

*Psychology and Political History: Why Constitutions tend to be flawed**



Psicología e Historia Política: Por qué las Constituciones tienden a ser defectuosas

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SUMARIO

1. Constitutions tend to be made in times of crisis / 2. Crises tend to go together with strong passions / 3. Emotions, beliefs, and preferences / 4. Case studies / 5. Do constitutions tend to be flawed?

RESUMEN

Este trabajo tiene un propósito tanto sustantivo como metodológico. El objetivo de fondo es documentar y explicar la tendencia de algunas constituciones políticas a ser defectuosas. El objetivo metodológico es utilizar este caso para ilustrar la importancia de la psicología y la historia política. Por "psicología" se entenderá tanto los escritos de los moralistas y filósofos, de Séneca a Adam Smith, así como los estudios experimentales más recientes. Implícitamente, y en ocasiones de forma explícita, el argumento a favor de la importancia de la psicología también es un argumento en contra de los modelos económicos del comportamiento humano como base en la búsqueda racional del interés propio. Con ciertos límites, estos modelos podrían explicar el comportamiento de consumidores y empresarios, sin embargo, poseen menos poder explicativo de las acciones de los creadores de constituciones.

PALABRAS CLAVE: Constituciones políticas, historia política, psicología, economía, interés.

ABSTRACT

This paper has both a substantive purpose and a methodological one. The substantive aim is to document and explain a tendency for political constitutions to be flawed. The methodological aim is to use this particular case to illustrate the relevance of psychology for political history. By "psychology" I shall understand both the writings of moralists and philosophers, from Seneca to Adam Smith, as well as more recent experimental studies. Implicitly, and occasionally explicitly, the argument for the importance of psychology is also an argument against economic models of human behavior as based on the rational pursuit of self-interest. Within limits, those models may explain the behavior of consumers and entrepreneurs, but they have less purchase on the actions of constitution-makers.

KEYWORDS: *Constitutions, political history, psychology, economics, interest.*

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The use of the expression “tend to” is deliberate, since I do not claim generality for these connections. Some constitutions are made “à froid”, that is, in the calm and dispassionate manner often summarized in the saying that constitutions are chains that Peter when sober imposes on Peter when drunk. I give an example later. Nevertheless, I believe such cases are rare. Hence although I believe that proposition (4) is true, it is also in a sense irrelevant. Rational belief formation is not all: political will and energy are also needed. These come from passion. In a phrase often attributed to Hegel, Kant (1764: 267) wrote that “Nothing great can be accomplished without passion”. Twenty-five years later, the Comte de Clermont-Tonnerre made a similar statement in the French constituent assembly: “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” (Allouche-Pourcel 2010: 461).

In Section I, I offer broad empirical evidence for proposition (1). Section II presents selective evidence for proposition (2). In Section III, I present some psychological findings supportive of proposition (3), together with some closely related findings about the impact of passions on *preference* formation. (Since psychologists talk about *emotions* rather than about *passions*, I shall often use their terminology.) In Section IV, I argue for the relevance of these psychological mechanisms in four constitution-making processes: the United States in 1787, France in 1789, Norway in 1814, and France in 1848. Section V has a brief conclusion.

1. Constitutions tend to be made in times of crisis

Let me begin by citing an editorial, “The fuse under the Fifth Republic”, in the *Financial Times* of August 16, 2014:

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

The notion of a Sixth Republic, less presidential in nature, was a theme

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

Let me restate the facts from the perspective of the birth rather than the demise of the republics. The first Republic was established in August 1793, in the context of war and internal massacres; the second in 1848, as the result of revolution; the third in 1871, in the aftermath of the Franco-Prussian war; the fourth in 1946, after the defeat of the Vichy regime; and the fifth in 1958, under the pressure from generals in Algeria. The French historical record also includes other constitutions that were made in times of crisis. The constitution of 1791 was the outcome of violence in Paris and in the countryside; that of 1795 marked the end of the Terror; those of 1799, 1802 and 1804 represented successive stages in Napoleon’s ascent to absolute power; the Charters of 1814 and 1815 marked the restoration of the monarchy; the Charter of 1830 came about through a revolution; and that of 1852 by a coup d’état. Compared to these epochal moments, today’s French crisis does not seem very deep, which is not to exclude that things could get so bad that a movement for radical constitutional change becomes irresistible.

Let me now disaggregate the notion of a crisis into eight more fine-grained categories: fear of a break-up of the nation, financial crisis, violent social unrest, revolution, regime implosion, fall of a dictatorship, end of a war, and fear of a coup. In several cases, two or more of these “elementary forms of crisis” coexisted and reinforced each other.

Fear of a break-up of the nation

America in 1787 is most prominent case in this category. Clinton Rossiter (1987: 57) writes that “[w]hether the United States in 1787 was in truth on the edge of dissolution is a question that will be argued among historians until the United States is no more. That a majority of the continental elite believed this to be the truth is the most solid, incontrovertible fact in the records of that year”. The fear of dissolution had deeper causes, to be discussed shortly. First, however, let me observe that this fear is most likely to occur in federal systems. After the implosion of Communism

in 1989, President Havel perceived the danger of dissolution of the Czechoslovak federation and tried, unsuccessfully, to prevent it by a new federal constitution.

Financial crisis

The calling of the Estates-General in France in 1789, which later transformed themselves into a constituent National Assembly, was triggered by an acute fear that the country might become insolvent and unable to pay the interests on its bonds. When calling the meeting of the Estates, Louis XVI did not have in mind any far-reaching political changes, but he was soon overtaken by events. The constitution-making episodes in Hungary (2010) and in Iceland (2011) occurred in the wake of the financial crisis of 2008. The calling of the Federal Convention of 1787 also owed a great deal to the monetary chaos of the country, with the individual states issuing ever-deprecating paper money and bonds.

Violent social unrest

The calling of the Federal Convention of 1787 was also triggered by social unrest, caused by the high taxes that some state assemblies imposed to enable redemption at full value of bonds that speculators had bought up at bargaining-basement rates (Elster 2012). In France in 1789, violence in the countryside was the direct cause of the abolition of feudalism literally overnight, on August 4 1789. A few weeks earlier, street violence in Paris had initiated the process whose outcome, inevitable in hindsight, was the abolition of the monarchy.

