CHAPTER 20

TOWARDS AN ECONOMIC ANALYSIS OF DELIBERATIVE DEMOCRACY

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1. INTRODUCTION

It is a pleasure and an honour for me to contribute to this volume celebrating Roger Van den Bergh's immense contribution to the Economic Analysis of Law (EAL). How time flies... I met Roger in my first EALE conference held in London in 1991. Roger was the energetic president of the then intimate *European Association of Law and Economics (EALE)*. In the subsequent year we already sang opera arias during the conference dinner in Lund, and concocted the nomination of the University of Haifa, which I was just about to join, as a host of the EALE conference. Indeed, Haifa was chosen to host the 1996 conference and in the pre email and Internet age, submissions were sent by post and we had to convene a meeting to discuss which papers to accept. Roger was living in Antwerp then, to which I flew over with a huge bag of papers. He picked me up at the airport and we had a long day meeting to go through the papers and choose which to accept – a day of real deliberation. The important professor treated the soon to become doctor as an equal colleague, and this was the beginning of a very nice friendship.

Roger is one of the important European scholars in the economic analysis of competition law and he introduced Europe to this important and specific discipline. My fields are constitutional law, legal philosophy and political theory. My contribution to this volume, therefore, is not directly connected to the core of Roger's fields. However, if one treats the public sphere and politics in the

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framework of market analysis, market failures and the need for central intervention in the free market, interesting parallels can be drawn between competition law and political theory, from which both fields can benefit. *Deliberative Democracy* has been in the spotlight of many political theorists in the last decades and is more relevant than ever in today's age of populism. This chapter will focus on its philosophical foundations from an economic analysis vantage point, with potential insights to the analysis of the economic market and indeed also to Competition Law and Economics.

2. WHAT IS A DELIBERATIVE DEMOCRACY?

Like Competition Law and Economics or the economic theory of the markets, the economic theory of the state, or of the political market, is founded on the basis of teleological morality, according to which the aim of the state, its institutions and norms, are to maximize total society's well-being (welfare or utilities or individuals' preferences). In the political realm this foundation corresponds to the Social Contract political philosophy, which is the broader foundation of modern liberal democratic theory and practice. Democracy is a system of collective decision-making, which relies on aggregation of votes (representing individual preferences) among all members of the political entity (direct democracy) or among their representatives (representative democracy).

Majority voting is pivotal to democracy, but majority vote does not take into account intensity of preferences and therefore does not necessarily yield maximization of utilities or total welfare.[1] Hence the need to complement majority decision-making with constraints in the shape of a bill of rights and other constitutional limits on the majority (which, in economic terminology, aim to protect minorities whereas their intensity of preferences is significantly higher than that of the majority), and separation of powers (which is meant to increase the majority required for a collective decision-making from a simple to a super-majority). All these were analysed and discussed in an impressive body of literature on the economic theory of the state. Deliberative democracy, which is a prime interest of contemporary political philosophers,[2] and is particularly

1 Majority vote as the prime ingredient of the good polity requires many clarifications: in what precise way aggregation of individual preferences should be conducted in order to qualify as a democratic decision? Is majority vote a necessary and sufficient condition for a democracy? How should majority vote be conducted and what ought to be the collective decision in case of majority cycling? The chapter will address some of these questions, but only in the context of deliberation. For a more comprehensive account, see Elkin-Koren & Salzberger 2005, p. 58-100.

2 Despite their very different political philosophies, the two most important political philosophers of the 20th century, John Rawls and Jurgen Habermas, advocate it. See Rawls 1997 and Habermas 1996.

relevant to our era of populist politics, is yet absent from the economic analysis and this chapter is meant to start filling this gap.

