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### **The failure of democracy in the elaboration of constitutional reforms**

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#### **Introduction**

Traditionally economists focus on market failures and the methods politicians use to correct them. Thus they are not aware of the scale of political failure or more particularly the failure in decision making in democracy. Political scientists and historians though know well the importance the foolishness of political elite could have had in a certain number of political decisions such as all the experiences in directed economics, Italian fascism and the Maoist great leap ahead, but also the foolishness represented by the war in Vietnam and/or the annexation by Saddam Hussein of part of Kuwait. Politicians and the electoral body that participated in the selection of representatives in the framework of a representative democracy are thus responsible for military conflict, annexation in opposition to peoples' rights to govern themselves, sometimes absurd budgetary decisions without any effect on the prosperity of the country or the well being of each citizen.

This theme becomes a subject of current events if, as numerous observers of voter decisions feel, they seem to be contrary to their own interests and more generally in contrast to all knowledge accumulated by experts and social science specialists. The choice of Brexit in the United Kingdom, the election of Donald Trump in the United States, the rise of extremes in France with the relative success of Marine Le Pen and the extreme left of Jean Luc Mélenchon are examples generally used to illustrate this type of question.

Political economics suggests an explanation for these political failures. It is not impossible that the financial market is guided by speculators with animalistic and gregarious minds. (Akerlof et Shiller<sup>1</sup> 2010) dominated by their emotions<sup>2</sup>, and/or a multiplicity of cognitive biases, but it is no less likely that democracy is also guided by incompetent men subject to their emotions. The main difference is that on the markets errors not corrected by the deciders are sanctioned by important financial losses of people who were mistaken, while errors in politics are borne by the whole of the national community. The result of this difference is that the only way to escape the cost is exile.

This communication is organized around four theories of democratic failure and concludes with a few constitutional measures which could partly compensate for dysfunction of such a political regime.

The theory of democratic failure is not new. It is however renewed with the school of public choices, but also the input from the evolutionist theory and more particularly political learning process. Political philosophy insists on the existence of an ethical weakness. The risk that democracy is "to offer to the people in mass the holocaust of the people in detail". Economic theory focuses more on the agency relation maintained by the voter and those elected and *in fine* the risk of agent opportunism as well as on the failure of political learning process who, as was recalled, are not necessarily incited to correct their errors in judgment. All these contributions which will be succinctly presented in this communication lead to the suggestion of a certain number of constitutional reforms: the reinforcing of the rule of law, implementation of a real political competition, rise in cost of political decision for each citizen and more generally the drop in value of political mandates in order to reduce the space occupied by political decisions in the formation of economic and social order which rejoins the implementation of rule of law which enforces the respect of individual sovereignty rather than consecrating the principle of the people's sovereignty .

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<sup>1</sup>Akerlof, G. and Shiller, R. (2009). Les esprits animaux. Comment les forces psychologiques mènent la finance et l'économie, Paris, Pearson.

<sup>2</sup> Bourgeois-Gironde, S. (2009). Les émotions économiques. Réflexions sur les mécanismes d'adaptation cérébrale à l'environnement socio-économique, Revue européenne des sciences sociales, numéro XLVII-144

### 1. Majority democracy and the risk of minority holocaust

In classical political philosophy democracy's weaknesses are essentially ethical. In order to understand it suffices to remember the etymology of the word democracy and deduce a certain number of results. Etymology of the words: autocracy, aristocracy, theocracy, technocracy, bureaucracy and democracy are the same. The word *kratos* means force or strength. Autocracy is a system where the power (*kratos*) is based on itself (*auto*). The democracy or *demokratia* is the government of the people (*demos*). The French constitution of 1958 keeps this definition. The article indicates that « national sovereignty belongs to the people who exercise by their representatives and by means of referendum ». To say that the people are sovereign means that there is nothing 'above' them. Who are the people? The people are represented by their elected representatives. Or their will is expressed by referendum. The people are the electoral body. This body is sovereign and is composed of all those who benefit from the right to vote in an election.

Such a response however remains imprecise as it doesn't indicate if the sovereign people must be unanimous or not. If unanimity is not retained the sovereignty is held by the majority of the electoral body. Democracy thus bequeaths the sovereignty to the majority. The majority is nothing above itself. Representatives of the majority have the power of last resort. They can then 'offer to the people in a mass the holocaust of the people in detail'. (Constant 1872<sup>3</sup>). They can guillotine the federalists as in the French revolution, kill Irish separatists as in England (Jouvenel 1972<sup>4</sup>, p :421), vote anti-Semitic laws as under the German Third Reich or vote full power to Maréchal Pétain as in France after the defeat. Democracy does not in this sense prevent totalitarian drifting if it is of unlimited nature, according to the expression of Friedrich Hayek (1983<sup>5</sup>).

