

"States out of Nature:  
The Legislative Founding of Democracies"

Richard Bensei  
Department of Government  
Cornell University

E-mail: [rfb2@cornell.edu](mailto:rfb2@cornell.edu)

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All states (and most particularly all democratic states) have had a "founding," a moment in which sovereignty is originally claimed in the name of a new government. For thousands of years, the justification for this sovereign right to rule has turned upon the relation between what came before (in the period prior to the creation of a state) and what came after (the exercise of sovereign power following the founding). The period before the founding of a sovereign state has been commonly referred to as the "state of nature" and we will use that terminology here to refer to the state of affairs that precedes the erection of a new governmental order. The founding itself is the often highly ritualized moment in which a new sovereign state is created, marking the transition from the state of nature into government. And we will use the latter term, government, to refer to the routinization of the sovereign right to rule that follows a founding.

In classical political theory, a founding is legitimate when the characteristics of a state's creation correctly relate the exercise of sovereign power to the antecedent social conditions that formerly prevailed in the state of nature. Put another way, individual experience of those social conditions both empower and constrain the proper exercise of sovereignty because the latter is a remedy for the pathologies of anarchy. The formation of a state is thus no more than a cure, a cure that must properly address the pathologies of anarchy and nothing more. Regardless of what those pathologies might be and how the creation of sovereignty might cure them, the central contention is that a people universally prefer a properly constructed state to existence in the state of nature and, since this preference is universal, they will consent to its formation. In this paper, I will focus on this concept of consent, the voluntary assent of a people then existing in a state of nature to the creation of a sovereign state that henceforth will govern them.<sup>1</sup>

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<sup>1</sup>. One of the most striking characteristics of sovereign states is that they have always justified their right to rule in the name of something other than themselves, whether it be a religion, a nation, an immanent class destiny, or a democratic will. No state has ever justified its right to rule solely in the name of its own existence. Those states grounded in principles other than a democratic will have usually assumed consent on the part of their subjects. A theocracy, for example, commits its energies and purpose to the greater glory of God. As a byproduct, its subjects usually gain an enhanced opportunity to achieve salvation. Since the test of a theocracy's legitimacy

Most political philosophers working in this tradition have viewed this consent as taking the form of a "social contract" in which people recognize the sovereignty of a governing authority in return for specification of the ways in which that right to rule will be exercised. From this perspective, the most salient aspects of the state of nature are those that guide the drafting of this social contract. Given that the experiences of a people in the state of nature are what they carry into the founding, it is those experiences that most inform what they then would want to write into the social contract. And given that the consent of the people is a precondition for a legitimate founding, we would expect that the founding of a new sovereign state would be illegitimate unless those specifications, themselves drawn from experiences in the state of nature, were written into the social contract.

There is an unavoidable tension between how we might imagine those experiences in the state of nature and how those who actually had those experiences subjectively felt them. Most social contract theorists have imagined one particularly salient characteristic of the state of nature (e.g., social violence, emergent property relations, or communal identity) and made that characteristic the primary element in what they then postulated to be a properly formed agreement.<sup>2</sup> In this paper, I will only be concerned with foundings in which the subjective experiences of a people in a state of nature are allowed free rein with respect to the drafting of a social contract. In other words, I will only discuss foundings in which individuals freely interpret and act upon their individual experiences in collectively creating a sovereignty. These foundings are democratic in the sense that majorities made up of free individuals decide whether or not a new sovereignty is to be created and, if so, what kind of state it should be. Such foundings are almost universal in the modern world, at least as utopian pretension.

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is its conformity to God's will and since all of a theocracy's citizens can be assumed to wish salvation, there is simply little or no reason to ask whether or not those citizens consent to the founding of the state. While the founding of states under auspices such as religion are fascinating in their own right, the scope of this paper will be confined to those states whose legitimacy rests, in whole or in part, in their dedication to democratic principles. The foundings of such states always involve the formal consent of those who will be governed.

<sup>2</sup>. In a moment we will briefly consider Hobbes, Locke, and Rousseau as social contract theorists who both stress consent as necessary to a legitimate founding and then more or less strongly qualify the range of alternative states to which a people might consent.

### Organization of This Paper

The classical concepts of "consent," "social contract," and "founding" structure much of what we have practiced and continue to practice as politics. The most dramatic instances in which these concepts have come into play are, not surprisingly, events in which a governing authority has been created. I will briefly examine two such events: the signing of the Mayflower Compact in 1620 and the 1787 Constitutional Convention in Philadelphia. But there are many more prosaic instances in which these concepts shape politics. For example, every time a convention is convened in the United States to revise a state constitution, these concepts shape the roles the delegates assume as they first organize their assembly and then begin to deliberate. The rituals and decisions attending the convening of the lower houses of state legislatures and the United States Congress are similarly influenced by these concepts.

The first purpose of this paper is to describe the ways in which these classic concepts have shaped the practice of legislative assemblies and constitutional conventions. The second is to demonstrate that, with respect to the creation of democracies, there is what I call an "opening dilemma" that unavoidably and universally compromises the democratic quality of the founding. The third purpose is to show how that opening dilemma is resolved in practice.

I start with an analysis of the relationship between the revelation of a democratic will and the organization of a legislative assembly, thereby tracing the opening dilemma back to both procedural and substantive contradictions. These contradictions are then explored through a very brief survey of the leading classical contract theorists. This discussion leads up to the examination of some of the most familiar democratic foundings, followed by an case studies drawn from organization of the United States House of Representatives in 1839 and the 1870 Illinois constitutional convention. Along the way, I suggest that: (1) every democratic founding is constrained by a pre-existing social context that confers identities upon the delegates (such that their beliefs and actions partially reflect political alignments in the society at large) and restrict the range of the social contract that can be written (usually because some other sovereign power is in a position to reject otherwise conceivable provisions as unacceptable);

(2) although most democratic foundings are rather mundane affairs, all of them entail potentially radical outcomes because that potential is essential to conferring legitimacy upon the sovereignty they create; and (3) the potentially radical possibilities of a constitutional convention in the United States simultaneously seem far-fetched (in the sense that American political culture is thought to exhibit a wide-ranging and deep consensus on the proper forms of government) and far too dangerous to entertain (making constitutional conventions at the national level non-existent and at the individual state level increasingly rare).

### The Legislative Founding of Democracies

A legislative assembly occupies the very center of almost every democratic founding.<sup>3</sup> In such an assembly, delegates representing various groups of the people gather together to craft a social contract to which they then consent. That social contract then becomes the "constitution" of the newly created sovereignty and the consent of the people, given through their respective delegates and, perhaps, a separate, ratifying referendum, becomes the central pillar of the new government's legitimacy.

These legislative assemblies all share at least three fundamental components. They have leaders; they have well-defined memberships; and they adopt formal rules of procedure. These components are shared by all legislative assemblies because they are essential to their primary functions: 1) the proposing of alternatives; 2) the disposing of those alternatives; and 3) the collective recognition of a decision. These functions are clearly of central importance to the emergence from a state of nature into a democratic state because they allow delegates to freely and collectively act upon their experiences in crafting a new sovereign authority. In other words, the legislative process embodying those functions permit individual wills (themselves shaped by their prior experiences) to separately contribute to the construction of the new social contract.<sup>4</sup> Any alternative social setting

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<sup>3</sup>. Given the almost totemic position of legislative assemblies as the political manifestation of a people, their central place in democratic foundings should come as no surprise. Legislatures, for example, have been described as the "principal embodiment of popular sovereignty," a role firmly instantiated as an "axiom of Western political thought." Charles R. Wise and Trevor L. Brown, "Laying the Foundation for Institutionalisation of Democratic Parliaments in the Newly Independent States: The Case of Ukraine," Journal of Legislative Studies 2:3 (Autumn 1996): 216.

<sup>4</sup>. Whether we see this process as one in which the collective will of the

for founding a sovereign state would involve much stronger a-priori assumptions regarding the nature of individual wills among the prospective citizenry and would thus severely compromise the democratic quality of the ensuing social contract.<sup>5</sup>

The fundamental components of a legislative assembly are clearly (and not surprisingly) related to its primary functions. A leader, for example, is essential in that someone must have the authority to recognize individuals for the purpose of proposing alternatives for the assembly's collective consideration.<sup>6</sup> A leader is also essential for supervising the process through which the assembly disposes of these alternatives (either by rejecting, adopting, and/or amending them). Finally, a leader monitors the rituals through which the assembly comes to ratify the social contract they have collectively constructed.<sup>7</sup> In the absence of a leader, members of an assembly would be unable to coordinate their deliberations or collectively recognize when a decision was made.<sup>8</sup>

A well-defined membership is similarly essential for determining who can propose alternatives for the assembly's consideration and who can participate, as a member of that assembly, in the disposition of those

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people is revealed or created in the assembly is of no importance here. What matters is that the process brings together delegates representing the diversity of individuals among the prospective citizenry.

<sup>5</sup>. For example, if a people wanted only to create God's estate on earth and they believed that only holy men knew how to do this, then only holy men should be involved in the drafting of the social contract and a legislative assembly would be, at best, irrelevant to the project. What is important here is the strength of the a-priori assumptions regarding a people's desires and beliefs. It is one thing if a prospective people freely select delegates to a founding assembly that then decides that only holy men should be involved in the drafting of the social contract and quite another if a prospective people are simply assumed to consent to a process involving only holy men.

<sup>6</sup>. For example, in the British House of Commons "it is absolutely necessary that the Speaker should be invested with authority to repress disorder and to give effect, promptly and decisively, to the rules and orders of the House. The ultimate authority upon all points is the House itself; but the Speaker is the executive officer by whom its rules are enforced." E. May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament (London: Butterworths, 19<sup>th</sup> edn. 1976), p. 436. Quoted approvingly in Stanley Bach, "The Office of Speaker in Comparative Perspective," Journal of Legislative Studies 5:3-4 (Autumn/Winter 1999): 211-212.

<sup>7</sup>. I am emphasizing the role of a presiding officer with respect to maintaining parliamentary order while using the term "leader" to indicate a more general range of possibilities sometimes open to such a figure. The reason for this will become clear.

<sup>8</sup>. I am ignoring, for the moment, both very small assemblies in which the costs of coordination would be greatly reduced and assemblies of any size in which the wills of the members are so closely aligned that they unanimously agree on all but the most minor issues involved in the forming of a constitution.

alternatives. In addition, only fully-credentialed members can consent to the social contract that has been crafted. Underpinning both the responsibilities of a leader and the legislative activities of members are the formal rules that specify procedures and rituals that structure the deliberations of the assembly.<sup>9</sup> These rules set out the relations between leaders and members, between motions (the offering of alternatives) and decisions (the disposition of those alternatives), and between procedure (the ritual possibility of an action) and substance (the text under consideration).

### The Central Paradox in Legislative Foundings of Democracies

I can now describe the opening dilemma attending the founding of democracies: The initial step in organizing the legislative assembly that will write a democratic constitution can never be "democratically" decided. Any founding assembly must, as a first step in its organization, either select a leader, determine its membership, or adopt formal rules. However, none of these alternative beginnings can be democratically decided in the absence of the others. For example, a leader cannot be democratically selected in the absence of an electorate (credentialed members) who are able to vote. And members are unable to offer and dispose of motions that might otherwise certify them as delegates if the assembly lacks a leader who can recognize them for that purpose. Finally, in the absence of formal rules (which, like a leader, must be democratically approved) members cannot even perform simple but necessary functions such as closing a debate so that the assembly can make a decision. Thus, at the very beginning of such an assembly, when the gathering is attempting to organize itself for the purpose of founding a new democratic state, there must be and always is an arbitrary

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<sup>9</sup>. All parliamentary procedures are rituals but not all legislative rituals are parliamentary procedures. For example, the election of a presiding officer is both a parliamentary procedure (in that the context and criteria for making a decision are well-defined under the rules) and a ritual (in that the election is a necessary step in the recognition of a leader by the collective body). However, almost all such elections (at least in the United States) are followed by the appointment of a small committee that then ceremonially "escorts" the newly-elected leader to the chair at the head of the assembly. This ceremony is clearly a ritual in which respect and deference are shown to the new leader but is not a parliamentary procedure (because it is rarely written into the rules and could be dispensed with without affecting the substance of the election). However, there is little reason to attempt to draw a firm distinction between rituals and procedures because they often shade into one another in practice.

decision.<sup>10</sup> This arbitrary decision resolves the opening dilemma confronting the assembly by installing a leader, certifying delegates as credentialed representatives, and/or adopting formal rules for doing both of these things. The last half of this paper will explore how, in practice, assemblies have actually resolved this opening dilemma and suggests explanations for what they have done. Before turning to these examples, however, we should investigate the relationship between leaders, members, and rules a bit more.

### Motions and Decisions

At the heart of the opening dilemma is the motion, the offering of a possible action by a member as an alternative that might be chosen by the assembly. One of the preconditions for the offering of a motion is that it be procedurally recognized by the assembly as rightfully commanding its entire attention at a specific point in the proceedings. A closely related precondition is that the motion must be procedurally related to other motions which are then pending or might become pending. Motions are related to one another by giving them precedence with respect to the order in which they must be disposed of by the assembly.<sup>11</sup> Put another way, there must be a collectively recognized order in which motions are decided.<sup>12</sup>

Equally implicated in the opening dilemma of a founding assembly is the decision through which a motion is accepted or rejected. Unlike the offering of a motion, the decision is a collective act in which the members of the

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<sup>10</sup>. This initial step is "arbitrary" solely because it cannot be legitimated as democratically decided. As I will show later in this paper, whatever an assembly does first is almost always thickly embedded in the political culture and power relations that fostered the gathering and thus legitimated as either (1) an acceptable (if not the best) way to solve the opening dilemma or (2) necessarily compliant with the desire of a larger power that must be appeased even as this new democratic state is being created.

<sup>11</sup>. For example, in most legislative assemblies a motion to adjourn has precedence over almost all other motions that might otherwise compete for the assembly's attention. By saying the motion to adjourn has precedence, we mean that the motion must be disposed of one way or another (either adopted or rejected) before the assembly can entertain a competing motion. For other examples of motions and their relative precedence, see J. Calvin Callaghan, "Precedence in Parliamentary Motions," in Haig A. Bosmajian, ed., Readings in Parliamentary Procedure (New York: Harper & Row, 1968), pp. 175-180.

<sup>12</sup>. For example, an amendment to a resolution must be disposed of before the resolution itself can be adopted or rejected. If there are several amendments, then the order in which the amendments are voted upon must be procedurally specified. For a discussion of the variety of ways amendments and proposals can be considered, see Bjorn Erik Rasch, "Parliamentary Floor Voting Procedures and Agenda Setting in Europe," Legislative Studies Quarterly 25:1 (February 2000): 3-23.

assembly participate by voting. Thus, one major precondition for a decision is the precise specification of who is eligible to vote and that specification, in turn, rests upon formal recognition of those who are credentialed members of the assembly. Without a formally recognized membership, an assembly simply cannot democratically decide how to dispose of motions because any method of voting requires the specification of who may vote.<sup>13</sup>

Without motions and their attendant decisions, leaders cannot be selected, members cannot be identified, and procedural rules cannot be adopted. Thus, whatever the assembly does first must take the form of an arbitrary motion and decision. Someone with no formal standing before the assembly (because no one can have, at the beginning, formal standing before the assembly) must assert a motion to which the assembly cannot authoritatively consent (because the assembly cannot authoritatively consent to anything). And that motion must resolve the opening dilemma, thereby cutting the Gordian knot that would otherwise hamstring the founding of any democratic state.<sup>14</sup>

#### Alternative Ways of Cutting the Gordian Knot

In practice, the opening dilemma facing founding assemblies has been resolved in many different ways, some quite complex and others quite simple.<sup>15</sup>

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<sup>13</sup>. A formally recognized membership is also one of preconditions for the procedural recognition of a motion because only credentialed members of the assembly are eligible to offer motions.

<sup>14</sup>. Every general discussion of parliamentary procedure that I have found fails to address this dilemma in that they all begin their description and analysis after someone has convened a meeting and assume that those who are in attendance are all members of the group and, in addition, have all agreed on the parliamentary rules that will structure the deliberations. See, for example, Alice Sturgis (revised by the American Institute of Parliamentarians), The Standard Code of Parliamentary Procedure, Fourth Edition (New York: McGraw-Hill, 2001); Jon L. Ericson, Notes and Comments on Robert's Rules (Carbondale: Southern Illinois University Press, 1991); Ray E. Keeseey, Modern Parliamentary Procedure (Boston: Houghton Mifflin, 1974); Joseph D. Menchofer and Harold E. Sponberg, Rules for Parliamentary Procedure (East Lansing: Michigan State College Press, 1951); Zoe Steen Moore and John B. Moore, Essentials of Parliamentary Procedure (New York: Harper & Brothers, 1944); and General Henry M. Robert, Parliamentary Law (New York: Appleton-Century-Crofts, 1923). The author of the last volume is the author of Robert's Rules of Order, the most widely used authority on parliamentary procedure. Similarly, studies of parliamentary practice in legislative assemblies also begin once a legislature has already been organized. See, for example, Terry Sullivan, Procedural Structure: Success and Influence in Congress (New York: Praeger, 1984).

<sup>15</sup>. I am not discussing here the other arrangements that are both equally

All of them have involved an initial motion that either installs a leader, defines a membership, or adopts procedural rules. As I will discuss in a moment, none of these motions is sufficient, in and of themselves, to resolve the opening dilemma. But they do predispose the solution by privileging one of these components as the context for creating the others.

If an assembly, for instance, arbitrarily accepts a leader, that leader is then in a position to impose what we might call "quasi-rules" and to recognize a "quasi-membership." The last two components warrant the prefix "quasi-" because they all come into play without being formally (that is to say, democratically) certified or adopted. When the acceptance of a leader is the opening move for an assembly, that leader in effect declares (in the sense of authoritatively and unilaterally pronouncing) what will be the procedural rules and who will constitute the formal membership. As will be shown later, this declaration almost always takes the form of an implicit practice as opposed to an overt announcement. In this implicit practice, the arbitrarily-selected leader recognizes individuals "as if" they were formally credentialed members and considers motions and the making of decisions "as if" rules had been adopted.<sup>16</sup> And usually the first order of business after that leader has been installed is the formal adoption of procedural rules and the formal certification of a membership list. The important point for our purposes here is that the acceptance of a leader, as the first step in the organization of an assembly, does not solve the opening dilemma. The

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necessary to the organization of a founding assembly and equally arbitrary with respect to how they are imposed. For example, the individuals who ultimately become members of a founding assembly must somehow coordinate their presence at a specific time and place so that the assembly can even entertain the opening dilemma. That coordination is usually provided through a public announcement of one kind or another but the democratic authority for making such an announcement, from the perspective of the assembly that the announcement enables, is entirely lacking (because the assembly the announcement calls together has not yet been organized). Later in the paper some of the implications attending this arbitrary act will be discussed. For example, are there occasions in which a founding assembly in fact rejects the legitimacy of the announcement that originally called it together? What might be the implications of such a rejection?

