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ULYSSES REBOUND

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1. METHOD TO THEIR MADNESS

A. Ulysses joins a Christmas Club

Irrational people create problems not only for themselves and those around them, but also for those who study them. They cause trouble for social scientists because their actions are inexplicable, at least according to generally accepted models of explanation. Explanations in the social sciences normally assume the form of rationalizations: actions are explained by showing that, relative to what the subjects believe and desire, the actions were done for good reasons. Conversely, when good reasons cannot be found for why someone acted as they did, their behavior remains inscrutable. Irrational people, therefore, stymie social scientists because their actions do not reveal the rationality needed to produce adequate explanations.

Consider the Christmas Club account. The holder of a Christmas Club account is required to deposit a certain amount of money every month until the beginning of the holiday shopping season. The interest on such accounts is usually below market and is sometimes significantly so. Moreover, there are substantial penalties for early withdrawal before Christmas; often withdrawals are not even permitted. As Richard Thaler has observed, these accounts 'offered the unusual combination of inconvenience (deposits were made in person every week), illiquidity (funds could not be withdrawn until late November), and low interest (in some cases, zero interest)' (Elster, 2000, p. 31).

On its face, the Christmas Club account appears to be a seriously irrational bargain. Why would anyone take such a bad deal when obviously better terms are readily available?

In his seminal study, *Ulysses and the Sirens*, Jon Elster showed that there is a method to such madness. To explain why some enter these agreements, Elster drew the reader's attention to the peculiar attitude

that many of us take towards the future. Since we tend to be creatures of the moment, we discount the future relative to the present. That is, we would be willing to pay more to enjoy something right now than we would if we were obliged to wait. Elster also pointed out that while we generally dislike waiting any additional time, we do not discount each marginal period at a fixed rate. It turns out that the longer we are forced to wait, the less we discount any additional delay. Waiting the marginal day, for example, matters a good deal when the wait is two, as opposed to three, days and we would be willing to pay a significant percentage to reduce that gap. But none of us really cares about being able to wait only ninety-eight, instead of ninety-nine, days and we would pay a far smaller percentage for that privilege. Economists sometimes refer to this way of discounting the future as 'hyperbolic' discounting.

As Elster showed, hyperbolic discounting leads to budgets that are inherently unstable. For it is inevitable that the insignificant delays that start in the distant future will eventually become the frustrating waits that begin in the present. From January's perspective, November does not arrive that much sooner than December, as both are a long way off. Therefore, the funds rational to allocate at the beginning of the year for November will be substantially the same as those rational to allocate for December. In November, however, the difference between November and December will no longer be negligible. Now, November is now, whereas December is a whole month away. From this new vantage point, the allocation made to November in January will be seen as inadequate. If the November self is rational, he will raid the funds that the January self planned to save for holiday presents.

This does not mean, however, that all hyperbolic plans are destined to unravel. The January self might predict the future expropriation and act so as to block the November self's attempt to reallocate. The holiday shopping fund can be given to someone trustworthy, such as a bank, with the understanding that the funds are not to be released until December.

Signing up for a Christmas Club account, Elster showed, is now interpretable as rational behavior. The attendant illiquidity of the principal is not a *cost* of such a bargain, but rather its *benefit* (the cost being the lower rate of interest). The Christmas Club holder is a modern day Ulysses lashing himself to the mast of the bank in order to fend off the November Sirens.

Elster argued that the Ulysses strategy of precommitment is a rational response not only to the quandary of hyperbolic discounting but to many other problems as well. *Ulysses and the Sirens* addressed the predicaments of weakness of the will, social passion and endogenous preference change and argued that central banks, periodic elections and consumer-sponsored advertising bans could be understood as Ulysses-like precommitment solutions.

This is fascinating stuff, and it is no wonder that Elster's book quickly became a classic. However, its impact did not primarily have to do with its originality: as Elster readily admitted, he was not the first to recognize the importance of precommitment strategies. His discussion of hyperbolic discounting explicitly drew on R. H. Strotz's pioneering work in the 1950's (in fact, the epigraph of Strotz's essay is taken from the Sirens episode of Homer's *Odyssey*). Nor did he claim credit for most of the other results, giving appropriate acknowledgments to the work of George Ainslee, Thomas Schelling, Kinn Kyland and Edward Prescott, among others.

Elster's great contribution was largely synthetic. Given his enormous breadth of knowledge and depth of imagination, he was able to draw on research in disparate disciplines and demonstrate the surprising ubiquity of precommitment strategies. Binding oneself to the mast was not a strategy reserved for epic poetry, Elster argued – most of us constrain our future selves in one way or another every day.

Researchers in economics, political science, psychology, philosophy, law, and literary theory took Elster's lead and began looking for other evidence of precommitment behavior. This research project has met with impressive success – a considerable amount of behavior previously thought to be self-defeating has been shown to be explainable as forms of rational self-binding. In the ensuing 15 years since the book was published, 'constraint theory', as Elster now calls it, has burgeoned into a full-fledged branch of rational choice theory.

In *Ulysses Unbound*, Elster revisits the field that he largely created. The book is divided into three essays, followed by a short coda. The first essay, 'Ulysses revisited: how and why people bind themselves', is a critical survey of past research in constraint theory as it pertains to individual action. The second essay, 'Ulysses unbound: constitutions as constraints', concerns the nature of precommitment in social settings, most notably in relation to the adoption of constitutions. The third essay, 'Less is more: creativity and constraints in art', extends constraint theory to the areas of aesthetics, where Elster argues that constraints are an essential component of artistic creation and value.

B. Ulysses revisited

Although much of *Ulysses Unbound* covers well-trodden ground, the inside flap is right to insist that the book 'is not simply a new edition of the earlier book'. As the title of his new book suggests, Elster has experienced a change of heart. Elster now believes that his former self might have seen Ulysses in too many places.

In *Ulysses and the Sirens*, Elster appealed to Ulysses in an effort to explain why societies adopt constitutions. Like Christmas Clubs, it is

puzzling why constitutions exist: insofar as constitutions impose limitations on governmental power, why would rational agents intentionally create obstacles to the eventual achievement of their goals? Enter Ulysses. Just as Ulysses sought to bind himself to the mast in order to guard against his own irrationality, members of society adopt constitutions so as to protect themselves from their own self-destructive tendencies. In both cases, Elster thought, the need to overcome passion and interest motivates each party to engage in prudent acts of self-binding.

In his new book, Elster rejects the aptness of the Ulysses analogy and, correspondingly, his previous explanation as to why societies adopt constitutions. The problem with the analogy, according to Elster, is its naiveté. Society is not composed of like-minded individuals whose principle desire is to protect each other from their own possible irrationality or self-interest. The adoption of a constitution, Elster reminds us, is a political act and, in politics, one side generally does not attempt to constrain itself – it tries to bind the other side. Winners in a political struggle are strengthened, not weakened, by their victory, and their increased power comes at the losers' expense. There is, therefore, nothing puzzling about the adoption of a constitution, for constitutions do not generally involve *self*-limitation – they involve *other*-limitation.