Democracy's first weakness is then ethical. Without constraints the sovereign majority can reduce freedom of speech, confiscate 100% of an individual's revenue over a certain level of revenue, vote discriminatory laws, manipulate the value of money, use taxes to serve the interests of the majority and impoverish the minorities, and the list doesn't end there. The sovereign majority enters into contradiction with individual sovereignty. A free individual is sovereign. There is nothing above him. He is free to choose his ends and means.

### 2 Democratic failure: myth or reality?

Debates between two currents of the school of public choices renew this study of democracy's limitations. These two currents are the Chicago school and the Virginia school. Each discard the hypothesis of the benevolence of those elected and more generally political agents who are the voters and feel that politics is composed of rational individuals who are concerned with self interest before being interested in others and general welfare in particular. Both currents uphold the theory of the invisible hand<sup>6</sup>. The price mechanism allows transformation of private vice into public virtue. The composition effect is virtuous. The sum of individual egotistical decisions creates a situation which is favorable to all without anyone having wished for such a result. The virtuous results of the market are the result of each egotistical action but not their intention.

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<sup>3</sup> Constant, Benjamin 1872. Principes de politique, Paris, édition Guillaumin.

<sup>4</sup>de Jouvenel Bertrand 1972. Du Pouvoir, Librairie Hachette collection Pluriel, Paris.

<sup>5</sup> Hayek, Friedrich 1983. Droit, Législation et Liberté. L'ordre politique d'un peuple libre, PUF, collection libre échange, Paris, traduction française par Raoul Audouin, Law, Legislation and Liberty, volume 3 Political order of a free people, Routledge&Kegan Paul, London and Henley, 1979.

<sup>6</sup> Smith, Adam, 1843. Recherche sur la nature et les causes de la richesse des nations, édition française, Paris, 2 volumes, traduction de Germain Garnier, Guillaumin.

## 2.1 The myth of democracy's failure

The Chicago school, according to the works of Stigler-Becker-Ricker-Wittman<sup>7</sup> enlarges this result to the political process. What is rational and what is effective. It will always be rational for an individual to exploit an opportunity for gain if it exists. Politico-economic balance equalizes the marginal cost to the marginal utility. No other solution would be desirable. There would be a type of invisible hand in politics which would transform private vices of citizens into public virtues. The democracy would not in the long term be defective. That which is cannot be otherwise. In democracy as on the market, political entrepreneurs will feed on democracy's failure to engage in reforms which will incessantly modify the institutions in the direction of better efficiency.

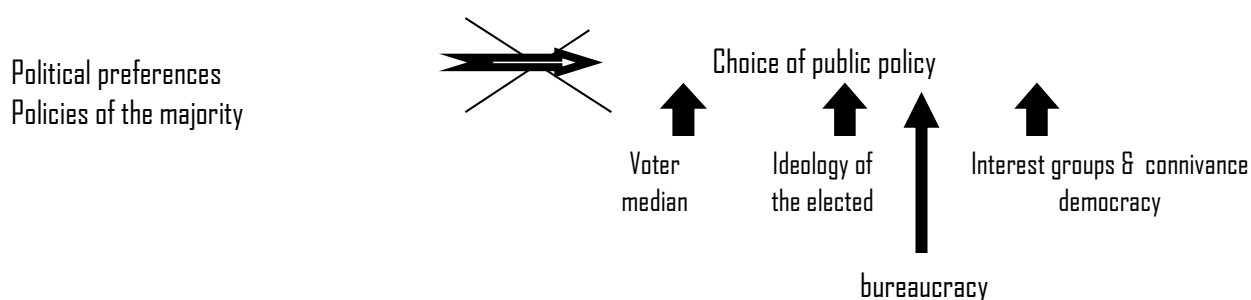
## 2.2 The reality of democracy's failure: perception bias and agent opportunism

The school of Virginia feels, on the contrary, that the incitation structure, the institutions, prevent the emergence of such an invisible hand in democracy. The absence of price mechanism makes the private vices in politics does not create public virtue (Facchini 2000). Democracy, as a process of revelation of preferences, does not possess the mechanisms which allow fighting efficiently against agent opportunism, otherwise stated, the elected and the agents in public function. Public policies are not, in this sense, the translation of voter preference. We find ourselves in a situation where an automobile producer could, without the consent of the consumer, change the product which he was sold contractually. Democracy also places political agents in a world of low cost decision which considerably lowers the price of irrational belief. The result is the rationality of irrationality in politics and a great many political decisions in contrast to voter interests. The voters would never act on the market the way they do in politics.

