

Election by Lot and the Democratic Diarchy

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Abstract

This thesis argues that 'democracy' can better be understood in terms of a conceptual diarchy of 'isonomia' (equal political rights) and 'isegoria' (equal speech rights), rather than the conventional diarchy of 'will' and 'opinion' that originated in the era of absolute monarchy. As the proposed diarchy has its origin in classical Greece, the thesis starts with a brief overview of the institutional changes in sixth-, fifth- and fourth-century Athenian democracy that implemented the distinction in different ways, and examines some of its dysfunctions. The particular aspect of Athenian democracy under focus is sortition – the random selection of citizens for public office – viewed in antiquity as democratic, whereas election was viewed as an aristocratic or oligarchic selection mechanism. The thesis takes issue with Bernard Manin's claim that the 'triumph of election' was on account of the natural right theory of consent, arguing that sortition-based proxy representation is a better way of indicating (hypothetical) consent than preference election.

The thesis then seeks to clarify the concept(s) of representation – essential to the implementation of the democratic diarchy in modern large-scale societies – and to study how the diarchy has been reincarnated in modern representative democracies, along with an examination of the pathologies thereof. Consideration is given as to what the deliberative style of assemblies selected by lot should be, alongside evaluation of the epistemic potential of cognitive diversity and the 'wisdom of crowds'. Given the need for both isonomia and isegoria to assume a representative form in large modern states, Michael Saward's *Representative Claim* is adopted as a theoretical model to extend the reach of political representation beyond elections.

The thesis concludes with tentative proposals as to how the fourth-century reforms (delegation of the final lawmaking decision to randomly-selected nomothetic courts) might be used as a template for modern institutions to resolve some of the problems of mass democracy.

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Introduction

Since the time of the birth of representative government at the end of the eighteenth century many claims have been made regarding the ‘crisis of democracy’. Most of the jeremiads were written in the wake of an extension to the franchise, and echoed Henry Ireton’s argument at the Putney Debates (1647) that ‘no man hath a right to an interest or share in the disposing of the affairs of the kingdom . . . that hath not a permanent fixed interest in this kingdom’. In the UK, conservative liberals such as Henry Maine and Walter Bagehot were deeply sceptical that parliamentary government could survive Disraeli’s extension of the franchise to include the majority of working men, and the resultant shift of the effective locus of decision making from the parliamentary chamber to the electoral hustings.

However the turn of the twenty-first century has witnessed unprecedented disapproval with the entire political class, and a dramatic collapse in membership of political parties, right across the developed world, leading to claims that ‘the age of party democracy has passed’ (Mair, 2013, p. 1).¹ In the UK the Royal Society for the Protection of Birds now has more than twice as many members as the three main political parties combined and politicians are now even more distrusted than estate agents, bankers and journalists (MORI, 2013). As Matthew Arnold’s *Dover Beach* (1867) catalogued the ‘long, withdrawing roar’ of the sea of religious faith, the long-term consequence of the Reform Act of the same year was to undermine voters’ faith in, and deference to, the political establishment. This is a consequence of the paradox at the heart of representative democracy – voters expect politicians both to pander to their wishes and at the same time to exercise strong leadership, giving rise to the (probably apocryphal) remark of the nineteenth-century French socialist politician Alexandre Ledru-Rollin: ‘there go the people, I must follow them for I am their leader’.

¹ Particularly worrying in the light of E.E. Schattschneider’s claim that ‘modern democracy is unthinkable save in terms of parties’. (Schattschneider, 1942, p. 1)

The current malaise has led to the growth of the so-called anti-politician, the ‘outsider’, who makes the (dubious) claim not to be a member of the ‘political class’ – Donald Trump, Nigel Farage, Beppe Grillo and Marine Le Pen being obvious examples. The close vote in the Scottish referendum of September 2014 was as much a rejection of the political class as it was a rational appraisal of the case for independence, and similar observations apply to the Brexit referendum and the US presidential election and Italian referenda of 2016.

The phenomenon of the anti-politician is a reaction to the perception that voters and members of the ‘political class’ have little in common. In her 1967 monograph *The Concept of Representation*, Hanna Pitkin argued that there are two primary aspects to political representation – ‘descriptive’ and ‘active’. Descriptive representation is based on a resemblance between rulers and the ruled – a democratic legislature should be a ‘portrait in miniature’ of the population that it seeks to represent (Adams, 1951). Surely a group of people that, in Bill Clinton’s words, ‘looks like America’, will be more likely to act in the interests of America than a group of rich, white, male lawyers, who are beholden to equally rich ‘n powerful lobbyists? This has led an anti-politician like Farage to deliberately cultivate a ‘blokeish’ image, seeking to reassure voters that he is no different from them. But one man cannot ‘describe’ the whole electorate and the anti-politician is confusing descriptive representation with Pitkin’s ‘active’ variant, whereby politicians seek to realize their constituents’ interests. When you hire a lawyer (or go to your doctor) the last thing on your mind is whether or not they resemble you, so anti-politicians are conflating these two very different forms of political representation. Chapter 4 of this thesis argues that each form requires a different appointment mechanism, with election reserved for the active representation of interests. But if descriptive representation is deemed important to democratic politics then final legislative judgment should be in the hands of a large jury selected by lot – the only way to create a statistically-representative microcosm of the whole citizen body.

The popular protest against the political establishment might be taken as confirmation of the ‘ruling class’ thesis which claims that *kratos* (power) has always been in the hands of the *aristoi* rather than the *demos* – modern governance is oligarchy dressed up as democracy. This perspective results from the work of the ‘New Machiavellians’ (Burnham, 1943): Robert Michels’ *Political Parties: A*

Sociological Study of the Oligarchical Tendencies of Modern Democracy (Michels, 1966 [1911]), Gaetano Mosca's *The Ruling Class* (Mosca, 1939) and Vilfredo Pareto's *The Rise and Fall of Elites* (Pareto, 1979 [1920]).² Joseph Schumpeter's theory of elite rotation (Schumpeter, 1996 [1942]) was the best justification liberal theorists could offer at a time when democracy itself was under challenge. Mosca outlined the ruling class thesis as follows:

[T]he ruling class or, rather, those who hold and exercise the public power, will always be a minority, and below them we find a numerous class of persons who do never, in any *real* sense, participate in government but merely submit to it: these may be called the ruled class. (Mosca, 1925, p. 16, cited in Meisel 1962, pp. 32-3)

These classic texts, which should be read in the context of the early twentieth-century dalliance with fascism and communism, were challenged by a new generation of economists and political scientists during and after the Second World War. According to Karl Mannheim's *Man and Society in an Age of Reconstruction*, the diffuse and mobile nature of modern society makes the formation of (hegemonic) elites enormously difficult – the elites end up cancelling each other out (Mannheim, 1940). Mannheim's thesis was broadly confirmed by Robert Dahl's study of power structures in New Haven, Connecticut, in which he argued that modern 'democracies' would be better described as a form of *polyarchy* rather than *oligarchy*. (Dahl, 1961)

The advent of 'populistic' political parties supposedly transferred power from elites to voters – Anthony Downs's (1957) exposition of Harold Hotelling's 'median voter theorem' (demonstrated mathematically by Duncan Black), states that 'two vote-seeking parties will both take the same position, at the centre of the distribution of

² Earlier examples of the ruling class thesis include the works of Karl Marx; later (contextualized) examples include C. Wright Mills' *The Power Elite* (1956) and Anthony Sampson's *Anatomy of Britain* (1962), both studies of the shadowy military/corporate/financial elites that were pulling the strings of the elected leaders nominally in power in the US and Britain – the 'invisible government' behind the 'ostensible government' (Rosenblum, 2008, p. 14).

voters' most-preferred positions' (Gilens & Page, 2014, p. 4 (m/s)). Although the median voter theorem was the product of rational-choice economics (politicians are vote maximisers and voters are preference seekers), it was anticipated by Tocqueville in *Democracy in America* and critiqued as 'populistic' democracy by Dahl (Dahl, 2006 (Ch. 2)).

However the median-voter theorem provides little solace for those who seek to defend an epistemically substantive (as opposed to purely procedural) theory of democracy. Even if it is the case that policy outcomes accurately reflect median preferences,³ such preferences tend to be singularly poorly informed (Zaller, 1992). Philip Converse, after a careful study of mass belief systems, concluded that large portions of the electorate 'simply do not have meaningful beliefs, even on issues that have formed the basis for intense political controversy among elites for substantial periods of time' (Converse, 1964, p. 245).⁴ 'Lack of strong opinions, resulting in almost random responses, is one way of explaining the attitudinal and ideological inconsistencies identified in the survey-based evidence' (Femia, 2009, p. 70). So even if, *pace* Mosca and the ruling-class theorists, the *demos* does have *kratos*, democracy is beginning to look like a poor way of making political decisions with good outcomes.

In addition to the median-voter theorem, Anthony Downs is also known for his theory of 'rational ignorance' – an attempt to explain why mass public opinion is so poorly informed. An elector in a mass democracy has no reason to study the issues in depth because her individual vote has, in effect, no causal efficacy at all (Downs, 1957). The power of the individual voter to influence the outcome of elections is minimal: in modern democracies the extension of the suffrage cannot in the end empower individuals because once the democratic 'cake' has grown past a critical size each voter's slice becomes so small as to be causally irrelevant.

³ A claim that is open to dispute – for arguments against the median-voter theorem, see Gilens and Page (2014).

⁴ For a detailed refutation of the *vox populi, vox dei* argument, see Green (2010).

The original *demokratia* of fifth-century Athens, when all substantive decisions were taken directly by the general assembly which all citizens were entitled to attend (actual attendance levels running into the several thousands), suffered from its own version of rational ignorance. Decisions were taken by a mass show of hands after cursory deliberation and were often poorly considered and erratic – the assembly on occasion reversing decisions on successive days. So in the fourth century the Athenians opted to delegate the lawmaking function to *nomothetai* (legislative courts). The *nomothetai* followed the competitive advocacy model of the People's Courts (*dikasteria*) and the decision function was devolved to large (typically 501-1501) randomly-selected juries, who listened to the adversarial debate and then determined the outcome via voting. Random selection by lot (a procedure known as sortition) was viewed by Aristotle as the essence of Athenian democracy – enabling all citizens to rule and be ruled in turn – and was used for the selection of most magistrates, but the focus of this thesis is on the use of sortition for legislative *juries*. Hansen (1991) attributes the comparative stability of the restored *demokratia* to the switch from assembly rule to considered decision-making by legislative juries.

Given the parallel between poorly-informed electoral choice and unreformed Athenian direct democracy, this thesis argues that democratic governance might well benefit from a modern-day reincarnation of the *nomothetai*. If trial by jury (a Greek innovation) is the best way of determining the truth in the law courts then why not take another leaf from the Athenians' book and institute the trial of legislative proposals in the High Court of Parliament, with the outcome determined by a statistically-representative sample of the citizen body? As in classical-era Athens the arguments for and against the proposed law would be made by members of the political class (in the modern case both elected members and expert advocates), but the debate would be judged, and the 'verdict' determined, by randomly-selected members of the public (the distinction between advocates and judges is fleshed out in Chapter 4). Whether or not ordinary members of the public have the necessary cognitive skills to make such decisions is discussed in Chapter 6, but at least allotted legislators would be required to listen to the debate – at present the (UK) parliamentary green benches are largely empty (except during Prime Minister's Question Time) and members only appear when the

division bell rings, before being herded through the appropriate lobby by the party whips.

Not only would such an innovation benefit from the historical precedent of the cradle of democracy,⁵ but the underlying methodology has been tested and refined by a social science research programme that has been running for more than two decades. James Fishkin's experiments in Deliberative Polling have confirmed the view of the ancient democrats that although 'the best counsellors [are] the wise, none can hear and decide so well as the many' (Thuc. 6.39; c.f. Plato, *Protagoras*, 322d-323d). Fishkin has demonstrated that a randomly-selected group of several hundred persons is able to make sensible decisions on issues ranging from the massive expansion of wind power in Texas and the building of sewage treatment plants in China to the crafting of budgetary priorities in Italy. More importantly, the selection methodology gives the organisers the confidence to claim that the representative microcosm

offers a picture of what everyone *would* think under good conditions. 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. (Fishkin, 2009, p. 194)

The experiments are the product of Fishkin's Center for Deliberative Democracy at Stanford University but the tightly-constrained form of deliberation that he champions has been compared unfavourably with the rich face-to-face exchange preferred by Habermasian deliberative democrats. Chapter 5 fleshes out the contrast between Habermasian and Fishkinian deliberation and concludes that the silent form of deliberation favoured by Fishkin, in which the deliberative jury's role

⁵ As an exercise in conceptual analysis and political sociology, this thesis does not seek to evaluate John Keane's historical claim that the original cradle of democracy was the small settlements of Asia Minor. (Keane, 2010)

is primarily to 'weigh' competing arguments is the only one that is compatible with the need to maintain accurate statistical representation.

Fishkin's Deliberative Polls have, with the exception of one undertaken in the Zegou province of the People's Republic of China, always been for information or advice only, but Ian Budge has suggested that they could in fact have a formal role to play in the political process:

Suppose actual powers of policy decision were given to random samples of citizens who after an extended conference were polled to decide between proposals on each issue, which were then put into effect. This would be one way of installing a deliberative democracy. Randomness of selection would ensure representativeness of panels, so every citizen would have an equal chance to participate. University-style seminars and lectures by experts would ensure due consideration was being given to all arguments. In this way deliberation would be focused and made effective, and would produce better policy – or at least the policy which would be preferred by most of the population if they gave it thought. Sampling in this way also guards against a common criticism of deliberative proposals – that they would take up too much time, that citizens are ill-informed, etc. Having decisions made by sub-sets of citizens who *will* be informed takes care of this. (Budge, 2000, p. 201)⁶

The governance of large modern states is, inevitably, representative, and the starting point of any consideration is generally the analytic distinctions made in Hanna Pitkin's seminal 1967 monograph *The Concept of Representation*. This thesis argues that the 'descriptive' variant provided by sortition could only ever be one element in a representative democracy and that the 'active' variant

⁶ The notion of 'giving representative samples of ordinary citizens the power to decide policy issues' is also one of the principles gleaned by Daniela Cammack from her exercise in 'rethinking Athenian democracy'. (Cammack, 2012, p. 131)

presupposes the ongoing need for election. Unlike some sortition proposals, this thesis argues for a 'mixed' system of government as outlined in Chapter 8.4.

The literature on sortition is in the pre-paradigm state and the goal of this thesis is to introduce some conceptual clarity – the primary intention being to map out the terrain in a comprehensive manner that might be helpful for future researchers. However, as sortition has been part of the machinery of governance in antiquity and is deemed to have potential to improve the working of modern democratic states, this requires the evaluation of a wider literature, including classical philology, the history of political thought, deliberative and epistemic democracy, political sociology, statistical theory, psephology and media studies. As a consequence this is a longer and much more general dissertation than is the norm – Chapter 7 alone might well be a subject for a freestanding PhD. Whilst the conceptual project is (hopefully) comprehensive, the evaluation of this additional literature is, of necessity, less so – if the conceptual distinctions are sound then it will be up to subject specialists in these additional fields to apply the concepts to their own literature.

Most Kleroterians⁷ or 'sortinistas' (Stone, 2017) and advocates of minipublics, elide or ignore Pitkin's distinction between descriptive and active representation, whereas mainstream (Habermasian) deliberative democrats are so focused on the quest for the 'ideal speech situation' that issues of representativity are glossed over (see Chapter 5). 'Real democracy', according to its deliberative advocates, has nothing to do with the aggregation of (bourgeois) preferences and (self)-interests, the goal is social solidarity. As the means employed to establish real democracy is the (transcendental) principle of discursive rationality ('universal reason'), it doesn't matter too much *which* citizens get to participate (so long as historically disadvantaged subaltern voices are well represented). (Bohman, 1996, p. 191)

Whether for reasons of incremental pragmatism (O'Leary, 2006; Van Reybrouck, 2013), or just hedging their bets (Callenbach and Phillips, 2008), most Kleroterians

⁷ A lively community of sortition advocates (both academics and activists) who trade insults on the 'Equality by Lot' discussion site: www.equalitybylot.wordpress.com

are prepared to countenance a bicameral system – one elected house and one allotted house – but there is no serious attempt to anticipate and resolve the inevitable conflict between the two. British political experience would indicate that the elected house will always trump the decisions of a house selected by any alternative procedure (heredity, appointment, sticking pins in the phone book, etc.). More importantly there is no attempt to distinguish between the different aspects of the legislative process (policy proposal and advocacy, revision and final legislative judgment) or to discuss the very different roles that election and sortition might play in each of these functions. This problem is addressed in Chapter 4 of this thesis, based on an important (and largely overlooked) distinction made by James Madison in *Federalist 10* between advocacy and judgment and the corrupting effect of combining both functions in a single ‘body of men’. James Harrington’s *Commonwealth of Oceana* (1656) provides a template for how this distinction might be implemented in the design of political institutions.

I.1 The democratic diarchy

Although we are accustomed to think of Athenian democracy in terms of the power (*kratos*) of the ordinary people (*demos*), and associate its birth with the 507 BC constitution of Cleisthenes, there is no evidence for the use of the word *demokratia* before the reforms of Ephialtes (462/1). Earlier sources used other terms, in particular two very different forms of equal rights, *isonomia* and *isegoria*. *Isonomia* – normally translated as ‘equal political rights’ – referred (*inter alia*) to the right of all male citizens to serve as a juror or magistrate and attend and vote at the assembly, where each vote carried the same numerical weight, irrespective of wealth, birth or connection. Assembly decisions were simple majorities, and the principle applied both to the verdict of the *dikasteria* (people’s courts) and *nomothetai* (fourth-century legislative panels). In this respect *isonomia* translates as (numerical) equality of outcome, or natural equality (Hansen, 1999, p. 83).⁸

⁸ In addition to the equal right to determine new laws, *isonomia* required that the law was implied impartially to all citizens, regardless of wealth, birth and social status. No Athenian citizen could be condemned without trial by jury (apart from thieves caught in the act, and who confessed to their crime).

However *isonomia* – in the sense of majority voting (or loudness of shouting) – was also the decision rule of the Spartan *apella*⁹ and the Roman *comitia*. What made Athens democratic, rather than oligarchic, was the combination of *isonomia* and *isegoria* (equal speech) – the equal right to advise citizens in the assembly – in Sparta and Rome this right was restricted to the nobility and the magistrates. *Isegoria* was a form of equality available to *ton Athenaion ho boulomenos hois exestin* ('he of the Athenians who wishes from amongst those who may'). In practice only a tiny minority of citizens – mostly the self-appointed political class (*rhetores*)¹⁰ – availed themselves of this form of equal liberty, so *isegoria* bears a close affinity to the modern concept of (formal) equality of opportunity (Hansen, 1999, p. 83).

Nadia Urbinati constructed her 2014 book *Democracy Disfigured* around a similar diarchy – in her case between sovereign will [*isonomia*] and opinion [*isegoria*]. '[T]he diarchy of "votes" and "opinion" is thus the key to appreciate democracy as a government that pivots on equal freedom' (*ibid.*, pp. 14-15).

As this thesis is a work in political theory (leading to tentative institutional proposals) rather than an exercise in Classical-era philology, Chapter 2, on the Athenian *polis*, only offers a brief outline of the extensive literature on the *isegoria/isonomia* debate. My motive for revisiting the classical literature – apart from the fact that the Athenian *demokratia* was a fully functioning system of government that lasted for two centuries – is an attempt to avoid certain linguistic confusions in Urbinati's book (discussed at length in Chapter 1). The same problem is to be found in Bernard Manin's *Principles of Representative Government* in which he refers to *isonomia* (the will of 'Parliament as a whole') as the 'higher will'; and *isegoria* (as expressed in the streets, in petitions and in the columns of the press') as the 'lower will' (Manin, 1997, p. 205). The Athenians

⁹ The *apella* simply accepted or rejected the proposals submitted to it. In later times the actual debate was almost, if not wholly, confined to the kings, elders, ephors and perhaps the other magistrates.

¹⁰ Although the 'Old Oligarch' begged to differ, claiming that 'any wretch who wants to can stand up and obtain what is good for him and the likes of himself', thereby 'allowing even the worst people to speak'. (Pseudo-Xonophon, *Constitution of the Athenians*, 6)

would not have approved of this hierarchy of wills, believing that both forms of democratic freedom were equally important.

It is rare, however, to encounter the *isonomia/isegoria* distinction outside classical history and philology – they have not been appropriated by modern political theorists, hence my claim that they are uncorrupted by (modern) association. My role model in abjuring vernacular speech distinctions like ‘will’ and ‘opinion’ in favour of archaic neologisms (sic) is Michael Oakeshott, who adopted the Latin diarchy of *universitas* and *societas* as monikers for his two modes of civil association (Oakeshott, 1975). As his concerns were philosophical, rather than historical, it suited his purpose to use archaic terms (from Roman private law) that he purloined for his own purposes, as they were uncontaminated by modern linguistic associations. Oakeshott was a skilled historian, but his goal was philosophical – the formulation of a theoretical typology that was extrapolated from an empirical base (early-modern European political experience), rather than deduced from an abstract thought experiment. This is my primary reason for reverting to the original Greek terms, albeit at the risk of accusations of anachronism and grave-robbing from classical philologists, contextualists in the history of political thought and other historicists. Like Oakeshott, my concerns are old-fashioned – namely the timeless and universal *philosophical* principles underlying my chosen concepts, as opposed to their concrete historical incarnations (or speculations on the intentions of the historical authors that utilised them, or the development of political languages).

I.1.1 A note on style

In order to differentiate between the classical/historical and general/philosophical use of the *isonomia/isegoria* diarchy, italics have been reserved for the former only, thus ‘fifth-century *isonomia*’ but ‘representative *isegoria*’. Although the modern appropriation is derived from the original Greek, no exact correspondence is claimed, especially as the use of the concepts changed over the course of the classical period.

I.2 Argumentative structure of the thesis

1. Clarification of the conceptual distinction between isonomia and isegoria at the heart of the democratic diarchy.
2. Brief overview of the institutional changes in sixth-, fifth- and fourth-century Athenian democracy that implemented the distinction in different ways, and examination of its pathologies.
3. Clarification of the concept(s) of representation – essential to the implementation of the democratic diarchy in modern large-scale societies.
4. Study of how the democratic diarchy has been reincarnated in modern representative democracies, and examination of its pathologies.
5. Speculation on how the fourth-century reforms (delegation of the final lawmaking decision to randomly-selected nomothetic courts) might be used as a template for modern institutions to resolve some of these pathologies.

The approach of the (empirically-grounded) political theorist is to ‘adumbrate the idea after the fact’ (Finley, 1991, p. 58), to build a typology from the available data and then, like Aristotle, to use the resulting conceptual distinctions as a tool for understanding and classifying actual constitutions (Leroi, 2014). As a moral philosopher Aristotle then went on to outline notions of the ‘best’ constitution (in both ideal and realistic forms). This thesis is an exercise in Aristotelian political theory (as opposed to the ‘ideal’ normative variant).¹¹

I.3 Chapter Overview

Chapter 1, **The Democratic Diarchy**, establishes a foundation for the conceptual framework of the thesis in Nadia Urbinati’s distinction between ‘opinion’ and political ‘will’ (Urbinati, 2014). However, the thesis takes issue with Urbinati’s decision to conflate opinion and judgment, arguing instead that the latter is an

¹¹ Michael Saward’s study *The Representative Claim* (2010) adopts a similar policy of bracketing the normative evaluation until the end.

indispensable aspect of political will, rather than a synonym for opinion. An alternative foundation is located in the Athenian proto-democratic distinction between *isonomia* and *isegoria*, and the remainder of the chapter constructs an innovative typology based on the classical nomenclature.

Chapter 2, **The Origin of the Diarchy: The Athenian *Polis***, temporarily brackets out the distinction between historically-derived concepts and concrete historical practice by examining the development of *isonomia* and *isegoria* over three centuries, along with the link between conceptual and institutional change. The chapter introduces the idea of the sortition-based representative *isonomia* of the fourth-century legislative court as a template for modern political practice.

Chapter 3, **The Triumph of Election: Natural Right or Wrong**, opens with Jane Mansbridge's claim that 'legitimate coercion is the fundamental problem of governance'. This being the case, obtaining the consent of the governed is essential to the 'perceived legitimacy' of democracies. The chapter examines Bernard Manin's argument that sortition was superseded by election on account of the natural right theory of consent and concludes that James Fishkin's model of sortive 'consent-by-proxy' is more coherent than the 'tacit' and 'implicit' consent supposedly demonstrated by electoral approximation.

Chapter 4, **The Diarchy Reborn: The Representative Republic**, examines in depth the concept(s) of representation in the work of Hanna Pitkin and other theorists and suggests a correspondence between the two concepts relevant to political representation ('descriptive' and 'substantive' representation) and the two elements of the democratic diarchy (*isonomia* and *isegoria*). Madison's categorical distinction between judgment and advocacy in *Federalist* 10 is employed as an additional argument against Urbinati's equation of judgment and opinion.

Chapter 5, **Isonomia: The Deliberative Microcosm**, examines the competing 'Germanic' and 'Latinate' models of deliberative democracy and concludes that only the latter variant adequately respects the *isegoria/isonomia* distinction. Owing to its focus on the 'ideal speech situation', Germanic-style deliberation undermines the statistically-representative function of randomly-selected bodies, hence the reliance of this thesis on the competing 'Latinate' model of silent deliberation within, as demonstrated by the plenary element of James Fishkin's experiments in

Deliberative Polling, in which deliberators do little more than ‘weigh’ the arguments of competing advocates.

Chapter 6, **Epistemic Democracy and the Wisdom of Crowds**, draws a categorical distinction between the epistemic benefits of ‘cognitive diversity’ and the aggregate judgment demonstrated by the ‘wisdom of crowds’ literature. The chapter argues that the former – which can best be achieved by crowd-sourcing, knowledge/information markets and citizen initiatives – is an aspect of isegoria, whereas the latter is the appropriate mechanism for the aggregate judgment (representative isonomia) of a large randomly-selected group. The maintenance of this distinction is essential in order to counter Urbinati’s claim that ‘epistocracy’ is one of the recent ‘pathologies’ of democracy.

Chapter 7, **Isegoria: The Representative Claim**, develops Lisa Disch’s (Disch, 2014) argument that for reasons of democratic legitimacy, Michael Saward’s ‘representative claim’ model should apply purely to the isegoria side of the democratic diarchy. Election, direct-democratic initiative and a competitive media marketplace are examined as complementary ways of establishing isegoria in large-scale modern democracies.

Chapter 8, **From Theory to Praxis**, moves beyond the realm of political theory by outlining some possible mechanisms through which the combination of isegoria and isonomia outlined in this thesis might be realized in modern institutions. The requirements of political stability, fiscal probity and long-term national interests suggest that the increase in popular sovereignty (by proxy) introduced by randomly-selected legislative courts would need to be counterbalanced by an increase in the skills, stable tenure and accountability of government executives and advocates appointed by other means; otherwise the ship of state might well be put at risk by navigators ‘elected by bean’. This would involve a reversion from ‘popular sovereignty’ to the ancient ideal of the mixed constitution.

Appendix I, **The Brexit Lottery**, reproduces an article I published in April 2016, arguing for a sortition-based alternative to the forthcoming Brexit referendum.

Appendix II, **The Blind Break and the Invisible Hand**, reviews the rapidly growing literature on the political potential of sortition and concludes that the literature on the prophylactic (‘blind break’), and descriptive representation functions of sortition

have very little in common. The neologism *stochation* is suggested as an appropriate term for the latter, as the ‘blind break’ (Dowlen, 2008) instituted by the ‘lottery principle’ (Stone, 2011) is entirely different from the ‘invisible hand’ revealed by the law of large numbers (LLN).

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¹² Thanks also to Barbara for her role as general editor for Imprint Academic's *Sortition and Public Policy* series (of which I am a director).

CHAPTER ONE

1. The Democratic Diarchy

The central argument of this thesis is that the concept of ‘democracy’ is in fact an amalgam of two egalitarian norms¹ that originated in Greece in the classical era – equal speech (*isegoria*) and equal share in determining the political will (*isonomia*).² The thesis also argues that the contemporary ‘crisis of democracy’ is caused by the conflation of these two norms and that a resolution of the crisis will require the adoption of some 4th-century Athenian practices – in particular representative *isonomia* by means of large randomly-selected juries. The focus of this chapter is primarily conceptual and normative, but also involves a critical evaluation of Habermas’s study of the historical development of the public sphere. This is on account of its key role in the establishment of the existing theoretical paradigm, that presents the conceptual diarchy in terms of ‘will’ and (public) ‘opinion’. In my conclusion I will argue that the classical Athenian diarchy, whilst sharing many features of Habermas’s model, has more democratic potential than one ultimately derived from the era of absolute monarchy.

Nadia Urbinati constructed her 2014 book *Democracy Disfigured* around the Habermasian diarchy (‘will’ and ‘opinion’), claiming that these two aspects of the democratic diarchy ‘are different, and should remain distinct’ (Urbinati, 2014, p. 2). As her book is the best recent presentation of the diarchy and as its focus is conceptual rather than historical, this chapter draws heavily on her analysis:

[T]he diarchy of ‘votes’ and ‘opinion’ is the key to appreciate democracy as a government that pivots on equal freedom (*ibid.*, pp. 14-15).

¹ Consideration of the epistemic benefits of democracy is postponed to Chapter 6.

² For justification of the rendering of *isonomia* as ‘equal share in determining the political will’ see Chapter 2.

The former variety of freedom is an example of equality of outcome (assuming majoritarian norms), whereas the latter is an example of equal opportunity, as ‘the formal equality that makes us citizens does not equalize the [differential] power that speech gives us to influence each other’ (*ibid.*, p. 25):

Citizens’ right to an *equal share* in determining the political will (one person, one vote) ought to go together with citizens’ *equal opportunity* . . . to form, express, voice and give their ideas public weight and influence. (pp. 228-9, my emphasis)

The present thesis respects Urbinati’s diarchy, which draws heavily on Jürgen Habermas’s *Structural Transformation of the Public Sphere*,³ where ‘Habermas makes a distinction between opinion-formation in the public sphere and will-formation in formal political institutions’ (Eriksen and Weigard, 2003, p. 125). However, as I hope to demonstrate in this chapter, exactly which side of the dividing line between ‘will’ and ‘opinion’ political *judgment* is located has very different entailments for the political institutions required to put the conceptual diarchy into practice.

Democracy is ‘government by means of opinion’ (Urbinati, 2014, p. 2), and equal political speech rights should be afforded to any citizen who wishes to exercise it. At the same time she insists on the primacy of democratic proceduralism (every vote has equal weight) and defends it against those who seek to privilege epistemic and other non-political goals, by arguing that ‘a commitment to “truth” in politics makes consent redundant’ (*ibid.*, p. 10). ‘Will’, in Urbinati’s model ‘stands for *procedures, rules and institutions* . . . authoritative decisions that obligate all the subjects equally’. (p. 22, emphasis in original). ‘Citizens’ equal rights to an equal share in determining the political will translates as one-person-one-vote’ (p. 28); ‘The normative value of democratic proceduralism is its impeccable ability to rely upon and reproduce equal liberty’ (p. 58).

³ The common ground between Urbinati and Habermas is limited to this early (1962) book. Habermas’s later work on deliberative democracy is viewed by Urbinati as a major contributor to the ‘epistemic pathology’ that is currently undermining democratic proceduralism.

According to Rousseau, popular participation in determining the sovereign will is crucial, because:

if citizens obey laws that they do not make directly, the system in which they live is not political, although they may call it so, because the autonomy of the sovereign will is the substance that makes for a body politic. (*ibid.*, p. 1)

Opinion, on the other hand, is an equally important component of the democratic diarchy:

A democracy without public opinion is a contradiction in terms. Insofar as public opinion can arise only where intellectual freedom, freedom of speech, press, and religion, are guaranteed, democracy coincides with political – though not necessarily economic – liberalism. (Kelsen, 1999 [1945], pp. 287-288)

Democratic Athens ‘was conceived as a *politeia en logois* (a polis based on speech) and its citizens were defined as *hoi boulomenoi* (“whoever wishes to do so”,⁴ i.e. to address the assembly). The electoral transformation of modern democracy did not change this principle’ (Urbinati, 2014, p. 20), but geographical and demographic considerations presuppose some sort of representative mechanism for isegoria.⁵ Aristotle held that a viable *polis* was self-sufficient, but could stretch no further than those capable of hearing the herald’s cry;⁶ Mill argued, however, that modern (print) media would enable an extended virtual forum of opinions by including issues of popular concern in the public arena: ‘the newspaper press, the real equivalent, though not in all respects an adequate one, of the Pnyx and the Forum’ (Mill, 1991, p. 210). And more recently:

⁴ Lit: ‘those who are willing’.

⁵ Chapter 7 is devoted to unpacking the notion of representative isegoria.

⁶ ‘Who can be the general of such a vast state, or who the herald, unless he have the voice of a Stentor?’ (Arist., *Pol.*, 1326b6)

Thanks to broadcasting, the whole world might become in some sense a public meeting. . . . And long before radio was invented, skillful reporting and a cheap Press had done something of the same thing. (Lindsay, 1930, p. 24)

In an earlier work, Urbinati acknowledged the origin of the will/opinion diarchy in classical Athenian political thought:

Applying the two kinds of equality practiced in Athens to representative democracy suggests that *isonomia* regulates the distribution of suffrage [will] and *isegoria* the distribution of voice [opinion]. (Urbinati, 2006, p. 40)

Urbinati views the two forms of equality from a classical perspective:⁷ *isonomia* presupposes ‘numerical’ equality (all votes carry equal weight, and are blind to inequalities of wealth, status and influence). *Isegoria*, however, presupposes ‘proportional’ equality:

[R]epresentation is a political process that operates in the domain of proportional equality because it is a means by which differences seek public visibility and advocacy . . . all ideas should have a chance to be represented, not only those that get the majority of the votes. (*ibid*)

While in the modern context this is a justification for proportional representation and discursive democracy, the Athenian notion of proportional representation, particularly the Platonic version, is more concerned with the ‘merit’ of the person(s) proposing the ideas.⁸

But who is to judge which opinions deserve representation (assuming we are not going to leave it, like Plato, to the judgment of Zeus)? Where this thesis parts company with Urbinati is over her (tautological) insistence that judgment is synonymous with opinion: ‘It is important that I make clear from the start that I use

⁷ Aristotle, *Nicomachean Ethics*, 1130b-1132b; cf. Plato, *Laws*, VI.757b-c.