<sup>16</sup>. As I will show later, one of the most interesting aspects of these implicit practices is that, in most cases, individuals do not seem to recognize just how much of what they are doing is the product of prior socialization into a common political culture, a socialization that allows the assembly to "bridge" the dilemma as the assembly is organized. From a formal parliamentary perspective, these implicit practices are completely "out of order" (or, more precisely, "outside of order"). In those cases where their irregularity surfaces in the organizing discussions, their fundamentally indeterminate character (i.e., that rules cannot be adopted without members and members cannot be certified without rules) can become a major stumbling bloc in the proceedings.

assembly only becomes a body capable of making democratic decisions once all three legislative components are in place.

Let us briefly reflect upon the other two possibilities. Imagine that the individuals organizing an assembly begin by formally certifying each other as members. This act would clearly be as insufficient, from a democratic perspective, as the initial acceptance of a leader. In the absence of formal rules, these members (even though certified) could not elect a leader. And in the absence of a leader, they could not adopt formal rules. Here the implicit practice that veils the dilemma (thus solving it) involves reliance upon quasi-rules and a quasi-leader. The last possibility is the arbitrary adoption of formal rules as the opening move. As long as the rules do not themselves specify the specific identities of the leader and the members, they too would be insufficient because a leader could not be elected without a formal membership and members could not be recognized for the purpose of conducting an election without a leader.<sup>17</sup>

The Relative Saliency of Leaders, Members, and Rules  
in Legislative Assemblies

In order to resolve the opening dilemma, an assembly must make an initial move by either accepting a leader, certifying a membership, or adopting rules.<sup>18</sup> This initial move thus places that component of the assembly in a potentially privileged position from which the others can be shaped. And that privileged position, from a democratic perspective, can be abused. In order to see how the choice of an initial move might deform an assembly (from a democratic perspective), we should examine the possible ways in which the relative saliency of leaders, members, and rules might vary.

Several things are immediately obvious when we begin to examine the relative saliency of these components (see Chart 1). First, the influence of each component of an assembly is deeply interrelated to the influence of the

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<sup>17</sup>. If the rules did specify the particular identities of the leader and members, they would of course no longer be purely procedural in nature. In such a case, adoption of the rules would resolve the opening dilemma by installing all three legislative components at once.

<sup>18</sup>. Forming a government within an existing state, as opposed to making the state itself, is a very different sort of problem. For an exploration of the ways in which government coalitions might and do form within a parliamentary regime, see Michael Laver and Kenneth A. Shepsle, Making and Breaking Governments: Cabinets and Legislatures in Parliamentary Democracies (New York: Cambridge University Press, 1996).

other components, so much so that we cannot even describe the salience of any of them without mentioning the influence of at least one of the others. These interlocking relationships arise because the characteristics of each component constitute, in part, the very basis of the influence of another. Thus, when we examine the upper left hand cell which describes a "dominant" leader, we find qualities relating the leader to both the procedural rules and to the members of the assembly. Because the rules and the rights of the members are the most important constraints upon the procedural prerogatives of a leader, we would be hard-pressed to conceive of a dominant leader without describing the leader's relationships to these other components.

Second, the influence of each component tends to vary inversely with the others. For example, much of a dominant leader's influence arises from the subordination of members and rules. If the members occupy a dominant position, then a leader's prerogatives are often severely circumscribed. And if the rules dominate a legislative organization, then the actions of both the leader and the members are strongly constrained. From this perspective, it is useful to conceive of influence within an assembly as a constant quality, what is gained by one component is lost by at least one and maybe both of the others.<sup>19</sup> I also will not take up a very different problem: a decrease in the influence of all three components of an assembly when and if the proceedings degenerate into chaos. If we define chaos in an assembly as "extreme disorder in which there is no agreement among the participants on the next action the assembly can take," then we have in some respects simply redescribed the "state of nature" from which the assembly emerged sometime in the past. As I have shown, emergence from the state of nature by an assembly entails the very creation of a leader, members, and rules. While this creation does in some sense entail an increase in influence for all three components, that observation is trivial...as is the observation that degeneration into chaos would entail a decrease in influence for all of them. Third, while the influence of each component tends to vary inversely with that of the others, it is possible for the influence of two of three components to co-vary when compared to a third. For example, the precision with which the rules prescribe the actions the assembly can take may co-vary with the prerogatives exercised by the members if those prerogatives are

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<sup>19</sup>. I am only referring here to influence within the assembly. We can easily imagine legislative arrangements that would either promote or decrease the assembly's influence vis-a-vis the outside world (e.g., other political institutions with which it maintains relations or society as a whole). The external influence of an assembly falls outside the scope of this paper.

among those things well-defined by the rules. In such a case, both the rules and members gain influence at the expense of the leader. The reverse could also occur: The prerogatives of a dominant leader could be set down with precision in the rules, thus augmenting the influence of both the leader and the rules at the expense of the members.

In fact, it might seem natural to think of the struggle for influence in an assembly as basically a contention between members and the leader, with the rules simply constituting the primary weapons with which that struggle is waged. Almost by definition, then, the rising influence of a leader in an assembly would be reflected in changes in the rules assigning the presiding officer wider prerogatives and vice versa. The ease with which we might accept this perspective is enhanced by the fact that the leader and the members are flesh and blood people who are thus capable of "struggling" for influence in an assembly. In contrast, the rules are nothing more than words arranged on a page, entirely lacking a "will to power" or anything else we might associate with human ambition.

Although it might seem natural to think of the struggle for influence as only a two-sided contest between the leader and the members, it would be a mistake and it would be a mistake for at least four reasons. The least important reason is that procedural rules are often difficult to change. This difficulty can often be traced back to the rules themselves because they specify the procedures through which they might be altered. Some of the most common difficulties include the creation of standing committees which are assigned jurisdiction over proposed changes and the requiring of extraordinarily large majorities for their approval. Because they are relatively difficult to change, they are "sticky" in the sense that the rules do not automatically adjust to changes in the relative influence of the leader and members.<sup>20</sup> In some cases, changing the rules may not be worth the effort because of these difficulties.<sup>21</sup> In other instances, changing the rules may not be possible until a later time (such as the beginning of a new Congress) when some set of rules, possibly including changes in the old set,

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<sup>20</sup>. One of the most resilient rules in the United States Congress is the complex of parliamentary arrangements attending the filibuster in the Senate. See, for example, C. Lawrence Evans, "Legislative Structure: Rules, Precedents, and Jurisdictions," Legislative Studies Quarterly 24:4 (November 1999): 608; Gregory Wawro and Eric Schickler, Filibuster: Obstruction and Lawmaking in the U.S. Senate (Princeton, N.J.: Princeton University Press, 2006).

<sup>21</sup>. See, for example, Gary W. Cox, "On the Effects of Legislative Rules," Legislative Studies Quarterly 25:2 (May 2000): 172-173.

must be adopted anew in any case. The resulting stickiness means that changes in the rules lag changes in the relative influence between the leader and the members.<sup>22</sup> However, while this lag does give the rules a slightly independent role in an assembly, the impact is usually unimportant.<sup>23</sup> And since there can be no stickiness when an assembly is being organized, the resulting lag is of no concern to us.

A more important reason we should treat the rules as an independent component of an assembly is that they are themselves a receptacle for influence. While the rules obviously cannot pursue influence in an assembly, they can nonetheless be given influence by the leader and members. Aside from the purely coordinating functions that the rules play in constructing legislative proceedings, the rules can specify motions, situations, and relations when neither the leader nor the members are attractive wielders of influence over these things. In place of what would otherwise be a discretionary decision by the leader or the members, for example, the rules could imperatively order that something occur or prevail. At one extreme, the rules would become akin to an itemized contract between individuals who did not trust one another, a contract that specified in detail what would happen and who would do it throughout the duration of the agreement. In that form, the rules might even bleed over into the substance of legislative proceedings by specifying when and how particular policies would be considered (see the lower left-hand cell in Chart 1). And, also like a contract, such a set of rules would gain influence independent of the individuals who had originally agreed to it.<sup>24</sup> Exactly how much influence such a set of rules might have would depend in part on how difficult it would be to change them.

We should also consider rules to be an independent component of an assembly because they gain precision over time through practice. Usage

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<sup>22</sup>. On the stickiness of procedural rules in the British Parliament, see Philip Norton, "Playing by the Rules: The Constraining Hand of Parliamentary Procedure," Journal of Legislative Studies 7:3 (Autumn 2001): 13-33.

<sup>23</sup>. The impact of this lag is not trivial in situations where the balance of influence is either changing very rapidly or subject to contingent negotiation in which the outcome is uncertain. The 1910 Cannon Revolt in the U.S. House of Representatives involved both these elements. While the influence of Speaker Cannon was dramatically declining vis-a-vis the members, the stickiness in the standing rules prevented a dramatic adjustment of the speaker's prerogatives until the next Congress.

<sup>24</sup>. Elizabeth Sanders posits a similar independent influence to well-specified statutes, relative to bureaucratic discretion, in her Roots of Reform: Farmers, Workers, and the American State, 1877-1917 (Chicago: University of

confers, at the very least, familiarity with their exercise, including an awareness of their unintended consequences (from the perspective of intent at the time of their adoption) and the emergence of norms (informal or customary practices between individuals that supplement and sometimes dramatically alter the operation of formal rules). In addition, particularly in assemblies where rules play a relatively influential role in the proceedings, usage creates precedents.<sup>25</sup> Based on particular incidents in which a rule was used, these precedents become authoritative interpretations of its application, thereby constraining its use in similar situations in the future.<sup>26</sup> Thus, if left unchanged over time, the rules become increasingly well-defined with a corresponding constriction on the ability of either the leader or the members to use them in innovative ways.<sup>27</sup>

Finally, some rules are valued in their own right as totemic symbols of a particular political culture. Many of the more ceremonial aspects of opening a legislative assembly, such as the appointment of a committee to

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Chicago Press, 1999), pp. 388-9.

<sup>25</sup>. Lewis Deschler, a former House Parliamentarian, described the chamber's reliance on precedents as the application of "a doctrine analogous to that known to the courts as 'stare decisis,' under which a judge in making a decision will look to earlier cases involving the question of law. In the same way, the House adheres to settled rulings that have been established by prior decision of the Speaker or Chairman...Precedents may be viewed as the 'common law,' so to speak, of the House, with much the same force and binding effect." Quoted in C. Lawrence Evans, "Legislative Structure: Rules, Precedents, and Jurisdictions," Legislative Studies Quarterly 24:4 (November 1999): 633.

<sup>26</sup>. Tom Raven, Czars, Kings, and Barons: Understanding Institutional Transition in the House of Representatives (dissertation in preparation), Chapter 4: "From Rules to Norms: The House as an Endogenous System". Also see C. Lawrence Evans, "Legislative Structure: Rules, Precedents, and Jurisdictions," Legislative Studies Quarterly 24:4 (November 1999): 613-615. Because practice can only create norms and precedents over a fairly long stretch of time, this consideration might seem inapplicable to the creation of an assembly in that these norms and precedents would not immediately accompany the adoption of the rules. However, as will be shown later in the paper, the rules that are actually adopted by constitutional conventions and legislative assemblies are usually copied more or less intact from other, previous assemblies. And, to the extent that the members can recall practice in those other assemblies, norms and precedents more or less immediately reappear in the new convention or assembly when those rules are adopted.

<sup>27</sup>. Stanley Bach, referring to the British House of Commons and the U.S. House of Representatives, describes the constraining role of precedents thusly: "[I]n making procedural rulings, both speakers are so surrounded by documentation and human expertise that it has become almost impossible for either to rule in a manner that is arbitrary or inconsistent with precedent. In both houses, speakers' ruling have been carefully noted for centuries. Equally important, key rulings are available to all members in published form. Both houses also publish manuals of procedure that explain what the rules and precedents permit and prohibit in enough detail to address all but the most remote procedural possibilities." "The Office of Speaker in Comparative Perspective," Journal of Legislative Studies 5:3-4 (Autumn/Winter 1999): 221.

escort a judge into the chamber for the purpose of swearing in the members or the prayer with which many assemblies open their proceedings, are deeply rooted in the texture of the political and social life of a community. But these ceremonies are not essential to the purely instrumental conduct of legislative deliberations. More interesting are those rules that give rise to iconic practices that do substantively impact deliberations. Perhaps the most visible of such iconic practices is the filibuster in the United States Senate, a practice that has become an integral part of the political culture of the nation.<sup>28</sup> But rules providing for majority decisions, publicly recorded votes, and liberal opportunities for amendments have all become culturally instantiated in the sense that they are valued above and beyond their effect on the prerogatives of a leader and members. This cultural validation is most clearly evident at the very beginning of an assembly's organization when the members rely upon not-yet-adopted rules to order their deliberations. The rules they use at that time are nothing more than a basic, consensual understanding of what they consider to be "fair play," informed, of course, by their previous experience in other rule-bound proceedings. This basic, consensual understanding, however, is fragile in that the slightest controversy over a particular parliamentary motion often threatens to throw the entire proceeding into confusion. That confusion, of course, can be traced back to the fact that a set of rules has not yet been formally adopted and thus nothing in the sense of a parliamentary order yet governs the proceedings.

#### Pathologies of Dominance

Chart 1 has been arranged so that the dominant characteristics of each of the three components are on the left, the co-equal characteristics are in the middle, and subordinate characteristics on the right. In many ways the characteristics of each component when it is subordinate to the others mirror the dominant qualities of the others. For example, compare the characteristics of a subordinate leader to those of dominant members with reference to the right to speak in the assembly. When the members are dominant in an assembly, they can claim an almost entirely unconstrained right to speak in debate. When a leader is subordinated (the mirror image), the presiding officer is more or less powerless to constrain the right of a

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<sup>28</sup>. Gregory Wawro and Eric Schickler, Filibuster: Obstruction and Lawmaking in the U.S. Senate (Princeton, N.J.: Princeton University Press, 2006).

member to speak in debate. Thus, when we speak of an assembly with dominant members, we are almost certainly also referring to an assembly in which either the leader or the rules or the both of them occupy subordinate roles. In terms of the ideal functioning of a democratic assembly, both domination and subordination of any of the three components introduces a pathology into legislative deliberations.<sup>29</sup> For ease of explication, I will refer only to dominant roles as "pathological" but the reader should remember that we could just as easily be describing subordinate roles in this way.<sup>30</sup>

A full exploration of the pathologies attending dominant roles of each of the components is beyond the scope of this paper but we can briefly sketch some of them. A dominant leader, for example, could exercise discretionary authority to recognize members as a means to influence their actions (thus reducing their independence). A dominant leader could also aggressively rule motions out of order (thus preventing some alternatives from being considered by the assembly). In the first case, some of the influence of individual members (e.g., their votes) could become attached to the leader, further strengthening the presiding officer within the assembly. In the latter, the presiding officer could directly shape, at least partially, the outcome of legislative deliberations. Both of these deform the assembly's ability to explore the range of individual wills and freely act upon them.<sup>31</sup> Thus, when

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<sup>29</sup>. This may seem obvious but, if so, I suspect the reason lies at least in part in a particular set of expectations regarding the independence of individual opinions from group consensus, both in reality and as a value in the prevailing political culture. More traditional societies, for example, might actually consider a very dominant role for rules a good thing. On the other hand, more individualist societies might opt for very strong prerogatives for members. And societies with pronounced authoritarian tendencies might favor dominant leaders. American political culture tends, on the whole, to value a rough balance between the three components (as in the middle categories of Chart 1) and that rough balance is what I will consider a "non-pathological" assembly in this paper.

<sup>30</sup>. Legislatures, of course, differ widely with respect to organization. Stanley Bach, for examples, has observed that "[e]ven a cursory study of national assemblies in democracies reveals that superficial similarities often mask profound differences in the distribution and exercise of authority..." "The Office of Speaker in Comparative Perspective," Journal of Legislative Studies 5:3-4 (Autumn/Winter 1999): 209.

<sup>31</sup>. Although he is describing an established party system, with the presiding officer more or less acting as the leader of the dominant party, Stanley Bach nonetheless provides a good description of the range of potential powers that a presiding officer may have. At one end is the "partisan" speaker, as agent of an organized majority; at the other is the "neutral" speaker, "the choice and the servant of the assembly as a whole." Bach explicitly associates the "partisan" speaker with the U.S. House of Representatives and the "neutral" speaker with the British House of Commons. "The Office of Speaker in Comparative Perspective," Journal of Legislative Studies 5:3-4 (Autumn/Winter 1999): 213-218.

the opening move in organizing an assembly is the acceptance of a leader, the risk is that this leader will use his authority over determining the quasi-rules and quasi-members to bolster his own position within the assembly and then use that privileged position to formally adopt a set of rules and to formally certify a membership list that codifies his enhanced authority and influence.

When the members are formerly certified as the opening move in organizing an assembly, their own prerogatives are enhanced almost by default. Individual members, for example, can insist upon the exercise of a right to speak at will and of a right to offer as many motions as they wish. Their privileged position can then be used to write these prerogatives into the rules that are formally adopted, thus binding the leader to recognize them. The most common pathology accompanying a dominant role for the members is thus excessive delay caused by individual members as they exercise those prerogatives. That delay, in many instances, can turn into a bargaining chip that allows individual members to distort the outcome of legislative deliberations.<sup>32</sup> For example, once a majority of the members is ready to adopt a particular measure, a dissenting minority can insist on concessions before allowing the measure to be adopted.<sup>33</sup>

When rules are adopted as the opening move, the pathological risk is that they will dictate outcomes either by severely constraining the processes through which a leader will subsequently be elected and/or the eligibility of members will be determined. For example, the rules might specify requirements for who might serve as leader in such a way that only a very few individuals might qualify. In the same way, the rules could also exclude some or even most individuals from serving in the assembly or impose

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<sup>32</sup>. Members here are considered to be autonomous individuals not necessarily affiliated with a political party or other group that might impose behavioral discipline as the price of subscribing to that particular identity. Once parties have become a feature of an assembly, access to at least some of the rights previously associated with individual members often becomes attached to the minority party. However, because party approval is a precondition for their exercise, prerogatives controlled by the minority party are not identical to those theoretically available to autonomous individuals. On minority party rights in the U.S. House of Representatives, see Sarah Binder, Minority Rights, Majority Rule: Partisanship and the Development of Congress (New York: Cambridge University Press, 1997).