A deliberative democracy requires that majority vote is conducted only subsequent to authentic deliberation (rather than merely the aggregation of preferences that occurs in voting). As opposed to the mere aggregation of pre-set preferences among decision-makers (all members of the entity or their representatives), deliberative democracy requires an exchange of views, the ability to present arguments and evidence in order to convince, and the construction of forums, institutions and procedures for such debates, under the implicit assumption that individuals' votes after deliberation might change in comparison to their original positions. As we shall see later, this is a crucial ingredient from the perspective of the economics approach. The more precise conditions for authentic deliberation are controversial. James Fishkin, for example, specifies five characteristics essential for legitimate deliberation, which go beyond the process of exchange of views and arguments: (1) Information – accurate and relevant data is made available to all participants; (2) Substantive balance – different positions are compared based on their supporting evidence; (3) Diversity – all major positions relevant to the matter at hand and held by the public are considered; (4) Conscientiousness – participants sincerely weigh all arguments; and (5) Equal consideration – views are weighed based on evidence, not on who is advocating a particular view.[3]

Different conditions for authentic deliberation are specified by Joshua Cohen. They include: (1) An ongoing independent association with expected continuation; (2) The citizens in the democracy structure their institutions in such a way that deliberation is the deciding factor in the creation of the institutions and the institutions allow deliberation to continue; (3) A commitment to the respect of a pluralism of values and aims within the polity; (4) The citizens consider deliberative procedure as the source of legitimacy, and prefer the causal history of legitimation for each law to be transparent and easily traceable to the deliberative process; and (5) Each member recognizes and respects other members' deliberative capacity.[4]

From these two examples we can learn that the components of a deliberative democracy are varied and controversial. They relate to cultural, psychological, educational, and indeed institutional features. Constitutional and legal norms have an effect on all these features, although for some of them the effect of laws is only marginal and indirect.

3 Fishkin 2011, p. 242-260.
4 Cohen 1989, p. 17-34.

3. THE PHILOSOPHICAL FOUNDATIONS OF DELIBERATIVE DEMOCRACY

Deliberative democracy can be advocated on behalf of deontological or non-instrumental moral theories; it can be advocated also on the basis of teleological or consequential or instrumental grounds, to which the economic approach belongs.

3.1. DEONTOLOGICAL JUSTIFICATIONS FOR DELIBERATIVE DEMOCRACY

One can distinguish between two families of deontological theories in the context of justifying deliberative democracy. One family, which can be dubbed '*substantive deontology*', includes Natural Law theories, which evaluate decisions or conduct on the basis of their compatibility with eternal and universal substantive good or rights and/or duties, regardless of their consequences in terms of individuals' preferences or well-being. It is not easy to justify democratic or majority decision-making on such deontological grounds, as opposed to other forms of decision-making, such as a decision by a moral expert who acts as a dictator (like the Pope or other religious figures). Whether a majority decision after deliberation is more likely to reach the policy or law or other decision compatible with Natural Law, more so than other forms of collective decision-making, is a complicated question, and since it is remote from the economics approach, I will not address it here. We can just note the core criticism against such a deontological position – how can we know what is the substantive good? If everyone unanimously agrees about the nature of such good, then decisions can be reached by consensus or by majority or indeed by a dictator (all yielding the same result). If, however, there is a disagreement regarding the substantive good, it is unclear which decision-making procedure, deliberative or otherwise, yields better chances to materialize the 'right' outcome.

A second family of deontological justifications of deliberative democracy, which can be dubbed '*procedural deontology*', holds that the value of deliberative democracy is intrinsic and independent of its actual consequences in terms of individuals' materialization of preferences or well-being. Such justifications were argued on behalf of democracy in general, whereas the intrinsic values mentioned are self-government[5] and equality.[6] Joshua Cohen, one of the advocates of deliberative democracy, can be viewed as holding such a deontological or

5 See, for example, Gould 1988.
6 See, for example, Waldron 1973.

intrinsic justification, adding to liberty (self-government) and equality, also the value of public justification.[7]