⁸ See Chapter 7.1.

the words “opinion” and “political judgment” interchangeably’ (*ibid.*, p. 22). But can this be an appropriate use of the word ‘judgment’? Whilst it’s clearly valid in the colloquial sense of ‘in my judgment’ (synonymous with ‘in my opinion’), the primary use of the term judgment is derived from juridical practice – ‘the evaluation of evidence to make a decision’. The derivation from the Latin *iudico* (‘to pass judgment’), via the old French *jugement*, is another reason to privilege the juridical meaning over the colloquial use. The Latin stem of the word judgment – *ius* (‘that which is binding’) – has nothing in common with *opinionem* (‘opinion, conjecture, fancy, belief, what one thinks’). Everyone in a democracy should be entitled to freely express their opinion and seek to influence the opinions of others, but the role of judgment is to evaluate the merits of competing opinions, so political judgment is clearly *an equal share in determining which opinions we should be bound by* [isonomia]. The role of the judge (or jury) is to deliberate by *weighing* the evidence/opinions and to decide which are the most persuasive – the term deliberation being derived from the Latin *liber* (weight). The context (the making of laws – directly or via the selection of political representatives) would suggest that the juridical meaning should trump the colloquial and that judgment should be assigned to the sovereign will element of the democratic diarchy. Note that my objection is not to the will/opinion diarchy per se, merely to Urbinati’s decision to attribute judgment to the latter function.

Elsewhere, however, she appears to contradict herself when she equates judgment with isonomia by acknowledging that candidates ‘become objects of judgment on the part of the voter’ (p. 26); ‘the right to vote in a modern democratic sense, which stresses the judgment of each citizen in the act of making a decision’ (p. 178); voters ‘predict how the candidates will behave and judge them accordingly’ (p. 179); ‘the authoritative will of the people must follow rules and procedures that are meant to respect or reflect individual judgment’ (p. 192); ‘when people used to vote for parties with a platform they exercised their judgment on future politics’ (p. 216). She also appears to agree with Rousseau’s distinction between *two* forms of judgment: people ‘can make good judgments in the general interest’ when they determine the sovereign will in the assembly but ‘somebody has to call to their attention the need for a specific law or policy because “it is in this judgment that they [the people] make mistakes”’ (*ibid.*, p. 42). Rousseau, in his admiration for Sparta, denied that the latter form of judgment should be available to

all (it should be restricted to delegated government officers). Given these multiple and conflicting meanings of the word judgment, it's hard to see how it can be a useful part of a rigorous conceptual model, hence my preference for the original Athenian diarchy (*isonomia* and *isegoria*).⁹

Granted that most voters 'simply do not have meaningful beliefs [opinions], even on issues that have formed the basis for intense political controversy among elites' (Converse, 1964, p. 245), nevertheless *voting* is an act of judgment, albeit often a poorly-informed one. This remains true, irrespective of whether voters are registering a choice between policy options (by judging policy proposals in a manifesto or voting in a referendum), rushing to Rousseau's assembly to determine the general will, evaluating a 'representative claim' (Saward, 2010) or merely, like the audience in *Pop Idol* or *Strictly Come Dancing*, participating in the political beauty contest that is dignified by the term 'audience democracy' (Manin, 1997, pp. 218-234). The epistemic merit (if any) of the judgment (addressed in Chapter 6, below) is orthogonal to its isonomic status (all votes in elections¹⁰ or *Pop Idol* count the same).

Opinion has entirely *analogue* properties – not only are there a multitude of different opinions but the individuals holding them may be located on a spectrum from the 'highly opinionated' to the indifferent Gallic shrug ('comme ci comme ça'). Political will/judgment, by contrast, is a *binary* (digital) function – legislative proposals ultimately have to be reduced to a simple up/down vote. This requires the form of judgment that Aristotle called *phronesis* and Kant *die Urteilskraft*:

⁹ This thesis does not adopt the methodology of 'ordinary language' political philosophers like Hanna Pitkin who have described their task as 'attending carefully to the way in which we ordinarily use words' (Pitkin, 1967, p. 6). The approach of this thesis is the opposite in that 'new' and unfamiliar concepts (that have an ancient provenance) are introduced to clarify analytic distinctions that are confused by vernacular words like 'will' and 'opinion'. Despite Pitkin's claim that, if she had read Wittgenstein, 'it would be a different [better?] book' (ibid., pp. 254-5, n. 14), the introduction of a family resemblance of linguistic usage would have further obfuscated the confusion. See Introduction, p. 17, above for Michael Oakeshott's similar reasons for adopting the Latin terms *societas* and *universitas* for his diarchical model of the modes of political association.

¹⁰ This is only true of PR-based electoral systems, as under single-member plurality (FPTP) systems opposition votes in 'safe' seats are effectively worthless.

the particular quality of human reason which is based neither on intelligence nor moral virtue, and which makes it possible to make up one's mind about particular cases where there are no given answers as to what is correct. (Eriksen and Weigard, p. 122)

Urbinati's attempt to separate judgment from sovereign will deprives the latter of all epistemic value; and conflates the notion of will and willfulness (in the pejorative sense of acting on impulse, as opposed to considered judgment) – itself a reflection of the pre-modern distinction between the *voluntas* (will) of the prince and the *ratio* of public deliberation (Habermas, 1992, p. 53).

To Urbinati, however, 'the identification of judgment in the juristic mode with political judgment is among the most relevant signs of the epistemic infiltration of democratic proceduralism' (Urbinati, 2014, p. 86). However, when a voter enters a judgment on a political candidate (or a question in a referendum) there is no obvious way to determine if this is an epistemic act (determining the general good) or simply registering a personal preference (act of will). In all probability it will be a combination of the two – the voter will indeed be influenced by her personal interests in voting in a certain way but will also consider the epistemic plausibility of the representative claim being evaluated. One of the problems with the Rousseauian project is the reification of a purely analytical distinction (between the *volonté générale* and the *volonté de tous*).¹¹ In practice voters will exercise their isonomia in judging what is in their own interest *and* in the general interest. As such *a vote is a judgment expressed through the medium of an act of will.*

Although, as in classical-era Athens, only a tiny number of citizens may choose to exercise their equal speech rights (isegoria), *all* citizens register their judgment when they contribute to the determination of the sovereign will in the polling booth (isonomia). The act of judgment is metaphorically equivalent to the act of measurement that collapses the quantum-mechanical wave function, via which a superposition of several eigenstates [opinions] appears to reduce to a single

¹¹ As Samuel Freeman has pointed out, assessing one's interests is not necessarily opposed to making judgments in the general interest. (Freeman, 2000, p. 375)

eigenstate [will] via the act of measurement [judging/voting]. If this is true then judgment is synonymous with will, not opinion.

Urbinati denies the relevance of the juridical mode of judgment to politics on account of its epistemic character (the role of a trial jury being to uncover matters of fact):

The identification of judgment in the juristic model with political judgment is among the most relevant signs of the epistemic infiltration of democratic proceduralism. (Urbinati, 2014, p. 86)

This claim, however ignores the historical fact that final legislative judgment in the mature (fourth-century) Athenian democracy was transferred from the assembly to large randomly-selected legislative courts (*nomothetai*). Although this was partly on account of epistemic considerations (legislative decisions in the assembly were often hurried and poorly considered) it was primarily done for administrative convenience. It would not, however, have occurred to Athenians that this ‘juristic turn’ in any way undermined democratic proceduralism, as the informed judgment of the legislative jury was held to represent the will of the whole citizen body. The fact that the references in the primary literature to the establishment of the *nomothetai* are few and far between supports the view that the delegation of legislative decisions to large randomly-selected juries was not viewed as in any way undermining the sovereignty of the *demos*. This being the case, the deliberative judgment of the fourth-century Athenian legislative courts is the template for the modern proposal outlined in Chapter 8 of this thesis.

1.1 Structural transformations and the creation of public opinion

The pre-modern source of the will/opinion diarchy can be found in Jean Bodin and Robert Filmer’s categorical distinction between the sovereign act of promulgation (the prerogative of the prince) and the deliberative advice of the sovereign’s ‘counselors’ that preceded it (Bodin, 1992, p. 23; Filmer, 1991, p. 47). Although the wise prince will listen to the opinions of his advisors, he is not bound by them, and

the implementation of the law by royal promulgation is his sole prerogative. The counselors offer their deliberative judgments (opinions), but the ultimate act of law is the sovereign judgment of the prince.¹² This ambiguity of the term ‘judgment’ (deliberative and judicial) is the reason for my preference for the original Athenian diarchy. To the Athenians, sovereignty (in the assembly and the legislative courts) was a matter of democratic judgment (*isonomia*) between the conflicting opinions of the *rhetores* and *demagogoi*, exercising their *isegoria* rights. Urbinati’s claim that ‘only in direct democracy are opinions identical with will because they translate immediately into decisions’ (Urbinati, 2014, p. 26) omits the crucial fact that the vote over individual policies in a direct democracy is also an act of judgment – choosing between conflicting advice/opinions on an issue-by-issue basis. As she rightly points out, the ‘miraculous’ transformation of violence into democracy – anticipating (and thereby pre-empting) the probable outcome of a fight by counting the strong arms in the opposing armies – is because ‘the weight of votes exceeds that of the numbers [as] . . . candidates become objects of judgment on the part of the voters’ (*ibid.*, pp. 25-6). Once the secret vote was established, members of rival groups could even vote for each other’s leaders without being accused of treachery.

Urbinati’s case for democracy as government by opinion is indebted to Jürgen Habermas’s *Structural Transformation of the Public Sphere*, and this section draws heavily on Habermas’s analysis of the historical record. The pre-democratic notion of representation (‘representative publicity’) amounted to the king or lord representing himself before an audience of spectators. The king was the only ‘public’ person and the sovereign will was his alone; the king merely displayed his power and there was no public discussion, as there was no ‘public’ in the modern sense (Habermas, 1992, p. 7). Representation was not about political communication, but the display of social status – the full expression of this doctrine being Louis XIV’s ‘*L’État c’est moi*’. (*ibid.*, p. 10)

¹² This was the reason for President Harry S. Truman’s legendary preference for one-armed economic advisers: ‘on the one hand this, on the other hand . . .’. But it’s the judgment of the president that matters in the end, because ‘the buck stops here’.

The growth of the capitalist mode of production (which extended economic production beyond the household) was crucial in the creation of the 'public' sphere: 'modern economics was no longer oriented to the *oikos*; the market had replaced the household, and it became "commercial economics"' (Habermas, 1992, p. 20). Hannah Arendt likewise refers to this 'private sphere of society that has become publicly relevant' when she contrasts the modern public/private relationship to the ancient and medieval (Arendt, 1958, p. 46).

Another crucial factor in the development of the public sphere was the 'traffic in commodities and news created by early capitalist long-distance trade' (Habermas, 1992, p. 15). The traffic in news was the result of commercial imperatives – merchants needing information about ships, the weather and the political situation in countries they were trading in. As this need became more widespread, news reached a general audience:

The traffic in news developed not only in connection with the needs of commerce; the news itself became a commodity. Commercial news reporting was therefore subject to the laws of the same market to whose rise it owed its existence in the first place. It is no accident that the printed journals often developed out of the same bureaus of correspondence that already handled hand-written newsletters. (Habermas, 1992, p. 21).

This was the origin of a critical, debating press – an essential step in the creation of public opinion – that facilitated the transition from the 'speech of power' (representative publicity) to the 'power of speech' (Lefort, 1988, p. 38). The new journals were also appropriated by government agencies in order to communicate royal decrees to their subjects (or at least those who could read), thereby creating a divide between the literate 'public' and the 'private' common man.

According to (Habermas, 1992), this new public sphere was 'bourgeois' in nature, its immediate historical origins being the coffee houses and commercial exchanges

of eighteenth-century England along with the *salons* of France.¹³ The original Greek categories public (*polis*) and private (*oikos*) only assumed their modern meaning with the onset of capitalism, when economic production moved beyond the household and manorial *fief* – the noun *Öffentlichkeit* (public sphere) being rarely used in Germany before the nineteenth century (Habermas, 1992, pp. 2-3).

The political public sphere had its origins in discussions based around artistic and literary journals and periodicals – as early as the seventeenth century periodicals existed which mixed criticism with news. Although the critical tradition was largely literary in origin (*literarische Öffentlichkeit*), it soon morphed into political criticism, and journals that at one time merely communicated government edicts to the ‘public’ began to bite the hand that fed them. The public sphere

was now casting itself loose as a forum in which the private people, come together to form a public, readied themselves to compel public authority to legitimate itself before public opinion. The *publicum* developed into the public, the *subjectum* into the [reasoning] subject, the receiver of regulations from above into the ruling authorities’ adversary. (Habermas, 1992, p. 26)

Habermas claims that the ‘fourth estate’ – an independent field of political criticism – was ushered in by the publication in 1726 of Bolingbroke’s *The Craftsman*, founded in opposition to Whig cabinet rule. (Habermas, 1992, p. 60)

Seeing as participation required significant leisure time and education (owing to the discussion of art and literature), participation was effectively limited to wealthy property owners:¹⁴

¹³ At the beginning of the 18th century London had approximately 3,000 coffee houses (Habermas, 1992, p. 32), and towards the end of the century, Germany had approximately 270 literary societies.

¹⁴ This provides another parallel between early-modern capitalism and the Greek public sphere – most Greek citizens with the free time to participate actively in public life were slave owners, the difference being that in Greek democracies the citizens who participated in *lexis* (discussion) in the *agora* (market place) also constituted the sovereign law-maker in the *ecclesia* (assembly). Not so in early-modern states, where political participation was

the public . . . was the bourgeois reading public of the eighteenth century. This public remained rooted in the world of letters even as it assumed political functions; education was the one criterion for admission – property ownership the other. (Habermas, 1992, p. 85)

This was on account of the Kantian argument that a free citizen must be his own master – anyone who worked for wages was the servant of another man. A man without property was not a citizen, but could become one some day (Habermas, 1992, p. 111). However success in the public sphere depends on the right *arguments*, not social status:

Through public discussion and reasoning different views on political questions may be subjected to criticism, and the public sphere is hence a necessary channel for establishing democratic legitimacy. (Eriksen and Weigard, 2003, p. 8)

‘Public opinion’ and the culture of rational-critical debate had its origins in the bourgeois reading public and the goal was the preservation of the interests¹⁵ of the capitalist social class by constraining the illegitimate use of power by the state – thereby developing the diarchy of the (royal) will and public opinion. Much of the political debate was on the topic of absolute sovereignty and the need to temper royal *voluntas* with public *ratio*:

A political consciousness developed in the public sphere of civil society which, in opposition to absolute sovereignty, articulated the concept of and demand for general and abstract laws [as opposed to sovereign decrees] and which ultimately come to assert itself (i.e.

limited to the exchange of opinions (Habermas, 1992, p. 3), hence the distinction between will and opinion (which would not have made sense in a Greek democracy).

¹⁵ Although there is a strong connection between the public sphere and the Hegelian notion of civil society as the realm of production and exchange, it does include other institutions, the important distinction being independence from state bureaucracy.

public opinion) as the only legitimate source of this law.¹⁶ (Habermas, 1992, p. 54)

The public sphere should not be seen as existing prior to or independent of decision-making agencies but as emerging in opposition to them . . . This view of the emergence of the public sphere is based on the contention that the state originated, more or less, through war or brute force. Only subsequently was state authority democratized, i.e. subjected to the rule of law. First came the state, then came democracy. Collective identity has to be made rather than merely discovered. (Eriksen, 2000, p. 58)

A key factor in the development of the independent public sphere in Britain was the ending of most forms of censorship by the lapsing of the licensing act in 1695 – ‘compared to the press in other European states, the British press enjoyed unique liberties’. (*ibid.*, p. 59)

The evolution of parliamentary democracy in Britain (partly a product of contingent factors resulting from the Hanoverian succession) meant that during the eighteenth century the king’s predominately aristocratic advisors assumed the (quasi-independent) status of ministers of state, including a ‘prime’ minister, so the ‘will’ element of the democratic diarchy became an amalgam of royal and aristocratic will. The limited franchise of eighteenth-century democracy meant that the bourgeoisie were still largely excluded from political life – as the House of Lords was still the dominant power – hence the continuing divide between (royal/aristocratic) sovereign will and (bourgeois) public opinion. The sovereign was required to legitimise itself before the critical judgment of the rational-critical public, but few among the critics had the vote (the power to convert judgment into political will), hence Habermas and Urbinati’s positioning of judgment in the (impotent) field of opinion. The sovereign state, however, was put in touch with the

¹⁶ The parallel between this and the fourth-century (Athenian) call to return to the *patrios politeia* – characterized by the rule of law rather than the rule of men – will be explored in the next chapter.

needs of society through the medium of public opinion (and, as before, the wise prince listened to his counsellors).

The 'public' was divided between the small number who used their reason/judgment critically and the even smaller number who could express their political will by voting or sitting in parliament (the vast number of 'private' men being excluded from both). But that was all set to change with the rapid expansion of the franchise (and educational opportunity and wealth redistribution) during the nineteenth and twentieth centuries, making Habermas and Urbinati's ongoing separation between will and judgment something of an eighteenth-century anachronism. The Great Reform Act of 1832 enfranchised the majority of the (male) bourgeoisie (holders of property worth the substantial (at the time) sum of £10 p.a.), removing the gap between judgment and will amongst the newly enfranchised. This development led to Marx's claim that 'the executive of the modern state is but a committee for managing the common affairs of the whole bourgeoisie' (Marx & Engels, 2004, Chapter 1). From that point on, the parliamentary state was an organ of bourgeois will, not just a target of its critical comments.

The bourgeois constitutional state (as theorised by Carl Schmitt) was an attempt to reconcile political will and reasoned judgment via the medium of general laws: 'Law is not the will of one or of many persons, but something *generally reasonable*; not *voluntas*, but rather *ratio*' (Schmitt, 2008, p. 182). The law involves a hybrid of reason/opinion (which formulates/justifies the law) and will (which enforces it) so the constitutional state seeks to bring together the two elements of the democratic diarchy, but in a slightly different way:

The distinction between legislative and executive power was modelled on the contrast between norm and action, between reason ordering and will acting. (Habermas, 1992, p. 82)

Hobbes's *auctoritas facit legem* was replaced by *veritas non auctoritas facit legem* (truth, not authority makes the law). Reason contains power. (Habermas, 1992, p. 53). 'Public debate was supposed to transform *voluntas* into a *ratio* that in the public competition of private arguments came into being as the consensus about what was practically necessary in the interest of all. (*ibid.*, p. 83)

But the contradictions underlying the constitutional state (which was predicated on the restriction of the franchise to property owners), led to its rapid demise: 'The general right to vote, the organisation of the Labour movement, and the formation of political parties, these factors in reality rendered impossible the idea of politics as a discourse between equals' (Eriksen and Weigard, p. 182). The expansion of the franchise led to the public sphere becoming an arena of competing private interests and violent conflict (Habermas, 1992, p. 132). Laws passed according to public pressure no longer embodied rational consensus:

The public sphere of social-welfare-state democracies is rather a field of competition among conflicting interests, in which organizations representing diverse constituencies negotiate and compromise among themselves and with government officials, while excluding the public from their proceedings. (Habermas, 1992, p. xii)

Rather than the benign liberal diarchy of public opinion making itself known to government via parliamentary discussion, in modern democracies 'the antagonistic political actors always are the parties in their roles as party-in-government and party-in-opposition'. (Habermas, 1992, p. 239)

According to Habermas, the structural transformations of the public sphere (resulting primarily from the extension of the franchise beyond the bourgeoisie to include the masses)¹⁷ led to the relationship between will and public opinion reverting to a form of neo-feudalism. Once again politicians represent themselves before the voters, a development legitimised by Bernard Manin as the 'audience democracy' stage of representative government (Manin, 1997, pp. 218-234). According to Habermas this amounts to the 'refeudalisation of the public sphere':

At one time publicity had to be gained in opposition to the secret politics of the monarchs Today, on the contrary, publicity is

¹⁷ Who abjured their historical destiny to seize control of the state (which would, according to Marxist theory, have ensured that their will would have become the dominant one), preferring instead to go shopping.

achieved with the help of the secret politics of interest groups.

(Habermas 1992, p. 201)

‘The public sphere in the world of letters was replaced by the pseudo-public or sham private world of culture consumption’, and public opinion is now manipulated by the media, advertising, culture and PR industries to create a public where none exists and to manufacture consensus (Habermas, 1992, p. 160). Modern people watch soap operas and ‘reality’ TV rather than talking about newspapers in a coffee house.¹⁸ Other writers are equally scornful of developments through which ‘politics turns into a spectator sport’ (Mair, 2013, p. 44), or in Giovanni Sartori’s term, the age of ‘video politics’. (Sartori, 2002)

Urbinati was motivated to write her book by the ‘plebiscitarian disfiguration’ of the public sphere in mass democracy, as pointed out by Habermas in 1962 when he published the original German edition of his thesis (*Strukturwandel der Öffentlichkeit*). This has come to its nadir with what she refers to as the ‘Berlusconi effect’ (Urbinati, 2014, p. 4), whereby a single charismatic figure dominated Italian political life for over a decade via his ownership of six national television channels (*ibid.*, p. 233).¹⁹ This, she claims, is a paradigm example of the ‘privatisation’ of the public sphere (*ibid.*, p. 3) and goes on to argue that the best remedy would be the sponsorship of ‘public’ media. This is ironic, given the origins of the public sphere in the capitalist mode of production and, in particular, the development of the press from the commercial needs of merchants and traders for information.²⁰ Her solution (an increased role for ‘public’ media) is equally ironic, as her paradigm example is the BBC – a monolithic organization that is funded by what is effectively

¹⁸ Habermas has, along with (Fraser, 1992) more recently described this as the ‘weak’ public sphere, by contrast with the ‘strong’ public (parliament), the locus of (representative) will-formation and decision making (Habermas, 1996).

¹⁹ In his review of *Democracy Disfigured* John P. McCormick describes the book as a ‘political polemic’ brought about by ‘a kind of Berlusconi hangover’. (McCormick, 2015, p. 170)

²⁰ For an outline of Habermas’s thesis on the origins of the fourth estate in the ‘traffic in commodities and news created by early capitalist long-distance trade’, see p. 32, above. Although modern mass media are substantially funded by advertising revenue, newspapers and journals originated on a purely subscription model.

a poll tax, enforced by the coercive power of the state. Chapter 7.4.1 examines the issue of media ownership and the competing claims of market competition and 'public' media for representative isegoria.

Urbinati's focus on democracy as opinion/judgment might well be viewed as an attempt to reclaim the public sphere from manipulative populism and the other forms of neo-feudalist 'acclamation' outlined by Habermas. However her parallel focus on democratic proceduralism (of political will) is a reaction against taking the Habermasian ideal of rational-critical debate to its epistemic conclusion – the replacement of *doxa* by *episteme* (Urbinati, *ibid.*, p. 5). Although I am sympathetic to Urbinati's overall claim:

The conceptualization of representative democracy as diarchy makes two claims: that 'will' and 'opinion' are the two powers of sovereign citizens, and that they are different and should remain distinct, although they are in need of constant communication. (Urbinati, 2014, p. 2)

the argument of this thesis is merely that Urbinati's goal would be better served by the reintegration of judgment and political will (the characteristic of the bourgeois constitutional state) by empowering the deliberative judgment of a statistically-representative microcosm as a proxy for the will of the whole citizen body. Opinion and advocacy, however, require an entirely different kind of representative mechanism and this is best achieved by Michael Saward's 'representative claim' model, as fleshed out in Chapter 7.

As I argue in Chapter 4, a better modern approximation of the original Athenian democratic diarchy is James Madison's distinction between judgment/will (isonomia) and advocacy (isegoria). Urbinati agrees fully with Madison that, unlike in the courtroom, 'the actors who advocate their cause in casting a ballot or voting in a representative assembly are the same ones who pass judgment' (p. 123), but ignores Madison's concerns that the fusion of advocacy and judgment has considerable potential to corrupt the political system – 'a [single] body of men are *unfit* to be both judges and parties [advocates] at the same time' (*Federalist*, 10, 8, my emphasis). The goal of the practical proposal outlined in Chapter 8 of this thesis is not to depoliticize the political process but to preserve the integrity of the

diarchy handed down to us from the founders of democracy by keeping the two elements – advocacy/opinion/*isegoria* and judgment/will/*isonomia* – at arm’s length. Modern representative democracy has hopelessly conflated these two elements and the goal of this thesis is to reinstate the distinction, both conceptually and institutionally.

Purely on the basis of Urbinati’s own arguments, the *isonomia/isegoria* distinction is a better candidate for the democratic diarchy than will/opinion. Political ‘will’ has its origin in the ‘sovereign act of promulgation’ – the sole prerogative of the absolute monarch (Urbinati, 2014, p. 248). All Rousseau did was to alter the numerical constitution of the sovereign, but he still maintained the emphasis of Bodin, Filmer and Hobbes on sovereign will. *Isonomia* – ‘equal political right’ is, by contrast, a thoroughly democratic concept – Herodotus even claiming that it was synonymous with *demokratia* itself (*ibid.*, p. 247, n.12). Given the goal of Urbinati’s project (to rectify the ‘disfigurations’ of modern democracy), it would make sense to ground the project in concepts with a democratic rather than autocratic provenance. To the Athenians the sovereign act of will was simultaneously an act of judgment (between the conflicting opinions of those exercising their *isegoria* rights), so this is a better foundation for the diarchy of a democratic state than one based on Bodin and Filmer’s absolutist diarchy. As Dario Castiglione puts it in a review of Urbinati’s book:

judgment is more like a faculty, the ability of making considered decisions and reaching appropriate conclusions. In this sense it is something different from opinion, the latter being a view about something . . . thus framing judgment in a democracy may look like a different operation from guaranteeing the exercise of opinion – though such a guarantee may be an important aspect and presupposition of judgment itself. (Castiglione, forthcoming, pp. 5-6 (m/s))

Indeed, Urbinati does acknowledge that ‘opinion’ is a thoroughly ambiguous term (*ibid.*, p. 35) – at best a ‘gray’ zone (p. 29) – both in its Greek (*doxa*) and Roman (*opinio*) incarnations. To Plato *doxa* was a ‘view or belief that falls below the bar of philosophical analysis’, open to manipulation by unscrupulous politicians as it was a halfway house between emotion and action (*ibid.*). Democracy reserves no place for the authority of epistemic claims – to be of any value (according to Plato), *doxa*

needed to be transformed into *episteme*. However to Aristotle, opinion was a form of verisimilitude (*verum similes*) – ‘a species of truth in its own right’ and ‘synonymous with constitutional political order . . . and thus with liberty’ (p.31). The ideal city would be ruled by godlike heroes, but given that actual cities are composed of ordinary mortals, their very imperfection makes the exchange of opinions in the assembly the only way of making decisions that are advantageous and just for all (p. 33). Urbinati clearly sides with Aristotle (as she conceives him) rather than Plato when evaluating the role of opinion in the political domain.

Other ambiguities in the term ‘opinion’ became evident in modernity. The English and French everyday usage regarded *opinio* as uncertain and not fully-demonstrated judgment, and ‘technical and philosophical language, from Plato’s *doxa* to Hegel’s *Meinen*, corresponded to the term’s meaning in everyday language’ (Habermas, 1992, p. 88). Such usage was in the pejorative sense of ‘common opinion’, ‘vulgar opinion’ etc., but another meaning referred more closely to judgment, i.e. “reputation” or regard: what one represents in the opinion of others’ (*ibid.*, p. 87). Hobbes went on to remove opinion from the public sphere by making it synonymous with ‘conscience’ and therefore placing it in the private domain, alongside religious belief – Hobbes ‘reduced all acts of believing, judging and opining to the same [irrelevant] level’, as *Leviathan* posited ‘a state based solely upon the *auctoritas* of the prince’ (*ibid.*, p. 90). But, given the emphasis of radical Protestantism on the *primary* status of conscience (religious and otherwise), Hobbes’s rhetorical move had the opposite effect from that which the author intended: Locke’s *Essay Concerning Human Understanding* turned Hobbes on his head by elevating the ‘Law of Opinion’ to a category of equal rank beside divine and state law (Locke, 2014, bk. 2, ch. 28, sec. 11). Nineteenth-century liberals like Mill and Tocqueville subsequently came to view public opinion as a coercive force – ‘the yoke of public opinion’ – as opposed to the guarantor of reason against force in general (Habermas, 1992, p. 133).

The epistemological status of opinion was just as hotly contested on the other side of the English Channel: the *philosophes*, drawing on Bayle, adopted the original pejorative meaning of opinion as ‘a mental condition of uncertainty and vacuousness’ but argued that anyone capable of deliberative *ratio* could shake off the oppressive yoke of both public opinion and received wisdom. Rousseau, however – the first author to use the term *opinion publique* in his *Discourse on the*

Arts and Sciences – argued the case for the reliable common sense of the public against the corrupting influence of deliberative and ‘rational’ discourse. (Habermas, 1992, pp. 92-3). Hegel, however, claimed that the great man will ‘despise public opinion’ (Hegel, 2010, section 318), and to Marx it was nothing other than false consciousness (Habermas, 1992, p. 124).

Given her project to introduce some analytical clarity into our understanding of the democratic diarchy (a goal shared by this thesis), the choice of a concept (opinion) with such a rich and confusing history of multiple meanings is unwise. In sharp contrast to the contested nature of *doxa* (opinion), *isegoria* (equal speech rights) is simple and straightforward, both conceptually and institutionally. When not praising *isonomia*, Herodotus and his contemporaries selected *isegoria* as the essence of democracy (*ibid.*, p.62; c.f. Finley, 1973, p. 19), so, purely on the strength of Urbinati’s own arguments, *isegoria* would appear to be a stronger candidate for inclusion in the democratic diarchy than a highly contested and ambiguous term like opinion. The same is true for the other element in the diarchy (will) – a concept that, as she acknowledges, has its origins in the pre-modern theory of absolute royal sovereignty – unlike *isonomia*, a concept with robust democratic provenance.

1.2 Conclusion

This thesis agrees with Habermas and Urbinati that democracy can best be understood in terms of two distinct elements; however their chosen diarchy of ‘will’ and ‘opinion’ is inappropriate for the following reasons:

1. Political ‘will’ has its origin in the princely *voluntas* of the pre-modern theory of absolute sovereignty and should have no place in the vernacular of democracy.
2. ‘Opinion’ is an imprecise and highly disputed term – Habermas and Urbinati between them outlining at least four meanings relevant to politics. It is difficult to understand how the adoption of such a vague and ambiguous term can bring any conceptual clarity to an already misunderstood topic.
3. From a historical perspective, the working democracy valorized by Habermas, in which there was an effective balance between sovereign will and the critical public sphere, only functioned for around 100 years,

and under a highly restricted franchise. Habermas charted the subsequent disintegration of the public sphere – focusing on the transformation of culture and the media into a form of consumption under the domination of private interests – until the 1960s, and Urbinati's book describes the continuing race to the bottom over the following half century. The pathologies that they both deplore are the structural consequence of the expansion of the franchise, so it's hard to see how an informed and critical public could be re-established under conditions of universal suffrage. John McCormick, indeed, views Urbinati's project as little more than motherhood and apple pie, claiming that it is

an idealized version of some amalgam of Arendtian pluralism and Millian deliberative democracy; a model in which robustly representative public opinion emerges from interaction between society and government in a way that incorporates all citizens as actors and not as mere spectators. I would like to live in such a democracy. (McCormick, 2015, p. 171)

McCormick puzzles as to why Urbinati insists that democratic innovations based on the Athenian lottery are impractical (*ibid.*, p. 172) and another participant in the same review symposium also recommends 'citizens' juries, sortition, referendums and veto power institutions' as a way of overcoming the paucity of influence of public opinion on the institutional decision-making process (Biba, 2015, p. 165). Jeffrey Green also draws an (unfavourable) contrast between Urbinati's 'idealized' account of liberal democracy and his own 'realist' approach to contemporary democratic practice. (Green, 2015)

4. The positioning of judgment on the opinion side of the diarchy reinforces the positivistic view of *voluntas* as the arbitrary and 'willful' decree of the sovereign. Rather than public *ratio* merely evaluating and holding to account sovereign *voluntas* (which generally amounts to shutting the stable door after the horse has bolted), it would be better for the *sovereign will to directly represent the considered judgment of the people.*

This thesis takes up the suggestion of Robert Dahl (1989, p. 340) that the considered judgment/will of the people could best be revealed by a deliberative minipopulus, and rejects Habermas's claim that this is 'abstract and somewhat utopian' (Habermas, 1997, p. 317). Admittedly Dahl only devoted three paragraphs of his book to sketching an outline of the minipopulus, so my preferred model for the development of considered public opinion is the well-developed Deliberative Polling (DP) programme. Its principal architect, James Fishkin, studied under Dahl at Yale and acknowledges Dahl's minipopulus as the original inspiration for the Deliberative Poll. While Urbinati (mis)understands the DP as an example of the 'epistemic' corruption of democratic proceduralism (Urbinati, 2014, pp. 113-4), Habermas castigates Dahl for *ignoring* the need for 'rational' deliberation, by concerning himself with 'sociological' representation, including such factors as 'the statistical distribution of income, school attendance, and refrigerators' (*ibid.*, p. 318). As demonstrated by his original thesis (1992), Habermas has scant concern for representativity – sociological or otherwise – viewing it largely in terms of pre-modern 'representative publicity', and this lead has been followed by the Habermasian school of deliberative democracy (whose motto might well be '*ratio*, not refrigerators'), as demonstrated in Chapter 5, below.

The minipopulus and Deliberative Poll draw their inspiration from the randomly-selected legislative juries of fourth-century Athens, so the Greek diarchy of *isonomia* and *isegoria* – both concepts of impeccably democratic provenance – provides the theoretical model for this thesis. The next chapter explores the original Athenian democratic diarchy in greater depth.

CHAPTER TWO

2. The Origin of the Diarchy: The Athenian Polis

‘The best counselors are intelligent [but] it is the many who are best at listening to the different arguments and judging between them.’

Athenagoras at Syracuse (Thuc. 6.39)

Although we are accustomed to think of Athenian democracy in terms of the power (*kratos*) of the ordinary people (*demos*), and associate its birth with the 507 BC constitution of Cleisthenes, there is no evidence for the use of the word *demokratia* before the reforms of Ephialtes (462/1) and the earliest extant use of the word is in Herodotus (6.43.3, 131.1), but it was probably coined about the time of Aeschylus’ *Suppliants*, i.e. in the 470s or 460s. (Mitchell, forthcoming). Earlier sources used other terms: *eleutheria* (liberty), and a small group of concepts beginning with the prefix ‘iso’: *isonomia* (political equality), *isegoria* (equal speech), *isegonia* (equal birth) and *isokratia* (equal power), leading to the characterization of Athenian democracy in terms of the compound term ‘equal liberty’ or ‘equal freedom’ (Hansen, 1999, pp. 73, 81).

Contrary to modern misunderstandings, traceable to Benjamin Constant’s 1816 essay, the ancients did make a distinction between public and private liberty, and the focus of this thesis is purely on the public sphere – the *polis*. Political liberty was secured by a diarchy of two, very different, forms of equality, which should not be conflated. *Isonomia*, normally translated as ‘equal political rights’,¹ referred, *inter alia*,² to the right of all male citizens to serve as a juror or magistrate and attend and vote at the assembly, where each vote carried the same numerical weight, irrespective of wealth, birth or connection. Assembly decisions were simple

¹ Probably originally ‘order based on equality’.