Revolution

Revolutions were followed by constitution-making in France in 1830 and in 1848, and, following the latter, in many other European countries (Dowe *et al.* 2000). Although the transition in Czechoslovakia in 1989 was called “the velvet revolution”, it is perhaps more aptly seen as regime implosion. Beginning in 2011, revolutions caused regimes to fall and new constitutions to be written or drafted in Tunisia, Egypt, and Libya.

Regime implosion

Except for Romania, the transitions and subsequent constitution making processes in Eastern Europe that began in Poland in June 1989 were entirely non-violent (Elster 1993). Because elections and huge street demonstrations showed the utter lack of legitimacy of the regimes, the

leaders refrained from using their repressive apparatus to hold on to power. Financial weakness and indebtedness also contributed to the collapse.

Fall of a dictatorship

After the fall of the military regimes in Greece (1974), Portugal (1974) and Spain (1976), these countries adopted new constitutions. In Latin America, Ecuador (1979), Brazil (1988), Chile (1990) and other countries followed suit.

End of a war

After the end of the Napoleonic wars, constitutional monarchies were established in France, Norway, and many German states. The constitution of the Third French Republic was adopted after the defeat in war with Prussia. After World War I, new constitutions were written in defeated Germany, the vastly reduced state of Austria, the newly created or recreated states of Poland and Czechoslovakia, the Baltic states, and several others (Headlam-Morley 1928). After World War II, new constitutions were written for the defeated states of Germany, Japan, and Italy, and in semi-victorious France. Wars of independence preceded the establishment of the first American constitution (the Articles of Confederation) and of constitutions in several African countries (Namibia, Algeria). Civil war brought about new constitutions in Zimbabwe and South Africa.

Fear of a coup

To my knowledge, this is a class with only one member: the making of the constitution of the Fifth French Republic (1958).

I conclude this brief and necessarily schematic survey with some comments on efforts to create new constitutions in circumstances that could *not* be characterized as crises.

In Canada, the status of Québec has been a consistently destabilizing issue in political life. On two occasions, elite negotiations revolving around this question reached agreements on a new constitution, but neither passed the hurdle of ratification. In 1990, the Meech Lake accord failed to be ratified by two of the provincial assemblies. In 1992 the Charlottetown accord failed to be ratified in a national referendum. Peter Russell (1993: 190) drew the conclusion that it was “clear that the present generation of Canadians will not try again to reach an accord on a broad package of constitutional changes designed to prevent a unity crisis. If in the near future Canada plunges once again into the constitutional maelstrom, it

will be because there is *an actual, not an apprehended crisis* of national unity” (my italics).

It is widely argued that these failures of ratification were due to a perception that the accords were merely interest-based bargains –politics as usual rather than “higher politics”. A similar perception may explain why, in the 12 referendums on state constitutions that were held in the United States between 1960 and 1980, seven of the proposals were rejected, two of them with a large margin, 4:1 in Rhode Island and 3:1 in New York State (Lenowitz 2007). The causality is opaque, and not central for my purposes here. I simply note the absence of a crisis of any of the varieties I surveyed above.

Sweden is an outlier. The abolition in 1969 of the bicameral system in Sweden, followed by a thoroughgoing reform of the constitution in 1974, has been called “institutional change” rather than “constitutional change” because of the routine manner in which was carried out. The main obstacles to the reform were institutional interest and party interest. Regardless of party affiliation, members of the to-be-abolished first chamber tended to be against the abolition. Also, the Social Democrats, who were in power, had traditionally benefited from their dominance in the indirectly elected first chamber. Yet since the party’s electoral losses in 1966 were widely attributed to its procrastination on the question of constitutional reform, Prime Minister Erlander decided that it had to be settled sooner rather than later. If it had not been for the electoral discontent, he might have been happy to retain the status quo. As for the electorate, it was hardly in the grip of passions, but perhaps in the grip of a principle.

2. Crises tend to go together with strong passions

Just as the idea of *crisis* can be broken down into many varieties of *crises*, the idea of *passion* can be broken down into many varieties of *passions*. I shall not talk about crises and emotions in general, but limit myself to the emotions that arise in constitution-making crises.

One can easily list some two dozen distinct emotions, which differ from one another both in the causes that trigger them and in their effects, notably the actions they inspire. In the context of constitution-making, the two most important emotions seem to be *fear* and *enthusiasm*. *Anger* and even *pridefulness* may also be at work in some cases. In the following discussion of the *causes* of these constitutional emotions, I focus on

six cases: the United States in 1787, France in 1789, 1848, and 1958, Norway in 1815, and Iceland in 2011. In the subsequent discussion of their *effects*, I consider the subset of four cases that I mentioned earlier.

Let me begin by citing two observations by Tocqueville about how *fear and enthusiasm may combine* to bring about constitutional change. Tocqueville brought deep readings and direct personal experience to his analyses of constitution-making. In his notes for the unfinished second volume of his work on the Revolution of 1789, Tocqueville discusses several decisions by the constituent National Assembly, and notably the momentous abolition of feudalism on August 4 1789. After the Revolution of 1848, he was elected to the Constituent Assembly and served on the Committee of the Constitution. In his *Recollections*, he describes the work of that Assembly and of the Committee in considerable detail.

The decision on August 4 was triggered by news from the countryside that peasants were attacking castles, burning records, and in a few cases killing nobles. Many of the framers, nobles as well as delegates from the Third Estate, owned such properties. The first reaction of the assembly was to crush the peasant rebellions, but within 24 hours the delegates changed their minds and adopted a series of decrees whose cumulative effect was the near-complete destruction of the feudal system of burdens and privileges.

