

The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice

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One contemporary method of reconciling the conflict in methodology between determinism and indeterminism is the notion of rational choice, which allows for both regularities in behavior and artistic creation. A detailed explanation of artistry within the rational choice context has not yet been developed, so this essay offers such an explanation in terms of the notion of heresthetics or the dynamic manipulation of the conditions of choice. The running example used throughout is the decision on the Constitutional Convention of 1787 on the method of selecting the president.

The Philosophical Issue

Looking backward at the climax of some earlier social event, for example, at the decision of a committee, it often appears to have been inevitable, as if there were just one admissible outcome and as if the committee were driven to that outcome by its composition, its internal customs, and its external constraints. A history written from this deterministic point of view admits no human choice and no element of chance and describes each step in the causal chain as forcing, with certainty, each succeeding step toward the decision.

It is true that, once an event has happened, an alternative event with a different outcome cannot occur, at least not in this world. But before the event has begun or is over, its outcome does not seem so inevitable. For example, if a committee has eleven members and operates by majority rule, then there are over a thousand winning coalitions. Each one, with its different personnel, might produce a different outcome. Furthermore, if the subject of decision allows for several different standards of judgment, then it is almost certain that no outcome is preferred by a majority to all others (McKelvey, 1976, 1979). In other words, for every outcome, p , that some majority might adopt, there is another outcome, q , supported by another majority, that can beat p . In this sense there may be no predictable equilibrium outcome(s) toward which the committee moves by reason of internal forces and members' tastes. Rather, with many procedurally equivalent possibilities, among which prediction seems difficult, the world seems quite undetermined. That a particular outcome occurs is a function of the

decisive coalition that happens to exist at the time of decision, of the outer boundaries in a policy space of members' most preferred alternatives, of the sequence in which alternatives are considered, and of many other constraints, including accidents, on the decision-making process. And until a decision is actually made, there is some probability for each of a set of possible outcomes.

Neither of these viewpoints, determinism or indeterminism, is philosophically attractive. Although determinism easily admits scientific generalization, it denies choice and artistry, which, however, many people believe they experience. They may merely confuse an indecipherable complexity with freedom of the will. Yet their sense of invention is still very lively. Similarly, determinism denies natural accident, which may be no more than an incapacity to measure, but which may also reflect genuine randomness in the world.

On the other hand, although indeterminism provides for choice and chance, it denies the possibility of generalizing about social outcomes. Yet the idea at the core of social science is that outcomes can be subsumed under general laws. And they are. For example, the well-attested law of demand (namely, that, with appropriate conditions, demand curves do not slope upward), can be used for many kinds of accurate predictions. So although social science is, of course, only modestly successful, it does have some triumphs, and a philosophical viewpoint that denies them is clearly untenable.

A third viewpoint, which circumvents the defects of both determinism and indeterminism, is the method of rational choice. This is in fact the

traditional paradigm in political science, although in the absence, until recently, of a well-developed political theory (Riker, 1982a,b, 1983), most of those who subscribed to the paradigm were not conscious of the nature of their allegiance. The fundamental assumption of this paradigm is that people maximize expected utility, namely that, given their goals, they choose those alternatives likely to result in the largest net achievement of goals. The scientific merit of the assumption is that it allows both for regularities and for freedom of choice. Since presumably all persons with the same goals in the same circumstances rationally choose the same alternative, regularities can be observed. Inasmuch as social institutions impose similar circumstances on persons with similar goals, the role of randomness is minimized, but the role for choice is fully preserved. Thus, generalization and social science are reconciled with choice and chance.

Merely to assert the reconciliation does not, however, explain how artistic creation can be subsumed under scientific generalization. To begin the reconciliation I point out that, for any reasonably complicated situation, the range of alternatives and outcomes is tremendous. Furthermore, often no alternative or outcome dominates (i.e., is socially chosen over all others), so that there is no obvious rational choice. The problem, then, is to explain how, in the face of apparent disequilibrium, regularities can be discerned and, simultaneously, creativity recognized (Fiorina & Shepsle, 1982; Riker, 1980). The first step, which is what social science has traditionally been concentrated on, is the identification of constraints imposed on possible outcomes by institutions, culture, ideology, and prior events. The next step, which rational choice models provide for, is the identification of partial equilibria from utility maximization within the constraints. The final step, to which this essay is addressed, is the explication of participants' acts of creative adjustment to improve their opportunities.¹

Conventional political science has provided considerable understanding of institutions, the first step. (For the history of an example of one such development, see Riker, 1982b.) Recent elaboration of rational choice theory, from Duncan Black to the present, has provided under-

standing of the second step, utility maximization in a political context. Unfortunately, not very much effort has been devoted to the third step, the study of creative adjustment, or what I have elsewhere described as heresthetics, the art of political strategy (Riker, 1983). Because this third step has hitherto been neglected, I shall devote this essay to the detailed study of one creative act with the intention, not simply of explicating it, but also of explaining how it can be placed within models of partial equilibria.

Background of the Event

The act to be studied is the decision, at the Federal Convention of 1787, on the provisions of the Constitution for the choice of the president. Admittedly this subject was not as politically intense or important as several others about which delegates either withdrew or threatened to withdraw. Nevertheless, the decision on the choice of the executive is appropriate for analyzing creativity because it was protracted—it recurred all summer; confusing—the decision was changed several times; and multifaceted—it involved consolidation and equality of states as well as the separation of powers. Near the end of the Convention, with the subject still unsettled, James Wilson (Pa.) remarked exasperatedly, "This subject has greatly divided the House, and it will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide" (Farrand, 1966, II, 501).² An exaggeration, of course, but an understandable one. Part of the difficulty was that many methods were feasible, and some were shown to be in a cycle. Another part was that alternative methods were invented and revised, nearly to the very end of the Convention. The successive invention, revision, and elimination of alternatives is a distinctive feature of the dynamics of social choice. I call it heresthetics (Riker, 1983), or the method and art of influencing social decisions. Through heresthetical manipulation, individual artistry enters decision making. Hence, the analysis of the development of an agenda which, like this one, was heresthetically manipulated, is an excellent vehicle for the explication of political creativity.

As a preface to the analysis of dynamics, it is useful to place before us the full set of possible

¹In economics one can easily identify these three steps with, first, the analysis of institutions like markets and auctions, with, second, the analysis of trading equilibria (i.e., Walrasian general equilibrium analysis or Edgeworthian study of the core of exchanges relations), and with, third, the Austrian emphasis on the dynamic role of entrepreneurs in the expansion of economic systems. I owe this analogy to William Mitchell.

²Hereafter, Farrand (1911/1966) is cited simply with volume and page number, and, if relevant, the date. All quotations of speeches are Madison's *Notes* and are Madison's precis of what was actually said. See Jillson (1979) for another version of the event studied here.

outcomes, as they would appear in a static analysis:

1. Election by the national legislature or some subset of it, analogous to the method of electing governors in most states;
2. Election by the people, or by electors chosen by the people, analogous to methods of electing governors in New York and in the New England states;
3. Election by some institutions of state government, analogous to the election of members of Congress under the Articles of Confederation;
4. Selection by various combinations of elements from the foregoing categories.

The method actually chosen was from the fourth category (i.e., by electors chosen in a manner prescribed by state legislatures, with election by the House of Representatives in the absence of a majority among the electors), as is the method used today (i.e., by electors popularly elected in states, with the same method of breaking ties). Although our present method was not thought of at the Convention, something very similar was rejected.

Another possible method, certainly technologically feasible in 1787, was hereditary succession, but for ideological reasons the framers did not consider it.