<sup>33</sup>. With respect to the founding of a democratic state, the major advantage of extensive legislative deliberations is increased legitimacy when the majority finally craft the social contract. See, for example, Edward L. Lascher, Jr., "Assessing Legislative Deliberation: A Preface to Empirical Analysis," Legislative Studies Quarterly 22:4 (November 1996): 502, 504, 515. Although Lascher's focus is restricted to public policy decisions in conventional

conditions (such as an oath) that might lead some individuals to excuse themselves. In very extreme cases, the rules could be so constraining as to actually dictate these outcomes by, for example, imposing conditions so constraining that only one member could qualify to serve as leader. Because, as noted before, the rules cannot act willfully, someone must favor their enactment. In this case, we might imagine an assembly so ridden by conflict that the rules become a kind of social contract through which some part of the assembly imposes a complex solution, including naming someone to act as leader and designating those who are eligible to act as members. Such a contract could even extend to the dictation of specific policy decisions.

Thus, in addition to the democratic dilemma facing founding assemblies, they also must confront the possibility that whatever is chosen as the first motion in resolving the dilemma will prejudice subsequent deliberations. In some ways at least, each kind of opening move corresponds to one of the classic interpretations of the state of nature.

#### Hobbes, Rousseau, and Locke

Founding assemblies must choose an opening move in order to organize themselves as a deliberative body. In terms of democratic consent, this move must be arbitrary. However, every founding assembly emerges from the state of nature with at least some shared beliefs, however rudimentary, as to what that opening move should be. Those beliefs, in turn, arise out of individual experience with the state of nature that preceded the assembly. In each of the classical interpretations of social contract theory, that experience was idealized in a particular way, a way that predisposes a solution to the opening dilemma.

For example, Hobbes contended that most salient feature of the state of nature was the extreme personal insecurity of individuals.<sup>34</sup> Their experience with that insecurity predisposed them to make the immediate imposition of political order their highest priority. In effect, political order took precedence over law (rules) and community (members) as they consented to the social contract that founded Leviathan. That did not mean that law and community were nullities (although Hobbes is often glossed as maintaining

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legislatures, the conclusion can be readily extended to founding assemblies.

<sup>34</sup>. As Hobbes put it, the state of nature is characterized by "continual fear, and danger of violent death, and the life of man [is] solitary, poor, nasty, brutish, and short."

something like that). But law and community were definitely secondary to the designation of a leader who would then, as part of the social contract between individuals and the new state, determine what the laws would be and who would belong to the community. The terms of the compact, in other words, highlighted personal security: The state would provide personal security and, in return, individuals would consent to the state's sovereignty. For Hobbes, then, the opening move is the selection of a leader because fear of anarchy is the most common salient concern of those founding the state.<sup>35</sup>

For Rousseau, the state of nature is comprised of successive stages. In the first of these, Rousseau said that

"nothing is so gentle as man in his primitive state when, placed by nature at equal distances from the stupidity of brutes and the fatal enlightenment of civil man, and limited equally by instinct and reason to protecting himself from the harm that threatens him, he is [naturally] restrained...from harming anyone himself, and nothing leads him to do so even after he has received harm."

In the next stage, jealousy, pride, and a desire for vengeance appear and men become "bloodthirsty and cruel." And, yet, this is paradoxically a period in which these same men are happiest, happier even than when they form a political community. Still, self-preservation ultimately impel them to abandon this state of natural freedom by creating a government. The task, according to Rousseau, is to "find a form of association which defends the protects the person and goods of each associate with all the common force, and by which each uniting with all yet obeys only himself and remains as free as before." In short, while men must give up their natural freedom when they found a state, they should still craft a social contract that guarantees them as much political freedom as possible.<sup>36</sup> The solution is to create a political society in which the sovereign is the general will of the people.

For Rousseau, one of the most notable features of the state of nature is the absence of a social community and, because of that absence, a failure to recognize and act upon the general will. However, unlike the Hobbesian

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<sup>35</sup>. Of course, Hobbes was writing both because he thought fear of anarchy was the most salient shared concern and because he thought it should be the most salient shared concern.

<sup>36</sup>. Hilail Gildin, Rousseau's Social Contract: The Design of the Argument (Chicago: University of Chicago Press, 1983), pp. 10-11, 14, 29-30.

world in which everyone fears anarchy without prompting, people in Rousseau's state of nature are not aware of the general will and must be sensitized as to its existence and proper role in politics. This responsibility falls upon the legislateur, a truly exceptional leader who, as "a transitional figure...edifies the moeurs of the people by way of the laws." Once "the citizen body is morally and politically mature enough to legislate the laws by themselves," the legislateur disappears. His exit marks the end of the state of nature and the onset of government, a government in which the people assembled are the only sovereign. While they must delegate decisions over "particulars" to "an elite body of aristocrats," the people retain absolute control over the general laws themselves, especially those constitutional provisions that erect the state.<sup>37</sup> In fact, this plenary power is so complete that whenever the people assemble, the government is dissolved and the "assembly is opened by asking whether the sovereign [the general will of the people] wishes to maintain the same form of government."<sup>38</sup>

For John Locke, the most salient characteristic of the state of nature is natural law. Comprised of principles derived from a divine moral order, this natural law is naturally apprehended by people even prior to the formation of a government. Among its most important strictures is the personal right to control one's own body and labor. When a person's labor is mixed with other objects, that person creates property and, by extension, gains a private, personal right to that property. However, in the state of nature, private property rights are at risk because others might and do transgress upon them. In retaliation, people whose property has been taken attempt to punish the transgressors but, in their zeal, may inflict punishments that are more severe than the original transgression. These two flaws, a lack of protection for property and a mismatch between punishment and crime, are corrected through the creation of a government. And, for Locke, the basic condition for creating a government is its conformity and

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<sup>37</sup>. Rousseau described the "foundational legislateur" as a leader who "saw all of men's passions and experienced none of them [and] had no relation to our nature and yet knew it thoroughly." Ethan Putterman, "Rousseau on Agenda-Setting and Majority Rule," American Political Science Review 97:3 (August 2003): 461, 468. Putterman also calls Rousseau "the earliest and, perhaps, most radical proponent of participatory democracy" in history (page 459). For a detailed discussion of the role of the legislateur, Hilail Gildin, Rousseau's Social Contract: The Design of the Argument (Chicago: University of Chicago Press, 1983), Chapter Three.

<sup>38</sup>. John T. Scott, "Rousseau's Anti-Agenda-Setting Agenda and Contemporary Democratic Theory," American Political Science Review 99:1 (February 2005): 139.

obedience to natural law. Thus the strongest foundation for consensus as a people enter into the social contract is this common recognition of the rules of political association. Because Locke's formulation exceeds the purely procedural notion of parliamentary rules by crossing over into substantive issues such as the protection of private property and because the common recognition of such rules would be a product of unmediated human nature, the rules of association would have precedence over both the selection of a leader or the identification of members.

These varying notions of what the state of nature might have been like tell us what people would have brought into the social contract in terms of prior experience.<sup>39</sup> The prior experience of a people takes the form of an imagined fact in that the state of nature is not only prior to government, it is also prior to most of what we associate with society in terms of customary association. For that reason, we have no historical record of how the deliberations accompanying the framing of an actual social contract were conducted. All three social contract theorists appear to have believed that the social contract was approved by acclamation as a self-evident, in light of prior experience, solution to the deficiencies of life in the state of nature. Even Rousseau's legislateur, whose leadership and instruction prepares the people for the social contract that they will then acclaim, could not have been originally accepted by the people without this consensus.<sup>40</sup> In all three instances, the legitimacy of the founding rests upon universal consensus and individual consent in a way that precludes extended deliberation or anything but the most rudimentary legislative process. For Hobbes, Locke, and Rousseau, the opening dilemma either did not exist or was utterly irrelevant because the question of how to begin

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<sup>39</sup>. They also tell us what the social contract itself should have contained in order to be legitimate. For example, Hobbes insistence that personal security was the most salient rational concern that individuals took into the social contract makes the effective provision of personal security the primary (almost the sole) criterion by which the new state should be judged. For Rousseau, the realization and implementation of the general will was the reason for creating a state and, thus, the satisfaction of the preconditions for the general will (e.g., absolute equality among citizens and the indivisibility of the general will itself) become the functions through which the state is made legitimate. And, for Locke, the protection of private property becomes both the reason for founding a state and the standard by which the state is evaluated.

<sup>40</sup>. In Gildin's words, the legislateur's "wisdom is [so clearly] the preserve of surpassingly superior individuals [and they] so excel their fellows that he [Rousseau] does not hesitate to call them gods." Here the consensus arises out of collective adoration. Rousseau's Social Contract: The Design of the Argument (Chicago: University of Chicago Press, 1983).

deliberations over a founding was of no importance to either the outcome (predetermined by the prior consensus) or individual consent (produced by reason from prior experience).<sup>41</sup>

However, Hobbes, Locke, and Rousseau do indicate that the individual experience that precedes a founding does differ and, for that reason, any consensus on how to proceed will be partial at best. In the worst scenarios, there may be no agreement at all on how to proceed. We now turn to two historical foundings in order to explore what people actually do when the characteristics of the government they wish to create are not self-evident.

### The Mayflower Compact

Writing in 1802, almost two centuries after the event, John Quincy Adams described the Mayflower Compact as

perhaps the only instance in human history of that positive, original social compact which speculative philosophers have imagined as the only legitimate source of government. Here was a unanimous and personal assent by all the individuals of the community to the association, by which they became a nation [italics in the original].

Adams added that "the founders of Plymouth had been impelled" to draft the Compact as an innovative solution to the "peculiarities of their situation."<sup>42</sup> And the situation was indeed peculiar. The Mayflower Compact was made aboard a small ship off the coast of what later became Massachusetts. The would-be colonists had intended to settle in what is now New York City, hundreds of miles to the South. They were now outside the boundaries of the royal patent that had been granted them and, technically at least, outside the law as well. A large minority of the settlers, however, belonged to a dissident Protestant sect (whom we know as the "Pilgrims") and had been more or less self-governing for years, particularly while living in exile in the Netherlands. Given their tight social organization and their hierarchical leadership, the Compact would have been unnecessary if they alone had sailed

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<sup>41</sup>. While we might wonder what kind of state Hobbes's ruler, Rousseau's people, and Locke's natural laws, had they been brought together at the founding, would have created, an even more interesting question would be how they would have gone about deciding what kind of state it would be.

<sup>42</sup>. Quoted in John A. Goodwin, The Pilgrim Republic: An Historical Review of the Colony of New Plymouth (Boston: Ticknor and Company, 1888), p. 65.

on the Mayflower.

The problem was with the "Strangers," the Anglican settlers who had joined the expedition in England, as well as the indentured servants and hired men who accompanied them. And, since the Mayflower was to over winter in the New World before returning to England, the ship's crew would also be a temporary part of the new settlement. Some among this "motley group of fellow travelers" had suggested "that they would have been a people outside the law" once they went ashore. To the Pilgrims, the possibility that some of the party would refuse to act in harmony with the rest "posed a real threat."<sup>43</sup> On board the Mayflower, authority was shared by the ship's captain and an agent for the "Adventurers," the group of investors who had sponsored the expedition as a profitable enterprise. Their authority would lapse, however, once the passengers disembarked.<sup>44</sup>

On November 9, 1620, the Mayflower sighted Cape Cod (which already carried the name on their charts.) After almost two weeks of hesitant exploration and indecision, the ship entered Massachusetts Bay and began to prepare for landing. One of the party later wrote that the "day before we came to harbor, observing some not well affected to unity and concord, but gave some appearance of faction, it was thought good there should be an association and agreement that we should combine together in one body and to submit to such government and governors as we should by common consent agree to make and choose, and set our hands to this that follows word for word:

In the name of God, Amen. We whose names are underwritten, the loyal subjects of our dread sovereign lord King James, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, etc.

Having undertaken, for the glory of God, and advancement of the Christian faith, and honor of our king and country, a voyage to plant the first colony in the northern parts of Virginia, do by these presents solemnly and mutually in the presence of God and one of another, covenant, and combine ourselves together into a civil body politic, for our better ordering and preservation, and furtherance of the ends aforesaid; and by virtue hereof to enact, constitute, and

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<sup>43</sup>. A Journal of the Pilgrims at Plymouth, Dwight B. Heath, Ed., (New York: Corinth Books, 1963), pp. vii, 17. The quoted material was written by Heath.

<sup>44</sup>. For a copy of the agreement between the "Adventurers" and the "Planters" (as the Pilgrims were called in the articles), see John A. Goodwin, The Pilgrim Republic: An Historical Review of the Colony of New Plymouth (Boston: Ticknor and Company, 1888), pp.52-53. Christopher Martin, the Adventurers's agent, "had shown nothing but contempt" for the Pilgrims during the voyage across the Atlantic. Nathaniel Philbrick, Mayflower: A Story of Courage, Community, and War (New York: Viking, 2006), p. 40.

such just and equal laws, ordinances, acts, constitutions, offices from time to time, as shall be thought most meet and convenient for the general good of the colony: unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names; Cape Cod, the 11<sup>th</sup> of November, in the year of the reign of our sovereign lord King James, of England, France and Ireland eighteenth and of Scotland fifty-fourth, Anno Domini 1620.<sup>45</sup>

Before analysing the Compact, we should briefly review the situation in which it was drafted. It was late November and winter was soon approaching. Counting crew and children, the entire party numbered just over a hundred people. They had not yet built winter shelters on land and their forays on shore had not even located a likely site for settlement. They had no supplies for the winter aside from those they had carried with them on the Mayflower. And they feared the native tribes that they knew would be nearby wherever they decided to settle. In all these ways, the settlers were about to step into a Hobbesian state of nature in which security and survival were immediate, pressing concerns.<sup>46</sup> However, there is much of Rousseau in this situation as well. Although, as they saw it, they were only deferring to the will of God, the Pilgrims reached consensual understandings that very much resembled Rousseau's description of the "general will," even down to the revision of dissident opinions into conformity once the congregation reached a decision. From this perspective, the situation was one in which that congregation was encompassing, by way of the Compact, those who had hitherto remained outside its communion. And then there is Locke. The expedition would not have been mounted at all had not the Adventurers put up the capital. To them, the New World was property waiting to be claimed, claimed by mixing labor (in this case Pilgrim labor) with it. Thus, we could make a case that the situation conformed more or less equally to the expectations of each of the social contract theorists.<sup>47</sup>

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<sup>45</sup>. A Journal of the Pilgrims at Plymouth, Dwight B. Heath, Ed., (New York: Corinth Books, 1963), pp. 17-18. This account was first published in 1622. It is unknown who wrote this entry. Note that ten days should be added to the date affixed to the Compact because the Gregorian calendar had not yet been adopted. By modern reckoning, the Compact was signed on November 21, 1620.

<sup>46</sup>. Even though the winter of 1620-21 was mild, over half of those who had sailed with the Mayflower died before spring. John A. Goodwin, The Pilgrim Republic: An Historical Review of the Colony of New Plymouth (Boston: Ticknor and Company, 1888), pp.116,581. A Journal of the Pilgrims at Plymouth, Dwight B. Heath, Ed., (New York: Corinth Books, 1963), p. viii.

<sup>47</sup>, A reminder to the reader that only Hobbes was alive when the Compact was signed. He was thirty-two. Locke would not be born for another twelve years

We know next to nothing with respect to who wrote the Compact or how it was presented to the rest of the passengers and crew. Since the accounts we have were written by Pilgrims and very much approve the agreement, we should probably surmise that their elders played a leading role. One nineteenth century writer fills in the blanks this way:

The adult males of the company were summoned to the `Mayflower's' cabin, the necessities of the case explained, and the following document was drawn up and signed by all the men of the company, as follows...Thus in a few minutes was this little unorganized group of adventurers converted into a commonwealth.<sup>48</sup>

This interpretation suggests a certain amount of voluntary consent on the part of the "Strangers," if not in the drafting of the Compact, then in the signing. However, an equally plausible interpretation would be that the choice laid before the "Strangers" was quite Hobbesian: either sign this document or you will be abandoned to your fate. Since the Pilgrims controlled the ship's supplies, failure to sign would have meant certain death in the coming winter.

As ultimate sources of its legitimacy, the Compact repeatedly cites God and King James, at least in the sense that the Compact is said to comport with their "glory" and "honor." But these claims are rather empty. As is the text itself. There is nothing in the Compact that specifies how decisions are to be made, who is to make them, or how they will be enforced. Hobbes would have immediately noted that the Compact fails to name a ruler, although other elements in the situation would have reassuringly suggested that security concerns were properly at the forefront of this founding. For Locke, however, there is little or no hint of natural law or private property. Although the Mayflower was a money-making proposition about to occupy an eminently exploitable New World, the terms of this founding were not motivated by individual rights. While Rousseau might have approved the

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and Rousseau's birth followed eighty years later.

<sup>48</sup>. John A. Goodwin, The Pilgrim Republic: An Historical Review of the Colony of New Plymouth (Boston: Ticknor and Company, 1888), pp. 62-64. Goodwin, however, admitted that he embellished his account in order to make the narrative more useful to the reader. For his part, Nathaniel Philbrick concludes that the Compact was the result of "an uneasy alliance between [Christopher Martin, the Adventurers' agent] and the passengers from Holland." Mayflower: A Story of Courage, Community, and War (New York: Viking, 2006), p. 40.

pledge that the settlement's government will be "most meet and convenient for the general good of the colony," he, along with the rest of us, might have wondered just how the "general good" was to be determined. However, the real substance and purpose of the agreement is quite compatible with Rousseau in another way. The most important aspect of the Compact was not the terms set down in the text but the public ritual in which men "promise all due submission and obedience." When individuals signed the compact, their act had the quality of a public oath, the violation of which would have meant exile or worse. This, then, was the opening move in the founding, an opening move that certified who would be members of the colony. A leader was soon to follow.<sup>49</sup> But the laws trailed far behind.