Initially, the decrees were made as concessions to the peasantry, to pacify them and to prevent further ravages. Yet as one deputy after another stood up and renounced his feudal privileges, the assembly was swept by a wave of collective enthusiasm. In the words that have been used to describe their attitude when they adopted another “self-denying ordinance” on May 16 1791, the decision to make themselves ineligible for the first ordinary legislature, they were “drunk with disinterestedness”. In Tocqueville’s words, the decrees of August 4 1789 were “the combined result, in doses that are impossible to determine, of fear and enthusiasm” (Tocqueville 1953: 214). Many contemporaries made similar, if more complex assessments of the motives (Elster 2007).

The making of the 1848 French constitution also took place in a context of popular violence. The workers of Paris rose up on three occasions. On February 22, their rebellion brought down the reign of Louis Philippe and led to elections of a constituent assembly; on May 15, they invaded the assembly to protest against the government’s lack of solidarity with the oppressed Polish people; on June 23, they took to arms and raised barricades in protest against the closing of the National Workshops. By

June 27, the insurrection had been violently crushed. The Committee of the Constitution began its work on May 19, delivered its first report on June 19 and its final report on August 30. Whereas the first report reflected fear of offering too little to the workers, the second was inspired by fear of offering too much. Tocqueville characterized the atmosphere in which the Committee worked as follows:

[The] nation had a sort of frenzied desire to see the work of constitution making finished and to see authority established. [...] The Assembly shared this longing and was constantly goading us, though there was hardly any need to do so, for memories of the 15th May and apprehensions of the days of June, combined with the sight of a divided, weak and incapable government in charge of affairs, were enough to drive us on. But the thing that most effectively deprived the Committee of its freedom of mind was [...] *fear of outside events and the enthusiasm of the moment*. It is difficult to appreciate how much this pressure of revolutionary ideas affected even those minds least subject to such influence, and how it almost unconsciously drove them farther than they meant to go, and sometimes even in a different direction (Tocqueville 1987: 169; my italics).

Let me now consider the emotions of fear and enthusiasm more carefully.

Concerning fear, it is important –and sometimes difficult– to distinguish between *visceral* and *prudential* fear. Whereas the former is a genuine emotion, caused by an imminent danger to the agent, the latter does not amount to more than a simple belief-desire complex (Gordon 1987: 77 and passim). As an example, “I take an umbrella because I fear that it will rain” *means* “I believe it will rain, I do not want it to rain, and taking an umbrella is a rational precaution against the rain”. When Montaigne (1991: 83) wrote that “it is fear I am most afraid of” and FDR said that “the only thing we have to fear is fear itself”, they were referring to *prudential fear of visceral fear*. To decide whether we are dealing with the prudential or the visceral variety, we have to consider whether the beliefs of the agents are merely the *cause* of the fear (as in the rain example) or one of its *effects*. Also, we have to consider the constancy or inconstancy of the emotion. I postpone these issues to the later discussion. For the time being, I simply assume, without argument or evidence, that in the examples I shall discuss we are dealing with visceral fear.

I believe that both the calling of the Federal Convention in 1787 and the constitution it produced were to some extent the product of visceral fear. Specifically, Shays' rebellion in Massachusetts in 1786-1787 threw a scare in the elites and galvanized them into taking action. The main achievement of the framers was to create a strong national government that could act directly on the citizens rather than, as under the Articles of Confederation, on the state governments. By taxing the citizens directly, the government could organize and fund the repression of rebellions without having to ask the states for contributions and soldiers. Under the influence of their visceral fear the framers misread Shays' rebellion as an effect of excessive democracy rather than of excessive taxation. In a letter to William Smith on November 13, 1787, Jefferson wrote that "Our Convention has been too much impressed by the insurrection of Massachusetts: and in the spur of the moment they are setting up a kite [a hawk] to keep the hen-yard in order. I hope in God this article will be rectified before the new constitution is accepted". I do not know which of the constitutional articles he had in mind. The constitution refers to "rebellion" (Art. I.9), "domestic violence" (Art. IV.4), or "insurrection" (Art. I.8). Be this as it may, it is clear that he thought the framers had adopted the article in question under a sudden emotional impulse, "in the spur of the moment".

In 1789, the behavior of the French *constituants* was shaped by visceral fear on several occasions. As an example, which I believe to be representative, I shall cite letters from 7 August onwards by the Comte de Ferrières (1932: 109 ff.) a deputy from the nobility, to his wife. The first letter contains very detailed instructions that she is to sell his sheep and his oxen, at any price, for cash; to gather all the money and documents in his castle in Mirebeau and transfer them to their house in Poitiers, making sure that nobody observes her doing so; to ship their mattresses, bed covers and sheets to Poitiers ("in case of an event, at least something will be saved"). Three days later, he tells her to go with their daughters to Poitiers, even if the harvest should suffer: "do not consider the costs, and do not ask for [the protection of] soldiers, which would cause alarm in the countryside". He does not care if after these precautions his castle is burned, as he is never going to live there again. One can easily read his anxiety between the lines.

His fears also affected his political behavior, as shown by a letter from August 7 addressed both to his constituency and to his friend Rabreuil:

[To his constituency:] It would have been dangerous even for you if I had expressed opposition to the general wish of the nation. It would have been to designate you and your possessions to the fury of the multitude, and to have exposed you to seeing your houses burned down.

[To Rabreuil:] Mme de Ferrières tells me that you would like me to get into the newspapers; that would be the means to lose the little credit I have in the third estate, for, at this moment, I could only speak out in opposition to what is being done; at least in great part; that would be pointless. Thus I keep silent, as do M. de Clermont, M. de Sulli, Mounier, and wise people. If I alienated the third estate in questions touching on the interests of my electoral districts, I would experience difficulties, if only because of the spirit of revenge (Comte de Ferrières 1932: 118-119).

In September 1789, the key votes on bicameralism and the royal veto may have been shaped, to an unknowable extent, by the fear of the deputies for their lives. This time, the perceived threat came from crowds in Paris, not from the peasants in the countryside. To explain why some members voted against bicameralism, a liberal deputy for the nobility wrote to his constituency, “Some deputies from the third estate have told me, I do not want my wife and children to have their throats cut” (Lally-Tolendal 1790: 141). Concerning the choice between a suspensive and an absolute (indefinite) veto, he wrote that “threats were circulating; I heard them resound around me. The calm reappeared only when it was clear that there seemed to be a majority for the *suspensive* refusal. Still almost 400 voted for the *indefinite*. There is no doubt that had it not been for the means employed, the manoeuvres of some and the weakness of others, the royal veto would have triumphed in all its fullness” (Lally-Tolendal 1790: 146). Many of these fears may have been unfounded, perhaps irrational, yet nonetheless may have powerfully influenced behavior.