Altogether, we can arrange the alternatives in sets, thus:

1. Alternatives the framers discussed or voted on;
2. Feasible alternatives, which include all four previous categories;
3. Possible alternatives, which include all feasible alternatives as well as infeasible ones like hereditary succession.

Considered alternatives is a proper subset of *feasible alternatives*, which is a proper subset of *possible alternatives*.

I turn now to a discussion of how considered alternatives were brought up and a decision reached among them.

Election by National Legislature

The first alternative, placed before the Convention in the Virginia plan, was election by the national legislature. This alternative had substantial support, was in fact adopted three times, and was incorporated into the penultimate draft. But it also had substantial opposition, which repeatedly invented substitutes. In the end an invention won.

The reason for the popularity of the original alternative was, I believe, that it harmonized with

the nationalism of the Virginia plan, which served as the basis for discussion and, ultimately, as the skeleton of the Constitution itself. In essence, the Virginia plan provided for a strong national government, politically separated from the states. To preserve the separation, the federal government was to administer its own laws, to supervise state legislation, and to be mostly independent of the states for renewal. It was to have a tripartite form:

- 1) a bicameral legislature, with a popularly elected branch and a smaller branch, elected by the first, though nominated by state legislatures, and with the right to negative state laws;
- 2) an executive elected by the national legislature and constituting (with some of the judiciary) a council of revision over legislative action;
- 3) a judiciary chosen by the national legislature.

The finished Constitution is very much like the Virginia plan, changed only in these main particulars: *representation in and election of the Senate*, where finally the Senate was to represent states equally and to be elected by state legislatures; *election of the president*, who finally was to be elected by electors—chosen in a manner to be prescribed by state legislatures—and, in the event of no majority, by the state delegations in the House of Representatives; *council of revision*, which, though eliminated, survived as the presidential veto; and, *negative on state legislation by the national legislature*, which though eliminated, survived in the supremacy clause. Aside from the council of revision, these modifications either grant state governments a role in selecting federal officials or liberate state governments from federal supervision. By so doing, they obscure the intense nationalism of the Virginia plan. This plan had provided for a separate national government which would supervise the states, but the modifications in Convention blurred it with concessions to provincialism.

The reason the Virginians made this extreme proposal was, I believe, their conviction that state legislatures were incompetent and unjust. Earlier, in the spring of 1787, Madison, their intellectual leader, has written a widely circulated manuscript, *Vices of the Constitutions of the United States*, in which state legislatures were blamed both for the weakness of the national government and for ten of the eleven "vices" (e.g., "injustices of the laws of the states") (Madison, IX, 345-358). In the Convention he ultimately deserted election of the executive by the national legislature because it might be like state legislatures which "had betrayed a strong propensity to a variety of pernicious measures" (II, 110, 25 July). So deeply did he distrust state legislatures that, throughout

the Convention, he pushed for a national negative on state laws (see, especially, I, 164, 169; II, 27, 589) and, afterward, writing to Jefferson, he described the Constitution pessimistically because it did not include the negative (Hobson, 1979; Madison, X, 211-212, October 24). The other Virginian delegates similarly despised state legislatures and indeed state governments generally. In Madison's record of the vote (8 June) on a motion to extend the national negative on state laws from "unconstitutional" laws to "improper" laws (I, 168, roll call 34), he noted that Blair, McClurg, and he voted for this extreme form of the negative, whereas Mason and Randolph voted nay. (Washington was not consulted, which probably means he was regarded by his colleagues as favoring Madison's position. Had Washington not, his vote would have produced a tie and would therefore have been obtained.) But Mason and Randolph also distrusted state governments, even though they were not willing to push the negative as far as the others. During the Convention, Mason frequently disparaged state legislatures.³ And Randolph based his opposition to a departure from the Virginia plan on his dislike of state power: "A Natl. Executive thus chosen (i.e., by state executives) will not be likely to defend with becoming vigilance & firmness the national rights agst. State encroachments" (I, 176). Furthermore, he maintained his opposition to all methods other than by the national legislature right to the end of the summer (II, 502).

Most of the other delegates shared the Virginians' distaste for state governments. Of the 55 delegates, only four could be regarded as genuine Anti-Federalists, that is, wholehearted supporters of provincial political establishments. These were Yates and Lansing of New York, who, however, went home on 10 July, Mercer of Maryland, who was present only two weeks in August, and Luther Martin of Maryland, the only one of the four to participate long and actively. (Gerry of Massachu-

setts, Mason, and Randolph ultimately refused to sign, but they had, until near the end, cooperated fully in planning a stronger federation.) Every other delegate who stayed to the end and probably most of those who went home early either had federalist sympathies throughout the Convention or acquired them during the summer. Even the small state diehards, who fought for a role for state legislatures in electing the Senate, cared very little for the state governments themselves. They wanted simply to protect Connecticut and New Jersey against New York, Delaware against Pennsylvania, Maryland against Virginia, etc. As C. Pinckney (S.C.) predicted, cynically and correctly: "Give New Jersey an equal vote, and she will dismiss her scruples, and concur in the National system" (I, 255).

As a consequence of federalist sympathies, most delegates appreciated the Virginians' intention to avoid, as much as possible, allowing state governments a part in selecting federal officials. Although those who favored election by the national legislature seldom rationalized their position, they adhered to their preference through most of the summer, mainly I believe, because of their intense conviction that the provincials should be supervised by the national elite. Accordingly, the less elitist ultimately abandoned the Virginia plan, while the most elitist persisted, right up to the end of the summer, in favoring election of the executive by the national legislature, e.g., Mason (Va.), Randolph (Va.), Williamson (N.C.), Rutledge (S.C.), and C. Pinckney (S.C.).

Opposition to Legislative Election

But this method was ultimately opposed by people like Gouverneur Morris (Pa.) who believed that, "of all possible modes of appointment that by the Legislature is the worst" (II, 103). The opponents were just as federalist as Madison, but they had different expectations about how the Virginia proposal would work out.

To begin with, the opponents attributed the vices of state governments to legislative supremacy, not simply to provinciality. They agreed, of course, with Madison that state legislatures were reckless, myopic, and fiscally irresponsible. But in their view the worst problem was that the legislatures were unrestrained. Despite the lipservice in the state constitutions to the idea of the separation of powers, in most states the governors were elected by the legislature and thus subordinate to it, as were indeed the popularly elected governors in New England and New York. Most of the delegates probably agreed with Madison's remark, "Experience has proved a tendency in our governments to throw all power into the Legislative

³His bluntest remark, uttered in support of the executive veto, justified it on the ground that the national legislature would "resemble" state legislatures and would therefore frequently "pass unjust and pernicious laws" (II, 78). Mason is often supposed to have been a principled Anti-Federalist because he refused to sign the Constitution. But as Ellsworth (Conn.) alleged, Mason's motive was not to defend state governments, but rather to support a provision for a regional economic interest, namely a provision to prevent eastern monopoly of the carrying of southern agricultural exports (Ford, 1892, pp. 161-162; *The Landholder* V, 10 Dec. 1787). In a letter to Jefferson in 1788 and again in conversation with him in 1792, Mason himself explained his defection on the same grounds (III, 304-305, 26 May 1788; III, 367, 30 Sept. 1792).

vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent" (II, 35).

It follows from this diagnosis that the appropriate constitutional structure is not merely the separation of the federal executive from the states, as in the Virginia plan, but also and especially the separation of the federal executive from the federal legislature, as James Wilson (Pa.) initially made clear when he "renewed his declarations in favor of an appointment by the people. He wished to derive not only both branches of the Legislature from the people, without the intervention of the State Legislatures but the Executive also; in order to make them as independent as possible of each other, as well as of the States" (I, 69).