### 2.2.1 Political non-coordination

In the Arrow-Downs model democracy is a procedure revealing political preferences. Democracy functions well if the interests and/or the ideologies of the voters constituting the majority are represented by those elected and if these last implement policies for which they were elected. There is a breakdown then of democracy once these majority preferences no longer explain the choice of public policy. (Figure 1).

**Figure 1** Dissociation of political offer and demand



The agency rhetoricians apply their tools to resolve these opportunism problems. It is because the incitation structure is defective that the control of voters over their elected and more generally the State is defective and favors the development of opportunistic behavior (Laffont 2000, p.120). Several reasons explain this political discordance. Figure 1 indicates four large sources of discordance of offer to the political demand.

Democracy does not expose the voter to the dictatorship of the majority but to the dictatorship of the median voter. The sovereign in democracy is not the majority but the median voter (Black's theorem). Who is the median? Strictly

<sup>7</sup> Wittman, Donald 1989. Why Democracies Produce Efficient Results ?, The Journal of Political Economy, 97, 6 : 1395-1424.

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speaking the median is the voter in the center of the range of voter preferences (Black 1948<sup>8</sup>). The median voter is he who commands. In an economic sense the median voter is he who has the median revenue. The median revenue is not the average revenue which is the average of revenues of the population considered. It is such that half the voters make less and the other half make more. The median annual revenue in France is 28660 euros. 50% of the population make more, 50% make less.<sup>9</sup> The median salary is in 2013 1772 euros per month.<sup>10</sup> To win the elections the median must vote for you. You must build a political program which corresponds to his political preferences. It is the median which can make a minority a majority. The direction of redistribution ('regressive or progressive) as well as the type of public service reflects the median preferences and serves his interests and not the general interest whether this last is transcendent or immanent.

Representative democracy does not then foresee an imperative mandate. The contract between the voter and the elected facilitates the opportunism of the elected whose only sanction is electoral. It suffices that he decides not to re-run to no longer be held to his campaign promises. The theory called Shirking explains the autonomy of the elected in relation to their electorate by absence of sanction (Dougan et Munger 1989<sup>11</sup>). Once democracy no longer succeeds in sanctioning candidates who made bad economic policy choices and/or who did the opposite of what they promised to do during the elections, democracy has failed.

Furthermore democracy is a form of oligarchy that isn't aware of itself. It is governed by casts, clans, interest groups who pressure the elected to impose their preference. Public policies are the result of this chain of political influence where interest groups act directly by financing the electoral campaigns, by neo-corporatism and the financing of campaign information whose objective is to reorient public opinion in its favor. By producing persuasive information which forges a majority they also act on the candidates by financing their electoral campaign. Candidates are then more committed in relation to their electorate. The interest groups can finally act directly on public administration during implementation of public policies, otherwise stated, the writing of decrees and ministerial rulings. The law is in appearance made by the elected but it is in fact produced by the administrations under pressure of interest groups which form the neo-corporatists system which holds the power. Such a system is qualified as connivance or buddy democracy. It is then the voters for whom the cost of forming an interest group of optimal size is the least who will govern the country, be sovereign.

Democracy can finally, if it doesn't implement good constitutional rules, be governed by its administration. It can become a bureaucracy, a political system where the force (kratos) is exercised by the offices and not the elected. Why is democracy exposed to this risk? Because the public administration is in a position of monopoly and it alone knows the cost function (Niskanen, 1971<sup>12</sup>). The offices can over bill the tax payers for the production of services they demand. Because there is no residual claimant in the double agency relationship maintained by the voter, the elected and the public administration (two levels of delegation). In a capitalist firm the entrepreneur has a particular status. He is not an employee like the others. He is the residual claimant (Demsetz 1995, 1997<sup>13</sup>). This means he is paid in function of results and is directly incited to obtain efficiency as the residual return (which represents his income) is a function of good use of resources. He is in this sense the only one who can benefit from the gains in the struggle against the agents' opportunism, their shirking behaviour, etc. In democracy the residual claimant could be the voter but he does

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<sup>8</sup> Black, Duncan 1948. On the rational of Group Decision-making, *Journal of Political Economy*, 56, 1 : 23-24. Traduction française Une analyse du processus de décisions collectives, dans Généreux, Jacques. *L'économie politique. Analyse économique des choix publics et de la vie politique*, Textes essentiels, Larousse, Paris, 1996.