Before leaving the Compact, we should also note how pre-existing social and political relations structured this founding. For example, the only people who could choose whether or not to sign were those who were aboard the Mayflower. The ship's hull thus gave this community-coming-into-being a very well-defined boundary. In addition, the absence of an alternative sovereignty, aside from the natives ashore, made the situation even more strikingly akin to an idealized state of nature. No one aboard the Mayflower could have chosen an alternative community. But not everyone aboard the Mayflower was eligible to give their consent. Patriarchal relations dictated that fathers sign for spouses and their children, as well as their servants and hired men, if they had them. Economically independent adult men without families were also eligible. Everyone else was obligated by what their patriarch or employer decided to do. Finally, the Compact itself "was modeled on the 'covenants' or 'combinations' which characterized most Separatist congregations" at the time. These agreements asserted collective "self-government...during a time when the divine right of kings was assumed."<sup>50</sup> However, collective self-government by a devout religious congregation is not the same thing as democracy.<sup>51</sup>

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<sup>49</sup>. John A. Goodwin, The Pilgrim Republic: An Historical Review of the Colony of New Plymouth (Boston: Ticknor and Company, 1888), p. 64.

<sup>50</sup>. A Journal of the Pilgrims at Plymouth, Dwight B. Heath, Ed., (New York: Corinth Books, 1963), p. 17, note 2.

<sup>51</sup>. As Philbrick notes, it "is deeply ironic that the document many consider to mark the beginning of what would one day be called the United States came from a people who had more in common with a cult than a democratic society..." Mayflower: A Story of Courage, Community, and War (New York: Viking, 2006), p.

The 1789 Constitutional Convention

The founding of the United States differed from the Mayflower Compact in many respects. For one thing, the Constitutional Convention had been originally planned and authorized by another sovereignty, the Continental Congress. On February 21, 1787, that assembly, operating under the Articles of Confederation, had adopted a resolution stating "That in the opinion of Congress, it is expedient, that on the second Monday in May next, a convention of delegates, who shall have been appointed by the several states, be held in Philadelphia, for the sole purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein" which must be "agreed to in Congress, and confirmed by the States."<sup>52</sup> In contrast, no other sovereignty had authorized the drafting of the Compact. In addition, had the Philadelphia convention failed to produce revisions in the Articles, the delegates would not have been thrown back into a state of nature because the Confederation, however inadequate its performance, would still have existed. Both practically and theoretically, the Philadelphia convention was deeply enmeshed in a sovereign environment composed of quasi-independent states and an ostensibly national congress. The settlers and crew aboard the Mayflower, their recognition of the suzerainty of God and king notwithstanding, were very much on their own.<sup>53</sup>

A third difference arose from the stipulation that the Philadelphia "delegates...shall have been appointed by the several States." On the one hand, this meant that the states would determine who would serve as members of the convention and that determination would be made before the convention met. On the other, appointment by the states implied that the delegates would represent the residents of those states. Not everyone who would have otherwise been socially qualified to serve as a delegate would be in Philadelphia. The Mayflower Compact clearly differed on both counts: No one but those aboard the vessel decided who did and did not have deliberative rights as to its framing and all those who were socially qualified (i.e., economically independent adult males) could individually consent to or reject

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<sup>52</sup>. Max Farrand, The Framing of the Constitution of the United States (New Haven, Connecticut: Yale University Press, 1913), p. 28.

<sup>53</sup>. The reader, however, should be reminded that the Pilgrims had designed the Compact in such a way that, had the others aboard the Mayflower refused to sign, their religious congregation would have become the de facto, if not de jure, sovereign.

the agreement.

On May 14, 1787, the day set for the opening of the Philadelphia convention, only some of the delegates from the several states appeared at the State House and those present adjourned from day to day until a majority of the states were represented. Finally, on May 25, delegates from a majority of the thirteen states assembled at the State House and the convention opened.

Mr. Robert Morris informed the members assembled that by the instruction & in behalf, of the deputation of Pena. He proposed George Washington Esqr. late Commander in chief for president of the Convention. Mr.

Jno.

Rutledge seconded the motion; expressing his confidence that the choice would be unanimous, and observing that the presence of Genl Washington forbade any observations on the occasion which might otherwise be proper.

General <Washington> was accordingly unanimously elected by ballot, and conducted to the chair by Mr. R. Morris and Mr. Rutledge; from which in a very emphatic manner he thanked the Convention for the honor they had conferred on him...<sup>54</sup>

Thus, the opening move of the Philadelphia convention was the election of a leader. This election clearly displayed both the opening dilemma that the convention faced and the way that the delegates immediately dealt with it. With respect to the dilemma, Morris had no formal right to claim the attention of the other delegates when he first proposed that the convention proceed to the election of a presiding officer and then nominated Washington for the post.<sup>55</sup> In the absence of a presiding officer and procedural rules, there was no one who could recognize him for the purpose of making these motions. However, there were equally clear sociological and political reasons why the other delegates accepted his, for want of a better word, audacity. For one thing, Pennsylvania was the ostensible host of this convention and Morris was acting upon the authority of the Pennsylvania delegation. For another, the only other recognized possible candidate for presiding officer was Benjamin Franklin.<sup>56</sup> Since Franklin was from

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<sup>54</sup>. The Records of the Federal Convention of 1787, ed. Max Farrand (New Haven, Conn.: Yale University Press, 1966; revised edition), Vol. 1, p. 3. The account is taken James Madison's notes on the proceedings.

<sup>55</sup>. The official records state that Morris made two separate motions. The Records of the Federal Convention of 1787, ed. Max Farrand (New Haven, Conn.: Yale University Press, 1966; revised edition), Vol. 1, p. 2.

<sup>56</sup>. Washington himself smoothed the way toward his election. When he arrived

Pennsylvania and, therefore, somewhat of a favorite son of that delegation, Morris in effect was both proposing Washington for the post and implicitly announcing that his election would be acceptable to Pennsylvania, the state most likely to object if any state objected.<sup>57</sup>

When Jonathan Rutledge of South Carolina seconded Washington's nomination, he was conforming to parliamentary practice that was probably universally familiar to the other delegates.<sup>58</sup> As we shall also see in other situations, that familiarity with a common practice underlay an acceptance of motions and seconds that otherwise would have been, at least, incomprehensible and, at worst, flatly objectionable because the rules embodying that practice had not yet been adopted. More problematic, at least potentially, was the balloting during the election itself. The delegates apparently voted by states, a majority of the delegates from each state determining how that state's vote would be cast. Since that voting method was also used in the Continental Congress under whose auspices the Philadelphia convention was called, that might have seemed to many, if not most, of the delegates the normal course to follow.<sup>59</sup> However, this method weighted each of the states equally, giving small states such as Delaware a vote equal to large states such as Pennsylvania. And, in preparations for the convention, the Pennsylvania delegation had suggested to their Virginia counterparts that, from the very beginning of the convention, the votes should be allocated to the several states in proportion to their size. If this were not done, the Pennsylvania delegates contended, the small states

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in Philadelphia for the convention, his "first move" was to make a social call on Franklin. Washington also lodged as a guest at the Morris home during the summer of 1787, as the convention deliberated. Catherine Drinker Bowen, Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787 (New York: Bantam, 1968), pp. 16, 21.

<sup>57</sup>. In fact, Franklin had himself intended to nominate Washington but the rainy weather and his gout kept him at home that day. Charles L. Mee, Jr., The Genius of the People (New York: Harper & Row, 1987), p. 79; Max Farrand, The Framing of the Constitution of the United States (New Haven, Connecticut: Yale University Press, 1913), p. 55. Also see Madison's notes, The Records of the Federal Convention of 1787, ed. Max Farrand (New Haven, Conn.: Yale University Press, 1966; revised edition), Vol. 1, p. 4.

<sup>58</sup>. Forty-two of the fifty-five delegates had previously served in the Continental Congress. In addition, more than half of them were lawyers and some of them had even served as speaker in their state legislature. All had held public office of some sort. Christopher Collier and James Lincoln Collier, Decision in Philadelphia: The Constitutional Convention of 1787 (New York: Random House, 1986), p. 76.

<sup>59</sup>. Charles L. Mee, Jr., The Genius of the People (New York: Harper & Row, 1987), p. 78.

would be in a position to block a change in the voting rules later on.<sup>60</sup> So a challenge to the voting method was at least conceivable and, if it had been made, formally irresolvable. However, in the actual event, no one challenged the allocation of one vote to each state.<sup>61</sup>

Immediately following Washington's election, the convention selected a secretary. After that, the delegates presented their credentials evidencing their appointment by their several states. In effect, the delegates reciprocally approved each other's membership in the convention by offering no objection to these presentations. If someone had so objected, there would have been, of course, no formal method of resolving the dispute. However, most if not all delegates considered the membership of the convention to have been determined before they even gathered in Philadelphia. For one thing, the resolution passed by the Continental Congress calling for the convention had indicated that the states were to appoint the delegates. Although, as we shall see, that resolution could not and did not bind the convention, it did recognize the very real sovereignty of the several states as an objective fact. To question the credentials of the delegates from one of the states would have been to compromise that state's sovereignty and, in all likelihood, would have led that state to withdraw from the convention. In addition, even though the resolution was practically non-binding, it did create an expectation as to the process through which delegates were to be selected. Absent any countervailing impulse, that expectation and the objective fact of individual state sovereignty over the matter served to make the reading of credentials uneventful.<sup>62</sup>

The convention completed its organization by appointing a committee "to draw up rules to be observed as the standing Orders of the Convention." The convention then adjourned over the weekend. When the delegates met the following Monday, this committee reported a set of rules that were

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<sup>60</sup>. Virginia opposed the Pennsylvania suggestion for fear that the small states would simply walk out of the convention before it had begun to deliberate. Charles L. Mee, Jr., The Genius of the People (New York: Harper & Row, 1987), pp. 82-83; Max Farrand, The Framing of the Constitution of the United States (New Haven, Connecticut: Yale University Press, 1913), p. 57.

<sup>61</sup>. Because Washington was elected unanimously, either voting method (one vote per state or weighted votes) would have given the same result. That fact, plus the prestige that Washington enjoyed at the convention, may have even further discouraged an objection.

<sup>62</sup>. The Records of the Federal Convention of 1787, ed. Max Farrand (New Haven, Conn.: Yale University Press, 1966; revised edition), Vol. 1, p. 2.

considered, amended, and then approved or rejected one by one.<sup>63</sup> Here, too, the convention could not have acted without bridging the opening dilemma in some way because they were operating outside any formal parliamentary procedure.<sup>64</sup> However, the question uppermost in the minds of most delegates (concerning the allocation of votes among the individual states) had already been settled with the balloting on Washington's nomination as president of the assembly.

The way in which the 1787 Constitutional Convention resolved the opening dilemma was rather ordinary. Most constitutional conventions that have revised the constitutions of the individual states have proceeded in the same fashion in that they have begun with the election of a leader (presiding officer), then approved the credentials of the delegates, and, finally, adopted parliamentary rules. Most of the lower houses of the state legislatures, as well as the United States House of Representatives, have followed this protocol as well. In addition, most assemblies that have confronted the opening dilemma have relied, either implicitly or explicitly, on the "instructions" of the sovereign authority that originally called for their creation. However, these instructions have always been contingently accepted, subject to alteration or even rejection once the assembly begins to organize.

As we have seen, the 1787 Constitutional Convention more or less conformed to the instructions that it had been given by the Continental Congress. The delegates were duly appointed by the individual states and their credentials were approved by their colleagues. And the parliamentary rules in effect in the Continental Congress more or less structured the

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<sup>63</sup>. The Records of the Federal Convention of 1787, ed. Max Farrand (New Haven, Conn.: Yale University Press, 1966; revised edition), Vol. 1, pp. 2, 4, 7-8, 10, 13, 15.

<sup>64</sup>. Under the Articles of Confederation, all important measures in the Continental Congress had to be approved by at least nine of the thirteen states in order to pass. This was practically equivalent to a two-thirds vote of the states. Max Farrand, The Framing of the Constitution of the United States (New Haven, Connecticut: Yale University Press, 1913), p. 3. Thus the convention could have confronted, at this stage, a choice between that requirement or a more relaxed simple majority rule. Since the vote on that choice would have necessarily required the very decision that it was ostensibly making (i.e., what the criteria would be for passing a proposal), there would have existed a very real possibility that the convention could not have reached a decision. For example, a simple majority could have favored a simple majority rule while a determined minority might have held that the default rule was the provision handed down from the Articles of Confederation. In the absence of parliamentary rules, there would have been no way to determine which of these two alternatives should determine the outcome and, thus, the convention could not have decided what the voting rule would be.

proceedings in the convention, at least until the formal rules had been adopted. But a very serious deviation with those instructions soon appeared. The 1787 Constitutional Convention had been instructed to confine its attentions to "the sole purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein."<sup>65</sup> "Mr. Gerry seemed to entertain the same doubt." Notes of Debates in the Federal Convention of 1787 Reported by James Madison (Athens, Ohio: Ohio University Press, 1966), p. 35. Almost immediately after they began deliberations, however, the delegates discarded the Articles of Confederation as so much waste paper and began to draw up plans for an entirely new government.<sup>66</sup> And, as is the nature of founding legislative assemblies once they begin to deliberate, the delegates recognized no authority to whom they might have to answer as they did so.<sup>67</sup> In this, too, they were more or less ordinary.

#### Foundings and the State of Nature

The most spectacular foundings involve the creation of a new sovereignty and, especially over time, become enshrouded in myths and enshrined in miracles. The Mayflower Compact and the 1787 Constitutional Convention fall in that category. However, foundings come in other forms and

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<sup>65</sup>. Many of the states had written in this purpose as a part of the credentials they provided their delegates, ostensibly constraining what they could do in the state's name once the convention began. Catherine Drinker Bowen, Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787 (New York: Bantam, 1968), pp. 23-24. And the point was not entirely lost on the delegates themselves. As James Madison reported in his minutes of the convention, "Genl Pinkney expressed a doubt whether the act of Congs recommending the Convention, or the Commissions of the Deputies to it, could authorise a discussion of a System founded on different principles from the federal Constitution.

<sup>66</sup>. One of the many reasons the delegates discarded the Articles of Confederation was the requirement that every state had to approve an amendment in order for it to be adopted. This provision, which gave any one state an effective veto, had frustrated previous attempts to revise the Articles.

<sup>67</sup>. The delegates did recognize, of course, that the several states would have to ratify the constitution they were drafting if it were to ever have any practical effect. But they decided how many states would have to consent in order to ratify what they had done. And, in other respects as well, they recognized no other authority who might have otherwise influenced their deliberations or rejected what they had crafted as an illegitimate assertion of power.

venues as well, anywhere and anytime that a direct relationship is asserted between the delegates in an assembly and the popular will of a people. Because it is the assertion of this direct relationship that engenders the opening dilemma, the latter appears much more often in the course of American politics than otherwise might be the case. Here we will discuss several of these situations, beginning with the founding of a national government.

For the founding of a national government, the state of nature is the absence of political obligation to any other state. Thus, the people come together as autonomous individuals free from the direction or influence of any other sovereign authority. They make a new sovereign authority out of nothing. If they fail to make a new sovereign authority, they remain in the state of nature. They also remain in the state of nature as long as the new social contract has not been ratified. The delegates to the assembly in which this social contract is crafted thus embody the popular will of the people in its entirety, unconstrained by obligations to any other political authority.<sup>68</sup>

For the rewriting of constitutions, the state of nature is entered into when the assembly convenes because the delegates are not and cannot be bound by the existing social contract as they revise it. However, the state of nature only extends to their obligation to respect the existing social contract in their deliberations on the revision. In all other aspects (such as the criminal law), they remain governed by the already-existing state. They remain in this (qualified or limited) state of nature only as long as they are in joint assembly. Once they adjourn, they leave the state of nature, regardless of whether or not the new social contract (constitution) has been adopted. In the United States, the revision of constitutions has only been carried out within the individual states. Because these individual states and their citizens are also obligated to the federal constitution, the delegates to the assemblies that revise individual state constitutions remain obligated to the federal constitution. For that reason, the delegates in

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<sup>68</sup>. In practice, no people in recorded history have entirely lacked a social organization that, however inadequate, they would have fallen back upon had the assembly failed to approve a constitution. For example, the people who participated in the Mayflower Compact and the 1787 Constitutional Convention would not have reverted to anarchy had their efforts been in vain. In fact, it is probably impossible to theoretically imagine a people entirely lacking in social organization even attempting the framing of a social contract. Every people bring something into the assembly (other than pure anarchy) that acts as a foil and possible alternative to the government they are creating. Even so, the delegates do not owe any formal political obligation to this foil.

such assemblies only embody that part of the popular will that is not already constrained by the national social contract. The state of nature is thus doubly limited in this case: (1) applying only to the delegates in their formal roles within the assembly and (2) entailing residual obligations to another political authority (the national government).

For the convening of legislatures, the state of nature emerges only with those (usually lower) chambers in which all the members are elected at the same time and exists only with respect to the newly elected chamber's obligation to obey the injunctions of the old as it creates a new organization. In a democracy, each elected branch of the government bears a direct relation to the popular will and the task of the legislature is to realize the social contract between a people and their state by passing legislation. For chambers whose members are all elected at the same time, this legislative obligation to the popular will extends to the organization (including the selection of a leader, the adoption of rules, and the determination of a membership) since the right and ability of the members in the previous chamber to represent the popular will has lapsed. Because it has lapsed the previous chamber is unable to bind the successor chamber in any way.<sup>69</sup>

While the newly elected members are organizing their chamber, they are in a state of nature with respect to prior chambers and thus under no obligation to respect what those chambers have done or attempted to impose on future chambers, including their own. While in this heavily qualified state of nature, the members of the new legislature remain bound, as citizens, by all the other institutions and authorities of the government. However, none of those other institutions or authorities can dictate or influence the organizing of the chamber (which is, in effect, a "re-founding" of the assembly). If such an assembly cannot organize itself, the entire government (in theory) is dissolved and a state of nature ensues.<sup>70</sup>

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<sup>69</sup>. Only the auxiliary offices and supporting functions of the chamber (such as maintenance and payroll functions) can continue from one chamber to the next. Everything related to the representative role of the chamber must be created anew.