According to Cohen's position,[8] laws and policies are morally good to the extent that they are publicly justified to the citizens of the community, the direct essence of free and reasoned debate among equals. As articulated by Christiano: 'Citizens justify laws and policies to each other on the basis of mutually acceptable reasons. Democracy, properly understood, is the context in which individuals freely engage in a process of reasoned discussion and deliberation on an equal footing. The ideas of freedom and equality provide guidelines for structuring democratic institutions.'[9] According to Cohen, deliberative democracy is freedom in two ways: (1) the participants consider themselves bound solely by the results and preconditions of the deliberation. They are free from any authority of prior norms or requirements, and (2) the participants suppose that they can act on the decision made; the deliberative process is a sufficient reason to comply with the decision reached. This statement clearly differentiates Cohen from Natural Law theories, on the one hand, and from teleological theories, on the other, as his ideal democracy is judged neither by compatibility of its outcomes to morality, nor by the contribution of its outcomes to materializing individual preferences. The mere process of deliberative decision-making yields a just and desirable polity.

This position can be criticized on various grounds, of which two points are especially relevant in context of utilizing the economics approach: (1) it fails to provide us with external criteria to compare different systems of deliberation, or to fine-tune the exact best procedural and institutional set-up. When there is no clear measurable goal against which one can evaluate the rules, institutions and actual practices of deliberation, at least from the perspective of economic analysis, we are at a cul-de-sac. (2) This justification also fails to connect the deliberative process and the final decision-making rule that has to be applied to reach a conclusive decision, whereas implicitly simple majority is still viewed as the desirable decision-making rule. It is not easy to justify simple majority on a deontological basis (or, indeed, as elaborated below, on a teleological basis) and it is unclear to me how this can be remedied when authentic deliberation preceded a vote, when after such deliberation there are still members who oppose the suggested decision. Deliberation will not necessarily remedy a decision violating basic rights of those who oppose it, and in this context such a decision will promote neither an external good (i.e. a Natural Law type of morality), nor a consequential goal such as utility, efficiency or distributive justice.

7 For a different categorization and elaboration of procedural deontological justification for deliberative democracy, see Cooke 2000, p. 947.

8 Cohen 1989.

9 Christiano 2008, p. 77.

A possible different interpretation of this view is that deliberation is desirable because it promotes consensus. It seems that many advocates of deliberative democracy, including Cohen himself, make a connection between deliberation and consensus building. Adopting this interpretation, however, shifts the type of justification for deliberative democracy from non-instrumental/deontological, i.e., an instrumental/consequential one. I will return to consensus shortly, but let me first provide an overview of possible instrumental or teleological justifications for deliberative democracy.

3.2. TELEOLOGICAL JUSTIFICATIONS FOR DELIBERATIVE DEMOCRACY

We can distinguish again between two families of teleological or instrumental justifications for deliberative democracy. One family that can be dubbed '*simple instrumentalism*' argues that deliberative democracy is justified because it yields good laws and policies. These laws and policies are better than those of other types of regimes because the interests, rights and opinions of most people in society are taken into account. In fact, John Stuart Mill made such an argument on behalf of democracy in general, because it forces decision-makers to take on board the interests of many, as opposed to a monarchy or aristocracy.[10] This is the result of the fact that democracy gives some political power to each. Such a line of reasoning can be extended or perhaps fortified to argue that deliberative democracy takes into account even more interests of more people than a democracy without deliberation. Deliberation enhances the collective information regarding the interests, preferences and material facts relevant to the decision, and thus is likely to improve the decision. In a deliberative democracy, people are more informed, they think carefully and rationally more than in other regimes (including mechanical democracy) because they know that they can make a difference, not only regarding the final outcome, but also with regards to their fellows' preferences and vote casting.

Criticism against this line of reasoning is similar to the one I spelled out against the second family of deontological theories. 'Simple instrumentalism' fails to enable comparing competing deliberative institutions and rules, because its justifications are too broad and imprecise.