² *Isonomia* was probably modelled on *eunomia* or ‘governance according to good laws’ (Raaflaub, 2004, p. 94). See p. 50 (below) for a discussion of equality *under* the law (as opposed to equality in law-making).

majorities, and the same principle applied to the verdict of the *dikasteria* (people's courts) and *nomothetai* (fourth-century legislative panels). In this respect *isonomia* translates as (numerical), or natural, equality (Hansen, 1999, p. 83). In fifth-century Athens the assembly was sovereign (in the fourth century, final legislative judgment was delegated to large randomly-selected nomothetic panels), and the equal right of all adult male citizens (or a representative sample thereof) to determine the laws indicated the *isonomia* at the heart of the Athenian *demokratia*. All citizens could, and most did, participate regularly in *polis* life (in addition to their rights as a private citizen, or *idiotes* – the modern derivation (idiot) being a legacy of Athenian contempt for a citizen who failed also to participate in public affairs).

What made Athens democratic, rather than oligarchic, was the combination of *isonomia* and *isegoria*, the equal right to speak in the assembly – in Sparta and Rome the latter was restricted to the nobility and the magistrates. *Isegoria* was a form of equality available to *ton Athenaion ho boulomenos hois exestin* ('he of the Athenians who wishes from amongst those who may'). In practice only a tiny minority of citizens – mostly members of the self-appointed political class (*rhetores*) availed themselves of this form of equal liberty,³ so *isegoria* bears a close affinity to the concept of (formal) equality of opportunity (Hansen, 1999, p. 83). Any citizen who chose to could seek to influence the debate (and the associated Greek notion of *parrhesia* encouraged frank and open speech acts), nevertheless *all* citizens attending the assembly (or the representative sample of citizens allotted to the legislative courts) exercised their equal political rights (*isonomia*) in judging the competing speech acts and determining the outcome.

The Athenians sometimes needed to be reminded of the diarchy at the heart of their *demokratia*, as illustrated by Pericles' last speech, in which he reminds the Athenians that they are just as responsible for the war as he is: 'I advised it [*isegoria*], but you voted for it [*isonomia*]' (Thuc., 2, VII). Thucydides makes the point again at the start of Book 8, commenting on the defeat of the Athenians at the

³ This is why Hobbes disparaged democracy as an 'aristocracy of orators' (Hobbes, 1994, p. 120).

hands of Syracuse: ‘they were angry with the orators who had joined in promoting the expedition, just as if they had not themselves voted it.’ Ditto with Aischines’ speech ‘On the Embassy’, when he observes that ‘I propose . . . while you vote’.⁴

The brief (and sketchy) excursion into classical-era history in this chapter is merely in order to provide some kind of historical provenance for the *conceptual* distinction at the heart of my own modern proposal. Given this limited purpose, I seek only to make four points:

1. The political system that the Greeks referred to as *demokratia* was in fact a hybrid of two important forms of equality – *isonomia* and *isegoria*.
2. This ideological distinction was implemented by a number of different institutions that changed over time.
3. The fourth-century reforms, which transferred the final decision in lawmaking to large randomly-selected juries were not viewed by the Athenians as undermining the *demokratia*, as the nomothetic panels were, in effect, delegated committees of the assembly (the change having been made primarily for bureaucratic reasons). However the fact that the juries were composed of older citizens who had sworn the Heliastic Oath was clearly intended to improve the stability and epistemic quality of the decision process. Law-making was a minor part of fourth-century political practice and the council and assembly continued to be the most important institutions, but the topic of this thesis is law-making (the most important aspect of *modern* politics), rather than ‘magisterial’ (executive) functions or ad hoc decrees, hence my exclusive focus on nomothesia (law-making).
4. The fourth century reforms also led in parallel to the increased use of election for the more important (primarily financial) magistracies and the

⁴ Aeschin. 2.160, trans. Adams. Note the orators’ use of the second person plural pronoun to refer to the *demos*, as opposed to the inclusive ‘we’ (Cammack, 2013b, p. 122), thereby indicating that the distinction between oratory (*isegoria*) and voting (*isonomia*) referred to differences of personnel, *rhetoires* and *idiotes*, that are entirely familiar to modern eyes. ‘The structure of Athenian politics was significantly closer to that of modern political systems than is commonly allowed’ (*ibid.*, p. 126).

‘professionalisation’ of the role of the political advisor, as exemplified by orators like Demosthenes and Aeschines.

The argument of this thesis is that the fourth-century delegation of isonomic judgment to large randomly-selected juries and the professionalisation of *isegoria* could usefully be a template for legislative procedures in large modern states.

The relative weighting of the two elements in the democratic diarchy is disputed by classical historians. On the one hand:

‘When Herodotos describes the birth of Athenian democracy it is *isegoria* and not *isonomia* that he singles out as the principal form of democratic equality’ (Hansen, 1999, p. 83).

Whereas, on the other:

‘It is an impressive witness to the importance which the members of the democratic Polis attached to its equal law that *Isonomia* should be their favorite ideological slogan, pre-eminent over even *Isegoria* or *Isokratia*.’ (Vlastos, 1953, p. 356)

Given this disagreement over the metonymy of the early Greek *demokratia*, the position of this thesis is that *both* norms were essential components of the Greek notion of equality, as incarnated in the institutions of fifth- and fourth-century Athenian democracy. Although scholarly disputes in philology are beyond the scope of this thesis, a very brief overview of Athenian history is necessary to justify my claim that the transition from assembly- to jury-based lawmaking was viewed at the time as entirely democratic, and that this could provide a precedent for the modern sortition project.

2.1 A short note on equality of opportunity

The term ‘equality of opportunity’ is used throughout this thesis in its *formal* sense – as befits its classical origins – as opposed to the modern emphasis on *substantive* equality. The Athenian phrase *ho boulomenos* translates as ‘he who wishes’ and refers, *inter alia*, to the formal right of any male citizen to address the assembly. (In practice this right was overwhelmingly exercised by a small minority of semi-professional politicians, self-selected and primarily drawn from the affluent

census classes.) Thucydides' thoroughly meritocratic rendition of Pericles' Funeral Oration is an ode to formal equality of opportunity:

[A]dvancement in public life falls to reputation for capacity, class considerations not being allowed to interfere with merit; nor again does poverty bar the way, if a man is able to serve the state, he is not hindered by the obscurity of his condition. (Thuc.2.37)

In practice, of course, some animals were a lot more equal than others (certainly in the fourth century) as 'the *demos* never produced spokesmen in the Assembly from their own ranks' (Finley, 1983, p. 27), although the Old Oligarch's diatribe against 'any wretch who wants to can stand up and obtain what is good for him' might suggest otherwise (see p. 64, below). Formal equality does nothing at all to create substantive opportunity, so the focus of modern egalitarians would be on removing the barriers – psychological, educational, financial, ethnic, gender, status etc – that dissuade the silent from exercising their speech rights. But that is not the sense in which the Athenians used the term *isegoria* so it is not the meaning adopted throughout this thesis.

The reason that the thesis does not address ways to ameliorate the inequalities that lead to the *individual* voices of the overwhelming majority of citizens going unheard is because, in large modern states, *isegoria* needs to assume a representative (collective) form. Chapter 7 outlines a number of representative mechanisms that enhance the *substantive* equality of citizens' voices in the modern democratic diarchy – including (paradoxically) the overwhelming majority who have nothing whatsoever to say.

2.2 Isonomia

Isonomia (ἰσονομία) is a compound term denoting equal distribution. According to Paul Cartledge:

The etymological root of *nomos* [νόμος] would seem to be a verb meaning 'to distribute'. What was on offer for distribution within the civic space of the polis was *timē*, status, prestige or honour, both abstractly in the form of the entitlement and encouragement to participate, and concretely in the form of political offices . . . By 500 BC

this broadly egalitarian ideal had engendered the concept of *isonomia*: an *exactly, mathematically equal distribution* of *timē* for those deemed relevantly equal (*isoī*), a precise equality of treatment for all citizens under the current positive laws (*nomoi*). (Cartledge, 2005, p. 15, my emphasis)

This leads to a perspective on *isonomia* as ‘the equal right of all citizens to exercise their political rights’ (Hansen, 1999, p. 396), the focus of this thesis being the right of all citizens to have an arithmetically equal share in a) governing and b) determining the laws under which they are to be governed – or ‘equal share of all citizens in the control of the state’ (Vlastos, 1953, p. 352). My emphasis on b) law-making, as opposed to a) governing (the role of randomly-selected magistrates), is on account of the focus of this thesis on the fourth-century institutional reforms to the *nomothesia* (law-making) process as a potential model for modern legislative practice. This thesis has little interest in the Athenian practice of selecting public administrators by lot for both numerical and epistemic reasons – the impossibility (and undesirability) of everybody ruling and being ruled in turn in large complex states.

Almost all scholars agree that *isonomia* referred to equal right in ruling, rather than just equality *under* the law (Hansen, 1999, p. 396). According to Gregory Vlastos’ rejoinder to (Gomme, 1956), equality under the law is certainly not a case of *political* equality (Vlastos, 1981, pp. 180-181). Equality under the law is a matter of normative, not natural equality and ‘is mostly described in language using the adjective *isos* instead of an abstract noun . . . or slogan as in the case of *isegoria* or *isonomia*’ (Hansen, 1999, p. 84). Although equality under the law was an important concept for the understanding of classical democracy, it is entirely uncontroversial (and, in theory, already operationalized) in modern democracies and therefore not a relevant aspect of equal law from the perspective of this thesis.

That *isonomia* in law-making may well be the most important element in the democratic diarchy (as opposed to *isegoria*), at least in its early incarnations, is born out by Victor Ehrenberg’s analysis of the policy of the ‘democratic’ monarch Pelasgus in Aeschylus’ *Suppliants*, dated to the beginning of the fifth century:

The essential constitutional facts are that the [democratic] form of government is strictly opposed to *autocratic* monarchy, that *the ruler depends on the decision of the people* and is responsible to them, that he leads the people by his oratory, and that *a decision in the assembly is reached by taking a vote through a show of hands*. (Ehrenberg, 1950, p. 524, my emphasis).

Note in particular that the numerical constitution of the ruler (in Aeschylus' case the mythical 'democratic' monarch Pelasgus) is irrelevant, so long as the final power is vested in the hands of the democratic assembly, where all citizens exercise numerical equality (*isonomia*) – that is why the term is *demokratia*, not *demarchia*. This remained largely true until the death of Pericles (*de facto* democratic monarch of Athens for three decades). When the democracy was restored in 403, *isegoria* in the legislative courts was restricted to the proponent of the new law and the five defence advocates elected by the assembly, and *isonomia* in lawmaking was achieved via the representative medium of large randomized juries.⁵

The task of the next three sub-sections will be to very briefly map the changing meaning of *isonomia* to changes in Athenian political institutions.

2.2.1 Sixth century: The reforms of Solon

Solon's division of the population into four property classes in 594 BC, the establishment of a people's court and (probably) elected council, along with the election of important offices of state (restricted to the top economic class) 'marked a complete break with the exclusive rights of a hereditary order, of a nobility of birth' (Finley, 1983, p. 13). Solon created the formal status of citizen and 'initiated a process whereby the *demos* became conscious of itself in forthrightly political terms' (Ober, 1996, p. 38). However, although a people's assembly that all citizens had the right to attend was created by Solon, its primary function was to elect magistrates and hold them to account. Aristotle classified the election and scrutiny

⁵ At the same time the assembly, according to Isocrates' *On the Peace*, continued to be dominated by demagogues – with *isegoria* reformulated as *parrhesia* (boldness of speech) – but that is not the concern of this thesis.

of magistrates by the people's assembly as a 'moderate' (type 1) form of democracy.

Solon's reforms only created intra-group *isonomia* (within each census class); as such the term would not have had popular appeal because the equal political rights of the *demos* were limited to electing magistrates (from the higher census classes). *Isonomia* was defined by way of contrast to tyrannical rule or *dynasteia* (Sealey, 1987, p. 99), it was 'the balanced equality of a society which previously had been oppressed by the rule of a tyrant. It meant the equality of peers, not of the people' (Ehrenberg, 1950, p. 531). *Isonomia*, assuming the term existed at the time of the Solonic 'moderate democracy', would probably have meant 'equality before the law' in the sense that that the (unequal) distribution of political rights and privileges within different social classes was upheld impartially.

Larsen argues that the word *isonomia* originated in connection with the expulsion of the tyrant in 510, i.e. *before* the Cleisthenic reforms (Larsen, 1948, p. 8) and that its earliest appearance (as an adjective) was in the aristocratic drinking-song on Harmodius and Aristogeiton.⁶ The two tyrannicides are praised because they made Athens isonomous by killing the tyrant, not because they empowered the *demos*:

I will bear the sword in a branch of myrtle
Just like Harmodios and Aristogeiton
When they killed the tyrant
and made Athens *isonomos* (PMG 893)

2.2.2 Fifth century: The reforms of Cleisthenes and Ephialtes

'Democracy was introduced into Athens by Kleisthenes in 507 BC' (Hansen, 1999, p. 27). However, the ideological catchphrase of the Athenian revolution was *isonomia* – that this predated *demokratia* as the common name for popular

⁶ This dating is controversial, other scholars date this c.490. However, the aristocratic origin of *isonomia* is endorsed by Cartledge (2005) and Raaflaub (2004).

government is attested by the contribution of 'Otanés' to the debate on constitutions in Herodotus, III, 80 (my emphasis):

'Rule by the majority, on the other hand, bears the fairest of all titles: *isonomia*. . . Those in office have their authority courtesy of a lottery, and wield it in a way that is strictly accountable. *Every policy decision must be referred to the commonality of the people*. This is why I give it as my opinion that we should abolish the monarchy and foster the rule of the masses. Everything, after all, is contained within the multitude.'
Such was the case made by Otanes.

According to Herodotus, Cleisthenes introduced his institutional reforms in 507 as, 'finding that he had no hope of success with only his aristocratic faction to help him, he "took into his faction the ordinary people" ' (Hdt. 5.66.2.) (Hansen, 1999, p. 33).⁷ But if Cleisthenes' new power base was the *demos*, why did he not refer to this new system of government as *demokratia* (assuming the term was available at the time)? The phrase 'took into his faction' suggests *adding* popular support to his existing aristocratic network as opposed to replacing the latter with the former. If so, then the adoption of the slogan *isonomia*⁸ as opposed to *demokratia* would have the merit of flattering the *demos* (by including them in a form of equality that was previously only a noble privilege) while at the same time not frightening the (aristocratic) horses:

All in all we may feel confident in concluding, therefore, that through *isonomia* and its cognates political equality became a popular slogan in the aristocrats' fight against tyranny, figured prominently in their

⁷ Josiah Ober (and J. Peter Euben) take issue with Herodotus's 'elitist' assumptions by arguing that the introduction of democracy was the result of a spontaneous popular uprising against Isagoras and the Spartan Cleomenes (Ober, 1996, Ch. 4), but (Rhodes, 2003, p. 77) concludes that Ober over-interprets an innocent remark by Herodotus, in order to buttress his overall thesis that the Athenian democracy was the achievement of an active *demos*, which was not led by the elite so much as led them. The scholarly dispute as to who was responsible for the foundation of the democracy (the aristocracy or the masses) does not affect the argument of this chapter one way or the other.

⁸ 'More of a banner than a label . . . [*isonomia*] may well have been the slogan by which Cleisthenes rallied the people to the support of his reforms' (Ostwald, 1969, p. 153).

celebration of the the overthrow of tyranny, and possibly was soon applied to the system introduced by Cleisthenes, which was characterized precisely by more broadly based civic equality and thus realized values shared at that time by aristocrats and non-aristocrats alike. (Raaflaub, 1996, p. 145)

The 507 reforms could well be regarded as a dispute between aristocratic factions, leading to 'democracy' as an unintended by-product, or 'spandrel' (to adopt Stephen Jay Gould's term). Hansen's dating (507) is derived from his 'institutional' approach to Greek democracy, and this has been criticised by Rhodes, Raaflaub and others, who focus more on the language used by the reformers to describe their intentions and work (Raaflaub, 2008). The linguistic terms in use at the time of Cleisthenes' reforms privileged two forms of equality (*isegoria* and *isonomia*), *demokratia* not surfacing until the 460s: 'Ephialtes and his supporters in 462/1 were the first reformers who claimed *explicitly* to be democratic' (Rhodes, 2003, p. 19, my emphasis).

The creation of the word *demokratia* indicates a shift of awareness among the Athenians. *Isonomia* (political equality), the word perhaps used to characterize Cleisthenes' system modified a traditional ideal of 'good order' (*eunomia*) by the criterion of equality. By contrast, *demokratia* and related terms defined a constitution by the criterion of who held power (*kratos* or *arche*). (Raaflaub, 2008, p. 112)

The four-decade gap between Cleisthenes' institutional reforms and the adoption of the ideological term *demokratia* bears an interesting (and close) parallel two millennia later. The American founders were, to a man, adamant that their new system of government was *republican* (rather than democratic) and that equal political right was limited to the principle of one-man-one-vote. The aristocratic nature of the electoral system would ensure the rule of the 'best' (or at least the most distinguished) citizens; if it were not for their privileging republican Rome over Greece, the founders might well have chosen to describe their republican form of government as *isonomia* or even *eunomia*. The only era of Athenian democracy that received the founders' approbation was the 'moderate' (electoral) democracy of the Solonic era. Nevertheless within a period of four decades, the political language (and partisan allegiance) of founding father James Madison had

morphed from 'republican' (1788) through Republican party (1791) and Democratic-Republican party to Democratic Party (1828). Perhaps it's not entirely fanciful to attribute a similar linguistic morphology to the events of the fifth century BC as

The political revolution which began with the expulsion of Hippias and culminated in Cleisthenes' great reform of the political order, started under the watchword [isonomia], but soon became the rule of the people [demokratia]. (Ehrenberg, 1950, p. 535)

The ongoing scholarly dispute over the (supposedly) aristocratic origins of *isonomia*, the relative contribution of *aristoi* and *demos* to the events of 507 and the exact date for the formation of the Athenian *demokratia* are beyond the scope of this thesis. While the *origins* of the term *isonomia* – aristocratic or democratic – are of interest to classical historians and philologists, the argument of this thesis is merely that, during the classical era, equal political right was a sine qua non of the *demokratia*. As the ordinary people now possessed *isonomia*, the outcome was a fundamental shift of power from the old council and magistrates to the assembly (just as the UK 1867 Reform Act led to a fundamental shift in power from the chamber of the House of Commons to the electoral hustings). Thus was born the classical age of Athenian *direct* democracy. Supreme power lay with the *demos* in the *ecclesia*. Most magistracies – including the council – were filled by lot (the exception being the military commanders (*strategoí*), who were elected), but our concern here is legislation and policy-making, not public administration, so the focus will be on Herodotus's phrase: 'every policy decision must be referred to the commonality of the people'. This aspect of *isonomia* required that key decisions of public policy, including the amendment of laws and the declaration of war and peace, were made by majority vote in the assembly (by a simple show of hands):

Cleisthenes will have enlarged the legislative authority of the common people by relying on their support for getting his reforms passed, and passage by the Assembly remained henceforth a prerequisite for the validation of new legislation (Ostwald, 1986, p. 24).

Ehrenberg's interpretation of Aeschylus' 'the people's ruling hand' (*Suppliants*, 621) is that 'the show of hands is the expression of the people's rule' (Ehrenberg, 1950, p. 522):

Hail, old man, bringing the most desired messages to me!
Tell us what has been decided!
The hand of the people (*demos*) having voted (*kratousa*),
what decision was reached? (602-4)

Hence my argument that *voting in the assembly* was a key element of *isonomia*:

The typical feature of early democracy was the majority vote of the people – the *demos* being the whole community of citizens as represented in the assembly. (Ehrenberg, 1950, p. 547)

Herodotus, writing probably in the 420s, uses the terms *isonomia* and *demokratia* 'indiscriminately' throughout his *Histories* (Ehrenberg, 1950, p. 526), indicating how the former had, by this time, practically morphed into the latter. *Isonomia*, viewed as a form of government, involved several elements, including 'election by lot, the audit of public officials, [and] the power of the assembly to discuss and decide all questions of public policy' (Vlastos, 1953, p. 337). To Vlastos this is emphatically 'equality of law . . . equal share of all the citizens in the control of the state'. (*ibid.*, p. 348; 352)

From an institutional perspective the equal share of all citizens in the control of the state took two forms during the fifth century: a) rotation by lot in administrative office and b) policy making by majority vote in the general assembly.

a) *Rotation by lot in office*

The basis of a democratic state is liberty; which, according to the common opinion of men, can only be enjoyed in such a state; this they affirm to be the great end of every democracy. One principle of liberty is for all to rule and be ruled in turn . . . (Arist., *Pol.*, VI, 40).

During the fifth century all magistracies, apart from the *stratego*i (military leaders) and members of the board of finance, were selected by lot. This would have meant a total of some 700 public officials, of which the overwhelming majority were

selected by lot, in addition to the 500 randomly-selected members of the council (Hansen, 1999, p. 240). Tenure was for one year only and at the end of every year each magistrate would have to give an account (*euthynai*) of his administration and use of public finance. In order to ensure that the principle of rotation of office worked in practice as well as in theory Pericles introduced daily pay for magistrates.⁹ The political ethos of Athenian society presupposed that all citizens would play an active role in the governance of the polis – it was a form of public (akin to military) service – indeed most citizens would have served for at least one year on the council during their lifetime (Hansen, 1999, p. 249). As such, rotation by lot in public office was a way of ensuring Aristotle’s chosen mechanism for democratic freedom – that all citizens should ‘rule and be ruled in turn’. In terms of *isonomia*, rotation ensured an equal distribution of *timē* to all citizens.

Although the selection principle (sortition) is at the heart of the modern proposals outlined in chapter 8 of this thesis, there is no suggestion that it should be used for the appointment of individual government officers (‘magistrates’) as rotation is self-evidently impossible in large modern states for reasons of scale, role-complexity and competence. This thesis instead focuses on the use of sortition for selecting juries in legislative courts, as dealt with in the next section (2.2.3).

b) Policy making by majority vote in the general assembly

. . . democratic justice is the application of numerical not proportionate equality; whence it follows that the majority must be supreme, and that whatever the majority approve must be the end and the just. (Arist., *Pol.*, VI, 40).

Lawmaking in the fifth century involved a mixture of laws (*nomoi*) and decrees (*psephismata*), all passed in the general assembly (*ecclesia*) by majority voting, via a show of hands.¹⁰ All male citizens over the age of eighteen were entitled to

⁹ Payment was first introduced for jurors, but juries were never considered magistracies.

¹⁰ The council had the right to issue minor administrative decrees, although these could be overruled by the assembly, the council being little more than a collegial secretariat for the

attend and all votes were equal, so this, along with rotation in office, constituted another example of *isonomia*. Aristotle viewed assembly and jury voting as an example of ‘numerical’ equality – in modern terms, equality of outcome or ‘natural’ equality (Hansen, 1999, p. 83). As I will demonstrate, Plato and Aristotle’s ‘proportionate’ equality, which better approximates to (formal) equality of opportunity, is reserved for *isegoria* (equal speech rights), which will be addressed in Section 2.3 (and Chapter 7.1).

2.2.3 Fourth century reaction: The return to the *patrios politeia*

The government of Athens is to follow its ancestral pattern, the laws of Solon and his measures and weights shall be used, as also the ordinances of Draco, which we used in former times. (Andoc. 1.83)

The democracy was restored (for the second time) in 403 BC and the Athenians were determined to learn from past errors and disasters. The new constitution would involve ‘rule by laws, not by men’ (Finley, 1983, pp. 135-136): ‘the Athenians returned to the idea that the laws, not the people, must be the highest power and that the laws must be stable, even if not wholly entrenched’ (Hansen, 1999, p. 174). If some form of tyranny is inevitable, it would be the impartial and dispassionate *tyranny of the laws* (Hoekstra, 2013). This development has led some scholars to postpone the date of the introduction of democracy to 403 BC: ‘in its fully developed form ancient democracy did not come into being before the end of the fifth century’ (Eder, 1998, p. 107; c.f. Ostwald, 1986).¹¹

Aristotle, however, did not believe that the mature Athenian democracy lived up to demanding republican standards on the rule of law, as it was rule by the poor. But irrespective of whether one adheres to a civic-republican or proto-Marxist analysis

assembly (Manin, Urbinati, & Landemore, 2008). The council ‘prepared the business of the Assembly and dealt with emergencies’ (Dahl, 1990, p. 30).

¹¹ This strikes me as a somewhat epistemic (outcome-oriented) perspective on democracy; from a procedural point of view, the high point of democracy as popular sovereignty was the last decades of the fifth century.

of Athenian politics, the fourth-century reforms were undeniably conservative in nature. No longer would it be viewed as 'shocking not to let the people do whatever they wish' (Xen., *Hell.*, 1.7.12). 'Written guidelines were needed to give the law precedence over the uncontrolled sovereignty of the people . . . in order that people were bound by their own *nomoi*' (Ostwald, 1986, pp. 411, 444). Key financial magistracies (including the all-powerful theoric official) would be elected for four years (as opposed to the one-year tenure of amateurs drawn by lot) – the success of the restored democracy (it lasted for some eighty years prior to its defeat by the overwhelming forces of Philip of Macedon) has largely been attributed to this decision (Hansen, 1999, p. 160), along with the general professionalisation of the role of the political advisor.¹² This led to a 'more efficient system in which men of ability were entrusted with considerable power' (Rhodes, 1980, p. 314). The other goals of the restoration democrats were equally conservative, motivated by a desire to return to the *patrios politeia* – the supposed golden age of moderate Solonian democracy (Hansen, 1999, p. 296).¹³ In the same way that James Madison and the other American founders created the legislative log-jam of the US Constitution by design, the restoration democrats (republicans?) did everything to make it as hard as possible to change the laws.

The most pertinent fourth-century innovation¹⁴ was that lawmaking powers were transferred from the assembly¹⁵ to *nomothetai* (legislative boards, comprised of randomly-selected jurors). These juries were established by a process of double

¹² The Athenians also chose to ignore the growing threat of Macedonian expansionism (in a similar manner to British attitudes to German militarism in the 1930s) as they were reluctant to sacrifice both their public theatre subsidies and their own lives in combat. (Samons, 2004, p. 161)

¹³ Note that the mantle of the *patrios politeia* was claimed by a variety of agents and interpreted in different ways.

¹⁴ The exact date for the establishment of legislative change by randomly-selected nomothetic panels is unclear, the earliest recorded date being 382/1 (Sealey, 1987, p. 44).

¹⁵ The assembly still issued decrees (*psephismata*) and remained the focus for major public policy decisions. War or peace? Invade Sicily? Withdraw from the Athenian countryside into the city and let the Spartans occupy the countryside? The primacy of the assembly in such matters remained true from the sixth through to the fourth centuries (although claims for the sixth century are possibly anachronistic). I am grateful to Melissa Lane for this point.

sortition: every year any male citizen over the age of thirty (and not disqualified for other reasons) could put himself forward for selection by lot to a jury pool of 6,000 (the system was put into place by Ephialtes for the selection of *dikastes*). Every trial day (whether juridical or legislative), members of the pool of jurors could present themselves at the courtroom before being allocated to panels via a second sortition (using a lottery machine called a *kleroterion*). Although the second sortition, performed on the day of the trial, was clearly intended to reduce the possibility of jury nobbling (by threats and/or bribes) the first sortition would have established a jury pool that ‘descriptively’ represented the whole citizen body – ‘assemblages of [jurors] were commonly regarded as representative of the whole polis’ (Rhodes, 1980, p. 320).¹⁶

Although selection by lot is normally seen as the hallmark of ‘radical’ democracy, this is only really true in the case of the appointment of magistrates – the new legislative courts were part of the conservative reaction – juries had far longer to consider the merits of legislative proposals and were comprised of older citizens (average age 40-50) who had sworn the Heliastic Oath:

I will cast my vote in consonance with the laws and with the decrees passed by the Assembly and by the Council. But if there is no

¹⁶ However, the higher minimum age and the introduction of subsistence-level jury pay by Pericles meant that the poor and the old were over-represented, as ridiculed by Aristophanes in *Wasps*. Sealey argues against the case for the representative microcosm, claiming that attributing the notion of statute law expressing the will of the legislator to classical-era Athens is anachronistic, as ‘this view springs in part from ideas developed by political theorists, who drew in turn on the Roman notion that government derives its authority from the consent of the governed’ (Sealey, 1987, p. 52). Josiah Ober has argued that the Athenians might have been using the *demos* as a synecdoche, whereby any actions by an organ of the democratic state were attributed to the *demos*. (Ober, 1989, pp. 330-331). However it is hard to reconcile a perspective derived from linguistic theory with the fifth-century view that it would be ‘shocking not to let the people do whatever they wish’ (Xen., *Hell.*, 1.7.12). Aristotle, certainly, did not differentiate between the will of the *demos* and the decisions of jurors, as the same social classes predominated in both instances. This is the chief reason why he viewed fourth-century democracy as radical as, in his view, supreme authority still resides not in the law, but in the vote of a majority (of jurors) (Arist, *Pol.*, 4.1292a4-7). Whilst it would clearly be anachronistic to view the large Athenian jury as a representative body in the modern sense, the very silence of the sources regarding the 4th century switch from assembly to jury lawmaking indicates that the change was certainly not seen as in any way undermining the rule of the *demos*.

[relevant] law I will give judgment in consonance with my own sense of what is most just, without favour or enmity. I will vote only on the matters raised in the charge, and I will listen impartially to accusers and defenders alike.

Athenian juries, whether ruling in *dikasteria* or *nomothetai*, were 'regarded as representing the people as a whole' (Ostwald, 1986, p. 34; cf. Hansen, 1978, pp. 127, n.121; Rhodes, 1972, pp. 169, 197-168). Just as the reforms of Ephialtes had effectively subdivided the assembly *qua* judiciary (*heliaia*) into jury panels, the fourth-century reforms performed the same task for the legislative powers of the *ecclesia*. Although the Greeks had no notion of mathematical proportionality, it was clear that the verdicts of large juries – whether legislative or juridical – were deemed to reflect the considered judgment of the whole political community: 'each panel being regarded as representative of the *demos* as a whole' (Ostwald, 1968, p. 74).

In addition to the oath and the higher age threshold, *nomothetai* voted by show of hands¹⁷ and the votes were counted rather than estimated. The high standard of Athenian juridical practice (in comparison to the assembly) is one of the reasons why the court is often described as the highest organ of state.¹⁸ (Hansen, 1999, p. 180). The process for the 'trial' of laws was modelled on the trial of persons: the citizen who proposed the change in the law would act as 'prosecutor' and the assembly would appoint five citizens to defend the existing law. Both parties were allocated equal time to argue their case, and the verdict would be delivered by the majority vote of the allotted jury, *without deliberating amongst themselves*.¹⁹ Although all men (according to the fifth-century Sophist, Protagoras), are possessed of *politike techne* (the art of political judgment) the formal advocacy and

¹⁷ *Dikastai* voted in secret via tokens.

¹⁸ In parallel to the establishment of the *nomothetai*, assembly decisions were subject to appeal by *graphe paranomon* in the law courts.

¹⁹ Although this ignores the hecklers, viewed by some scholars as part of the democratic process (see p. 70, below)

silent deliberation²⁰ that characterized fourth-century nomothesia was necessary to realize its full potential – factors that ‘deliberative’ democrats seeking (in vain) for ancient provenance for their modern projects should reflect on.

Proposals to revise the legislative code²¹ would now have to overcome multiple hurdles (Blackwell, 2003; Hansen, 1999, pp. 168-9):

- 1) Legislative proposals (in writing) by any willing citizen (*ho boulomenos*)
- 2) Publication of the proposal before the Monument to the Eponymous Heroes in the *agora*, to inform any citizen who wished to have a say in the matter
- 3) Pre-legislative scrutiny (*probouleumata*)
- 4) Reading out of the proposal and initial deliberation in the assembly (*ecclesia*)
- 5) Vote, at the next session but one of the assembly, whether or not to establish a legislative court
- 6) Nomothesia (legislative trial)
- 7) Publication of revised law before the Monument to the Eponymous Heroes
- 8) Trial outcome subject to appeal in the people’s court (*graphe nomon me epitedeion theinai*)

All of these stages were interspersed by long cooling-off periods that would have been filled by Condorcet-style public debate in the *agora*. Even successful legislative ventures would be subject to appeal (trial in the people’s court) and the proposer would be liable to prosecution throughout (Hansen, 1999, p. 212).

Once a law (*nomos*) had been established by the above process it could not be overruled by an assembly decree (*psephisma*), so this was a serious constraint on

²⁰ In the sense of ‘deliberation within’ (see Chapter 5.1.2, below)

²¹ In addition to the ad hoc *ho boulomenos* procedure described here, there were parallel paths for legislation initiated by the annual review of laws in the assembly, and by the *Thesmothetai* (a board of nine magistrates).

the kind of willful and erratic decisions that characterize mass democracy. Notwithstanding the conservative aims of the 403 reforms, the resulting constitution was still truly democratic and egalitarian. *Anybody* (with a strong nerve) could seek to repeal or alter a law. *Everybody* could participate in the assembly debate (*isegoria*) and the resultant decision (*isonomia*) whether or not to appoint a board of *nomothetai*, and *every mature citizen* could (and should) participate at some point of their life in the scrutiny process – either as a member of the council or of the courts. At the same time there was proper allowance for professional competence (in the election of key magistrates) and for the politically ambitious (*rhetores*) – although the Athenians made sure that the stick (or Damoclean sword) and the carrot were of equal weight. This meant that the ‘principle of the sovereignty of law was given official primacy over the principle of popular sovereignty’ (Ostwald, 1986, p. xx). How the restored democracy would have developed given a longer run is, like any counterfactual, impossible to say, but many of the flaws of fifth-century democracy appear to have been addressed – the tyrant of direct popular sovereignty (*Demos*) was now chained by a multitude of checks and balances – albeit insufficiently to convince Aristotle that it amounted to *kata taxin* (right ordering),²² but was certainly an improvement on the radical direct democracy of the late fifth century:

Council and Assembly receded into the background in matters of internal policy, and the jury courts held center stage. . . . [I]n matters of legislation the Assembly relinquished its final say to *nomothetai*. Thus the democracy achieved stability, consistency, and continuity when the higher sovereignty of *nomos* limited the sovereignty of the people. (Ostwald, 1968, p. 524)

²² Most of Aristotle’s objections to democracy were aimed at late fifth-century practice (Hoekstra, 2013). It remains unclear as to why he chose to ignore the fourth-century innovations; perhaps it was because the conservative constraints on the modification of the laws did little to check the torrent of assembly edicts (*psephismata*), and the *demos* (reincarnated in jury form) retained the final veto, as opposed to the mixed system of oligarchy, aristocracy and democracy that he preferred.

The relative silence of contemporary sources (including critics of jury democracy like Aristotle) on the transition from assembly- to jury-based nomothesia should be taken as confirmation that the change was viewed as uncontroversial at the time – it making little difference (from a democratic perspective) whether the laws were determined by the full assembly or a sub-set thereof. The claim of this thesis is that a similar switch in modern legislative practice – from mass- to sortition-based democracy – should be equally uncontroversial.