Both nationalism and an ideal of separated powers stand behind this remark. Madison himself, once he was converted to Wilson's view, intellectualized it—both in the Convention and in the 51st *Federalist*—in the way it has survived in the constitutional tradition (II, 34):

If it be essential to the preservation of liberty that the Legisl: Execut: & Judiciary powers be separate, it is essential to a maintenance of the separation, that they should be independent of each other. The Executive could not be independent of the Legislature, if dependent on the pleasure of that branch for a reappointment. . . .

Thus justified, the mode ultimately adopted of electing the President is an essential institution for the ideal of the separation of powers, which is, perhaps, one reason why the nonseparationist Virginia method was rejected.

But although a desire for consistency may have predisposed the delegates to some alternative method, the positive force came from Pennsylvanians, especially Wilson and G. Morris. Pennsylvania was the only state with a unicameral legislature and thus wholly lacking in an institutional expression of the separation of powers. In its domestic politics, the unchecked legislative supremacy was so central an issue that one of the names of the political parties derived from it: the Constitutionalist (populist) and the Republican (anticonstitutional and liberal). Since most Pennsylvania delegates were Republican, the Convention had a core of distrust of legislative supremacy from the very beginning. Wilson initiated the attack on the Virginia method and G. Morris, an adept and persistent heresthetician, ultimately maneuvered the Convention into adopting the electoral college. So it is to them, I think, that the bulk of the credit should go for inventing and fleshing out this institution.

Displacement of the Method of Legislative Election

I turn now to an analysis of the rhetorical and heresthetical strategy by which the Virginia proposal was displaced. After the Convention was organized (25-29 May), the procedure to deal with the Virginia plan was:

Stage 1. Committee of the Whole (29 May to 13 June): to consider the Virginia resolutions and report them, as revised, to the Convention;

Stage 2. Report of the Committee of the Whole (15 June to 26 July): to consider the resolutions of the Report and refer them, as revised, to the Committee of Detail;

Stage 3. Report of the Committee of Detail (6 August to 10 September): to consider the Articles of the Report and refer them, as revised, to the Committee on Style;

Stage 4. Report of the Committee on Style (12-17 September): to revise the Articles of the Report and adopt the Constitution.

The drama of events on Presidential election was that in Stage 1 the nationalistic Virginia proposal was adopted 8-2 (roll call 12, I, 79) but near the end of Stage 3 it was rejected 2-8 (roll call 445, II, 508) with one divided, and a separation of powers proposal was adopted 9-2 (roll call 457, II, 520). In brief, the course of that remarkable reversal was: In Stage 1 the separationists offered only minor opposition. In Stage 2, although nationalists easily defeated a motion for popular election, the separationists responded with a clever rhetorical and heresthetical attack. Then they coalesced with the small-state interest, fresh from its triumph on the equality of states in the Senate, in support of an electoral college chosen by state legislatures. This motion passed, but then the nationalists came back (with support from delegates from distant states) and displaced the college with the original Virginia method. Thus ended Stage 2. But in Stage 3, after initial failures for popular election and for electors, the matter was referred to a Committee of Eleven, composed mostly of separationists, including especially G. Morris. Its report was the substance of our present electoral college, which satisfied the small state interest because election was initially to be in a college chosen by state legislatures and ultimately in the Senate, which satisfied the delegates from distant states because a state's electors were to meet in the state capital, and which satisfied, most of all and fundamentally, the separationists because it avoided election by the national legislature. A diehard nationalist motion to substitute the Virginia proposal for the college failed

decisively, and the college was adopted by a large majority. It, of course, survived with minor revisions into Stage 4 and the Constitution as adopted.

The Method of Popular Election

The separationists probably preferred some kind of popular election, either direct or by electors. But they could never muster enough support for such proposals on their own, even though they tried four times, so they were inspired both to launch a rhetorical and heresthetical attack and to coalesce with the small state interest. Thus, the first step along the road to the adoption of the electoral college is the repeated failure of both kinds of popular election.

Although support for popular election increased over the summer, as indicated in Table 1 (i.e., from roll call 11 to roll call 359), it could not ultimately win, as indicated in roll call 361. Why not? The short answer is, I think, that the arguments for it simply were not persuasive for the majority who found it distasteful. That it was distasteful even its most convinced proponents recognized. Wilson, for example, introduced his motion (roll call 11) with the admission that he was "almost unwilling to declare" his preference because he was "apprehensive that it might appear chimerical" (I, 80). As for others, some

thought popular election unwieldy (Butler (S.C.), II, 112; King (Mass.), II, 56); others thought the people incapable of judging executive talent (Sherman (Conn.), II, 29; Williamson (N.C.): "There was the same difference between election . . . by the people and by the legislature, as between an appointment by lot, and by choice" II, 32; Mason (Va.): "It would be as unnatural to refer the choice of a Chief Magistrate to the people, as it would, to refer a trial of colours to a blind man" II, 31; and still others feared the people would be misled by demagogues (C. Pinckney (S.C.), II, 30; Mason, II, 119; Gerry (Mass), II, 57, where the typical demagogues are on the left, i.e., the Shaysites who turned out Governor Bowdoin for doing "his duty," and II, 114, where the typical demagogues are on the right, i.e., the Cincinnati). But probably the most telling argument was uttered by Madison, speaking ostensibly in favor of popular election: "the right of suffrage was more diffusive in the Northern than the Southern states, and the latter could have no influence in the election on the score of the Negroes" (II, 57). The effect of this viewpoint is seen in the fact that North Carolina, South Carolina, and Georgia never voted for popular election and in the fact that Ellsworth immediately picked up on Madison's reiteration of his argument, saying that the "objection from different sizes of states was unanswerable" (II, 111).

Table 1. Motions for Popular Election of the President

| Date and Stage | Roll Call Number and Page | Movers | Motion | Outcome | Yea | Nay | Divided |
|-------------------|---------------------------|----------------------|---|-------------------------------|-----------------------------|---|------------|
| 2 June Stage 1 | 11 I, 79 | Wilson | Electors, popularly chosen in districts | 2-7-1 (N.H., N.J. absent) | Pa., Md. | Mass., Conn., Del., Va., N.C., S.C., Ga. | N.Y. |
| 17 July Stage 2 | 165 II, 24 | G. Morris | Citizens of U.S. | 1-9 (N.H., N.Y. absent) | Pa. | Mass., Conn., N.J., Del., Md., Va., N.C., S.C., Ga. | |
| 24 August Stage 3 | 355 II, 399 | Carroll Wilson | People | 2-9 (N.Y. absent) | Pa., Del. | N.H., Mass., Conn., N.J., Md., Va., N.C., S.C., Ga. | |
| 24 August Stage 3 | 359 II, 399 | G. Morris Carroll | Electors chosen by people of several states | 5-6 (N.Y. absent) | Conn., N.J., Pa., Del., Va. | N.H., Mass., Md., N.C., S.C., Ga. | |
| 24 August Stage 3 | 361 II, 399 | G. Morris | Electors | 4-4-2 (Mass., N.Y. absent) | N.J., Pa., Del., Va. | N.H., N.C., S.C., Ga. | Conn., Md. |

On the other side, there was very little to recommend popular election. The best argument was practical: that it would guarantee the election of a person of "general notoriety," "continental reputation," and "distinguished character," polite references to Washington who was sitting up front of the room (by Wilson, I, 68, G. Morris, II, 29, and Madison, II, 57, and II, 111). But the delegates were, of course, practically certain that Washington would be offered the office whatever the method, so this was far from a conclusive argument.

