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The Triumph of Election: A Pyrrhic Victory?

In her 2014 presidential address to the American Political Science Association, Jane Mansbridge argued that:

Legitimate coercion is the fundamental problem of governance. How can large, highly interdependent structures produce sufficient legitimate coercion to solve their collective action problems?²

Democratic norms presuppose that this fundamental problem of governance should be resolved by 'mutual coercion mutually arrived at'³ and this is normally associated with the consent associated with electoral democracy and majority rule. However, and crucially from the perspective of this paper, Mansbridge claims that 'legitimacy can be based on representation by lot'.⁴ Bernard Manin, however, disagrees with Mansbridge's claim and argues that the 'triumph of election' over sortition⁵ at the time of the birth of modern representative government was a consequence of the natural right theory of consent: 'However lot is interpreted, whatever its other properties, it cannot *possibly* be perceived as an expression of consent.'⁶

The need to obtain the consent of the governed is Manin's explanation as to what would otherwise be something of a historical conundrum:

At the same time that the founding fathers were declaring the equality of all citizens, they decided without the least hesitation to establish, on both sides of the Atlantic, the unqualified dominion of a method of selection, long deemed to be aristocratic.⁷

This is clearly a puzzle for our understanding of the French Revolution, where *égalité* was an explicit goal. But the American revolutionaries were equally determined to avoid aristocratic domination, so why did they choose to ignore the lessons of antiquity? Direct democracy might have been impossible in the extended republic but why not random selection by lot – one of the principal mechanisms of the original *demokratia*?

Manin argues that sortition was *not even considered* as a candidate mechanism at the time of the birth of representative government, on account of the 'natural right' perspective on consent that was dominant at the time. Although the English translation of Manin's book uses the phrase 'perceived as an expression of consent' (rather than 'conceived'), the context indicates that his concern is with logical possibility, rather than appearance. The original (French) text reads:

¹ I am grateful to Dario Castiglione, Gil Delannoi, Robin Douglass, Iain Hampsher-Monk, M.H. Hansen, Bernard Manin and Peter Stone for comments on earlier versions of this paper which was presented at the *Tirage au Sort* seminar, SciencesPo, Paris, May 24-5 2012.

² J. Mansbridge, *What is political science for?* in *Perspectives on Politics*, 12 (2014), pp. 8-17 (my emphasis).

³ Ivi, p. 10.

⁴ Ivi, p. 11.

⁵ The random selection of citizens for public office by lot.

⁶ B. Manin, *The Principles of Representative Government*, Cambridge University Press, Cambridge 1997, pp. 84-5 (my emphasis).

⁷ Ivi, p. 79.

Quelles que soient par ailleurs ses mérites et ses propriétés, le tirage au sort présente en effet ce caractère incontestable qu'il ne fait pas intervenir la volonté humaine et ne peut pas passer pour une expression du consentement.⁸

Which would more accurately translate as:

Whatever its other merits and properties, selection by lot has [one] incontestable characteristic – it does not involve the human will – and [therefore] cannot possibly be an expression of consent.

'ne peut pas passer pour' has the strong meaning of something not being possible, or even reasonable.⁹ There are in fact two separate issues involved in Manin's claim that I would like to deal with in turn:

1. Is the claim *historically* accurate, or were there other factors involved, apart from the natural right theory of consent?
2. Is it *logically* true, irrespective of the beliefs of the founders of representative government (or the linguistic paradigms in use at the time)? It should be noted that Manin employs the present tense – 'il ne peut pas passer pour une expression du consentement' – so his argument is a general philosophical one, rather than just a matter of historical interpretation.

The historical problem

The natural rights theory of consent

Manin's focus is on the intellectual climate that was prevalent at the time of the foundation of representative government (the seventeenth and eighteenth centuries). The particular linguistic context that he privileges is natural rights theory, in its dominant (Lockean) form, according to which the legitimacy of government depends on the consent of the governed. He references all of the usual authorities from the natural right and social contract traditions (Grotius, Hobbes, Pufendorf, Locke and Rousseau) to illustrate the undeniable importance of the natural rights theory of consent at the time. But what evidence is there for the explicit connection between natural rights, consent and *election*? Manin acknowledges that 'among the natural rights theorists, only Locke mentions the need to renew popular consent by the regular election of Parliament'.¹⁰ However Locke's call for regular elections was on account of the special case of property rights and taxation; ultimately he viewed government as a sacred trust (which could be instantiated in a number of ways) and was more concerned with the legitimate grounds for the *withdrawal* of consent when that trust was betrayed. The only author that I could locate in Manin's book directly connecting election and natural right is Rousseau, who subtitled *The Social Contract* 'The Principles of Political Right' but who viewed parliamentary elections as producing a form of slavery. Rousseau demanded that every citizen should consent in person and that ruled out electoral representation, which only allowed Englishmen a brief moment of freedom every five years during the election of parliamentary representatives. The other natural rights theorists referenced by Manin (Grotius, Hobbes and Pufendorf) agree that representative government

⁸ B. Manin, *Principes du Gouvernement Représentatif*, Calmann-Lévy, Paris 1995, p. 116.

⁹ I am grateful to Gil Delannoi for this point. My interpretation assumes that Manin respects the distinction between how things are (*esse*) as opposed to how they might appear (*periphere*) and is more concerned with the former.

¹⁰ Ivi, p. 176.

requires popular consent, but without stipulating the mechanism of election. Hobbesian consent, while a necessary condition for obligation and authority 'can be inferred from certain states of affairs':

In casting the net of obligation as widely as possible, consent is sometimes stretched vanishingly thin. He allows consent to be tacit, so that one who openly lives under a government and receives protection from it thereby consents, and so authorizes the sovereign and obligates himself.¹¹

Hobbes's requirement for consent has no implications for the chosen method of representation (monarchical, elective, sortive etc). Hugo Grotius's writings on election were primarily concerned with the theological meaning of the word (salvation); Pufendorf did argue that 'a kingdom is acquired by the voluntary consent of a people through the medium of an election' but his reference here was to the original foundational act – subsequent descent could be by hereditary right if that was the wish of the original founders.¹²

Manin notes that all talk of sortition suddenly 'vanished almost without all trace', one generation after the publication of *Spirit of the Laws* (1748) and the *Social Contract* (1762).¹³ This period, however, corresponds with the *waning* tide of natural rights theory – 1748 also saw the publication of Hume's critique of 'tacit' consent 'Of the Original Contract', and Jeremy Bentham wrote his condemnation of natural rights as 'rhetorical nonsense – nonsense on stilts' in 1791 – leading to a new emphasis on positive (*civil*) rights. The high tide of natural rights theory occurred almost a century *before* all talk of sortition 'vanished without trace'. According to Manin, *election* is the obvious way of instantiating consent-based natural right as 'under an elective system, the consent of the people is constantly reiterated'.¹⁴ Unfortunately I was unable to find in his book *any* direct citations from the contemporary literature to support his 'somewhat conjectural'¹⁵ claim regarding the causal connection between election and consent – in every case the connection is only between *representation* and consent; the assumption that representation has to be via the mechanism of election is based on his general philosophical claim: 'What makes a system representative is not the fact that a few govern in the place of the people, but that they are selected by election alone'.¹⁶ This (tautological) assumption, which is the basis of his argument, fails to consider alternative forms of representation (symbolic, descriptive, ascriptive etc.) so he is right to differentiate his historical and institutional approach¹⁷ from the conceptual focus of Liebholz¹⁸ and Pitkin,¹⁹ but the failure to address such conceptual issues opens his thesis to accusations of circularity. Whilst it's entirely plausible that the natural rights theory of consent directly led to the 'triumph of election' – indeed Manin may be proved to be correct – the veracity of this claim can only be established by a careful literature review of the authors who were influential at the time.