As a last example of how fear can trigger a process of constitution-making as well as shaping specific clauses in the constitution, I shall consider the birth of the Fifth French Republic. Under the pressure of events in Algeria, the parliamentarians of the Fourth Republic granted full constitution-making powers to de Gaulle on June 1 1958. As he said later, in inimitable telescoping, “I had a problem of conscience. I could just let things take their course: the paratroopers in Paris, the parliamen-

tarians in the Seine, the general strike, the government of the Americans: it was written on the wall. Finally a moment would have arrived when everybody would have come looking for de Gaulle, but at what price? Thus I decided to intervene in time to prevent the drama” (Peyrefitte 1994: 262). It makes sense to assume that some parliamentarians feared for their lives and that their visceral fear affected their decision to abdicate from power. A crucial event that led credibility to their fear, beyond what mere rumors could do, was the landing on May 24 in Corsica of paratroopers from Algeria, who ruled over the island through a Committee of Public Safety. The parliamentarians also accepted a mandate to create a constitution with a strong executive power, hoping that de Gaulle would solve the Algerian problem and then, like Cincinnatus, retire to his homestead. Their first expectation was fulfilled, but not the second.

Turning now to *enthusiasm*, let me first note that psychologists, to my knowledge, do not even acknowledge the existence of this emotion, except in the trivialized form of looking forward to something good (“anticipatory enthusiasm”). A study by two political scientists (Marchus and Mackuen 1993) uses the term roughly in the sense of “strong approval” (readers of American letters of recommendation will recognize this usage). Since the concept seems to be up for grabs, let me propose a tentative characterization. Enthusiasm is triggered by the belief that the public interest or a moral good can be realized by collective action in the face of organized opposition. We can most easily recognize it by its behavioral effects: supernormal energy, subnormal need for food and sleep, and, crucially, lower risk aversion or even risk seeking. Although these features are also observed in states of hypomania or hyperthymia, enthusiasm differs in the triggering cause I have postulated. It may, though, recruit some of the same neural circuits as these states. The emotion is morally neutral, in the sense that it can motivate Nazis or religious fanatics no less than democrats.

It seems clear, from innumerable descriptions, that the French *constituants* of 1789 were enthusiastic in this sense. They egged each other on, and were egged on by a large audience in the galleries. Although their exaltation could border on sentimentality (“Schwärmerei”), on several occasions, notably in late June and early July, it made them willing to risk their lives. Had they not stood up to the attempts of Louis XVI to intimidate them, the Revolution would have been cut short at the outset. Regarding the making of the Norwegian constitution of 1814, its foremost historian asserts that the framers were characterized by “an

incredibly vitality and restless activity” – “enthusiasm (*begeistring*) was their normal state of mind” (Steen 1951: 143-144). Eyewitness reports of mass demonstrations in Eastern Europe in 1989 and in the Arab Spring in 2011-12 also show the importance of this emotion. Incidentally, they equally show the inanity of the idea that revolutionaries are rational agents motivated by the personal benefits they expect to obtain as leaders of the post-revolutionary regime (Tullock 1971; Acemoglu and Robinson 2001). If some actors were animated by *fear* (as must have been the case in all these episodes except in Norway), the enthusiasm of other actors may have provided “safety in numbers”.

Concerning *anger*, this emotion seems to have been an important motive behind the Icelandic constitution-making process that began in 2010. As noted, the process was triggered by a financial crisis –not only by the general crisis that encompassed all Western economies, but also by local mismanagement. As a leading reformer has written, “When countries crash, a natural thing for their inhabitants to do, *inter alia*, is inspect their legal and constitutional foundations to look for latent flaws and to fix them. This was, in fact, one of the demands of the ‘Pots-and-pan’ revolution’ that shook Iceland after the country’s spectacular financial crash in October 2008” (Gylfason 2012). In the words of another observer, “the public *outrage*, which after the economic collapse was directed at the government, converged on the issue of writing a new constitution” (Ólafsson 2011; my italics).

In addition to motivating this forward-looking task, the anger triggered a strong demand for backward-looking measures, that is, a demand for punishment of the bankers and politicians who were held responsible for the collapse. Although retribution is usually viewed as the action tendency of anger, the emotion can also motivate action to prevent recurrence (“never again!”). A similar remark applies to fear, whose action tendencies are usually thought to be *fight* and *flight*. As noted, in August 1789 the first reaction of the French framers was to fight –to crush the peasant rebellions– until they opted for concessions instead, in the hope of preventing recurrence.

In my discussion of the French constitution-makers of 1848 (Section V), I suggest that their behavior may have been shaped by the emotion of *pridefulness*, triggered by the belief about their own importance in the scheme of things. This idea is supported by Marx’s devastating comment that they were trying to model themselves on the revolutionaries of 1789, replacing, however, the tragedy as farce.

3. Emotions, beliefs, and preferences

In the previous Section, I considered the emotions of fear, enthusiasm and anger as *effects* of a political situation. In this Section, I discuss emotions as *causes* of belief formation. I also consider how they may affect risk preferences and time preferences in ways that, in practice, may be confounded with their effects on beliefs.

Ancient and modern moralists have often opposed passion to *reason*. Since they were not particularly concerned with defining what they meant by reason, I shall propose a definition that captures, in three parts, what they may have had in mind: *the choice of rational means (i) to promote the long-term (ii) public interest (iii)*. La Bruyère captured the second and the third component of this idea when he wrote that “To think only of oneself and of the present time is a source of error in politics”. Similarly, James Madison defined the goal of politics as promoting “the permanent and aggregate interests of the community”. These and other writers probably took it for granted that the right choice of *ends* (ii and iii) would be ineffective or could even be dangerous unless accompanied by the right choice of *means* (i). That choice requires rational belief formation, a process that includes (i) optimal gathering of information and (ii) rational cognitive processing of information.