Relatively few persons can be identified as favoring popular election. From quotations in Madison's *Notes* we know about: Wilson, G. Morris, Madison, Carroll (Md.), Dickinson (Del.), Franklin (Pa.), and possibly King (Mass.). Beyond that we know that Jenifer (representing Maryland by himself) voted yea on vote 11, but apparently he then changed his mind, because Maryland voted nay on votes 165, 355, and 359. Had Jenifer voted yea on any of these, his vote with Carroll's would have divided Maryland, as it probably did on vote 361. We also know that Hamilton must have voted yea on vote 11—on which New York was divided—because only he and Yates then represented New York, and Yates must surely have voted nay. But the New Yorkers went home before any other votes in Table 1 occurred. Dickinson must have persuaded at least two others from Delaware to vote yea on 24 August, although the record of Delaware is erratic on that day. Morris, Wilson, and Franklin must have been joined consistently by at least one other from Pennsylvania. And for votes 359 and 361 Madison must have persuaded Blair and Washington, because surely Mason and Randolph were too devoted to the Virginia plan to approve popular election. Connecticut also voted yea on 359 and was divided on 361, which means that Sherman and Johnson once agreed and once split on a yea vote. Finally, on 24 August, New Jersey was represented by Brearley, Dayton, and Livingston, at least two of whom must have voted yea on 359 and 361. Altogether, then, at its best showing, no more than about 14 to 20 delegates (out of 42 then in Philadelphia) approved of popular election. These were concentrated in four delegations: Pennsylvania, Delaware, Virginia, and New Jersey. Furthermore, it is likely that delegates from Connecticut and New Jersey, who voted for electors but not for direct popular election, were mainly interested in electors as a way to increase the influence of small states and only incidentally supporters of the extreme separationist doctrine. If so, no more than 11 to 17 favored popular election itself.

As against these, we know, by inference from Madison's *Notes* and from the number present in

each delegation, the number required for the delegation to vote, and the vote actually cast, that toward the end of the summer two of the five delegates from Virginia, two of the three from Massachusetts, three of the four from Maryland, and all the delegates from New Hampshire, North Carolina, South Carolina, and Georgia were solidly against popular election in any form. This is a total of at least 19 delegates controlling at least 6 of the 11 delegations. Clearly, the method of popular election could not have been adopted.

The Rhetorical Attack: "Intrigue"

My count, arrived at by immersion in detail, was immediately evident to the separationists. Once aware of their shortage of votes—on 17 July when the Convention took up the election of the executive in Stage 2—they responded with the argument from the doctrine of the separation of powers. G. Morris was first: "If the Executive be chosen by the Natl. Legislature, he will not be independent on it; and if not independent, usurpation & tyranny on the part of the Legislature will be the consequence" (II, 31). Others reiterated his theme: G. Morris (Pa.) himself: II, 52, 103-104, 112, 500; Madison (Va.), by then a convert to the separationist cause: II, 34-35, 56-57, 109; McClurg (Va.): II, 36; King (Mass.): II, 67; Wilson (Pa.): II, 102-103; and Dickinson (Del.): II, 114.

The structure of this argument is the inference of an institutional form from an accepted principle of philosophy. Such abstract arguments are not universally convincing among practical men of affairs. More persuasive, probably, are simple analogies with well-known situations that the auditors agree are undesirable. Exactly such an analogy was available in the widely accepted proposition that legislative election of executives involved "intrigue." By "intrigue" the framers probably meant no more than maneuvering to form cabinets in fragmented parliamentary systems. (The one concrete example was G. Morris's discussion of the intrigue by which, in 1784, Pitt came to office by defeating Fox's India bill (II, 104).) This now-ordinary behavior is, however, what the framers found distasteful because it seemed to place office above principle, and hence, for the separationists, it was an appropriate symbol of the evil in legislative election.

That many framers disapproved of parliamentary "intrigue" cannot be doubted. Of course the separationists referred to it often, gradually substituting Morris's striking phrase "cabal and corruption": G. Morris (Pa.): II, 31, 103-104, 112, 403; "cabal and corruption" II, 500, 501; Madison (Va.): II, 109-111; Wilson (Pa.): II, 30, 32, 103, 501. But others, who were not separa-

tionists, also seemed fearful of intrigue and cabal, which indicates the probable effectiveness of this analogy: Mason (Va.), who used the word "intrigue" in the first discussion of election of the executive: I, 68, 1 June; I, 86; II, 500; Gerry (Mass.): I, 80, 175; Randolph (Va.): II, 54-55; Butler (S.C.): II, 112, 501; Williamson (N.C.): II, 113, 501; and Hamilton (N.Y.): II, 524-525. At the end of the Convention, G. Morris identified the "principal advantage" of the electoral college as "taking away the opportunity for cabal." Presumably, he thought this was the most important rhetorical theme, not only for himself but also for his auditors.

The Heresthetical Attack: McClurg's Motion

Although it doubtless was rhetorically desirable to reiterate the threat of intrigue, it probably appeared even better to link "intrigue" logically with the Virginia proposal. The separationists accomplished this by what seems a consciously heresthetic maneuver. (In this connection the distinction between rhetoric and heresthetic is that rhetoric involves converting others by persuasive argument, whereas heresthetic involves structuring the situation so that others accept it willingly.) Here the maneuver was to induce acceptance of the proposition that, if elected by the legislature, then, in order to avoid intrigue, the executive should have a long term and be ineligible for a second one. Mason himself had assumed the linkage when, in Stage 1, he proposed a seven-year term to minimize "a temptation . . . to intrigue" (I, 68). Then in Stage 2, just after the rejection of popular election, G. Morris (Pa.), Houston (Ga.), and McClurg (Va.) conducted a remarkable heresthetic maneuver to reimprint the stigma (II, 32-35).

On 17 July the Convention unanimously reaffirmed (II, 24, roll call 167) the resolution (from Stage 1) "to be chosen by the National Legislature" and it was in order to consider "for the term of seven years." Houston moved and Morris seconded to postpone, and the Convention approved. Then "to be ineligible a second time" came up in order, and Houston moved and Sherman (Conn.) seconded to strike it out. Morris argued that ineligibility "destroyed the great motive to good behavior," as if "saying to him, make hay while the sun shines." Ineligibility was struck out, 6-4 (II, 24, roll call 168), and "for a term of seven years" was again taken up, presumably pursuant to Houston's first motion. McClurg moved and Morris seconded to strike out "seven years" and insert "good behavior." This motion failed, 4-6 (II, 24, roll call 169), but it certainly stirred things up.

Implying, as it did, life tenure, it shocked McClurg's Virginia colleagues, especially since Washington was the only serious candidate. Mason sharply rebuked McClurg, prophesying that, if adopted, his motion would lead to hereditary monarchy and revolution. Madison, on the other hand, was embarrassed and felt obliged to defend McClurg by showing that his motion embodied the separation of powers, even though it might not be the "proper" expedient.⁴ This was the first time Madison joined the separationists. It seems certain that respect for McClurg forced him to speak out.

The main effect, however, was that McClurg's motion embedded intrigue in the Virginia proposal: If legislative election meant repeated elections with intrigue at each one, then the only way out for those fearful of intrigue was life tenure with only one election. If the Morris-Houstoun-McClurg stratagem did nothing else, it forced a general reconsideration on 19 July.