¹¹ K. Hoekstra, *The de facto turn in Hobbes's political philosophy* in T. Sorell & L. Foisneau (eds.) *Leviathan after 350 years*, Oxford University Press, Oxford 2004.

¹² S.V. Pufendorf, *De officio hominis et civis juxta legem naturalem, libri duo*, John Hayes, Cambridge 1682, X.3.

¹³ Manin, *The Principles of Representative Government*, p. 79.

¹⁴ *Ivi*, p. 85.

¹⁵ *Ivi*, p. 83.

¹⁶ *Ivi*, p. 41.

¹⁷ *Ivi*, p. 6.

¹⁸ G. Liebholz, *Das Wesen der Repraesentation*, Walter de Gruyter, Berlin 1966.

¹⁹ H. Pitkin, *The Concept of Representation*, University of California Press, Berkeley 1967.

Absent such a review – which is beyond the scope of this short paper – it's worth pointing out that there are several other candidates for the historical triumph of election, both circumstantial and ideational, that I will deal with briefly below.

Institutional path-dependency

Manin's purported focus is on 'concrete institutional arrangements', not 'abstract, timeless ideas',²⁰ so he opens his discussion of natural rights theories with an examination of the medieval institutional context in which they developed:

There are good grounds for thinking that the electoral techniques employed by representative governments had their origins in medieval elections, both those of 'Assemblies of Estates' and those practiced by the Church.²¹

Harrington, Rousseau and Montesquieu agreed that the appointment of representatives by election had its origins in feudal institutions. To Harrington this was an example of 'Gothic prudence' and to Montesquieu the 'marvellous system [of election] was found in the woods [of Germania]'.²² The choice of the word 'prudence' would suggest that political institutions were being judged in terms of epistemic outcomes, as opposed to compliance with normative doctrines such as the natural right theory of consent.

Although this was also the context in which natural rights theories developed, the emphasis on election may well have been a consequence of the development of existing and familiar institutional practices, as opposed to abstract ideational factors. Manin claims that the American revolutionary slogan 'no taxation without representation' refers to 'the prevalence of the ancient belief that the convening of *elected* representatives was the only legitimate way to impose taxation'.²³ However the slogan would be equally comprehensible in the absence of the word 'election' – had the English parliament been constituted by sortition, then the American colonists would have insisted that they select their indigenous representatives in the same way. No doubt if the revolution had occurred a hundred or more years earlier the American colonists would have demanded their own hereditary aristocracy (or monarch).²⁴ The issue at hand was the geographical delineation of the *demos*, not the chosen mechanism of representation.

Manin acknowledges that natural rights theories developed partly in response to the primitive 'ascriptive' representation involved in the medieval principle of *Quod Omnes Tangit* (QOT) with its assumption of 'consent' to the decisions of elected representatives.²⁵ It should, of course be recognized that ascriptive 'consent' is more akin to having a gun placed against your head than the free expression of will that we normally associate with the term,²⁶ a fact that Manin duly acknowledges, claiming that very often the elected representatives of the people were merely asked to give their seal of approval to what the authorities

²⁰ Manin, *The Principles of Representative Government*, p. 4.

²¹ Ivi, p. 86.

²² Ivi, p. 90.

²³ Ivi, p. 86 (my emphasis).

²⁴ Eric Nelson's revisionist argument that the American revolution was *against* parliamentary (elective) rule is of relevance here (E. Nelson, *The Royalist Revolution: Monarchy and the American Founding*, Harvard University Press, Cambridge MA 2014).

²⁵ Manin, *The Principles of Representative Government*, p. 88.

²⁶ A.P. Griffiths and R. Wollheim, *How can one person represent another?*, in *Proceedings of the Aristotelian Society*, Supplementary Volumes, 34 (1960), pp. 117-224.

had proposed. There were usually no policy choices involved and the process was often limited to a mere 'acclamation'.²⁷

Once the delegates had given their consent to a particular measure or tax, the king, pope, or emperor could then turn to the people and say: 'You consented to have representatives speak on your behalf; you must now obey what they have approved.'²⁸

But the connection with preference election is entirely contingent, as parliamentary representatives were selected by a variety of mechanisms. A popular assembly constituted by random sampling (sortition) would have been treated in an identical manner to elected representatives when faced with the taxation demands of the executive.

Geography and technology

Another circumstantial candidate of particular relevance to the American Revolution was the difficulty, in the absence of modern sampling technology, of instituting sortition in the widespread and thinly-populated North American states. Given the founders' arguments (or at least those of the dominant Federalist faction) in favour of large constituencies, a very large hat would have been required from which to draw the tokens for those selected for political office, although Manin discusses the possibility of a multiple-step procedure, starting at the local level.²⁹ There is also the issue of confidence in the probity of the draw process, traditionally guaranteed by the draw taking place in public ceremonials, again difficult in widely-dispersed rural communities. Manin's book includes a sympathetic consideration of the Anti-Federalist case for 'descriptive' representation and concludes that Ball³⁰ [and Landemore³¹] were wrong to conflate the Federalist–Anti-Federalist argument with Pitkin's distinction between trustee and delegate styles of representation,³² with its implicit suggestion that only persons of distinction are capable of disinterested judgment. However he fails (as did the Anti-Federalists themselves) to consider that sortition would be the best way of establishing a legislative assembly that was a 'portrait in miniature' of the entire political community. It should be noted that geographical extent and size constraints were the main impediment to

²⁷ Manin, *The Principles of Representative Government*, p. 88.

²⁸ Ivi, pp. 87-8.

²⁹ Ivi, p. 82. Professor Manin might also draw support from Mark Goldie's evidence that rotation in officeholding (which was traditionally associated with sortition) was surprisingly widespread in early-modern England (M. Goldie, *The unacknowledged republic: Office-holding in Early Modern England*, in T. Harris (ed.) *The Politics of the Excluded, c1500-1850*. Palgrave Macmillan, NY and Basingstoke 2001.) Goldie estimates that there must have been 50,000 office holders (at parish level) at any one time and that, with rotation, during a decade, over half the adult male population would have had to have held office. He might also be encouraged by Iain Hampsher-Monk's argument that the transition from the early-modern concept of limited freedom as a consequence of office-holding to the modern notion of freedom as the exercise of individual judgment freed from institutional constraint was a consequence of the Lockean version of radical Protestantism closely linked to natural rights theory. (I. Hampsher-Monk, *Liberty and citizenship in early modern England* in Q. Skinner and M. van Gelderen (eds.), *Freedom and the Construction of Europe*, Cambridge University Press, Cambridge 2013.)