<sup>9</sup>[http://www.insee.fr/fr/themes/tableau.asp?ref\\_id=NATSDSD4202&reg\\_id=0](http://www.insee.fr/fr/themes/tableau.asp?ref_id=NATSDSD4202&reg_id=0).

<sup>10</sup>[http://www.insee.fr/fr/themes/document.asp?ref\\_id=ipl565](http://www.insee.fr/fr/themes/document.asp?ref_id=ipl565)

<sup>11</sup> "Several recent empirical studies of legislative voting conclude that forces others than the objectively identifiable self-interest of voters in a district influence a representative's voting behaviour" (Dougan and Munger, 1989, 119).

<sup>12</sup>Niskanen W. (1971), *Bureaucraty and Representative Government*.

<sup>13</sup>Demsetz, Harold (1997). *L'économie de la firme. Sept commentaires critiques*, éditions management, Societesn Les essentiels de la gestion, Traduction française *The Economics of the Business Firm – Seven Critical Commentaries*, Cambridge UniversityPress (1995).

not play this role for two reasons. The gains from the struggle against opportunism are collective goods. Each tax payer has an interest in behaving as a clandestine passenger. He waits until the others commit resources in politics to improve performance of public administration. The costs of the collective are private but the gains are public. The other reason is linked to the volume of gain. The number of tax payers is high. This means that the gains will be rather low for each tax payer. The cost/benefit relationship is then not necessarily favorable for control. The voters and their elected lack incitation to use their power to sanction non productive bureaucrats and be aware of the exact cost. There is not in fact in politics any profit seeking as no one can nominally appropriate a profit. There is no residual claimant. Neither the elected nor the voters are monetarily incited to control opportunism of public administration.

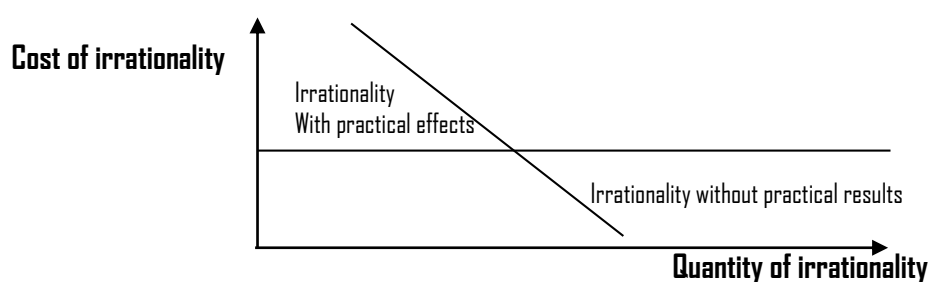
### 2.2.2 A world of low cost decisions where the price of irrational belief is low

Democracy's failures are not only due to the mechanism of revelation of political preferences. They also originate in the way in which the voters form their preferences.

A great deal of literature observes that the voters are incompetent in economic and political matters (Facchini 2017<sup>14</sup>). The French have limited knowledge of public finance, the nature of monetary policies, the rate of production growth, the doctrinal orientation of candidates, the contents of their political program, etc. This incompetence is not without consequence on their political choices. If the vote sanctions or rewards a public policy and the voters are incompetent it is difficult to believe in the efficiency of the voting system. In France for example the voters perceive that there is inflation in the sense of 'expensive' since the creation of the euro. The facts contradict this suggestion. They then wrongly attribute inflation to the euro. They vote then for parties who preach the return to the franc. These same citizens can sanction a government for a growth rate they under or over estimate and think they know. The external control mechanism of government opportunism is in this sense extremely defective because it is based on false information. We cannot however stop here. We must explain why the citizens are incompetent. .