Were Houstoun's and McClurg's motions consciously heresthetical? Madison thought that McClurg's motion was contrary to his true taste and thus wholly a maneuver. Certainly his motion was no threat of monarchy without the prior elimination of ineligibility, which is what Houstoun's motions accomplished. I infer, therefore, that McClurg's motion was part of a planned sequence that included Houstoun's as well. (Observe that the reversal of motions from term length first and ineligibility second to ineligibility first and term length second was necessary to delete ineligibility. Almost certainly, in regular order, with a long term adopted first, the Convention would not have deleted ineligibility. Hence Houstoun's motions were essential both to consider term length on its own merits—which may be all that Houstoun intended—and, as Morris probably intended, pave the way for McClurg's motion, which was entirely appropriate and made sense once it appeared likely that the term would be short and that there would be "intrigue" at each election.) Of course McClurg may simply have stumbled into Morris's plot, although it is equally likely that Morris may have exploited McClurg's innocence and Houstoun's simple intention to debate the length of term on its own merits. From the omnipresence of Morris in the

⁴Adding a later footnote (doubtless to protect himself from a charge of monarchical sympathies), Madison explained that he spoke "to aid in parrying animadversions likely to fall on . . . Dr. McClurg, for whom J. M. has a particular regard and whose appointment to the Convention he had actively promoted. The Doctr. though possessing talents of the highest order, was modest and unaccustomed to assert them in public debate" (II, 34).

whole event—seconding Houstoun's first motion and McClurg's, speaking for Houstoun's second motion and McClurg's—I suspect, without chance of verification, that Morris planned the whole sequence. (It is less likely Houstoun did, for he seldom participated, and Sherman seems to have happened into the scene out of an ideological preference (I, 68) for reelection as a reward.)

Whoever may have been the master heresthetician, we know from Madison's footnote, inserted, it is true, after 1787, that he thought McClurg's motion was consciously heresthetic: "The probable object of this motion was merely to enforce the argument against the re-eligibility of the Executive" (II, 33). McClurg himself implied the same in the debate, saying that, after ineligibility was removed (by Houstoun's motion) the "only mode left for effecting" independence was tenure during good behavior (II, 36). Actually, the heresthetical intent was probably deeper: to stigmatize legislative election as necessitating either ineligibility or monarchy. In a contemporary footnote appended to the record of the vote on McClurg's motion, Madison sensed this deeper heresthetic: "This vote is not to be considered as any certain index of opinion [i.e., in favor of 'during good behavior' or monarchy], as a number in the affirmative [four states, New Jersey, Pennsylvania, Delaware, and Virginia] probably had it chiefly in view to alarm those attached to a dependence of the Executive on the Legislative, & thereby facilitate some final arrangements of a contrary tendency" (II, 36). Later he added that "the avowed friends" of "during good behavior" were no more than three or four. If so, given that at least ten delegates had to vote yea in the four supporting states, clearly at least six delegates—including, of course, Madison himself who was necessary for a yea vote in Virginia—voted contrary to their true tastes to bring about an advantageous parliamentary situation. They succeeded for their heresthetical tactic certainly "facilitated" "contrary arrangements."

Rhetorical and Heresthetical Success

Two days later the Convention reconsidered ineligibility. This discussion led to, and subsequent decisions revealed, the rhetorical success of associating legislative election with the single term. On 17 July the currently adopted method was "by the national legislature," and the Convention retained the seven-year term (4-6, II, 24, roll call 170). But on 19 July, after the method of electors had been adopted, the Convention rejected both ineligibility for a second term (2-8, II, 51, roll call 184) and a seven-year term (3-5, with two divided), finally settling on six years (II, 51, roll calls 185, 186). Presumably, with legis-

lative election out, protections against intrigue were no longer needed. When, however, "by the national legislature" was reinstated on 24 July, both the seven-year term and ineligibility were also reinstated (7-3, with one absent, II, 118, roll call 224). The return of legislative election apparently required the return of the protections. And when the electoral college had been finally adopted, the Convention twice rejected, by large majorities, motions for a longer-than-four-year term, presumably because the college obviated the need for protection against intrigue (II, 520, roll calls 453, 454).

Rather complacently and perhaps slyly, Wilson, who was surely one of the architects of the separationists' rhetoric, observed: "It seems to be the unanimous sense that the Executive should not be appointed by the Legislature, unless he is rendered ineligible a 2d. time" and he used this association to urge popular election, which would allow second terms (II, 56, 19 July). Wilson was almost, but not quite, correct about unanimity. Delegates on both sides did agree that legislative election implied ineligibility for a second term:

Supporters of legislative election: Mason (Va.): II, 112, 119 ("a second election ought to be absolutely prohibited"); Randolph (Va.): II, 54-55; L. Martin (Md.): II, 52, 58, 101; Williamson (N.C.): II, 58, 100-101, 501; Rutledge (S.C.): II, 57; C. Pinckney (S.C.): II, 111-112; and Butler (S.C.), ultimately a separationist: II, 112.

Separationists: G. Morris (Pa.): II, 54, 500; McClurg (Va.): II, 33; Wilson (Pa.): II, 56, 501-502; Hamilton (N.Y.): II, 524; Gerry (Mass.): II, 57; II, 100-102, 112.

Not all the delegates were, at the time Wilson spoke of unanimity, possessed of his sense of it. Four New Englanders refused the association because they, like G. Morris, believed strongly in re-eligibility as a reward. Ellsworth (Conn.) specifically denied that ineligibility was a "natural consequence of his being elected by the Legislature" (II, 101), and King (Mass.) elaborated by quoting Sherman (Conn.) (I, 68) "that he who has proved himself most fit for an Office, ought not to be excluded from holding it" (II, 55). Strong (Mass.) offered a different argument when he "supposed that there would be no necessity, if the Executive should be appointed by the Legislature, to make him ineligible a 2d. time; as new elections of the Legislature will have intervened; and he will not depend for his 2d. appointment on the same sett of men as his first was recd. from" (II, 100). Strong's argument was probably not persuasive, however, because most framers worried about intrigue for future election, not intrigue in the past. By the end of the summer, even Sherman had accepted the entire rhetorical stance of the separationists. Originally he had

thought that "an independence of the Executive on the supreme Legislative, was . . . the very essence of tyranny" and "he was against throwing out of office the man best qualified" (I, 68). But as a member of the Brearley committee, he defended the electoral college as a way "to get rid of ineligibility, which was attached to the mode of election by the Legislature, & to render the Executive independent of the Legislature" (II, 499). Surely this is a remarkable instance of persuasion. It was accomplished by rhetorically and heretically associating intrigue with legislative election and then by associating legislative election with no second term. But although Sherman's capitulation is especially striking, the previously cited roll calls at the end of Stage 2 (184, 185, 186, and 224) indicate that Sherman's reversal was not unique.

The beauty of this whole maneuver is that the separationists used the agreement they shared with the legislative electionists about intrigue to persuade the New Englanders of the relevance and danger of intrigue. Having done so, the separationists used the support of the New Englanders to eliminate entirely election by the legislature. Altogether, G. Morris, Wilson, and Madison deserve great credit for their rhetorical success, but mostly, I suppose, Morris, for he was a dominant figure both in debate and in committee.

Coalition with the Small State Interest

Brilliant as was the rhetorical success, it was not enough to win. The separationists also needed allies. So I now turn to an analysis of their alliances.