One has to respect the integrity of a theorist who writes a book pointing out his own past howlers. *Ulysses Unbound* represents a much-needed corrective to the politically innocent and methodologically suspect accounts of constitutional adoption that followed Elster's earlier work. The idea that constitutions are devices that the masses use to prevent themselves from running amok is nothing but a rational choice fantasy masquerading as a social scientific theory.

Unfortunately, Elster is not always as clear as one might wish – he often presents arguments in far too compressed a form, leaves key terms either ambiguous or undefined, and, in some cases, uses examples that undercut the very points he is attempting to make. My presentation in Sections 2 and 3 of his understanding of constraint theory and its application to constitutional contexts thus involves a certain degree of sympathetic reconstruction. Here is one small, but telling, example: at first glance, the title of the eponymous essay 'Ulysses unbound: constitutions as constraints' reads like a straightforward contradiction. If Ulysses is unbound, then constitutions cannot be constraints; if constitutions are constraints, then Ulysses must be bound. It took several readings before I could make out the distinction that Elster was implicitly drawing between binding and constraining. For Elster, it seems that to 'bind' is shorthand for to 'make impossible'. To 'constrain', by contrast, means the same as to 'make more difficult', but not necessarily impossible. Elster, therefore, appears to be claiming that those who adopt

constitutions are able to break the rules, but doing so is difficult for them. It is regrettable that a title should be so confusing, and it is by no means the only part of the book that will similarly frustrate the reader.

Although Elster has undoubtedly made a significant advance in explaining why societies adopt constitutions, his explanation, as I argue in Section 4, is at best a partial one. Elster is right to observe that the adoption process is, at bottom, a struggle for power and that groups often use constitutional provisions to dominate other groups. Yet, the false choice that structures his analysis leads him to mistakenly conclude that the winners of such power struggles do not end up constraining themselves in the process. Constitutions, in Elster's view, must *either* be devices that groups use to constrain themselves *or* devices groups use to constrain others – they cannot be both. Because groups use constitutions to constrain other groups, he deduces that groups cannot use constitutions to constrain themselves. But other-constraint, I argue below, does not preclude self-constraint and, in constitutional contexts, actually presupposes it. The political need to compromise with opposing groups, as well as the moral demands of the rule of law to limit official discretion, require that the winners of a constitutional struggle precommit themselves by adopting certain constitutional provisions and accept them as guides to their conduct.

In Section 5, I argue that Elster's account is incomplete in a far more fundamental way. As will become apparent, Elster uses the term 'precommitment' in a systematically ambiguous manner. When discussing cases of individual precommitment, the ties that bind are causal in nature. Ulysses causally precommitted himself by tying himself to the mast. By contrast, when discussing collective precommitment, the binding is normative in nature. Constitutions impose duties and confer powers. Once the ambiguity is detected, the question arises as to the connection between normative and causal precommitment. Once members have formally adopted certain legal limitations on their behavior, how does this normative fact stop members from flouting the rules they have just assumed? Not to put too fine a point on it, but most constitutions are just pieces of paper.[1] How are the wills of men and women kept in check by 'mere parchment boundaries'?[2]

This is not a trivial piece of the puzzle. Without accounting for how normative precommitment can translate into causal precommitment, Elster's entire project, namely, to explain why and how members of society constrain themselves and others via constitutions, borders on the pointless. Surprisingly, Elster has little to say about an issue that is so central to his inquiry. And what he does say, I will argue, is

[1] The rest are not even pieces of paper – they are simply conventional practices.
[2] The Federalist No. 10 (James Madison).

unpersuasive. In Section 6, I suggest that in order to uncover the relationship between normative and causal commitment, we ought to return to the Ulysses analogy. Officials who publicly accept the law are doing to themselves with rules what Ulysses did to himself with ropes – they are causally constraining their future selves in such a way that the option of disobeying the law will no longer be feasible. It is only by seeing rules as affecting the set of feasible options, I conclude, that renders the practice of constitutionalism rational and, hence, explicable.

2. OVERVIEW OF CONSTRAINT THEORY

Elster begins *Ulysses Unbound* by setting out constraint theory's point of departure. In the standard case, greater choice is not worse, and sometimes better, than lesser choice.[3] It is not worse because the additional options need not be exercised; it is sometimes better because the additional options, if exercised, might make one better off. The same is true for information. It is not worse to have more information because the additional information can always be ignored; it is sometimes better because the information might allow one to make a better choice. In the standard case, therefore, it would never be rational to limit choice or information.

Constraint theory deals with the non-standard cases, where agents are better off with fewer choices and less information. It was in Ulysses' interest to limit his ability to surrender to temptation, and that is why he lashed himself to the mast. Likewise, it was in the crew members' interest not to hear the Sirens' song, and that is why Ulysses had them put wax in their ears.

Having set out the 'what' of constraint theory, Elster proceeds to the 'why' and 'how'. The 'why' concerns the reasons for constraining oneself; the 'how' deals with the devices for accomplishing this feat. Chapter One of *Ulysses Unbound* concerns individual precommitment, while Chapter Two is devoted to collective precommitment. I will discuss each case in turn.

A. Individual precommitment

Elster considers five main reasons why it would be advantageous for an individual to precommit himself: to overcome passion, self-interest, hyperbolic discounting, strategic time-inconsistency, and preference-change. He also recognizes eight devices for individual precommitment: eliminating options, imposing costs, setting up rewards, creating delays,

[3] Elster writes that in the standard case more choice is 'always better' than less choice. Since this is clearly false, I assume that he meant to say that more choice is sometimes better, but never worse, than less choice.

changing preferences, investing in bargaining power, inducing ignorance, and inducing passion.

Having already discussed hyperbolic discounting in the introduction, and given that overcoming self-interest and preference change are special cases of the three other reasons, I will only explore the rationales of overcoming passion and strategic time-inconsistency and the devices that are appropriate to them.

Passion: Sometimes when we act in the heat of passion, we act in ways that we might not endorse in the cool light of reason. By 'passion', Elster does not simply mean strong emotions, such as lust, jealousy and anger. He also has in mind states such as drunkenness, addiction and pain that affect our ability to act on our better judgement.

To protect ourselves against the destructive effects of passion, we can precommit to follow the optimal course of action. For example, if I fear that I will have too much to drink and will nevertheless want to drive in spite of my altered state, I can give my keys to a friend and ask him to ignore my request for their return. If the plan is successful, I will have avoided disaster by eliminating my ability to act in a disastrous manner. Another example might be my announcing to all of my friends that I will quit smoking. The hope is that back-pedaling will cause me to feel embarrassed in front of my friends, and this will ratchet up the costs of my reneging so as to motivate me to abide by my declaration.