³⁰ T. Ball, *A Republic – If You Can Keep It*, in T. Ball & J.G.A. Pocock (eds.) *Conceptual Change and the Constitution*. University Press of Kansas 1988.

³¹ H. Landemore, *Between Burke and the Anti-Federalists: An epistemic argument for descriptive representation*, retrieved from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1832842

³² Manin, *The Principles of Representative Government*, pp. 108-115.

achieving the Anti-Federalist ideal of descriptive representation as, in the absence of 20th-century proportional sampling technologies, it would necessitate an excessively large legislative assembly. This was the main reason the Anti-Federalists failed to pursue the argument for descriptive representation more aggressively.

The influence of Roman republicanism

An alternative perspective on the ideational context prevalent in the eighteenth century has been offered by M.H. Hansen, one of the leading historians of Athenian democracy, who argues that there was much more interest at the time in the mixed constitution of republican Rome than democratic Athens.³³ The choice of *noms de plume* of contemporary political writers (Publius, Brutus, Cato etc) and a cursory study of upstate New York place names (Camillus, Cicero, Cincinnatus, Corinth, Fabius, Ilion, Junius, Macedon, Marcellus, Pompey, Rome, Romulus, Scipio, Sempronius, Sparta, Syracuse, Troy, Ulysses, and Virgil) indicates a numerical balance favouring Rome over Greece, notwithstanding the central place of ancient Greek philosophy and literature in the classical educational canon. The focus on republican Rome was because of the dissemination of a hostile view of Greek democracy by philosophers like Plato and Aristotle, so it was unsurprising that the electoral system of republican Rome was preferred over the supposed 'chaos' of Greek democracy (the very different practices of Athens and the other *poleis* being frequently conflated by the philosophers). The historian Polybius 'took no interest in Athenian democracy and dismissed it in one sentence'.³⁴ Plutarch's *Life of Solon* mis-described the fourth century as a period in which democracy was in decline, and Herodotus, Thucydides, Xenophon and Demosthenes went unread.³⁵ A true understanding of Athenian democracy was not available until the 'historical turn' of the nineteenth century, ushered in by Vols. 4-6 of George Grote's *History of Greece* (1847-8), but anticipated by Bulwer Lytton's *Athens: Its Rise and Fall* (1837). After that there was a growing interest in Athenian democracy, but the elective republican institutions now opportunistically relabeled 'democratic' were entirely different from anything that would have passed for democracy in the classical period (as Manin acknowledges throughout his book).

Class interests

The protection of property rights was the primary concern of the founders of representative government, hence their use of Lockean slogans such as 'no taxation without representation'. It would not have escaped the notice of wannabee governing elites that the electoral system of Rome invariably led to rule being concentrated in the hands of aristocratic families. The classical sources all viewed election as an oligarchic mechanism:

We know that in Rome, though the people had given itself the right to elevate plebeians to office, it could not bring itself to elect them; and although in Athens it was possible, by virtue of the law of Aristides, for magistrates to be drawn from any class, Xenophon tells us it never happened that the common people asked for themselves those magistracies that might affect its safety or its glory.³⁶

³³ M.H. Hansen, *The Tradition of Greek Democracy and Its Importance For Modern Democracy*, The Royal Danish Academy of Science and Letters, Copenhagen 2005.

³⁴ *Ivi*, p. 9.

³⁵ *Ivi*, p. 13.

³⁶ Montesquieu, *Spirit of the Laws*, Book II, ch. 2, cited in Manin, *The Principles of Representative Government*, p. 73.

Manin cites the Putney debate between Rainsborough and Ireton in defence of his thesis.³⁷ This debate, however was not over the principle of election per se, it was over the *extension of the franchise* beyond those with a 'fixed permanent [property] interest in this kingdom' and as such would have been equally applicable to a sortition-based approach where a limited suffrage was in operation.³⁸ Locke's arguments on consent as a prerequisite to taxation (which Manin cites on p. 85 of his book) were also specifically aimed at the protection of property rights, rather than a defence of the electoral principle per se. If parliamentary representatives had been selected by lot from the same narrow band of forty-shilling freeholders there is no reason to believe that this would have led to a different representation of the will of the propertied class. The focus on election as a way of indicating consent is particularly problematic in the English case owing to the inconvenient truth that, prior to the Great Reform Act of 1832, *elections in eighty-five percent of UK county constituencies were uncontested*³⁹ – a statistic explained by the prevailing culture of deference, allied with the considerable personal expense involved for the candidates.⁴⁰ Modern notions of consent presuppose an element of *choice*, leading us to reject as undemocratic elections that only offer a single candidate, as well as rotten and pocket boroughs, where voters had little choice other than to consent to the will (in Edmund Burke's case) of the Marquess of Rockingham.

According to the Marxian perspective on class interests, ideological factors such as natural rights theories are nothing but a smoke-screen to disguise material interests.⁴¹ Natural rights (as opposed to property rights) have stronger entailments for the extension of the suffrage than they do for the particular choice of balloting mechanisms. The decision by representative governments in England and France⁴² to impose markedly higher property qualifications (or indirect elections combined with a tax threshold) for electoral candidates than ordinary voters⁴³ would support the suspicion that election was a way to ensure that power remained in the hands of the rich. Election is the best way to ensure that, whoever was chosen, the executive of the modern state would remain 'a committee for managing the common affairs of the whole bourgeoisie'.⁴⁴ Many of the modern-day activists advocating the replacement of election by sortition are influenced by neo-Marxist perspectives.⁴⁵

³⁷ Manin, *The Principles of Representative Government*, p. 84.

³⁸ Although Professor Manin took issue with this claim in his response to my paper during the 2012 Paris sortition seminar, the record of the debate in the General Council of the Army, Putney Church, 29 October 1647 indicates clearly that the dispute was over the extension of the franchise (beyond the forty-shilling threshold), rather than the choice of balloting method, which was simply *assumed* to be preference election (D. Wootton, *Divine Right and Democracy*, Penguin Books, Harmondsworth 1986). Sortition was used by the Athenian oligarchy in 411 and also by the Venetian republic, so a clear distinction needs to be drawn between balloting methods and the extent of the suffrage (O. Dowlen, *The Political Potential of Sortition*, Imprint Academic, Exeter 2008).

³⁹ S. Ingle, *The British Party System*, Pinter, London & New York, 2000, p. 6.

⁴⁰ Manin, *The Principles of Representative Government*, p. 96.

⁴¹ C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, Oxford University Press, Oxford 1962.

⁴² Manin attributes American exceptionalism to the property qualification to expediency rather than principle: 'the exceptionally egalitarian character of representation in the United States owes more to geography than philosophy' (MANIN, *The Principles of Representative Government*, p. 96).

⁴³ Ivi, Ch. 3.

⁴⁴ K. Marx & F. Engels, *The Communist Manifesto*, Penguin, Harmondsworth 2004.