**Figure 2**

The theory of rational irrationality



Bryan Caplan (2006) explains political incompetence by the low cost of irrational beliefs in the political sphere (Figure 2). The demand for irrational beliefs increases when their price decreases. It is because the costs of irrationality are null that they will be irrational. The private costs of such biases are almost null for the voters while the social costs can be extremely high. This divergence between private and social cost makes the degree of irrationality in politics much higher than in domestic life

### 3 Democracy and the existence of failed political apprenticeship

Democracy is not only a mechanism of revelation of political preferences. It is also a system of formation of political preferences. It is a system of deliberation where the agents exchange knowledge of their experiences and their

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<sup>14</sup>Facchini, François 2017. Public Choice Failure and voter incompetence in France, Political Quarterly. Forthcoming.

conception of the common interest. The question is not then that the voter preferences are in error but that the voters do not succeed in correcting their errors in judgment. The theory of failed political apprenticeship is thus based on another way of qualifying democracy. Democracy here is a process of revision and revelation of political preferences. Under this definition tyranny of given preferences is avoided and attention is paid to apprenticeship (Hayek, 1960<sup>15</sup>; Wohlgemuth 2002a<sup>16</sup>, 239-242) and co-determination of ideologies. Political preferences are no longer the facts (Wohlgemuth, 2002a, 227), but social constructions. We could then avoid immaculate conception of indifference curves and we would lift one of the main barriers to the explanation of the process of construction of ideologies which inspire the voters and the elected. (Wohlgemuth, 2002b<sup>17</sup>, 231).

In this model the actors' political preferences would be imperfect as for D.C. North (1981<sup>18</sup>) and the voters would be ready to modify them. The voters wouldn't have the same ideologies as the elected because they would delegate to politicians the power to experiment more or less coherent new ideologies from past experience. The formation of ideologies in democracies would then be the result of an interactive process open to apprenticeship and discovery where the main element would not be the incontestability of an argument but rather its contestability by majority opinion (Wohlgemuth, 2002a, 230; 2002b, 228). Political preferences structured by ideology would no longer be immutable facts. They would be more or less malleable. There would be democratic failure only when the voters and the elected are incapable either by interest or ideology or by epistemic impossibility to learn, to correct their errors.

Several situations are possible. The political actors learn well, they don't learn, they learn badly.

### 3.1 The myth of political apprenticeship failure

The equivalent of the Chicago school in the cognitive framework and application of the Bayesian model. The voters would revise their belief in function of new information they receive. They would replace the wrong information by the right information. They would learn according to a Bayesian model (Messenger 2005, 2006). This model has been criticized but has the advantage of being operational (Messenger 2003, p.3). It is in fact the most used to account for the way in which individuals learn. It is articulated perfectly around the paradigm of perfect rationality (Zechman 1979). In the Bayesian model ideology does not play a role (North 1992, p.485), as it is totally flexible. It is modified almost in real time. All new information is taken into account and integrated into the new ideology. The political agent is constantly adjusting his ideology to facts. The cognitive feedback emits information which is received and interpreted by agents who correct their errors (North 1992, p.585). The agents are almost obliged to revise their beliefs because if they don't they will be marginalized. Their ideological model will not survive society's competition. The cognitive feedback would render obsolete the representation models of the world which inspired past policies. In this framework false ideologies should be set aside and replaced by better quality ideologies.

The failure of protectionist policies and the success of free trade explain the adoption of free market policy (Meseguer 2006). In the same spirit the welfare state crisis would create cognitive conditions for liberalization policies while the crises of market economy and the crisis of 2008 in particular would create the conditions for its return (Buera et al. 2011). Buera et al. (2011) rejoin thus Ikeda's thesis (1997) that showed on the basis of Mises and Hayek's work that theoretically there exist public policy cycles which correspond to reversed revisions of political ideologies of men of government and their voters. Ideology is in no way an obstacle to economic policy adjustments. Governments always use the information they have to adjust their ideologies. There is then convergence. All individuals learn the same way. . There is no heterogeneity of the way in which individuals interpret the world and react. We are then in the presence of

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<sup>15</sup>Hayek, F. 1960. *The Constitution of Liberty*, Chicago : University of Chicago Press.

<sup>16</sup>Wohlgemuth, M. 2002a. *Evolutionary Approach to Politics*, *Kyklos*, vol.55, 2, 223-246.

<sup>17</sup>Wohlgemuth, M. 2002b. *Evolutionary Approaches to Politics*, *Kyklos*, vol.55, 2, 223-246.

<sup>18</sup>North, D.C. 1981. *Structure and Change in Economic History*, W.W. Norton & Company, New York. London.

rapid learning processes, continual and which converge without cost toward a common position. The generating factor is information which contradicts a component of the initial ideology.