The other family of teleological justifications for deliberative democracy can be dubbed '*complex instrumentalism*'. This family is the focal source for the economic approach. It goes one step further from 'simple instrumentalism' and evaluates the type of regime or the collective decision-making process according to its effects on the well-being of all individuals or on their materialization of preferences. Such justifications originate from the moral theory of Utilitarianism.

[10] Mill 1861.

on the one hand, and from the social contract political theories, on the other. Liberalism is the starting point for both. Three of its significant foundations are: (1) that there is no value save individuals' values, or, in other words, collective good or morality is judged according to some kind of aggregation of the utilities or well-being of all individuals in the polity; there is no added value originating from any collectivity; (2) the preferences or well-being of every individual have to be equally considered when collective decisions are made; and (3) individuals are rational in the sense that they know what is good for them and they will engage in the collective decision-making process to promote their good accordingly.

The first foundation implicitly rejects a Natural Law type of morality according to which there is universal, eternal and pre-given distinction between good and bad, moral and immoral. On the contrary, good and bad are subjective; what is good for one person might be bad (or immoral) for another. A collective moral decision is thus an aggregation of individual preferences which, according to the second foundation, has to give equal weight to each individual; every preference has to be incorporated in the collective decision-making process on the basis of the equality principle. Utilitarianism and its derivatives (among which wealth maximization – the prime normative goal of most writings associated with the economics approach) deduct from these foundations that the moral collective decision is the one that maximizes society's total utility, i.e. the sum of all individuals' utilities. A good policy or collective decision-making process is the one that enhances total utility, and the best decision is the one maximizing total utility.

An alternative deduction within 'complex instrumentalism' can be attributed to some of the social contract theories. According to a simplified articulation of these theories, only collective decisions that gain a consensual support (directly or indirectly as elaborated below) are desirable or morally justified. A straightforward justification for this principle implicitly presupposes the foundations of Liberalism: if there is no collective value save individuals' values and individuals are assumed to be rational, knowing what is good for them, a decision agreed upon by everyone is by definition a good one. A different justification views consensus as a second best to utility maximization, which cannot be practically materialized; this is due to the fact that utilities cannot be measured and are not comparable across individuals. Since individuals are rational, decision reached by consensus, by definition, increases the well-being of every person participating in the vote and hence increases aggregate utility. Moreover, a decision which maximizes society's utility can be reached through consensus, because if it really enhances total well-being, those who gain from it will be able to compensate those who loose from it until the latter will be indifferent (and thus will abstain), or will be slightly better-off (and thus will support the decision), achieving a consensus. According to this framework,

deliberation is only a mechanism or an instrument, rather than the goal employed in order to achieve a consensus.

Having said this, decision-making is hampered by decision-making costs and strategic behaviour. The latter is the result of the very same factors that bring us to the second best in the first place – that individual utilities resulting from acceptance or rejection of a policy or law are not in the public knowledge, enabling such strategic behaviour. We, therefore, cannot rely on conducting consensual decision-making for every collective decision. The solution advocated by the social contract philosophers and practiced by liberal democracies in the past 70 years is to construct in the consensual social contract (or in legal terminology – the constitution) only the fundamental rules of the polity, which are characterized by their general nature, diminishing the likelihood of strategic behaviour (in some way equivalent reasoning to John Rawls' veil of ignorance). The constitution also delegates by consensus the day-to-day collective decision-making to representatives, using a majority rule, balancing this delegation, on the one hand, by introducing veto type mechanisms such as substantive bill of rights and judicial review, and, on the other hand, by establishing structural-institutional elements, such as separation of powers, meant to shift the decision-making rule from simple to qualified majority. These balancing elements reflect the fact that majority decision-making alone will not materialize the best decisions à-la complex instrumentalism. Simple majority decision-making does not reflect any intensity of preferences and thus will not likely yield utility-maximization or consensus (and of course will not reflect any external good in line of deontological or Natural Law foundations).