⁴⁵ See, for example, some of the proposals on the leading sortition forum Equality by Lot: <https://equalitybylot.wordpress.com/>

Religion

The connection between election and ‘the elect’ in both Calvinist and Arminian thought is also of relevance: it is no coincidence that the triumph of election was largely in northern Protestant states, whereas sortition survived longest in Catholic Italy. The governance of Presbyterian churches by elected lay leaders (‘elders’ or ‘presbyters’) must have had an important influence on preferences in the field of secular government, especially as American settlers and their descendants would have been more familiar with the writings of John Calvin than John Locke. Madison’s tutor at Princeton was the evangelical minister John Witherspoon, and Madison’s use of the phrase ‘chosen body of citizens’ in the *Federalist* passage celebrating the refining effect of the electoral filter⁴⁶ was a clear allusion to the Calvinist notion of the ‘chosen Few’.⁴⁷ Although the argument for the religious *origin* of lot has long been discredited, Protestant sensibilities may have had a part to play in its *demise*, as lot-drawing ceremonies would, for those of a Puritan disposition, have smacked of Catholic ritualism, or even as a continuation of pagan notions of the religious significance of the lot-drawn ‘prerogative century’ in the Roman *comitia*.⁴⁸ Protestants prefer to make their decisions based on the inner voice of conscience rather than by following the lead of the gods (*omen*) or other forms of divination that might be revealed by lot. This is why the work on lotteries of the Puritan divine Thomas Gataker ruled out divination as a blasphemous use of the lot.⁴⁹ Although the divinatory role of the lot was also banned by Pope Honorius III in 1223,⁵⁰ popular Catholic sensibilities do not always follow papal decretals.

Meritocracy

Socrates’ sarcastic quip about sortition being akin to choosing ship-pilots, architects or flute-players ‘by bean’ is usually cited by those who argue that election is the best way of selecting the most *able* for political office. Indeed the Athenians reserved magistracies that required military experience or particular technical and financial skills for election. The contextual evidence that Manin cites tends to support this consequentialist explanation, rather than any natural right concern for securing the consent of the governed:

There was no doubt in Harrington’s mind that election, unlike lot, selected preexisting elites. When men are left free, he argued, they spontaneously recognize their betters.⁵¹

Harrington, it must be emphasized, believed in a ‘natural aristocracy’ of merit, rather than seeking to privilege accidents of birth, and elections would enable men to select not so much their social betters, but the competent rather than the foolish.⁵² Montesquieu also praised ‘the natural ability of the people to discern merit’ via election.⁵³ Although ‘merit’ was, to Montesquieu a combination of natural aristocracy and privilege defined by birth, wealth and prestige, nevertheless, election was preferred for purely epistemic

⁴⁶ A. Hamilton, J. Madison, & J. Jay, *The Federalist*, Oxford University Press, Oxford 2008, No. 10, p. 53.

⁴⁷ Manin, *The Principles of Representative Government*, p. 117.

⁴⁸ Ivi, p. 48.

⁴⁹ T. Gataker, *The Nature and Use of Lotteries*, C. Boyle (ed.), Exeter, Imprint Academic 2008 (1627). However some Protestant sects (e.g. the Moravians) took very seriously the divinatory uses of the lot.

⁵⁰ Manin, *The Principles of Representative Government*, pp. 88-89.

⁵¹ Ivi, p. 67, discussing Harrington, *The Prerogative of Popular Governance*, in J.G.A. Pocock (ed.), *The Political Works of James Harrington*, Cambridge University Press, Cambridge 1977, p. 477.

⁵² Ivi.

⁵³ Ivi, p. 72.

(outcome-oriented) reasons.⁵⁴ Election was advocated in order to select the best leaders, rather than to indicate the consent of ordinary citizens. Likewise, Rousseau's argument for election in the context of aristocratic government was as 'a method by which probity, intelligence, experience, and all the other grounds for preference and public esteem are so many guarantees that men will be wisely governed.'⁵⁵ Similarly, for James Madison:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society. . . . The elective mode of obtaining rulers is the characteristic policy of republican government.⁵⁶

Once again, Madison was not concerned with natural rights, the consent of the governed, or the representativity of those selected for office, only the best way to select 'wise and virtuous legislators'. Similarly, for Siéyès 'politics was a realm of competence, not equality,⁵⁷ and election was the best way of selecting competent political officers. Adam Smith had demonstrated that the division of labour was the most productive way of organizing the economy and Benjamin Constant merely applied the same principles to the body politic in his 1819 formula:

The representative system is nothing but an organization by means of which a nation charges a few individuals to do what it cannot or does not wish to do herself.⁵⁸

Competence in political office, of course, might also be secured by competitive examinations, operational track record, use of recruitment consultants or rule by a Platonic guardian class. Our task, however, is the more limited one of deciding why, at the time of the birth of representative democracy, election was chosen over sortition as the appropriate mechanism. The evidence cited above would suggest that election was chosen over sortition primarily on account of consequentialist considerations (wise and competent government) rather than the normative case for natural rights and the consent of the governed. Manin also refers to our 'amazement' at how such a politically-sophisticated people as the ancient Athenians could adopt a policy so likely to arrogate power to those 'with no particular aptitude for governing'.⁵⁹ Fustel de Coulanges resorted to a religious explanation as he was also puzzled as to why politically-sophisticated Athenians should adopt such a 'bizarre' and 'absurd' system of ruling.⁶⁰ For Gustave Glotz: 'Appointing rulers by lot seems so absurd to us today that we find it difficult to imagine how an intelligent people managed to conceive of and sustain such a system.'⁶¹ Scepticism over outcomes, rather than concern about natural rights, would appear to be the decisive argument against 'this manifestly defective method of

⁵⁴ Ivi, p. 73.

⁵⁵ J.-J. Rousseau, *The Social Contract*, Book III, Ch. 5.

⁵⁶ Hamilton, Madison & Jay, *The Federalist*, No. 57, p. 282.

⁵⁷ N. Urbinati, *Representative Democracy: Principles and Genealogy*, Chicago University Press, Chicago 2006.

⁵⁸ B. Constant, *The liberty of the ancients compared with that of the moderns*, in B. Fontana (ed.), *Political Writings*, Cambridge University Press, Cambridge 1988.

⁵⁹ Manin, *The Principles of Representative Government*, p. 9.

⁶⁰ N.D. Fustel de Coulanges, *La Cité Antique*, Flammarion, Paris 1984, Ch. 10.

⁶¹ Cited in Manin, *The Principles of Representative Government*, p. 26.

selection', both for modern people and the founders of representative government – indeed, 'its disappearance requires no further explanation'.⁶²

This paper will offer no further contextual evidence to demonstrate that any of the factors discussed in this section directly led to the 'triumph of election' and as such they are just as speculative as Manin's chosen explanation. The focus of this paper, however, is not just on disputes in the history of political thought (which I would be happy, if the evidence pointed that way, to concede to Manin),⁶³ it is the philosophical question of whether sortition could *ever* be a mechanism for representative government based on the consent of the governed. Although this would only require demonstration of its representational potential, James Fishkin⁶⁴ makes the further argument that sortition is a *better* candidate to indicate consent than election, and it is this greater challenge that is the focus of the next section.