Before I discuss the impact of passion on the rational choice of means, let me comment on how passion can shape the ends of the agent. La Bruyère, to cite him again, offered a famous Maxim: “Nothing is easier for passion than to overcome reason; its great triumph is to conquer interest.” One might add, as a corollary, that nothing is easier for interest than to overcome reason, except when reason allies itself with passion. Enthusiasm might seem to illustrate this case, at least with respect to the choice of ends. Let me repeat a statement by Clermont-Tonnerre that I cited earlier: “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”. He said this in a debate over the new division of France into *départements*, which would replace the division into provinces. Although the old division generated inefficiency as well as injustice, reforms stumbled on the fact that they would inevitably create losers as well as winners. The ancien régime had so many veto players motivated by local or institutional interests that what Madison called “the mild voice of reason” could hardly be heard.

Earlier, I said that psychologists seem to ignore the emotion of enthusiasm. Kant (1790: 154) offered, however, a brief but suggestive analysis. He asserted that like any other affect, enthusiasm is “blind, either in the choice of its end, or, if this is given by Reason, in its implementation; for it is that movement of the mind that makes it incapable of engaging in free consideration of principle.” As I am not a Kant scholar I cannot say for sure what he meant, but it seems plausible to understand him as saying that enthusiasm is an obstacle to the rational choice of means to implement the very end that it inspires. *The emotion trips itself up*, as it were. In the words of someone who *is* a Kant scholar (Allouche-Pourcel 2010: 105), enthusiasm illustrates the saying that “The best is the enemy of the good.”

Now, enthusiasm is only one of the constitutional emotions that I have considered. Other emotions, including fear, anger, and pridefulness can also distort cognition, by several causal mechanisms.

First, emotions are characterized by their *urgency*, a desire to act immediately (Elster 2009). Actors under the influence of a strong emotion often make a suboptimal investment in acquiring information. Because gathering information about the long-term consequences of choice is especially time-consuming, there is a risk that an emotional actor will consider only the most obvious and immediate effects. By contrast, Seneca said, “reason grants a hearing to both sides, then seeks to postpone action, even its own, in order that it may gain time to sift out the truth”. Urgency generates low-quality beliefs, but not intrinsically biased beliefs. It may have disastrous consequences when the facts refute the belief, as illustrated by the proverb “Marry in haste, repent at leisure”. At a larger scale, the urgency of the reactions to the attacks on September 11, 2001 may have prevented Western governments from understanding that some anti-terrorist measures may create more terrorists than they deter or apprehend.

Urgency induces a tendency to gather insufficient information about the temporally remote consequences of present choices. There is also evidence that emotions induce a tendency to *care less* about those consequences, that is, to increase the agent’s rate of time discounting (Loewenstein 1996). In *The Theory of Moral Sentiments*, Adam Smith wrote that “The qualities most useful to ourselves are, first of all, superior reason and understanding, by which we are *capable of discerning the remote consequences of all our actions*, and of foreseeing the advantage or detriment which is likely to result from them: and secondly, self-command, by which we are *enabled to abstain from present pleasure or*

to endure present pain, in order to obtain a greater pleasure or to avoid a greater pain in some future time. In the union of those two qualities consists the virtue of prudence, of all the virtues that which is most useful to the individual.” Emotions can undermine both the capabilities I have underlined. In practice, it may be difficult to tell whether imprudent behavior is due to the one or to the other –whether the consequences fail to appear on the mental screen of the agent or whether he fails to be motivated by them.

Second, emotions can generate biased beliefs by either of two mechanisms identified by La Fontaine: “Everyone believes easily what they fear and what they hope”. Let me begin with the second and most familiar, wishful thinking. The tendency to believe what one would like to be true is, of course, universal. In enthusiasm, it is prominent. When we are in love, we tend to invest the other person with all sorts of wonderful qualities that neutral observers fail to perceive. At a larger scale, the damages caused by “irrational exuberance” in the recent financial crisis are well known. When wishful thinking is combined with urgency, as it tends to be, the biased beliefs will not be subject to normal corrective mechanisms. With respect to marriages, a strong social norm of long engagement periods may alleviate this problem. In financial markets, by contrast, a second’s delay may cause ruin.

The tendency to believe what we fear –*counterwishful* thinking– is less familiar and more puzzling. In wishful thinking, we obtain at least the momentary pleasure of believing that the world is as we would like it to be. In counterwishful thinking, we obtain only the pain of believing that it is not. What’s in it for the organism? Puzzling as it is, there is no doubt that the phenomenon exists. Individuals with a paranoid personality disorder frequently believe that their spouses are unfaithful to them, with no more evidence than Othello had. Panics with no evidential basis, such as the Great Fear of 1789 or rumors of the return of Napoleon I caused great distress and, crucially, were used as the basis for action, e.g. in both cases cutting the grain before it was ripe. Panics based on unfounded rumors in financial markets are also well known.

A final cognitive effect of the emotions is that, while we are in their grip, it may be difficult to realize that they will eventually subside (the “hot-cold empathy gap.”) Shame-induced suicides, as when six French citizens killed themselves in 1996 after having been exposed as consumers of pedophilic materials, might not have occurred if the individuals had been able to anticipate that the contempt of others, and their own shame,

would subside. People may also suffer from a “cold-hot empathy gap”, which is the difficulty in anticipating, when in a calm state, the pains of a future experience such as being caught cheating on an exam or giving birth without anesthesia. (On both these gaps, see Loewenstein 1996.) The same French citizens might not have engaged in the behaviors that, when exposed, triggered the contempt of observers had they anticipated how horribly bad the shame would feel.