2.3 Isegoria

‘Who is willing, having some good advice, to bring it before the city?’
The man who will has glory, who will not keeps silence. What in the city can be more equal than that? (Euripides, *The Suppliant Women*, 438-41)

Although ‘Otanés’ in the constitutional debate describes democratic practice in terms of *isonomia*, when Herodotus charts the birth of Athenian democracy ‘it is *isegoria* and not *isonomia* that he singles out as the principle of democratic equality’ (Hansen, 1999, p. 83). The emphasis on (proportional) equality of opportunity – rather than natural (arithmetic) equality – is also taken up by Thucydides in Pericles’ funeral oration:

When it comes to esteem in public affairs, a man is preferred according to his own reputation of something, not, on the whole, just turn and turn about, but for excellence, and even in poverty no man is debarred by obscurity of reputation. (Thuc. 2.37.1-3)

Isonomia (equal political right) is clearly a necessary but *insufficient* condition for *demokratia* – the latter presupposes that all citizens should have the right to propose legislation and to address the assembly. The ‘Old Oligarch’ in his *Constitution of the Athenians* clearly regards (and deplores) equal speech rights as the key element in the *demokratia*:

Someone might say that they ought not to let everyone speak on equal terms and serve on the council, but rather just the cleverest and finest. Yet their policy is also excellent in this very point of allowing even the worst people to speak. For if the good men were to speak

and make policy, it would be splendid for the likes of themselves but not so for the men of the people. But, as things are, any wretch who wants to can stand up and obtain what is good for him and the likes of himself. (Ps. Xen., *Const. Ath.*, 1.7)

When was *isegoria* introduced to Athens? The sources are unclear, largely on account of the late fifth- and fourth-century habit of attributing most constitutional innovations to the ancestral lawmaker (Solon). Although precise dating is unnecessary for the purpose of this thesis, nevertheless the *restrictions* on legislative *isegoria* introduced by the fourth-century reforms are central to the study, so these institutional changes need to be grounded in an overall historical perspective, sketched out in the next three sub-sections.

2.3.1 Sixth century: The reforms of Solon

What was the historical origin of the right of all Athenian citizens to address the assembly? Some scholars have argued that the speech by the common soldier Thersites to the assembly in Homer's *Iliad*, book II, is an example of archaic *isegoria* (Bonner, 1933, p. 67), but Odysseus' rebuke:

I assert there is no worse man than you are. Therefore you shall not lift up your mouth to argue with princes (*Il.*, 2, trans. Lattimore).

is surely a sign that *isegoria* was an aristocratic privilege (Griffith, 1966, p. 117).²³ According to (Lewis, 1971, p. 129) 'Lysias and Aeschines ascribe the origin of the right [of all citizens to address the assembly] to Solon, and Demosthenes asserts that Solon excluded [only] male prostitutes from the right' (Diog. L., I 55; Aesch., iii 2-4; Dem., Xxii 30). Ehrenberg claims that Solon created 'an assembly in which every citizen could get up and speak' (Ehrenberg, 1950, p. 538), but we need to be

²³ Although Odysseus' 'discouragement' of the 'vulgar, obscene and dull-witted' Thersites (by threatening to strip him naked and bludgeon him with Agamemnon's scepter) could be taken to indicate that aristocratic restrictions on the right of all citizens to address the assembly were more *de facto* than *de jure*.

sceptical regarding such claims, due to ‘the well-known practice of orators of ascribing any law to Solon if it was (to them) a fairly old one’ (Griffith, 1966, p. 119). Solon himself claimed to have ‘given the *demos* just as much political privilege as suffices, neither less than more’ (Solon, F 5, 1-2), and there is no good reason to believe that this included the right to address the assembly.

There seems little doubt, however, that Solon introduced the principle of *ho boulomenos* (he who is willing) for the launch of prosecutions, but once the judicial process was commenced, speech acts would be restricted to elected magistrates. The ‘equal right of prosecuting’ may have been Demosthenes’ sense of *isegoria* (Dem., LX 28), and this indeed became the principal characteristic of lawmaking in his own time, as the ‘prosecution’ of laws in the courts came to mirror the prosecution of persons.

The other act of the Solonian democracy that is relevant to the subsequent development of *isegoria* was the (probable) establishment of the council of 400. The council was restricted to members of the higher census groups, nevertheless Solon’s council marked a shift away from the monopolization of power by a hereditary aristocracy. In parallel to the notion of *isonomos oligarchia*, the ‘equal right to speak in aristocratic councils was tacitly admitted [only] among gentlemen’ (Woodhead, 1967, p. 135). This right would have been inherited by the ‘intermediate’ Solonic council and passed on to the popular council introduced by Cleisthenes’ reforms. As most citizens would serve at some time of their life on the council, this may well have been the breeding ground for *isegoria* in the general assembly (Woodhead, 1967).

2.3.2 Fifth century: The reforms of Cleisthenes, Pericles and Ephialtes

The *isegoria* of the Solonic democracy – restricted to members of the council – was almost certainly further limited, or even abolished, under the Peisistratan tyranny and restored by Cleisthenes to the newly created Council of 500.²⁴ The principle of free speech is celebrated in Aeschylus’ *Persians* (472):

²⁴ Ironically Cleisthenes’ political opponent was Isagoras (Equal Speaker)!

No longer will the tongues of men
be under guard. For the people
have been released to talk freely,
since the yoke of strength has been removed.
(Aesch., *Persians*, 590-3)

The first recorded use of the word *isegoria*, however, was not until Herodotus:

The Athenians grew in strength. For it is clear that not in one thing alone but in all respects freedom of speech (*isegoria*) is a great thing. For while the Athenians were ruled by tyrants they were not better at the arts of war than their neighbours. But once they had got rid of the tyrants they were by far the first. (*Hist.*, 5.78)

Note that here Herodotus regards *isegoria* as synonymous with *demokratia*,²⁵ -- 'he named the part to describe the whole' (metonymy) -- and suggests that it originated with Cleisthenes' reforms (Griffith, 1966, p. 115). Griffith, however, argues that Herodotus is guilty of anachronism -- the reforms of Pericles and Ephialtes, which provided pay for public service and severely restricted the role of the old aristocratic council, were a necessary prerequisite for full *isegoria*.²⁶ This is because it was less a matter of equal citizen rights than custom, practice and the personal confidence required to participate in public speech. Prior to the introduction of a daily stipend for council members, citizens of modest means could not afford to put themselves forward for council membership, so would not have benefited from this training ground in oratory. The very fact that no writer (including the fourth-century critics of democracy) refers to any formal change in the law leading to full *isegoria* in the assembly buttresses the view that it can be attributed

²⁵ The Online Liddell-Scott-Jones Greek-English Lexicon (*LSJ*) defines *isigoria* (sic) as both 'equal right of speech' and 'political equality' (<http://stephanus.tlg.uci.edu/lsg/#eid=52418&context=search>). The term also applied both to social and political speech in general as well as the specific right to address the assembly on hearing the Herald's opening call 'Who is willing, having some good advice, to bring it before the city?'

²⁶ This would certainly be true for substantive equality, less so for formal equality of opportunity (see p. 48, above).

more to changes of custom and personnel (in particular the democratization of assembly officials) than a formal alteration to law (Lewis, 1971, p. 138).²⁷

The consequence of the reforms was, after the death of Pericles, 'the freeing [of] the Assembly from all vestiges of restraint by Council or the generals, so that it became the supreme controlling authority in the State' (Griffith, 1966, p. 131). This led to the age of the demagogues. Although every citizen who was willing (*ho boulomenos*) had the right to address the assembly (*isegoria*) and even to propose replacement laws, decrees and (from 415) political prosecutions (*graphe paranomon*), in practice this role was assumed by a small minority of semi-professional politicians, self-selected and generally drawn from the affluent census classes – the assembly 'looked to a few key men in any given period to lay down alternative policy lines from which to choose' (Finley, 1973, p. 24).²⁸ However the only power political leaders had was the power of persuasion, the outcome was always determined by the popular vote, hence their name *rhetores* (orators). In the fifth century, many of the political leaders were also military commanders, hence the compound term *rhetores kai strategoi*. The politicians were often accused of acting like demagogues²⁹ and misleading the people by making proposals that were either unconstitutional or against the public interest, hence the frequency of ostracisms and political prosecutions in the courts. But our experience of modern demagoguery might well make us suspect that the causation was often in the opposite direction – sometimes the dog is wagging its tail and sometimes the tail is wagging the dog:

²⁷ Lewis, however, takes issue with Griffith's strong conclusion on the post-Periclean origins of *isonomia*, arguing that it existed at least since the reforms of Cleisthenes. (Lewis, 1971, p. 138). The dispute over the precise dating, however, is not the concern of this thesis.

²⁸ The evidential foundation for this claim is limited, it being possible that in the 5th century more people were involved.

²⁹ *Demagogos*, derived from *demos* and *ago* (to lead) was originally a neutral descriptive term for a leader of the people who had (usually) not been a military commander. The pejorative sense of the demagogue as mob leader was a consequence of Plato's distinction between the statesman and the demagogue; this became thematic of Athenian democracy as a result of Plutarch, not the classical historians. (Ober, 1996, p. 91)

Ever since this breed of [*demagogos*] appeared who ply you with such questions as 'What would you like? What shall I propose? How can I oblige you?' the interests of the state have been frittered away for a momentary popularity. The natural consequences follow, and the orators profit by your disgrace. (Dem., 3.21-22)

Demosthenes was writing in the fourth century but, given the opportunity for honorary decrees, gold crowns and other perquisites voted by the assembly, late fifth-century political leaders were equally likely to tell the *demos* what it wanted to hear. Some have claimed that this is the inevitable consequence of democracy, both ancient and modern (Samons, 2004, p. 45): 'Perhaps the majority of any democratic electorate will usually prefer leaders who tell them what they want to hear or believe' (*ibid.*, p.154).³⁰ In the words of the chorus in Aristophanes' *Knights* (424 BC):

Demos, the rule you bear is fine, since all humankind fears you like a tyrant [*andra turannon*]. But you are easily led about, you enjoy being flattered and beguiled, and the orators always leave you with your mouth hanging open. (Aristophanes, *Knights*, 1111-19)

Aristophanes' chorus was perfectly comfortable with the 'tyrannical' nature of the rule of the *demos*, but is aware of the risk of this rule being compromised by the tendency of *Demos* to be swayed by seductive speakers (Hoekstra, 2013, p.10, DRAFT M/S).

Although Athenian political leaders received no direct remuneration, many of them became very wealthy as a result of perquisites voted by the assembly, or via 'gifts' from lobbyists: The Greek word for bribery (*dorodokia*) translates as 'receiving gifts'; whether it was a gift or a bribe depended on whether it was in the interests of

³⁰ And the deception cuts both ways: in the UK 2010 general election everyone (politicians and voters) knew there would be savage spending cuts after the elections, irrespective of who won, but no political party would acknowledge this truth in a straightforward manner. So who was (mis)leading who?

the state (Harvey, 1985, p. 81).³¹ The Greeks were perfectly happy for politicians to enrich themselves, so long as there was an alignment between their interests and the (perceived) interests of the *demos*.

As such, political leaders must have been sorely tempted to tell the *demos* what they believed it wanted to hear, leading to endemic financial mismanagement and the calamitous decisions (in particular the Sicilian disaster of 413) that led to defeat in the Peloponnesian War. This contributed to the decision of the assembly in 411 to abolish itself and to replace the *demokratia* with an oligarchic council.

2.3.4 Fourth century reaction: The return to the *patrios politeia*

When the democracy was restored, conservative reformers were determined to learn from the problems of the age of the demagogues. As we saw in section 2.2.3 (above), the fourth-century reforms imposed significant constraints on the direct democracy by transferring *isonomia* (in lawmaking) from *all* citizens meeting in the assembly to large representative juries comprised of older citizens who had sworn the Heliastic Oath. The restrictions on *isegoria* were, if anything, even more severe as *ho boulomenos* was restricted to the original meetings of the assembly which discussed whether or not to initiate the process of *nomothesia*. From that stage onwards *isegoria* rights were limited to the proposers of the new law and the five citizens elected by the assembly to defend the existing law – part of the overall professionalisation of the role of the political advisor (with obvious modern parallels).

The legislative jury listened to the debate and then voted by show of hands without further deliberation – speech acts from jurors were proscribed as *thorubos* (clamour). Whilst some modern scholars who equate democracy strictly with *isegoria* view dikastic and nomothetic *thorubos* as the *only* democratic element in the court process (Bers, 1985), this was not the view of the fourth-century reformers, who viewed the restrictions on *isegoria* as an important element in the transition from the rule of men to the rule of law. Griffith, in fact, goes so far as to

³¹ It was also held to be more wicked to receive than to offer a 'gift'.

point out that *nobody* who wrote of the Athenian constitution a century after Horodotus seems to have shared his view that *isegoria* was synonymous with democracy (Griffith, 1966, p. 116), fourth-century concerns having more to do with equal political rights than equal speech.³² Despite the claims of ‘deliberative’ democrats to emulate ancient Athenian norms and practices, this would appear to be something that the fourth-century reforms were trying to minimize.

In some respects the Athenian law courts were a form of ‘audience’ democracy, in that the courts were ‘similar to the Theatre of Dionysos’ and litigants were ‘delivering lines written for them by logographers’ (Lanni, 1997, p. 183). The juries were not just judging the merits of the case in hand – in political trials the judgment was on the *persona* of the elite politician. The court was a public stage for the social elite to compete for prestige . . . a forum for ongoing communication between elite litigants and mass jurors’ (*ibid.*) ‘in a context which made explicit the power of the masses to judge the actions and behavior of elite individuals’ (Ober, 1989, p. 145). But, unlike modern audience democracies, Athenian jurors were obliged to listen to a balanced debate (see p. 61, above), as opposed to selective and one-sided sound-bites (as in the assembly) and were sworn to judge the case impartially.

2.4 Conclusion

This chapter has surveyed the changing meanings of *isonomia* (equal political rights) and *isegoria* (equal speech) along with the institutions that served to instantiate them as a working *demokratia*. In the archaic period *nomos* was a description of, and normative prescription for, some kind of (natural/supernatural) order, and *nomoi* were duly recorded by the original lawgiver (in a manner not entirely dissimilar to Moses handing down God’s commandments from Mount Sinai). During the fifth century *nomoi* were viewed as purely human constructs, and

³² The term *isegoria* was rarely used in the 4th century: ‘by the end of the fifth century “free speech” or “frank speech” (*parrhesia*) was used more frequently to describe the Athenians’ ability to speak openly . . . perhaps because the idea of equality itself was coming under pressure.’ (Mitchell, 2007, p. 6)

egalitarian norms and institutions ensured that they were now constructed isonomously. The fourth-century reforms were motivated by an attempt to return to the sixth-century view that the *nomoi* took precedence over human artifice, hence the need to make changing the laws as difficult as possible:

It was deliberately made difficult to have a *nomos* enacted: it could be done only at a certain time in the year; the proposer had to examine the existing code and if necessary propose the repeal of any law with which his new law would conflict; the proposal had to be displayed in public and read out at three meetings of the assembly; and the *nomothetai* who finally pronounced on it were not any citizens but men who had taken the oath and registered as jurors (*inter alia*, men of thirty and over. (Rhodes, 1980, p. 306)

The evolution of *isegoria* also took a circular trajectory – during the sixth century it was limited to the lawgiver and his aristocratic circle, whereas during the fifth century it became the right of any citizen who wished to advise his peers. The fourth-century reformers decided that this amounted to little more than *thorubos*, opting instead to effectively limit political speech to the daring (who adopted the risky path of legislative innovation) and the few (the five *aristoi* elected by their peers to defend the existing laws).

Concept		6 th century	5 th century	4 th century
<i>Nomos</i> (law); <i>Isonomia</i> (equal law)	Ideology	Natural order	Human statute	Law
	Institutions	<i>Thesmoi</i> (divine law)	Show of hands in the assembly	Deliberative scrutiny
<i>Isegoria</i> (equal speech); <i>Agoreuein</i> (public speech)	Ideology	The province of ‘the cleverest and the finest’ (<i>Ps.Xen.</i>)	Ho boulomenos	Effective return to ‘the cleverest and the finest’
	Institutions	Magistrates and aristocrats only	Anyone who chose to advise the people	Proposers and elected opposers

Table 2.1: The evolution of isonomia and isegoria in classical-era Athens

As acknowledged at the start of this chapter, the focus on the law-making process and the fourth-century reforms will appear one-sided from the perspective of

classical historians, as it overlooks the ongoing role of the council, assembly (and *agora*). But the goal of this chapter is the limited one of finding ancient provenance for a modern constitutional proposal, rather than being a well-rounded portrait of political practice at the time (a modern *nomothetai* would also play a partial role in a mixed constitution but the context would be entirely different). Given that my undertaking is that of the grave-robber (rather than the historian), I feel under no obligation to scrutinize ancient artifacts that have no relevance to my own proposal. No doubt Arlene Saxonhouse would consider this work part of the ‘modern mythmaking’ project. (Saxonhouse, 1993)

Having established in this chapter the centrality of the democratic diarchy (*isonomia* and *isegoria*) to the Athenian *demokratia*, the remainder of this thesis examines how these principles have been instantiated in modern democracies, the principal difference being the need for *representation* for both elements in the diarchy (on account of the vast increase in the number of citizens of modern *poleis* and the complex requirements of modern governance). The principle of isonomic lawmaking by randomly-selected sample can apply equally well to large and small *poleis*, and the professionalization of the role of the orator (and the election by the *demos* of representatives to defend the existing laws) in the fourth century appears to be a portend of modern developments.

The final conclusion, outlined in Chapter 8, is that modern representative democracy could also benefit from a return to the *patrios politeia* by incorporating some of the practices of fourth-century Athens – specifically nomothetic judgment by large representative juries, elected by lot – and that the move to representative *isegoria* via the election of spokesmen by the assembly also has modern parallels.

The next chapter considers why, at the birth of the modern era – given the understanding (derived from Aristotle via Montesquieu) that sortition was a democratic mechanism (and election aristocratic) – sortition was *not even considered* as a mechanism for a system of governance based on foundational beliefs in the democratic equality of all citizens.

CHAPTER THREE

3. The Triumph of Election: Natural Right or Wrong?

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?
(Mansbridge, 2014, p. 9, my emphasis)

Democratic norms presuppose that this fundamental problem of governance should be resolved by ‘mutual coercion mutually arrived at’ (*ibid.*, p.10) and this is normally associated with the consent associated with electoral democracy and majority rule. However, and crucially from the perspective of this thesis, Mansbridge claims that ‘legitimacy can be based on representation by lot’ (*ibid.*, p.11). Bernard Manin, however, disagrees with Mansbridge’s claim and argues that the ‘triumph of election’ over sortition 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.’ (Manin, 1997, pp. 84-5, my emphasis)¹

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

¹ An earlier version of this chapter was presented at Bernard Manin’s *Tirage au Sort* seminar, SciencesPo, Paris, May 24-5, 2012. (Delannoi, 2012)

both sides of the Atlantic, the unqualified dominion of a method of selection, long deemed to be aristocratic. (Manin, 1997, p.79)

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 well 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 – originally published in French as *Principes du Gouvernement Représentatif* (Paris, Calmann-Lévy, 1995) – 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:

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.

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 reasonable.² 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.

Although the principal concern of this thesis is the latter claim, as opposed to a study in the history of political thought, I will first deal briefly with the former.

3.1 The historical problem

3.1.1 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. 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' (Manin, 1997, p. 176). But Locke's

² I am grateful to Gil Delannoï for this point. My interpretation assumes that Manin respects the distinction between how things are (*esse*) as opposed to how they might appear (*percipere*) and is more concerned with the former.

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 precluded 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 named (Grotius, Hobbes and Pufendorf) agree that representative government 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 (Hoekstra, 2004, p. 67)

The 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. (Pufendorf, 1682, X.3)

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), (Manin, 1997, p. 79). 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’ (Manin, 1997, p. 85). Unfortunately I was unable to find in his book *any* direct citations from the contemporary literature to support his ‘somewhat conjectural’ (*ibid.*, p.83) 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’ (Manin, 1997, p. 41). This (tautological) assumption, which is the basis of his argument, fails to consider alternative forms of representation (symbolic, descriptive, ascriptive etc.) so he is correct (*ibid.*, p.6) to differentiate his historical and institutional approach from the conceptual focus of (Liebholz, 1966) and (Pitkin, 1967), 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. Absent such a review – which is outside the scope of this thesis’s focus on conceptual rather than historical issues – 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.

3.1.2 Institutional path-dependency

Manin’s purported focus is on ‘concrete institutional arrangements’, not ‘abstract, timeless ideas’ (Manin, 1997, p. 4), 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. (Manin, 1997, p. 86)

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]' (Manin, 1997, p. 90). The choice of the word 'prudence' by both Harrington and Montesquieu 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' (*ibid.*, p.86, my emphasis). However the slogan would be equally comprehensible in the absence of the word 'elected'; 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).³ The issue at hand was the delineation of the *demos*, not the chosen mechanism of representation.

Manin does acknowledge 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 (*ibid.*, p. 88). 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 (Griffiths & Wollheim, 1960), a fact that Manin duly acknowledges, claiming that very often the

³ Eric Nelson's revisionist argument that the American Revolution was *against* parliamentary (elective) rule is of relevance here. (Nelson, 2014)

elected representatives of the people were merely asked to give their seal of approval to what the authorities had proposed. There were usually no policy choices involved and the process was often limited to a mere 'acclamation' (Manin, 1997, p. 88):

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.' (*ibid.*, pp.87-8).

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

3.1.3 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 (Manin, 1997, p. 82).⁴ There is also the issue of confidence in the probity of the draw process, traditionally guaranteed by the draw taking place in public

⁴ Manin might also draw support from the evidence in (Goldie, 2001) indicating that rotation in officeholding (which was traditionally associated with sortition) was surprisingly widespread in early-modern England. 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. (Hampsher-Monk, 2012)

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 (Ball, 1988) [and (Landemore, 2010)] were wrong to conflate the Federalist–Anti-Federalist argument with Pitkin's distinction between trustee and delegate styles of representation (Manin, 1997, pp. 108-115), 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 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.

3.1.4 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 (Hansen, 2005). 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' (Hansen, 2005, p. 9). 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 (*ibid*, p.13). 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).

3.1.5 Class interests

The protection of property rights was the primary concern of the founders of representative government, hence their use of Lockean slogans like ‘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. (Montesquieu, *Spirit of the Laws*, Book II, ch. 2, cited in (Manin, 1997, p. 73))

Manin cites the Putney debate between Rainsborough and Ireton in defence of his thesis (*ibid.*, p. 84). 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.⁵ Locke’s

⁵ Although Professor Manin took issue with this claim in his response to my paper during his 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

arguments on consent as a prerequisite to taxation (which Manin cites on p.85) 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* (Ingle, 2000, p. 6) – a statistic explained by the prevailing culture of deference, allied with the considerable personal expense involved by the candidates (Manin, 1997, p. 96). 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 (Macpherson, 1962). 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 France⁶ to impose markedly higher property qualifications (or indirect elections combined with a tax threshold) for electoral candidates than ordinary voters (Manin, 1997, ch. 3) would support the suspicion that election was a way to

extension of the franchise (beyond the forty-shilling threshold), rather than the choice of balloting method, which was simply *assumed* to be preference election (Wooton, 1986, pp. 285-317). Sortition was used by the Athenian oligarchy in 411 and also by the Venetian republic (Dowlen, 2008), so a clear distinction needs to be drawn between balloting methods and the extent of the suffrage.

⁶ 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, 1997, p. 107)

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' (Marx & Engels, 2004, p. 221). Many of the modern-day activists advocating the replacement of election by sortition are influenced by neo-Marxist perspectives.⁷

3.1.6 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 filter (Hamilton, Madison, & Jay, 2008, No. 10, p. 53) was a clear allusion to the Calvinist notion of the 'chosen Few' (Manin, 1997, p. 117). 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* (Manin, 1997, p. 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 (Gataker, 2008 (1627)).⁸ Although the divinatory role of the lot was also banned

⁷ See, for example, some of the proposals on the leading sortition forum Equality by Lot: <https://equalitybylot.wordpress.com/>

⁸ Although some Protestant sects (e.g. the Moravians) took very seriously the divinatory uses of the lot.

by Pope Honorius III in 1223 (Manin, 1997, pp. 88-89), popular Catholic sensibilities do not always follow papal decretals.

3.1.7 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. (Manin, 1997, p. 67, discussing Harrington, *The Prerogative of Popular Governance*, p. 477)

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 (*ibid.*). Montesquieu also praised 'the natural ability of the people to discern merit' via election (Manin, 1997, p. 72). Although 'merit' was, to Montesquieu a combination of natural aristocracy and privilege defined by birth, wealth and prestige, nevertheless, election was preferred for consequentialist reasons (*ibid.*, p.73). 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.' (Rousseau, 1998, III, Ch. 5)

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'
(Hamilton, Madison, & Jay, 2008, No. 57, p. 282).

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, to Siéyès 'politics was a realm of competence, not equality' (Urbinati, 2006, p. 143), 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. (Constant, 1988, p. 325)

Competence in political office, of course, might also be secured by competitive examinations, 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' (Manin, 1997, p. 9). 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 (Fustel de Coulanges, 1984, III, Ch. 10). 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' (Glotz, 1988, p.26, cited in Manin, 1997, p. 26). Scepticism over outcomes, rather than concern about natural rights, would appear to be the knock-down argument against 'this manifestly defective method of selection', both for modern people and the founders of representative government – indeed, 'its disappearance requires no further explanation'. (Manin, 1997, p. 10)

This thesis 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. My principal concern, however, is not with disputes in the history of political thought (which I would be happy, if the evidence pointed that way, to concede to Manin),⁹ 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, (Fishkin, 2009) makes the further argument that sortition is a *better* candidate to indicate consent than election, and it is this greater challenge that is the principal focus of the present chapter.

3.2 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* (Locke, 1967) has been subject to extensive criticism (Bentham, 2002; Brilmayer, 1989; D. Hume, 1965 [1748]; Raz, 1986; Simmons, 2001; Wellman, 2001). The attempts to overcome these objections – including John Rawls’s theory of ‘reasonable consensus’ (Rawls, 1996) and David Estlund’s notion of ‘normative consent’ (Estlund, 2008) – have in turn been subject to criticisms from Thomas Christiano (Christiano, 1996) and Jeremy Waldron (Waldron, 1999b). But these philosophical disagreements are well beyond the purview of this thesis, in which I address the far more tractable question – *assuming the coherence of the notion of political consent, is there any reason why*

⁹ 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 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 procedures (see Chapter 6, below), casting serious doubt on the traditional understanding of elite competence.

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 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 endeavor 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 receaving . . . protection they have assented, so the mere fact of their being alive counts for assent (whenever there exists a a power that can destroy them). (Hoekstra, 2004, p. 68)

Although Hobbes's 'there being no Obligation on any man, which ariseth not from some act of his own'¹⁰ 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' (ibid., pp.68-9).

However, the construction of Lockean-style government-by-consent (where every citizen must indicate her own consent)¹¹ 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.

¹⁰ Leviathan 21.10, p. 111.

¹¹ Or, at the very least, the reserve power to withhold consent under certain conditions.

Hegel adopted the pre-modern perspective that political representation was conducted through the 'corporations'¹² 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' (Hegel, 2010, p. 160). 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 (Pitkin, 1967, Ch. 8). 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 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 (Hoppe, 2001, pp. 283-284).

Consent by the mechanism of preference elections is at best partial, tacit and *approximate* as it reflects only the consent of the majority. Unfortunately there is no direct way for parliamentary representatives accurately to gauge what the actual

¹² 'Corporations' should be understood in the context of medieval estates theory, rather than the institutions of modern commerce.

views of their constituents are, and the task of bundling preferences together in a coherent way would appear to be impossible (Arrow, 1951). This is particularly problematic when substantial numbers of citizens choose to boycott the poll (and thereby withhold their consent)¹³ either because they believe the system to be corrupt or unjust, or because they realize that their individual votes 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.¹⁴ 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 (Fishkin, 2009, p. 194, my emphasis).

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:

¹³ 'Don't vote, it only encourages them', as the old anarchist slogan puts it.

¹⁴ I am grateful to M.H. Hansen (private communication) for these points.

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. (Callenbach & Phillips, 2008, pp. 29-31)

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 any kind of one-to-one relationship between a citizen and 'her' proxy. But could 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' (Hampsher-Monk, 1992, p. 90). 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.

The argument for consent by proxy would take the following lines (paraphrasing Fishkin, 2009):

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 microbiologists 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. 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.¹⁵ 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

¹⁵ I am grateful to the statistician Conall Boyle for this point.

methodologies (but drawing different samples from the same population), one would anticipate closely matching, if not identical results. James Fishkin's Deliberative Polling 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. (Condorcet, 1994; Surowiecki, 2004)

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' (Hume, 1965), along with Ronald Dworkin's objection that a hypothetical contract 'is no contract at all' (Dworkin, 1977, p. 151). This thesis, however, is more concerned with ongoing day-to-day consent than mythical social 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 pre-specified margin of error) then hypothetical consent has been demonstrated, in that no reasonable and 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' (Ackerman & Fishkin,

2005) and the result would be the same – the reasons for proportional sampling being both practical (financial and opportunity costs) and the early breaching of the rational ignorance threshold. 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. If so, they might well turn straight to Chapter 6, which considers the epistemic potential of the ‘wisdom of crowds’.

3.3 Mansbridge revisited: perceived legitimacy

As this is a thesis in normative political theory, the emphasis has been on the need to ‘justify legitimate coercion . . . with good *reasons* that withstand collective scrutiny’ (Mansbridge, 2014, p. 11, my emphasis). However ‘perceived’ or ‘empirical’ legitimacy – ‘when a group of people believes that something is legitimate’ – is equally important (*ibid.*), and this sub-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’ (Fishkin, 2009, p.151): the implication being that electoral success and legitimacy are anything other than synonymous. The crucial issue, from a citizen’s perspective, is the *perceived legitimacy* of political institutions, rather than the 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.¹⁶ Probability theory was unknown in classical times, casting doubt on

¹⁶ 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

the claim that the lot was used explicitly as a method of random sampling.¹⁷ 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 – epistemic evaluations of the value of cognitive diversity in the decision-making process are dealt with in Chapter 6, below.

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’ (Mansbridge, 2010, p. 55). Focussing 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’ (Mansbridge, 2010, p.57). 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’ (Mansbridge, 2010, p.57). We are only just beginning on this path, Mansbridge

house of advocates rather than in the judgment chamber, where democratic norms should predominate, or by extra-democratic constitutional safeguards (See Chapter 7.3.3, below).

¹⁷ 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, 1997, 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 (Tuck, 1979, pp. 104-105).

concludes, and Fishkin's book is a milestone along the way, although 'it will take a while for the public and for the deliberative system as a whole to give Deliberative Polls the credibility and the respect that they deserve' (*ibid.*, p.60).

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.
(Levinson, 2010, p. 66)

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' (Fishkin, 2009, pp.155, 156). 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' (cited in Levinson, 2010). As a consequence Fishkin appears to be cautiously promoting the DP as an informed focus group.

This chapter, 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*' (2009, p.195, my emphasis). 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.

3.4 Conclusion

Some of the commentators on an earlier draft of this chapter 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 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 – a dubious trope in Manin's eyes (Manin, et al., 2008) – 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*).¹⁸ To the 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,

¹⁸ 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.

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, or nothing, 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’.¹⁹ In Burke’s and (Hegel’s) time these ‘corporations’ (a relic of the medieval estates), included the mercantile, agricultural and professional interests (Pitkin, 1967, p. 174). 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), Kleroterians²⁰ 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

¹⁹ 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, 2008, 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’ (ibid., 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).

²⁰ This term for advocates of sortition is derived from *Equality by Lot*, ‘the blog of the Kleroterians.’ <http://www.equalitybylot.wordpress.com>

interests was in place, the 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.' (Castiglione, 2017, p. 14 (English m/s))

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' (Hampsher-Monk, 2011, p. 4) 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. They might well agree with Harrington's view that elites are simply better at articulating 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 sortition 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. (Edmund Burke, 'A Letter to Hercules Langrishe MP', cited in (Hampsher-Monk, 2011), my emphasis)

This chapter has sought to establish the *principle* that sortition could (and should) play an important and democratically legitimate role in representative government through the mechanism of representation by proxy. The next chapter examines the scope and limitations of the 'descriptive' representation principle involved and the entailments for the division of political labour.

CHAPTER FOUR

4. The Diarchy Reborn: The Representative Republic

After two chapters that touched on historical issues, it is time to refocus on the conceptual diarchy at the heart of this thesis:

The process for making binding decisions includes at least two analytically distinguishable stages: [1] setting the agenda and [2] deciding the outcome. (Dahl, 1989, p. 107)

For the decision process to be ‘democratic’ it is necessary that the sovereignty of ‘the people’ (or at least all citizen members of the political association) should be the validating principle (*ibid.*, p. 106). In the original *polis*, the principal of *ho boulomenos* meant that any Athenian citizen who so desired could (in principle) contribute directly to the first stage – setting the political agenda (*isegoria*). In addition to this every citizen could (and should) attend in person at the general assembly, where the decision outcome was determined by the (equal) reckoning of votes (*isonomia*). It was also possible for citizens to ‘rule and be ruled in turn’ by offering themselves for selection as magistrates, jurors and/or for the Council of 500 (rotation). The consequence of these three principles – *isegoria*, *isonomia* and rotation – was an effective system of popular sovereignty based on the presumption of equality between citizens. No doubt actual practice failed to live up to these lofty ideals, but the same could be said of any political undertaking.

The notion of equality was at the heart of Athenian democracy¹ – Athens in the Age of Pericles was unashamedly meritocratic and anyone who wished to advise the people merely had to approach the platform when hearing the crier’s call ‘who wishes to speak?’ (Hansen, 1991, p. 142). Nobody was ruled out on account of

¹ See Chapter 2.1, above, for a discussion of ancient and modern perspectives on equality of opportunity.

poverty, or humble birth. Most citizens would have served on the Council at least once in their lifetime and stood a reasonable chance of being *epistates ton prytaneon* (Council leader) by rotation (*ibid.*, p. 250). In fact ‘every fourth adult male Athenian citizen could say, “I have been for twenty-four hours President of Athens”’ (*ibid.*, p. 314).

Although fully respecting the three principles, the fourth-century reforms outlined in Chapter 2 introduced a *proto-representative* system. The direct-democratic principle of *ho boulomenos* was restricted to the preliminary stage of the legislative process – once the challenge was accepted to consider a change in the law, the assembly instituted a representative system of isegoria by *electing* the five officials to speak for the people in defence of the existing laws, selected in a manner that would satisfy Manin’s principle of distinction. The reforms also marked a departure from direct-democratic *isonomia* by entrusting the final legislative judgment to a sortition-based sample of mature citizens who had taken the Heliastic Oath.²

However the fourth-century reforms were introduced primarily for administrative convenience; the Greeks did not believe in the possibility of a democratic *polis* that was larger than one in which all citizens could, in principle, participate directly and they had no explicit notion of political representation – the Persian empire was *inevitably* a despotism, purely on account of its size (Dahl, 1989, p. 16). In classical political thought the distinction between different systems of ruling was primarily numerical (counting the number of *archai*), the assumption being that a tyrant would rule in his own interests, oligarchs in the interests of the rich and democrats in the interests of the poor.