The conceptual problem

But how could sortition *possibly* be perceived as a mechanism of consent? The philosophical literature on the legitimacy of political authority and the associated problem of democratic consent is extensive. The natural right to freedom and the role of 'tacit' consent outlined in 1690 by Locke's *Second Treatise on Civil Government* has been subject to extensive criticism.⁶⁵ The attempts to overcome these objections – including John Rawls's theory of 'reasonable consensus',⁶⁶ and David Estlund's notion of 'normative consent'⁶⁷ – have in turn been subject to critique from Thomas Christiano⁶⁸ and Jeremy Waldron.⁶⁹ But these philosophical disagreements are well beyond the purview of this short paper, in which I address the far more tractable question – *assuming the coherence of the notion of political consent, is there any reason why it may not equally well be instantiated by allotted 'representation by proxy' as by preference election?*

Sortition as a way of indicating consent would have been unproblematic to Hobbes, as he would have argued that if you live under a sovereign body constituted by sortition then your consent is exactly the

⁶² Manin, *The Principles of Representative Government*, p. 10.

⁶³ However if it is the case, as the balance of evidence would suggest, that the triumph of election was down to consequentialist concerns, then the two issues are not entirely unrelated. Recent work in deliberative democracy (an area in which Professor Manin has long been active) would support the view that the epistemic diversity generated by sortition may well be an essential component of sound decision outcomes, casting serious doubt on the traditional understanding of elite competence (H. Landemore, *Democratic Reason: Politics, Collective Intelligence and the Rule of the Many*, Princeton University Press, Princeton NJ 2013).

⁶⁴ J. Fishkin, *When the People Speak: Deliberative Democracy and Public Consultation*, Oxford University Press, Oxford 2009.

⁶⁵ J. Bentham, J. 2002. *Rights, Representation, and Reform: Nonsense upon Stilts and Other Writings on the French Revolution*, in P. Schofield, C. Pease-Watkins & C. Blamires (ed.), *The Collected Works of Jeremy Bentham*, Oxford 2002; L. Brilmayer, *Justifying International Acts*, Ithaca: NY, Cornell University Press 1989; D. Hume, *Of the Original Contract*, in: A. Macintyre (ed.) *Hume's Ethical Writings*. University of Notre Dame Press, London 1965 [1748]; J. Raz, *The Morality of Freedom*, Oxford University Press, Oxford 1986; J. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge, Cambridge University Press, 2001; C. Wellman, *Toward a Liberal Theory of Political Obligation*, in *Ethics*, 111 (2001), pp. 735-759.

⁶⁶ J. Rawls, *Political Liberalism*, Columbia University Press, New York 1996.

⁶⁷ D. Estlund, *Democratic Authority: A Philosophical Framework*, Princeton University Press, Princeton NJ 2008.

⁶⁸ T. Christiano, *The Rule of the Many*, Westview Press, Boulder: CO 1996.

⁶⁹ J. Waldron, *Law and Disagreement*, Oxford University Press, Oxford 1999.

same as under any other form of sovereignty (consent merely being your understanding of the obligations resulting from accepting the protection of the ruler). To Hobbes, consent can be 'attributed', or 'presumed' as, by Nature, every man is supposed to endeavour all he can to obtain that which is necessary for his conservation. Although

'the Conquerour makes no Law over the Conquered by vertue of his power' but by virtue of their assent', Hobbes says, however, that even 'in receiving . . . protection they have assented, so the mere fact of their being alive counts for assent (whenever there exists a power that can destroy them).⁷⁰

Although Hobbes's 'there being no Obligation on any man, which ariseth not from some act of his own'⁷¹ looks, at face value, like the words of a liberal consent theorist, the 'very ubiquity of consent, as the foundation of all obligations, has an opposite effect . . . in this sense one *has* consented when one *ought* to have consented'.⁷²

However, the construction of Lockean-style government-by-consent (where every citizen must indicate her own consent)⁷³ in a mass democracy of atomised individuals with disparate views and interests is a much more serious challenge – and this is just as true in the case of election as it is of sortition. Note that the form of consent under consideration is the *ongoing* consent to the specific outcomes of the political decision-making process as opposed to any inferred agreement to a hypothetical social contract as a foundational act.

Hegel adopted the pre-modern perspective that political representation was conducted through the 'corporations'⁷⁴ of civil society: '[deputies] are representatives not of individuals or a conglomeration of them, but of one of the essential spheres of society and its large-scale interests.'⁷⁵ Burke held a similar view and argued that parliament existed to facilitate the deliberative exchange of reasons between the representatives of these unattached corporate interests, the goal being the determination of the national good.⁷⁶ All members of corporations are assumed to consent to the decisions of their representatives, as they share an identity of interests. However, a representative assembly in a greatly expanded franchise becomes (as both these authors predicted) a congress of individual particular interests, so the distinction between the majority and minority positions becomes a very real one. How is it possible to maintain the principle that *everyone* should give their own consent under universal franchise with, in Hobbes's words, the inevitable conflict between the interests of a 'multitude of particular men'?

Today, a person is deemed to be politically 'represented' no matter what, i.e., regardless of his own will and actions or that of his representative. A person is considered represented if he votes, but also if he does not vote. He is considered represented if the candidate he has voted for is elected, but also if another candidate is elected. He is represented, whether the

⁷⁰ Hoekstra, *The de facto turn in Hobbes's political philosophy*, p. 68.

⁷¹ T. Hobbes, *Leviathan*, ed. R. Tuck, Cambridge University Press, Cambridge 1996, p. 150.

⁷² Hoekstra, *The de facto turn in Hobbes's political philosophy*, pp.68-9.

⁷³ Or, at the very least, the reserve power to withhold consent under certain conditions.

⁷⁴ 'Corporations' should be understood in the context of medieval estates theory, rather than the institutions of modern commerce.

⁷⁵ G.W.F. Hegel, *The Philosophy of Right*, trans. J. Sibree, Dover, New York 1956, para. 311, p. 202.

⁷⁶ Pitkin, *The Concept of Representation*, Ch. 8.

candidate he voted or did not vote for does or does not do what he wished him to do. And he is considered politically represented, whether 'his' representative will find majority support among all elected representatives or not.⁷⁷

Consent by the mechanism of preference elections is at best partial, tacit and *approximate* as it reflects only the consent of the majority amongst those who chose to cast their vote. Unfortunately there is no direct way for parliamentary representatives accurately to gauge what the actual views of their constituents are, and the task of bundling preferences together in a coherent way would appear to be impossible.⁷⁸ This is particularly problematic when substantial numbers of citizens choose to boycott the poll (and thereby withhold their consent)⁷⁹ either because they believe the system to be corrupt or unjust, or because they realize that their individual vote will make no essential difference to the outcome; another problem being inhabitants of foreign origin without citizen rights. Particular problems (from a consent perspective) also apply to countries with compulsory voting systems.⁸⁰ So it's not entirely clear that, under modern conditions, election is the inevitable, or even the best, way of ensuring that the political system embodies the consent of the people.