It is one of the great merits of Elster's book that, in addition to these pedestrian examples, it contains many delightful illustrations of how certain precommitment devices can, and have been, used to combat the effects of passion. Noteworthy are the cases reported by Montaigne and cited by Elster regarding the virtues of ignorance in maintaining marital bliss. According to Montaigne, it was the custom of Roman men to send a messenger in advance 'to announce their arrival to their womenfolk so as not to take them unawares'.[4] Montaigne also mentions the practice of some unspecified culture where a priest would have sexual relations with the newly-wed bride 'to remove from the groom any doubts or worries'.[5]

Strategic Time-Inconsistency: In the short term, it is almost always in a person's self-interest to renege on a promise when the other side has already performed. Moreover, if the promisor will never see the promissee again, and word of the misdeed will not leak out, it will be in the promisor's long-term self-interest to default as well.

However, if the offeree is rational, and believed that the offeror is rational and self-interested, the offeror is unlikely to benefit from such arrangements. For a rational offeree would predict that in such circumstances the offeror would not honor the offer and, hence, the

[4] Montaigne (1991, p. 982), cited in Elster (2000, p. 16).
[5] Montaigne (1991).

offeree would not accept the offer. This is problematic for the offeror, not only because he would not be in a position to exploit the offeree, but also because he would not be able to benefit from the offer *even if he happened to be sincere*. Promises exhibit what Elster calls 'strategic time-inconsistency': even though it would be in one's rational self-interest to intend to keep one's promises, it would not be in one's rational self-interest to actually keep one's promises. Because of this strategic time-inconsistency, rational, self-interested agents are unlikely to profit from mutually advantageous bargains.

Threats also suffer from strategic time-inconsistency. It is generally not in a threatener's short-term self-interest to carry out a threat, given that it is costly to carry out a threat and a threat is carried out at a time when the threat is no longer capable of motivating conduct. Likewise, if the interaction will not be repeated and news of the bluff will remain with the parties, it will be irrational even in the long run for the threatener to carry out the threat. Knowing this, rational victims in such circumstances would treat the threats as empty and would call the bluffs. Hence, threateners would not be in a position to benefit from threats, even if the threats were not in fact empty.

Following Thomas Schelling, Elster argues that offerors and threateners can make themselves credible by precommitting themselves to follow through on their stated intentions. With respect to many promises, for example, a legally-valid contract is an extremely effective precommitment device. The state in this case acts as the enforcer, guaranteeing that the bargain is respected. The promisor might also increase the costs of reneging by announcing to others that an agreement has been made, thereby incurring reputational costs if he defaults.

Similarly, threateners can make their pronouncements more credible by taking the matter out of their hands. They can automate their response, as with a doomsday machine, or change their environment, as when troops burn their bridges to make retreats impossible. They can also increase their costs of capitulating by announcing their threat to as many people as possible, as when a labor leader announces his threat to union members and to other business leaders.

Those threatened can also employ many of the same precommitment devices to make their refusals more believable. They can make acquiescence impossible or more costly. In addition, they can protect themselves by cutting off avenues of communication between them and the threateners. Threats not received cannot be effective.

B. Collective precommitment

The basic tenet of constraint theory – that sometimes less is more – holds true for social, as well as individual, choice. In certain cases, members of

groups are made better off when they repudiate some of their power to affect the norms that govern social interaction. Since the law is the main instrument in most cultures for setting the terms of social interaction, and since constitutions are the chief means by which legal systems set limits on authority, the appropriate response in these non-standard situations is for the group to precommit themselves and adopt a constitution.

In Chapter Two, Elster claims that there are four main reasons for adopting a constitution: to overcome passion and interest, hyperbolic discounting, strategic time-inconsistency, and to ensure efficiency. He also discusses five techniques constitutions employ to implement the desired precommitment: imposing costs, eliminating options, creating delays, requiring super-majorities and separation of powers.

Passion and Interest: By 'passion and interest', Elster is primarily referring to the passion of the masses and the interests of legislators. In case studies ranging from the *graphe paranomon* of Athenian democracy to the checks and balances of the American system, Elster argues that various constitutional structures have been designed or maintained because of their capacity to curb the destructive tendencies of mob rule as well as the rent-seeking behavior of legislators.

In perhaps the most interesting and informative section of the book, Elster details how bicameralism and the executive veto each serve the same two functions. By requiring that legislation pass through two houses of the legislature, bicameralism protects against outbursts of political fervor by slowing the legislative process down and allowing passions to cool. It guards against legislative self-interest by pitting one set of legislators against the other, neutralizing one ambition with another. Likewise, providing the executive with veto power over legislation provides a check against social passion by furnishing the executive with the ability to strike down socially intemperate legislation. It guards against legislative rent-seeking by pitting the political self-interest of the executive against those of the legislature.

Hyperbolic Discounting: Just as individual budgets are inherently unstable due to hyperbolic discounting, one might expect collective allocations of resources to be similarly precarious. Policies instituted in the past would eventually be deemed excessively prudent and significant political pressure would build for some form of reallocation. Constitutional provisions might, therefore, be utilized as a solution to the dangers of hyperbolic discounting. Although Elster has no evidence that any provision has ever been intentionally adopted for these reasons, he speculates that measures that invest in social infrastructure, such as the right to education and housing, might have been motivated by such concerns or maintained because of these benefits.

Strategic Time-Inconsistency: Offers made by the government are

liable to suffer from the same strategic time-inconsistency as those made by individuals. Elster illustrates this using a wage negotiation game between a government and a trade union. Because the trade union is solely concerned with real wages, the government has an interest in promising to implement a zero-inflation plan in order to persuade the union to accept a lower nominal wage package. However, once an agreement has been made, the government might find it advantageous to renege on the zero-inflation plan. In order to boost employment, the government might increase the money supply, thereby increasing inflation. Because the trade union knows all this, it will not trust the government and will insist on higher wages. One solution to this credibility problem is for the government, via a constitutional provision, to transfer its power over the money supply to an independent central bank. Because the bank will have a considerably smaller interest in boosting employment, it can be trusted to keep its hands off of the money spigot.

Efficiency: Elster argues that it is efficient to 'constitutionalize' certain legal rules. By requiring that the basic structure of government and fundamental rights be changed only by a super-majority, the stability of basic forms of social and economic interaction is increased, opportunities for rent-seeking are decreased, and vote-cycling is made less likely.

3. THE REJECTION OF THE ULYSSES ANALOGY

A. Other-constraint, not self-constraint

In *Ulysses and the Sirens*, Elster analogized the quandary that democratic societies face with the predicament that Ulysses confronts. In both cases, the protagonists are at risk of being undone by their own passions. And in both cases, the protagonists realize the danger and respond by binding themselves – in one case with ropes, the other with constitutions – so as to prevent their future selves from surrendering to temptation.