Once the separationists brought about reconsideration on 19 July, King (Mass.) revived the proposal for popularly chosen electors and Paterson (N.J.) suggested that electors be chosen on the ratio of one for the smallest state and three for the largest. Ellsworth (Conn.) put Paterson's suggestion as a motion to strike out "by the national legislature" and to insert "electors appointed by the Legislatures of the States in the following proportion: One person from each State whose numbers shall not exceed 100,000—*Two* from each of the others, whose numbers shall not exceed 300,000—and *Three* from each of the rest." Temporal considerations are important for understanding this motion. Three days earlier (16 July), the Convention had voted (roll call 156) for equal representation in the Senate, doubtless its most important decision because it ensured that the small states would stay in the Convention and that the Constitution would be written. The vote was extremely close and pitted the delegates of the small states against the main intellectual leadership from Pennsylvania, Virginia, and South

Carolina. Paterson (N.J.) had been the floor leader of the small states—or so I infer from Madison's *Notes* (II, 18). Now, in his euphoria, he was, with Ellsworth, apparently intending to push the small state interest even further by providing a relatively large voice for them in choosing the executive.

There was a great difference on 19 July from 16 July, however. On the subject of equal representation in the Senate, Wilson (Pa.), Morris (Pa.), Madison (Va.), Mason (Va.), Randolph (Va.), and Rutledge (S.C.) had fought to the bitter end. Indeed, on 17 July, when the large-state cause was wholly lost, G. Morris opened daily business with a motion to reconsider roll call 156, but he did not even get a second. In a pathetic aside, Madison remarked: "It was probably approved by several members, who either despaired of success, or were apprehensive that the attempt would inflame the jealousies of the smaller States" (II, 25). Morris, Wilson, and Madison were politically resilient, however, and on 19 July they immediately allied their delegations with the small state bloc, presumably because that was the only way to beat legislative election. In Table 2 roll calls 156 on representation and 182 on electors are set forth for comparison. The main changes from 156 to 182 are that Virginia and Pennsylvania joined the small-state side and North Carolina left it for the legislative election bloc. This must have been easy for North Carolina. Only four delegates were present, and only three voted yea on 156. Hence only two were necessary to join Spaight for the nay vote on 182. Williamson spoke against 182, so a nay on 182 needed only the conversion of the totally silent A. Martin or the almost silent Davie.

Unfortunately for the separationists, the small state-separationist coalition was disrupted by the interests of distant states. Butler (S.C.) (II, 59), Williamson (N.C.) (II, 59, 526), Spaight (N.C.) (II, 95, 99, 526), and Houstoun (Ga.) (II, 95, 99) complained about the cost of sending electors to a capital in the Middle Atlantic states. An odd concern, so it seems today. Gerry (Mass.) thought so too (II, 100). But both New Hampshire and Georgia had difficulty that summer in financing their delegates. So on 23 and 24 July Houstoun moved and Spaight seconded the reinstatement of legislative election. The Convention approved (7-4, II, 98, roll call 215). As is apparent from Table 2, five of the seven states that voted yea are geographically peripheral. New Jersey and Delaware are, however, pivotal in the change from 182 to 215, and I can only guess why. Three New Jersey delegates were present in late July (Brearley, Livingston, and Paterson, III, 588; IV, 72), and the delegation did not have the required three to vote on 18, 21, and 23 July. My guess is that the delegation was split 2-1 on the method of

election, and one person changed sides on vote 215, perhaps in deference to peripheral states. As for Delaware, no explanatory evidence exists, although I suspect, from its otherwise erratic voting, the same kind of absence and individual change as in New Jersey.

The reinstatement of legislative election did not, however, settle the issue. The separationists and others continued to offer alternatives. Wilson (Pa.) proposed a method of lot, but this was clearly heresthetic to emphasize his hostility to legislative election, and he seconded a motion to postpone (II, 105-106). Ellsworth (Conn.) offered a compromise: legislative election, except when an incumbent was re-eligible, in which case electors would elect. This failed 4-7 on roll call 218 (Table 2), with the previous blocs splitting up in curious ways. C. Pinckney (S.C.) offered a motion restricting the executive to six years' service out of

any twelve. This too may have been intended as a compromise, but it failed (II, 108, roll calls 219 and 220). On 26 July Mason spoke powerfully for legislative election and moved reinstatement of "seven years" and "ineligible a second time." This passed 7-3 (roll call 224) and was followed immediately by reaffirmation of the whole resolution 6-3, with one divided and one absent (roll call 225). It is not hard to explain roll calls 224 and 225. The majority was made up of states devoted to legislative election, peripheral states, and New Jersey with its wobbly and knife-edge majority. Massachusetts was divided or evasive, as on most of these votes. Virginia, however, shifted from separationist to legislative election for easily explicable reasons: Its separationist majority on votes 182 and 215 doubtless consisted of Madison, McClurg, Washington, and Blair against Mason and Randolph. But McClurg went home before

Table 2. Indecision at the End of Stage 2

| Date and Stage | Roll Call Number and Page | Movers | Motion | Outcome | Yea | Nay | Divided |
|-----------------|---------------------------|------------------|---|-------------------------------|--|--|---------|
| 16 July Stage 2 | 156 II, 15 | | To accept the report for equal representation in upper house | 5-4-1 (N.H., N.Y. absent) | Conn., N.J., Del., Md., N.C. (small state bloc) | Pa., Va., S.C., Ga. (large state bloc) | Mass. |
| 19 July Stage 2 | 182 II, 51 | Ellsworth | To strike out "by the national legislature" and insert "by electors in the ratio of . . ." | 6-3-1 (N.H., N.Y. absent) | Conn., N.J., Pa., Del., Md., Va. (small state and separationist bloc) | N.C., S.C., Ga. (legislative election bloc) | Mass. |
| 24 July Stage 2 | 215 II, 98 | Houstoun Spaight | To strike out "by electors" and insert "by the national legislature" | 7-4 (N.Y. absent) | N.H., Mass., N.J., Del., N.C., S.C., Ga. (distant states and legislative election bloc) | Conn., Pa., Md., Va. (small states and separationists) | |
| 24 July Stage 2 | 218 II, 108 | Ellsworth | To add "except when the magistrate last chosen . . . in which case the choice shall be by electors" | 4-7 (N.Y. absent) | N.H., Conn., Pa., Md. | Mass., N.J., Del., Va., N.C., S.C., Ga. | |
| 26 July Stage 2 | 224 II, 118 | Mason | To insert "for a term of seven years, to be ineligible a second time" | 7-3 (Mass., N.Y. absent) | N.H., N.J., Md., Va., N.C., S.C., Ga. | Conn., Pa., Del. | |
| 26 July Stage 2 | 225 II, 118 | | To agree to the resolution on election of the executive | 6-3-1 (Mass., N.Y. absent) | N.H., Conn., N.J., N.C., S.C., Ga. | Pa., Del., Md. | Va. |

the votes of 26 July, and Blair switched between votes 215 and 225. (Blair was the swing vote in Virginia, and we know almost nothing else about him. Of the six Virginia votes for which Madison records the detail, Randolph and Mason were always opposed to Madison. Washington joined Madison four times out of five, and McClurg joined him two out of two. But Blair sided with Randolph and Mason thrice and with Madison thrice.)

Thus ended Stage 2 with a victory for legislative election, although the separationists had raised considerable doubt about its propriety.

Revelation of a Cycle

In Stage 3, on 24 August, when the Convention again took up the method of election, Rutledge (S.C.) immediately moved to elect by joint ballot of the two houses. This was great luck for the separationists. Rutledge had been a diehard opponent of equal representation in the Senate (roll call 156, Table 2), and this motion was doubtless an oblique counterattack to regain part of what the large states had lost on 16 July.