<sup>70</sup>. More realistically, the failure to organize a chamber would initiate a constitutional crisis in which none of the branches, including those that were otherwise up and running normally, would have the right to rule. The government could only operate until the money that had been previously appropriated ran out and/or already existing statutory authority became inadequate for its tasks. In practice, chambers have often had difficulty organizing themselves, sometimes for months on end. In the meantime, the other branches of government have operated more or less routinely while

In each of these situations, the state of nature ensures the absolute autonomy of the assembly as an expression of the popular will by: (1) excluding all other sovereignties that might otherwise influence its initial organization and (2) eliminating all distinctions between individual delegates that otherwise might distort the representation of their respective constituencies. Because it performs these functions, this absolute autonomy is a precondition for the popular legitimacy of the assembly because only autonomous (free) and equal individuals are able to consent to the political institutions they create.

As we shall see, a people thoroughly accustomed to a particular political order sometimes appear to treat this autonomy as a theoretical fiction, in practice presuming that their common political culture has created a consensus that can bridge any of the misunderstandings or conflicts that might otherwise accompany the opening dilemma. Often they are right but sometimes they, almost inadvertently, discover that the state of nature can raise fundamental questions with respect to whether or not an unimpaired popular will can ever be theoretically or practically expressed.<sup>71</sup> In addressing these questions, there is no real alternative to examining how assemblies have actually behaved. For that reason, we now turn to two thoroughly American instances in which the opening dilemma attending founding assemblies has flowered in full bloom. The first arose during the organization of the United States House of Representatives at the beginning of the Twenty-sixth Congress in 1839. The second comes to us as the verbatim record of the organization of the 1869 Constitutional Convention of the State

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waiting for the chamber to organize. The extreme case would arise if the chamber could not ever organize, thus impairing the relation of the branches, as an ensemble, to the popular will. Could the president, for example, legitimately exercise sovereign authority if the House of Representatives were incapable of organizing after an election? This is not an answerable question.

<sup>71</sup>. Because the opening dilemma invariably imposes arbitrary inequalities on the delegates and depends on a parliamentary order that cannot itself be democratically ratified, it is, of course, one threat to this unimpaired expression. But we should also note that, because of their embedment in the state of nature, founding assemblies cannot be confined to the purpose for which they were called together. As we have seen, the 1789 Constitutional Convention in Philadelphia was convened in order to revise the Articles of Confederation but almost immediately abandoned that compact in drafting what became the United States Constitution. Even more dramatically, the States-General called together by Louis XVI in 1789 in order to authorize and legitimate new tax measures to rescue the French state from bankruptcy almost immediately transformed itself into the National Assembly, proclaimed a republic, and beheaded the king some three and a half years after its original convocation.

of Illinois.<sup>72</sup>

The United States House of Representatives and  
the State of Nature

All of the members of the United States House of Representatives are elected every two years. Because no part of the membership of the House overlaps from one Congress to another, the House must organize itself anew at the beginning of each Congress. When the newly-elected members assemble in the Capitol, they are thus in a "state of nature" with respect to each other and the other branches of the federal government. The only formal limitations on this state of nature are those parts of the United States Constitution that enjoin the House to elect a speaker and otherwise impose obligations on the members as United States citizens. Otherwise, the members-elect must find their own way toward resolving the opening dilemma by selecting a leader, defining their own membership, and adopting rules of procedure for their deliberations. And, as in every other like situation, there is no democratic process for doing these things.

Over the years, however, the House has developed customs that serve the new members as "guiding expectations" as to how the opening dilemma will be resolved. As the House performs its opening rituals, these guiding expectations are doubtless viewed as binding procedures by most of the new members, probably the more so in that these rituals have not been seriously challenged for many decades. However, before the chamber is organized, the members are nonetheless formally unknown to one another, lack a formally ordained leader, and have not adopted a common procedural language in which to deliberate. In this section, I will briefly review how the members-elect developed practices that, more or less in some instances, permitted them to resolve the opening dilemma. This review is limited to the nineteenth century because the case I have chosen to illustrate how many of the practices were actually used comes from the beginning of the Twenty-sixth Congress in December, 1839. However, much of this discussion is still relevant to the organization of the modern House.

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<sup>72</sup>. The Illinois constitutional convention appears in the appendix to this paper.

When the members-elect assemble in the House chamber for the first time, they are enjoined to do so by the provision in the Constitution that specifies the day and time for the convening of the new Congress. This clause serves as a coordinating device for bringing the members-elect together but otherwise provides no guidance as to what they might do when they assemble. Under federal law, however, the prior House of Representatives had elected a clerk, one of several officials who aid the speaker in administration of the chamber. Under that law, the term of office of the clerk continues until a new clerk has been elected by the succeeding House. One of the duties, again under the law, is to preside over the initial organization of the new House. That law is utterly binding upon the clerk, imposing these duties as legal obligations. However, that same law does not bind the members-elect in accepting his (temporary) leadership. The apparent paradox arises from the fact that no House can impose rules or officers upon its successor. The clerk, under the law, becomes a simple federal official once the old House dissolves. Thus, he can continue his (mainly administrative) duties between the old and new Congress and can be assigned responsibility for organizing the new House. However, from the perspective of the members-elect, his presence at the head of the chamber as they assemble is no more than a guiding expectation arising out of tradition and custom. If the members-elect wish, the clerk can be acknowledged, ignored, or replaced at will.

The first task performed by the clerk is to call the chamber to order at the constitutionally mandated time. He then proceeds to call the roll of the members-elect. This roll has been made up by the clerk after examination of the credentials of election presented to him by the members-elect. The ritual calling of the names defines the membership of the House for the purpose of electing a speaker. Once the members are enrolled, they can then cast votes in that election. Once a speaker is elected, he takes the oath of office and then, in turn, swears in the other members. The last step in the organization of the House is usually the adoption of formal rules. At that point, the House of Representatives sends a message to the Senate that it is now organized and ready to proceed to business.

When Asher Hinds published his compilation of precedents in 1907, he described this process in terms that suggested a kind of diplomatic etiquette:

When a new Congress assembles on the first Monday in December, the Members-elect are called to order at 12 m. by the Clerk of the preceding

House,<sup>73</sup> standing at his desk. After prayer by the Chaplain of the last House, the Clerk announces:

Representatives-elect: Under the provisions of the Constitution of the United States this is the hour fixed by law for the meeting of the House

of Representatives of the ---- Congress of the United States of America.

The Clerk of the House of Representatives of the ---- Congress will read

the names of those whose credentials show that they were regularly elected to this body in pursuance of the laws of their respective States

and of the United States.<sup>74</sup> As the roll is called, following the alphabetical order of the States, those present will please answer to their names, that we may discover if there is a quorum present.<sup>75</sup>

When the roll call has been completed, the Delegates being called last, the Clerk presents a tabulated statement of the changes in the membership that have occurred since the regular election.

Then, if a quorum is present, the Clerk announces the fact, and declares

that the next business in order is the election of a Speaker.<sup>76</sup> Nominations are made from the floor, simply by naming the candidates.<sup>77</sup>

The House has for many years elected its Speaker by viva voce vote.<sup>78</sup> The Clerk appoints four tellers, from the Members-elect, representing the parties making nominations,<sup>79</sup> who, seated at the Clerk's desk, make the record as each Member-elect, when the roll is called, alphabetically, announces the name of his choice. The roll call being completed, one of the tellers, usually the one first named, announces the result of the vote, the Clerk having previously read over the names

<sup>73</sup>. "In accordance with section 1 of House Rule III. (see sec. 64 of this work.) In case the Clerk can not for any reason officiate, the duties devolve on the Sergeant-at-Arms, and next upon the Doorkeeper. (See Revised Statutes, secs. 32 and 33.)"

<sup>74</sup>. "This roll is made up in accordance with section 31 of the Revised Statutes."

<sup>75</sup>. "Form used by Clerk James Kerr, of the Fifty-third Congress, in calling to order the House of the Fifty-fourth Congress, December 2, 1895."

<sup>76</sup>. "See sections 6747-6750 of Volume V of this work for controversies as to transaction of business before organization. Also see" Congressional Record: 51:1: 80, and 55:1: 15.

<sup>77</sup>. "Sometimes a resolution to proceed to election of Speaker is adopted; but very early as well as very late precedents exist for proceeding without the resolution. See case December 8, 1829, when, without resolution or motion, the House proceeded to ballot for Speaker." House Journal: 21:1: 7.

<sup>78</sup>. "See section 187 of this work for rule relating to viva voce election and its origin. The rules, however, are not adopted until the House is organized."

<sup>79</sup>. "See" Congressional Record: 55:1: 15.

of those voting for each candidate.

The Clerk, having restated the vote as reported by the tellers, announces that—

Mr. ----, a Representative from the State of ----, having received a majority of all the votes cast, is duly elected Speaker of the House of Representatives of the ---- Congress.

The Clerk then designates certain Members, usually the other candidates who have been voted for, to conduct the Speaker-elect to the chair.

The Speaker-elect having taken the chair and addressed the House, the Clerk designates the Member-elect present who has served longest continuously<sup>80</sup> as a Representative to administer the oath of office to the Speaker-elect.<sup>81</sup>

After the administration of the oath the Speaker administers the oath to  
 the Members-elect and Delegates,<sup>82</sup> who are usually called to the area in front of the Speaker's desk several at a time, by States. The Delegates  
 are sworn last. Members of whose election there is no question, but whose certificates have not arrived, may be sworn in by unanimous consent.

The election of the remaining officers of the House is next in order. The rule prescribes that these elections shall be viva voce.<sup>83</sup> It is usually accomplished, however, by the adoption of a resolution of five paragraphs, each in this form.

That ---- ----, of the State of ----, be, and he is hereby, chosen ---- of the House of Representatives.

and relating to the Clerk, Sergeant-at-Arms, Doorkeeper, Postmaster, and  
 Chaplain, in the order named.

The minority party usually present their candidates in a similar

<sup>80</sup>. "This does not always seem to have been the custom. Thus, in 1815, the oath was administered to Speaker Clay by Mr. Robert Wright, of Maryland who was much younger as a Member than either Nathaniel Macon, of North Carolina, who had served since 1793, or Richard Stanford, of the same State, who had served since 1797, and both of whom were present." Annals: 14:1: 374. There are more examples in this footnote.

<sup>81</sup>. "This oath is the same as that administered to members-elect. (See sec. 128 of this work.) It does not seem to have been the invariable custom for the Speaker to address the House first. This, in 1815, Mr. Clay took the oath first." House Journal: 14:1: 7.

<sup>82</sup>. "This order is according to the old form." House Journal: 2:1: 434.

<sup>83</sup>. "See section 187 of this work. The rules, however, are not usually adopted until after the officers are elected, the old rule that the rules should continue in force from Congress to Congress having been dropped in the Fifty-first Congress. See debate of May 15, 1797, where the point was raised and discussed that the rules of the former House were not binding in the election of a Clerk." Annals: 5:1: 51.

resolution, which they move as a substitute.

The Speaker having administered the oath of office to the officers elected, the organization of the House is completed...<sup>84</sup>

The similarity between this process and the etiquette attending diplomatic negotiations is a little more than skin-deep. Statutory law and international law have about the same status in each case: Members-elect and nations conform when it is convenient to do so but the authority of the law dissolves under pressure. In addition, there are ritual courtesies intermingled with substantive decisions. In fact, some of the ritual courtesies, such as the calling of the roll, are substantive decisions in that they recognize and confer official standing upon the members. And much of the context within which the members-elect and diplomats act takes on meaning from a consensual understanding of the political culture they share. But there is a major difference in the task at hand. The members-elect are constituting a government when they organize the House of Representatives and this government will have more than token sovereignty when they are done.<sup>85</sup>

When Asher Hinds collected the precedents of the House of Representatives in 1907, many of the decisions that he codified pertained to the initial organization of the chamber. As he was careful to note, these precedents were constituted of a very different material from those that interpreted practice after the House was organized. The major difference was that there were no formal rules underlying the precedents so that they did not attach themselves to or interpret procedures that the chamber had approved (because the chamber has not adopted rules at the time of its initial organization). They are, for that reason, similar to traditions or customs whose authoritative standing arise from both their familiarity in practice and their apparent reasonableness as solutions to particular problems.

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<sup>84</sup>. Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States (Washington: Government Printing Office, 1907), Volume 5, No. 81, pp. 60-63. In subsequent notes, references will be condensed, for example, in the following form: Hinds' 5: 81: 60-63. I should note that Hinds did not include the adoption of parliamentary rules as a condition for completing the organization of the House, although he did list adoption as something that occurred almost immediately after the sequence laid out in the text.

<sup>85</sup>. With very minor and entirely cosmetic differences, the modern House of Representatives follows the protocol outlined by Hinds. See, for example, Congressional Record 108:1: 1-21, January 7, 2003.

For example, clerks have usually and almost slavishly followed tradition in compiling the initial roll. In practice, the certificates of election issued by the states (usually the governor) have been viewed by clerks as prima facie evidence of election, if they are in good order and conform to the law of the particular state. In that sense, clerks have been almost automatons in translating that information into the initial roll. However, when challenged by members-elect, clerks have diligently protected their absolute authority over that compilation. As we shall soon see in the next section, it is a good thing that they aggressively defend their prerogatives at this stage because any other course of action (such as allowing members-elect to amend the roll before it has been called) almost guarantees procedural chaos.<sup>86</sup>

Another area of contention has been the status of the parliamentary rules. Since the House is not a continuing body, the rules must be formally adopted anew at the beginning of each Congress. Clerks have universally put off the adoption of rules until a speaker has been elected, in part because the chamber cannot adopt them before the roll has been called and in part because a motion to elect a speaker, once the roll has been completed, has been given a higher privilege than almost any other motion.<sup>87</sup> But this practice raises a question: how can the members-elect propose actions to the chamber and how can the clerk decide points of order, if his own rulings are challenged? In a formal sense, there is no basis for any of these things before parliamentary rules have been adopted. In the past, the House has tried to make rules binding on the succeeding chamber. If the succeeding House passively consented by not challenging this arrangement, that would solve the problem.<sup>88</sup> But, in fact, most new chambers have openly recognized and asserted that a prior House cannot bind the organization of a future

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<sup>86</sup>. The major problem is that, before the roll has been completed, the chamber cannot decide questions except under unanimous consent because the membership has not yet been defined. For a sampling of the precedents with respect to compilation of the roll, see Hinds' I: 14-15, 19, 21-3, 47, 84-5: 11, 12-3, 14-5, 36-7, 64-5.

<sup>87</sup>. This high privilege arises, in turn, from the constitutional injunction that the House elect a speaker and the corollary understanding that the unelected clerk should cede the chair to the new speaker as soon as possible.

<sup>88</sup>. In 1860, for example, the House ordered that "These rules [the standing rules of the House] shall be the rules of the House of Representatives of the present and succeeding Congresses, unless otherwise ordered." This rule remained on the books for the next three decades. During this period, however, the speaker sometimes ruled and the members sometimes objected that no House could bind its successor in this way. This arrangement was finally altogether abandoned in 1890. Hinds' V: 6743-7: 882-4.

House in that way.

Instead, the practice of the chamber during the organization and before formal rules have been adopted has generally held that the clerk and, after his election, the speaker are guided by what has been variously termed "the general parliamentary law of the country," "the common parliamentary law," and the "common legislative law." This vernacular procedure has been interpreted as a combination of "Jefferson's Manual and modified by the practice of American legislative assemblies, especially of the House of Representatives." In some of the rulings based on these interpretations, rules specific to the House have been smuggled back into the proceedings even though they have not been formally adopted.<sup>89</sup>

These precedents have almost always been created under conditions of great uncertainty because of the disorganized state of the chamber. In addition, the issues they address would not have been raised at all had the political stakes not been high as well. This combination of great uncertainty and high political stakes makes them extremely interesting in their own right. However, we are more interested in how they help us better understand the opening dilemma than in how they might authoritatively guide future House practice. These precedents help us better understand the dilemma because, for the most part, they arose in situations in which "the problem of how to proceed when there was no formally authorized way to proceed" was the issue confronting the chamber. For the purpose of better understanding the opening dilemma through precedents set in actual practice, I want to now turn to the organization of the House of Representatives in 1839, at the beginning of the Twenty-sixth Congress. This organization generated more precedents addressing the compilation of the roll, the procedure of the chamber, the roll of the clerk, and so on than any other

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<sup>89</sup>. For a sampling of these precedents, see Hinds' I: 93-6, 101: 66-7, 68; V: 6755-63: 885-9. One of the most important features of this vernacular procedure is the point of order through which a member can ask the chair to either explain a procedural ruling or challenge that ruling. If dissatisfied with the chair's explanation, the member can then appeal the chair's decision. That appeal then gives the chamber the opportunity to either endorse or reject the chair's ruling. Either way, the chamber has, in effect, adopted a procedure. The point of order thus allows a chair to rule rather expansively during the organization because the chamber can always call the chair to account if the rulings are unacceptable. In that way, the chair can ease the chamber through many of the lacunae that would otherwise stymie the proceedings, developing a partial set of rules through precedents. The reader should note, however, that these precedents still have no standing when the House organizes anew at the beginning of the next Congress.

organization in the history of the House.<sup>90</sup>

The Organization of the House of Representatives:

The 26<sup>th</sup> Congress: December, 1839

On December 2, 1839, the members-elect of the House of Representatives gathered together in the United States Capitol. The Congressional Globe reported the event.

This being the day set apart by the Constitution for the assembling of the two Houses of Congress, at 12 o'clock, m. the Clerk (Mr. Garland) called the House to order, and said: 'According to the usual practice, gentlemen, I am prepared, if it is the pleasure of the House, to proceed

to call the names of members of Congress elected to the Twenty-sixth Congress, first session.'