An alternative approach to this form of *electoral approximation*, and one arguably better suited to a mass society, is *representation by proxy* – I may not attend (and consent or dissent) in person but, if the statistical sampling process is accurate, there would be people *like me* present who could participate in a deliberative forum and then vote as my proxy, and their presence (and voting power) would be directly proportionate to how many people 'like me' there are in the wider population – i.e. sortition as a form of unmediated proportional representation:

A representative microcosm offers a picture of what everyone *would* think under good conditions [well-informed deliberation]. In theory if everyone deliberated, *the conclusions would not be much different*. So the microcosm offers a *proxy* for the much more ambitious scenario of what would happen if everyone discussed the issues and weighed competing arguments under similarly favourable conditions.⁸¹

Sortition might well be viewed as a return to a virtual corporatist form of representation – focusing on 'types', rather than 'persons' – as a lot-derived assembly would include:

On average about 50% women; 12% blacks; 6% Latinos; 25% blue-collar workers; 10% unemployed persons; two doctors or dentists; one school administrator; two accountants; one real estate agent; eight teachers; one scientist; four bookkeepers; nine food service workers; one childcare worker; three carpenters; four farm laborers; three auto mechanics; one fire fighter; one computer specialist; and a Buddhist.⁸²

It's important to note that the word 'proxy' pertains to the *aggregate* representation across the whole sample – there is no suggestion that there is a one-to-one relationship between a citizen and 'her' proxy. But could

⁷⁷ H.-H. Hoppe, *Democracy – The God That Failed*, Transaction Publishers, New Brunswick, 2001.

⁷⁸ K. Arrow, *Social Choice and Individual Values*, Yale University Press, New Haven 1951.

⁷⁹ 'Don't vote, it only encourages them', as the old anarchist slogan puts it.

⁸⁰ I am grateful to M.H. Hansen (private communication) for these points.

⁸¹ J. Fishkin, *When the People Speak*, p. 194 (my emphasis).

⁸² E. Callenbach & M. Phillips, *A Citizen Legislature*, Imprint Academic, Exeter 2008, pp. 29-31.

representation-by-proxy ever be considered a form of *consent*? Can I be a party to a contract that I did not sign myself? Admittedly this is a difficulty, as the judgment (and interests) of all Buddhist food-service workers would not necessarily be identical, although the corporatist perspective would anticipate significant commonalities. But the difficulty is no greater than that generated by mythical social contracts that are either the result, in Hobbes's case, of logical deduction of how a rational person would choose to act or, in Locke's case, 'speculative economic history'.⁸³ The notion that consent is somehow embodied in electoral representation is true only under the near-unanimous conditions of the tiny property-based franchise of Locke's time. So consent-by-proxy would have to do *very little work* to improve on the dubious claims of consent by electoral approximation.

An argument for consent by proxy might assume the following lines:⁸⁴

1. Someone 'like me' would, *ex hypothesi*, exercise judgment in the same way that I would myself. The argument does not require a definition of the likeness criteria (age, gender, occupation, political preferences etc.), as the random selection process in principle reflects the incidence of *any* politically-significant quality in the general population (assuming a large enough sample).
2. The number of representatives sharing characteristics and preferences 'like me' in an allotted assembly would be proportionate to the number in the general population. If the sample were not sufficiently fine-grained to accurately reflect the distribution of any quality deemed to be salient to the exercise of political judgment then the sample numbers would need to be increased accordingly. Only a relatively small sample would be needed to provide an accurate gender balance, whereas the proportional representation of, say, albinos or molecular biologists would require a larger sample. The rapid growth of the polling industry is a testimonial to the accuracy and validity of the probability sampling principle.
3. Therefore, assuming a) well-balanced information and expert advocacy and b) independence, then the aggregate judgment of the allotted assembly would represent the considered judgment of the whole population.

All electors are currently deemed to consent to the results of a general election, whether or not 'their' candidate was victorious; so the same principle should apply to the result of a vote in an allotted assembly, the only difference being the employment of one or other of the two mechanisms – preference election or sortition – that constitute a ballot.⁸⁵ Although one might successfully argue that the consent involved is at best tacit or hypothetical, the same is true in *both* instances of the ballot.

The legitimacy of a lot-based approach to consent requires very careful institutional design, in order to ensure that an assembly constituted by sortition accurately reflects the majority preferences of the population that it represents – *to the extent that it makes no difference which concrete individuals are comprised in the sample*. 'Consent' would be regarded by statisticians as a 'population parameter' and would be no different from any other attempt to estimate the value of some attribute of a population.⁸⁶ Indeed opinion polls often directly ask respondents to consent to, or disagree with, a variety of different propositions, and even to indicate the depth of feeling involved – strongly agree/agree/undecided/ disagree/strongly disagree – rather than a simple yes/no verdict. If multiple public opinion polls were performed by independent polling organizations, using identical questionnaires and sampling methodologies (but drawing different samples

⁸³ I. Hampsher-Monk, *A History of Modern Political Thought*, Blackwell, Oxford 1992, p. 90.

⁸⁴ Paraphrasing J. Fishkin, *When the People Speak*.

⁸⁵ According to the OED, a ballot can be either a system of voting or a lottery. <https://en.oxforddictionaries.com/definition/ballot>

⁸⁶ I am grateful to the statistician Conall Boyle for this point.

from the same population), one would anticipate closely matching, if not identical, results. James Fishkin's Deliberative Polling (DP) programme presupposes a similar paradigm (although with added small-group deliberation); considerable effort is made to ensure that as many of those selected actually attend (in order to ensure accurate statistical representation), the issues to be debated are decided in advance and balanced information and advocacy are provided exogenously. The outcome of the Deliberative Poll is decided by secret vote, on majoritarian principles. Independence is important to statisticians, so every effort should be made to ensure that all members vote without influencing each other – if necessary by eliminating the face-to-face small-group deliberation that is an integral part of the existing DP methodology. This would limit the speech acts of proxy representatives to asking questions to the expert advocates. Independence is also an essential factor from an epistemic point of view, as evidenced by the preconditions of the Condorcet Jury Theorem and the wisdom-of-crowds literature.⁸⁷

All notions of implied consent are open to Hume's objection that to claim people have given their 'tacit' consent to obey the laws simply by remaining in their country of birth is tantamount to saying that someone tacitly consents to obey a ship's captain 'though he was carried on board while asleep and must leap into the ocean and perish the moment he leaves her',⁸⁸ along with Ronald Dworkin's objection that a hypothetical contract 'is no contract at all'.⁸⁹ This paper, however, is more concerned with ongoing day-to-day consent than mythical original contracts, and the hypothesis underlying the notion of consent by proxy has the benefit of being *open to experimental refutation*. Given the default assumption of majority rule, then the condition that it would make no difference which empirical individuals are included in the sample can be tested by convening multiple concurrent DP-style groups with identical information/advocacy. If all groups return the same decision outcome (within a specified margin of error) then hypothetical consent has been demonstrated, in that *no reasonable democratically-minded person could refuse to consent to a decision taken by a proxy group that would have returned the same decision if she had participated in person*. In theory the experiment could be extended so that *every* citizen participates in a massive concurrent DP, or 'Deliberation Day'⁹⁰ and the result would be the same – the reasons for random statistical sampling being both practical (financial and opportunity costs) and the difficulty in maintaining an 'attentive' public on account of the early breaching of the rational ignorance threshold.⁹¹ Those of a Hobbesian or Humean (rather than democratic) persuasion might also require that rule by representative proxies should continue to deliver a system of laws that enables people to pursue their interests peacefully and conveniently.