Elster now believes that this analogy was based on a fallacy. From the fact that it is often rational for members of democratic societies to precommit themselves by adopting a constitution, it does not follow that this is actually why they do it. Political actors might have other, and perhaps better, reasons to adopt constitutions than to overcome passion. Explanations in the social sciences cannot be based on unsupported 'just so' stories, but on a close examination of the facts.

Elster no longer believes that the Ulysses analogy bears up under the weight of the evidence. He begins his critique by recounting a story from the French constitutional experience. During the initial phases of the French Revolution, Louis XVI threatened the French Assembly by amassing troops around Versailles, where the Assembly was then meeting, and by later giving orders to a regiment in Flanders to march

on Paris. This royal intimidation precipitated events that led to the full-scale revolution. In an effort to prevent similar occurrences in the future, the victorious French Assembly adopted a provision in its constitution forbidding the executive from bringing troops within 37 miles of the legislative body. As Elster points out, it would be highly implausible to see this restriction as one that the executive, that is, the king, imposed upon himself. Not only would he have had no political interest in such a limiting provision, but by the time the constitution had been adopted, he would have lost his veto over its ratification. Elster concludes that 'this was not an exercise in *self*-binding . . . Rather than binding himself, the king was bound by the assembly' (Elster, 2000, p. 93).

Elster proceeds to argue that many provisions that might at first blush appear to be instances of self-binding are, on reinspection, more plausibly regarded as cases where the strong bind the weak. In *Ulysses and the Sirens*, for example, he claimed that measures that mandate periodic elections (and, therefore, do not permit voters to recall their representatives at will) could be interpreted as the electorate's method of protecting itself from its own impetuousness. Elster is now harsh in his assessment of this earlier view: 'Obviously, no electorate ever did anything of the kind. If voters lack the means to recall their representatives at will, the explanation surely has more to do with the motives of politicians than with those of the voters' (Elster, 2000, p. 90). Likewise, one might be tempted to explain bicameralism as the electorate's attempt to slow down the legislative process and, in so doing, to guard against their own momentary passions and interests. However, it does not follow that a legislature is bicameral from the mere fact that it would have been rational for voters to have supported a bicameral system. Elster believes it much more likely that bicameralism is the product of a minority elite's anxieties about the masses than the masses' own 'Ulyssesian' sense of prudence.

While Elster rejects the Ulysses analogy as generally naive and misleading, he does not think that it is entirely inapt. First, Elster recognizes that there have been some, albeit rare, instances of genuine self-constraint. He mentions the case of the Hungarian Parliament which, in 1989–90, voted to create a constitutional court and invested that court with the power of judicial review, namely the power to strike down government regulations deemed unconstitutional.

Second, Elster concedes that there is a looser sense in which it may be proper to speak of self-constraint. If one generation intentionally constrains itself, and in the process constrains a future generation, we may speak of self-constraint just in case we would expect the future generation to have welcomed the restrictions imposed.

Finally, Elster believes that restrictions introduced to constrain others might be maintained because of their self-constraining properties.

Although upper legislative houses such as the United States Senate are generally introduced by elites to constrain popular majorities, the explanation of its longevity might lie in the ability of bicameral structures to cool down social passions through delay. In Elster's terminology, bicameralism would be an incidental, but not an essential, constraint.

B. The ties that do not bind

The Ulysses analogy not only contains a 'why' component, namely an explanation as to why societies adopt constitutions, but also a 'how' component, namely how the adoption of constitutions affects behavior: just as the ropes eliminated the possibility that Ulysses could go to the Sirens, constitutions eliminate the ability of members to act unconstitutionally.

Elster rejects this aspect of the Ulysses analogy as well. Even when a group uses a constitution to constrain itself, he argues, the constitution does not bind. Elster, of course, is not contesting that members of various legal systems have legal obligations to obey their constitutions; in that sense, constitutions do bind. What he appears to deny is that the process of constitutional adoption renders unconstitutional behavior impossible.[6]

Elster offers two arguments in support of this position. He first points out that constitutional restrictions are almost never absolute. Every modern constitution has amendment procedures for most, and sometimes all, of their provisions.

> Nor are constitutions acts of self-*binding* in a strict sense . . . When Ulysses bound himself to the mast and had his rowers put wax in their ears, it was to make it *impossible* for him to succumb to the song of the Sirens. Constitutions are usually designed to make it *difficult* to change their provisions, but not impossible. (Elster, 2000, p. 94)

Although the First Amendment to the United States Constitution forbids Congress from abridging freedom of speech, the First Amendment can be repealed. There are possible states of affairs, therefore, where Congress validly enacts legislation that abridges freedom of speech. To be sure, it would be extremely difficult to bring these states about, but it is not impossible.

Some constitutions, most notably the German federal constitution, entrench certain rights so deeply that they are not amendable. Still, Elster does not believe that this renders the actions prohibited impossible.

[6] As we will see in Section 7, the notions of possibility and impossibility used here are ambiguous.

> Although some constitutions have provisions that are immune against amendment, even these do not bind in a strict sense, because extra-constitutional action always remains possible. The individual who wants to bind himself can entrust his will to external institutions or forces, outside his control, that prevent him from changing his mind. But *there is nothing external to society*, barring the case of commitment through international institutions with powers of enforcement, such as the International Monetary Fund or the World Bank. And even these cannot make it impossible to act against a precommitment, only make it more costly to do so. (Elster, 2000, pp. 94–5)

According to this objection, rules can bind an agent only when there is someone besides that agent who enforces the rule. Hence, constitutional rules cannot bind everyone in a society, for there would be no one left to enforce the rules. Any time everyone wished to break the rules, the rules could, and would, be broken.

4. THE APTNESS OF THE ULYSSES ANALOGY

A. Which analogy?

Before we evaluate Elster's rejection of the Ulysses analogy, it might be helpful to distinguish between two different versions of the 'why' component of the analogy, one strict, the other loose. On the strict interpretation, members of society who vote to adopt or amend their constitutions see themselves as facing roughly the same problem that Ulysses faced, namely the possibility that passion will overcome their future selves. Accordingly, the normal explanation for why societies adopt constitutions is that individual members wish to protect themselves against their own irrationality with regard to decisions that affect the collective.

According to the loose interpretation, members who vote to adopt or amend their constitutions are like Ulysses, not so much in the sense that their decision problems are the same, but rather that their respective decision problems are both of the non-standard sort, that is cases where less choice is better than more choice. As we have seen, members of societies can have reasons for wishing to precommit themselves other than to overcome passion. They may face problems of strategic time-inconsistency, hyperbolic discounting, inefficiency, or some other reason. The loose interpretation of the Ulysses analogy is agnostic with regard to the reasons why members of society precommit themselves – it only claims that the normal explanation for why societies adopt constitutions is that individual members are seeking to constrain their future selves.