The Clerk then called over the names of the following gentlemen, who appeared to be in their seats:

Hugh Garland had served as clerk in the previous Congress and was, as has been discussed, now presiding over the initial organization the newly elected House. If the organization had proceeded routinely, his duties would have been completed in an hour or so. But this was not to be a routine organization.<sup>91</sup>

By custom, the clerk called the roll by state, beginning with the extreme northeastern corner of the nation (Maine) and working his way down the eastern seaboard, picking up Vermont as he went along but otherwise only calling states with an Atlantic shoreline. When he reached New Jersey, however, he only called one name (Joseph F. Randolph). After that name, the

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<sup>90</sup>. For a particularly long discussion and interpretation stemming from the 1839 organization, see Hinds' I: 103: 68-74.

<sup>91</sup>. From the perspective of the clerk's responsibilities, a "routine" organization was one in which he first called the roll and then invited the members to nominate candidates for speaker. In most instances before the Civil War and the vast majority afterward, a speaker was elected on the first ballot and immediately took over as presiding officer. The clerk was thus relieved of all subsequent responsibility for the organization as soon as the roll had been called and a speaker was elected. However, in those instances where a speaker was not elected on the first ballot, the clerk had to remain in the chair until one of the candidates was victorious. In some cases, the speaker contests could take weeks. For background on the clerk's duties in the House, including as presiding officer during initial organization, see Jeffery A. Jenkins and Charles Stewart III, "More than Just a Mouthpiece: The House Clerk as Party Operative, 1789-1870," presented to the American Political Science Association annual meeting in Chicago, Illinois, September 2-5, 2004.

clerk stopped and stated, in the words of the reporter for the Congressional Globe, "that there was conflicting evidence with regard to the election of five members from this State, and asked if it was the pleasure of the House that he should pass over their names until the call of the balance of the roll was completed."

As subsequent events demonstrated, there were several ways to interpret the clerk's action. On the most immediate level, he may have been motivated by partisan interest. Hugh Garland had been elected clerk in the previous Congress by the Democrats and hoped, if all went well, to be reelected to the post by the Democrats in the present Congress. The five New Jersey names he proposed to skip were all Whigs. Without including these Whigs, the chamber was closely balanced between the major parties with the most accurate count we have giving the Democrats 120 seats and the Whigs 108, along with two Conservatives from Virginia and six Anti-Masonic members from Pennsylvania.<sup>92</sup> With 236 members in the chamber as the 26<sup>th</sup> Congress opened (again not including the New Jersey Whigs), the Democrats held only two more than half the seats. However, if the five New Jersey Whigs were seated, no party would enjoy a majority. So Garland had an immediate stake in ensuring a Democratic majority in the chamber and, of course, his party had an even larger stake in the election of a Democratic speaker.<sup>93</sup>

However, the partisan dimension of this contest is largely irrelevant to my present purpose. I want to instead explain why Garland's question

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<sup>92</sup>. With two exceptions, this is the count given in Kenneth C. Martis, The Historical Atlas of Political Parties in the United States Congress, 1789-1989 (New York: Macmillan, 1989), p.95. One exception is the Massachusetts sixth district which was vacant when the House convened. The district had elected a Whig, James C. Alvord, but Alvord died before the session opened. Since the seat was vacant, the total in Martis (109) was adjusted to 108. The more important exception arises out of the status of five Democrats from New Jersey who were not seated until the following March. Their subtraction reduces the total number of Democrats in Martis from 125 to 120. (The Congressional Globe (26:1: 1, 42-43) also indicated the names of Democratic members in Roman and all other parties in italics but there are several apparent errors in that list.) While the compilation in Martis is the best we have, party designations in this period were haphazardly reported and a little unstable. With respect to the House of Representatives in this Congress, Martis reports discrepancies in the party affiliation of fifty-three members among his sources (pp. 360-2). Although the vast majority of these discrepancies are minor errors in the respective compilations, as opposed to weak or ambiguous party identities, the general political environment was not completely polarized into a two party system and some members could, for that reason, refuse to align with either of the two parties.

<sup>93</sup>. Jenkins and Stewart provide a detailed partisan interpretation of this contest in "More than a Mouthpiece...", pp. 12-21. For a succinct statement of what might have been the clerk's intentions, see Congressional Globe 26:1: 10.

threatened to tie the chamber up in logical knots, knots so complex and logically irresolvable that the members, regardless of their partisan interests, had difficulty even constructing the situation in which they found themselves. The question Garland placed before the chamber was whether "he should pass over [the names of the five New Jersey members-elect] until the call of the balance of the roll was completed." At this point, Garland had called the names of seven states with a representation of 78 seats. Because one seat in Massachusetts was vacant, 77 members had answered the call. Garland had also called the name of one of the New Jersey members-elect as well, for a total of 78 responses. Since the total membership of the House at this time was 242, this was well short of a quorum.<sup>94</sup> And, without a quorum, the chamber could not vote on a question. That meant that the only way the chamber could indicate to Garland what he should do was by unanimous consent. And, because the partisan stakes were high, unanimous consent was not going to be forthcoming for either calling the names or leaving them off the roll.

The clerk's interpretation of his role as presiding officer was that he should exercise as little discretion as possible in organizing the House. It was from this perspective that Garland tried, on the second day of debate over calling the roll, to explain and justify the stand he had taken.

No man...feels more than I do the delicacy and difficulty of his position. From the beginning I have felt a high responsibility resting upon me, and before God and my country, I assure you I have had but one motive, and that was to do my duty justly and impartially, without regard to personal or party considerations. I have been placed in a novel and unprecedented situation [in that the] difficulty in the present case was presented to the Clerk himself. Conflicting evidence [as to the credentials of the New Jersey Whigs] was brought into his office, and what was he to do? What was I to do in this case? Was I to take upon myself the powers of the House of Representatives—the powers which the Constitution has given to it to decide on the qualifications

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<sup>94</sup>. Custom held that the order of the states begin with Maine and move south along the Atlantic seaboard. Another way of calling the states, say starting with the most extreme southwestern state and moving east, would have produced a quorum before New Jersey was reached. Because Garland was not bound by custom, he could even have chosen to order the states in such a way that New Jersey was last to be called. As William Slade, a Vermont Whig, observed, the clerk might even "have called them [the individual members] over in alphabetic order, for there was nothing obligatory on him to call them over by States. The present rule was merely an arbitrary one, and did not always exist in that body." Congressional Globe 26:1: 2. However, custom was useful for Garland's purposes in that he apparently wanted, if possible, the chamber to grant unanimous consent to his proposal.

of its members? I assure gentlemen that I have felt the delicacy of my situation, and I have labored assiduously to be enabled to come to correct conclusions in relation to this question.<sup>95</sup>

Even though he had serious doubt as to the legitimacy of the credentials offered by the five New Jersey Whigs, he could not simply strike them from the roll or, even more aggressively, substitute the names of their five Democratic challengers in their place. And this serious doubt also prevented him from placing the New Jersey Whigs on the roll because that, too, would have been an exercise of power that he believed to be beyond his reach. The only course of action that minimized his discretion was to place the question before the chamber and let the chamber decide what he should do.<sup>96</sup>

The traditional deference of the clerk arises out of his status as an unelected official with no clear connection to the popular will of the people. The members-elect, on the other hand, embody that will as a collective. The clerk's task, seen this way, is to bring that collective into being (i.e., organize the chamber) without distorting or frustrating the popular will as it was reflected or transmitted in the last election.<sup>97</sup> In this case, the governor of New Jersey had certified five members-elect from that state as properly elected representatives. The governor had affixed the "broad seal" of New Jersey to their credentials (this comes down to us as the "broad seal" contest) and they had, in turn, presented those credentials to the clerk. The customary practice of clerks then and since has been to consider the credentials of members-elect as determinative for the purposes of creating the initial roll if they are in good order (the main criteria for "good order" being that they are in the form specified by the laws of the

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<sup>95</sup>. Congressional Globe 26:1: 6. As the debate wore on, several members offered alternative interpretations of the clerk's authority. For one of the most expansive of these interpretations, see Congressional Globe 26:1: 14.

<sup>96</sup>. Garland consistently hewed to this position on other questions as well. For example, when asked by a member how a question would be decided when a quorum was not yet in existence, he replied that "it was not for him to decide as to what course the House ought to pursue in relation to this matter." When asked whether a member could offer a motion to table the clerk's question concerning the credentials of the New Jersey Whigs, Garland similarly said "that would be a matter for the House to decide." Congressional Globe 26:1: 2.

<sup>97</sup>. As might be imagined, the preservation of democratic principles came up fairly often in this debate. For example, John Weller, a Ohio Democrat, ended a speech by saying that "whenever he saw an effort made to disregard the expressed will of the people, and trampled (sic) upon their constitutional rights, he would be heard in their defence. Yes, sir, said he, as long as God gives me a voice to speak, that voice shall be heard in vindicating the cause of an outraged and insulted people." Congressional Globe 26:1: 11.

particular state). In terms of that practice, then, Garland should have read the names of the five New Jersey Whigs and then completed the roll.

If he had done that, there would have been no controversy. However, the governor of New Jersey had decided to invalidate the returns from two of the towns, Millville and South Amboy.<sup>98</sup> Since these were heavily Democratic towns and the election had been very close (New Jersey was then electing representatives at large), the omission of their votes had changed a Democratic majority for these five seats into a Whig majority. The secretary of state of New Jersey had brought the governor's action to the attention of the clerk by issuing credentials to the five New Jersey Democrats who, in turn, presented them to the clerk. While these latter credentials were not legally authorized, the clerk was still presented with two sets of credentials from New Jersey with the clear implication that the members bearing the governor's credentials had not won a majority of the votes in the state. The clerk was thus faced, as he saw it, with three choices: (1) he could comply with tradition and seat members-elect that he suspected were not properly elected; (2) he could, alternatively, seat the Democrats who might have been properly elected but bore improper credentials; or (3) he could turn the question over to the chamber.<sup>99</sup> He chose the last course of action and that was how the controversy came before the chamber.

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<sup>98</sup>. Joseph Randolph, the New Jersey Whig whose name the clerk did read onto the roll before he stopped, explained that the governor had rejected "the votes of the people of these two districts...because, in one instance, the judges of election had received a large number of the votes of aliens, and in the other case...because they had not complied with the statute of the State." Congressional Globe 26:1: 13. The governor's action, in turn, rested upon the refusal of the county clerks of the two counties containing these townships to certify their votes. Chester H. Rowell, A Historical and Legal Digest of All the Contested Election Cases...1789-1901 (1901; reprinted by Greenwood Press, 1976), pp. 109-10. As most experienced politicians in the United States knew, voting irregularities were often the norm, not the exception, in nineteenth century American elections. In a close election, any governor could, if he had the power to do so, change the outcome by selectively throwing out returns from voting places that were reported to have departed from the letter of the law. In this instance, a Whig governor had thrown out just enough Democratic votes to throw the congressional election to his own party. Whether or not he was justified in doing so (and not, for example, throwing out equally suspect Whig precincts at the same time) was something that was probably itself an irresolvable and, therefore, moot question. Months later, the House of Representatives did seat the Democrats challenging the five New Jersey Whigs. For an overview of contested elections generally, see Jeffery A. Jenkins, "Partisanship and Contested Election Cases in the House of Representatives, 1789-1902," Studies in American Political Development 18 (Fall 2004) 112-135.

<sup>99</sup>. The interpretation in the text is constructed from the comments made by the clerk and his supporters in the chamber. I am not attempting to represent what might have been their underlying motivations which many observers then and since have believed to be highly partisan.

The problem was that the chamber was not yet a "House" because it had not yet been called into being by the clerk. Because Garland had stopped at New Jersey, the members-elect whose names had been called did not constitute a quorum. So there was not yet a "House" under the United States Constitution and, thus, the members could not vote.<sup>100</sup> And, as noted earlier, the only way around that difficulty, unanimous consent by those members whose names had been called, was not available.<sup>101</sup> What made the situation absolutely intractable was that the clerk absolutely refused to proceed with the roll without instructions with respect to the New Jersey members. Since the chamber was in no shape to instruct him and since he would not go forward without instructions, the chamber was at a standstill.<sup>102</sup>

At this point, many of the members-elect sought recognition from the clerk. Some of them chided him for obstructing the organization of the chamber. Others asked for a reading of the credentials that had been presented by the contenders for the New Jersey seats. And many more tried to find their way through the theoretical and practical thicket that the clerk had produced. Because they illustrate most clearly just how the House of Representatives is suspended in its own "state of nature" vis-a-vis the popular will, the latter are the most interesting.

Most discussion centered around two possible courses of action, both of them requiring the clerk to exercise his own discretion in calling the roll. The first was that the clerk should simply proceed to call the names of the other members about whose credentials and qualifications there was no doubt. He would then leave the New Jersey names off the roll and, when the roll was

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<sup>100</sup>. As Mark Cooper, a Georgia Whig, put it, "Who and what they were that now debated this matter? They were not the House of Representatives, because, though placed together in this hall, they did not yet know each other as such, having exhibited no credentials, nor answered to their names. Until that should be done, they were nor more a House, as contemplated by the Constitution, than before they left home." Congressional Globe 26:1: 15.

<sup>101</sup>. Some of the members apparently contended that even unanimous consent was not possible at this point in the organization. For example, William Slade, a Vermont Whig, said, "Now an objection had been started that he for one could not get over. There was no body as yet competent to decide any question...The Clerk could not now put any question to the House; and, therefore, he must go on until he can get a sufficient number of names to form a quorum to decide the question." Congressional Globe 26:1: 2, 3.

<sup>102</sup>. From a partisan perspective, we might still wonder just what Garland thought he was going to accomplish by bringing the organization to a halt. If he had chosen to omit the New Jersey Whigs and read the rest of the roll, the chamber would have had a very narrow Democratic majority and might have voted to exclude those Whigs. But in order to get to that point, he had to read the rest of the roll. Since he would not do that, the chamber was simply stuck, apparently to neither party's advantage. And several members of his own party

completed, the chamber would have a quorum that could then decide how to proceed.<sup>103</sup> The other alternative was that the clerk should simply accept the credentials of the New Jersey members and, thus, at least provisionally, decide their eligibility as he called the roll. Because no one thought that the chamber could formally direct the clerk to choose between these alternatives, the debate between them was oriented toward persuading Garland to exercise his own discretion in one way or another.

There were several analytical levels in this controversy. On the most superficial level, the major parties were squared off one another in what would be, however the issue was decided, a closely divided chamber. If the clerk chose to leave the five New Jersey Whigs off the roll, then the quorum that decided the legitimacy of their credentials would have a slight Democratic majority. If he included them on the roll, then no party would have a majority in the chamber.<sup>104</sup> Thus, whatever he decided would tilt the ultimate resolution of the controversy in one direction or another.

On a less partisan, somewhat higher level, many of the members believed that the only proper way to proceed was to honor customary practice. Almost all clerks in the past had accepted the credentials presented by members-elect as prima facie evidence of election to the House of Representatives. While all the members realized that past practice could not bind the clerk or the chamber, tradition did provide a common locus for resolving what would otherwise be intensely partisan conflicts, conflicts in essence irresolvable because a shared understanding of the criteria for judgment would simply not exist.<sup>105</sup> This was thus a case in which past "precedent" could provide a

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openly opposed his position for that very reason.

<sup>103</sup>. Ever alert to the possibility of abuse, William Slade insisted that the "Clerk would be bound to go through the whole twenty-six States" then in the Union when he called the roll. A quorum produced by a partial reading of the roll would not be "competent to decide upon the qualifications of all who might happen to come after them" on the list. To contend otherwise, "would indeed be an absurdity." Congressional Globe 26:1: 4. Slade was apparently implying that, if the clerk were allowed to read through only part of the roll in order to produce a quorum, he might stop at any point after reading half of the names and, if that were possible, the clerk might choose to stop at a point when his party had more than half the members in that quorum. His party could then judge the credentials of the members whose names had not yet been called and thus weaken the opposition party by excluding them.

<sup>104</sup>. Because party affiliations were much weaker in this period than they would become later on, the clerk's choice would "tilt," not "determine," the ultimate outcome. The uncertainty within the chamber with respect to the relative strength of the major parties was a very real factor in the debate.

<sup>105</sup>. This was, however, a very fragile locus. Aaron Vanderpoel, a New York Democrat, described past practice as "the pitiful squeaking notes of form and technicality" that should not squelch "the potent voice and will of the people

convenient fiction for resolving one aspect of the opening dilemma.<sup>106</sup>

In this instance, the precedents were a fiction because they are nothing more than the past interpretation of formal rules of procedure. In metaphorical terms, precedents "clothe" the language of formal rules with meaning as those rules are used in parliamentary practice. Without formal rules, however, precedents are like clothes suspended in thin air and fall uselessly to the floor.<sup>107</sup> And, before the chamber was organized, there were no formal rules to form the body which precedents might clothe.<sup>108</sup> The fiction

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of a sovereign State." Congressional Globe 26:1: 9.

<sup>106</sup>. Henry Wise, a Virginia Whig who played a prominent role throughout this debate, put the problem this way: "The Clerk had said that he is not the person to decide the question who are entitled to seats, and has referred the matter to us; but we have no more right to decide it at present than he has; and the question will necessarily come back to the Clerk at last to be decided; and this was the view which he desired to press upon the Clerk, and make him, as man situated above party, as a sworn officer, and as a Christian...he wished the Clerk to tell him, as a sworn officer, as a native born gentleman of his own mother State, and as a Christian, ready to answer before God and his country, why he had not discharged his duty in the present case" and included the names of the five New Jersey Whigs. Later on, Wise pleaded with the clerk to "call either of the two sets of members claiming to represent" New Jersey. "All [Wise] wanted was for the Clerk to proceed...and he begged the Clerk to go on." Congressional Globe 26:1: 7, 10. Because the case could not be made on legal grounds alone, Wise invoked God, country, affection for his native state, and the civility of gentlemen in attempting to persuade Garland to proceed with the roll.

<sup>107</sup>. By invoking "the ordinance of 1785" and a "resolution of 1791," Henry Wise attempted to provide rules upon which to hang past practice. As he saw the matter, these acts "imposed the duty upon the Celrk of the last Congress to keep a roll of members of Congress, and to call over that roll at their meeting." Because past practice had been based on these acts, that practice now bound the clerk in the present situation and he should therefore call the names of the five New Jersey Whigs and complete the roll. But, as John White, a Kentucky Whig, pointed out, "the ordinance of 1785, and the resolution of 1791...were no more binding upon the present body than the rules of the last Congress. Their force was only recognised by courtesy, and they had no binding effect upon this body." That being the case, the precedents that Wise so desperately wanted to invoke fell to the ground. White even referred to Garland as a "quasi Clerk," as if to underscore his own uncertain status in the proceedings. Congressional Globe 26:1: 6, 7. The resolution of 1791 provided "That the Clerk of the House of Representatives of the United States shall be deemed to continue in office until another be appointed." Hinds' I: 235: 135.