4. ECONOMIC ANALYSIS OF DELIBERATIVE DEMOCRACY

How can deliberation affect the analysis of 'complex instrumentalism'? This is the key question when deliberative democracy is analysed within the framework of the economics approach. Let me offer three preliminary insights:

4.1. FROM AN ANALYSIS OF AN INDIVIDUAL DECISION TO THE ANALYSIS OF A SET OF DECISIONS

The standard microeconomics market theory, as well as the economic analysis of the state and its institutions, assumes that individual preferences are fixed. The market mechanism or the collective decision-making process is meant to yield the best results in terms of aggregating pre-set preferences. At first glance, deliberation, under this assumption, will not be able to improve the collective

outcome of a particular decision and since it comes with a cost (the increase in actual decision-making process cost), it would be viewed as inferior to a mere voting procedure. However, a more careful look will reveal that deliberation can improve the outcome of a sequence of decisions because it will create the institutional platform enabling a trade-off between decisions. A decision-maker will agree to vote in favour of a decision which he disfavours if another decision which he favours will be supported by other decision-makers who are against the decision but will be better-off if the decision they favour is accepted. Such a trade-off, dubbed also '*logrolling*', corresponds with the theoretical conjecture that a decision which enhances total utility can be adopted by consensus, as it will be worthwhile for its supporters to compensate the opponents to the degree they are indifferent regarding the decision in question, in our case – compensation through votes for other decisions. Under majority decision-making, such logrolling facilitated by deliberation might improve total utility in comparison to mere mechanic votes, but might not yield maximization of utility as a consensual decision-making rule.

4.2. DELIBERATION AND CHANGING PREFERENCES OR VOTES

Deliberation can be justified also if we change the assumption about fixed preferences and alternatively assume either (1) that individual preferences may change as the result of the market mechanisms and indeed as the result of the collective decision-making processes, or (2) that as a result of deliberation some decision-makers will cast their vote against their preferences, acknowledging that preferences of others are much more important in a specific question than their own (one person prefers A to B but only slightly, and once she knows that another person prefers B to A because A will yield a catastrophic result for her, the first person will vote for B despite her small preference for A). Under the alternative assumptions, we are on a very different analytical territory. In such a territory, deliberation might improve the decisions vis-à-vis the goals of complex instrumentalism, i.e. achieve higher levels of aggregate utility or satisfaction of preferences, or promote the chances to achieve a consensual decision.

An interesting possible illustration of incorporating deliberation into the contractual justification of collective decision-making is Jean-Jacques Rousseau's concept of the 'General will'.[11] The political theory of Rousseau certainly belongs to the social contract tradition. However, one can classify it outside the scope of Liberalism and as part of the communitarian tradition, which ascribes value to society (or to the 'collective') beyond the values reflected by the preferences of its individuals, thus violating Liberalism's first foundation. The 'General will' (or the

[11] Rousseau 1762.

general good) is portrayed by Rousseau as distinct or separate from some kind of aggregation of all individuals' wills. This raises the question as to the source of the difference between individual preferences' aggregation and the 'General will'. Bypassing Rousseau's own somewhat vague explanations regarding this gap, we can attempt to attribute the difference, within a Liberal terminology, to a change of individuals' preferences (or their final vote which goes against their preferences), which is the result of the political or decision-making process itself. In other words, while the classical Liberal political theory (originating from Hobbes (1651) and Locke (1690) and manifested in the modern economic theory of the state) implicitly assumes that individual preferences are fixed and that the political process is a mere exercise of preferences aggregation, Rousseau's theory can be interpreted as an early version of deliberative democracy, assuming that individuals' preferences (or final vote) are not exogenous, but endogenous to the political process. Accordingly, the difference between the 'General will' and the sum of the wills of all individuals can be presented as the result of changes of preferences (or vote casting), from self-regarding towards more cooperative, other-regarding and less-conflicting preferences. This change of preferences or vote is the result of collective endeavours, such as deliberation and participation. Further research is needed to examine what are the exact terms for the most successful political infrastructure that brings the best other-regarding preference dynamic which will enable the society to maximize utilities and enhance its frontiers.