Elster clearly believes that he has discredited the loose interpretation. He states in several places that constitutions are not, in general,

intentional precommitment devices.[7] However, as I will now show, his objections to the Ulysses analogy are effective only against the strict interpretation. Nothing he says falsifies the proposition that constitutions are precommitment devices.

As we saw in the previous section, Elster maintains that constitutions are generally adopted or amended by one group in order to constrain another group. Let us accept this claim as true for the sake of the argument. It follows that the reason why constitutions are adopted or amended cannot be that individual members are seeking to constrain their future selves against their own irrationality. Hence, Elster is justified in rejecting the strict interpretation of the Ulysses analogy.

However, it does not follow from the fact that constitutions are devices for constraining others that they are not also devices for self-constraint. To see this, consider any garden-variety bilateral contract. A bilateral contract is a contract of mutual promises. It is formed when each party offers to perform some action that benefits the other party – acts of self-constraint – followed by each party accepting the offer of the other – acts of other-constraint. A bilateral contract, therefore, involves both self- and other-constraint. Indeed, a bilateral contract is a device that is capable of constraining another person precisely because it is a device that is capable of self-constraint as well.

Not only is it possible that constitutions might be devices for self-, as well as other-, constraint, but, as I intend to argue, they are such devices. In the next section, I will argue that constitutions are like contracts in that bargaining and compromise are integral parts of the adoption and amendment processes. Constitutional actors are able to impose restrictions on others only because they are willing to impose restrictions on themselves.

In the section following the next, I will extend the argument by showing that self-binding is an essential part of constitutional adoption and implementation because it is an essential part of the rule of law. Those who adopt a constitution, as well as those who swear to uphold it, constrain themselves to respect the allocation of duties and powers that the constitution sets out. They do this, as we will see, not to constrain others but rather to reassure them that the power of the state will be used when, and only when, authorized by law.

[7] See, e.g., Elster (2000, p. ix). ('Chapter II reflects a change in my views about *constitutions* as precommitment devices. I have been much influenced by a critical comment on *Ulysses and the Sirens* by my friend and mentor, the late Norwegian historian Jen Arup Seip: ''In politics, people never try to bind themselves, only others''. Although that statement is too stark, I now think it closer to the truth than the view that self-binding is the essence of constitution-making'.)

B. Self-constraint as the price of other-constraint

Politics, as one cliché goes, is the art of the compromise. One faction almost never gets *exactly* what it wants. It generally has to taper its demands back to a point where enough support can gel around an acceptable proposal. This is all the more true in constitutional politics, since constitutional adoption generally requires more than a simple majority. The majority cannot simply force its will on the minority, for majorities do not have such power. To achieve their ends, the proposals floated by the majority must draw enough of the minority into the fold so as to assemble the requisite super-majority. This effort will generally take the form of accepting restrictions on the majority's eventual power or freedom.

Consider the degree of compromise that went into the adoption of the United States Constitution.[8] In order to secure the agreement of the South, for example, the North had to agree to a number of pro-slavery positions. Article I, Section 9 of the United States Constitution prohibits Congress from regulating the slave trade until 1808; Article V renders this provision unamendable until that time. Article IV, Section 2 denies a state the power to free fugitive slaves and affirmatively requires them to return such slaves to their lawful owners. The North also agreed to count slaves for the purposes of representation in the House of Representatives, thereby increasing the political power of the slave-owning states, although the South agreed that each slave would only be recognized as three-fifths of a person.

Bicameralism was itself a double compromise. First, it was a compromise between those who believed that the federal legislature should be like the House of Commons, that is, large chamber, members drawn from the ranks of their constituencies, elected directly and short terms of office, and those who thought it should more resemble the House of Lords, that is, small chamber, members possessing substantial property, elected indirectly and long terms of office. Second, bicameralism represented a compromise between the larger and smaller states. The larger states demanded that representation be based purely on population, whereas the smaller states insisted that representation be based solely on statehood status. The resulting settlement established a two-chambered legislature, composed of a strongly democratic lower house whose size was based on population, and a more aristocratic upper house whose size was determined solely by the number of states in the Union.

In each of these cases, one side accepted restrictions on their own

[8] I apologize in advance for the parochialism. I use examples from the United States Constitution because I am most familiar with it. I believe that the points I make generalize to other constitutional contexts as well.

conduct in order to get the other side to accept restrictions on their conduct. The northern states, through their various representatives, agreed that they would neither have the power to regulate the slave trade for twenty years, nor have the power to emancipate a fugitive slave for the indefinite future. The smaller states gained a greater voice in the Senate but only at the expense of a diluted voice in the House of Representatives. Without these forms of self-limitation, the requisite constitutional consensus could never have been forged.

As political weapons, therefore, constitutions are double-edged swords. While it is true that parties may use a constitutional provision to limit the power of other parties, the winners will generally be forced to accept other provisions that limit their own power. In constitution-making, precommitment is the political price that one must pay in order to commit others.

C. Self-constraint and the rule of law

The decision to precommit, though, is not always the product of political necessity. Political actors often recognize the moral necessity of constraining their future selves. As I will attempt to show, leaders who wish to create the conditions of freedom and autonomy willingly accept limitations on their power by adopting a constitution.

As many have noted, the problem with broad grants of discretionary power is that it breeds high levels of insecurity. When officials are not guided by public authoritative standards, it becomes difficult, or even impossible, for others to predict with confidence how these officials will exercise their authority. Citizens might doubt that behavior that they believe is innocent would be allowed or would be found culpable and deserving of punishment. They might also be uncertain whether conduct thought to be worthy of protection would be protected or would be ignored by those in authority. And given these high stakes, the uncertainty would be crippling. If people did not know whether certain conduct would be deemed forbidden after the fact, they would refrain from taking their chances. Similarly, if unsure whether their agreements would be enforced, rights respected and wrongs redressed, they would shy away from engaging in many worthwhile activities. The existence of broad discretionary powers, therefore, has the tendency to significantly curtail freedom. This holds true regardless of why, or even whether, such powers are exercised.

The solution to this problem is for members of groups to accept significant bounds to their power. They do this, first, by adopting rules, constitutional and otherwise, that bestow upon themselves only a limited set of powers and confer the same or other powers on other groups. Members will also adopt rules that impose duties on themselves

and grant permissions to others. Second, they will adopt rules that limit their power to change the rules whenever they see fit. Third, they will commit themselves to respecting this allocation of authority and obligation. They will recognize that power may be exercised when and only when it is authorized by the rules that they have laid down in advance and that duty must be heeded even when it is disadvantageous to do so. The solution, in other words, is for these groups to abide by the rule of law.

