THE OPTIMAL DESIGN OF A CONSTITUENT ASSEMBLY*

by

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I. Introduction

If there is one task for which “wisdom” would seem highly desirable, it is that of writing a constitution that is intended to last for the indefinite future. In fact, wisdom is not only desirable in light of the importance of the issues, but also necessary in light of their complexity. Writing to his son soon after the opening of the Federal Convention in Philadelphia, George Mason confessed that “to view through the calm, sedate medium of reason the influence which the establishment now proposed may have upon the happiness or misery of millions yet unborn, is an object of such magnitude, as absorbs, and in a manner suspends, the operations of the human understanding” (in Farrand III, p. 33).

A good constitution is a complex piece of machinery, a set of interlocking parts that are finely adjusted to each other. A priori, one might think that the task of writing it is best entrusted to a single individual who can weigh all the relevant considerations without having to accept the compromises that are inevitable in any collective decision-making process. In stylized form, whereas both $[A, B]$ and $[A’, B’]$ might be viable combinations, the committee compromise $[(A+A’)/2, (B + B’)/2]$ might not be. The first reasonably well-documented

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constitution, that of Solon, was in fact the accomplishment of a single individual. Although details are shrouded in obscurity, it seems to have been remarkably successful. Other examples of constitutions essentially handed down by a single person include the “octroyed” Prussian constitution of 1848 and the constitution of the Fifth French Republic. These can hardly, however, be said to have been uncontroversially successful.

In this article I shall not address the issue whether a constitution is best written by a single person or by an assembly of citizens, but only focus on the optimal mode of decision-making by assembly. Let me nevertheless mention one obvious objection to the idea of singly-authored constitutions, namely that in the absence of a reliable procedure for finding a person with the requisite wisdom the proposal is too fragile to be taken seriously. In fact, this observation also applies to the analysis I propose here. I shall analyze the conditions that make for optimal constitution-making, without looking into the processes by which these conditions might be realized. Actual constitution-making is often a messy business, triggered by crises of one kind or another, and rarely governed by the “calm, sedate medium of reason”. The cliché that constitutions are chains imposed by Peter when sober on Peter when drunk is, in fact, seriously misleading. Overstating the case somewhat, one might say that the conditions for optimal constitution-making are the very same as those in which the need for adopting a constitution will not be felt.

I take a purely procedural approach to the issue of the optimal design of the constituent assembly, in the sense that I shall remain agnostic as to the nature of the optimal constitution. There is no specific outcome that the process is supposed to be tracking. Adopting Rawls’s terminology, I am proposing neither perfect nor imperfect procedural justice (Rawls 1999, p.74-75). At the same time, it would not be accurate to say that I am proposing a scheme for pure procedural justice (ibid.) in which the outcome is ipso facto optimal if the
correct procedure has been followed. I believe not only that in a given context some constitutional schemes may be better than others, but also that the best procedures may lead to a suboptimal outcome. The relevant question, however, is whether it is possible to eliminate or minimize the features that, from the ex ante point of view, are likely to lead to bias of one kind of another. If one were to succeed in that task and the constitution that resulted still had flaws, these might simply be due to the undue influence of strong but misguided delegates, against whom no procedural safeguards can be erected.

I shall proceed as follows. In Section II, I set out the basic framework of interest-reason-passion that will guide much of the discussion. In the following Sections I then address issues of institutional design: the tasks of the constituent assembly (Section III), the size and duration of the assembly (Section IV), the location of the assembly (Section V), the election of delegates to the assembly (Section VI), the question of secrecy versus publicity of the proceedings of the assembly (Section VII), the internal organization of the assembly (Section VIII), and the embeddedness of the assembly in broader upstream and downstream processes (Section IX). Section X summarizes the main ideas of the paper. To a surprising or maybe unsurprising extent, a good constitution-making process turns out to consist of mutually interlocking parts much in the way a good constitution does.

I rely throughout on historical examples, notably on the two eighteenth-century cases I know best, to flesh out the implications of the various proposals. In some cases I also rely on historical illustrations to show that constitution-makers had some awareness of the normative desirability of the criteria I propose. Although some of the historical episodes have little direct relevance for contemporary constitution-making, my hope is that they will contribute to the general framework I present.
I conclude this Introduction by mentioning the two main theoretical analyses of the topic, both from the late 18th century. First, there are the well-known works by Condorcet (1785, 1788). Second, there are the less well-known but remarkable writings in French by Bentham (1788, 1789) that purport to advice the French on the organization of the upcoming Etats-Généraux. Although I return briefly to these writings below, my comments will not in any way do them full justice.

II. Interest, reason and passion

As I have spelled out this framework at some length elsewhere (Elster 1999, Ch.V; Elster 2007a, Chs. 4 and 5), I offer only a bare-bones account, supplemented by a few remarks motivated by the question at hand.

In their analysis of human motivations, the 17th century French moralists made a fruitful distinction among interest, reason and passion. Interest is the pursuit of personal advantage, be it money, fame, power, or salvation. Even action to help our children counts as the pursuit of interest, since our fate is so closely bound up with theirs. A parent sending his children to an expensive private school where they can get the best education is not sacrificing his interest but pursuing it. The passions may be taken to include emotions as well as other visceral urges, such as hunger, thirst, and sexual or addictive cravings. The ancients also included states of madness within the same general category because, like emotions, they are involuntary, unbidden, and subversive of rational deliberation. For many purposes, we may also include states of intoxication among the passions. From the point of view of the law, anger, drunkenness and madness have often been treated as being on a par.

Reason is a more complicated idea. The moralists mostly used it about the desire to promote the public good rather than private ends. Occasionally, they
also used it to refer to long-term (prudential) motivations as distinct from short-term (myopic) concerns. Both ideas may be summarized under the heading of **impartiality**. In designing public policy, one should treat individuals impartially rather than favoring some groups or individuals over others. Individuals, too, may act on this motivation. Parents may sacrifice their interest by sending their children to a public school, because they believe in equality of opportunity. At the same time, policy makers as well as private individuals ought to treat outcomes occurring at successive times in an impartial manner by giving each of them the same weight in current decision-making, rather than privileging outcomes in the near future. When, as Mason wrote to his son, one is trying to organize the lives of “millions yet unborn”, the importance of this consideration is obvious.

In negative terms the constituent assembly ought to be organized to minimize the influence of individual or group interest, including that of the current generation. At the same time, the process ought to be designed to insulate the framers from the influence of passions, be it their own or those of others in a position to influence or pressure them. In positive terms, the assembly ought to be designed to maximize the influence of what Madison in Federalist 42 called “the mild voice of reason”.