Mansbridge revisited: perceived legitimacy

As the topic of this paper is normative political theory, the emphasis has been on the need to 'justify legitimate coercion . . . with good *reasons* that withstand collective scrutiny'.⁹² However 'perceived' or 'empirical' legitimacy – 'when a group of people believes that something is legitimate' – is equally important

⁸⁷ M.D. Condorcet, *Essay on the Application of Probability Theory to Plurality Decision-Making*, in I. McLean and F. Hewitt (eds.) *Condorcet*, Cheltenham 1994; J. Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few*, Abacus, London 2004.

⁸⁸ Hume, *Of the Original Contract*, p. 263.

⁸⁹ R. Dworkin, *Taking Rights Seriously*, Harvard University Press, Cambridge MA, 1977.

⁹⁰ B. Ackerman & J. Fishkin, *Deliberation Day*, Yale University Press, New Haven CT 2005.

⁹¹ R.A. Dahl, *Democracy and Its Critics*, Yale University Press, New Haven CT 1989, p. 340.

⁹² Mansbridge, *What is political science for?*, p. 11 (my emphasis).

(*ibid.*), and this section is devoted to the public reception of the 20-year research programme in Deliberative Polling as an indication of the feasibility of extending the procedure beyond a purely advisory role.

A Deliberative Poll on healthcare options undertaken by Fishkin in Rome enabled elected officials to argue that the ‘perceived legitimacy’ of the DP results gave them the ‘cover to do the right thing’:⁹³ the implication being that electoral success and legitimacy are anything but synonymous. The crucial issue, from a citizen’s perspective, is the *perceived legitimacy* of political institutions, rather than arcane conceptual arguments that are the province of political theorists. A sophisticated knowledge of probability theory is required in order to understand how a sample can truly be representative of a target population.⁹⁴ Probability theory was unknown in classical times, casting doubt on the claim that the lot was used explicitly as a method of random sampling.⁹⁵ But that does not rule out probability sampling as a way of representing public opinion in modern times (otherwise the opinion pollsters would all go bankrupt). All that is needed is to educate the wider public regarding the potential legitimacy of sortition – such an approach would be instrumental in the development of hypothetical consent to the decision outcomes of sortition democracy. This would also presuppose that allotted assemblies would deliver ‘sensible’ decisions on policy proposals.⁹⁶

Participants in a symposium on Fishkin’s 2009 book *When the People Speak* noted that careful experiments in Deliberative Polling are the best way of establishing the perceived legitimacy of majoritarian decision-making by a randomly-selected deliberative microcosm. Jane Mansbridge describes Fishkin’s work as the ‘gold standard of attempts to sample what a considered public opinion might be on issues of political importance’.⁹⁷ Focusing on the issue of consent, she describes the consent afforded by citizens to electoral representation as ‘somewhat tacit’ and based on ‘incomplete information, incorrect premises, or manipulated loyalties’. Her hope is that lot will ‘make a significant comeback’ but that would require both ‘a nuanced theoretical discussion of its [normative] legitimacy’ as a form of representation and ‘sufficient citizen experience with the institution to make an informed judgment’.⁹⁸ We are only just beginning on this path, Mansbridge concludes, and Fishkin’s book is a milestone along the way, although ‘it will take a while

⁹³ Fishkin, *When the People Speak*, p. 151.

⁹⁴ The advantage of sortition over stratified sampling is that, from the perspective of general political judgment, there is no obvious way of knowing in advance which particular factors merit representation – socio-economic, gender, ethnicity, religious belief, underlying policy orientation, moral principles, psycho-political attitudinal dispositions etc. Although some would claim that the protection of minority interests would require stratified sampling, this would be better served by ensuring such interests were included in an independent house of advocates rather than in the judgment chamber, where democratic norms should predominate, or by extra-democratic constitutional safeguards.

⁹⁵ Manin, however, argues that ‘thinking about the political use of lot may have led the Greeks to an intuition not unlike the notion of mathematically equal chances. It was true, in any case, that lot had the effect of distributing *something* equal in terms of number (*to ison kat’arithmon*), even if its precise nature eluded rigorous theorization’ (MANIN, *The Principles of Representative Government*, p.39). Richard Tuck notes that the ‘estimation of probabilities’ predates Leibniz and Huygens’s mathematical studies – appearing, for example, in the writings of Grotius and the members of the Tew Circle, thereby casting doubt on Ian Hacking’s account of the context in which the concept of probability emerged (R. Tuck, *Natural Rights Theories: Their Origin and Development*, Cambridge University Press, Cambridge 1979).

⁹⁶ For evidence of the epistemic value of cognitive diversity, see Landemore, *Democratic Reason*; Surowiecki, *The Wisdom of Crowds*.

⁹⁷ J. Mansbridge, *Deliberative Polling As the Gold Standard*, in *The Good Society*, 19 (2010), pp. 55-62, p. 55.

⁹⁸ *Ivi.* p. 57.

for the public and for the deliberative system as a whole to give Deliberative Polls the credibility and the respect that they deserve'.⁹⁹

The jurist Sanford Levinson, another participant in the symposium, also focused on how a random sample might be seen as a legitimate form of representation:

The legitimacy arises from both the equal probability that any given person (discounting for minimal baseline qualifications) might have been chosen and the perception by those not chosen that the system of lottery selection assures the relative 'representativeness' of the sample chosen. To adopt the language of Bill Clinton, the deliberative assembly will look sufficiently 'like America' to provide necessary reassurance that one's own views are not absent from the assembly.¹⁰⁰

Although Levinson acknowledges that the necessary grasp of probability theory ('representativeness') will require a great deal of sophistication on the part of ordinary citizens, the biggest obstacle is the vested interests of elected legislators. Fishkin's 2007 DP in Zeguo, China, did not suffer from this as the results were eagerly implemented by the local Communist Party leaders and People's Congress, thus suggesting that liberal democracy may actually *impede* the institutionalisation of the deliberative process. The success of the Zeguo DP has given rise to further projects in China which provide a judicious mix of élite and deliberative democracy, providing the 'first glimmerings of another model' which 'may set an example for public consultation in many settings around the world'.¹⁰¹ The response from the political class in liberal democracies has been less enthusiastic: turkeys are unlikely to vote for Christmas because, in the words of the political scientist John P. Roche, paraphrasing Acton: 'power corrupts, and the possibility of losing power corrupts absolutely'.¹⁰² As a consequence Fishkin appears to be cautiously promoting the DP as an informed focus group.

This paper, however, has argued that deliberation by an allotted microcosm is a *more* legitimate way of indicating democratic consent than its electoral equivalent. As Fishkin puts it, 'consulting the public's considered judgments is a bit like seeking its collective informed *consent*'.¹⁰³ One might counter that perceived legitimacy is not the same thing as consent, but the legitimating narrative of electoral democracy fares no better on this score: few governments are mandated by the votes of the majority of the electorate. If a hypothetical contract (social or otherwise) is 'not worth the paper that it's not written on', then perhaps we need a new discourse for the age of universal suffrage.