Constitutions, and the rule of law, therefore, greatly alleviate the jeopardy associated with unlimited discretion. For when those with power confer upon themselves limited authority and bind themselves to the rules set out in advance, they enable the rest of us to anticipate their actions. We can predict that power will only be used within the prescribed boundaries and that officials will heed their duty even when it is against their interest. The fact that officials are bound to the rules reduces the uncertainty of the future and, in turn, increases personal liberty and autonomy.

It should be clear from this analysis that those who adopt a constitution and are committed to the rule of law are not the only ones who bind themselves. Any time an official sincerely swears an oath to uphold the constitution, she is also engaged in an act of self-constraint. Such a person recognizes that the rules will often require her to act in ways that offend her political and ethical sensibilities. Yet, her commitment to the rule of law will demand that she follow the law, not her own personal sense of right and wrong.

I readily admit that I have no idea how many individuals throughout history have actually respected the rule of law and how often that has motivated constitutional adoption and constitutional commitment. Although the ideal of the rule of law has been axiomatic in Western political thought since the Glorious Revolution, it is hard to separate lip service from sincere commitment. However, I have little doubt that many political actors have been genuinely concerned about the dangers of unlimited power and have acted so as to deny themselves power that they might have wrested from others. Considerations of space and competence, though, forbid a detailed investigation of the scope of the explanatory hypothesis offered in this section.[9]

[9] But see, e.g., Robert Cover (1975). In the first half of the nineteenth century, numerous suits were brought by fugitive slaves seeking protection from the courts. As Cover recounts, many of these actions came before judges who were deeply opposed to slavery and supported the abolitionist movement. Yet, in many instances, these abolitionist judges dismissed the actions as legally insufficient. The deals made by politicians were enforced by judges who had no sympathy for the laws that they were required to enforce. They did, however, have a resolute commitment to the rule of law and, at the end of the day, that commitment prevailed.

D. Self -constraint as the flip side of other-constraint

Pace Elster, the Ulysses analogy is perfectly apt, at least according to the loose interpretation. Constitutions are not just devices for constraining others, but, as we have seen, are also devices for self-constraint. Constitutions, like contracts, empower one group to impose constraints on others precisely because they enable each group to impose limits on themselves. Moreover, when one group seeks to constrain another, they will often recognize the value of accepting certain constraints on their own behavior in the effort to reassure others that power will be exercised in a predictable and reliable manner.

Elster, therefore, drew the wrong conclusion from the evidence he collected. Recall that Elster rejected the view that constitutions are devices for self-binding by focusing on provisions that were clearly adopted by one group in order to constrain another. But, as we have seen, self-constraint is the flip side of other-constraint. For when one group imposes limits on the power of another group, they know that they are *ipso facto* limited to the limits that they manage to secure. As Laurence Tribe (1988, p. 298) has described the limiting nature of grants of federal power in the United States Constitution: 'The Constitution in granting congressional power thus simultaneously limits it: *an act of Congress is invalid unless it is affirmatively authorized under the Constitution*'. Commitment to the bargain struck, as well as the rule of law, requires that the parties respect the space of power that each leaves to each other.

5. CAUSAL AND NORMATIVE PRECOMMITMENT

Having argued that precommitment is a ubiquitous feature of constitutional adoption, I would now like to turn to the mechanics of this precommitment. I will attempt to show that Elster was again wrong to reject the Ulysses analogy and that the best explanation for how constitutions function as precommitment devices is that they bind those who accept them as guides to conduct. In order to see this, we must first clarify what we mean when we say that constitutions are precommitment devices and that constitutions fulfill such functions by binding those who accept them.

A. Two senses of precommitment

The careful reader might have noticed that the previous discussions have employed two different senses of precommitment. With respect to individual choice, an agent precommits himself when he sets a chain of physical events in motion, an event in the chain either affects the feasibility of an option or the payoff associated with an option and, once that event has occurred, the agent can no longer exercise any causal

control over the chain. Call this causal precommitment. Ulysses causally precommitted himself because he ordered himself lashed to the mast, this act led to the infeasibility of his heeding the Sirens' call and, once lashed, he no longer had the ability to untie himself. We will say that an act of causal precommitment results in a causal constraint. Further, if that act of causal precommitment generates a causal constraint that renders an option infeasible, as opposed to merely changing its payoff structure, we will refer to such an act as one of causal self-binding. Ulysses' act, therefore, was one of causal self-binding.

With respect to social choice, however, an agent precommits herself by affecting the rights that she enjoys. The agent does this by setting a chain of normative events in motion, an event in the chain eliminates some of the rights she possesses or would have possessed had the event not occurred and, once that event has occurred, the agent can no longer exercise any further normative control over the chain. Call this normative precommitment. State legislators who successfully enact a constitutional provision ceding authority to the federal government normatively precommit themselves because by casting their votes they lose legal power and are unable to change the normative situation until a repealing provision is proposed and is put up for a vote. We will say that an act of normative precommitment results in a normative constraint. Because normative precommitment always results in the elimination or preclusion of a right, and because eliminating or precluding a right is the normative analogue of making an option infeasible, we will say that every act of normative precommitment is an act of normative self-binding.

Elster does not distinguish between the causal and normative senses of precommitment, constraint and self-binding, although he employs the two senses in his discussions. In the individual case, the precommitment devices that Elster mentions are primarily gadgets such as ropes, bank vaults and doomsday machines, while in social cases, the devices are different types of legal rules. This slippage, and Elster's failure to acknowledge it, is unfortunate because it masks the nature and importance of the 'how' question under consideration. When Elster asks how constitutions function as precommitment devices, he is not interested in the question of how they normatively bind their members. The answer to this is trivial, at least from a philosophical perspective: they bind through their rules. What he, and we, really want to know is how acts of normative precommitment translate into acts of causal precommitment. How does the utterance 'Yea' to a roll call vote, or 'I hereby solemnly swear to uphold the Constitution of . . ., upon induction into office, causally affect the decision environment so that the utterer has a reason that he did not have before? Without understanding how normative acts generate causal constraints on action, constitutional

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adoption will remain rationally inexplicable. For if uttering 'Yea' has no effect on the decision environment, why does the utterer bother to vote?

Although Elster does not address the issue in these terms, he does have a position on the connection between normative and causal precommitment in constitutional contexts. As we saw in Section 2.B, Elster rejected the 'how' component of the Ulysses analogy. Elster argued that constitutional adoption does not render unconstitutional conduct impossible. Constitutions only make such behavior 'more costly' (Elster, 2000, p. 95).

Surprisingly, Elster never tells us what these costs are or how constitutional adoption imposes them on individuals. Perhaps Elster thought it too obvious to mention. But, as I will argue, none of the obvious candidates provide viable explanations for how constitutional rules impose costs on constitutional decision-makers.

B. The sanctions argument

Elster might argue that legal officials follow the rules because they do not wish to incur the legal sanctions that would inevitably attend their violation. Legislators who enact an unconstitutional law, for example, would be rebuffed by a court through the exercise of judicial review. If a judge fails to strike down the law, his ruling would be reversed by a higher court. And if the appellate court, in turn, neglected to invalidate the law, an even higher court would intercede to invalidate the unconstitutional act.