The New Jersey and Connecticut delegates responded rigorously, playing the role of leaders of the small states—as they had on the issue of representation in the Senate—even though by 24 August the original captains, Paterson and Ellsworth, had gone home. Sherman (Conn.) objected that a joint ballot would deprive the “States represented in the *Senate* of the negative

intended them in that house” (II, 401); and Dayton (N.J.) said he “could never agree” because a “joint ballot would in fact give the appointment to one house.” Brearley (N.J.) supported them and Wilson (Pa.), Madison (Va.), and Gorham (Mass.) defended Rutledge. Here flared up, with immediate intensity, a reflection of the great dispute on representation: Pennsylvania, Virginia, Massachusetts, and South Carolina against Connecticut and New Jersey. When put to a vote, Rutledge’s motion passed 7-4 (roll call 356, Table 3). Then Dayton moved that, on the joint ballot, each state have one vote, which failed 5-6 (roll call 357, Table 3). Note also in Table 3 that Dayton reactivated the small state bloc of 16 July. (On roll call 356 Delaware inexplicably voted against its interest, but on 357 it had rejoined the bloc. Only New Hampshire, not present on 16 July, voted with the big states, which Langdon (N.H.) explained was owing to its experience of deadlock between the Houses in gubernatorial elections.)

G. Morris, ever the opportunist and an exceptionally adroit parliament man, took the chance to reactivate the coalition of small states and separationists. He moved for a combination of the electors espoused by small states and the popular election espoused by separationists. Morris lost (roll call 359, Table 3), but he reactivated the coalition he and Ellsworth had formed in Stage 2. Pennsylvania and Virginia—presumably Madison had won back Blair—joined Connecticut, New Jersey, and Delaware. Only Maryland is

Table 3. The Approach to the Committee on Postponed Matters: Stage 3

| Date | Roll Call Number and Page | Movers | Motion | Outcome | Yea | Nay | Divided |
|-----------|---------------------------|----------------------|--|-------------------------------|---|-----------------------------------|------------|
| 24 August | 356 II, 399 | Rutledge | To insert “joint” before “ballot” | 7-4 (N.Y. absent) | N.H., Mass., Pa., Del., Va., N.C., S.C. | Conn., N.J., Md., Ga. | |
| 24 August | 357 II, 399 | Dayton Brearley | To insert “each State having one vote” | 5-6 (N.Y. absent) | Conn., N.J., Del., Md., Ga. | N.H., Mass., Pa., Va., N.C., S.C. | |
| 24 August | 359 II, 399 | G. Morris Carroll | To be elected by electors chosen by the people | 5-6 (N.Y. absent) | Conn., N.J., Pa., Del., Va. | N.H., Mass., Md., N.C., S.C., Ga. | |
| 24 August | 360 II, 399 | Broome | To commit last two clauses of Article X, section 1 | 5-5-1 (N.Y. absent) | N.J., Pa., Del., Md., Va. | N.H., Mass., N.C., S.C., Ga. | Conn. |
| 24 August | 361 II, 399 | G. Morris | To be elected by electors | 4-4-2 (N.Y., Mass. absent) | N.J., Pa., Del., Va. | N.H., N.C., S.C., Ga. | Conn., Md. |

out of place. (I think Jenifer left the room: on 356 and 357 at least three Maryland delegates voted with the small states. On 359—if Jenifer was out—McHenry and Martin probably outvoted Carroll. On 360 Maryland was back with the small states, and on 361 Maryland divided, perhaps with Carroll and Jenifer together.)

Then Dayton (N.J.) moved to postpone, which failed by voice vote, and Broome (Del.) moved to refer to a committee, which failed in a tie (roll call 360, Table 3), with Maryland back in place and Connecticut inexplicably divided. Doubtless encouraged by the tie vote on 360, Morris moved for electors without specifying how they would be chosen. This too resulted in a tie (roll call 361, Table 3). The Convention, now warned of deadlocks, postponed consideration and later consigned the issue to a committee on postponed matters (II, 463, 31 August), which invented the electoral college.

The route for reopening the issue was the revelation of a voting cycle. Let: *a* stand for “legislative election without joint ballot,” *b* stand for “election by electors,” *c* stand for “legislative election with joint ballot.” Then observe:

- a* beat *b*, in roll calls 215 and 225 (Table 2), Stage 2,
- b* tied with *c*, in roll call 361 (Table 3), Stage 3,
- c* beat *a*, in roll call 356 (Table 3), Stage 3.

Had Rutledge not brought up the joint ballot, this cycle would not have been revealed—indeed, would not have existed. Legislative election would probably have survived. Once revealed, however, the cycle appeared as a deadlock, which is the way cycles are usually interpreted by those who do not know about social choice theory. However interpreted, the significance of the cycle that Morris revealed was that it gave him another chance in the committee.

Committee on Postponed Matters

The delegates elected to the Committee on Postponed Matters were almost entirely separationists or their allies.⁵ G. Morris (Pa.) and Madison (Va.) were the most vocal separationists. King (Mass.), Dickinson (Del.), and Carroll (Md.) had usually supported them, when others from their states had not. Sherman (Conn.) and Brearley (N.J., the chairman) were at this time the spokesmen for the small state interest. As for the others,

for each state the one elected was the one most likely to support the coalition: Gilman (N.H.) rather than Langdon, who had spoken for the joint ballot; Baldwin (Ga.) rather than Few, who never uttered a word, according to Madison's *Notes*; Butler (S.C.), who had spoken of “intrigue” rather than Rutledge or C. Pinckney, highly vocal supporters of legislative election; and Williamson (N.C.) who feared “intrigue,” rather than Spaight, who seconded Houstoun. Thus the separationist-small state coalition had at least seven sympathizers, and perhaps ten, because Baldwin, Gilman, and possibly Butler voted for the committee report.⁶ Only Williamson persisted in opposition.

As a result the committee tailored a plan to satisfy all those who might oppose legislative election. For distant states, electors were to meet in the states, thereby saving a trip to the capital. For those in favor of popular election, electors were to be chosen in the manner prescribed by state legislatures, which allowed for popular election. For the separationists, the college avoided the legislature entirely, if any candidate got a majority. For the small state interest, there were two provisions: First, each state was to have as many electors as Representatives and Senators, which gave the small states an edge. Second, if no candidate had a majority of electoral votes, the Senate (wherein states were equal) was to choose from the five highest.

It is uncertain just what the framers expected about election in the Senate. Some separationists accurately forecast that one candidate would usually get an electoral majority (G. Morris, II, 512), because, as Madison pointed out, it was to the advantage of large states to avoid decision in the Senate (II, 513) and because, as Baldwin pointed out, “increasing intercourse . . . would render important characters less and less unknown” (II, 501). On the other hand, some supporters of the committee plan (Sherman, II, 512-513; King, II, 514) apparently believed the Senate would usually elect, perhaps as often as “nineteen times out of twenty,” as legislative electionists like Mason (II, 512) and C. Pinckney (II, 511) believed. On balance, most people anticipated just what would benefit them, a systematic bias that rendered the plan almost universally appealing.

⁶Georgia, with two delegates, voted yea, so Baldwin did. New Hampshire, with two delegates once voted for (roll call 457, II, 520) and once was divided (roll call 445, II, 508), from which I infer Gilman voted yea against Langdon and then converted him. South Carolina voted nay; but if C. C. Pinckney joined Rutledge and C. Pinckney, then Butler could have voted yea without a trace.

⁵Probably the delegates voted individually rather than by states in electing committees, thereby giving the large delegation from Pennsylvania an advantage with which it significantly affected the outcome here.