In any event democracy failed to survive the collapse of *polis* civilization and Dahl goes on to examine the ‘second major transformation’ with the ‘gradual shift of the idea of democracy away from its historical locus in the city-state to the vaster

² Given that the final legislative decisions were still taken by a jury of ordinary citizens (as opposed to elected representatives), some might describe this as an example of direct democracy, or an intermediate *genus*: ‘lottery democracy’ (Goodwin, 2012). From the point of view of this thesis, however, such a system is an example of indirect democracy, merely substituting a *different method of balloting* (lot rather than preference election)

domain of the nation, country, or national state' (Dahl, 1989, p. 213). Although the second transformation ended up with the same name as its classical forebear, the new system was in fact a hybrid of Athenian democracy, Roman republicanism, medieval notions of representation and universal claims of freedom, equality and rights. The Athenians, however would not have been impressed by the formal egalitarianism of the modern nation state as the equal portion of political rights (isonomia) possessed by each citizen is so tiny as to have no causal efficacy. Substantive political equality is effectively limited to members of the political class as the casting of a single vote in an election in a large modern state does nothing to empower individual citizens.³

It might be argued that the inequality in large modern states could be redressed by the reintroduction of sortition, as every citizen has an equal probability of securing effective political power via the lottery. Whereas a single vote in a large modern state has no effective causal value, if an individual is selected by sortition to serve in a modern sovereign assembly comprising only several hundred citizens then that would represent an equal opportunity to acquire serious political power. However, whereas most members of the Athenian *polis* could expect to exercise genuine sovereign power via the sortition process (the citizen body was only 30-40,000 strong and every year over 7,000 magistracies and jury places were distributed by lot), the probability of an individual citizen being elected by lot in a large modern state is infinitesimally small. It is hard to take sortition seriously as an egalitarian principle when the selection of the vast majority of citizens can be ruled out a priori on account of the mathematics of scale.

Of course this is the reason why large modern states have to rely on the principle of representation in order to achieve substantive political equality and the same principle would apply to the adoption of sortition.⁴ But what exactly do we mean by

³ See pp. 154-5, below, for a discussion of the diminishing returns resulting from universal franchise.

⁴ Note that, with the exception of Chapter 6 ('Epistemic democracy and the wisdom of crowds'), the concern of this thesis is *substantive political equality*, rather than whether or not the adoption of sortition would improve democratic outcomes from an epistemic point of view.

political representation, and what form of representation would be required for a sortition-based system? In ordinary language, the noun ‘representation’ has (broadly speaking) two distinct meanings – one ‘active’, and the other ‘descriptive’:

1. The *action* of speaking or acting on behalf of someone or the state of being so represented: ‘You may qualify for free legal representation’.
2. The *description* or portrayal of someone or something in a particular way: ‘The representation of women in newspapers’.⁵

Electoral democracy is based on the first meaning, as voters choose the person(s) or political parties who they judge best suited to act on their behalf. The last few decades, however, have witnessed a growing disaffection with electoral representation in Western democracies, illustrated by a dramatic fall in the membership of political parties. For example, membership of the UK Conservative Party has dropped from 2.8 million in 1953 to around 100,000 (2013).⁶ Political parties are no longer mass-membership organisations and might better be described as political ‘franchises’ – less than 1% of UK citizens in 2014 belonged to one of the three principal longstanding political parties (Labour, Conservative and Liberal Democrats). And the problem goes far beyond party membership as ‘the 2001 election in the UK was marked by the lowest level of turnout since the advent of mass democracy’. (Mair, 2013, p. 26)

Although the above party membership figures are drawn from the UK, Peter Mair provides comparable figures for European democracies and concludes that ‘What we see now, however, is a much clearer indication of cross-national convergence in the trends that matter. In other words, not only are these various trends now pointing in the same direction, they are also doing so almost everywhere’ (Mair, 2013, p. 21). The decline in party members seems a characteristic of all long-

⁵ <https://en.oxforddictionaries.com/definition/representation>

⁶ The 2016 surge in membership for the UK Labour Party may be anomalous on account of the apparent disconnect between Labour activists and voters (at the time). In the same year that party membership soared, the Labour candidate in the Richmond Park by-election lost his deposit. At the time of writing (July 2017) it was too soon to judge the extent to which the rise in support for Labour at the June election was a product of contingent factors or represented a genuine change in voter preferences.

established democracies (Van Biezen, Mair, & Poguntke, 2012). Mair and Van Biezen's comparative study of thirteen long-established European democracies in the 1980s and 1990s demonstrated a halving of the ratio of party members to the electorate at large during this period; across all twenty, the average membership ratio (5%) was little more than a third of the level recorded in the early 1960s (Mair & Van Biezen, 2001). Mair's research indicates a pan-European 'picture of membership loss of quite staggering proportions . . . on average, across established democracies, membership levels in absolute numbers have nearly halved since 1980'. (Mair, 2013, pp. 40, 42)

One of the reasons for the fall in party membership and electoral participation is that it's not clear how mainstream political parties can adequately represent the sheer diversity of modern multicultural societies. Elected politicians often appear very different from their constituents in terms of ethnicity, education, occupation, wealth, gender etc. – and this has, rightly or wrongly, led to the perception of a tiny self-serving political elite, only concerned with pursuing its own 'sinister' interest (Bentham, 1990, 1999; cf. Elster, 2013). There are also epistemic concerns – if politicians are drawn from a narrow homogeneous group that fails to represent the electorate 'descriptively' then they will lack the necessary cognitive and life-experience diversity to properly address all the issues that come up in everyday politics.

Geographically-defined single-member constituencies render it impossible for the two forms of representation, active and descriptive, to be combined – whilst a single agent might well be elected to actively champion the majority interests of her constituents there is no way that a single person can 'describe' a large number of persons. The argument of this thesis is that *both* types of representation (active and descriptive) are necessary for democracy to function well and that the two varieties map reasonably well to the Greek *isegoria/isonomia* distinction. 'Active' representatives are those who seek to lead and advise the people by making a representative claim (Saward, 2010), whereas the final legislative judgment should, as in fourth-century democracy, be in the hands of a 'descriptively' representative sample of the *demos*. The case for this hybrid solution – politicians proposing and (a representative sample of) the people disposing – requires first of all a thorough investigation of the very concept of representation.

4.1 'Acting for' and 'standing for': two forms of representation

In a 1960 Aristotelian Society symposium 'How can one person represent another' A. Phillips Griffiths and Richard Wollheim described how there are in fact *four* distinct concepts of representation – 'descriptive', 'symbolic', 'ascriptive' and the active 'representation of interests' (Griffiths & Wollheim, 1960). Griffiths defined these concepts as follows:

Descriptive Representation:

I am a descriptive representative of my generation – a sample, specimen, or analogue – when I am sufficiently like my fellows for someone to be reasonably safe in drawing conclusions about the other members of my generation from what they know about me. I cannot of course be *made* such a representative; I can only properly be thought to be one if I am in fact already like my contemporaries. For one thing to descriptively represent ['stand for'] another it is both necessary and sufficient that it is similar in some respects to what it is supposed to represent. (Griffiths & Wollheim, 1960, p.188, my emphasis)

Symbolic Representation:

We might say that the monarch represents the majesty of the state even though we know that in himself he is not at all majestic but a rather silly little man. I shall call this sense – in which an individual is for some reason or for none chosen as a focus of attitudes thought appropriate to something other than himself – symbolic representation. (*ibid.*, p.189)

Ascriptive Representation:

A man's legal representative may be quite unlike him. He represents him in virtue of the fact that what he does or decides *commits* his client . . . as his accredited representative [he] commits him to something whatever the facts may be about what [his principal] is willing or is not willing to agree to (*ibid.*, p.189, my emphasis). [In Hanna Pitkin's words 'the "essential function" of ascriptive

representation is that the consequences of A's action should fall on B'.
(Pitkin, 1967, p.50)]

Representation of Interests:

A member of Parliament, while not being like [say] a trade unionist, nor appointed by any trade union, may on some ground or other always concern himself with ['act for'] the interests of trades unions as against any other interests. The sense in which he would be a representative, not only or necessarily of some class or persons, but of some interests, I shall call representation of interests. (*ibid.*, pp.189-90)⁷

Griffiths rules out **symbolic** representation as of any relevance to democratic legislatures, although he acknowledges that the Labour Party might, for rhetorical reasons, have chosen [in 1960] to appeal to the icon of Kier Hardy as a symbol of the 'fine old traditions of the British working class movement etc.' (*ibid.*, p.189), and that right-wing parties might, for similar reasons, choose to appeal to the Union Jack as a symbolic representation of British sovereignty (*ibid.*, p.191). The tendency for voters in some countries to vote for wives/sons/cognates of deceased representatives is arguably an instance of symbolic representation. Although Indira Gandhi was not a blood relative of Mahatma Gandhi, the name (acquired by marriage to Feroze Gandhi) certainly helped her gain and retain power (and pass on the mantle to her son Rajiv and then, in turn, to his Italian-born widow Sonia). Electoral nepotism in elections to the Irish Dáil is commonplace – 'The election of a close relative of a sitting or former TD may require a popular mandate, but it is almost as automatic in practice as the succession of a royal heir' (Martin, 2009).

⁷ 'Interests' in this sense refer both to raw preferences and reflective judgment as to how such interests (including class-based and economic factors) are best served. According to a further distinction in (Pitkin, 1967, Ch. 7), the former are served by delegate- and the latter by trustee-style representation, but Pitkin's further distinction is not central to this thesis. The relevant point is that 'interests' pertain to particular individuals and social groups (L: *interesse* – to be in between; to differ) and thus correspond (in aggregate) to Rousseau's 'will of all', whereas the hypothetical 'general will' (the common good) does not admit of such differentiation.

Griffiths argues that democratic representation involves a combination of **ascriptive** representation and the active **representation of interests**. The former is true as a matter of historical fact, at least in the case of the UK parliament, which had its origins in the requirement by medieval kings for the towns and counties of the realm to send knights and burgesses to meet with the king's council. Attendance was a 'chore and a duty, reluctantly performed' (Pitkin, 1967, p.3). However '[t]he authorities who thus called for the election of representatives usually insisted that they be invested with full powers (*plenipotentiarii*) – that is to say, that the electors should consider themselves *bound* by the decisions of the elected, whatever those decisions may be' (Manin, 1997, p.87, my emphasis). Thus electoral representation started out for the convenience of the executive (see Chapter 3.1.2, above).

But, as always, there was a *quid pro quo*: as the power of parliament grew (resulting from the need of the executive to have its taxation requirements granted) MPs increasingly came to assert their own side of the bargain – if they were going to (ascriptively) bind their constituents with their assent to the crown's fiscal agenda then the crown would, in turn, have to respect the interests of its constituents. The growth of political parties resulting from the expansion of the franchise during the nineteenth century enabled constituents to enforce this bargain – if voters' ascriptive representatives failed to protect their interests then they would be removed during the subsequent general election.⁸ This leads Griffiths to conclude that there is 'some kind of conceptual connexion between ascriptive representation and the representation of interests' (Griffiths & Wollheim, 1960, p. 190), as they are the two sides of a Faustian pact.

⁸ Notwithstanding this sanction, Griffiths is adamant that ascriptive representation does *not* embody the 'consent' of the principals – constituents in the case of political representatives (Griffiths & Wollheim, 1960, p. 202). The best gloss that he can put on this 'consent' is that 'the normative consequence falling on the principal in the case of Parliamentary representation is that so far as he is represented he loses the right to complain when his own political judgment is ignored; a right he would have if he were not represented' (*ibid.*, p.204). This is in direct contrast to Bernard Manin's Lockean argument that the 'triumph of election' (over sortition) was on account of the natural right theory of consent (Manin, 1997, Ch. 2). For a detailed rejoinder to Manin's claim, along with an outline of Fishkin's competing notion of 'consent by proxy' see Chapter 3 of this thesis.

Moving now to the case of **descriptive** representation, Griffiths opens his article by citing John Stuart Mill's plea for the presence of the working classes in parliament:

On the question of strikes, for instance, it is doubtful if there is so much as one among the leading members of the House who is not firmly convinced that the reason of the matter is unqualifiedly on the side of the masters, and that the men's view of it is simply absurd. Those who have studied the question know well how far this is from being the case; and in how different, and how infinitely less superficial a manner the point would have to be argued, if the classes who strike were able to make themselves heard in Parliament' (Mill, 1991, pp. 246-247).

However, Griffiths, in his gloss on Mill's observation, observes that there is no *necessary* connection between descriptive and other forms of representation:

Mill is not concerned to assert any necessary connexion: his arguments are designed to show a connexion which as a matter of fact exists between descriptive representation and the representation of interests, which gives a ground for choosing a certain kind of ascriptive representatives (Griffiths & Wollheim, 1960, p. 190).

Indeed, while working-class MPs might well reflect the interests of the indigenous working classes,⁹ such a 'matter of fact' correlation between descriptive representation and the representation of interests will not be true in every case: 'we should not allow lunatics to be represented by lunatics'. It would seem therefore that 'the connexion between descriptive and ascriptive representation where it exists is mediated by the demand that ascriptive representation should be the representation of interests' (*ibid.*). This is because 'the representation of interests

⁹ An alternative reading of this passage would be that Mill's concern was less with the *interests* of the working man and more with the general epistemic benefits (the 'reason of the matter') that would be derived from a working-class presence in parliament, although there is a clear overlap between the two perspectives (representation of interests presupposes the knowledge of what those interests are). I am grateful to H el ene Landemore for this point.

implies *action* on the part of the representative' (*ibid.*, p.191, my emphasis): while lunatics are most accurately 'described' by other lunatics this doesn't mean that they will be the best advocates for their interests.

Hanna Pitkin adopts a similar perspective in her book *The Concept of Representation* (Pitkin, 1967), concluding that there are a variety of aspects to representation – aesthetic, symbolic, formalistic, descriptive and active – the last two being the most relevant to political representation.

Pitkin opens her book with an examination of Hobbes's purely formalistic system of representation, presented in Chapter 16 ('Of Persons, Authors and Things Personated') of *Leviathan*. According to Hobbes, a representative is an 'artificial person':

he that acteth another, is said to bear his person, or act in his name; ... and is called in divers occasions, diversely; as a *representer*, or *representative*, a *lieutenant*, a *vicar*, an *attorney*, a *deputy*, a *procurator*, an *actor*, and the like. (Hobbes, 1996, p.112)

Unfortunately Hobbes's scheme of representation places all the rights at the representative's disposal and all the burdens on the represented, who is deemed to have authorized the act of representation (even if he played no part whatsoever in contracting with his peers in the creation of the commonwealth or choosing the representative). But what can it mean to have an unaccountable representative? Pitkin has little time for such a formalized conception of representation, arguing that 'we feel that something has gone wrong, that representation has somehow disappeared while our backs were turned' (Pitkin, 1967, p. 37). She is similarly dismissive of other purely formal perspectives on representation, including *Organschaft* theorists, Max Weber and Eric Voegelin (*ibid.*, Chapter 3), drawing a sharp contrast between formal 'authorization' theories and substantive 'accountability' theories, her interest being purely in the latter.

Pitkin, like Griffiths, concludes that political representation is primarily to do with the **active representation of interests** ('acting for others', *ibid.*, p.141), but nevertheless devotes a chapter of her book to **descriptive** representation. The latter involves 'standing for' and requires a degree of identity between the representative and her constituency, as evidenced by contemporary demands for

all-women shortlists and positive discrimination for ethnic minorities (Mansbridge, 1999; Phillips, 1995). For someone to descriptively represent a target population, she would have to be 'like' them according to the pertinent criteria (age, gender, socio-economic class, ethnicity, etc.) Random selection of a statistically-representative sample is the most accurate way of achieving descriptive representation – in fact the *only* way, given the combinatorial complexity of stratified sampling by even a modest number of criteria¹⁰ -- hence the use of random sampling by the Stanford Center for Deliberative Democracy for its Deliberative Polling (DP) programme (Fishkin, 2009). An implicit assumption of the DP programme is that political preferences, attitudes, interests and ideologies are distributed in a similar fashion to objective demographic factors and that, given a large enough sample, the allotted microcosm will mirror the population in terms of all these qualities (the more fine-grained the factors deemed pertinent, the larger the sample base required).

The descriptively-sampled 'representative',¹¹ however, 'does not represent by *doing* anything at all; so it makes no sense to talk about his role or his duties and whether he has performed them' (Pitkin, 1967, p. 113, my emphasis). On the other hand, **active** (substantive) representation, Pitkin's primary category for political representation, requires the representative to pursue the *interests* of her constituents, in a similar manner to a trustee or legal advocate.¹² There is no need

¹⁰ Advocates of 'stratified' sampling would impose quotas according to certain arbitrarily-privileged criteria, generally to protect the interests of gender and ethnic groups who would otherwise be under-represented (Mansbridge, 1999; Phillips, 1995). However such an approach could never generate the rich diversity enabled by sortition (see the passage from Callenbach and Phillips, below).

¹¹ The word 'representative' (singular) is really a misnomer, as the representation only exists at the collective (aggregate) level. 'Descriptive representative' is a rare example of a noun that exists in plural form only.

¹² The use here of the word 'trustee' is not a reference to Pitkin's additional 'trustee–delegate' distinction regarding the degree to which representatives are mandate-independent. A trustee or legal advocate may well privilege her own judgment over that of her principal, nevertheless is legally or contractually obliged to represent the interests of her principal rather than the interests of the whole (the latter being Burke's idealization of the role of the political representative). For liberal theorists like Pitkin the interests of the whole are constructed out of the aggregation of the votes of individual political representatives. Burke's ideal-typical politician would more accurately be described as a

for 'active' representatives to in any way mirror their constituents' identities, thereby justifying the continuing use of electoral representation in single-member constituencies. According to Pitkin, descriptive representation doesn't cover what the representatives *do*, while active representation is indifferent to *who* does it. Although, as Griffiths observed, the two forms may well be contingently related, there is no inherent conceptual relationship.

A similar distinction, drawing on (Skinner, 2005), is made by the republican theorist Philip Pettit:

There are two fundamentally contrasting varieties of representation, indicative and responsive. Indicative [descriptive] representers *stand for* the representees in the sense of typifying or epitomizing them . . . Responsive representers *act for* or *speak for* the representees, playing the part of an agent in relation to a principal; how they act is responsive to how the representees would want them to act. (Pettit, 2010a, p. 65)¹³

statesman (in Plato's sense of a disinterested promoter of the public good) rather than representative. Synonyms that Pitkin lists for active representative include actor, agent, ambassador, attorney, commissioner, *delegate*, deputy, emissary, envoy, factor, guardian, lieutenant, proctor, procurator, proxy, steward, substitute, *trustee*, tutor and vicar (Pitkin, 1967, p. 119, my emphasis). Writers may differ over the degree to which a political representative is a 'mere delegate' or a 'free agent' (*ibid.*, p 120), nevertheless there is no disputing the obligation of the representative to *act for* her principal – the only dispute being over the degree to which she should follow her principal's instructions or use her own judgment as to how her principal's 'true' interests are best pursued. Pitkin acknowledges that the notion of 'acting for others' involves the conflation of three distinct ideas: 'the idea of substitution or acting instead of, the idea of taking care of or acting in the interest of, and the idea of acting as a subordinate, on instructions, in accord with the wishes of another' (*ibid.*, p. 139). These distinctions, however, are orthogonal to the main thrust of this thesis.

¹³ Unfortunately Pettit is vague on how indicative (descriptive) representation might be achieved in practice. Although he does from time to time mention sortition, the extra-electoral contestatory institutions he typically advocates 'function much more like the countermajoritarian ones typifying liberal constitutionalism – namely, upper legislative chambers and supreme courts' (McCormick, 2011, p. 155). To Pettit, and other neo-republicans, the principal problem with democracy is the tyranny of the majority, whereas to advocates of descriptive representation by sortition the problem is the tyranny of the ruling elite (*ibid.*, p.158).

Pettit's distinction maps particularly well to the isonomia/isegoria distinction at the heart of this thesis. Isonomia as a democratic norm presupposes that all citizens should have a mathematically equal share in legislative decision-making; but given that practical considerations of scale rule out this possibility in modern states then a large statistically-representative sample that 'stands for' the whole citizen body is the next best alternative. Few citizens, however, will seek to play an active role in politics, and considerations of scale and distance require that those who do seek to advise the sovereign body should make a representative claim. The representative claims of those whose isegoria is most responsive to the needs and/or wishes of the representees will be successful (see Chapter 7, below).

Note that the currency of politics (both ancient and modern) is *speech acts* (advocacy); this thesis presupposes a categorical distinction between democratic politics and public administration (as opposed to the fused 'Westminster' system of parliamentary democracy) – appointment of persons to the latter function ('magistrates' in ancient parlance and government executives in modern) being subject to other principles. Although the Athenians appointed both administrative magistrates and jurors by lot, these were entirely different functions, the equal freedom of the former being secured by the principle of rotation (all citizens being able, in principle, to rule and be ruled in turn).¹⁴ Rotation is clearly impossible in large modern states, and alternative mechanisms for the selection of government executives are discussed in Chapter 8.3.5. The fact that the Athenians chose to elect certain key (financial and military) magistracies is likewise orthogonal to elective *isegoria* (the choice by the assembly of the five spokesmen to defend the existing law).

¹⁴ The sheer size of Athenian juries – 501 to 5,001 – would suggest that some sort of proto-representative principle was involved (that would have been unnecessary for purely administrative roles). Unfortunately the sources are silent on exactly *why* sortition was adopted in antiquity.

4.2 Advocacy and judgment: The Madisonian moment

The Athenians were absolutely clear regarding the entirely different roles of policy advocates and the sovereign *demos* – as Pericles put it ‘I advised it, but you voted for it’ (Thuc., 2, VII). The same principle was true in the age of Demosthenes, the only difference being that the final legislative judgment was delegated to a representative sample (the allotted jury in the legislative court), rather than all citizens voting in the assembly. Not so in modern representative assemblies, where the two roles are hopelessly conflated:

[a] body of men are unfit to be both judges and parties at the same time . . . Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail (*Federalist*, 10, ¶8).¹⁵

In this important passage ‘Publius’ (James Madison) outlines two entirely distinct aspects of political representation – ‘judges’ (decision-makers) and ‘parties’ (advocates for interests) – that, when combined in a single ‘body of men’, run the danger of corrupting each other: for legislative decision-makers are also ‘advocates and parties to the causes which they determine’ (*ibid.*) Madison’s view on political *judgment* appears to be that of a classical republican who believed in the possibility of disinterested virtue in human affairs (Banning, 1988, pp. 194-195); but from the point of view of *parties* (interests) he is a proto-liberal, ‘concerned with men who are pursuing their own interests, sometimes rationally calculated, in a system that is more amoral than immoral’ (Howe, 1988, p. 108). Proto-liberal, that is, until one considers the *passions* that underlie those interests, at which point Madison’s pessimism regarding the need to impose controls on the evil inclinations of mankind is closer to Hobbes or Calvin.

¹⁵ An earlier version of this section was published as ‘The Two Sides of the Representative Coin’, *Studies in Social Justice*, 5 (2), pp. 197-211. In view of the numerous editions of the *Federalist Papers*, all references are to volume and paragraph rather than to a specific edition.

But how can one writer be all these three creatures – republican, liberal and Hobbist – at one and the same time? Madison, like many of his eighteenth-century peers, was steeped in ‘faculty’ psychology,¹⁶ which posited an ascending hierarchy of human nature: from the ‘mechanical’ through the ‘animal’ to the ‘rational’ (*ibid.*, p. 109). According to this school of thought, the passions were part of man’s animal nature but ‘interest’ inhabited a precarious half-way house – ‘passionate’ when parties are motivated by short-term *self-interest*, ‘prudential’ when motivated by long-term and *general* considerations. At the top of the pinnacle stood reason and conscience: collective, dispassionate, wise and virtuous. Unfortunately, as Alexander Pope realized, for most mortals ‘the ruling passion conquers reason still’, leading Madison to the Calvinist conclusion that the ‘stern virtue [reason] is the growth of few soils’ (*Federalist*, 73, ¶1). This is one reason why he advocated the enlarged republic, as it would provide a deeper pool from which to elect ‘a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations’ (*Federalist*, 10, ¶16), thereby ensuring that *judgment* was exercised by ‘the elect’ – representatives of ‘enlightened views and virtuous sentiments’ (*Federalist*, 10, ¶21).

Madison deplored the formation of *parties* or ‘factions’¹⁷ because they seduced interests away from long-term and general considerations (*Federalist*, 50, ¶6); furthermore he acknowledged that parties were likely to predominate, owing to the strength of the passions, and would thus tend to corrupt the constitution. Hence the second role of the extended republic, over and above that of ensuring the judgment of a virtuous elite: ‘extend the sphere, and you take in a greater variety of parties and interests’ (*Federalist*, 10, ¶20). In an extended republic, with large

¹⁶ Madison’s tutor at Princeton was the Scottish Presbyterian cleric and moral philosopher John Witherspoon. Faculty psychology was in some respects a secularized version of the Calvinist doctrine of original sin – Madison’s famous ‘If men were angels, no government would be necessary’ (*Federalist*, 51, ¶4) was lifted straight from John Calvin’s Sermon on Galatians 3:19-20, ‘The Many Functions of God’s Law’ (1558).

¹⁷ The reason Madison and the other founding fathers disliked democracy and always connected it with factional evils is that they learned about it from Plato, Aristotle and Plutarch, who were all critical of democracy (M.H. Hansen, personal communication).

constituencies, the multiplicity of interests balances out as ‘ambition counteracts ambition’ (*Federalist*, 51, ¶4). *Divide et impera*: divide interests and reason will (given sufficient time), conquer all.

While Madison/Publius was advocating the positive benefits of the *enlarged* republic, his Antifederalist opponents argued that the preservation of republican *virtù* required *small* political units and a primarily agrarian economy. Antifederalists preferred the simple and heroic Spartan virtues to the corrupting influence of commerce and trade in unnecessary luxury goods: ‘Frugality, industry, temperance and simplicity – the rustic traits of the sturdy yeoman – were the stuff that made society strong’ (Wood, 1969, p. 52). They rejected the aristocratic hierarchy of merit assumed by faculty psychology, arguing instead the democratic case that the legislature should represent all ‘classes’ (occupations) ‘descriptively’: ‘the farmer, merchant, mechanic and other various orders of people, ought to be represented according to their respective weight and numbers’ (Dry, 1985, p. 125).

Unfortunately events such as Shays’s rebellion¹⁸ meant that the delegates at the US Constitutional Convention were more than a little nervous about Antifederalist plans for the legislature accurately to reflect the weight and numbers of the *demos*, so Publius won the ratification battle. However he lost the war. All the calamities that Madison predicted through combining ‘judges’ and ‘advocates’ in a ‘single body of men’ quickly came to pass. Partisan interests and the corrupting influence of money, media and celebrity quickly put paid to his hope that an enlarged republic would produce enlightened and virtuous representatives. The unanticipated seizure of power by political parties during Madison’s own lifetime meant that his hopes that the enlarged republic would balance out interests by allowing ‘ambition to counteract ambition’ (*Federalist*, 51, ¶4) were dashed by the forces of factionalism. ‘Advocates’ and ‘judges’ became well and truly fused in an electoral system dominated by factional political parties. Madison’s ‘republican

¹⁸ An armed uprising in central and western Massachusetts (mainly Springfield) from 1786 to 1787.

remedy for the diseases most incident to republican government' (*Federalist*, 10, ¶23) turned out be more akin to a dose of quack medicine.¹⁹

4.2.1 A binary solution to the representative conundrum

It would appear then that the combination of judgment and advocacy in one legislative body *inevitably* leads to factionalism and corruption:

One of the reasons why [the legislature] is so prone to the evils of factionalism, Publius argues, is that legislators are constantly being cast in the dual role of advocates and judges in the causes before them (*Federalist*, 10, ¶18). Their self-interest corrupts what should ideally be a disinterested pursuit of the common good (Howe, 1988, p.124).

But if Madison is right – judgment and the advocacy of interests are impossible to combine in one 'body of [fallen] men' – then why not have *two* bodies ('judges' and 'advocates') created by two entirely different systems of representation – as in fourth-century Athenian practice?²⁰

According to Hanna Pitkin (1967), the primary duty of a representative is as an active advocate for the substantive *interests* of her constituents. Active representation does not require that an elected representative should resemble her constituents in any respect, only that she should act as a trustee/delegate/advocate for their interests, in a similar manner to a lawyer representing the beneficiaries of a trust fund. Competitive elections are the time-honoured way voters choose advocates to act on their behalf. Legal advocates

¹⁹ Although British patent medicines lost their dominance in the US after the American Revolution, they were soon replaced by sales of home produced 'snake oil' elixirs.

²⁰ The use throughout this chapter of the words 'advocate' and 'judge' should not be confused with their judicial meaning (my distinction corresponds better to 'advocate' and 'jury'); meanwhile 'parties', 'interests' and 'advocates' are treated here as synonymous. This confusion of modern terminology is the reason that I prefer the original Greek alternative of *isonomia* and *isegoria*. Also, although Howe (1988) associates advocacy with self-interest, one can also be an advocate for a cause on the basis of ideological conviction – the motivating claim of many political activists.

would be out of a job if they failed to act solely in their clients' interests; likewise with elected representatives. In politics, however, we expect our advocates also to be judge and jury (and, in the case of fused parliamentary systems like the UK, executioner as well). But how can a member of the tiny elite of 'natural aristocrats' returned by the electoral process overcome her own self-interest and that of the faction she represents, so as to judge impartially on behalf of the whole nation?

Nadia Urbinati acknowledges the conceptual distinction between advocacy and judgment ('deliberation' in the sense of weighing alternatives) along with Madison's dilemma that 'the actors who advocate their cause in the assembly are the same ones who pass judgment' (Urbinati, 2006, p.47). However her solution to the possibility of corruption when the two functions are mixed is purely normative: 'impartiality is at most a prescriptive maxim and a moral duty', and relies on Aristotelian and Ciceronian notions of the norms of deliberative rhetoric: 'Advocates must "feel" the force of others' arguments in order to envision the path toward the best possible outcome' (Urbinati, 2006, p.47). This normative exhortation – reminiscent of the advice given by *Star Wars*' Obi-Wan Kenobe to the young Luke Skywalker to 'feel the force' – glosses over three obvious problems. First, classical rhetoricians assumed moral virtue as a prerequisite in debate, whereas their modern equivalents presuppose knavery (Remer, 1995); second, the term 'advocate' is drawn from jurisprudence, where the 'judging' is performed by a supposedly dispassionate jury; and third, the modern UK and other similar parliaments are characterized by an almost total absence of deliberation (the outcome of the 'debate' being predetermined by the parliamentary arithmetic), whereas in US-style constitutions, pork trading has more influence on judgment than deliberative rhetoric.²¹

According to Madison's Antifederalist opponents there was no such thing as 'dispassionate' judgment; the best we can do is to ensure that all interests are represented 'descriptively'. The legislative assembly should be 'an exact portrait, in miniature' of the whole citizenry (Adams, 1951, p.205), one that mirrors the

²¹ Cf. (Pettit, 2010b, p. 65), drawing on (Skinner, 2005).

composition of the nation: the 'farmer, merchant and mechanic' (Dry, 1985, p.125) rather than predominately white male lawyers. The ideal democracy is direct, but where this is rendered impossible for reasons of scale, the legislature should be a representative cross-section of the larger citizen body – isonomia by statistically-representative sample.

4.2.2 Ancient remedies for a modern disease

The legal process is indifferent about *who* the advocates are (they are judged purely on their competence and rhetorical ability) but reserves the final judgment for a randomly-selected lay group (the jury) whose verdict, according to the UK Home Office guide for jurors, *represents the considered judgment of the whole community*. But if this works for the law courts, then why not the High Court of Parliament? Most readers will share Antifederalist scepticism about the dispassionate, rational judgment of a natural aristocracy of wisdom and virtue, magically transcending partisan interests.²² Modern sensibilities are better represented by James Surowiecki (2004) and Philip Tetlock's (2005) arguments that the aggregate 'wisdom of crowds' is a more reliable and democratic way of judging most issues than reliance on experts and aristocrats, natural or otherwise (c.f. Estlund, 2008; Landemore, 2012; Page, 2007). If there is such a thing as the 'general will', then the best way to capture it is via the mechanical principle of Condorcet's 'jury theorem' regarding the probability of a group of individuals arriving at a 'correct' decision, rather than by privileging the 'god's eye' view of an aristocratic elite (Urbinati, 2006, Ch.6; Grofman and Feld, 1988). Modern parallels include Philip Converse's 'miracle of aggregation' (Converse, 1990), Robert Erikson and colleagues' portrayal of the properties of the *Macro Polity*: 'the collective intelligence that emerges when the voices of the public are pooled into an aggregated unit' (Erikson, Mackuen, & Stimson, 2002, p. 447), and Benjamin Page and Robert Shapiro's notion of emergent 'collective [political] wisdom' (Page

²² The early-modern republican theorist James Harrington believed that élites were simply better at dressing up their own interests in discursive language. By 'wisdom' Harrington did not mean a 'Platonic capacity to know metaphysical truths', simply an ability of the élite to calculate its own interests (Remer, 1995, p.552): 'Reason is nothing but interest, there be divers interests, and so divers reasons' (Harrington, 1992, p. 171).

and Shapiro, 1992, p. 15) This ‘collective wisdom’ approach to deliberative judgment (and its origins in Greek political thought) is explored in full in Chapter 6.

The only democratically-legitimate way of harnessing the wisdom of crowds in a large nation state is via descriptive representation and, as the polling industry has demonstrated, the only way of ensuring accurate descriptive representation is through probability sampling using a randomly-selected microcosm (Levy, 2008) a process known, when applied to political representation, as *stochation*.²³ Although the mechanism has its origins in fourth-century Athens – they even invented a lottery machine, the *kleroterion* – it has not fallen entirely out of use: in addition to the Anglo-American jury, the Deliberative Polling (DP) experiments of James Fishkin (2009) and his colleagues have shown that a large, randomly-selected group of ordinary citizens confirms Condorcet’s jury theorem: it can judge an issue just as rationally as any elite body.

On the other hand *election* is the best – or perhaps the only – way of ensuring active representation. As Bernard Manin (1997) has argued, elections produce elites: ‘It is no accident that the terms “election” and “elite” have the same etymology and that in a number of languages the same adjective denotes a person of distinction and a person who has been chosen.’ (Manin, 1997, p.140) This is because elections are designed to select the *best* candidates (*hoi aristoi*). Manin’s observation on the aristocratic nature of the electoral process applies universally – including under universal suffrage with the opportunity for everyone to stand as a candidate – so the term ‘electoral democracy’ is verging on the oxymoronic (‘electoral aristocracy’ would be a more accurate term).

The crucial question is how to combine these two distinct aspects of representation: ‘judgment’ and ‘advocacy’ – isonomia and isegoria – without incurring the factional evils that Madison deplored. A radical answer would be a

²³ 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 στόχος (*stokhos*) – to ‘aim’, conjecture, or approximate. Such a body would have a random probability distribution that may be analysed statistically and whose predictive accuracy depends, primarily, on sample size.

binary division of roles within the legislature, as James Harrington proposed in his *Commonwealth of Oceana* (1656). Harrington's proposal was based on the Venetian ballot, which involved a combination of election and sortition. Harrington's proposal assumed the complete separation of executive²⁴ and legislative powers and advocated a further separation *within* the legislature – responsibility for policy proposals (isegoria) being allocated to the 'aristocratic' (elected) element in the legislature and voting rights (isonomia) restricted to the 'democratic' (randomly-selected)²⁵ element:

An equal commonwealth is a government founded upon balance . . . a senate debating and proposing, a representative of the people resolving, and a magistracy executing (Harrington, 1992, p.25).