To these summary remarks I now want to add two considerations. First, some of my earlier writings may have left the misleading impression that reason is only a matter of impartial motivation. On reflection, it is clear that the intuitive idea of reason also has a cognitive or epistemic element, in that it requires decisions to be based on rational beliefs (Elster 2006). My preferred conception of wisdom (individual or collective), therefore, is that of impartial motivations conjoined with rational beliefs. Generally speaking, rational belief formation requires both optimal processing of available information and optimal gathering of information. In the context of decision-making by an assembly, these two
requirements translate, roughly speaking, into optimal deliberation (Sections VII and VIII) and optimal representation (Section VI). The purpose of these processes is partly to improve the understanding of factual problems (where the shoe pinches) and partly to improve the quality of solutions (how to make good shoes).

Second, the claim that passion ought, as far as possible, to be eliminated is somewhat problematic. Hegel wrote that “Nothing great in the world has been accomplished without passion”. That impartiality does not exclude passion was demonstrated by the French framers in 1789 who, in the words of the biographer of one of them, were “drunk with disinterestedness” (Lebègue 1991, p. 261). One of the most impressive of them, the Comte de Clermont-Tonnerre, said that “Anarchy is a frightening yet necessary passage, and the only moment one can establish a new order of things. It is not in calm times that one can take uniform measures” (AP 9, p.461). To overcome petty interests, reason may need to form an alliance with passion. The decrees of the night of August 4 1789 are often cited as an example, although the facts are a bit more complicated (Elster 2007 b).

More recently, Jeb Rudenfeld has made a systematic argument to this effect. To assess it, we may note once more that constitutions are usually written in times of transition, turbulence and even violence. The Peter who writes the constitution is more likely to be drunk than to be sober. This fact does not, of course, prove that he is engaged in an act of “hot” (emotional) precommitment against his future “cold” (dispassionate but not necessarily disinterested) state. Rudenfeld takes that additional step when distinguishing between precommitment and commitment. “Ulyssian precommitment appeals to rationality against the seduction of transient passion, [...] commitment appeals to passion against the seduction of rationality” (Rubenfeld 2001, p.129).
Constitution-makers enlist the help of passion to entrench the common good against private interest (not, as he misleadingly says, against rationality).

This may all be true. Yet even if we were to accept that constitution-making is unlikely to occur without passion and unlikely to succeed without it, it would be absurd to claim that passion ought to be built into the constitution-making process. The passions that have constructive potential derive from the general political context, not from within the assembly itself, although the latter often acts as an amplifier. Moreover, these passions can also have destructive and distorting effects. For one thing, they may make participants afraid of speaking their mind. For another, even though enthusiasm may provide admirable ends, it also tends to undermine the clearheaded thinking needed to realize them. Even in the best of cases the impact of passion on collective wisdom is ambiguous: while enhancing impartiality, it impedes rational belief formation.

In the following, then, I focus on three issues: how to minimize the role of interest, how to minimize the role of passion, and how to maximize the epistemic quality of the decisions. It is not only a question of substituting arguing for bargaining (Elster 2000), but also of reducing the scope of fear, anger, malice, vanity and other emotions that may interfere with the quality of the arguments.

III. The task of the constituent assembly

It might seem obvious that the task of constituent assemblies is to adopt (or propose) a constitution. While certainly a task, it has rarely, however, been their only task. One may in fact distinguish four varieties of constituent assemblies:

- constitutional conventions (conventions, for short)
- mandated constituent legislatures
- self-created constituent legislatures
In the following I argue that conventions are superior to the other three (mixed) regimes. I first characterize the various regimes, then discuss and reject arguments purporting to show the superiority of mixed regimes to conventions, and conclude by offering some arguments against the mixed regimes.

A constitutional convention is elected for the sole purpose of adopting the constitution and does in fact carry out only that task. The best-known instances are the Federal Convention (with current affairs being handled by the Continental Congress) and the Parliamentary Council that elaborated the 1949 Bonn constitution (with current affairs being handled by the occupational powers). The American states have also used this format on many occasions (Hoar 1917). Later, I discuss some recent Latin American instances.

A mandated constituent legislature is explicitly elected with the double task of adopting a constitution and performing the task of an ordinary legislature. Thus in the election of the first French parliament after 1945 the voters were asked, “Do you want the assembly elected today to be a constituent assembly?” 96% of the voters answered Yes. In 1776, John Scott argued that the existing Provincial Congress in the state of New York “had the power to [frame] a government, or at least, that it is doubtful whether they have not that power”. Gouverneur Morris argued strongly, however, for the calling of a constitutional convention, and a compromise was reached in the form of the election of a mandated constituent legislature, which took care of Morris’s concern for the legitimacy of the new constitution (Kline 1978, pp.54-56). In Delaware, by contrast, the need for a constitutional convention was seen as more important than the need for a mandate (Kruman 1997, p.28-29).

A self-created constituent legislature is elected as an ordinary parliament and then turns itself into a constituent assembly. This was a very common pattern
among the American states during the revolutionary years. Among the constituent assemblies convened in this period, eight fell in this category (Hoar 1917). The Second Continental Congress, too, was a self-appointed constituent body when it enacted the Articles of Confederation. The Hungarian parliament of 1989-1990 was also self-appointed. It had been created under Communist rule, but took it upon itself to destroy that regime by piecewise constitutional amendments that amounted to a wholly new constitution.

A self-created legislative assembly is elected as a constitutional convention and then assumes legislative powers, following either of two principles: “He who can do more can do less” (Le Pillouer 2003, pp.98, 130, 133) and “He who can create a power can also exercise it” (ibid., p. 143). Examples include the Frankfurt parliament of 1848, which dissolved the Assembly of the German Confederation and arrogated its powers to itself, and the Indian constituent assembly of 1946. In the nineteenth century, a number of American states called conventions that authorized themselves to legislate (Hoar 1917, pp. 140-48).

As a practical matter, a country usually needs a body or an organ to handle current affairs. That body may be (i) the constituent assembly, (ii) another elected legislative body or (iii) an unelected body such as an occupational power or a provisional government. Disregarding the relatively few cases in the third category (Italy 1946, Germany 1949), the first solution is by far the most common one. To my knowledge, concurrent constituent and legislative bodies have been found only in America (1787), Colombia (1991) and Venezuela (1999). In the last two cases, a President essentially declared war on his legislature by calling elections to a constituent assembly in ways not provided for by the existing constitution. The “cohabitation” of the two assemblies proved to be highly unstable. In Colombia, the constitutional convention ordered the dissolution of the legislature and elected an interim legislature from within its own body. In Venezuela, the constitutional convention took it upon
itself to “assume the functions of the legislators [...] when these do not [...] carry out their tasks or delay their execution” (Le Monde, September 1 1999). These events correspond to the analysis of Robespierre in a speech from 1793, in which he said that “A double representation contains the germ of civil war. [...] One assembly would appeal to the existing constitution and the other to the keener interest that a people takes in new representatives; the struggle would be engaged and the rivalry would excite hatred” (cited after Le Pillouer 2003, p.127).