Conclusion

Some of the commentators on an earlier draft of this paper pleaded with me to give up on the liberal notion of consent in favour of the republican notion of 'democratic legitimacy' (often presupposing the ominous requirement that citizens be 'forced to be free'), or to concentrate instead on the anti-elitist or epistemic/consequentialist case for selecting legislators by lot. However I agree with Manin that the consent

⁹⁹ Ivi. p. 60.

¹⁰⁰ S. Levinson, *Democracy and the Extended Republic: Reflections On the Fishkinian Project*, in *The Good Society*, 19 (2010), pp. 63-67, p. 66.

¹⁰¹ Fishkin, *When the People Speak*, pp. 155-6.

¹⁰² Cited in Levinson, *Democracy and the Extended Republic*.

¹⁰³ Fishkin, *When the People Speak*, p. 195 (my emphasis).

of the governed is a core element of democratic legitimacy, but would simply argue that Fishkin's case for consent-by-proxy turns out to be a better candidate than preference election. This is because the consent justification of electoral democracy is at best partial, tacit, implicit and *approximate* as it reflects only the consent of the majority (or their elected representatives) to an arbitrary bundle of policy preferences. Given the 'crisis of legitimacy' affecting modern electoral democracies, the triumph of election may well turn out to be something of a Pyrrhic victory.

One of the reasons behind Manin's claim for the sheer *impossibility* of sortition as a way of implementing consent may well be that the classical use of sortition was the random selection of *persons* as magistrates (*archai*), and jurors (*dikastai*).¹⁰⁴ To Athenians this would have indicated *diachronic* consent via the principle of 'rule and be ruled in turn' (rotation) – as such, sortition was an aspect of direct democracy. Such a principle, however, is of no relevance in large modern states, where diachronic 'consent' can only be instituted by the effective rotation of *parties* – if 'your' party doesn't win, chances are it could next time, when the previous winners are ejected at the polls. Consent-by-proxy is a *synchronic* mechanism, as each and every legislative proposal would be subject to the real-time deliberative scrutiny of a randomly-selected microcosm of the entire citizen body. Such a proposal is an example of indirect democracy via descriptive representation and as such has little in common with its classical namesake.

Sortive representation-by-proxy involves a return to a pre-modern concept of representation, and shares a number of features in common with Edmund Burke's vision of members of parliament representing their subordinate 'corporations' and their associate interests 'virtually'.¹⁰⁵ In Burke's and (Hegel's) time these 'corporations' (a relic of the medieval estates), included the mercantile, agricultural and professional interests.¹⁰⁶ Modern advocates of descriptive representation assume a similar view of unattached interests but, whereas proponents of stratified sampling seek to privilege the representation of gender and racial interests (Phillips, 1995), Kleroterians¹⁰⁷ are happy to leave it all down to the luck of the draw. Descriptive representation by proxy is 'virtual' in the Burkean sense of there being no formal relationship between proxy representatives and their 'constituents':

Neither election nor actual transmission of consent were necessary elements of representation. As long as the natural coincidence of interests was in place, the

¹⁰⁴ Juries are the best approximation to the modern notion of sortition as a means to represent the considered judgment of the whole community. It's no coincidence that this is the only residual modern usage of sortition.

¹⁰⁵ Nadia Urbinati argues that a parallel could be drawn between Burkean virtual representation and Sieyes' distinction between passive and active electors: 'Nonelectors participated indirectly in the political life of their country through the voice of the electors who, in exercising their active rights, also guarded the passive rights of all' (Urbinati, *Representative Democracy*, p. 151). But she acknowledges that Sieyes' focus on the election of *competent* political officials meant that 'representativity had no place in his theory of electoral consent' – it is 'an authorizing system of appointing experts', 'associated directly with rationality in contrast to prejudice and partial interests' (Ivi, pp. 147, 159). As such it is hard to see a parallel between Sieyes' vision of the national assembly as a virtual representation of the people (or, more accurately, the citizen body) and the virtual representativity of a randomly-selected microcosm of the political community – which would provide a mirror image of the latter (warts and all).

¹⁰⁶ Pitkin, *The Concept of Representation*, p. 174.

¹⁰⁷ This term for advocates of sortition is derived from *Equality by Lot*, 'the blog of the Kleroterians.' <http://www.equalitybylot.wordpress.com>

representatives could deliberate for the people, in Burke's words, as part of an 'assembly of *one* nation, with *one* interest, that of the whole.'¹⁰⁸

As with Burke, decision-making would result from the deliberative exchange of reasons in the forum of the nation, but would also depend on the eliciting of 'similar feelings, dispositions and prejudices'¹⁰⁹ in the proxies and the target groupings that they represent.

Where Kleroterians would part company with Burke is over their claim that the aggregate judgment of a random sample of ordinary citizens would be, at minimum, no worse than that of an elected elite.¹¹⁰ They might well agree with Harrington's view that elites are simply better at articulating their interests and would therefore allocate an advocacy rather than judgment role to political elites. Kleroterians also disagree over the value of proportionality, with Habermasian deliberative democrats taking the Burkean line that there is no obvious connection between counting votes and rational judgment. Advocates of 'stochation'¹¹¹ argue instead that, once the deliberative exchange has finished, evaluation of the best arguments will inevitably (and quite properly) be made against the background of feelings, dispositions, prejudices and interests and that the outcome should be decided on majoritarian principles. Such an approach *combines*, in Hampsher-Monk's terminology, the Burkean notion of the dispositional affect binding the representative to her constituents with the mimetic precision of a descriptive sample, so we can have Burke's cake and eat it. Virtual representation occurs:

[when] there is a communion of interests, and a sympathy in feelings and desires, between those who act in the name of any description of people, and the people in whose name they act, though the trustees are not actually chosen by them . . . *Such a representation I think to be, in many cases, even better than the actual.* It possesses most of its advantages, and is free from many of its inconveniences; it corrects the irregularities in the literal representation, when the shifting current of human affairs, or the acting of public interests in different ways, carry it obliquely from its first line of direction. The people may err in their choice [of representatives], but common interest and common sentiment are rarely mistaken.¹¹²

¹⁰⁸ D. Castiglione, *The metamorphoses of modern government: by the people, by representation, by the public*, in M. Albertone & D. Castiglione (eds.) *Les Défis de la Représentation: Langages, pratiques et figuration du gouvernement*, Garnier, Paris 2017, p. 14 (English ms).

¹⁰⁹ I. Hampsher-Monk, *Against representation as mimesis: political and aesthetic representation in Edmund Burke*, Legitimacy and Representation conference, University of Reading, September 2011.

¹¹⁰ Estlund, *Democratic Authority*; c.f. P.E. Tetlock, *Expert Political Judgment: How Good Is It? How Could We Know?*, Princeton University Press, Princeton NJ 2005.

¹¹¹ A neologism coined by André Sauzeau for the establishment of a descriptively-representative microcosm of a target population by statistical sampling. The term derives from the Greek *stokhos* – to 'aim', conjecture, or approximate. Such a body would have a random probability distribution that may be analysed statistically but may not be predicted precisely.

¹¹² Edmund Burke, *A Letter to Hercules Langrishe MP*, cited in Hampsher-Monk, *Against representation as mimesis*.