According to J.G.A. Pocock, the editor of the Cambridge edition of *Oceana*,

there is to be a 'natural aristocracy', constituted by the people themselves in the act of recognizing [via elections] and deferring to those of superior talent; it will possess its own 'virtue,' the capacity to reflect, and will exercise its own function, that of *proposing alternatives* [isegoria] between which the many's 'virtue,' the capacity to *decide*, entitles them to choose [isonomia]. The difference between aristocracy and democracy is moral, numerical and functional but has no necessary connection with the existence of estates, orders or classes (Pocock, 1988, pp. 63, my emphasis).

²⁴ Although this thesis does not address how the executive should be constituted, Harrington's analysis would suggest that it is not a *political* office. If competence is the foremost requirement then there is no reason in principle for the appointment of government ministers to be any different from the recruitment process for any other senior executive role. The general argument of this chapter – that the distinction between the three aspects of political power (advocacy, judgment and execution) should be maintained by a unique selection mechanism for each role – would rule out using one process (election) for the selection of advocates *and* executives.

²⁵ In fact Harrington's Senate was created by election alone and entailed a property franchise, whereas the democratic house – the Popular Tribe – was constituted by a complex mix of sortition and election. Given that the property franchise is no longer acceptable, my modern re-working of Harrington's proposal relies instead on election for the 'aristocratic' and sortition for the 'democratic' chambers.

Harrington illustrates the natural justice of his binary legislature with the example of two girls dividing a cake equally:

Two of them have a cake yet undivided, which was given between them: that each of them therefore might have that which is due, 'Divide', says one to the other, 'and I will choose; or let me divide, and you shall choose.' If this be but once agreed upon, it is enough; for the dividant, dividing unequally, loses, in regard that the other takes the better half. Wherefore she divides equally, and so both have right (Harrington, 1992, p.22).

In the modern reworking of Harrington's proposal (see below, Chapter 8) both elements – *hoi aristoi* and *hoi polloi* – sit within the same house: the elective element proposes and debates legislative alternatives (*isegoria*) and the sortive element decides the outcome by voting (*isonomia*), in a similar manner to a (very large) trial jury. The right of elected politicians (*hoi aristoi*) to introduce legislative proposals is restricted to the manifesto commitments of the political party or parties that won the most votes in the general election.²⁶ Given that the winners of the election are not forming a government but only putting forward policy proposals, a nationwide system of proportional representation would most accurately mirror the raw preferences of the electorate. Allotted members have the monopoly of the vote but cannot propose legislative alternatives, as descriptive-democratic legitimacy applies only in aggregate, rather than to individual members (see Chapter 5, below). In this respect elected members correspond to Harrington's 'divident', whereas the allotted members correspond to the second girl, who chooses which slice of cake to eat (Harrington, 1992, p.22).

A constitution respecting this binary distinction has been proposed by Marcus Schmidt, who runs the largest Danish opinion poll organisation (Hansen, 2005, pp. 54-5). Schmidt's proposal is for a 70,000-strong Electronic Second Chamber,

²⁶ In addition, government ministers would be entitled to introduce bills of a 'housekeeping' nature as 'secondary' legislation is normally viewed as an executive function. There could also be a role for successful direct-democratic initiatives, i.e. online petitions that exceeded the 100,000 signature threshold. This option is examined in more detail in Chapter 7.3.4.

selected annually by lot. As Denmark has only four million electors, this means that most citizens would serve for one year during their life, thereby emulating the rotation effect of Athenian-style sortition – ‘rule and be ruled in turn’ (Aristotle, 2008, VI .1.1317b). The first chamber of parliament, elected on a party-political basis, continues to prepare all bills. Working members of the second chamber have a paid day off every week to study and debate the proposals and then vote by pincode-activated telephone (every vote is rewarded by a tax credit). In Schmidt’s bicameral constitution, if the votes in the elected and allotted chambers fail to reach unanimity, then the proposal is put to a general referendum. However, the functional distinction within Harrington’s legislature between ‘debating/proposing’ (isegoria) and ‘resolving’ (isonomia) (Harrington, 1992, p.25) – ‘parties’ and ‘judges’ in Madison’s terminology – does not require a bicameral solution. Indeed the trial jury analogy suggests that both elements would need to meet in plenary, as it is hard to understand how a jury could adequately judge a case without first hearing the evidence (both for and against the legislative proposal).

However, the victorious party or parties in the election (*hoi aristoi*) would still need to convince the allotted legislature through the force of their arguments, as voting rights would be restricted to the members of the randomly-selected minidemos (*hoi polloi*). It would no longer be possible for a victorious party to steamroller through a policy that was buried in an election manifesto that few had bothered to read or that was deliberately concealed before the election. But given it is the same electorate that is being balloted in two complementary ways (preference election and sortition) one would anticipate that the winning party/parties in the election would also have a reasonable probability of winning the parliamentary vote. However – and this is the crucial point – the victorious political parties would need to ensure that their policies won both the mass (*unconsidered*) vote and the *considered* verdict of the same population, sampled descriptively – populism checked by deliberative rationality. The time interval between the original elections and the debate in the allotted chamber would also greatly improve the quality of legislation by allowing space for extended deliberation in the media and the general public, an essential part of Condorcet’s constitutional proposal (Urbinati, 2006, Ch.6).

4.3 Conclusion

The two norms of equal freedom that we have derived from Athenian political practice – equal speech rights (*isegoria*) and equal right to determine the outcome of the legislative debate (*isonomia*) can only be implemented in large modern states by representative mechanisms. A study of the modern literature on representation suggests that the first norm maps well onto the principle of the active representation of interests. Successful makers of representative claims have the right for their proposals to be considered for legislative judgment. Given the impossibility of all citizens in large modern states participating directly in the act of judgment, *isonomia* can best be ensured by a randomly-selected microcosm, thereby fulfilling the other principal desideratum of political representation – judgment by a group that ‘stands for’ the whole citizen body ‘descriptively’.

Modern political practice conflates both forms of representation – active and descriptive – so that parties come to be judges in their own cause, a danger identified by James Madison in *Federalist* 10. A bicameral constitution along the lines of James Harrington’s *Commonwealth of Oceana* would inoculate the body politic against Madisonian corruption, and honour in full the distinction between ‘descriptive’ and ‘active’ representation, *isonomia* and *isegoria*. Several other sortive proposals have featured in the recent literature (Burnheim, 1989; Lieb, 2004; O’Leary, 2006; Callenbach and Phillips, 2008; van Reybouck, 2016; Hennig, 2017) but they are potentially open to corruption on account of their failure to acknowledge and implement the *isonomia/isegoria* distinction. The Federalists won the ratification debate at the Constitutional Convention; a compromise solution would have included the Anti-Federalist proposal for descriptive representation.

The next two chapters (5 and 6) are devoted to a detailed discussion of the entailments of the need for *isonomia* in large modern states to be representative. Although the topic of Chapter 7 (representative *isegoria*) should, logically, come first, it focuses more on the empirical political science literature and, as such, provides a smoother segue into the final chapter in which I make some tentative proposals as to how the distinctions made in this thesis might be realized in constitutional design.

CHAPTER FIVE

5. Isonomia: the Deliberative Microcosm

Almost all the work in democratic theory being done these days is of the deliberative/discursive kind, or responses to it (Minch, 2009, p. 1).

The previous chapter made the case for the verdict of a descriptively-representative microcosm as a proxy for ‘what everybody would think under good conditions’ (Fishkin, 2009, p.194). The model for this is the Deliberative Polling methodology of the Stanford Center for Deliberative Democracy. But what are the ‘good conditions’ that would be required in a large-scale modern democracy to ensure representative isonomia? Since the so-called ‘deliberative turn’ starting in the 1980s, the democracy agenda has been driven by theorists in ‘discursive’ and ‘deliberative’ democracy – the quotation at the start of this chapter is from a study of the contribution of Michael Oakeshott to the field of democratic theory. However Oakeshott is best known as an advocate of ‘government by conversation’, a practice that (arguably) *ended* in the UK with the introduction of mass democracy in the wake of the 1867 Reform Act. The 1867 Act enfranchised much of the male urban working class and transferred political power from the forum of the nation to the electoral hustings, where the discourse style is more of a shouting match than a deliberative conversation.¹ As the outcome of parliamentary and congressional votes is now largely pre-determined by party arithmetic, most elected politicians don’t even bother to attend the debates, thereby destroying the notion of the parliamentary/congressional assembly as the deliberative chamber of the nation – in the UK parliament, the only serious plenary deliberation takes place in the unelected House of Lords (Weatherill, 2000, p. 173). Current democratic practice

¹ Even before the reform acts it was doubtful whether a meaningful conversation could take place in an assembly as large as the House of Commons, leading Walter Bagehot to locate the efficient source of power in the much smaller cabinet (Bagehot, 1963) – the size of which corresponds closely to the maximum size feasible for a deliberative group (Coote & Lenaghan, 1997).

would appear to be a very long way removed from normative political theory. Indeed, judging from the disconnect between the literature in descriptive/comparative/quantitative political science and normative political theory, academics in each area appear to inhabit different intellectual worlds, even though they are members of the same university departments.²

Bernard Manin views the 1867 Reform Act as a key factor in the transition from ‘parliamentary’ to ‘party’ democracy (Manin, 1997) – any substantive deliberation that takes place in a party democracy takes place *in camera*, far removed from the public arena, either in secret cabinet committee or, more recently, amongst a tiny cabal of advisers in the party leader’s snug.

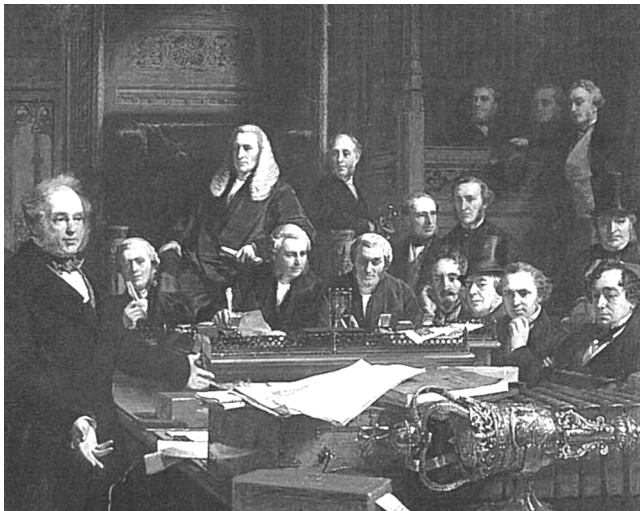


Figure 5.1: Parliamentary democracy (c. 1865)



Party democracy (c. 2009)

If it is the case that, historically speaking, the introduction of *democracy* (or, more precisely, universal suffrage) has led to the demise of (parliamentary/congressional) *deliberation*, then surely the very concept of ‘deliberative democracy’ is oxymoronic – a shotgun marriage rather than a union of souls. Most deliberative democrats, following the lead of the early work of Jürgen Habermas (1973, 1992), are interested in civil-society rather than parliamentary (or congressional) deliberation and focus primarily on the norms governing the internal

² The upgrade committee for my PhD advised me to read and reference either one or the other literature, leading me to jettison a couple of chapters of an earlier draft of this thesis.

procedures of deliberative forums, but the concern of this chapter is somewhat different – how to reconcile deliberation with political representation. My topic here is *demokratia* (a form of government) as opposed to democracy as a set of procedural norms that could be applied to any deliberative body. This chapter argues that there are two competing models of deliberation, one derived from *isegoria* (equal speech) and one from *isonomia* (equal political right). Only the latter form is appropriate to a sortition-based *demokratia*, the former being more closely related to election (discussed in Chapter 7, below).

According to political theorist Yves Sintomer, the word ‘deliberation’ has two conflicting meanings. In the Latinate literature (and its Anglophone derivatives), deliberation means ‘the decision of a collective body’, whereas

In German, conversely, deliberation excludes decision and a ‘*deliberative Stimme*’ (a deliberative voice) is only consultative. These semantic differences partly explain the difficult diffusion of the concept of ‘deliberative democracy’ in West European languages other than English. (Sintomer, 2010a, p. 36).

5.1 Two Concepts of Deliberation

5.1.1 ‘Germanic’ isegoria-based theories³

Deliberative theorists have evolved two distinct approaches to bringing together the two partners in the shotgun marriage of democracy and deliberation – but this involves a stark choice of whether to side with the bride (democracy) or the groom (deliberation). Opting for the pews on the groom’s side, Habermasians, Rawlsians, communitarians and critical theorists focus on the *procedural rules of the communicative exchange* – the search for the ‘ideal speech situation’ or equal speech rights (*isegoria*) (Habermas, 1973). The pews on the bride’s side of the church are occupied by those whose primary concern is *accurate descriptive*

³ Note that the terms ‘Germanic’ and ‘Latinate’ refer only to the derivation of the *concepts*, not the nationality of the theorists involved (most of the ‘Germanic’ authors are American).

representation (discussed in 5.1.2), the obvious example being practitioners of James Fishkin's Deliberative Polling methodology. Habermasians are primarily concerned with the isegoria of all the participants in the deliberation, whereas Fishkinians are more concerned with preserving the proxy-based isonomia of the *vast majority of citizens who fail to draw the lottery ticket*.

This binary distinction should not be confused with Rainer Forst's 'Three Models of Deliberative Democracy' (Forst, 2001). Forst's overwhelming interest is the *norms* that guide deliberation, which leads him to distinguish three types of deliberative democrats: liberals (Ackerman, Larmore, Nagel, Rawls); communitarians (MacIntyre, Sandel, Taylor, Walzer) and those advocating 'the rule of reasons' (Cohen, Dryzek, Fraser, Habermas, Young). Forst's concern is not so much with what *actions* deliberators should or should not perform but what *values* they should pursue (justice, the common good, or the 'best reasons') – as such the three models are a subset of what I will (synoptically) refer to as 'Germanic' deliberative democracy as it derives from the German '*deliberative Stimme*' (deliberative voice) – hence the emphasis on discourse rights (isegoria) and consultation in the literature on deliberative democracy from this tradition (Sintomer, 2010a, p. 36). For the 'stern proponents of deliberative democracy . . . overcoming disagreement is a regulative ideal' (Rosenblum, 2008, p. 3). Advocates of all three of Forst's variants of the 'Germanic' deliberative model are, to a greater or lesser extent, contemptuous of the aggregation of individual preferences (informed or otherwise) that is the goal of Fishkin's Deliberative Poll and would be impatient with the limitations imposed on the deliberative mandate required to ensure statistical representativity (the principal topic of this chapter). As Forst's concerns are with the internal workings of the deliberative body the word 'representation' only occurs once in his article (p. 370) and is only referenced as a problem (without proposing a solution): 'the question of the institutional conditions [of representational fidelity] . . . is too complex even to begin to take up here' (*ibid.*, p.350). Given that the concern of this thesis is modern-day *demokratia* (i.e. the institutional conditions of political representation), there is no need to enter into the argument between these three competing norms of (Germanic) deliberative democracy as *they all fail the representativity test*, for reasons provided below.

'Germanic' theorists are not particularly concerned as to whether or not those invited to the wedding feast generate an accurate microcosm of society at large.

For example Jon Elster's perspective on deliberative democracy as 'decision making by discussion among free and equal citizens' is predicated on an (acknowledged) 'minimal' definition of democracy as 'any kind of effective and formalized control by citizens over leaders or policies' (Elster, 1998, p.1; p.98). Note that Elster *does* appear to be referring to *demokratia* ('citizens', 'leaders', 'policies') rather than deliberative democracy as a general set of procedural norms, but appears unconcerned as to *which* citizens get to deliberate and whether or not they accurately (and proportionately) represent the views and interests of their peers:

The rationalist promise of deliberation makes the question of who participates secondary, *if not irrelevant* . . . what matters is that decisions fulfill the rationalist promise of an ideal speech situation, not who specifically gets to engage in the actual conversation and who, on the other hand, must remain in a position of spectatorship. (Green, 2010, p.58, my emphasis)

Deliberative democrats are actually seeking to return to the Burkean ideal of the deliberative pursuit of the 'laws of God and nature' (Pitkin, 1967, p. 169). At least Burke accepted the notion of diverse interests (albeit of an 'unattached' nature, not requiring a direct relationship between voters and parliamentary representatives); Elster, however, is content with the homogeneous notion of 'citizen'. If there is an implicit notion of interests it is the Machiavellian/Marxist distinction between the interests of the *popolo* and the *grandi* – elected parliaments being nothing but committees for managing the affairs of the latter.

The model underlying the Germanic model of deliberation appears to be *isegoria* – the equal right of any Athenian citizen who wished to avail himself of the Assembly cryer's open invitation to 'who wishes to speak', but there is no modern equivalent of the Athenian assembly where all citizens can attend and make a judgment on each speech act, so such an approach to democracy is distinctly anachronistic.

This lack of concern with concrete persons is also because the Habermasian deliberative ideal is for an "anonymous" or even "subject-less" deliberative civil society' (Scheuerman, 2006, p. 87). Unfortunately this leads to

a problematic *conceptual bifurcation between deliberation and democracy*. Deliberation without the meaningful (deliberative) involvement of concrete subjects is, in reality, no longer democratic. (Scheuerman, 2006, pp. 87, emphasis in original)

Similarly, Joshua Cohen's view of deliberative democracy as 'free public reasoning among equals' (J. Cohen, 1998, p. 186) focuses on the internal workings of the deliberative forum and ignores issues of representativity. Despite acknowledging that for political power to be legitimate it must 'arise from the collective decisions of the equal members of a society who are governed by that power' (Cohen, 1998, p.185), his article fails to explain how this is even *possible* in large modern states. Habermas himself is accused of an 'extraordinary disregard for detail . . . the project seems clear from afar, but becomes fuzzier as one approaches' (Heath, 1995, p. 146). Adam Przeworski appears equally nonchalant about *which* citizens get to deliberate: "democratic political deliberation" occurs when a discussion leads to a decision by voting' (Przeworski, 1998, p. 140); note that such a definition of 'democratic' deliberation could be equally applicable to the decision procedure of a military junta or a meeting of Plato's guardians. Surely though, if a deliberative assembly is to implement *demokratia* (rule of the people), then we 'need to know *who* deliberates, and we should be worried if most people are kept at the margins of political deliberation' (Gargarella, 1998, pp. 274, my emphasis). Note that 'keeping most people at the margins' is the reciprocal – or perhaps even intended – consequence of the current preoccupation of 'deliberative democrats' with the inclusion of 'marginalized' people (at the expense of the 'average' citizen).

This lack of concern over which citizens participate in the discussion is because deliberative theorists focus on the 'forceless force of the better *argument*'⁴ (Habermas, 1981, Vol. 1, p. 47) – deliberation is a discursive process and discursive rationality doesn't require accurate representation any more than Burke's deliberative assembly of statesmen required that Manchester and the other new conurbations should return MPs in proportion to their population. Burke

⁴ Der zwanglose Zwang des besseren Arguments.

recognized the existence of collective interests (commercial, agricultural, professional etc.), but such interests could be represented 'virtually' so long as they had *some* representatives sharing the same interests – thus the members for Bristol could act as advocates for the (trading) interests of the citizens of Manchester (Pitkin, 1967, p. 174). Modern deliberative democrats are also concerned that previously 'disadvantaged' collective identities should be included, the principal categories being gender, ethnicity, race [and, more recently, sexual orientation] (Phillips, 1995).

The focus of Habermasians on disadvantaged and excluded minorities, social injustice, and the inequalities of contemporary capitalist society (as opposed to the liberal-pluralist concern of the Fishkinians with the proportionate representation of 'mainstream' interests), is largely because 'deliberative democracy, when properly conceived, is the rightful heir of the early Frankfurt School [of cultural Marxism]' (Scheuerman, 2006, pp. 86) – deliberative democracy adopts a 'critical approach to the liberal state and its political economy [capitalism]' (Dryzek, 2000, p. 89). In his essay 'Traditional and Critical Theory' Max Horkheimer expands on Marx's notion of 'real democracy':

Democracy is for Marx the political form of socialism . . . democratic institutions on this view should no longer be aggregative or based on rational self-interest; rather, they should be participatory and based on *richer notions of reason and solidarity*. . . The underpinnings of such a notion of democracy . . . are to be found in an historical notion of *universal reason*. . . (J. Bohman, 1996, p. 191)

Deliberative theorists, like Burke (and, in the above sense only, Marx), are 'concerned not with votes but with arguments' (Gargarella, 1998, p.264). Deliberative democracy can be seen as a nostalgic return to the form of politics immortalized in Burke's 1774 *Speech to the Electors of Bristol* in which he described parliament as a 'deliberative assembly of one nation, with one interest, that of the whole' (Burke, 1975, pp. 28-29). Burke's deliberative assembly was intent on discovering the 'laws of God and nature' (Pitkin, 1967, p.169); modern deliberative theorists might well be seen as repackaging this quest for a secular age – the Mind of God having been replaced by the Principle of Reason, a direct descendant of Christian teleology (Gray, 2003; O'Hear, 2000):

[D]emocratic procedure no longer draws its legitimizing force only, *indeed not even predominantly*, from political participation and the expression of political will, but rather from the general accessibility of a deliberative process whose structure grounds an expectation of *rationaly acceptable results*. (Habermas, 2001, pp. 110, my emphasis)

Habermas's rejection of 'political participation' and 'the expression of political will' is the reason that Nadia Urbinati associates deliberative democracy with one of the 'disfigurations' of democracy, namely 'unpolitical democracy' or 'epistocracy' (Urbinati, 2014, Ch. 2). 'Germanic' deliberative theorists are scornful of the shift from discursive rationality to social psychology that characterized the evolution of parliamentary institutions from the Burkean virtual representation of 'objective' interests to 'liberalism and the representation of people with interests' (Pitkin, 1967, Ch. 9). As the ideal outcome of deliberation is rational consensus, discursive democrats are uncomfortable with majority voting, with its attendant risk of the aggregation of interests (the political equivalent of bourgeois 'possessive individualism' (Macpherson, 1962)), horse trading and other grubby compromises, preferring instead the pursuit of normative ideals like justification rationality, common good orientation, respect and agreement, interactivity, constructive politics, sincerity and truthfulness (Baechtiger, Shikano, Pedrini, & Ryser, 2009).⁵ There is an element of motherhood and apple pie involved here, Habermas himself acknowledging that 'rational discourses have an improbable character and are like islands in the ocean of everyday practice' (Habermas, 1996, p. 323):

⁵ These authors in fact describe pure (Habermasian) deliberative democracy, rooted in the 'logic of communicative action' as Type I deliberation; Type II deliberation 'incorporates alternative forms of communication (such as story-telling) and embraces self-interested behavior such as bargaining' (*ibid.*, p. 3). But such accommodation with political *realpolitik* is viewed by many deliberative theorists as a regrettable corruption of the Habermasian ideal and would argue that if it's not possible in practice to revert to eighteenth-century government by conversation then, as normative political theorists, that's really *not their problem*. The goal of this thesis, however, is to reconcile deliberative ideals with the contingent empirical constraints of modern democracies and that will require significant compromises all round.

Underlying mainstream approaches to contemporary [deliberative] democratic theory is the image of an idealized citizen, free from prejudice, devoted to the common interest, and perfectly capable of arriving at rationally informed preferences. (Femia, 2009, p. 68)

Deliberative theorists are generally content for participants in the debate to be volunteers (certainly not randomly-drafted conscripts, as is the case with trial juries) and the voluntary principle inevitably privileges the ‘usual suspects’ – i.e. those already active in civil society (Burnheim, 2006 (1985); Chapman & Lowndes, 2009; Elstub, 2008) rather than the proverbial Man on the Clapham Omnibus. Thus the pursuit of equal speech rights (isegoria) is at the expense of some of the isonomic principles of electoral democracy – equal representation (of individuals rather than favoured social categories) and majority rule. This is unsurprising, seeing as ‘largely under the influence of Habermas, the idea that democracy revolves around the *transformation* rather than the aggregation of preferences [a principal focus of the critical theory project] has become almost an axiom of contemporary democratic theory’. (Femia, 2009, p. 68, my emphasis). The overriding need, according to the Italian cultural Marxist Antonio Gramsci, was to emancipate the masses from the ‘bourgeois cultural hegemony’ created by the myriad mechanisms of socialization, by dissolving the resultant ‘contradictory consciousness’ to reveal an underlying rationality of everyday ‘lived’ experience (Femia, 1987). Deliberation amongst ‘ordinary’ people, under conditions of equality, might⁶ help overcome the prevailing bourgeois hegemony, as it could allow the working-class to develop organic intellectuals and an alternative hegemony within civil society. The (statistical) privileging of ‘ordinary’ people is the prime attraction of sortition to Marxists like C.L.R. James. (James, 1956)

⁶ Gramsci, however, would have been sceptical, as mass attitudes are largely a function of elite discourse (Zaller, 1992). Post-Marxists, however, appear to believe the transformation can be achieved without the need for a vanguard party to ‘iron out’ the contradictions in working class consciousness. This is because elite deliberation has replaced economism as the driving force of historical development, and the left have won the culture wars even if they failed to capture the commanding heights of the economy.

Given the argument of this thesis that *demokratia* involves a judicious combination of isegoria and isonomia, the focus of 'Germanic' deliberative democrats on the ideal speech situation (isegoria) is one-sided:

What is striking about Habermas' theory of communicative rationality is that the listening element of the communication is entirely absent. His ideal speech operates as if the listening element is wholly unproblematic.' (Dobson, 2012, p. 855; cf. Dobson, 2014)

Habermas's account of communicative action unwittingly postulates an unproblematic hearing: a listener who always hears all there is to be heard; a listening which is invariably accurate and complete. There is no theoretical recognition of auditory distortion, ideological deafness, institutional noise, the specific ways in which power channels hearing and listening channels power. It is as if, when it comes to listening, a metaphysics of presence still governed his thinking. (Levin, 1989, p. 111)

5.1.2 'Latinate' isonomia-based deliberation

In ordinary language, deliberation usually means something like careful consideration before a decision. (Chambers, 2012, p. 58)

Deliberative theorists in this 'ordinary language' camp – those who privilege democratic equality over discursive rationality – use the trial jury model, where most of the talking is done by third parties (courtroom advocates) and the model for the speech acts involved is forensic or rhetorical rather than deliberative. The role of the trial jury is to listen to the evidence and judge accordingly (most jurors make their minds up prior to entering the jury room). Jurors are selected at random, partly in order to ensure that defendants are tried by their peers – i.e. by a representative cross-section of ordinary citizens. Advocates of this jury-style 'minipublic' approach will be found on the bride's side of the church at the deliberative democracy shotgun wedding, where the pews have been block-

booked by the Center for Deliberative Democracy at Stanford University, in the front row of which is seated its director, Professor James Fishkin.⁷ The corporate lawyers arrived before the wedding and stamped the pews with the Center's trademark: Deliberative Polling®. Fishkinians emphasise the 'descriptive' (statistical) representivity of the Deliberative Poll (DP) and go to great lengths to ensure that all those who are selected by lot actually turn up for the debate. In St. Luke's rendering of the parable of the wedding feast the host instructed his servants to 'Go out to the highways and country roads and urge people to come in, so that my house will be filled'; in a similar manner Professor Fishkin instructs his deliberative pollsters to ensure that as many of the randomly-selected conscripts as possible turn up for the debate by ensuring that they are financially compensated, that their child-minding needs are met and that their employers are willing to grant them the necessary leave. This is because, just as a statistical sample selected for a public opinion poll has to be an accurate reflection of the demographics of the whole population, a deliberative assembly needs to be a 'portrait in miniature' of the whole electorate, especially if the assembly is designed to serve some kind of isonomic legislative function. Participation would ideally be mandatory, thereby obviating the need for stratified sampling (Stone, 2011, p. 176, n. 27). This is because a voluntary model would lead to the over-representation of political activists (Buchstein & Hein, 2010, p. 147). As Jon Elster acknowledges, 'those who know a great deal about a subject also tend to have an interest in it or to be moved by strong passions; otherwise they would not have bothered to become informed about it' (Elster, 1998, p.109), thus any concession to the voluntary principle will *distort the descriptive accuracy of the sample*.

However the flip side of Fishkin's concern for representativity is that the wedding feast is a meagre affair – more akin to Oliver Twist's bowl of gruel than St. Matthew's fatted calf. Randomly-selected citizen conscripts will know very little about the subject under discussion and are unlikely to introduce well-considered

⁷ There are many other examples of citizen-jury style approaches to deliberative democracy but the Deliberative Poll is unique in the emphasis that it places on a) accurate statistical representativity and b) balanced exogenous advocacy – the deliberative model underlying this thesis.

and innovative arguments of their own. Thus the DP is structured around a balanced expert briefing followed by a joust between partisan advocates (for and against the proposal under consideration). DP participants get to formulate their own questions for the experts, but their prime function is to determine the *outcome* (or, more accurately, indicate a shift in preferences) via a secret ballot at the end of the debate. Active participation is restricted to conversations in small sub-groups, under the watchful eye of trained moderators, and the primary purpose of the small groups is to prepare questions for the experts in the plenary sessions.

In sharp contrast to the Habermasian '*deliberative Stimme*' (deliberative voice), Fishkin's notion of deliberation is derived from the Latin root of the word (*libra*: weight), according to which the role of a *de-liber-ator* is to arrive at a decision by 'weighing up' competing arguments (Fishkin, 2009, p. 35). As such, his concept of deliberation is not dissimilar to the silent, inner deliberation (and secret voting) preferred by Jean-Jacques Rousseau, also derived from this Latinate meaning in which deliberation is associated with the *decision of a collective body*. Other advocates of silent 'deliberation within' are Robert Goodin and Simon Niemeyer (Goodin & Niemeyer, 2003) who:

deplore that since the deliberative turn of the 1990s, most deliberative democrats have moved away from the monological ideal of deliberation at the heart of the early Rawls model of the original position and embraced instead Habermas's later emphasis on actual interpersonal engagements. For Goodin and Niemeyer, this move away from hypothetical imagined discourse toward actual deliberation is misguided because, for them, it is 'deliberation within' rather than talking with others – or 'external deliberation' – that should be the focus of theories of deliberative democracy. (Landemore, 2012, pp. 130-131)⁸

⁸ I will consider Landemore's epistemic objection to 'deliberation within' in Chapter 6.2.1, below.

Other advocates of the silent model of ‘deliberation within’ include the Belfast political scientist John Garry: ‘talking gets in the way of democracy’ (Garry, Stevenson, & Stone, 2015, p. 4 [draft paper, needs updating]), and the Green political theorist Andrew Dobson (Dobson, 2012, 2014):

people taking it in *turns* to listen have a better chance of developing the required ‘we’ community than people taking it in turns to *speak*. . . It might appear ironic that discursive democracy could be improved by having less discussion, but it only appears to because we have got so used to thinking of discursive democracy in terms of speaking’ (Dobson, 2012, pp. 846, 857, emphasis in original).

Garry and Dobson’s focus on listening should not be confused with Jeffrey Green’s ‘ocular’ approach (Green, 2010), but the advocates of listening and watching are few in comparison with those focusing on the *vox populi*. According to Garry, Dobson and Green the ears and eyes of the people have been displaced by the Habermasian emphasis on its big mouth – isegoria at the expense of isonomia.

Although the term ‘deliberation’ is derived from the Latin *libra*, the concept of deliberation (*bouleusis*) as choosing between different alternatives (*prohairesis*) originated in Aristotle’s *Nichomachean Ethics* (Book VI).⁹ As the first biologist, Aristotle would have been delighted to hear that evolutionary psychologists now believe that we are all equipped with innate cognitive mechanisms specifically designed for the weighing of alternative arguments in order to find the epistemically optimal outcome (Landemore, 2012, p. 126). Although Aristotle defined the political animal (*zoon politikon*) in terms of the capacity to speak, nevertheless *convincing people* and the ability to *evaluate the arguments of others* are distinct cognitive mechanisms (Landemore, 2012, p. 124): ‘deliberative talk . . . admirable though it is as a “discovery procedure”, ought not in and of itself constitute our “decision procedure”’ (Goodin, 2008, p. 255).

⁹ Although the standard interpretation of the comparative model of deliberation in *Nichomachean Ethics* is subject to scholarly dispute. (Nielsen, 2011)

It's important to recognize that we are dealing here with two *entirely distinct deliberative traditions*, one (Germanic) emphasizing the norms governing equal speech rights (isegoria) and the other (Latin) the decision of a collective body (isonomia) (Sintomer, 2010a, p. 47), hence my adoption of these two terms to label an otherwise diverse group of theorists. Note that the terms 'Germanic' and 'Latin' refer only to the derivation of the *concepts*, not the nationality of the theorists involved (most of the 'Germanic' authors are American). An alternative terminology would be the Goodin/Niemeyer distinction between 'external' and 'internal' deliberation (there is an exact one-to-one mapping) but my preference is for etymology.

Given the tensions and contradictions described above, can deliberation possibly ameliorate any of the problems of representative democracy, and if so what form should it take ('Germanic' or 'Latin')? The disaffection with electoral democracy has led to a revival of interest in Athenian-style democracy,¹⁰ one of its key mechanisms being selection of public officials and jurors by random lot (sortition) – and this is the method used by Fishkin for the Deliberative Poll. According to the *Oxford English Dictionary*, the meanings of the word 'ballot' include both preference elections and random selection or 'allotment' (sortition). Given the current dissatisfaction with preference election and the various proposals for deliberative alternatives, why not refashion a deliberative legislature by an Athenian-style ballot (bronze dice in a stone box) rather than by the Westminster-style ballot (paper tokens in a metal box)? Could a randomly-selected allotted chamber (AC) be an alternative model for political representation, in which the legislature represents the demographic composition of society 'descriptively', in the

¹⁰ This thesis will not deal with the other aspect of Athenian democracy – the right of all (male) citizens to attend and vote at the assembly (*ecclesia*). There have been a number of recent calls for the incorporation of direct democracy into large modern states, usually by means of electronic technologies (telephone or internet voting). However, given the huge size of modern nation states, the problem of 'rational ignorance' (see below) is even more applicable than during the election of political representatives (Downs, 1957). Apart from in small countries with a long tradition of direct democracy, such as Switzerland, referendums on particular issues are frequently used as an opportunity for citizens to express their general approval or disapproval for the government, as opposed to providing a considered verdict on the specific topic of the plebiscite.

same way that those selected randomly for a statistical opinion poll represent the wider population proportionately? And if so what would be the appropriate procedural model for such a legislature – the full-blooded deliberation presupposed by the Germanic ideal speech situation or the anaemic Latinate model of the Deliberative Poll?