The two Latin American cases and Robespierre’s dubious authority do not prove that dual assemblies are disastrous. After all, the Federal Convention and the Continental Congress did coexist without friction. One might argue, perhaps, that constituent legislatures are desirable because of the scarcity of competent legislators. If a country opts for the concurrent operation of a legislature and a constitutional convention, the quality of debates and decisions in one or both will suffer. Against this argument one may cite the claim by Bryce (1905, p.62) that “Experience has shown [...] in the United States, the country in which this method [conventions] has been largely used for redrafting, or preparing amendments to, the Constitutions of the several States, that a set of men can be found for the work of a Convention better than those who form the ordinary legislature of the State”.

In Canada, the Beaudoin-Edwards Special Joint Committee argued that constituent legislatures are superior because the framers can be held accountable at the next election. It is certainly desirable that self-created constituent legislatures should be held accountable in some way, either by election or by downstream ratification of the constitution. If these were to arrogate the constituent power to themselves without being accountable to anyone, it would amount to a legislative coup d’état. It is less clear why conventions (or constituent legislatures with an upstream mandate) would also
need a downstream approval. If this should be thought desirable, ratification can obviate the need to hold the ax of reelection over the head of the framers. I return to these questions in Section X.

One might argue, furthermore, that conventions are inferior to constituent legislatures because, in their inability to legislate, they might write matters into the constitution that ought, by the nature of the subject matter, to be left to statute. This has, in particular, been common in many American state conventions. Although “this subterfuge of including legislation in the constitution has not always gone unchallenged by the courts”, still “many of our State constitutions today [1917] consist for the most part of legislative details which ought to have been left to the ordinary legislature” (Hoar 1917, p.143-44). Yet this temptation is matched by the temptation of a majority in constituent legislatures to constitutionalize clauses that by their nature belong to statute, to make it more unlikely that future majorities will overturn them. Along similar lines, as soon as the Assemblée Constituante had imposed the principle that statutes but not constitutional provisions were subject to the royal veto, the deputies had a clear incentive to present each of their decisions as a constitutional one (de Staël 2000, p. 243).

As an argument against mixed regimes one may cite the fact that it is easier to keep proceedings secret in a single-task constituent assembly than in a dual-task one. As this argument depends on the premise that secrecy is a good thing, I postpone discussion until Section VII. Another argument against mixed regimes is that decisions made by the assembly wearing its legislative hat may unduly affect the decisions it makes wearing its constitutional hat (a form of path-dependence). An example from the Assemblée Constituante will illustrate the problem.

In the fall of 1789, Mirabeau twice addressed the issue of the relation between the King’s minister and the assembly. In September, his proposal that ministers
chosen from the assembly could retain their seat (or stand for re-election) might have been adopted had it been put to a vote, which for technical reasons it was not (AP 9, p. 212). When the issue came up again in November, he argued for the more limited proposal that the ministers be allowed to have a “consultative voice” in the assembly until “the constitution shall have fixed the rules which shall be followed with regard to them” (AP 9, p. 711). Had the vote not been postponed until the next day, the proposal might have been adopted. As the delay gave Mirabeau’s enemies time to gather their forces, it was defeated.

Among the arguments offered against it, the most relevant for my purposes was made by Pierre-François Blin, a deputy of the third estate: “The issue may seem detached from the constitution and to be merely provisional; but the authority of the past on the future binds the facts at all times” (AP 9, p. 716). Although the appeal to the danger of precedent-setting was probably a pretext for excluding Mirabeau from the ministry, the argument itself is plausible and, in fact, applies directly to Blin’s own successful motion that “No member of the National Assembly shall from now on be able to enter the ministry during the term of the present session”. It is likely that the article in the constitution of 1791 banning members of any assembly from the ministry during their tenure and in the two years following it, can be traced back to his motion. Although mainly adopted for the purely tactical purpose of stopping the ascent of Mirabeau, the assembly could then hardly disavow the lofty principle on which it pretended to rest.

A constituent legislature may also be subject to a self-enhancing bias, in the sense of creating an excessively strong legislative branch with correspondingly weak executive and judicial branches. The bias might stem from one of two sources. First, if the framers expect or hope to be elected to the first post-constitutional assembly, they have a direct interest in being able to promote their interest - or just to exercise power - at that later stage. In 1780, the voters in Massachusetts turned down a constitution proposed by a constituent
legislature partly because of a perception that the legislators had “Prepossessions in their own Favor” (Kruman 1997, p.32). The constitution proposed by a subsequent convention was, however, ratified. When Robespierre’s proposed the famous (and disastrous) self-denying ordinance that the French framers adopted on May 16 1791, he justified it by the need to ensure disinterestedness. Second, as members of the legislature they might naturally come to think that the institution to which they belong is a particularly important one, partly because they have more intimate knowledge about it than about the other branches and partly because there is a natural human tendency to enhance one’s own importance in the scheme of things.

Finally, as further discussed in Section VI, if one and the same assembly is entrusted both writing the constitution and with forming a government, it is liable to perform one of the tasks suboptimally, depending on the mode of election of delegates. In the terminology explained below, either governability or representativeness will suffer.

IV. The optimal size and duration of a constituent assembly

The number of delegates to constituent assemblies varies considerably, with the Federal Convention (55 delegates) and the Assemblée Constituante (1200 delegates) being at the two extremes. The Parliamentary Council in Bonn, with 65 delegates is close to the lower extreme, whereas the French and German assemblies of 1848, with respectively 800 and 649 members, are the ones I have found that come closest to the upper extreme.

The optimal number is clearly related to the size and homogeneity of the country. The larger and the more diverse the population, the more delegates are needed ensure a broadly representative assembly. For the time being, I bracket that issue, which I shall discuss in Section VI.
Let me first cite from the locus classicus on the subject, *Federalist* 55 by Madison:

Sixty or seventy men may be more properly trusted with a given degree of power than six or seven. But it does not follow that six or seven hundred would be proportionably a better depositary. And if we carry on the supposition to six or seven thousand, the whole reasoning ought to be reversed. The truth is that in all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes; as, on the other hand, the number ought at most to be kept within a certain limit, in order to avoid the confusion and intemperance of a multitude. In all very numerous assemblies, of whatever character composed, passion never fails to wrest the sceptre from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.