4.3. INCORPORATING EXPERTISE DECISION-MAKING OR KNOWLEDGE AGGREGATION TO THE ECONOMIC THEORY OF THE STATE

Social Choice is the branch of economics that examines collective decision-making as an aggregation of individual preferences or opinions in small groups. It is a sub-branch of Public Choice, which deals also with the effects of large groups decision-making procedures, such as interest groups effects and rent-seeking. Social Choice analyses the interaction between (1) a group of possible decisions, (2) a group of decision-makers, and (3) decision-making rule and procedure. The analysis can be conducted on the positive level (given a set group of options, a group of decision-makers and a decision-making rule – what are the likely outcomes in terms of materializing preferences or the quality of decisions) and on the normative level (for a certain type of decision – what are the optimal decision-makers group and rule).

One can distinguish theoretically between two types of collective decision-making: aggregation of preferences (in the narrow sense, i.e. where no external truth exists) and aggregation of knowledge. The latter type of decision-making is characterized by an existence of an objective external truth and the focus of the

analysis is on the procedure (or the decision-making rule and decision-makers group) that will yield the highest chances for the collective group to get to the truth (or on the positive level of analysis – given a group and a rule, what should we expect the decision to be in terms of proximity to the 'truth'). Under this framework, for example, if we assume that each decision-maker has the same probability, higher than 0.5 (i.e. higher than flipping a coin), to reach the 'correct decision', a majority rule is the best decision-making rule for deciding between a finite set of options (such as guilty or innocent in a trial, or among three policy options for a legislature, or indeed the number of balls in a jar) and the higher the number of decision-makers taking part in the vote, the higher is the probability to reach the correct decision. This basic maxim can be attributed to the Jury theorem of Condorcet, rediscovered and expanded by Black.[12]

For a dichotomous (infinite) set of options (such as sentencing – number of years in prison, or amount of damages, or amount of budget allocation for a certain item) the average (rather than the majority) is the best decision-making rule and again the probability to reach the 'right' decision rises with the number of decision-makers.[13] For both types of decisions (set number of options and dichotomous), a relatively small group of decision-makers is sufficient to significantly increase the chances to reach the correct decision in comparison to a sole decision-maker. Beyond several decision-makers, the marginal benefit of an additional member is small and might be outweighed by the emerging cost of the decision-making process itself.

I elaborated on the foundations of expertise aggregation because in context of the economic analysis of the state or economic political philosophy, it has been preference aggregation that served the exclusive scientific framework. In the real world, however, many collective decisions are a combination of the two types and there is also a disagreement as to the exact nature of various decisions, which is the result of different meta-philosophical positions. For example, for Natural Law type of deontological theories there is an external 'correct' decision for all types of decisions, including those that for Utilitarians or Positivists are mere preferences aggregation. Similarly, whether a decision regarding the guilt of an accused in a criminal trial is a sole matter of expertise or whether it also includes preferences, depends on a philosophical position regarding the existence of an objective truth and its relation with the legal truth. This factor naturally complicates the analysis in a field that has much more potential for further development. Since my particular focus is on deliberation I will leave these serious questions aside and focus on the effects of deliberation on the expertise analytical framework.

Under the expertise framework, the focal question is whether as a result of deliberation, better experts can convince their fellow decision-makers in the

12 Black 1958. For a more general theorem, see Ben-Yashar & Paroush 2001, p. 737-746.
13 Hogarth 1978, p. 40-46.

correctness of their positions, increasing the probabilities for the collective body to reach the 'right' decision, or alternatively it is the non-experts who will convince the experts, lowering the probabilities of a 'right' decision. Does the joint interactive efforts of a group of people who might combine different pieces of information and know-how or skills, each held by a different individual decision-maker, increase the probability to reach the 'right' decision in comparison to a mere vote without deliberation? Social psychology has addressed such questions not exactly in the framework articulated here, but in a way that can provide us some leads for further research. Psychologists differentiate between a nominal group and an interactive group. This dichotomy roughly corresponds to aggregation of votes without deliberation (nominal group) as opposed to aggregation of votes with deliberation (interactive group).