This chapter argues that the Latinate approach is (unfortunately) right – deliberation has to be limited to a tightly-constrained form in order not to contravene the equal freedom (isonomia) of the vast majority of citizens who *fail* to be selected by lot. Preference elections in large states may do little to empower individual citizens, but at least everyone is *equally* impotent. Like Odysseus's choice of whether to navigate closer to Scylla or Charybdis, it's better to compromise the ideal speech situation than to put at risk the isonomic ship of state. This, as argued in the previous chapter, is largely for conceptual reasons – 'descriptive' representation is an aggregate, statistical concept; whereas the 'active' functions of political representation can only be fulfilled by preference elections, partisan or plebiscitory (see Chapter 7.3.1, below). The Germanic deliberative model, if applied to an allotted *demokratia*, would *contravene democratic norms by mixing statistical and active functions in a single body*.¹¹

To understand this argument requires a careful unpicking of the hybrid concept of representation into its component elements (undertaken in Chapter 4). If Griffiths, Pitkin and Pettit are correct, and political representation requires both aspects – descriptive and active – (although all their analyses privilege the latter),¹² then how

¹¹ And there would also be practical objections – if members of a randomly-selected deliberative assembly were to have the powers to initiate and act as advocates for legislation they would become vulnerable to corruption by rich and powerful lobbyists, as assembly members would not be constrained by manifesto commitments, party ideology or the need to seek re-election. This problem would not apply if the assembly were designed along Fishkinian lines (silent deliberation and secret voting). The model also presupposes a strict separation between legislative and executive powers, with the latter personnel appointed on ability and/or past administrative experience (as opposed to being elected either directly or from within the legislature).

¹² In a more recent (2004) paper, Pitkin concluded that her earlier book was too sanguine as to the ability of (active) representation to instantiate democracy: 'Like most people even today, I more or less [in 1967] equated democracy with representation, or at least with

is it possible to realize these two different aspects simultaneously in the design of political institutions? Descriptive representation is the easy part – James Fishkin’s experiments in Deliberative Polling provide a template to develop proportional opinion sampling into a full-blown method of descriptive representation. Fishkin’s experiments have indicated that a randomly-selected assembly can decide the outcome of a debate on political issues in a competent manner when assisted by balanced teams of expert advocates. The quality of the resultant decision-making would appear to be no worse than decisions taken by elected representatives,¹³ few of whom even attend parliamentary debates and then only generally vote along predetermined partisan lines. Thus the Deliberative Poll design would appear to be a paradigm example of *informed decision-making (or preference aggregation) by a descriptively representative body*. Fishkin’s findings have been supported by a growing body of literature favourably comparing the ‘wisdom of crowds’ with so-called ‘expert’ political judgment. The issue of the ‘rightness’ of the decision-making process is dealt with in Chapter 6 – my concerns here are with egalitarian rather than epistemic norms. For the present purpose suffice it to say that measuring the informed preferences of a statistically-representative sample is adequate from an epistemic point of view and is a considerable improvement on the recording of uninformed preferences in a public referendum (and most general elections).

A Deliberative Poll (DP) would normally consist of 200-300 members, but if an allotted legislative chamber (AC) were designed along similar lines and given

representative government. It seemed axiomatic that under modern conditions only representation can make democracy possible. That assumption is not false, but it is profoundly misleading . . . Representation has supplanted democracy instead of serving it.’ (Pitkin, 2004, pp. 336, 339)

¹³ Strictly speaking Fishkin’s findings only indicate that post-deliberative preferences are seemingly more ‘informed’ and that deliberation is not afflicted by many of the problems that cause epistemic failure (polarization, group think etc.). It isn’t at all clear how it would be possible to judge the epistemic ‘rightness’ of a deliberative poll – although (Tetlock, 2005) contains a few clues – whereas the consequences of the decisions of legislative bodies are open to comparative and retrospective scrutiny. For further consideration on the epistemic potential of randomly-selected amateur decision makers see Chapter 6, below.

statutory (as opposed to advisory) powers, it might well be felt that the number should be larger, as legislative chambers typically involve 500-600 members.¹⁴ And this is the nub of the problem – an AC is democratically representative only in *aggregate*, whereas the maximum effective size for (Germanic-style) group deliberation is as low as twenty-four or even twelve! (Coote & Lenaghan, 1997).¹⁵ Thus dividing the chamber into small working groups immediately fails in terms of representative equality, hence Fishkin’s reliance on carefully-trained monitors for the small-group sessions to ensure that exchanges are not monopolized by garrulous or high-status individuals. My own personal experience of jury service has shown me how individual jurors can affect the verdict through sheer argumentative force during the jury-room deliberations. Whilst this might well be deemed acceptable from an epistemic point of view, the resultant decision cannot be taken to be representative of the population that the group is supposedly mirroring as the outcome is determined by the random presence or absence of single individuals. Whatever the epistemic merits of the verdict of the jury in the trial of Socrates (which entailed no jury-room deliberation), it would be hard to claim that it did not represent the majority view of Athenian citizens – a different jury (of 500 citizens) would almost certainly have returned the same verdict (assuming the same rhetoric for the prosecution and defence). The consistency of outcomes between different samples is a prerequisite to the use of legislative juries and this would preclude anything other than balanced (exogenous) advocacy: ‘Decisions made by imagined [silent] deliberation are *invariant across sample* but decisions made by talk-based deliberation are not’ (Garry, et al., 2015, p. 7[draft, needs updating] my emphasis)

On the face of it, [ongoing descriptive representativity of the minipopulus] seems unlikely. From everyday life we know that different conversations with different participants (or with the same

¹⁴ The statistician John Garry has argued for an absolute minimum of 1,000. (Garry, et al., 2015)

¹⁵ c.f. Dahl, 1990, p. 53: ‘I think that the optimal size for a working committee of actively participating members can hardly be more than ten or a dozen and is probably less.’

participants interjecting at different points) proceed in radically different directions. Given the path dependency of conversational dynamics, and the sheer creativity of conversing agents, it beggars belief that any one group would come to exactly the same conclusions by exactly the same route as any other. (Lawyers say it is a ‘well-known secret’ that ‘no two juries and no two judges are alike.’) Yet that is what strong advocates of ersatz deliberation must be claiming to be at least approximately true, in insisting that deliberation within a representative subset will genuinely mirror, and can therefore substitute for, deliberations across the whole community. (Goodin, 2003, pp. 58-59)

In his report on deliberative polls done for three different local public utilities in Texas, Fishkin is pleased to report that in all three cases the shift in public opinion, pre- to post-deliberation, was in the same *direction* (Fishkin, 1997, p. 220). But the *absolute numbers* nonetheless diverged wildly. In one case, half the respondents thought post-deliberation that ‘investing in conservation’ was the ‘option to pursue first’, whereas in another case less than a sixth thought so. In one case, over a third still thought post-deliberation that ‘renewable energy’ should be the top option, whereas in another case less than a sixth thought so. Clearly, these deliberating groups ought not to be regarded as interchangeable. Neither, in consequence, does this evidence inspire confidence in the general theory of ‘ersatz deliberation’, treating smaller deliberative groups as microcosms capable of literally ‘substituting’ for deliberation across the whole community. (*ibid.*, p. 74)

To those who share the perspective of this thesis – that descriptive representativity should be privileged over collective wisdom – this finding is deeply disturbing. There is a need to isolate and exclude those aspects of deliberation that lead to inconsistency between the samples. One possibility is that this would mean excluding all intra-group deliberation, leaving jury members with little more to do than ask questions and then record their anonymous votes at the end of the exchange of reasons between exogenously-selected and well-balanced advocates. This procedure could be tested (for invariance) experimentally by convening a number of randomly-selected samples to see if they judged the merits

of information/advocacy presented to them (consistently across the different samples) in the same way (allowing for a pre-defined margin of error).

If the assembly had statutory powers,¹⁶ scrutinizing the independence of the monitors of the DP small-groups would also produce a problem of infinite regression, on the principle of *quis custodiet ipsos custodes?* (who will guard the guards themselves?) (Juvenal, *Satires*, VI, lines 347–8). Given that the ultimate role of the DP jurors is to listen to the arguments of competing teams of expert advocates and then decide the outcome of the issue under debate by secret ballot it's not clear exactly what the role of small-group deliberation would be (other than to formulate questions for the panels of experts at the plenary session). In the case of the court-room trial, active deliberation in the jury room is on account of the requirement to arrive at a consensual (and, hopefully, epistemically correct) verdict; not so with the majority-vote requirement of the political jury. It should also be noted that proponents of the 'wisdom of crowds' warn of the dangers of bias and convergent 'groupthink' occasioned by the (likely) dominance of articulate, educated and other high-status individuals (Surowiecki, 2004). This is because 'the debates tend to be dominated by a small number of skilled and charismatic speakers' (Elster, 1998, p.109). Although the best way of overcoming demagoguery is to reduce the size of the group, small groups cease to be an accurate microcosm of the whole electorate and thus fail in terms of statistical representativity (the original *raison d'être* for random selection).

Fishkin, however, is adamant (personal communication) that the small-group sessions play an important role in ensuring informed decision making, perhaps on the basis of E.M. Forster's epithet, coined at the high point of the behaviourist era – 'How can I know what I think till I [hear] what I say'. One suspects however that the small-group deliberations may well be a reflection of the dominance of the

¹⁶ According to James Bohman, a deliberative group with binding decision-making rather than purely advisory powers would be a 'minidemos' rather than a 'minipublic'. (James Bohman, 2012, p. 77) In Habermasian terminology the minidemos has communicative power, whereas the minipublic only communicative freedom. This is the reason that a minidemos could not be subject to facilitation or monitoring, irrespective of any claims for independence on the part of the facilitators.

Germanic 'Ideal Speech Situation' (isegoria) model within the broader deliberative democracy community, which has criticized the DP for the comparatively low level of active deliberation (although 'Germanic' deliberative theorists may in turn be criticized for their lack of concern for accurate descriptive representation). But if small-group sessions depend on impartial trained monitors and if this is deemed to be unacceptable in a legislative assembly with statutory powers (for Juvenal's reasons), then it may well be that the small-group aspect would need to be jettisoned. According to (Goodin, 2008, Ch. 3), most of the heavy lifting is done by silent (Rousseauian) 'deliberation within' (as is generally the case with trial jurors' decisions).

5.2 Advocacy - vs - Judgment

The problem becomes even worse if members of the assembly are also to act as advocates for and against legislative bills. Although Pitkin only deals briefly with random selection in her book, nevertheless the following passage outlines the general problem regarding the role of 'descriptive representatives':

If the contemplated action is voting, then presumably (but not obviously) it means that the [descriptively-mandated] representative must vote as a majority of his constituents would. But any activities other than voting are less easy to deal with. Is he really literally to deliberate as if he were several hundred thousand people? To bargain that way? To speak that way? And if not that way, then how? (Pitkin, 1967, pp. 144-145)

What Pitkin is saying here is that voting on binary issues (yea or nay) is a simple aggregative process¹⁷ – it would be possible for example for a binding-mandate

¹⁷ It is frequently retorted that the legislative process differs from the trial procedure in that legislative issues are more complex and not subject to binary decisions. However this conflates the policy-making and legislative processes. The existing High Court of Parliament only has two lobbies (yea and nay) and an AC (allotted chamber) might well choose to reject a bill, recommending (effectively) to 'revise and resubmit'. For additional arguments as to how seemingly complex decisions can be resolved into a series of binaries see (Landmore, 2008).

representative to simply act as a token for the aggregate votes of her constituents (as is the standard practice at trade union conferences). However the delegate is entirely ignorant as to why each of her members might choose to vote that way – as soon as the delegate rises to her feet to speak, she can only give a *particular* argument and immediately loses democratic legitimacy as only those in the target population sharing that particular perspective would be represented. Anything other than aggregate behaviour by a descriptively-representative chamber is in breach of its democratic legitimacy and that means that allotted members would necessarily be restricted to *asking questions* (on points of information) *and voting*.

5.2.1 Speech Acts and their Measurement

As soon as a descriptively-representative member engages in a speech act (isegoria) – either to the whole assembly or to a sub-group – she becomes an (individual) advocate and thereby loses her (statistical) democratic legitimacy. The reason for this is that the OMOV¹⁸ principle of democracy requires that the members of an allotted chamber (AC) possess an equal influence in the secret ballot that determines the outcome of the debate (isonomia). However, in the parlance of Austinian linguistic philosophy, the ‘perlocutionary force’ (outcome) of the speech acts of each individual will be anything but equal (Austin, 1975). This is because allotted members, unlike elected politicians, have not been selected on the basis of their intelligence, social status, knowledge or rhetorical skills, so those members who perchance possess persuasive skills, or who are perceived to be of high social or occupational status will influence the outcome of the debate in a manner that is incompatible with their descriptively-representative status. ‘Eloquent or charismatic or highly motivated speakers can, in such circumstances, dominate the proceedings, no matter how silly or self-serving their arguments may be’ (Femia, 2009, p. 75). And less active members will tend to follow the lead provided by the eloquent:

¹⁸ One [Person] One Vote. All votes carry exactly the same causal power to affect the outcome.

People in collective settings appear only too ready to conform to the majority in the group and to abandon their own personal beliefs and opinions. Study after study has shown this to be a 'near-universal phenomenon', probably related to the human need for self-evaluation. (Brown, 1988, quoted in Femia, 2009, p. 73)

The fact is that nobody wants to be the 'odd one out'¹⁹ (Deutsch & Gerard, 1955), and people will value uniformity in groups and will often behave so as to enforce it (Festinger, 1950, 1954); however most of the advocates of deliberative democracy 'betray little, if any, interest in [such] findings of political science and social psychology' (Femia, 2009, p. 69). But the claim that, as George Orwell put it in his political satire on Stalinism, *Animal Farm*, 'all animals are equal, but some animals are more equal than others' is born out by the following extract from interviewing participants in the popular deliberative assemblies²⁰ established in the wake of Argentina's political crisis of 2001:

although there were no 'titles' or 'hierarchies' in the assemblies, there were indeed 'people with different interests', with different 'histories', 'careers', 'training' or 'personalities', all of which established clear differences among them. These were not expressed in terms of the right to speak (which was in principle accessible to all), but in terms of

¹⁹ This is not necessarily because people trust the judgments of their confederates but simply because they want to avoid the possibility of social ridicule (Femia, 2009, p. 74). The 'need to belong' is a 'powerful, fundamental and extremely pervasive motivation' (R.F. & Leary, 1995); such a powerful social psychological mechanism can only harm the epistemic value of collective deliberation. Although 'groupthink' (Janis, 1972; Sunstein, 2002) is less of a risk in the sort of cognitively diverse assembly constituted by sortition, nevertheless *any* deliberative group charged with arriving at a consensus (the ideal outcome of Habermasian deliberation), will 'insulate itself from inconvenient information and rarely search systematically through alternative policy options to assess their relative merits . . . Once the members converge on a normatively "correct" point of view, their attachment to it will become dogmatic. The price of unanimity or harmony – the aim, after all, of deliberative democracy – may thus be bad decisions and half-baked policies'. (Femia, 2009, p. 74)

²⁰ As the popular assemblies arose 'spontaneously' rather than as a result of sortition, they could not claim to be statistically representative, nevertheless they are a valuable indication of the intrinsic problem of imbalance of perlocutionary outcomes in the performance of speech acts, which is a characteristic of *any* deliberative assembly.

the extent to which each one's words were taken into account.

'Proposals', states a member of the Asamblea 20 de Diciembre de Flores, 'had a different weight according to who said them' (Male, 34, with previous political experience).

Few consider that the sprouting of this kind of differences could have been avoided; the majority considers it instead as a natural process as they acknowledge the presence of 'natural hierarchies', 'spontaneous leaderships' and 'natural-born leaders'. 'All processes yield leaders', says a politically experienced member of the Asamblea Popular de Liniers. 'Who is the one who says "let's do this"? There are always leaders, natural commanders' (Male, 47).

Since what is at stake is the differential of attention given to the word of some above that of others within a space characterized, above all, by the production of discourse, it is only natural that those who are considered to be 'points of reference' are in the first place those who 'know how to speak', have 'rhetorical abilities', show 'a high cultural level' or bring in some useful knowledge on a relevant field. Those who fit that description were usually professionals and intellectuals who 'could easily occupy all the space with their ideas'. (Pousadela, 2008, pp. 111-112)

'One [Person] One Vote' as a clearly-defined principle of democracy can easily be undermined by the unequal distribution of the persuasive powers to influence how the votes are cast. Formal isonomia and isegoria are easily undermined by the kind of imbalances revealed by the Argentinian experiment in deliberative democracy. In the words of one assembly participant, this quickly led to disillusion:

[At the beginning we thought] 'fine, we have people who did not finish elementary school and who join because they want security, they want their children to be able to safely go through the park, and at the same time we have a psychologist, an economist, people with previous political participation. Our discussions are going to oscillate and we are going to grow up together. The lady who is worried that their children can walk through the park is going to learn from the

other one, and the latter is going to learn from her'. I thought that was going to yield a change. But no, the neighbor simply left (...) People who came as plain neighbors, without much of an intellect, had to give way to those who knew, because those who knew were the visionaries (Female, 55, ex- Asamblea de Monserrat, with previous political experience). (*ibid.*, p. 112)

The equal freedom of people with previous political experience, and even 'visionaries' is already well catered for in liberal democratic societies. However nobody elects the members of a voluntary or descriptively-representative assembly on the basis of their stated views or rhetorical abilities, so they cannot claim the mandate that comes via electoral success. Only if it were possible to equalize the time allotted to each speaker (including obliging shy and retiring members to match colleagues of a more Churchillian disposition) and to equalize the perlocutionary force of each utterance would it be possible for members of an allotted chamber to actively participate in a debate leading to a statutory legislative outcome without contravening democratic norms. However, without a 'robust account of the "force" of language in social and political interaction' this is a serious challenge (Johnson, 1998, p. 175).

The 'empirical turn' in deliberative democracy has led to positivistic attempts to monitor the speech-act equality of all participants by using metrics like the Discourse Quality Index (Steenbergen, Baechtiger, Spornidie, & Steiner, 2003), but it's unclear how monitoring the frequency of participation and the number of words used by chosen 'disadvantaged' minority groups (generally women and ethnic minorities) can translate into substantive equality of perlocutionary outcome (Baechtiger, et al., 2009, p. 5; Stromer-Galley, 2007). Whilst participants may be urged to respect all participants and defer to the better argument (rather than the most persuasive oratory), it is hard to establish any sort of discourse parity between a seasoned public speaker and a member of a 'disadvantaged' group who does not habitually engage in idealized forms of deliberation (Sanders, 1997). And how is it possible to guard against the wolf in sheep's clothing – a partisan interest masquerading as an argument for the general good, as deliberators will be motivated to make utterances of a 'plays-well-with-others' nature (Mucciaroni & Quirk, 2010). 'The [deliberative] norm does not induce members to become impartial, only to appear to be so' (Elster, 1998, p.101). In sum, the difficulties

involved in ensuring the sincerity and substantive (outcome) equality of the speech acts of individual members of a descriptively-representative legislature are so great as to *negate the original case for sortition*.

Note that this observation is true *ex hypothesi*, as it depends on the nature of the *concept* of descriptive representation, rather than any empirical observations. Public opinion surveys based on probability sampling (Levy, 2008), are only valid in aggregate – pollsters ask the same question to a large number of respondents and then present the results using statistical tools. The individual response of one respondent might be of interest to a social anthropologist or ethnomethodologist but is of no scientific significance and is of no value from a democratic perspective. The very fact that ‘descriptive’ and ‘statistical’ representation are synonymous is a further indication that it is impossible for an individual member of an allotted parliament (unlike an individual MP) to claim the status of a ‘descriptive representative’ as the concept only applies in plural. When the (elected) Honourable Member for Bristol South stands up to speak she can legitimately expect to command the attention of the House, but this is not the case for a ‘descriptive’ representative. This is a knock-down argument in the ‘analytical a priori’ sense. Any democratic theorist who advocates an active isegoria role for individual members of an allotted assembly would first need to refute this argument regarding the *conceptual* status of descriptive (statistical) representation. I am not aware (at the time of writing) of any such successful refutation, most writers naively viewing ‘allotted members’ as on a par with elected members – i.e. political agents selected by two different forms of balloting. Proposals to introduce sortition alongside election are generally bicameral, with the representatives in allotted and elected chambers performing identical functions in parallel (Callenbach and Phillips, 2008; O’Leary, 2006), without recognition of the entirely different forms of representation involved – active for election, and descriptive for sortition.

This distinction is derived from Pitkin’s ‘ordinary language’ approach to philosophical issues: take, for example, the argument that a legislature should be a ‘portrait in miniature’ of the whole electorate. Although a (painted) portrait is composed of a number of individual brush strokes, the overall representation is based on the aggregation of the strokes – individual brush strokes hold no significance outside of the context of the full work. A representation of an image displayed on a digital computer screen is even more pertinent – the screen I am

using to compose this thesis contains 2,073,600 pixels, but no individual pixel contains any information that is of relevance to the document being displayed – this would only be the case if the computer screen relied on holographic technology, where each piece of film contains a lower-resolution version of the full image. If individual ‘descriptive representatives’ were like holographic film then we would only need *one* of them to mirror the whole society; the fact that we need several hundred in order to ensure a reasonably accurate description indicates that the allotted representative in this analogy better resembles an individual computer pixel than a tiny piece of holographic film.

Advocates of ‘Germanic’ deliberative democracy reject Austinian arguments on perlocutionary imbalances, as *isegoria* (equal right of addressing the public assembly) only demands equal *access* to speech, not equal outcomes: ‘All members of the political community . . . take part in discourse. Each must have fundamentally *equal chances* to take a position on all relevant contributions’ (Habermas, 1996, pp. 182, my emphasis).²¹ ‘Equal’ deliberation must have the following attributes:

(1) participation in such deliberation is governed by norms of equality and symmetry; all have the same chances to initiate speech acts, to question, to interrogate, and to open debate (2) all have the same right to question the assigned topics of conversation; and (3) all have the same right to initiate reflexive arguments about the very rules of the discourse procedure and the way in which they are applied.²²

(Benhabib, 1996, p. 70)

²¹ Note, however, that *isegoria* was an aspect of Athenian *direct* democracy – *all* citizens had the right to address the assembly; not so with a deliberative microcosm established by sortition. Large modern states require a system of representation, and references by deliberative democrats to the practices of Athenian direct democracy unhelpfully ignore this distinction.

²² One is reminded here of the classical liberal perspective on freedom prior to T.H. Green’s observations on its economic and social prerequisites. Unfortunately, for *isegoria* to be anything more than a merely formal equality of opportunity presupposes an egalitarian social and economic setting that ‘has emerged from the confines of class and thrown off the millennia-old shackles of social stratification and exploitation’ (Habermas,

Just as Burke was confident that the deliberative forum of the nation needed only *one* advocate for (say) the merchant interest, 'Germanic' deliberators would be content (in principle) with a single advocate of a particular viewpoint, such is their faith in the power of rational discourse (and disdain for interest aggregation and majority voting). Such assemblies only require a few dozen deliberators, but would not be considered descriptively representative in a way that would be meaningful to anyone working in the polling industry.

To choose another ordinary-language example, when someone refers to themselves as 'only a statistic' this implies a denial of individuality, as a 'statistic' (singular) properly refers to a number (usually a percentage), as opposed to an individual unit in the target population that the statistic is used to represent. 'Allotted representatives' is an example of the limited set of substantives that only exist in plural form so, in order to avoid confusion, it would be better to refer to 'allotted forum', 'allotted chamber', 'allotted assembly', 'allotted legislature' etc. as opposed to the traditional language of parliamentary or congressional representatives (persons). That way there will be no further temptation to commit the error of reifying the result of a *conceptual confusion* into the 'allotted representative', through the mistaken belief that a change in the balloting method (from election to sortition) will produce a 'descriptive representative' that is on a par with an elected representative.²³ Elections are for named *individuals* (or, in the case of some systems of proportional representation, place-holders on party lists), whereas sortition generates a *collective* representation that is a portrait in miniature of the whole society. This must cast serious doubt on some recent proposals for allotted assemblies where individual members perform an active function (Burnheim, 2006;

1996, p. 308). Given the growing inequality of modern societies this is a demanding precondition for equal deliberation that is unlikely to be realized any time soon – it is 'fundamentally utopian given present economic and political conditions' (Scheuerman, 2006, p. 95). For further discussion of equality of opportunity, see Chapter 2.1 (above).

²³ One is reminded here of Gilbert Ryle's example of the category error made when one looks for an entity called 'Oxford University', only to find a collection of individual buildings (colleges, libraries etc). (Ryle, 1949)

Callenbach & Phillips, 2008; McCormick, 2011; O'Leary, 2006; van Reybrouck, 2016; Hennig, 2017), as opposed to proposals that limit the role of the allotted assembly to a collective judgment or veto function (Barnett & Carty, 2008; Lieb, 2004; Schmidt, 2001; Sutherland, 2008; Zakaras, 2010). (Fishkin, 2009) would also fit into the latter category were he to propose that Deliberative Polling assemblies have more than a modest advisory or educative role. Such a model would, paradoxically, be far more radical than the civil-society 'influence' models of deliberative democracy inspired by Critical Theory, as

deliberative *influence* does not a democracy make . . . By neglecting the question of how the commanding heights of global power could be directly subjected to popular self-legislation, these models risk throwing out the baby with the bathwater. In contrast, the core idea of modern democracy requires the exercise of political power in accordance with rules and laws freely consented to by those affected by them. In this classical view, democracy requires autonomous self-legislation. Only the exercise of the commanding heights of decision-making by deliberative citizens can achieve democracy' (Scheurman, 2006, p. 94, my emphasis).

The problem with the 'subjectless' and 'anonymous' deliberation favoured by Habermasians is 'how can the plurality of deliberative civil society undergo an effective funneling into a (unified) expression of democratically legitimate political power?' (Scheurman, 2006, p. 98). (Dryzek, 2000a), in characteristic Frankfurt School style, describes these concerns as a political sellout to 'liberal constitutionalism' but all genuine democrats must surely be concerned with the mechanisms for general law-making and the rule of law. As we saw in Chapter 2, this was the primary concern of the fourth-century Athenian reforms. Once again we are witnessing the tension between the two elements of the oxymoron that constitutes 'Germanic' deliberative democracy – a 'worrisome tendency to discount the indispensable democratic core of the idea of deliberative democracy' (Scheurman, 2006, p. 102). However democratic the internal procedural norms, it still ain't *demokratia*.

5.3 The ongoing need for election

The problem of the aggregate nature of the descriptively-democratic mandate becomes even worse when one considers the possible role of an allotted chamber in formulating its own legislative agenda. Although the randomly-selected Athenian Council of 500 (*boule*) was the principal channel for legislative innovations, the *boule* was not the prime law-making body – it was just a ‘collegial magistracy’ (secretariat for the legislative assembly) and emphatically *not* a representative institution as it ‘was not perceived as standing for the people’ (Manin, et al., 2008, p. 2). Legislative proposals made by, or via, the *boule* were subject to ratification by the entire citizen body at the legislative assembly (*ecclesia*), before (in the fourth century) undergoing further deliberative scrutiny in randomly-selected *nomothetai* (legislative courts). In this sense legislative proposals generated by a randomly-selected council had to overcome two additional democratic filters:

- The unconsidered assent of the entire demos in the assembly (where there was little opportunity for serious deliberative scrutiny), and
- The considered verdict of the allotted jury in the legislative court, comprised of jurors who were over thirty who had taken the dikastic oath (Hansen, 1990, pp. 222-226).

How might such a three-fold legislative process be replicated in a large-scale modern democracy, and would it fulfil the requirement for both forms of representation (descriptive and active)? A typical meeting of the Athenian assembly might have involved the presence of some 3,000-6,000 citizens, which is pretty much the upper limit for direct democracy. One of the reasons for the introduction of electoral representation was the dramatically-increased size of the modern nation state, the resultant problem being that the inherently ‘aristocratic’ nature of the electoral process inevitably returns an assembly that no longer accurately reflects the full diversity of the population that is being represented (Manin, 1997). Selection by election is based on the ‘principle of distinction’ and, as such, elected representatives will be anything but typical of their constituents (*ibid.*). The problem of scale was the principal reason that the Anti-Federalist faction of the American founders failed to pursue the argument for accurate descriptive representation (which they favoured) with more vigour – they thought that it was ‘wildly impractical’ in so large a union:

Is it practicable for a country so large and so numerous ... to elect a representation that will speak their sentiments, without their becoming so numerous as to be incapable of transacting public business? ... [A] legislature, formed of representatives from the respective parts, would not only be too numerous to act with any care or decision, but would be composed of such heterogeneous and discordant principles, as would constantly be contending with each other (Brutus, 1981).

This is clearly true if representatives are required to 'speak their sentiments', as every speaker will have an individual perspective on a particular issue, resulting in a 'confusion of voices' not heard since the Tower of Babel. Not so if participation is restricted to the aggregate function of voting. Each participant in a proportional opinion poll will have her own private reasons for answering a question in the positive or negative (or assigning a weight to a preference) but the aggregation of the results will indicate overall preferences, irrespective of the individual factors that give rise to them. The mathematics of proportional opinion polls demonstrates that samples can be surprisingly small and still accurately reflect aggregate opinion. Needless to say the technology to enable large-scale statistical sampling was not available to the American founders.

A key problem in large-scale democracies is that the ability of individual votes to affect the final election outcome is so small that few of the electors who turn out to vote take the trouble to study the issues at stake and the proposals that political parties make to address them. The thinly-disguised secret of modern politics is that nobody reads the election manifesto and the votes cast are largely on the basis of what is in effect a political beauty contest. The public choice theorist Anthony Downs referred to this as the problem of 'rational ignorance' (Downs, 1957) – an elector in a mass democracy has no reason to study the issues in depth because her individual vote has little causal power. The power of the individual elector to change the outcome of elections is minimal as in modern democracies the extension of the suffrage cannot in the end empower individuals because once the democratic 'cake' has grown past a critical size each voter's slice becomes so small as to be causally irrelevant. This is because – unlike with other public goods such as street lighting – the efficacy of the vote suffers from diminishing returns as the franchise is extended. However, democratic mythology hides this fact so democracy is not believed to suffer from diminishing returns. When people see

through the myth, and discover voting is causally irrelevant, apathy results (Graham, 2002), a result accurately predicted by (Hegel, 2010, §311).²⁴

Arguably this is little worse than the decisions of the Athenian assembly, which were often poorly considered and swayed by demagogues – this was one of the reasons for the fourth-century innovation of the *nomothetai* (randomly-selected legislative courts). But, presupposing the need to reconcile large political states with democratic norms, is there any alternative to an element of ignorance (rational or otherwise) in the initial choice of legislative proposals if, as argued in this chapter, the introduction of laws is an active function that cannot legitimately be undertaken by a descriptively-representative chamber?²⁵ It would appear that elections (and/or direct-democratic initiatives) are the only legitimate mechanism for introducing legislative proposals: the victorious party or parties in the election would have the right to introduce manifesto bills for the considered judgment of the descriptively-representative sovereign assembly. Notwithstanding the elitist

²⁴ This ‘public-choice’ analysis of electoral impotence is not without its critics, Richard Tuck claiming that the ‘free-rider’ argument does not apply to cases (for example majoritarian elections) where there is a specific threshold involved (Tuck, 2008). However this ignores the fact that in closely-contested elections the inevitable recounts eliminate the causal efficacy of the individual ballot slip, so there is no clear instance of the ‘casting’ vote (Graham, 2002). And even if one accepts Tuck’s argument that voting *is* a rational act, innumerable studies have revealed that voters remain profoundly ignorant of the issues and policies involved when casting their votes. Tuck claims that the free-rider problem was only invented some fifty years ago and that its all-pervasive influence is down to the effective propaganda of free-market economists. But is this explanation plausible? – for example a swift check on Amazon.com reveals a low ranking for Anthony Downs’s *Economic Theory of Democracy*. Whilst Tuck is no doubt right that the widespread belief that self-interest is the major causal explanation of human behaviour is an aspect of modernity, such views clearly pre-date public choice economics and their wide influence is better attributed to Hobbes, Bentham, Darwin, Marx, Nietzsche and Freud. For further criticism of economic theories of democracy see (Mackie, 2003, 2011).

²⁵ Rousseau’s (and Mill’s) solution was to limit the right to propose new legislation to the executive branch, which would, in large states, be constituted by some principle other than election. Rousseau viewed the executive as the active, ‘physical’ branch of the polity, reserving the requirement for democratic equality for the sovereign (moral) branch. Such a system was ideally suited to a small community like Geneva; sortition might well be the only way of enabling sovereign equality in a large state. The distinction between the active and descriptive aspects of the representative function is entirely compatible with *The Social Contract*; Rousseau’s famous rejection of representative government was, in effect, a criticism of the merging of the two distinct functions (sovereign and executive) in the British parliament.

implications of election and the fact that voters are doing little more than expressing a raw preference or voting in a political beauty contest, election would appear to be the obvious democratic method for the initiation of legislation.²⁶

5.4 Conclusion

This chapter has examined two competing ‘schools’ of deliberative democracy – the ‘Germanic’ and the ‘Latinate’ and concludes that only the latter is suitable as a template for a modern *demokratia*. In order not to contravene democratic equality (isonomia), a randomly-selected legislative assembly has to be of a sufficient size (300–1,000) to ensure statistical representativity, and can only legitimately act in aggregate. As soon as the assembly is sub-divided, or as soon as any member performs a speech act – such as policy proposal and advocacy – the assembly loses its democratic mandate. ‘[F]ace to face dialogue may subvert deliberative democratic ideals’ (Smith, 2000, p. 36) by undermining the isonomia of the vast majority of citizens not selected by the political lottery, and may encourage the suppression of conflict (Mansbridge, 1983, pp. 276-277). As such, sortition can only be one element in a mixed constitution, alongside preference elections or petitions/plebiscites (for policy initiation) as well as other extra-democratic mechanisms to ensure executive competence, the preservation of long-term interests and balanced expert advocacy. The need for equal speech (isegoria) in large modern states to be subject to representative mechanisms is addressed in Chapter 7.

²⁶ It might be argued that the 2004 initiative by the government of British Columbia to empower a randomly-selected citizen assembly as a democratic alternative for constitution-making and reform provides an exception to this principle (Warren & Pearce, 2008). However, of the original stratified sample of 23,034 only 1,715 opted to be selected, 964 (4% of the original sample) came to the selection meeting and 158 were randomly selected (Goodin, 2008, p. 14), so there is no way to tell the degree to which the final assembly was an accurate microcosm of the whole population (arguably citizens with a proactive interest in political and constitutional issues would be more likely to agree to participate). Another potential problem is the power of the full-time officials to influence the debate, in particular via the (assumed) impartiality of the selection process of expert advisors, as (unlike in most Deliberative Polls) there was no clear division between ‘pros’ and ‘antis’. Another criticism was the use of quota sampling (stratified sampling with weakened adherence to randomization). (O’Flynn & Sood, 2014)

Nevertheless sortition is an *indispensible* component of any system of government that seeks to call itself democratic: ‘what is needed is a public with the representativeness of minipublics and the decision authority of existing democratic institutions (Bohman, 2012, p. 87).²⁷

The discussion of sortition so far has focused on its intrinsic legitimacy in terms of democratic equality, the next chapter addresses consequentialist concerns regarding the ability of ordinary citizens to make well-considered political judgments with benign epistemic outcomes.