A lower limit is imposed by the need to prevent “elected oligarchies” who would be able to use the “given degree of power” to promote their private interests. More generally, a lower limit is needed to prevent bargains and logrolling, assuming (perhaps controversially) that these are in general undesirable activities (see Stratmann 1997; Mueller 2003, pp.104-12). Before the rise of the modern political party it was indeed very hard to strike bargains among large numbers of unregimented individuals. The experience from the French Assemblée Constituante, with its shifting alliances formed around this or that leader, offers an example. The best-known attempted logrolling, proposed by the “triumvirate” (Barnave, Duport and A. Lameth) to Mounier in August 1789, came to nothing. By contrast, at the much smaller Federal Convention hard bargains between the slaveholding Southern states and the seafaring Northern states were struck and kept.

Assuming, again controversially (Dowding and van Hees 2007), that strategic or sophisticated voting is undesirable, small assemblies would also be undesirable. The reason is that as the number of voters “grows large the likelihood of a voter’s knowing the preferences of the others grows small, and thus so do the chances of successfully manipulating the outcome” (Mueller
Once again, this argument holds only for the period preceding the rise of political parties.

Madison’s argument that an upper limit is needed “to avoid the confusion and intemperance of a multitude” may also seem to be confirmed by the Assemblée Constituante, which did indeed at times exhibit an utterly chaotic style. It is not clear, however, whether this fact was due to the large number of delegates or to the public character of the debates (see Section VII). I can see no reason in principle why a numerous assembly debating behind closed doors could not enforce some discipline on itself, except for the fact that with many delegates there is a near-certainty that some of them would leak the contents of the debates to the public and create public commotion that would render calm debate impossible. As I note in Section V, a judicious choice of location for the assembly might reduce this problem.

Condorcet’s jury theorem might seem to offer an argument for large assemblies, assuming that the conditions for the theorem (independence, individual competence, sincere voting) are empirically validated. In his writings, however, Condorcet shows himself to be quite aware of the dangers of large assemblies. In the essay where he first states the jury theorem, he notes (Condorcet 1785, p. 166 ff.) that in large assemblies most people will be only marginally competent, that is, will be able to reach the correct decision in a dichotomous choice with probability only slightly larger than one half. As a result, he claims, the likelihood that the majority reaches the right decision may be “below the limit that has been assigned for it”. The remedy, in his opinion, consists in two-stage elections, since even the marginally competent “will be sufficiently enlightened, not to state with any probability which individual among many has the greatest merit, but to choose as the most enlightened one of those who are [in my terminology, J.E.] more than marginally competent”. Elsewhere, he makes a more sociological argument for an interior optimum:
"If a body is not numerous enough, it is necessarily weak, because, in the occasions where courage is needed, everyone will fear to be personally compromised. But the problem of too numerous a body is that it has a strength independent from that which it owes to its quality of a representative assembly, that is a strength based on the particular credit of its members and resulting from their union only. The numerous body can abuse this strength; it can derive from it a form of independence. There thus exists a middle-ground that it is important, and sometimes hard, to grasp." (Condorcet 1788, p. 366)

I do not know whether Bentham, at the time he wrote his two essays for the Estates-General, was aware of Condorcet’s 1785 essay, but internal evidence suggests that he was. In his first essay, he admits that “It is certain that with a larger number [of delegates] there is also a larger probability of a good rather than a bad decision” (Bentham 1788, p. 35). Yet, he goes on to say, experience from the British parliament suggests that “the greater the number of voters the less the weight and the value of each vote, the less its price in the eyes of the voter, and the less of an incentive he has in assuring that it conforms to the true end and even in casting it at all”. In the second essay he first states the argument for a large assembly: “With the number of members increases the chances of wisdom (sagesse). So many members, so many sources of enlightenment” and then objects that “the reduction that this same cause brings in the strength of the motivation to exercise one’s enlightenment offsets this advantage” (Bentham 1789, p. 122).

Condorcet, as noted, assumed that assembly members would be unequally competent, and, like Aristotle, saw the different levels of competence as exogenously given. Bentham’s twist is that he saw competence as endogenous, that is, as a function of assembly size. In large assemblies, the incentive for any given individual to inform herself is small, and the temptation to free ride on the information-gathering of others correspondingly large. This remarkable observation was rediscovered by Karotkin and Paroush (2003), who do not, however, cite Bentham’s work. It provides, in my opinion, perhaps the best
argument for a low upper limit on the size of the constituent assembly. As a
guess, I’d say that an assembly with less than fifty members is dangerously
vulnerable to strategic behavior and one with more than a hundred dangerously
vulnerable to free-riding in information-gathering. The second claim must,
however, be counterbalanced by the need for diversity to be discussed shortly.

The duration of constituent assemblies is also subject to considerable variation.
The Norwegian assembly of 1814 sat for five weeks, and the Assemblée
Constituante for more than two years. Between these extremes we find the
Federal Convention (three months), the 1948-49 German Parliamentary Council
(six months), the 1848 Paris assembly (6 months), the 1848-49 Frankfurt
assembly (one year) and the 1988 Brazilian constitution (two years).

There are two relevant normative issues: Should the assembly be subject to a
time limit? If so, what is the optimal duration? To my (limited) knowledge,
there are few cases of firm and credible time limits, perhaps because constituent
assemblies often ignore the constraints that upstream actors try to impose on
them (Elster 1993). External events may create a pressure to finish quickly, but
– like the passions they trigger (see above) – these can hardly be included in an
institutional design. One example of a firm time limit is nevertheless offered by
the 1994 interim South African constitution, which laid down that the final
constitution had to be adopted within two years.

If the constituent assembly is not subject to a firm time constraint, some actors
may be able to benefit from dragging their feet. Thus in the work on the 1949
Bonn constitution, “[t]he major parties had different attitudes with regard to the
time schedule of the work of the Council. […] The sooner the elections took
place the better for the SPD, whereas the CDU hoped to gain time until the new
economic policy and the seasonal upward turn in employment might produce a
shift to the right” (Merk 1963, p. 96). In a situation of this kind, the more
patient actor should be able to obtain a substantive concession from the
impatient part in exchange for an early adoption of the document. From a normative point of view, this effect is clearly undesirable. Note, however, that bargaining of this kind may occur even with a time limit, unless the assembly is under the constraint that the constitution has to be adopted by time \( t \) and no earlier. Yet the relevance of this observation is somewhat reduced by the general tendency in negotiations for the final agreement to be reached only under the pressure of an impending deadline. Assuming, then, that time limits will in fact be binding constraints, they ought to be part of the optimal design.

There is not much one can say on the question of the optimal duration of the assembly. If secrecy is a desideratum (see below), a short-lived assembly may be necessary. A smaller assembly will usually be able to write the constitution more quickly than a large one. The Federal Convention illustrates both ideas. If the country is large and/or federally organized, more time may be needed. The issue is also related to the optimal length of the constitutional document (Section VIII). If the plan is to write a short and general constitution, it can be done more quickly; conversely, a short time limit may be a way of inducing conciseness (although we know the apology of the letter-writer: “I am sorry I did not have the time to be brief”).