Despite the simplicity of this position, it is clearly inadequate as it does not generalize. For sanctioning is itself a rule-governed activity and, therefore, is an activity that is also in need of explanation. Why, we might ask, do officials honor the legal rules that require the imposition of sanctions on officials who themselves do not honor the legal rules? Obviously it cannot be sanctions all the way down.

Elster might respond that legal officials who did not follow the rules would be subject to political sanctions, and this threat is enough to deter non-enforcement of the law. This explanation, however, is also unsatisfying. First, it does not explain why officials are deterred by criticisms that attend the non-enforcement of law but not to criticisms that follow the enforcement of law. Judges, for example, often get reproached for enforcing the rights of criminal defendants and yet they continue to exclude evidence from trials that has been illegally seized and release defendants whose trials have not commenced in a timely manner. Second, and more importantly, it does not explain why members of the public condemn officials who fail to follow the rules. If officials had no reasons to follow the rules, why would the public criticize them for their dereliction of duty? Public disapprobation actually presupposes that

officials have acted in a manner that warrants disapprobation. Until we can explain why officials have reasons to guide their behavior by the rules, we will not be able to explain why they are denounced for failing to follow them or why they are sensitive to these criticisms. But once we have such an explanation, we will no longer need to rely on public disapprobation in order to account for why officials comply with their normative precommitments.

C. The reputation argument

Another possible cost to which Elster might appeal is the injury to the credibility of the government. On this explanation, even though the constitution might require officials to act in ways that they might find objectionable in individual cases, long run considerations militate that they ought to choose to adhere scrupulously to the rules laid down in advance. By abiding by their official commitments, and by doing so in a public manner, they will cultivate and maintain their reputation for 'rule-adherence'. By contrast, departures from the law will be met with a corresponding reduction in official credibility. Although every moral wrong will not be righted, and every right will not be protected in a system that respects the rule of law, at least everyone will be able to predict the consequences of their actions. Citizens can rely on the rules and plan accordingly: they can avoid legally prohibited actions, engage in legally permitted ones and assert rights conferred by law.

Despite its initial plausibility and widespread acceptance among social scientists and legal theorists, I do not think the reputation argument can be correct. When fully unspooled, the argument unravels into an infinite regress. To see this, we should ask why citizens will believe that officials will comply with the law in the future upon learning that they have complied with the law in the present. Presumably, they will expect similar compliance behavior in the future if and only if they believe that it is rational for officials to comply with the law in the future. But why would it be rational for officials to choose to follow through on their threats and promises in the future?

Reapplying the reputation argument to the future case gets us no closer to an answer: in order to show that it is rational for officials to follow through on their promises and threats in the future, the reputation argument must establish that the authorities have reason to follow through on their promises and threats in the future of that future. Yet, what reason can the authorities have to act that way in the future of that future? We can obviously repeat the reputation argument at this point, but the same problems will always reappear at the next round.

The reputation argument, therefore, fails to account for the connection between normative and causal precommitment for roughly the same

reason that Elster's earlier argument did, namely, they both engage in a form of bootstrapping. In this case, the reputation argument attempts to establish present optimality by presupposing future optimality. It can succeed, however, only if the claim that the authorities have reason to apply the law in the future can be independently sustained. The puzzle arises precisely because we do not know what this independent justification could be. If we did, we would not need the reputation argument.

It should be noted that the objection just leveled against the reputation argument presupposes some very strong assumptions. It assumes that officials and citizens are rational, that the officials also have an interest in acting morally, that each believes this of each other, that each believes that each believes this of each other, and so on. Such assumptions probably do not hold true in real life, at least in the unqualified form presented. However, any theory that attempts to explain how the rule of law can flourish must allow for the possibility that these assumptions might be true. It would be hard to see why the rule of law would be so venerated if its existence essentially depended on some form of irrationality. Surely it must be possible for rational and moral individuals to abide by a system of rules and for rational individuals to benefit from this practice.

6. THE RETURN OF ULYSSES

A. Binding oneself to the law's mast

We saw that the desire to avoid reputational injury cannot explain why it is rational for officials to respect the rules adopted. Yet, if reputational costs, or for that matter, legal penalties and political sanctions, cannot account for the respect due the rule of law, what can?

It is here that I think we should resurrect the Ulysses analogy. What I would like to suggest is that when legal officials accept the existing rules as guides to their conduct, they are attempting to do to themselves internally what Ulysses did to himself externally by lashing himself to the mast. Their goal is to causally bind their future selves using nothing but their wills. If they are successful, they will have managed to eliminate the option of non-conformity to the rules just as Ulysses lashing himself to the mast rendered going to the Sirens not a feasible option.[10]

[10] In the context of this review, I cannot defend the fully developed version of the alternative thesis I outline here. I recognize that many of its claims are not obvious or immediately intuitive. For an in-depth discussion and defense, see 'The difference that rules make' in *Analyzing Law: New Essays in Legal Theory*, especially the discussion of the Constraint Model, with particular emphasis on the characterization of feasibility. See also

In contrast to the sanction and reputation arguments, this account does not treat existing rules as factors to be considered in future deliberation about whether to comply – they do not impose costs that are entered as debits in a cost-benefit analysis. Rules are relevant to practical reasoning because, and only because, they affect the set of options that it is feasible for an agent to perform. Once an official commits himself to obey the law, compliance with the existing rules is the only feasible option. And because conformity to the rules is the only feasible option, it is also the only optimal option. The rationality of rule-guided behavior is assured by the dramatic effect that the rules have on practical reasoning.

On this conception of rules, Ulysses and the Sirens would be an especially apt metaphor for how constitutions motivate official compliance. Legal officials, by accepting the constitution as the ultimate guide to their conduct, are lashing themselves to the mast of the rule in the attempt to render unconstitutional acts infeasible. By committing to a constitution, and to a legal system in general, officials will thus be constraining their future selves to implement the norms deemed authoritative. They will not be choosing to apply the rules when they deem them applicable – they will simply be following through on their earlier commitment. And given our previous discussions, it is easy to see why this self-limitation is rational to adopt. For this commitment enables the rule of law to flourish. When officials constrain themselves to apply the rules, people will be led to predict that they will follow through on the law's threat. This, in turn, will engender the sought-after reliance. It would be reasonable for the citizenry to rely on official fulfilment of the law's promise by applying the rules regardless of the consequences.

Notice that the inference from the belief that officials are committed to the law to the prediction that they will fulfill their commitment does not lead to an infinite regress. Because those who are committed to rules do not make choices to apply the rules when they deem them applicable, there is no need to explain the rationality of an instance of rule-guidance by reference to future consequences. It is rational for the committed official to apply the law in any given instance because that is the only option available. To be sure, any instance of rule-guidance will enhance predictability and hence engender important positive benefits; however, it is crucial that enhancing predictability is not the reason for following through but rather the reason for adopting the commitment in the first place.