Various experiments found that, side-by-side to the improved performance of the interactive group in comparison to a nominal one, achieved by combining information and know-how, there are several social effects that actually harm the working of the interactive group and thus decrease the probability to reach the correct decision. Such effects include: conformism,[14] informational cascade and reputational cascade,[15] group polarization,[16] and the common knowledge bias.[17] The numerous experimental studies conducted in the past decades do not amount to a clear-cut conclusion as to a categorical advantage of interactive groups over nominal ones. Further research has to be conducted on the categories in which deliberation improves performance and the type of tasks in which deliberation diminishes the level of performance, as well as extending the research to preference aggregation decision-making. Such findings should have significant implications on the value of deliberation outweighed by its costs and may provide possible refinement and detailing of the specific policies to promote constructive deliberation and avoid wasteful deliberation.

In addition, the vast majority of experiments was conducted in lab conditions. Their application to real world decision-making may not be straightforward. For example, as argued by some deliberative democracy adherers, the advanced knowledge about the exact process of decision-making might have an *a priori* effect on the level of knowledge and preparation of the participating decision-makers. Similarly, the real world implications of crucial decision-making might lead to different conduct than in game type lab experiments. Other bodies of knowledge and additional branches of behavioural sciences have to be incorporated into studying these questions and at this stage we can only raise the questions and possible frameworks to address them.

14 E.g. Asch 1955, p. 31-35.
15 E.g. Sunstein & Hastie 2008.
16 E.g. Sunstein 2007, p. 443-447.
17 E.g. Wittenbaum, Hollingshead & Botero 2004, p. 286-310.

without providing definite answers that can assist us to prescribe the exact optimal laws and procedures.

5. CONCLUSION

Some of the issues discussed in the last section using economic terminology and analysis, were the very same issues that were discussed by actual politicians and intellectuals in the context of constructing constitutions and political systems. The debate among the US founding fathers can be explained in the framework I just articulated. This debate expressed itself in the daily newspapers, amalgamated into a book,[18] and was concluded with the drafting and ratification of the US constitution, which can be viewed as the first liberal democratic constitution. The Federalists' camp aimed to construct a system of government that will yield decision-making reflecting maximization of preferences or society well-being. The Federalists implicitly assumed fixed preferences and their advocacy on behalf of a big polity was the result of (in modern terminology) interest groups and rent-seeking analysis. Their focus on separation of powers and checks and balances mechanisms was aimed to increase the majority required for decisions and to enable the minorities some veto powers if their intensity of preferences is high.

The anti-Federalists camp who opposed a big political entity can be presented as implicitly assuming that only in a small polity where people know each other, care about each other, understand their fellow citizens' stances, there is a likelihood that preferences will transform from pure egoistic towards more other-regarding preferences, and/or that people will cast their votes against their selfish interest if they acknowledge that interests of others are of greater weight or intensity. They also believed that only in small polities voters can be persuaded by experts as to the common good. Hence, they advocated a substantive bill of rights and various deliberative mechanisms and a political culture of public hearings and platforms of discussions before decision-making. Although the Federalists won with regard to the federal structure of the US polity, many of the anti-Federalists ingredients are present in the current US system of government and political culture.

It seems that the debate is still undecided, and perhaps the format in which it is phrased here can prompt more sophisticated studies, including empirical and experimental, which will enhance our understanding. A tentative conclusion, however, is that vis-à-vis the economic approach, deliberation before voting can improve the quality of the decisions in some cases but not in all. An interesting

[18] The Federalist Papers 1788.

exercise is to export the framework of the discussion offered here to the economic market itself and to competition law. I leave this task to others.

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