.

n305. *Id.* at 531.

n306. See discussion supra Part IV.

n307. In some cases, though, predictions about one's own future behavior may be uttered as genuine warnings. See Frank, supra note 274, at 55, and passim.

n308. See 1 *Orateurs*, supra note 2, at 935; Mathiez, supra note 81, at 267.

n309. See Egret, supra note 15, at 154, 158.

n310. Mounier and Mathiez do not find evidence of deliberate instigation. See *Orateurs*, supra note 2, at 935. Egret's view is more ambiguous. See Egret, supra note 15, at 142-43.

n311. We may note at this point the possibility of self-fulfilling warnings, which are, in this respect, intermediate between ordinary warnings and threats. By publicly telling the King that his troops were unreliable, Mirabeau may in fact have ensured the truth of that statement.

n312. See Jon Elster, *Alchemies*, supra note 147, at 1-47.

n313. See generally Robert A. Caro, *The Power Broker: Robert Moses and the Fall of New York* (1974).

n314. Francois Duc De La Rochefoucauld, *Maxims* 218 (Leonard Tancock trans., Penguin Books 1959) (1665).

n315. See Paul Veyne, *Le Pain et le Cirque* 469 (1976).

n316. Richard Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, *49 U. Chi. L. Rev.* 263, 273 (1982).