### **3.2 The duality of political learning failures**

Such a position supposes firstly that the citizens have a Bayesian learning method. (Facchini 2016<sup>19</sup>) which supposes that their way of learning is the right one, but also that we know what should be learned from an event such as the crisis of 2007-2008. The plurality of representations of this crisis as well as the difficulty in which the political agents find themselves in order to possess the right learning model renders however this first hypothesis improbable. It supposes that eventually there is always a happy ending which historically is difficult to uphold for all men particularly those who had to give their life for bad political causes or who lived during a period when politicians made bad choices or again for the present generations who must support the consequences of bad choices of past generations who believed for example that public indebtedness was the solution to their problem and who in fact carried the costs of their consumption over to future generations. Political learning is for all these reasons at best inexistent and at worst bad.

#### **3.2.1 Absence of learning or denial of reality**

Individuals do not learn in politics. There is for this reason a great inertia of ideologies. Men act within the framework of an ideology which is inert. This inertia translates their refusal to learn. They don't learn firstly because it is not in their interest to do so. Public agents for example have no interest in believing that public spending and public jobs destroy private jobs? They will for this reason develop denial strategies to limit all forms of cognitive dissonance and continue to believe that they serve the public interest. They will also always uphold election candidates who are pro-public spending. The result of this ideological inertia is status quo and institutional blockage. They do not learn after that because they do not individually support the costs of such an attitude. On a market an entrepreneur who does not correct his anticipation errors would be lead into bankruptcy. In politics the cost of error is socialized. If public spending has a negative effect on jobs the pro-spending policies destroy private jobs and create unemployment. This unemployment has however no effect on public agents who are protected by their status of civil servant. They have no interest in making their beliefs evolve and in admitting that public jobs and public spending have a negative effect on total jobs. The costs of denial of reality would be under these conditions much lower in politics than on the market. They do not learn because their posture is moral and non experimental. They do not judge a policy in terms of good or bad results, but on the basis of ethical criteria. They do not try to know whether the redistribution policies are good for the poorest, but only to defend the policies which attempt to reduce inequality even if this type of policy has no effect on the inequalities. What counts is not the results of the public policy but the moral intention which inspires it..

#### **3.2.2 Bad learning**

The third position defends the idea that political agents do not learn not because it is not in their interest but because it is very difficult to correctly correct political beliefs. Voters learn but badly. Four reasons explain this failure. A) Voters perceive the world through a filter, their ideology, which harms the quality of their learning.. B) The information voters have can be false or lead them to think something which is only partially true, interest groups, and men of state who have an interest in indoctrinating them. C) In politics the costs and benefits of choices are social. It is not sufficient that a voter learns well, the majority of voters must succeed in learning well. The centralized nature of the political system renders improbable the probability that the political system learns well D) It is very difficult to know what we feel about our choices and the choices of politicians. If I voted for François Holland in the Presidential elections in 2012 I don't know if I made an error because I don't have information on the assessment of Nicolas Sarkozy had he been elected.

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<sup>19</sup> Facchini, François 2016. Political Ideological Change: a theoretical approach, *Social Science Information*, 55, 4, December, 589-602



Ignorance is not only authentic. In authentic ignorance I do not have information which is available. Ignorance is radical if information which allows me to learn is not available.

### 4. Conclusion

As on the market and under the hypothesis that there exists a political process capable of integrating these democratic failures into the making of political decisions it becomes reasonable to correct failures in democracy. For this a certain number of constitutional reforms have been suggested by the economists.

If the main defect of democracy is ethical and that it calls into cause the sovereignty of the individual we must prevent people from being above the individual. This solution is the traditional vision of rule of law. The constitution is presented as a means of protecting private property from majority decisions<sup>20</sup>. Justice is then naturally placed above government because it is guided by law. This means that if justice no longer protects property rights it becomes unjust.<sup>21</sup> It reduces freedom and *in fine* the stock of knowledge available because it limits everyone's experimentation. The law obliges each individual to ask the community if he can do what he wants to do. The respect of individual sovereignty supposes the respect of private property which itself passes by a) independence of judiciary power (Kerman et Mahoney 2005<sup>22</sup>; Feld et Voigt 2005<sup>23</sup>), b) independence of the central bank in order to limit manipulation of the value of money by politicians and the advent of political cycles (Berger, de Haann and Eijffinger 2001<sup>24</sup>), implementation of a threshold of fiscal pressure above which the state cannot tax, as was done in California under the title of suggestion 13<sup>25</sup>, c) by the separation of the executive and the legislative, e) by the option to contest an administrative decision, f) by the possibility of filing an appeal for non constitutionality and g) establishing equality of governors and the governed.