In the last several paragraphs, I have argued that emotions can induce irrational beliefs. Conversely, a demonstration that individuals, in a given case, hold irrational beliefs may serve as evidence that they were in the grip of a strong emotion. It does not, of course, serve as conclusive evidence, since the beliefs might also be due to “cold” biases rather than to “hot” irrationality. People who form irrationally sanguine beliefs about the future performance of an investment fund may be subject to wishful thinking, but could also be victims of selection bias. One should also be aware of the fact that the effect of emotion on beliefs may be masked by their effect on preferences, notably on risk preferences. Experiments suggest that positive emotions make people more risk-averse (Isen and Geva 1987), whereas negative emotions cause them to be more risk-seeking (Leith and Baumeister 1996). At the same time, positive and negative emotions generate, respectively, optimistic and pessimistic cognitive biases (Isen and Patrick 1983). Thus, happy people would assess the odds as more favorable, but for given odds be less willing to risk their money. This last claim does not, however, ring true for the emotion of enthusiasm. There is no doubt that revolutionaries are often subject to wishful thinking, but I do not think their willingness to risk their lives is due only to a magical belief that they are invulnerable. Rather, normal risk-aversion seems to be suspended. The converse idea, that unhappy people assess the odds as less favorable, but for given odds are more willing to take risks, is perhaps more plausible.

In addition to irrational belief-formation, emotional *inconstancy* over time can provide evidence of an emotional motivation. (This is not the same as time *inconsistency*, although behaviorally the two can look similar.) Emotions, typically, have a “short half-life”. If, therefore, a postponement of action leaves the intention unchanged, it is a sign that the agent is motivated either by reason (as Seneca claimed) or by interest (as Hume claimed). Even if an emotion leads to immediate and irreversible action, its subsequent decay can be detected by expressions of regret. The tendency for emotions to decline in strength with time is not, however, a

law-like one. In societies with strong norms of honor, anger may sustain revenge for years or decades. Also, the shape of the decay curve can be linear, concave or convex. There is little hard knowledge about these issues.

4. Case studies

I shall now discuss how these general remarks may bear on constitution-making processes.

The Federal Convention

The American framers were, I believe, subject to irrational belief formation (see Elster 2012 for a more detailed analysis). They had an exaggerated fear of the issuance of paper money by the states, perceiving it as a weapon in the class struggle between debtors and creditors, whereas in reality it was simply a necessity brought about by the Revolutionary War. They had also an exaggerated fear of leveling, debtor-relief, “agrarian laws”, and similar measures. In his notes on the debates at the Convention, Madison reported Elbridge Gerry as saying that

The evils we experience flow from the excess of democracy. The people do not want [lack] virtue, but are the dupes of pretended patriots. In Massts. it had been fully confirmed by experience that they are daily misled into the most baneful measures and opinions by the false reports circulated by designing men, and which no one on the spot can refute. One principal evil arises from the want of due provision for those employed in the administration of Governnt. It would seem to be a maxim of democracy to starve the public servants. He mentioned the popular clamour in Massts. for the reduction of salaries and the attack made on that of the Govr. though secured by the spirit of the Constitution itself. He had he said been too republican heretofore: he was still however republican, but had been taught by experience the danger of the levelling spirit (Farrand 1966, vol. 1: 48).

As a matter of fact, the demand for a reduction of the salary of the Massachusetts governor was merely to adjust his salary for the deflation caused by the absorption of specie in the payment of taxes to fund redemption at face value of war bonds held by speculators. The framers also failed to see how Shays’ rebellion flowed from the inability of farmers to pay these taxes rather than being a generalized attack on creditors. They

ignored the fact that paper money might serve them well in the future as it had in the past, before 1776. As Jefferson suggested, they simply panicked. As a result, they adopted a *counterrevolutionary constitution*, with the triple check on the popular will represented by the Senate, the presidential veto, and judicial review (at least of state legislation).

It must be added, however, that without the panic the Convention might not have been called, and the Confederation might have collapsed. The Articles of Confederation had severe flaws, but something like the Hamilton plan would have been sufficient to correct them. However, the energy needed to address the flaws produced an overcorrection.

The constituents of 1789

The emotional quality of the French framers of 1789 can be seen starkly in the urgency of their behavior and in their second thoughts (reflecting the decay in the strength of the emotions). One can also discern elements of wishful thinking and of the hot-cold empathy gap (see Elster 2007, 2011 for more detailed analyses).

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

Several *constituants* also changed their mind or expressed regrets. In letters of August 14 and 16, Comte de Ferrières reversed some of the instructions from his earlier letters. The political decisions were, however, difficult to reverse once they had become known. In his *Journal*, the deputy Duquesnoy (1894: 349) cites a Germanicism by the Alsatian deputy Rewbell: “the people are penetrated by the benefits they have been promised; they will not let themselves be de-penetrated”. In a letter to the deputy Faulcon of September 22, we read that «Landowners, to whatever order they might belong, probably regret the sacrifices they made in a moment of delirium; but how can one go back on gains that were announced with such blameable haste?» (Kessel 1969: 381 n. 940). Later, the assembly tried to sabotage its own decrees by legislation enacted in March and May 1790 (Markoff 1996: 460-462).

Although a quantitative assessment is impossible, there is no doubt that the strong emotions of the night of August 4 1789 induced a temporary preference change in many deputies. Did they also induce irrational belief formation? One may argue that the intended effect of calming the peasantry by these concessions was based on wishful thinking. Commenting on the Revolution generally, Tocqueville (2011: 157) argued that such concessions can be counterproductive: “The evil that one endures patiently because it seems inevitable becomes unbearable the moment its elimination becomes conceivable. Then, every abuse that is eliminated seems only to reveal the others that remain, and makes their sting that much more painful. The ill has diminished, to be sure, but sensitivity to it has increased”. Commenting specifically on the decrees of August 1789, Jean Jaurès (1968: 469) wrote that: “Not only did the nobles think that the abolition of the tithe without compensation would increase their income from land, but they believed above all that this immediate satisfaction obtained at the expense of the clergy would make the peasantry less eager to pursue the abolition of the feudal dues: they hoped to divert the storm towards the goods of the church. *What a poor calculation!* Quite to the contrary, the peasants were all the more unlikely to accept the need for compensation with regard to the feudal dues as they had been dispensed with compensation for the tithe.” The phrase I have italicized may be read as saying that the nobles were wrong, but not irrationally so, or as affirming that they were indeed irrational. Whatever Jaurès had in mind, I opt for the second idea. When ruling classes ignore the fact that reactive concessions (as distinct from preemptive ones) tend to generate demands for more concessions, they are subject to irrational wishful thinking.