V. The optimal location of the constituent assembly

If the proceedings of the constituent assembly are secret, it does not matter where it meets. If, however, the debates are open to and reported in the press, or even open to visitors, the location can matter a great deal. Once individuals with strong interests in one or another outcome of the process know which solutions seem to be emerging, they may try to influence the votes by bribes or threats. The constituent assemblies in Versailles/Paris (1789), Paris (1848) and Frankfurt (1848) show that this is not simply an abstract possibility, but a real and sometimes decisive factor in shaping the outcome. Under such
circumstances, “the coercionless force of the better argument” (Habermas) may not stand much of a chance. To reduce the danger of the problem occurring, one may choose to locate the assembly in a small town emote from any major urban agglomerations. Thus in 1919 the Germans deliberately chose to hold the constituent assembly in Weimar, well away from the street rioting in Berlin.

In the discussions leading up to the Estates-General, the danger was only dimly understood. In 1788, there were several options on the table: Paris, Versailles at 13 km from Paris, or a more distant town such as Soissons at 100 km or Compiègne at 80 km (Kessel 1969, pp.74-76; Egret 1975, pp.249-50). In the choice among these options, the Queen and the Garde des Sceaux (Minister of Justice), Barentin, preferred the more distant locations because they feared the influence of the Parisian agitators on the deliberations of the assembly. The King’s principal minister Necker preferred Paris, because he thought the proximity to the capital market in Paris would have a moderating influence on the assembly. The King decided in favor of Versailles because he did not want interference with his hunting habits. After July 14, however, it became impossible to ignore the dangerous presence of Paris. In September, an ill-assorted deputation of moderates and royalists, with the approval of Necker and the Foreign Minister, Montmorin, proposed the transferal of the assembly to Compiègne or Soissons. The moderates wanted to remove the assembly from the threat of popular interference, and the royalists to remove the protection against military threats that Paris had just shown it could offer (Mathiez 1898, p.272). When the ministers put the proposal to the King, he refused. He was drowsy after hunting and slept through most of the council.

As implied by the last comment on the motives of the royalists, popular crowds are not the only threat to an assembly: troops can be equally dangerous. The events leading up to July 14 underline the importance of this fact. As Sieyes reminded the Assembly on July 8, the provincial estates in Brittany did not
deliberate if there were troops within 40 km. The assembly had not forgotten
the lessons from July 13-14 (and from the events on October 5-6) when it laid
down, in the constitution of September 3 1791, that “The executive power [i.e.
the King] cannot cause any body of troops to pass or sojourn within thirty
thousand toises [60 km] of the legislative body, except upon its requisition or its
authorization.” As we see, the “separation of powers” can have a literal physical
meaning as well as its usual institutional meaning.

V. The optimal mode of election to the constituent assembly

The optimal mode of election to any assembly depends on the task the assembly
has to perform. In electing a legislature that is to vote a government into power,
a system that tends to give a clear-cut majority to one party is preferable to one
that will produce many small parties. This criterion of “governability” favors
majority voting or proportional voting with a high threshold. In electing a
constituent assembly, a system that tends to reflect, in miniature, the diversity
of the nation is preferable to one that risks excluding significant minorities. This
criterion of “representativeness” favors proportional voting with a low threshold
or no threshold. As noted briefly above, a mixed assembly that is to perform
both tasks may therefore fail in one of them. Whereas governability does not
require an extensive suffrage, representativeness obviously does.

The argument for representativeness rests on epistemic rather than on
normative grounds. It is not a question of the individual’s right to influence the
choice of delegates, but of the community’s need for the individual’s
knowledge. In the words of Barnave (AP 29, p.366), voting is a function, not a
right. The delegates do not represent interest, but the knowledge of interest
(where the shoe pinches). In 1789 Louis XVI (or his minister) devised
electoral rules that made the parish priests rather than the bishops the main
representatives of the clergy to the Estates-General. He did so, he asserted in
the electoral rules announced on January 24, 1789, because “the good and useful pastors, who assist the people in their needs on a close and daily basis [...] know their sufferings and apprehensions most intimately” (AP 1, p. 544). The lower clergy “thus were to represent the peasantry as well as the clerical assemblies that had elected them” (Necheles 1974, p. 427). We may note in passing that the King’s enlightened choice also became his undoing, when in May-June 1789 the priests allied themselves with the Third Estate to undermine the estate system itself and ultimately the royal power.

Along (somewhat) similar lines, the “economic interpretation” of the American constitution proposed by Charles Beard does not amount, as is often said, to a claim that the delegates to the Federal Convention were influenced, in casting their votes, by their personal economic interests. Rather the question was: “Did they represent distinct groups whose economic interests they understood and felt in concrete, definite form through their own personal experience with identical property rights, or were they working merely under the guidance of abstract principles of political science?” (Beard 1986, p. 73). In opting for the former answer, he looked to the qualitative experience of the framers rather than to their quantitative interest. “That is, he makes no distinction between, say, a planter who had land of $20,000 and incidentally a few dollars in securities, and a financier who had invested most of his resources in securities. Each is classified as a security holder, and no weight is attached to the relative importance of the securities of each. This practice is consistent with Beard’s explicit concentration on the significance of holdings of various forms of property as giving the delegates experience with the tribulations of each, rather than as inspiring them to act in certain ways out of self-interest” (McDonald 1992, p. 12-13).

This argument, to be sure, is not quite the same as the one I made with regard to Louis XVI. One thing is to justify an electoral system ex ante by its
knowledge-representing (rather than interest-aggregating) effects, another is to explain the document that was adopted by the knowledge (rather than the interests) of the delegates. I am only making the point that in the normative perspective of optimal design, the composition of the delegations at the Federal Convention may have served a desirable epistemic function. In the Assemblée Constituante, with two thirds of the third estate being magistrates and lawyers “working merely under the guidance of abstract principles of political science”, lack of practical economic experience was a severe handicap.

Let me cite two other episodes in which the conveners of a constituent assembly opted for representativeness rather than governability. In the election of delegates to the 1919 Weimar assembly, the provisional Socialist government deliberately adopted proportional voting, together with female suffrage, in spite of the fact that both features were against their electoral interests (Huber 1978, p.10670. A more self-serving choice of electoral system might, by enhancing the stability of the government, have prevented the disasters that followed. In 1990, Vaclav Havel imposed a similarly counter-interested proportional system, to allow a place for his former Communist enemies in the constituent assembly (Elster 1995 a). One of Havel’s close associates told me in 1993 that “this decision will be seen either as the glory or the weakness of the November [1989] revolution: we were winners that accepted a degree of self-limitation”. As Louis XVI and the German socialists before him, Havel paid a high price for his impartiality. The Communists, notably the deputies from Slovakia, ended up as constitution-wreckers rather than as constitution-makers.