Consequently, the plan survived on the floor without substantial emendation and was twice approved by a large majority: (a) on a motion by Rutledge to postpone to take up legislative appointment (roll call 445, II, 508), which failed 2-8-1, with New Hampshire divided and the Carolinas nay; (b) on the report of the committee (roll call 457, II, 520), which passed 9-2, with the Carolinas dissenting.

One change was adopted on the floor: to relocate the residual power to elect from the Senate to the House, voting by states. This preserved the advantage for the small states and satisfied some who thought the Senate might be too powerful. Otherwise the committee plan stuck. It is astonishing that a compromise put together over a weekend to satisfy diverse, parochial, and temporary interests has, with only slight modification by the Twelfth Amendment, served adequately for two centuries.

We know nothing for certain about how this compromise was made, but I infer that G. Morris put it together. He was an active and dominating floor leader,⁷ whose colleagues respected his ability,⁸ who creatively suggested deals,⁹ and who knew how to abandon hopeless positions.¹⁰ So he was precisely the kind of person to take charge of a committee. Furthermore, on the floor he acted as committee spokesman, giving "the reasons of the Committee and his own" (II, 500). Even more suggestive, however, is his response to Wilson's criticism of the plan for ultimate election in the Senate. Through Madison's emotionless precis, one still senses Morris's sharp resentment, as a proud and offended author, of the remarks of a colleague from whom he expected support: "Mr. Govr. Morris expressed his wonder at the observations of Mr. Wilson so far as they preferred the plan in the printed Report [i.e. of the Committee on Detail] to the new modification of it before the House, and entered into a comparative view of

the two, with an eye to the nature of Mr. Wilson's objections" (II, 523).

But although we can only guess at Morris's role, we know that the report took the supporters of legislative election by surprise. Randolph (Va.) and C. Pinckney (S.C.) "wished for a particular explanation . . . of the reasons for changing the mode" (II, 500). Morris responded. But what he could not tell them were facts he probably did not fully understand himself: that the Virginia proposal was about to be finally replaced because of the separationists' rhetorical and heresthetical skill and persistence, because of the cycle generated by Rutledge's unwise motion, and because of the clever appeal to diverse interests put together in the proposal for the electoral college.

Generalizations about Heresthetics

I undertook this interpretation of the origin of the electoral college in order to explicate political invention and the relation between creativity and social regularities. Now I extract the moral from my story.

In the static model of decision making, choice is made from a fixed set of alternatives. The dynamic process differs. The set of alternatives is not fixed, and the alternatives themselves change over time. In my example, only one alternative existed initially, many were invented during the course of "narrowing the alternatives," and the winning one was not created until most others were disposed of. Furthermore, *all* the continuing alternatives were changed in gross or subtle ways throughout the event. As shown in Table 1, the motion for popular election was never incarnated in the same words twice. The system of electors adopted on 19 July differed much from the college adopted on 6 September. Even the Virginia proposal was transformed. When Rutledge offered it against the electoral college on 5 September, it was changed by his idea of a joint ballot from simply a method of election, as it had been on 23 June or 26 July, to an expression of the power of the large states.

In my example, and probably in general, the set of alternatives is indefinitely large, and the continuing elements are constantly revised. This continuing creation is, of course, the artistic element of the dynamic world that differentiates it from the static model.

The setting for creation in this example was the composite of the desire to win and the expectation of losing. The separationists' intense will to win was demonstrated by their persistent invention of new forms of popular election and by their readiness to ally with the small state interest, even though they had lost to that interest on something much more important and painful. Their expecta-

⁷By Madison, *Notes*, we know he spoke more frequently than anyone else (Rossiter, p. 252).

⁸They chose him for committees more frequently, relative to expectations, than any other active delegate. (For him, the ratio of actual to expected committee membership was 2.8, for King 2.5, for Rutledge and Williamson 2.3.)

⁹He suggested the compromise on the slave trade and navigation laws (II, 374).

¹⁰In the debate on impeachment, he initially opposed it on separationist grounds as just another chance for "intrigue," but when Davie (N.C.), Wilson (Pa.), Mason (Va.), Franklin (Pa.), Madison (Va.), Gerry (Mass.), and Randolph (Va.) favored it and only two young men, C. Pinckney (S.C.) and King (Mass.), supported it, Morris quickly acknowledged his "opinion had been changed" (II, 64-68).

tion of losing on the presidency was demonstrated by the large majorities by which legislative election was adopted on roll calls 215 and 225 (Table 3). Even the one (disastrous) creation by the supporters of legislative election (namely, Rutledge's motion for a joint ballot) was immediately interpreted, not so much as a motion on the method of election (on which Rutledge was winning), but as a motion on the composition and authority of the Senate (on which Rutledge had lost). So creativity on both sides emanated from the will to win in the face of prospective loss.

I believe this motivation, so clear in my example, is probably quite general. The political world selects for people who want to win politically; that is, those who do not want to win are more likely than others to lose and thus be excluded from political decisions. (In my example McClurg, whom Madison thought something of an innocent, was so taken aback by the adverse reaction to his one heresthetical effort that he went sulkily home (II, 67).) Consequently, most of the people—and certainly most of the leaders—in the political system display the same kind of persistence as did G. Morris, Madison, Sherman, Rutledge, and others. In the Philadelphia Convention this persistence was layers deep: after Paterson and Ellsworth went home, Brearley and Dayton were just as determined in the small states' cause as their more significant colleagues had been. This more or less general motivation is, so I believe, what makes generalization about politics possible. Most participants have the same goal, namely, to win on whatever is the point at issue. Assuming they think seriously about how to achieve their goals, they may be expected to behave in similar ways.

This characteristic of political actors is the basis for the reconciliation, by rational choice analysis, between determinism and indeterminism. The combination of an open-ended set of alternatives with the presence of people motivated to win makes possible many generalizations about the process of winning. Both the size principle and the median voter principle, for example, depend on exactly these conditions: participants who are motivated to win and who creatively adjust alternatives to arrive at minimal winning coalitions (Dodd, 1976; Enelow & Hinich, in press; McKelvey, 1976, 1979; Riker, 1963; Riker & Ordeshook, 1972, chap. 11-12). So also other recent generalizations about political dynamics depend on these conditions (Kramer, 1977; McKelvey, Ordeshook, & Winer, 1978).

It seems to me that many more such generalizations are possible, which is why I recommend the study of heresthetics. We know, for example, almost nothing about the way alternatives are modified in political conflicts. Yet this kind of

heresthetical maneuver is how groups are forced into minimal winning coalitions and coalitions aimed at the median voter. In my example the separationists adopted a rhetorical stance and hammered at it until they were successful. They tested out alternatives, rejecting or exploiting them as appropriate. I suspect there are patterns of such behavior. Perhaps there are regularities in the way rhetorical positions are established, appeals, for example, to well-established references and symbols, like the separationists' appeal to well-established and hallowed principle (i.e., the separation of powers doctrine) and to a well-established argument (i.e., about the danger of intrigue in legislative election). Perhaps there are regularities in the way losers coalesce with defecting subsets of apparent winners, as separationists allied with the small state interest. Perhaps even there are regularities in the way apparent losers develop cycles and exploit them when revealed, as Morris developed and exploited a cycle out of Rutledge's motion for a joint ballot. The evidence from an anecdote like the one I have related is not, of course, enough to establish any generalization. But to me the evidence suggests there are underlying patterns which are worth looking for. There is no chance they will turn out to be a general equilibrium (Riker, 1980), but they may be partial equilibria or at least involve some repetitive events. And so, as retiring president, I commend this search to you.

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