The counterproductive effects of concession are matched by those of repression. According to the well-documented “psychology of tyranny”, strong repressive measures often generate *hatred* in the subjects which more than offsets the *fear* they were intended to instill. Perhaps the French framers switched from a policy of repression to a policy of concession between August 3 and August 4 because they realized the irrationality of the former policy. In that case, the choice of the latter might be excused, for what else could they have done? It was too late for preemptive measures. As Tocqueville (2003: 650) noted “the only way to attenuate and postpone [the] revolution is to do, *before one is forced to do it*, all that is possible to improve the situation of the people” (my italics).

It seems very likely that the votes of some deputies on bicameralism and on the veto were influenced by the belief that they might be physically harmed if they voted the wrong way. In the days following August 4, the votes of the clergy on the abolition of the tithe without compensation also seem to have been shaped by this belief. It is difficult and perhaps impossible to determine, however, whether these beliefs were a rational cause of prudential fear or an irrational effect of visceral fear. Even when constitution-making is shaped by violence, it is not necessarily shaped by emotion.

Norway in 1814

After the American, the Norwegian constitution is the oldest in the world. Since it is less known than the other constitutions I discuss, I shall first give some background.

The constitution was created in the highly charged field of late-Napoleonic and post-Napoleonic politics. By the treaty of Kiel (January 1814), Denmark conceded Norway to Sweden in exchange for concessions elsewhere. The previous year, prince Christian Frederik, first in line for the Danish throne, had been appointed stadtholder in Norway. When he received news about the Kiel treaty on January 24 1814, with instructions from the Danish king to surrender the Norwegian fortresses and return to Denmark, he decided to disobey and carve out a space for himself in Norway. The Swedish troops were, however, busy elsewhere. The Swedish crown prince and de facto ruler, Carl Johan, was involved, with his army, in the final stages of the struggle against Napoleon, which ended with the latter’s abdication in early April. Christian Frederik stepped into the vacuum to call a constituent assembly and proclaim himself regent, in the firm expectation that he would later be chosen as king.

The assembly met at Eidsvold north of Oslo on April 10. Much of the work was done by a constitutional committee with 15 members, but its proposals were often modified in the plenary discussions. Adopting a kind of “gag rule”, the committee decided not to consider the political issue of the choice of a ruler, but limit itself to the task of writing a constitution that would promote the welfare of the nation, regardless of which royal family were to receive the crown. On May 17, a constitution for an independent Norway was adopted and Christian Frederik chosen as king. The decision was in strict violation of the Kiel treaty, and Norway was in no position to resist economic and military coercion by Sweden and England. After unsuccessful international mediation, a light military skirmish between Norway and Sweden ended with the convention of Moss on August 14, in which the Swedish promised to respect the Eidsvold constitution, with the minimal modifications needed to adapt it to the state of union between the two countries. After further negotiations, such changes were incorporated in the “November constitution”.

Broadly speaking, the assembly was made up of two groups, the “independence party” (a fluid and informal grouping) and the “Swedish party” who thought the Kiel treaty left no other option than union with Sweden. They were right, but fortunately they were a minority. The majority, which we might also think of as the Enthusiastic Party, got its way in a crucial vote when the assembly rejected the proposal to create a committee of foreign affairs, with the task of gathering information about the international situation and perhaps even conducting diplomacy. The vote implied that the assembly would not carry out factual investigations that might undermine the belief that Norwegian independence was a feasible option. I am not claiming that the *motive* behind the vote was a paradoxical desire to remain ignorant, but it may have had ignorance as an *effect*.

The enthusiastic advocates of independence at Eidsvold were clearly subject to wishful thinking. They overlooked the fact –obvious to us, and to the sober advocates of a union with Sweden– that England would never allow a retreat from the Kiel treaty. Nevertheless, the fact that the constitution was established by Norwegians as a *fait accompli*, not granted by Sweden or negotiated with Sweden, turned out to be immensely valuable. The historian I cited earlier, writes that “it is natural to speculate about the much more violent political reality the draft would have encountered if it should have been negotiated immediately with the Swedish authorities and confronted with the Swedish constitution” (Steen 1951: 163). In his *Recollections*, one of the framers provided an answer: “Under the

auspices of independence and shaped by the nation's own representatives, the work took a much more liberal form than if it had been carried out under the impressive influence of Sweden, itself supported by the most powerful states of Europe" (Aall 1859: 407).

Had the Swedish party had its way, the Union would have been much less favorable to Norway. Blind enthusiasm, in Kant's words, led to an outcome that prudent and realistic considerations, *aimed at the same ends*, could never have produced. Yet Don Quixote is there to remind us that enthusiasm is no guarantee for success. We find an example of the disastrous effects of enthusiasm in a decision by the French framers that I cited earlier, when they rendered themselves ineligible to the first ordinary legislature. By ensuring that the first legislature would be filled with inexperienced men, the decision opened the way to the Jacobin clubs and the Terror.

A Norwegian colleague, Øystein Sørensen, has pointed out to me that if the enthusiasm had persisted through the summer, the Norwegians might have been led into a real military confrontation with Sweden, which would have led to a humiliating defeat and possibly an imposed constitution. Perhaps the enthusiasm had an "optimal half-life" –sustaining the wishful belief in independence for the time it took to write the constitution, but not beyond.

France in 1848

The making of the 1848 French constitution was shaped largely under the influence of fear and, more unusually, of *pridefulness*. The framers were operating in a political environment dominated by two forces: the workers in Paris and Louis-Napoleon Bonaparte, the nephew of Napoleon I and a disreputable political adventurer. Their fear of Paris led them first to make concessions to the workers and then, after the June insurrection, to withdraw them. Their pridefulness did not allow them to neutralize Louis-Napoleon while there was still time to do so. Because the impact of fear is well understood, I focus on pridefulness.