Similar arguments apply to the extent of the suffrage. There is a tendency for a wider suffrage in electing deputies to conventions than in choosing representatives to legislatures (for the American state constitutions, see Hoar
1917, p. 203-7). In the elections to the 1780 constituent legislature in Massachusetts (see above) the general court (lower house) “enfranchised all free adult male town inhabitants for the duration of the constitution-making process” (Kruman 1997, p. 30-31). The enfranchisement held from the election of delegates to a constituent legislature up to (but not, as we shall see shortly, beyond) the ratification of the document. The act for the holding of the Indiana convention in 1918 temporarily extended the vote to women for the ratification (Hoar 1917, p.205).

Where delegates to a constituent assembly have been elected by universal or wide suffrage, the assembly may nevertheless write a more restricted suffrage into the constitution. The Massachusetts charter that governed elections prior to the adoption of the 1780 constitution limited suffrage to those who had “an estate of freehold in land [...] to the value of 40 shillings per Annu [...] or other estate to the value of forty pounds sterling”. In the election to the convention that succeeded the unsuccessful constituent legislature, all freemen could vote and, later, participate in the ratification. The constitution adopted by the convention, however, increased the property qualifications by 50 % compared to the charter (Hoar 1917, p. 206).

There is indeed nothing intrinsically contradictory in a convention elected by universal suffrage adopting a limited suffrage for future legislatures. For an analogy, consider the outcome when revisions in the Danish constitution were submitted to referendum in 1953. Each voter cast two votes, one for or against the proposed constitution and one for a change in the voting age. The alternatives for the second vote were to lower the age from 25 to 23 or to 21 years. In the first vote, only citizens above 25 could cast a vote. In the second, everybody above 21 could vote. The result of the referendum was that the extended extraordinary electorate refused a corresponding extension of the ordinary electorate. A majority of the voters above 21 decided to lower the
voting age from 25 to 23 rather than to 21. “We the people” may collectively decide that only some of “us” shall be entrusted with day-to-day political decisions. Conversely, the 1830 Virginia constitution was “ratified in an election open to all who were prospectively enfranchised by it” (Pole 1966, p.332).

VII. Secrecy versus publicity

To discuss whether secrecy of the proceedings is desirable, one has to assume that it is feasible. As mentioned earlier, it may not be possible to keep proceedings secret if the assembly is large. Also, the longer the duration of the assembly, the harder it will be to keep secrecy. There may of course be tradeoffs among these factors. One may for instance think that secrecy is so important that one has to sacrifice representativeness, if the latter would lead to an unmanageably large assembly. I do not claim, however, to be able to address this issue. I shall only try to address arguments for and against the use of closed proceedings, assuming that other factors are constant.

Judge Brandeis said that “Sunlight is the best disinfectant, and electric light the most efficient policeman”. Bentham (1791, p.29) wrote, “The greater the number of temptations to which the exercise of political power is exposed, the more necessary is it to give to those who possess it, the most powerful reasons to resist it. But there is no reason more constant and more universal than the superintendence of the public.” In 1781, Necker noted in a Memorandum on the provincial assemblies to the King that “the publicity of the debates will force honesty” (Castaldo 1989, p. 304). These are strong arguments that remain valid in many contexts. With regard to ordinary legislatures, at least, they appear self-evident today. They reflect what J. R. Pole (1983, p. 140) calls a shift from “the politics of trust” to “the politics of vigilance”. Bentham (1791, p.37), too, is explicit on this point: “Is it objected against the régime of
publicity that it is a system of distrust? This is true, and every good political institution is founded upon that base”. Political constitutions, in particular, may be viewed as systems of organized distrust (Elster 2007 a, pp. 434-39).

It does not follow, however, that the process of establishing the constitution ought to be “founded upon that base”. Let me begin by making a minor point. Among the many arguments for publicity made by Bentham, one concerns the issue of accountability: “In an assembly elected by the people, and renewed from time to time, publicity is absolutely necessary to enable the electors to act from knowledge. For what purpose renew the assembly, if the people are always obliged to choose from among men of whom they know nothing?” (Bentham 1999, p. 33). This argument does not apply constituent assemblies, which only meet once. As noted earlier, the ax of reelection that might be applied to a constituent legislature is not needed if the people can ratify the constitution.

To go into more central matters, we first need to spell out the possible forms that publicity may take. The following categories refer mainly to what happens during the tenure of the assembly, although he shall see later that information divulged at later times may also constitute an issue.

- Access of visitors to the galleries of the assembly
- Publication of speeches by the delegates
- Publication of the names of delegates who voted for and against a given proposal
- Publication of the number of delegates who voted for and against a given proposal

Again, the Federal Convention and the Assemblée Constituante stand at opposite extremes. In the former there were no visitors; the speeches were first published (in Madison’s abridged versions) more than fifty years after the event; we do not know how individual delegates voted. We do not know, however, how the state delegations voted on each of the 569 roll-call votes.
In the latter, there were large crowds in the galleries, which could accommodate more than a thousand visitors (Versailles) or more than 500 (Paris). The speeches were widely reported and often published. Although names of delegates who voted for and against a given proposal were not published in the technical sense of appearing in print, the fact that any member could ask for roll call vote on any issue (instead of the usual method of voting by standing and sitting) implied that nobody could count on his vote going unnoticed. Although roll-call votes obviously established the size of the majority and the minority, these numbers did not appear in print, due to the Rousseauist ideology according to which the function of the vote was to discover the general will (Castaldo 1989, p. 273).

As the assemblies in Paris (1789-1791), Paris (1848) and Frankfurt (1848) demonstrate with particular force, the first and the third form of publicity may interfere seriously with the quality of the debates and of the decisions. Vanity can prevent people from changing their mind as a result of argument, and fear can prevent them from speaking (and voting) their mind in the first place.

On the first point, we may cite what Madison is reported to have said many years after the Federal Convention: “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. Mr. Madison thinks no constitution would ever have been adopted by the convention had the debates been public”” (Farrand 1966, vol.III, p.479). Conversely, the vanity of the French framers and notably their desire for popularity made for cant and grand-standing on many issues. On the second point, the presence of an audience who can note the names of delegates who vote against popular
proposals may, in a heated situation, have a chilling effect. The defeat of bicameralism and of the executive veto in Paris (September 1789) was partly due the fact that many delegates feared for their lives if they voted in favor of these proposals (Egret 1950).