<sup>108</sup>. The clerk repeatedly and correctly decided that rules particular to the House of Representatives, such as a prohibition that no member should speak twice to the same question, were not in force because they had not been adopted by the present chamber. See, for example, Congressional Globe 26:1: 11. In many ways, parliamentary rules are the "language" of legislative action. Legislators simply cannot deliberate upon policy questions or craft their decisions into definitive statements in the absence of a structured context in which to move amendments, take votes, and write law. And that brings up the question of just what the members were using as a parliamentary language in 1839 before the adoption of formal rules. One of the members, Henry Wise, said that the "rules of common sense were...sufficient" as the chamber deliberated the fate of the New Jersey Whigs. Joseph Tillinghast, a

was not that there did not exist past practice because clerks had, indeed, customarily formed the roll in this way. The fiction instead arose when the chamber had to imagine that there existed formal rules which those precedents clothed.<sup>109</sup> William Cost Johnson, a Maryland Whig, wrapped himself in this cloth as he contended that it was clear that

embarrassment...would ensue when they once departed from the established usage of that body [the House] since the foundation of the Government. The House must see the evils that would spring up if they allowed the Clerk to exercise his discretion...it had been the immemorial custom for the Clerk to enrol, and call the names of those members who had the certificates of the Governors of their States of their being duly elected.<sup>110</sup>

However, as Johnson probably understood as he pointed to the avoidance of "evils" as the reason to conform to custom, there was simply nothing formally authoritative about that past practice except the willingness of the members-elect to accept it.<sup>111</sup> As reasons go, the avoidance of "evils" was probably as good as any for deciding what the clerk should do. If, on the other hand, the members-elect were to insist on formal authority as the grounding for the clerk's action, the opening dilemma would be irresolvable because there was no formal authority to be had.

On what might be considered the highest analytical level, the choice

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Rhode Island Whig, agreed that there existed "natural rules of order and natural precedents which it was impossible for the House to overlook; and [maintained that] these natural rules of order...were all sufficient for the government of the body until this question was decided." Congressional Globe 26:1: 57. However, the extent to which "common sense" and "natural rules" could govern the proceedings was clearly defined by the limits of the political culture the member shared because, in case of dispute, there were no written rules to which to refer.

<sup>109</sup>. On several occasions, members even referred to the rules and precedents of the British House of Commons as guides for the House. See, for example, Congressional Globe 26:1: 8, 36.

<sup>110</sup>. Congressional Globe 26:1: 3.

<sup>111</sup>. Because custom favored inclusion of the New Jersey Whigs in the clerk's roll, Whigs consistently cited traditional practice in support of their position. One of them was William Halstead, one of the New Jersey claimants, who contended "that until this House was properly organized, and decided upon the question, the commission of the Governor must be taken as prima facie evidence of his right to a seat on that floor. He argues that he was entitled to his seat until a Speaker was chosen, the oaths were administered, and the question was judicially decided upon by the House; and until that was done, the House had no right to make a judicial decision which might forever destroy the sovereignty of the State of New Jersey." There is, of course, no way of knowing what position Halstead might have assumed had the shoe been on the other foot.

between the two alternatives was constructed as a decision that would "haunt" the future. This visitation would take several forms. In one form, whatever was decided would shape the strategies and tactics used in subsequent organizations of the House. For example, if the clerk were to decide to exercise his own discretion to exclude the New Jersey Whigs from the initial roll, future clerks could cite that decision in support of their own decisions to exclude members from the roll. Such exclusion could, as was being charged in this contest, shift partisan control in the chamber and could do so even when the chamber was not closely balanced. The clerk would thus become a very powerful political actor even though he was not an elected official. In fact, he would be very powerful even though he was, otherwise, nothing more than a lame duck chamber employee. If the clerk were, on the other hand, to accept the credentials issued by the New Jersey governor, the discretionary authority of the clerk would be much more constrained. The focus of political competition for control of the chamber would shift, in relative terms, from the clerk to the governors of the states. In sum, this was not only a decision concerning the claims of the New Jersey Whigs to seats in the chamber; it was also a choice concerning the relative importance of the House clerk and the governors of the individual states in the future of American politics.

As several members noted, this change in the relative power of the clerk and the individual governors would also transfer authority from the states to the federal government and thus affect federal relations. Several members, for that reason, stressed protection of the sovereignty of the states when they urged the clerk to include the New Jersey Whigs on the roll. John White, for example, warned

if we disregard the laws of the States, enacted upon a subject expressly reserved for their legislation, and substitute our own will for their solemn statutes...we will have established a principle that will sap the very foundation of State sovereignty, the last vestige of liberty reserved to the members of this Confederacy. Such a principle carried out must lead to the concentration of all power in the General Government. It would override all the barriers erected in the Constitution between the Central Government and the rights of the several States, and would ultimately end in absolute despotism.<sup>112</sup>

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<sup>112</sup>. Congressional Globe 26:1: 26.

Others pointed to the sovereignty of the people of a state, as opposed to the sanctity of an action by a state official. This was the position assumed by Robert Craig, a Virginia Democrat, who said,

With regard to State sovereignty, which had been so much spoken of, he would say that he had the highest regard for it. But when he spoke of the sovereignty of a State, he did not mean that there was no difference between the people who constituted the State in this country, and the Governor and Council. In this country the people constituted the State.<sup>113</sup>

Although the issue would become more complicated in the next couple of decades, Craig's interpretation of state sovereignty would have appalled southern secessionists in the winter of 1860-61. One of the implications of his position, for example, might have been that the Lincoln administration investigate the conduct of elections to secessionist conventions and the subsequent referenda on taking their states out of the Union.

But the future could also be haunted in ways other than the relative influence of political actors and institutions. The basic problem underlying the opening dilemma was ensuring a strong and independent connection between the House of Representatives as an institution and the popular will. That is reason, for example, that prior organizations of the House cannot control or direct the organizations of the chamber. That is also the reason that the other branches of the federal government, such as the Supreme Court or the presidency, have no role to play in the organization of the chamber. The newly elected House of Representatives emerges pristine from communion with the popular will, unsullied and undistorted by either its past incarnations or the interests of competing political institutions. But there is still the possibility of either error or malignant design in this emergence.

The "broad seal" contest, for example, raised at least two possibilities. One was that the clerk might manipulate the making of the roll for his own purposes, utterly abandoning any trustee role as enabler of the popular will. As William Cost Johnson, a Maryland Whig, put it,

If the Clerk be permitted to say who he will name as returned as members, or who he will not, he may, in that way, have a majority of members qualified friendly to him, and, in short, exercise all the powers of the House with regard to the qualifications of members...<sup>114</sup>

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<sup>113</sup>. Congressional Globe 26:1: 3, 13.

Johnson was immediately followed by Richard Biddle, a member of the Anti-Masonic party from Pennsylvania. Biddle was even more emphatic.

It was proposed, in short, that the Clerk should be the judge [of the qualifications of the members-elect]. Now there appeared to be some degree of plausibility in this proposition...But...do you not see that an enormous abuse of power might arise from the precedent thus to be established for the next Congress? If that course be adopted now, it will be adopted forever hereafter, and whenever a Clerk shall undertake to say that the seats of gentlemen are contested. Do you not see that at the opening of every succeeding Congress, the Clerk may thus dispute the seats of his adversaries?<sup>115</sup>

The other possibility for error or malignant design was that a governor of one of the states might issue credentials to members-elect that they knew, for a fact, had not been popularly elected. While this would also constitute a breach of democratic principles, the failure would be confined to that state in which the breach was made. In addition, there was hope that, over the long term, the people would turn the rascal out and restore democratic integrity to their state.

Either way, the connection between the emergence of the newly-elected House and the popular will would be disrupted. However, the risks attending each of these possibilities are very different. One clerk, acting entirely alone, could attempt to hijack the chamber. That both centralized the risk at the national level (i.e., within the chamber where the clerk served) and within one person. To the extent that that risk was minimized (by constraining the clerk's discretion), the risk that the governors might issue tainted credentials was increased, because they would know that the credentials they issued would be accepted whatever reservations the clerk might otherwise have. In that case, the risk was very decentralized across the several states and in the hands of the individual governors. At the very least, coordinated action across the states and between the governors would be much more difficult to execute than a unilateral decision carried out by the House clerk. Seen this way, the future risk to the democratic integrity

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<sup>114</sup>. Congressional Globe 26:1: 3.

<sup>115</sup>. Biddle added that the only way to avoid "the monstrous abuses that will grow up if this precedent should now be set" was to consider "the Clerk [to be only] the mouthpiece of the body—a body not yet organized, it was true, but a body competent for the despatch of business—and [the clerk] has no right to act but in accordance with its established usages." Congressional Globe 26:1: 3.

of the House of Representatives would, everything else being equal, be lowered if the clerk were to read the names of the New Jersey Whigs in the initial roll.<sup>116</sup>

On the third day of the standstill, the members-elect began to propose resolutions that might resolve the quandary in which they found themselves. Cave Johnson, a Tennessee Democrat, considered the resolution offered by Henry Wise to be "all right" but worried that, even if it were adopted, the dispute might drag on forever anyway.

We have no officers to preside over the deliberations of the House; we have no rules or regulations by which the debate is to be conducted; we have no means of ending debate, and he apprehended, if the resolution was adopted, that so soon as we entered upon the examination of the cases from New Jersey, an interminable debate of some kind would arise, and weeks would elapse, when we should find ourselves no nearer the object we all desire, than we are at present.

As a solution, he proposed that the chamber provisionally adopt the rules used in the prior Congress until the House was properly organized.<sup>117</sup> Wise, however, suggested that Johnson wait until the resolution was adopted to move adoption of rules. While Johnson's concern was well justified, a premature adoption of formal rules would only serve to empower the clerk, making him the equivalent of a speaker until that officer could be elected. The potential problems with that course of action would have been clear to everyone in the chamber and Wise did not want to entangle that issue with his own proposal.

On the fourth day of debate, John Quincy Adams of Massachusetts, former president of the United States and acknowledged dean of the Whig party in the House of Representatives, rose from his seat and heatedly denounced everything about the predicament in which they all found themselves.

Your Clerk has decided that he could not proceed; he refers the decision to you, and then he refuses to put the question in order that you may make the decision; and has persisted in the refusal to put a question of any kind until he discovered yesterday that he might put the question of

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<sup>116</sup>. The reader should note that there are, of course, an infinite number of ways this risk could be minimized. I am here only evaluating the relative risk of the two alternatives that had held center stage during the chamber debate in 1839.

<sup>117</sup>. Congressional Globe 26:1: 12.

adjournment. Now, fellow-citizens, in what predicament are we placed? We are fixed here as firm and as immoveable as those columns; we can neither go forward nor backward; and the Clerk tells us that he will persist in both these decisions...We might stay here until doomsday, and

not be one step nearer to our organization than we now are...

We cannot control the Clerk. He is, in the position which he has assumed, an absolute despot; and unless you set aside all his decisions,

and act for yourselves, you will not be able to advance one step.<sup>118</sup>

At the end of his harangue, Adams offered a resolution that would have ordered the clerk to call the names of the New Jersey Whigs and then complete the roll. But one of the other members then disclosed a letter from the clerk that indicated that the clerk would refuse to call the names of the New Jersey Whigs even if a majority of the other members-elect were to ask him to do so. Without unanimous consent, even Adams' resolution was dead on arrival.

This led Adams to propose what might have seemed, then and now, a radical solution.

I propose that the House shall act in whatever form it pleases; it may choose a temporary Clerk, or not, as it thinks proper...The House may set aside the Clerk, but it is not forced to obey his despotical dictates....I appeal to the House, from the decision of the Clerk, to act for itself.

We should remember that the chamber at this point lacked an official membership and formal rules. It did have a leader of sorts in the form of the clerk but Adams was proposing to ignore the clerk. Noting that the clerk refused to put any question before the chamber for a vote, the former president "proposed to put the questions to the House himself." In doing this, he would simply stand and announce to the chamber that was what he was doing. He would clearly lack any authority, even the fiction of custom and tradition, for doing so.

But this was enough to flush Garland out of his box. The clerk reviewed what he had done over the last four days and described some of his reasons for the course he had taken. He was particularly careful to justify his refusal to put any questions before the chamber to a vote, explaining that there would have been no way to prevent all the men who claimed to have been elected from New Jersey from voting. If they voted, there would have

been more votes than there were, under the present apportionment, members in the House. Such an outcome would mean that the "vote would be entirely lost, which ever way it went" and the chamber would be no better off than it had been before. As a result, he "could not now put questions as Clerk of the House, but, if it was the pleasure of the House, he could put questions as chairman of the meeting."

Seizing this opportunity, Robert Barnwell Rhett, a South Carolina Democrat, immediately offered a resolution that would have placed Lewis Williams, a North Carolina Whig and the oldest member of the House in the chair "of this meeting until the House should be organized." However, Williams himself objected to this resolution and it, too, was dead on arrival.<sup>119</sup> Several members sought to offer their own resolutions but the chamber rapidly degenerated into "much confusion" as members objected to their presentation. And then came the coup in which the clerk was deposed.

Mr. Rhett then varied his motion, so as to call Mr. Adams to the Chair, instead of Mr. Williams, and putting the question himself to the meeting

it was carried, and Mr. Adams took the Chair.

Much confusion and noise being heard in the galleries, and some hissing.<sup>120</sup> "And it passed in the affirmative." 26:1: 6.

Rhett's allegiance to the Democratic party was beyond doubt and Adams was firmly ensconced in the Whig party. The outcome was thus probably arranged before Rhett offered his resolution. In order to avoid all the problems that might emerge in a formal vote, Rhett simply declared Adams to be elected and that was that. The clerk was not asked to recognize Rhett as he offered the motion or to put the question to the chamber. It was simply done. And all of this, in terms of formal authority, was just as legitimate as anything else they might have chosen to do.<sup>121</sup>

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<sup>118</sup>. Congressional Globe 26:1: 19.

<sup>119</sup>. When chambers appoint someone to temporarily chair an assembly as it organizes, the person chosen is often the oldest member in terms of chronological age. For that reason, Williams was a logical choice and Rhett probably did not even consult him before offering his resolution.

<sup>120</sup>. Congressional Globe 26:1: 19-20. The House Journal reported that "Mr. Rhett, of South Carolina, read in his place the following resolution: 'Resolved, That the Honorable John Quincy Adams be appointed Chairman of this House, to serve until the House be organized by the election of a Speaker.'

"Mr. Rhett then put the question on the said resolution to the members,

<sup>121</sup>. In terms of cultural norms and social context, of course, Rhett's action was probably seen as more appropriate than many other alternatives. However,

Just after Adams took the chair, Charles Mercer, a Virginia Whig, moved that the rules of the previous House "be adopted for the government of the proceedings of this meeting." This resolution was adopted so peremptorily that the Congressional Globe did not even record that a question was put to the chamber.<sup>122</sup> "It passed in the affirmative unanimously." 26:1: 6. So the members-elect now had rules and a jerry-rigged leader, alternately called the "Chair," "Chairman pro tempore," and "President" when he was addressed. But the implications for the primary question, who would be considered a member of the House, were still unclear. And, on that note, the chamber adjourned.

When Adams called the chamber to order the next day, the question before the chamber was still how to complete the roll. There ensued a long and complicated debate over various alternatives, all of them presented in the form of resolutions and many of them attracting proposals for amendments. The basic problem before the chamber had indeed changed but it had not changed very much. When the clerk had been in the chair, he had refused to put questions to the chamber because he did not believe that the chamber was sufficiently organized to vote. With Adams in the chair, the chamber was ready to vote, if it could only figure out how to vote. The problem was whether the claimants to the New Jersey seats were eligible to vote on the question of their own inclusion on the roll. This question threatened to turn into an infinite regress in that, if the chamber were to vote on that question, the eligibility of the New Jersey claimants would arise again in that vote. And so on. There was simply no way to construct the question such that the eligibility of the New Jersey claimants would not be an issue.

During this debate, Adams announced his own position on their eligibility in no uncertain terms.

He conceived the rule to be, that the persons who presented the evidence

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his initiative would have been rejected out of hand by the members-elect in the chamber if he had attempted the same thing on the first day. There was, in that sense, a "test" of legitimacy for actions within the chamber that had nothing to do with formal authority. My point here is that cultural norms and social context were the only test within the space occupied by the opening dilemma.

<sup>122</sup>. Congressional Globe 26:1: 20. The House Journal recorded that "Mr. Mercer then moved that the rules of the late House of Representatives, so far as applicable to this body in its present state of organization, be the rules for the government of its proceedings.

"And the question on this motion being put by the Chairman.

required by the Constitution of the United States, and the laws of the State of New Jersey, were entitled to sit and vote in the House until deprived from doing so by the act of the House. This was his opinion, and he expressed it with more confidence, because he had declared it before he was placed by a vote of the House in the chair he now occupied.<sup>123</sup>

His position, combined with the uncertain applicability of House rules to the situation in the chamber, produced an extraordinary number of "points of order" in which his rulings were questioned. In the process, these points piled one atop the other, so that unraveling just what might be the question before the chamber became quite complex. Several of the rulings that Adams made were overturned but he ultimately came up with a solution to the problem of how the chamber might vote.

Because the roll had not yet been completed, the chamber could not vote by the "yeas and nays" because it still lacked an official list of members. But Adams ruled that the chamber could vote by tellers, a method that would require the members to file past colleagues who had been appointed by the chair to count them. There was still the stumbling block that had stymied the clerk: what to do if more votes were cast than there were members of the House under the last apportionment. But Adams decided, as chair, to postpone that question until it actually arose. At the beginning of the sixth day of the contest, a question came up over an amendment of the journal entry for the previous day. Adams directed that

The gentlemen who acted as tellers would please count all who passed between them; and if any member passed through whose title to a seat they considered contested, they should report that fact to the meeting, and the meeting would decide on the question.