While the Committee of the Constitution was working on its first draft, Louis Napoleon was elected deputy by four districts in the by-elections that took place on June 4. While the Assembly first upheld a law from 1832 law banning members of former dynasties from France, it voted the next day (June 13) to allow Louis-Napoleon to enter the country. He refused to accept his mandate, but was elected in five districts when he again stood again for office in September. The second time, he also obtained many votes in districts where he was not a candidate. These elections

showed that he had considerable popular appeal. In the Assembly and in the Committee, however, he had mostly enemies. If these had been reasonably clear-sighted, they should have understood that there were only two ways of blocking his access to the presidency.

First, even after accepting his presence on French soil, the Assembly could have declared him ineligible to the presidency. A proposal to this effect was made in the Committee, but rejected by nine votes to seven. When the first draft were sent out to be parallel debates in the *bureaux*, many rejected this idea as “undignified”. When the proposal was made in the Assembly, one deputy (Conquerel) answered that “to make a law against a person is not worthy of a great assembly and a great nation”. The socialist Louis Blanc said that “to give the impression of fearing for the Republic is to insult it”. These are statements of collective pridefulness or institutional amour-propre.

Second, the Constituent Assembly could have written indirect election of the president by the legislative assembly into the constitution. The chief of the executive, General Cavaignac, could easily have used the prestige he derived from crushing the June insurrection to impose indirect elections and have himself elected. He preferred to have the president elected by universal suffrage and plurality voting and then run for the office, either because he was certain he would be elected or because he was willing to trade off some uncertainty against the greater power that direct elections would confer. Tocqueville was more clearheaded. He predicted that in elections with universal suffrage and a plurality winner, Louis-Bonaparte was certain to be elected. On the basis of his knowledge of American presidential elections, he proposed the substitution of an electoral college for direct popular vote and that of an absolute majority for plurality. Although the assembly rejected the first idea, it accepted the second. It did not, however, block Louis-Napoleon, who received 74% of the votes against 20% for Cavaignac.

If we assume, as I think we can, that most delegates were strongly against Louis-Napoleon as president, the question arises whether they were subject to irrational belief formation when choosing direct election of the president. In an era before opinion polls, the delegates had not much to go on, but the success of Louis-Bonaparte in the June and September elections should have been sufficiently disturbing to make them prefer indirect elections. It is hard to tell whether they underestimated how popular Louis-Bonaparte was or how bad the effects of his victory would be. One way or another, they were irrational.

The decisive factor in the assembly's decision to have the president elected directly was apparently an extraordinary speech by the poet-politician Lamartine (who later received 0.3% of the votes in the presidential election) on October 6, 1848:

Even if the people should choose that [candidate] that my perhaps uninformed foresight fears it might choose, what does it matter? *Ala jacta est*. Let God and the people speak! We must leave something for Providence. That will be the light for those who, like ourselves, cannot read in the darkness of the future. Let us appeal to Providence, pray that it will enlighten the people, and submit ourselves to its decree. Perhaps we ourselves shall perish at the task? No, No, and in fact it would be beautiful to perish in initiating the people to freedom! So what if the people errs, if it lets itself be blinded by the splendor of its own past glory; if it withdraws from its own sovereignty after the first step, as if frightened by the greatness of the edifice we have opened for it in the republic and by the difficulties of its institutions; if it wants to abdicate its safety, its dignity, its liberty into the hands of a reminiscence of Empire; if it says: bring me back to the chains of the old Monarchy; if it disavows us and disavows itself; oh well, so much the worse for the people! It will not be ourselves, but the people that shall have been lacking in perseverance and courage (Lamartine cited by Elster 2013: 214-215).

This statement reflects a view of constitutional politics as *drama* rather than as institution building. By ushering in what became, within three years, a dictatorial regime, Lamartine's and the assembly's preoccupation with their dignity and their historical role, as well as their disdain for the people, did incalculable harm for France.

5. Do constitutions tend to be flawed?

Earlier I mentioned a hallowed (but shallow) view of constitutions as chains that Peter when sober imposes on Peter when drunk. According to that metaphor, to whose popularity I have unfortunately contributed, we should not expect constitutions to be typically flawed, at least if "sober" is taken in the sense of "motivated by reason". However, if the term is taken in the sense of "dispassionate", Peter when sober might be motivated partly or wholly by his *interest*. Some constitution-making processes and

the documents they produced have no doubt been flawed because shaped by the very sober interests of the founders. The importance of slavery-related issues at the Federal Convention provides a striking example, but virtually all constituent processes reflect personal interest, group interest, class interest or institutional interest in one way or another.

This source of constitutional flaws is not my concern here. Rather, I have tried to turn the metaphor on its head, to consider the flaws of constitutions that *Peter when drunk* imposes on a later Peter, whether drunk or sober. As the Swedish counterexample shows –and there are no doubt others– one cannot make a *conceptual* claim that framers tend to be under the influence of passion. I have, however, tried to argue for three empirical claims.

First, I have made a factual claim that constitutions tend to be made in circumstances that tend to induce strong emotions. Although the geographical sphere of my selected cases is limited, within that sphere at least the claim seems to hold up well.

Second, I have made a causal claim that because vested interests are so important in politics-as-usual more than interest is required to bring about a transition to constitutional “higher politics”. Reason by itself may provide what is needed, as was perhaps the case in Sweden in 1974, but passion is usually more effective, especially in an alliance with reason. It is hard to imagine, in fact, a constitution-making process driven by unalloyed passion, in a frenzy of destruction.

Third, I have made a *causal claim about factual or causal beliefs*: constitutional emotions cause framers to form beliefs about matters of fact or means-end relations that subvert the ends that the very same emotions generate. If constitution making usually requires passion, it follows that most constitutions will have a flawed cognitive basis. As I observed when comparing the document proposed by the Federal Convention with the Articles of Confederation, a flawed constitution may nevertheless be superior to the system it replaces. The comparison with a hypothetical constitution written by Peter when sober is irrelevant.

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