The principal argument in favor of publicity is that it prevents delegates from striking self-interested bargains and constrains them to argue for their proposals in terms of the public good. In an early development of this idea (Elster 1986, p. 113) I claimed that by virtue of being forced to argue in terms of the common good “one will end up having the preferences that initially one was faking”. Today, I would only claim that hypocrisy has a certain civilizing force in that it takes the most self-serving proposals off the agenda. Be this as it may (I’m still not sure), it seems clear that publicity (or transparency) prevents the kind of bargaining in “smoke-filled back-rooms” that have repeatedly been the bane of Canadian constitution-making (Russell 1993, pp. 134-45, 191, 219-27).

I have argued elsewhere (Elster 1995 b) that whereas secrecy tends to induce bargaining and publicity to induce arguing, secrecy also improves the quality of whatever arguing that does take place behind closed doors. The net impact of the choice of the one or the other mode of decision-making seems on the quality of the decisions, therefore, to be indeterminate. In general, this seems right. In the particular case of constitution-making, however, the dangers of secrecy may be reduced to the extent that the framers limit themselves to general institutional issues on which self-interest has no purchase. According to Calvin Jillson (1988, p.16), the American framers were generally guided by their interest except when it came to such matters as unicameralism versus bicameralism and life tenure versus fixed-term tenure for judges or for the executive. “This was not because the constitution-makers disregarded their personal interests in favor of broader social interests when considering
questions at the ‘higher’ level of constitutional choice, but because they were unlikely to see what difference choices concerning such broad structural questions would make to them as individuals, or to their states and region”.

At the Federal Convention, there were plenty of issues at the “lower” constitutional level at which interest does have a purchase. The constitutional clauses favoring creditors over debtors, small states over large states and the prohibition of export duties certainly reflect interest. (At the same time, the refusal at the Convention to favor the original thirteen states over the future Western states reflects a counter-interested attitude rather than the irrelevance of interest.) In any constitution-making setting, there will obviously be issues of this kind. If we compare constituent assemblies to ordinary legislatures, however, the latter will have a much stronger focus on interest-relevant issues and therefore a much greater need for the disinfectant of publicity.

Moreover the agenda of the framers is not given, but to some extent up to them. They can choose to write a short and concise constitution that focuses on broad principles of institutional design and avoids the kind of absurdly detailed clauses that we find, for example, in the Brazilian constitution. In other words, a joint regime of secrecy and brevity might limit the impact of interest and enhance the role of reason.

VIII. The internal organization of the assembly

The issue of secrecy versus publicity can be restated as the issue of the optimal combination of secrecy and publicity. In this Section, I discuss combinations within the assembly as well. In the next Section, I consider combination of secrecy and publicity at the national level. In the present Section I also consider some other aspects of the internal organization of the assembly. Should it be unicameral or bicameral? How are debates to be organized?
Should decisions be taken by simple or by qualified majority voting? Ought votes to be secret or public?

Beginning with the Assemblée Constituante, many assemblies have been based on a division of labor between closed committees and plenary debates that are open to the public. In modern assemblies, this is invariably the case. Even if the members of the committee should be tempted to strike a deal based on their private interests, they are constrained by the fact that the terms of the bargain will have to be defended in public-interest terms before the plenary assembly. In technical matters, the assembly may show some deference to the committee, provided that this constraint is satisfied. In broader matters of policy – should elections be held every three, every four or every five years? – there is no reason to expect such deference. A populist politician who is the focus of media attention might successfully propose frequent elections and severe term limits on plausible-sounding public-interest grounds (there are many such). Hence my tentative preference would be for a system combining closed committees and closed plenary sessions.

Unicameralism versus bicameralism is often an issue on the agenda of a constituent assembly. In addition, one may ask whether the assembly itself should have one or two houses. In the Assemblée Constituante, Clermont-Tonnerre argued that bicameralism had its place in the constitution but not in the constituent assembly: “To create everything, a single Chamber with its irresistible force and energy is needed. The three-headed hydra [king, first chamber and second chamber] would never have allowed the making of a constitution; but all that must change in the future: more is needed to conserve than to establish; and haste must be avoided in a legislative body” AP 8, p. 574). We note that of the many possible arguments for bicameralism, he singles out the cooling-down and slowing-down effect of the system.
One might ask, however, whether haste cannot also be a problem for constituent assemblies. The history of the Assemblée Constituante shows in fact that even at the constitution-making stage there may be some justification for a divided assembly. According to the règlement of the assembly, “Any proposal in legislative or constitutional matters must be brought to discussion on three different days”. In the rush of decisions on the Night of August 4, however, the assembly ignored this self-imposed constraint. In a letter to his constituency, the Comte d’Antraigues complained that in order to “engage the [...] assembly to consent to all the decrees of August 4 one had to [...] destroy the wisest rules of the assembly itself, which put a brake on hasty deliberations” (Kessel 1969, p.127) The Comte de Roys wrote to his constituency in similar terms (Kessel 1969, p. 200). Having tried to stem the tide on August 4 the Marquis de Foucauld also referred to the violation of the rules in a speech on August 6 (ibid.). In response, those who wanted immediate action said that “an élan of patriotism does not need three days” and “since one cannot vary in such sentiments, the three days would be a pointless waste of time” (Courrier de Provence XXIV).

The episode illustrates a general phenomenon: he that can bind can also unbind. Hence, “the legislative […], in order to its being restrained, should absolutely be divided. For, whatever laws it can make to restrain itself, they never can be, relatively to it, any thing more than simple resolutions: as those bars which it might erect to stop its own motions must then be within it, and rest upon it, they can be no bars” (De Lolme 1807, p.219). Etienne Dumont makes the same point in a passage he inserted into Bentham’s Political Tactics: “a single assembly may have the best rules, and disregard them when it pleases. Experience proves that it is easy to set them aside; and urgency of circumstances always furnish a ready pretext, and a popular pretext, for doing what the dominant party desires. If there are two assemblies, the forms will be
observed; because if one violate them, it affords a legitimate reason to the other for rejection of everything presented to it after such suspicious innovation” (Bentham 1999, p.26).

Although De Lolme and Dumont had in mind the ordinary legislative process, the episode of the night of August 4 1789 shows that their argument applies equally to a constituent assembly. The question is whether it applies to the ideal assembly I am trying to construct in this paper. It is not obvious to me that it does. The “urgency of circumstances” that might provide a “popular pretext” for the assembly to ignore its self-imposed constraints did indeed obtain on the night of August 4, but only by virtue of the extremely intense interaction among the assembly, the audience, and Paris. An assembly working behind closed doors, insulated from strong and urgency-generating emotions, would have less need for protection against impulsiveness.