The chamber then divided, with 106 voting in favor of the amendment and 107 opposed. The amendment was lost but, much more importantly, none of the New Jersey claimants had voted. Because they had not voted, the result was not challenged.<sup>124</sup> In effect, Adams had left the decision of whether or not to vote up to the New Jersey claimants and all ten of them (the five Whigs and five Democrats) had abstained. After this vote, there was much debate over the merits of the case, including a lengthy reading of their credentials, and then the House adjourned until Monday, December 9, 1839.

<sup>123</sup> . Congressional Globe 26:1: 20-21.

<sup>124</sup> . Congressional Globe 26:1: 27.

The seventh day of the contest was consumed in debate over how to proceed with only one vote and that one inconsequential. On the eighth day, however, the chamber moved a little bit closer to a resolution of the problem. Adams had previously ruled that the New Jersey Whigs had the right to vote if the issue came up. His ruling had been appealed and the chamber now voted to overturn his decision. In that vote, four of the New Jersey Whigs and four of the New Jersey Democrats participated but the total number of votes recorded was below the constitutional apportionment and, because they divided equally on the question, the result was not affected. This led Francis Thomas, a Maryland Democrat, to suggest

a mode of proceeding without difficulty. We ought to endeavor to get along without difficulty, until it could be no longer avoided, and then it would be time enough to decide upon this question...if the fact of any portion of the members from New Jersey voting should not change the result, let the decision of the question be announced without raising this question; but if, by their votes, the result is changed, then it will be time enough to bring up this question as to who shall vote. He threw this out as a suggestion to the House.<sup>125</sup>

For the moment, though, Thomas's suggestion drew no response from the other members. Instead, controversy swirled around the chair's insistence that the chamber decide who should cast New Jersey's votes. Adams had decided that the Whig claimants should do so but that the chamber had overruled him. So now the question reverted back to who should cast the New Jersey votes. The Congressional Globe reported that "[h]alf the members of the House were standing up," competing for the attention of the chair. Although the rules of the previous House had been adopted to govern this meeting, there was nothing in those rules that might apply to this situation and points of order once again rapidly piled atop one another. And just as rapidly as Adams decided these points, members appealed his rulings.

In this debate, one of the members moved "that neither set of members from New Jersey shall vote until the question who shall vote from the State of New Jersey? Shall be first decided by the House." This led Adams to dig in his heels as he ruled that he could not

entertain a resolution, the effect of which would be deprive the State of New Jersey of her representation on this floor. It was not competent

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<sup>125</sup>. Congressional Globe 26:1: 35.

for this meeting to pass such a resolution. The resolution...declared, in effect, that the people of the State of New Jersey should not be represented on this floor, and the Chair could not put the question, upon such a resolution, to the House.<sup>126</sup>

James McKay, the North Carolina Democrat who had offered the motion that Adams had now struck down, denounced the ruling as "a monstrous assumption of authority by the Chair."<sup>127</sup> He was followed by Robert Craig but the Congressional Globe reported so "much noise and confusion...that the Reporter heard him [Craig] very imperfectly; and, in the concluding part of his remarks, his voice was completely drowned by the cries of 'order, order!' 'Go on, go on!' &c." In some ways the situation was similar to the one that prevailed under the clerk. Adams was insisting that chamber determine who should vote for New Jersey but appeared to offer no way in which it could decide that question. The day ended with a vote to adjourn which was approved, 116 to 113. Three New Jersey Democrats voted yea and New Jersey Whigs voted nay. In announcing the result, Adams "stated that the votes of the members whose seats were disputed not varying the result, it was decided in the affirmative." Thomas's suggestion was now a working principle within the meeting.

The ninth day of the contest saw more progress toward a resolution. After the reading of the previous day's journal, the session began with a vote on an appeal of one of the chair's rulings. A majority of the chamber voted to overturn the decision, 118 to 112, but the five New Jersey Whigs voted nay and three of the five New Jersey Democrats voted yea. There was also a contested seat in Pennsylvania and both of the claimants to that seat also voted. When added to the New Jersey contestants, they made six members voting on the affirmative side of the question and four voting on the negative side. Adams then declared,

without announcing the result, that there were six members voting in the affirmative whose right to vote was contested, and four voting in the negative whose rights were also contested; and as the names of these persons had been given in to the Clerk, it would be for the House to decide upon their right to vote, name by name, as they had been presented to the Clerk.<sup>128</sup>

<sup>126</sup> . Congressional Globe 26:1: 36.

<sup>127</sup> . Congressional Globe 26:1: 37.

<sup>128</sup> . Congressional Globe 26:1: 39. The Pennsylvania contest sometimes complicated the proceedings but was usually an insignificant factor.

In this vote, the votes of the contested members did not make a difference in the outcome; even if all six Whigs were counted and none of the Democrats, the chair's decision would still have been overturned, 114 to 112. But this, as William Cost Johnson immediately pointed out, brought another principle into play.

There are more members from New Jersey and Pennsylvania voting than those States are entitled to have on this floor by the Constitution and laws of the United States. Therefore the question must be decided as to who have a right to vote.

And this was just what Adams had in mind.

The Chair again stated that there were more members voting from New Jersey and Pennsylvania than could be permitted to vote under the Constitution and laws, and it would now be for the House to determine who of them should vote.

So this was how Adams had decided to present the issue to the chamber.<sup>129</sup> But not everyone, particularly the Democrats, was happy with this solution. One of them, Hopkins Turney of Tennessee, wanted "to know if you [Adams] were placed in that chair to suppress the decisions of this House, and play the tyrant?" In response, Edward Stanly, a North Carolina Whig, "ran across the area in front of the Clerk's table, and up one of the passages, slapping his hands, and crying out in a loud voice, 'Let the gentleman come to me; I will settle that question with him.'" Once again, the Globe reported much "noise and confusion, with cries of 'order, order!...'" As Turney continued his tirade, the Globe that "[g]reat disorder was now prevailing in the House."<sup>130</sup>

After more debate, points of order, appeals from the decisions of the chair, and counter-resolutions, the chamber finally came to a vote on the eligibility of the Pennsylvania Whig to vote and decided the question in the affirmative, 119 to 112. The New Jersey claimants voted on this question, again producing the anomaly that more votes were cast by that state than it was allowed under the constitutional apportionment. However, the vote was allowed to stand, probably because do anything else would again place the

<sup>129</sup>. This had happened before, of course; Adams just decided to recognize it as a violation in order to bring the issue to a head.

<sup>130</sup>. Congressional Globe 26:1: 39.

chamber in an infinite regress.<sup>131</sup> The question then became the eligibility of the first of the New Jersey Whigs to vote. This was decided in the negative, leading Adams to state that he considered "this decision of the House to be utterly unconstitutional." This provoked "[r]oars of laughter" from the other members, after which Adams declared that he would accept the decision of the chamber anyway.

The eligibility of the other New Jersey Whigs to vote was similarly rejected. Then the chamber rejected the eligibility of all the Democratic claimants as well, with all the Democrats abstaining on these votes. In effect, the New Jersey seats had been declared vacant by the chamber.<sup>132</sup> After much more debate on how to proceed, the House adjourned.

Just before adjourning, the chamber approved a resolution providing

That the House will proceed to call the names of gentlemen whose rights to seats are not disputed or contested.<sup>133</sup>

However, the resolution had been bound up with another proposition that, once the roll was completed, the chamber immediately proceed to decide between the competing claims of the New Jersey members. At the beginning of the next (now the tenth) day of the contest, this complication was resolved and the clerk completed the calling of the roll. The House now had a quorum but immediately became ensnared in a protest entered into the House Journal by the New Jersey Whigs. This protest need not detain us, although the House soon found that there was no way to remove it (a fact that made the Democrats very unhappy). The rest of the day was spent in debate over the creation of a committee to investigate the respective claims in the New Jersey contest.

On the eleventh day, again after much debate and parliamentary maneuvering, the House again rejected the claims of the New Jersey Whigs. Because the roll had been completed, the vote was by the yeas and nays.<sup>134</sup> After much more debate, including motions and counter-motions, Horace Everett, a Vermont Whig rose and

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<sup>131</sup>. If the New Jersey claimants insisted on voting, they would invalidate every vote, including a vote on their own eligibility to vote. The only way out of the regress was to ignore them with respect to votes on their own and the Pennsylvania members' eligibility to vote.

<sup>132</sup>. Congressional Globe 26:1: 40.

<sup>133</sup>. Congressional Globe 26:1: 41-42.

<sup>134</sup>. Congressional Globe 26:1: 48.

appealed to his friends to withdraw further opposition. We are fairly beaten, said he, and let us submit like men. If the gentleman from Maine would agree to modify his resolution, so as to go into the election of Speaker tomorrow at twelve o'clock, instead of now, he would no longer oppose it.

Although still quite chaotic, the House then voted to proceed to the election of a speaker.<sup>135</sup> After much more debate, some of it apparently intended to delay the first vote on electing a speaker, the House adjourned at midnight.

The twelfth day began with more parliamentary maneuvering, including several attempts by the Whigs to reconsider the vote by which the House had agreed to proceed to elect a speaker. After this inconclusive interlude, the first vote on electing a speaker was had. Because none of the candidates had a majority, the House proceeded to a second vote, with the same result. Six ballots were taken in all that day and then the House adjourned over until Monday, December 16, 1839. On the thirteenth day, on the eleventh ballot, the House finally elected Robert M.T. Hunter, a Virginia Whig, Speaker of the House of Representatives.<sup>136</sup> The House now had a roll and had a speaker but the election of a speaker had caused it to lose parliamentary rules because the previous resolution, providing for the adoption of the rules of the House, had been explicitly limited to "the proceedings of this meeting." The "meeting" expired with the election of a Speaker and now the House had no rules once more.

The next day the new speaker opened the session with a brief address to the House thanking them for "high and undeserved honor which you have conferred on me." Soon after that Hunter administered the oath of office to all the members except those from New Jersey. The Whigs tried desperately to order that their New Jersey colleagues be sworn as well but that provoked another long debate. In turn, this unresolved issue postponed adoption of formal rules of procedure for fear, on the part of the Whigs, that this would prejudice the case for the New Jersey Whigs.<sup>137</sup> On the seventeenth day, four

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<sup>135</sup> . Congressional Globe 26:1: 49.

<sup>136</sup> . As is customary, the oath of office was administered to Hunter by the oldest member of the House, Lewis Williams of North Carolina. House Journal 26:1: 80.

<sup>137</sup> . Congressional Globe 26:1: 57. Although the reason for taking this attitude was not completely clear, it seemed to rest on the fact that the organization would not be complete until the rules were adopted. That being the case, the decision on the eligibility of the New Jersey Whigs to take the oath took the form of "unfinished business" attending the swearing of the other members, as opposed to a definitive exclusion that would require

days after Hunter had been elected speaker, the House finally voted not to swear in the New Jersey Whigs. On Saturday, December 21, 1839, the eighteenth day of the contest, the House adopted a resolution providing that the rules of the last House of Representatives be in force for the next ten days, during which time a committee would decide on what changes should be made before they were permanently approved. Shortly thereafter, the House sent a message to the Senate informing that chamber the House was now organized and "ready to proceed to business."<sup>138</sup>

### Conclusion

Much of the dispute over whether the New Jersey Whigs should be read onto the roll of the House may seem the banal product of partisan competition for control of the chamber. As we have seen, members of the major parties certainly saw the stakes as high. But, in a sense, they are always high and yet the American system, as democracies everywhere, has developed rules of engagement that channel much of that competition into appeals for popular support in an election, as opposed to manipulation of the rules themselves. From that perspective, there is a question that demands an answer: Why has the House of Representatives, thus far at least, refused to set down such rules of engagement for its organization? This question implicitly assumes that the opening dilemma facing the chamber every two years is something the chamber has chosen to preserve.

That it is, in fact, a choice is uncertain. On the one hand, if the House of Representatives were to announce to the world that it is now a continuing body, with officers (such as the clerk) and rules of procedure that remain in place until new ones are selected, no other branch of the federal government could overturn that decision. In that sense, members of the present House of Representatives could simply declare (and thus choose) that the officers and rules continue from one Congress to the next. On the other hand, this declaration would nonetheless be null and void if the members-elect of the next House chose to regard it as null and void. This would be so for the same reason: No other branch of the federal government

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separate action on the part of the House in order to bring them back onto the roll.

could overturn that decision. The autonomy of each House in determining its own organization is in that sense both absolute and inescapable.

We could ask how this situation has come to pass and, while the answer to that historical question would be useful, in the end it would be woefully incomplete. The fundamental reason for reemergence of the opening dilemma at the organization of each new House of Representatives is that the opening dilemma is essential for preserving the umbilical cord connecting the popular will to the legislative function of the chamber. That cord could be compromised, for example, by assigning one or more organizational duties to one of the other branches of the federal government. In many states, for example, the secretary of state receives the election results from the county clerks, compiles the names of the candidates who prevailed in those elections into a roll, and swears in the members of the lower chamber of the legislature as a constitutional or statutory responsibility.<sup>139</sup> That arrangement resolves one of the major elements of the opening dilemma at the very beginning of the chamber's organization. But it also severely compromises the autonomy of the chamber by placing one of its foundational connections to the popular will, the determination of who was properly elected to the chamber, in the hands of another branch. And the other obvious solution, turning the House into a continuing body much like the Senate, suffers from the same problem. No one who served in the prior House of Representatives possesses a connection to the popular will in the new chamber. That connection was renewed in the last election and, in the process, severed the now-old umbilical that had sustained the democratic legitimacy of the prior House.

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<sup>138</sup>. Congressional Globe 26:1: 72,75.

<sup>139</sup>. If the U.S. House of Representatives were to adopt this arrangement, it would have to be by way of a constitutional amendment. Otherwise, the succeeding House could simply reject it.

In short, there is no institution or official to whom the House of Representatives could turn over responsibility for resolving its opening dilemma without compromising its own communion with the popular will. But, as we have seen, that does not mean that members of the House have been or will be comfortable with very high uncertainty and irregularity that accompanies the opening dilemma. Resolution of the opening dilemma has been the subject of statutory law, formal rules, and dozens of precedents. All of them have been and still are fully incompatible with the opening dilemma in its pristine role as a democratic founding. They have instead been, in the words of Asher Hinds, of "persuasive effect only."<sup>140</sup> They are fictions intended to convey a patina of conventionality and predictability upon what is, fundamentally and unavoidably, the netherworld in which democracies are founded.

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<sup>140</sup>. Hinds was referring to a rule adopted by the House in 1880 that specified that: "The Clerk shall, at the commencement of the first session of each Congress, call the Members to order, proceed to call the roll of Members by States in alphabetical order, and, pending the election of a Speaker or a Speaker pro tempore, call the House to order, preserve order and decorum, and decide all questions of order subject to appeal by any Member." Hinds noted that, because formal rules are not usually adopted until after the election of a speaker, this rule would not be in force during the period to which it applied. Hinds' 5: 64: 50-1.



Chart 1: Variability in the Roles of Leaders, Members, and Rules

<u>Feature of an Assembly</u>	<u>Characteristics When Dominant</u>	<u>Characteristics When Co-equal</u>	<u>Characteristics When Subordinate</u>
<u>Leader</u>	A dominant leader makes procedural rulings by fiat, including those recognizing members for the purpose of offering motions and other purposes	A co-equal leader makes procedural rulings by fiat only when the rules are ambiguous and always recognizes members when there is some possibility that the motion they may offer may be favored by the assembly's majority	A subordinate leader asks the consent of the members whenever the rules are ambiguous and immediately instantiates their decision amongst the formal rules, as well as recognizes members whenever they seek recognition
<u>Members</u>	When individual members dominate an assembly, their exercise of prerogatives, such as the right to speak, are uncompromised	Co-equal individual members exercise their prerogatives unless they use them in ways that thwart the assembly's majority	When individual members are subordinated, they possess few prerogatives, even in situations where the revelation of the majority in an assembly might depend on their participation
<u>Rules</u>	When rules dominate an assembly, they: (1) assign roles and prerogatives to members with precision; (2) prescribe a ritual order that strongly constrains assembly deliberations; and (3) blur the distinction between procedure and substance by imperatively demanding action on the latter	When rules are a co-equal feature of an assembly, they: (1) weakly attach prerogatives to particular roles; (2) allow either the leader or members to shape the flow of deliberations; and (3) seldom make distinctions between the substantive content of motions before the assembly	When rules are subordinated in an assembly, they do little more than broadly define a distinction between the leader and the members, along with a basic frame for offering and disposing of motions

Chart 2: Foundings and the State of Nature

<u>Institution Created</u>	<u>Relation to the Popular Will</u>	<u>Reversion to the State of Nature if the Founding Fails</u>
National government	An assembly of delegates drafts a constitution which, once ratified, becomes a social contract between a people and their government. The delegates embody the popular will in its entirety.	In theory, if the assembly fails to draft a constitution or the constitution is not ratified, the people are left without a government (a state of nature). In practice, there is usually some de facto and/or de jure authority that provides at least the rudiments of civil order. However, this authority lacks legitimacy in that the people have not consented to its rule.
Revision of the constitution of an individual state the	An assembly of delegates drafts a revised constitution which becomes a new social contract between a people and their state. The delegates embody that part of the popular will that is not already constrained by the national social contract (constitution).	In theory and in practice, the existing state constitution remains the operating social contract between a people and their state until and if the new revision is approved. However, those provisions of existing state constitution that might otherwise constrain the delegates in their deliberations on the revision are rendered inoperative. In a sense the delegates (but not the people) enter a state of nature when they organize their constitutional convention. <sup>141</sup> However, even in the convention, the delegates are constrained by the national constitution.
Organization of a lower house of a legislature	An assembly drafts legislation that realizes the social contract between a people and their state. The representatives embody that part of the popular will not constrained by existing constitutions or represented by other branches.	In theory and in practice, each branch of the state bears a direct relation to the popular will. As a result, no branch can impair or constrain the founding of another (beyond what the constitution already provides). In addition, for those branches of the legislature whose membership is entirely renewed in an election cycle, previous assemblies cannot constrain the organization of future assemblies. If such an assembly cannot organize, the entire government (in theory) is dissolved and a state of nature ensues.

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<sup>141</sup>. The situation is a little different for a territory in that a constitutional convention is convened for the purpose of framing a state constitution. In that case, the delegates enter into a state of nature with respect to the territorial government, thus rendering territorial law inoperative while they deliberate.