If the failure of democracy is more a problem of agency we should try and protect the voters from opportunism of those elected and their administrations. We should, as the rhetoricians of the agency say, improve the democratic control and the optimization of constraints to impose « on politicians to facilitate the efficiency of their actions while limiting the discretion they have to follow private agendas » (Laffont 2000, p.120). If democracy transforms into a democracy of connivance where small groups of powerful succeed in manipulating public opinion and legislating to block institutional changes which are not in their interest or their conception of the general interest we must reinforce political competition and fight against all entry barriers in politics which protect the oligarchy.

To these ends we can develop two types of federalism: a budgetary federalism firstly and a functional federalism after that.

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<sup>20</sup>Siegan B.S. (1985), « Economic Liberties and the Constitution Protection at the State Level », *Cato Journal*, vol.4, n°3, Winter, pp.689-702. Voiraussi Dorn ([1985], p. 661).

<sup>21</sup>Dorn J.A. (1985, p.666), « Economic liberties and the judiciary », *The Cato Journal*, vol.4, number 3, Winter, pp. 661-668, NuméroSpécial sur « Economic Liberties and the Judiciary ».

<sup>22</sup>Klerman D. and Mahoney P. (2005), "The Value of Judicial Independence", *American Law & Economic Review*. Glaeser E., PopEleches C. and Vishny R. (2004), "Judicial Checks and Balances", *Journal of Political Economy*, 112.

<sup>23</sup>Feld L.P. and Voigt S. (2005), "Economic Growth an Judicial Independence: Cross-Country Evidence Using a New Set of Indicators", *European Journal of Political Economy*, vol.19, n°3, traduitenpartie pour *Problèmeséconomiques* n°2972 (30/03/2005).

<sup>24</sup>Berger H., J. de Haan, and S. Eijffinger (2001), "Central Bank Independence: an Update of Theory and Evidence", *Journal of Economic Survey*, 15, pp.3-20.

<sup>25</sup>Shadbegian R. (1996), "Do Tax and Expenditure Limitations Affect the Size and Growth of Government?", *Contemporary Economic Policy*, 14, n°2, pp.22 - 35.

The theory of budgetary federalism develops in the framework of the theory of principle-agent<sup>26</sup>. Generally we distinguish three government structures<sup>27</sup>: a unitary government, a federal government and a confederation of states. Here only opposition between the unitary government and the federal government interests us. A unitary government is a government where there exists only one level of government to which all citizens participate directly or by the intermediary of a person or party they have elected<sup>28</sup>. All collective decisions affecting the citizen are made at this government level. A federal government is made up of two or more levels of government each having the primacy or all responsibility for decisions made in specific collective domains<sup>29</sup>. The agent is at the same time a citizen of the federal state (American) and of the state in which he resides (Texan). He participates directly or elects representatives to legislative assemblies of each level of government. The unitary government is distinguished then from the federal government by its process of assignment of tasks. In the unitary government the voters delegate power to a single agent while in the federal models the power is fragmented between several agents. The power is divided. Federalism leads then to a better control than the unitary models. The reason for this suggestion is the implementation of a control mechanism by what is called voting by the feet.<sup>30</sup> Each level of jurisdiction is in competition to produce different more or less localized baskets of public goods. This competition concerns the levels of taxation and public spending. It protects from collusion between producers of public goods and only exists because the citizens and the capital are mobile. It is the diversity of local levels of production of public goods which increases the competition between jurisdictions and renders the control of the federal system more efficient than a unitary system. The theory predicts then that the federal government structures allow a more effective control of the elected and favors a better management of public funds.