The question of how to organize the debates in the assembly presupposes that the delegates do not come with bound mandates. Although some delegates at the Federal Convention, in the Assemblée Constituante and in the Frankfurt assembly claimed to be bound by the instructions from their constituencies, the actual proceedings respected Burke’s principle that a national assembly “is not a congress of ambassadors from different and hostile interests [but] a deliberative assembly of one nation, with one interest, that of the whole”.

Once this principle has been established, the optimal rules of debate for a constituent assembly would seem to be more or less the same as for any other assembly. To ensure the quality of the debates, one might (following de Staël 2000, p. 179) ban the use of speaking from manuscripts. As in the partly similar case of voting, the President of the Assembly should recognize speakers on the principle that speaking is a function, not an individual right (Jouvenel 1961). The tenor of the actual debates will no doubt be different
from those in ordinary legislatures, since (assuming secrecy) the delegates will speak only to one another and not to their audience or their constituency.

By contrast, it is arguable that voting in a constituent assembly ought to proceed differently from voting in an ordinary legislature. Consider first the question of ordinary majority voting versus supermajority voting. It might seem tempting to argue that by virtue of the importance of the issues, decisions in a constituent assembly ought to be taken by a qualified majority. If amendments to the constitution require supermajorities, as they very often do, should not the same requirement a fortiori be imposed on the adoption of the constitution itself? On reflection, however, only simple majority will do. Qualified majorities are possible only when there is a status quo that will remain in place if a given proposal does not achieve the requisite majority, but this condition cannot obtain in a constituent assembly that starts from tabula rasa. The relevant comparison is to voting the annual budget, not to amending the constitution. It may seem paradoxical – and is in some ways undesirable – that an assembly should be able to impose by simple majority a law that later generations can undo only with a qualified majority. A small majority may be able to “lock in” its preferences and exercise a de facto dictatorship over the future. Yet the overall effect of the alternative – making the constitution amendable by simple majority – is likely to be worse.

Consider next the issue of public versus secret voting in the assembly. In an ordinary legislature, votes are casts in public so that the electorate can hold their representatives accountable. As a by-product, logrolling is made possible. If one decides that vote trading is undesirable on normative grounds (see above), one can block that option simply by enforcing the secret ballot. Under conditions of secret voting, nobody can make a credible promise to vote this way or that. This question is independent of the issue of the secrecy or publicity of debates. In theory, one might envisage any of the four possible
combinations of public or secret debates and votes. If the debates are public, perhaps because the need for diversity requires a large assembly that will not be able to maintain secrecy, one might in fact impose secret voting both to eliminate interest-based logrolling and to make the delegates unafraid of voting the wrong way on popular proposals. Note how, in the previous sentence, size, diversity, publicity, secrecy, interest and passion interact in a way that illustrates the interlocking nature of the elements of the optimal assembly.

IX. Is the optimal process hourglass-shaped?

At the beginning of the previous section I mentioned how secrecy and publicity may be combined with the constituent assembly. Here, I discuss how they may be combined at the broader national level. The idea is that the closed assembly may be supplemented by upstream and downstream public consultations, generating an overall “hourglass-shaped” procedure (Russell 1993, p. 191).

In the process of electing delegates to the assembly, one may also create a national debate over the main constitutional issues. In 1789, the French people expressed their grievances and proposed remedies for them in the cahiers de doléances that take up 4,000 double-column small-print pages of the Archives Parlementaires. Before the adoption of the South African constitution in 1996, the constituent assembly invited suggestions from the citizens and received 1.2 million responses. In neither case, however, is there any evidence suggesting that the opinions expressed in this way made much of a difference to the constitution that was finally adopted. The most influential upstream process is probably the debates that take place among the candidates to the assembly rather than direct citizen involvement.
The downstream process of ratification by the citizens, following a national debate, is more important. Generally speaking, one would think that most constitutions submitted to referendum would be approved, simply because members of the assembly will be sufficiently rational and well-informed to anticipate the views of the electorate. At the national and supra-national scale, there are some exceptions, but not many. The Australian constitution of 1898 had to be revised after it failed a referendum in New South Wales. In France in 1946, voters turned down the first proposal for a new constitution, probably because it was perceived to give too much power to a parliament that might be dominated by the Communists. In 1992, a proposed constitution for Canada was turned down by voters in Québec because they thought it gave too little to Québec, and by voters in other provinces because thought it gave too many concessions to Québec. In 1994, Albanian voters turned down a proposed constitution. In 2005, a new constitution was voted down in Kenya. And the proposed EU constitution was of course turned down by voters in France and Holland (for multiple reasons).

At the infra-national level Lenowitz (2007) shows that among the twelve constitutions submitted by conventions (not mixed assemblies) to referendum in the American states in the 1960s and 1970s, seven were rejected, in two cases with a high margin (4:1 in Rhode Island and 3:1 in New York State). These are striking and puzzling findings, which are hard to reconcile with “the law of anticipated reactions”.

In some cases (Canada, New York State) these failures seem to have reflected an aversion of the electorate to the bargaining style of constitution-making. If politicians go about constitution-making in the mode of politics as usual, the voters will punish them. Moreover, when politicians are in that mode, they may be unable to perceive the difference. In this perspective, the downstream
ratification process serves as a corrective device when politicians are unable to adopt a normatively proper constitutional framework.

X. Summary

In this paper I have tried to argue that the task of constitution-making implies a number of normative demands that can, to some extent at least, be resolved by institutional design.

Minimizing the role of interest. To exclude logrolling, bargaining and strategic voting, assuming these to be undesirable, the size of the assembly should not be too small. To exclude logrolling, one might also impose secret voting. Bound mandates should be excluded. The assembly should focus on issues of broad constitutional design, with regard to which individual or group interests are neutral. To prevent the more patient parties from gaining an unfair bargaining advantage, the assembly should work under a time limit. To exclude a self-enhancing “legislature-centric” bias, the assembly should not at the same time serve as an ordinary legislature.

Minimizing the role of passion. To exclude audience pressure that might bring delegates under the sway of emotion (vanity or fear), the assembly should debate in secret or, alternatively, vote in secret. An isolated location of the assembly may serve the same end. To present the assembly from giving in to impulses, a bicameral organization might or might not be needed.

Maximizing epistemic quality. (i) Optimal information gathering. Elections to the assembly should be organized to ensure diversity and representativeness. The idea – close to the eighteenth-century notion of “virtual representation” - is to have many epistemic perspectives and a variety of experiences represented, not to have each of them represented in proportion to its numerical importance in the electorate. (ii) Optimal information processing.
To prevent free-riding on the information of others, the assembly should not be too large. The rules of debating should favor exchanges rather than prepared speeches. Speaking should be viewed as a function serving the needs of the assembly, not as an individual right.
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