'Authority' in *Oxford Handbook of Jurisprudence and Legal Philosophy*; 'Judicial can't', *Nous* (forthcoming); and 'Rule-guided behavior' in *The New Palgrave Dictionary of Economics and the Law*. My goal in this review is not to convince the reader of my alternative account, but simply to motivate the grounds for thinking about constitutions and rules in a novel way that Elster seems to have missed.

B. Responding to Elster's objections

How does this interpretation of the 'how' component of the Ulysses analogy fare in light of Elster's attack? Recall that Elster advanced two objections. First, he argued that constitutions do not generally bind members of society because they are generally amendable. Second, constitutions cannot bind every member of society because if so, no one would be left to enforce the rules, and rules bind agents only when someone besides the bound agents is prepared to enforce the rules.

It should be clear by now that these two objections each challenge completely different theses. The amendment objection aims to show that constitutions cannot *normatively* bind because members of society always retain the normative control to restore the rights that they previously had by amending their constitution. The enforcement objection, by contrast, attempts to show that constitutions cannot *causally* bind every member because the infeasibility of unconstitutional behavior presupposes that the rules are enforceable, and it is not possible to enforce the rules against everyone at the same time.

Fortunately, neither of these objections succeeds. First, the fact that a constitution is amendable is compatible with the claim that constitutions – understood as the total set of constitutional rules – normatively bind. For amendment provisions are part of constitutions and place non-negotiable limits on members' abilities to change constitutional law. If members wish to amend their constitution, they must use the process set out in the amendment provisions. They have no normative power to change their constitution in any other way.[11] Therefore, while the legal proposition 'Congress shall make no law abridging freedom of speech' can be made false in the American system, the proposition 'Unless the First Amendment is repealed in accordance with constitutionally approved procedures, Congress shall make no law abridging freedom of speech' can never become false. This latter proposition, therefore, is normatively binding and, for those who genuinely respect the rule of law, causally binding as well.

The second objection fails because rules can causally bind even when there is no one to enforce the rules. When officials accept the existing rules as guides to their conduct, their present selves are attempting to preclude their future selves from acting in derogation of the existing rules. The rule-guided official, therefore, does not need to be kept in line by some external force. The very fact that her past self accepted the law as the guide to conduct would act as the internal force rendering non-conformity infeasible.

[11] Even if a constitution allows members to amend the amendment provisions, they must nevertheless do so according to the requirements set out in the amendment provisions that they seek to change.

C. Physical vs. psychological impossibility

There is one sense in which I agree with Elster that the Ulysses metaphor is misleading. It would be a mistake to suppose that when an agent accepts a rule as a guide to action, he makes the behavior that constitutes the violation of the rule *physically* impossible. It is not as if such an agent were to try to break the rule, he would be unable to move his arms and legs to carry out that intention.

Rules do not prevent agents from carrying out their non-conforming intentions; rather, I would argue that they prevent them from forming such intentions in the first place. Rules bind individuals by making non-conformity *psychologically* impossible. By this I mean that the adoption blocks the ability of the individual to form a certain intentional mental state, namely, the intention to violate the rule.

How, then, does the adoption of a rule prevent the formation of the non-conforming intention? Here is one suggestion: the commitment to the rule might prevent the agent from considering the reasons for disobeying the rule. The reasons for breaking the rule would, in other words, be 'repressed' by the rule. This repression would block the possibility of the agent forming an intention to act contrary to the rule, for agents can only form intentions on the basis of the awareness of reasons.

I would submit that this repression is a familiar feature of rule-guided behavior. It shows up in the tendency of people who are in the grip of a rule to refuse to even think about breaking the rule. In response to challenges to their rules, people often say, 'I have a rule not to do this, so I am not even going to consider doing it'.

One also sees this repression at work in the type of training that those in the military receive. The goal of boot camp is to undo the training reasonable people learn while growing up, namely, the skill of thinking before acting. Soldiers are trained to react to orders, not to think. This is accomplished partly by immersing the cadet into a completely regimented life and partly by demanding that they engage in tasks that are absurd on their face, such as cleaning floors with toothbrushes. A very effective way to get people to repress reasons is to stop them from prompting themselves for reasons in the first place.

7. RULES AND CONSTRAINT THEORY

Much more of course needs to be said about the way in which public acts of acceptance, and rules in general, operate as precommitment devices. As I see it, this is the next frontier of constraint theory. Indeed, it may be that all of the research in constraint theory to this point has just been the tip of the iceberg. For most acts of precommitment in everyday life do not take the form of external physical constraints, such as ropes, handcuffs and doomsday machines – they take the form of rules.

It is perhaps the most disappointing aspect of *Ulysses Unbound* that Elster says so little about the nature of rules. After all, a large part of the book is devoted to analyzing the role that constitutions play in constraining the actions of officials. Insofar as constitutions are constituted by rules, one cannot hope to understand the nature of constitutional precommitment if one does not understand the general role that rules play in practical reasoning.

Elster's omission is all the more distressing given the extensive literature on the nature of rules that has emerged in the last twenty-five years. There is no consideration, for example, of Joseph Raz's theory of exclusionary reasons, David Gauthier's theory of constrained maximization, Edward McClennen's theory of resolute choice or Isaac Levi's theory of routine expansion. A book on constraint theory, and its application to constitutional theory, should engage with at least some of this material.

Ulysses Unbound tells only part of the story of constraint theory. But I do not think that the omissions should eclipse the achievements. For those wishing to write the next chapters in the story, there is no better place to begin than *Ulysses Unbound*. And it should be remembered that without Elster we might not have even known that there was a story here to be told.

REFERENCES

Elster, Jon. 1984. *Ulysses and the Sirens*. Cambridge University Press
Elster, Jon. 2000. *Ulysses Unbound*. Cambridge University Press
Cover, R. 1975. *Justice Accused*. Yale University Press
de Montaigne, M. *The Complete Essays*. M. A. Screech (ed.). Penguin
Shapiro, S. J. 1998. 'The difference that rules make'. In *Analyzing Law: New Essays on Legal Theory*. B. Box (ed.). Clarendon Press
Shapiro, S. J. and E. McClennen. 1998. 'Rule-guided behavior'. In *The New Palgrave Dictionary of Economics and the Law*. P. Newman (ed.). St Martin's Press
Shapiro, S. J. Forthcoming. 'Authority'. In *Oxford Handbook of Jurisprudence and Legal Philosophy*. J. Coleman and S. Shapiro (eds.). Clarendon Press
Shapiro, S. J. Forthcoming. 'Judicial can't'. *Nous*
Tribe, Laurence 1988. *American Constitutional Law*. 2nd edn. Foundation Press