Functional federalism<sup>31</sup> is inspired by budgetary federalism but de-territorializes voting by the feet. It is possible then to create competition between the institutional systems without migrating. Functional federalism thus limits the world of political possibilities by giving to citizens the possibility to adhere to a group (nation) for cultural affairs, to another for transport, and to another for education of their children. This possibility must allow cost reduction at the exit and intensify competition. Functional federalism leads to elimination of each state's geographical or territorial monopoly. It establishes new borders between states that are in the same situation as companies. They produce public goods which respond to a demand. They are in competition to have the citizens' trust who alone are able to design the borders of each state. The border is no longer, under these conditions, the result of a military past but of market size. The territorial monopoly can only be rebuilt if all the inhabitants of a geographical zone adhere by contract to the political programs of the state as a whole. If this is not the case the territories of each state superpose. Each state is in competition with another on quality, quantity and the price of public goods (tax). The functional federalism leads then to the formation of new jurisdictions of variable geometry where the principle of subsidiary dominates. This federalism exists because of a constitutional decision. The constitution only has to permit that a French citizen can deduct from his taxes the amount affected to education of his children if he chooses to send them to another country. He has the advantage of using information carried by the institutional choices of the agents and to put alongside the electoral system (vote) a system of voting with the feet without exit cost which obliges the states to consider the constitutional preferences of its citizens. This type of federalism leads also to citizens being better informed about the alternatives and the political choices of politicians as they can sanction directly by their choice. Inversely they oblige

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<sup>26</sup> Voir Josselin J.M. et Marciano A. (2002), « Les relations de mandat dans les systèmes constitutionnels. Approche théorique et application au cas européen », *Revue d'économie politique*, 112 (6), nov-déc., pp.921 – 941 et Perrot D. (2003), *Asymétrie d'information et structures multigouvernementales. Une application aux décisions publiques dans l'Union européenne*, Thèse de Doctorat, LAEP, Université de Paris I.

<sup>27</sup> Mueller D.C. (1995, p.784), « Fédéralisme et Union européenne: une perspective constitutionnelle », *Revue d'économie politique*, vol.105, pp.779 – 805.

<sup>28</sup> La Grèce antique, l'Italie de la renaissance, la France et la Grande-Bretagne sont des exemples de gouvernements unitaires.

<sup>29</sup> La Suisse et les Etats-Unis sont plutôt des fédérations.

<sup>30</sup> Josselin J.M. et Marciano A. (2002, p.928).

<sup>31</sup> Frey B. and Eichenberger R. (1999), *The New democratic Federalism of Europe*, Edward Elgar, London. Voir aussi Casalla, A. et Frey, B.S. (1992), « Towards an Economic Theory of Overlapping Political Juridictions », *European Economic Review*, 36, pp.639-646.

## NEW PUBLICATION

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politicians to consider the citizens' political preferences who could threaten the state to not buy their service. A government that can no longer prevent exit is in fact more attentive to the voice than a monopoly government.

If democracy's main failure is in the existence of low cost decisions in politics, the solution is to increase the voter decision costs. This means finding rules that prevent political agents from moving the cost of their choices onto others. Buchanan (1990<sup>32</sup>) in his seminal article suggests forcing parliamentarians to privilege the generality of the law on its discriminatory nature. The result of discriminatory laws is to move the costs of certain choices onto others. General laws reduce the negative transfers and the conflicting nature of public policies. A general law deals with the unequal in an equal manner while a discriminatory law deals with the unequal in an unequal manner. A general law applies to all citizens. A discriminatory law only applies to a small group. A forfeit tax is a general principle. A progressive tax on income or fortune is discriminating. Fiscal law applies differently according to the individual's level of revenue.

If lastly it is a learning failure whose origins are found in indoctrination (manipulation of opinion) the size of the group, and/or the ideology through which the voters see the world the rise in costs of bad political choices is a first solution. We can also act upon the conditions of indoctrination (manipulation of opinion) and the value of the mandate. National education is a political instrument of legitimization of political power. Even the idea of national education is the expression of this. The dismantling of national education and the monopoly of the convocation for diplomas which is consubstantial of this principle of national program is a possible way to explore. The last trail is the lowering of the value of the mandates. If individuals refuse to correct their errors it is because in the short term they are bound by political decisions. They cannot not see that a Mayor has, once he fixes the plan for occupations of land, all power over the price of his land and the future value of his patrimony, even if he wants to ignore politics because he has understood that in such a system the agents are rather irrational. He cannot do it as he would expose himself to a too great risk of devaluation of his capital. It is the value of the mandates that can explain the prevarication behavior (Facchini 2004<sup>33</sup>) and more generally the central place occupied by the elected in the influence game which animates the pressure groups.

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<sup>32</sup> Buchanan, James 1990. The Domain of Constitutional Economics. *Constitutional Political Economy*, vol.1, n°1, Winter, pp.1-18.

<sup>33</sup> Facchini, François 2004. Critiques de trois arguments justifiant les lois sur le financement de la vie politique. *Politiques et management public*, 22 : 27-46.