²⁷ No doubt ‘Germanic’ deliberative democracy would continue to seek to influence public policy but this would be more akin to the existing role of think tanks (the twenty-first century equivalent of the bourgeois coffee house) than a formal element of a democratic constitution (see Chapter 7.4.3, below).

CHAPTER SIX

6. Epistemic Democracy and the Wisdom of Crowds

The previous chapter considered isonomia from the perspective of egalitarian norms – how the aggregate judgment of a minidemos could be said to fairly represent the preferences of its target population. The normative focus of Chapter 7 is similar in that it discusses how it might be possible to implement equal speech rights in large modern states where sheer numbers preclude the direct-democratic principle of *ho boulomenos*. The current chapter is very different in that it focuses on *consequential* considerations – i.e. epistemic outcomes as opposed to intrinsic norms such as democratic equality and procedural legitimacy.

According to the perspective known as ‘political cognitivism’ the purpose of majority voting is to ‘predict which [solution to a governance problem] is likely to be the most effective’¹ (Landemore, 2013, p. 11). Granted this epistemic perspective, then who is best suited to give the ‘right’ solution? If Socrates doubted the *phronesis* (practical wisdom) of selecting ordinary citizens to offices of state ‘by bean’ in a small ancient polis, then how much more of a problem is governance by amateurs in complex modern states? *Hoi idiotai* was, in classical Greece, a neutral descriptive term for private citizens, whereas few moderns would favour rule by idiots. (Landemore, 2013b, p. 1)

The chapter examines the modern social science research regarding the epistemic competence of large groups – the so-called ‘wisdom of crowds’ (Surowiecki, 2004) or ‘wisdom of the multitude’ (Waldron, 1995). But first of all it is necessary to examine the case for the supposed advantage of the judgment of political *experts*.

¹ Stating that a public decision has epistemic value means that it can be judged according to standards of rightness that are independent of the virtues of the procedures that lead to it (Burgers, 2015, pp. 27, fn.24; cf. Estlund, 2008, pp. 159-183). ‘Political cognitivism [is] roughly the view that there are right and wrong answers in politics and that these answers can be known, if only approximately’. (Landemore, 2013, p. 15)

Since the publication of Benjamin Constant's 1819 essay on ancient and modern liberty (Constant, 1988), the governance of modern states has become increasingly professional, notwithstanding the growth of democracy – if anything the growth of professionalization maps closely to the extension of the franchise. If it is the case that specialization and the division of labour have been beneficial in every other occupation, then surely the same principle must apply to political decision-making? Republican liberty was appropriate for small, cohesive slave-owning societies, but in large commercial societies everyone has to earn a living, so direct involvement by most citizens in politics requires, to purloin Oscar Wilde's quip, 'too many evenings'. Constant wrote his essay in the aftermath of the French Revolution and the Terror – when the danger of republican enthusiasm was fresh in the minds of his audience – so his emphasis on civil liberties, the rule of law and freedom from excessive state intervention went down well in bourgeois circles. The nineteenth century was a time to get rich – *enrichissez-vous*, as Guizot put it – not to get directly involved in matters of state.

But while it may be *expedient* to choose political specialists by election, is there any evidence that the resulting decisions are (epistemically) *better* than those taken by amateurs, or even better than random? This is particularly problematic on account of the 'ingenuity and determination that political elites display in rendering their positions impregnable to evidence' (Tetlock, 2005, p. xi). An obvious example here is the ongoing claim by Tony Blair that removing Saddam Hussein was the 'right' thing to do, notwithstanding the disastrous consequences for Iraq and the Middle East. Psychologist Philip Tetlock attributes this to the fact that 'smart people are bad Bayesians', in that they are less likely to update their beliefs in the light of changing circumstances² (*ibid.*, p. 125):

Reviewing the cognitive strategies experts use to justify holding firm, we discover a formidable array of dissonance-reduction strategies

² The lesson of J.M. Keynes' question 'when the facts change, I change my mind, what do you do sir?' has still to be learned in neoconservative circles.

tailor-made for defusing threats to professional self-esteem. (*ibid.*, p. 162)

Non-experts, who have no territory or status to defend, are more amenable to a dispassionate evaluation of the evidence. In a fourteen-year, fifty-eight-country study comparing the accuracy of 284 expert and non-expert ('dilettante') predictions (27,451 total forecasts) on a wide range of political futures, Tetlock discovered that

experts on their home turf made neither better calibrated nor more discriminating forecasts than did dilettante trespassers [participants who were opining on matters outside their own professional domain] ...[and] there was also little sign that expertise by itself, or indicators of degrees of expertise, improved performance ... People who devoted years of arduous study to a [politically-salient] topic were as hard-pressed as colleagues casually dropping in from other fields to affix realistic probabilities to possible futures.³ (Tetlock, 2005, p. 54)

The research results demonstrated that there was no evidence that 'distinguished political scientists, area study specialists, economists, and so on – are any better than journalists or attentive readers of the New York Times in "reading" emerging situations.' (*ibid.*, p. 233)

Tetlock claims that his findings are robust when controlled for seniority, types of expertise (academic, government or private-sector background), and apply across a variety of subtypes – short-term or long-term, domestic, economic and national security issues, thereby leading him to the conclusion that 'the case for performance parity between experts and dilettantes is strong' (*ibid.*). Unfortunately human beings are predisposed to put a high premium on expert opinion:

³ The predictions Tetlock considers are of the same normative type as 'Was the Iraq war a good decision?' as opposed to a factual question like 'Does Saddam have WMDs?'. I'm grateful to H  l  ne Landemore for this point.

We are in thrall to experts for the same reasons that our ancestors submitted to shamans and oracles: our uncontrollable need to believe in a controllable world and our flawed understanding of the laws of chance. We lack the willpower and good sense to resist the snake oil products on offer. Who wants to believe that, on the big questions, we could do as well tossing a coin as by consulting the accredited experts? (Tetlock, 2005, p. 63)

The central argument of this thesis is that we would, indeed, be better off ‘tossing a coin’ – in the metaphorical sense of devolving our political decisions to a random sample of dilettantes selected ‘by bean’ rather than relying on a class of self-proclaimed political experts, given that the aggregate epistemic ability of dilettantes appears just as good. If anything it’s better than parity as ‘better-known forecasters – those more likely to be feted by the media – were *less* well calibrated than their lower-profile colleagues’ (Tetlock, 2005, p. 68, my emphasis). This may well be because media pundits (and some celebrity politicians) tend to be strongly opinionated and primarily drawn from those who ‘know one big thing’ – doggedly persistent ‘hedgehogs’ in Isaiah Berlin’s dichotomy, as opposed to the wily opportunist pragmatism of their fox-like opponents (Berlin, 1997). ‘The worst performers were hedgehog extremists making long-term predictions in their domain of expertise’ (Tetlock, 2005, p. 80) – just the sort of people who make interesting media pundits. Knowledge *decreases* the accuracy of forecasters that fall within this category of cognitive styles – another factor supporting the case for a diverse sample of amateur decision makers.

It might well be retorted that elected politicians are not, and could never be, experts on the wide range of issues that they are asked to legislate over. Politicians draw heavily on an army of advisors (both within their own staff and the government bureaucracy) and generally take decisions on the basis of a short executive summary or other heuristic (such as party policy and manifesto commitments). Elections are undertaken in order to select intelligent and competent decision-makers, rather than experts – ‘elections appear to vet candidates so that the better ones for the job are more likely to be selected’ (Bergers, 2015, p. 13) – so it is no coincidence that most elected politicians have a background in professions with highly-transferrable cognitive skills – law, finance, business or public service. (Ornstein, Mann, & Malbin, 2008, p. 35)

There is, however, a growing body of empirical research in deliberative polling, citizens' juries, and randomly-selected constitutional assemblies indicating that ordinary citizens are capable of judging a range of complex political issues in an equally competent manner, when presented with balanced information and advocacy (Fishkin, 2009; Gronlund, Bachtiger, & Setala, 2014; Smith, 2009). The principal reason for the lack of citizen competence regarding political matters is the problem of rational ignorance in the context of elections – there is no obvious incentive for citizens to inform themselves on issues where their single vote has negligible causal efficacy. This problem, however, is resolved by randomly-selected mini-publics, where every vote really *does* count and proper deliberation is integrated into the process before the vote. Coote and Leneghan, who ran projects with citizens' juries in the UK observe that:

The pilots indicate that most jurors are reasonably well able to deal with quite complex issues and to scrutinise and assimilate arguments and data. Their capacity to do so depends to a great extent upon the question and agenda being prepared in an appropriate and manageable form . . . [W]e were deeply impressed – as were most other observers – with the level of competence with which jurors tackled their task. (Coote & Lenaghan, 1997, pp. 88-89)

Tetlock's findings would suggest that a random sample would be as good decision-makers as professional politicians, less amenable to group-think and other forms of cognitive bias, and would more accurately represent the preferences and interests of the target population that they represent 'statistically', whereas there are reasons to believe that the preferences and interests of the political class may well deviate from those of the wider population (Gilens & Page, 2014).⁴ Although a random

⁴ Although commentators like Hélène Landemore, drawing on the tradition of J.S. Mill, view the representation of preferences and interests in epistemic terms, this thesis is closer to the Marxist understanding of the determination of interests by social and economic factors, so deals with the representation of interests in a different context (Chapter 4); ditto the (lack of) accountability of political decision-makers selected by lot (Chapter 5).

sample of all citizens would be equally likely to include those of a ‘hedgehog’⁵ disposition (we have all come across the ‘Alf Garnett’ type – the saloon bar bore who regales all in earshot with his dogmatic and poorly-informed view of the world), there are good reasons to believe that the *aggregate* judgment of the random sample would be closer to Tetlock’s epistemic ideal:

Good judges tend to be moderate foxes: eclectic thinkers who are tolerant of counterarguments, and prone to hedge their probabilistic bets and not stray too far from just-guessing and base-rate probabilities of events’ (Tetlock, 2005, p. 85).

The moderation and ‘foxeyness’ of the group is for purely *statistical* reasons – given that the remit of the minidemos would be limited to listening to balanced information and then voting, there are reasons to think that the outliers (the ‘Alf Garnetts’ and ‘Citizen Smiths’ in the sample) would cancel out (assuming a large enough sample), leaving the aggregate decision in the hands of the silent majority.⁶ Moderation and pragmatism would be *an emergent property of the group judgment*, which would not require a majority of fox-like pragmatists in the group. In psephological terms this would be equivalent to the mean – rather, than median – voter theorem. This fox-like style of judgment (that correlates with accurate forecasting) – ‘scattered and diffused, moving on many levels, seizing upon the essence of a vast variety of experiences’ (Tetlock, 2005, p. 87) – is a product of the diversity of a randomly-selected sample, rather than the cognitive styles of individual members of the group:

[A] single expert who thinks like a ‘fox’ rather than a ‘hedgehog’ . . . is probably equivalent to a diverse enough group of people. In fact, diverse enough groups can outperform even a ‘fox’, since the fox is outperformed by statistical regression, and large groups’ predictive

⁵ ‘Hedgehogs were more likely to be [ideological] extremists (average $r = .31$ across the three content of belief system scales.’ (Tetlock, 2005, p. 84)

⁶ Extreme views would also tend to be filtered out at the earlier (deliberative) stage, so decision-makers would only get to vote on more reasonable proposals.

power can be uncannily close to a complex statistical regression.

(Landemore, 2013, pp. 15-16)

There are also good reasons to imagine that sampling from a pool of (effective) volunteers⁷ (a procedure used in a number of citizen assemblies and policy juries) would return a higher proportion of partisans and strongly-opinionated hedgehog types (Fiorina, 1999), whereas randomly-selected ‘conscripts’⁸ – who have no particular interest in political matters – would be more likely to make their minds up after listening to the evidence and arguments. This is a statistical variant of James Madison’s search for ‘disinterested’ political representatives that he argued (rightly or wrongly) would be privileged by elections in large constituencies.

This chapter considers in turn two very different models for the implementation of aggregate judgment and collective wisdom – the Condorcetian ‘jury theorem’ and the Aristotelian ‘pot-luck meal’ – as relevant to isonomia and isegoria (the diarchy at the heart of this thesis) respectively, and argues that sortition is the epistemically-appropriate way to implement aggregate judgment (isonomia) only. This is because, in the words of Thucydides’ Athenagoras at democratic Syracuse, although ‘the best counselors are the intelligent it is the many who are best at listening to the different arguments and judging between them’ (Th. 6.39.1). However, when it comes to harvesting the cognitive diversity necessary for representative isegoria, better mechanisms are available than relying on the democratic mechanism of ‘pot luck’. The two mechanisms are entirely different, as the *independent* judgment required by Condorcetian procedures to establish the

⁷ The word ‘volunteer’ reflects the disparity between those invited to participate via the original random sample and the small minority who accept the invitation – in the case of the British Columbia Citizen Assembly a mere 4% (Warren and Pearse, 2008). There is no way to tell the degree to which the final assembly was an accurate microcosm of the whole population – arguably citizens with a proactive interest in political and constitutional issues would be more likely to volunteer their time, thereby making a highly unrepresentative sample of the target population (see p. 156, above).

⁸ The use of the term ‘conscript’ assumes that the summons to serve on a political jury would be at least as mandatory as that of its judicial equivalent. Consideration would also need to be given to minimum age and competence levels, along with the exclusion of felons or citizens with a history of psychological disorders. (Burgers, 2012, p. 16)

'right' answer rules out the collaborative exchange of ideas suggested by the pot-luck meal analogy:

The [Condorcetian] collective wisdom⁹ that something like the Iowa Electronic Markets produces is, at least when it's working well, the result of many different independent judgments, rather than something that the group as a whole has consciously come up with. In a small [Aristotelian] group, by contrast, the group – even if it is an ad hoc group formed for the sake of a single project or experiment – has an identity of its own. And the influence of the people in the group on each other's judgment is inescapable. (Surowiecki, 2004, p. 176)

According to H el ene Landemore this distinction – between 'counting' [isonomia] and 'talking' [isegoria]¹⁰ has its origins in Plato's dialogue *Protagoras: or the Sophists*.¹¹ According to Protagoras's myth, every human being has a parcel of political knowledge (*politike techn e*) and Zeus insisted that this should be distributed equally to everybody. Political knowledge can be accessed in a democratic manner either by a) counting heads or b) exchanging reasons. The modern 'counting' tradition takes up the aggregative idea present in the myth:

Spinoza is possibly the first to refer to the advantage conferred by the sheer number of people involved in the making of a decision. This tradition focuses on the epistemic properties of judgment aggregation when large numbers of people are involved. This intuitive idea takes proper analytical shape in the Jury Theorem of the philosopher and mathematician Condorcet, which puts the law of large numbers in the

⁹ Arguably markets' wisdom is better explained by 'the Miracle of Aggregation' (Landemore, 2013, pp. 156-60), as the CJT is a narrower result, tailored specifically to explain majority rule's epistemic properties.

¹⁰ Landemore attributes the labeling – 'counting' and 'talking' – to Jacob Levy.

¹¹ Protagoras (485-420 BC) is often viewed as the first democratic political theorist. (Farrar, 1988, p. 77; Finley, 1973, p. 28). As this is a thesis in conceptual political theory as opposed to the history of political thought, my discussion of the historical sources of the dichotomy are more sketchy than the chapter of Landemore's book devoted to a 'Selective Genealogy of the Epistemic Argument for Democracy'. (Landemore, 2013, Ch.3)

service of an epistemic argument for majority rule. . . . the aggregative tradition is heavily dependent on the progress of the mathematical sciences and, in particular, probability theory. (Landemore, 2013, p. 54)

The alternative, ‘talking’, tradition in the myth, which runs from Aristotle to Dewey, develops the idea in a deliberative direction:

The contemporary heirs of such a tradition are deliberative epistemic democrats (e.g., Cohen, Estlund, Habermas). This deliberative tradition suggests that if the many can be smarter than, or at least as smart as, the few, it is because democratic discussion mirrors at the level of the group the individual elements of reason present in each citizen. (*ibid.*, p. 53)

The exposition of the ‘counting’ rationale in the next section is heavily indebted to James Surowiecki’s 2004 book *The Wisdom of Crowds* – and I argue at the end of the chapter that his dismissal of James Fishkin’s attempt to apply the wisdom of crowds to political decision-making is on account of a widespread failure within the deliberative democracy literature to draw a clear conceptual distinction between the two forms of collective wisdom – Condorcetian (counting) and Aristotelian (talking).

6.1 The counting approach: Condorcet’s jury theorem and the ‘wisdom of crowds’

The ‘wisdom’ of the aggregate judgment of a large group is a statistical one – the mathematics behind the Condorcet Jury Theorem being not that dissimilar from the Law of Large Numbers (see Appendix A2.2.2). What is the nature of the ‘wisdom’ involved?

[T]he answer rests on a mathematical truism. If you ask a large enough group of diverse, independent people to make a prediction or estimate a probability, and then average those estimates, the errors each of them makes in coming up with an answer will cancel themselves out. Each person’s guess, you might say, has two

components: information and error. Subtract the error, and you're left with the information.¹² (Surowiecki, 2004, p. 10)

In his 1785 work *Essai sur l'application de l'analyse à la probabilité des décisions rendues à la pluralité des voix* (Condorcet, 1994), the Marquis de Condorcet imagined a decision-making jury each of whose members could make a correct¹³ decision with a fixed probability p , where $\frac{1}{2} < p < 1$. From this assumption, Condorcet proved that 1) the probability that the committee's majority will decide correctly is higher than p ; and 2) the probability that the committee's majority will decide correctly approaches 1 as the size of the jury increases (Stone, 1999, p. 1). The theorem has been confirmed by a number of recent studies, including the demonstration that majorities will still outperform the average individual in a group event even if p is allowed to vary by individual, as long as the distribution of values of p is symmetric. (Grofman, Owen, & Feld, 1983)

The outcomes of this mathematical truism are surprisingly useful in practice. Francis Galton was astonished to discover at a 1906 country fair that the average of the entries to a competition to estimate the weight of a dressed ox was 1,197 pounds, whereas the actual weight was 1,198 pounds (Surowiecki, 2004, p. xiii). In the TV game show *Who Wants to Be a Millionaire*, pre-selected experts were only correct sixty-five percent of the time, whereas the comparable average figure for the random studio audience was ninety-one percent (*ibid.*, p. 4); in an experiment in the 1920s, the aggregate judgment of students asked to guess the temperature

¹² There is also an elitist version of this 'miracle of aggregation', according to which 'a few informed people in a group are enough to guide the group to the right average answer, as long as uninformed people's answers are randomly or symmetrically distributed and thus cancel each other out'. (Landemore, 2013, p. 157)

¹³ From the perspective of this chapter the assumption that there is such a thing as an epistemically 'correct' decision in political matters is deemed plausible, as few would deny that a procedurally-legitimate decision that resulted in a famine or economic collapse was a wrong one from an epistemic perspective (Estlund, 2008, pp. 159-183). Whilst relativists and proceduralists might question the validity of extending this principle beyond such extreme examples, the aims of this thesis are comparatively modest. All that is required is to demonstrate that 1) the aggregate decision is of higher epistemic value than those of the individuals making up the group and 2) that the decision is no worse than one that might have been arrived at by other procedures (including arrogating the decision to professionals and experts).

of a classroom was less than half a degree Fahrenheit off the actual temperature; and a group estimate of the number of jelly beans in a jar (871) was very close to the actual number (850) (*ibid.*, pp. 3-5). The wisdom of crowds is an emergent statistical property and the accuracy increases with the size of the group (as Condorcet demonstrated mathematically) – in Galton’s case 787 entry tickets, but in the jelly bean experiment a mere fifty-six (*ibid.*, p. 5).

Tetlock’s quantitative study of the accuracy of political predictions also endorsed the value of statistical aggregation as ‘the average predictions of forecasters are generally more accurate than the majority of [individual] forecasters from whom the averages were computed’ (Tetlock, 2005, p. 118). And this mathematical truism has important implications in the real world beyond the social science laboratory. For example the spread betting industry depends entirely on the aggregate statistical accuracy of punters’ predictions – the profitability of the business does not depend on bookmaker’s professional knowledge of ‘form’, but on the fact that the bookie’s margin on the bets they win is higher than on those they lose (*ibid.*, p. 12); Google’s phenomenally successful page-ranking algorithm merely reflects the aggregate ‘wisdom’ of millions of independent web users (*ibid.*, pp. 16-17); and the accuracy of prediction, futures and decision markets like the Iowa Electronic Markets and Hollywood Stock Exchange depends entirely on the diversity, independence and decentralization of thousands of punters who are prepared to put their money where their mouth is (*ibid.*, p. 22). Google’s recent (2016) Penguin algorithm revisions introduced severe penalties for attempts to undermine the accuracy of diverse and independent collective wisdom via search engine optimization (SEO).

These three vital conditions – diversity, independence and decentralization – are what differentiate the ‘crowd’ in the heading of this section (borrowed from the title of James Surowiecki’s book), from a herd (or a mob). A well-calibrated stock market degenerates into a bubble when too many people follow each others’ lead, the problem being, in the words of *Fortune* managing editor Andy Serwer, ‘the more stocks go up, the more of us get into the market’ (cited in Surowiecki, 2004, p. 257). At this point the market begins to look more like a herd or a mob:

A mob in the middle of a riot appears to be a single organism acting with one mind. And obviously the mob’s behavior has a collective

dimension that a group of random people just milling about does not have. (*ibid.*, pp. 256-7)

As Charles Mackay put it in his 1841 book *Extraordinary Popular Delusions and the Madness of Crowds* (to which Surowiecki tilts his hat ironically):

Men, it has been well said, think in herds . . . It will be seen that they go mad in herds, while they only recover their senses slowly, and one by one. (Mackay, 1980 (1841), p. xx)

Surowiecki's inversion of Mackay's claim depends on the diversity in the cognitive styles of a large number of sovereign *individuals*:

[I]n most of [the experiments] the members of the group were not talking to each other or working on a problem together. They were making individual guesses, which were aggregated and then averaged. This is exactly what Galton did, and it is likely to produce excellent results. . . . Each fairgoer figured out his estimate of the weight of the ox on his own, relying on what economists call 'private information'. (Private information isn't just concrete data. It can also include interpretation, analysis, or even intuition.) And when you put all those independent estimates together, the combined guess was, as we've seen, near perfect. (Surowiecki, 2004, pp. 5, 41)

In this respect Surowiecki would not disagree with Friedrich Schiller's dictum:

'anyone taken as an individual is tolerably sensible or reasonable – as a member of a [herd] he at once becomes a blockhead' (quoted by financier Bernard Baruch in his introduction to the 1934 edition of Mackay's book). In other words as soon as sovereign individuals start to act in harmony (i.e. as a herd) then the benefit of epistemic diversity is lost. Herding behaviour can also explain the innate conservatism of football coaches and mutual-fund managers and why 'no one ever got fired for buying IBM' (Surowiecki, 2004, p. 49). 'Someone who bucks the [herd] runs the risk of being considered crazy' (*ibid.*, p. 50). For this reason Surowiecki's thesis presupposes the categorical distinction between crowd and herd. A crowd, unlike a herd, mob, or colony of ants, is a group of individuals who just happen to be sharing the same space (physical and/or virtual).

And this is not just a matter of large crowds, as the phenomenon of ‘groupthink’ (Janis, 1982), group polarization (Sunstein, 2002), status deference (Torrance, 1955), talkativeness, informational and reputational cascades, and ‘conformation bias’ – when decision makers unconsciously seek information that reinforces their underlying intuitions (Surowiecki, 2004, pp. 177-8) – mostly applies to small collectivities like working parties, parliaments or juries¹⁴ deliberating together (Le Bon, 1982):

Fostering diversity is actually more important in small groups and in formal organizations than in larger collectives – like markets or electorates – for a simple reason: the sheer size of most markets, coupled with the fact that anyone with money can enter them (you don’t need to be admitted or hired), means that a certain level of diversity is almost guaranteed. (Surowiecki, 2001, p. 29)

According to the psychologist Irving Janis, the principal cause of a foreign policy disaster like the 1961 Bay of Pigs invasion was the fact that a small committee within the Kennedy administration planned and carried out its strategy without ever talking to anyone who was sceptical of the prospects of success (Janis, 1982). As the historian Arthur Schlesinger Jr. put it, ‘Our meetings took place in a curious atmosphere of assumed consensus’ (cited in Surowiecki, 2004, p. 37). In a group that shares a common mindset the centripetal forces leading to unanimity are hard to resist, and shared beliefs are reinforced by a process that discredits or overlooks information that challenges the conventional wisdom. Ongoing independence of

¹⁴ Note the difference between the *aggregative* (majority) judgment of the legislative juries proposed in Chapter 4 (comprised of sovereign individuals) and the *collective* judgment of a trial jury (where unanimity is the default outcome). The former is a passive act of isonomic representation (of the opinions, interests and beliefs of the target population), whereas the latter is an attempt to uncover the truth of the matter (guilt or innocence); the former ‘does not ask it’s members to modify their positions in order to let the group reach a decision everyone can be happy with’ (Surowiecki, 2004, p. xix). Such an individualist procedure would be of no use in a criminal trial (jury members do indeed seek to persuade minority members to change their position, as Landemore (2013) notes in her study of the movie *Twelve Angry Men*) and would be frowned on by Habermasian-style deliberative democrats, who privilege unanimity. The only way to reconcile the two different jury styles is to (artificially) insist that political decision-making is a purely epistemic process in which values and preferences have no part to play.

judgment is much harder to achieve in small deliberative groups, especially ones that frown on opinion/preference aggregation mechanisms like voting by privileging the dispassionate rule of reasons that *everybody* can accept.¹⁵ This is an inconvenient truth for advocates of (Habermasian) deliberative democracy as ‘you can be biased and irrational, but as long as you’re independent, you won’t make the group any dumber’ (Surowiecki, 2004, p. 41). Solomon Asch’s classic studies in which experimental subjects were induced to deny the clear evidence of their own eyes by an emergent group consensus (manufactured by undercover confederates of the experimenter) provide graphic evidence of the power of groupthink. (Asch, 1963)

Independence is important as it helps ‘keep the mistakes that people make from becoming correlated’ and because independents are more likely to be able to contribute new information rather than the familiar old data (Surowiecki, 2004, p. 41). The other value is that independence and decentralization help prevent ‘information cascades’ – when everyone ends up making the wrong decision by following the lead of pioneers possessed (by chance) of the wrong information. This was the reason behind the nineteenth-century mania for plank roads and other evolutionary dead ends. (*ibid.*, pp. 53-4)

Although Surowiecki uses terms like ‘crowd’, ‘collectivity’, ‘group’, and ‘collective intelligence’ interchangeably throughout the book, most of his (benign) examples *aggregate the judgments of individuals* (who may or may not be gathered together in one place at the same time) as ‘paradoxically, the best way for the group to be smart is for each person in it to think and act as independently as possible’. (Surowiecki, 2004, pp. xix-xx) – the group is a ‘statistical’ reality, rather than an ‘experiential’ one (*ibid.*, p. 175). This is the model underwriting the practical proposal in Chapter 8 for large randomly-selected legislative juries whose remit is limited to listening to balanced information and advocacy and then voting in secret,

¹⁵ Although independence can be cultivated by ‘positive dissensus’ (Landemore and Page, 2015), and under ideal conditions the epistemic benefits of active deliberation can potentially outrank those of voting.

thereby maintaining the diversity and independence criteria essential for the (statistical) wisdom of crowds.¹⁶

However, the evidence supporting the epistemic value of randomly-selected bodies is limited to the ability of juries to make an aggregate judgment on a pre-specified agenda, hence Jan-Willem Burgers' (2015) claim that sortition-based assemblies are only suitable for holding politicians to account and judging the outcome of an informed debate on legislative proposals – i.e. an isonomic function (in the terminology of this thesis). The (statistical) wisdom of crowds has no relevance to the other, innovative, role of elected politicians, i.e. coming up with, and arguing the merits of new proposals (isegoria). This would suggest a bicameral design in which the allotted assembly had a veto role over proposals generated exogenously by elected politicians or direct-democratic mechanisms.

The competing 'democratic reason' model – in which ordinary citizens are required to play a far more active role in proposing and arguing for or against policy initiatives – is outlined in the next section, along with criticism of the claim that random selection has a useful role to play in the process.

6.2 The talking approach: Cognitive diversity and democratic reason

Hélène Landemore's 2013 book *Democratic Reason: Politics, Collective Intelligence and the Rule of the Many* is the principal critical focus of this section as

¹⁶ (Landemore & Page, 2015) argue that political decision making is largely a matter of prediction (e.g. 'assessment of what is most conducive to the common good on, let us say, the question of budget deficits' (*ibid.*, p. 230), and that deliberative exchange can eliminate errors and enrich people's predictive models on such issues, on the basis of 'positive dissensus'. However the authors specifically bracket out the problem of preference aggregation (arguably the most important responsibility of legislative juries acting as a proxy for the whole political community), and it is unclear how large randomly-selected groups of amateurs could do anything more than 'report their signals' – a form of deliberation ruled out as having *no* epistemic value (*ibid.*, p. 239) – without adversely affecting the descriptive representativity of the jury. Such forms of deliberation may be of value to elite bodies (many of the examples chosen are from macroeconomic theory), but of little relevance to a large randomly-selected body charged with reflecting the informed *preferences* of the whole political community.

it offers one of the most developed arguments for the *epistemic* benefits of the talking approach. Deliberative democrats are, by contrast, more interested in procedural norms, and Landmore also distances her approach from the wisdom of crowds model outlined in the previous section:

Although James Surowiecki (2004) has made the case for more-inclusive decision making on the basis of the statistical properties of large numbers and the Condorcet Jury Theorem, he says little about cognitive diversity per se. He also tends to focus only on the purely aggregative side of collective intelligence, dismissing its deliberative aspects as counterproductive and conducive to polarization.
(Landmore, 2013, p. 7)

Many of the advocates for the talking approach to collective wisdom ground their argument in a passage from Aristotle's *Politics*:

The many (*hoi polloi*), of whom none is individually an excellent (*spoudaios*) man, nevertheless can, when joined together, be better than those [the excellent few], not as individuals but all together (*hōs sumpantas*), just as potluck (*sumphorēta*) dinners can be better than those provided at one man's expense. For, there being many, each person possesses a constituent part (*morion*) of virtue (*aretē*) and practical reason (*phronēsis*), and when they have come together, the multitude (*plēthos*) is like a single person (*hōsper hena anthrōpon*), yet many-footed and many-handed and possessing many sense-capacities (*aisthēseis*), so it is likewise [like a single person with multiple excellences] as regards to its facets of character (*ta êthē*) and its intelligence (*dianoia*). This is why the many (*hoi polloi*) judge better in regard to musical works and those of the poets, for some judge a particular part (*ti morion*), while all of them judge the whole (*panta de pantes*). (Arist., *Pol*, 3.1281a42-b10)

The interpretation of this passage is the subject of ongoing scholarly dispute (Cammack, 2013a; Waldron, 1995); Waldron's interpretation underwrites Landmore's epistemic case for democracy, whereas Cammack focuses instead on collective *virtue*. Waldron suggests two versions of the 'doctrine of the wisdom

of the multitude' (DWM): a weak version (DWM1) claims that the wisdom of the group is superior to that of any of its component members, whereas a strong version (DWM2) argues that the people as a whole (i.e. the *demos*) is wiser than any subset – aristocratic or otherwise – on account of the maximisation of cognitive diversity. Landemore acknowledges Bernard Manin's observation (Manin, 2005, p. 17) that nowhere in the passage does Aristotle employ the notion of deliberation (*sumbouleuoioin*), suggesting that deliberative democrats need to be a little cautious about grounding their project in this particular classic text; however most commentators (Risse, 2001; Waldron, 1999a) view the mechanism as deliberative (talking) rather than aggregative (counting). As the methodology of this thesis is conceptual analysis as opposed to historical exegesis, this interpretative debate is of secondary importance and I'm content therefore for Aristotle to be used as the pin-up boy for those arguing the case for the deliberative approach to collective wisdom¹⁷ – the claim will be judged on its own merits, as opposed to an argument from ancient authority.

Landemore tracks the development of the notion of collective wisdom in the writings of Aquinas, Peter of Auvergne and in Marsilius of Padua's *Defensor Pacis* ('the common utility of a law is better known by the entire multitude').¹⁸ However this could be taken as an example of the combination of aristocratic deliberation and popular judgment, on account of the Aristotelian argument that whereas artists and architects are the best designers of paintings and buildings, those who look at the paintings and live in the houses are the best judges of their quality (Landemore, 2013, p. 64). If you want a reliable hotel review then aggregate the total ratings on Trip Advisor, but this has nothing to do with deliberation (the ideal review system would prohibit new commentators from reading earlier reviews before posting their own ratings).

¹⁷ Aristotle, of course, was no democrat and thought you needed to have a reasonably well-educated populace to get the right answer.

¹⁸ Cited in (Bull, 2005, p. 26).

Landemore's interpretation of Machiavelli's *Discourses on Livy* – which famously equates *vox populi* with *vox dei* – also suggests a non-deliberative slant as the 'prudence', 'stability' and 'better judgment' of the people is on account of its '*hidden*' virtue (Landemore, 2013, p. 64, my emphasis). Sometimes Machiavelli claims that this virtue is an innate (social-psychological) characteristic of the *populi*, but it always cashes out in terms of the aggregative judgment revealed by voting:

As to judging things, if a people hears two orators who incline to different sides, when they are of equal virtue, very few times does one see it not take up the better opinion, and not be persuaded of the truth that it hears. (Machiavelli, 1996, p. 158)

In this example the deliberative function is arrogated to the (elite) orators, so the 'voice' of the *populi* is limited to voting – when defeated candidate Dick Tuck remarked that 'the people have spoken, the bastards', his reference was to the *counting of the votes* for the California State Senate election of 1966. As such Machiavelli's *Discourses* would support the case for the Wisdom of Crowds (previous section), rather than Collective Wisdom (this section). John P. McCormick's *Machiavellian Democracy* also proposes that the direct-democratic role of the *populi* in a modern democracy should be limited to a randomly-selected minidemos, which would possess a judgment (or veto) role – the modern equivalent of the *Tribuni Plebis* (McCormick, 2011, Ch. 4). Once again this is a hidden virtue that emerges through the aggregation process, not through deliberation:

This ability to make good judgments is, in Machiavelli's account, passive and reactive. The people do not initiate a view; they simply respond to those voiced [by elite orators] in the public forum. (Landemore, 2013, p. 66)

Landemore's discussion of Rousseau's general will assumes an epistemic, rather than proceduralist, interpretation (*ibid.*, p. 69).¹⁹ However Rousseau is unambiguously hostile to deliberation in any context other than behind the closed doors of the council chamber of the (aristocratic) government. Rousseau's requirement for independent judgment, untarnished by discursive and factional considerations, means that citizens should vote independently and on the basis of their own intuitive knowledge of the issues involved – to Rousseau, the right answer is simply obvious, so long as the citizen is pure of heart (Landemore, 2013, p. 74). Another passage from the *Social Contract* suggests that Rousseauian judgment may even be aggregative as 'if one takes away the pluses and minuses [of the individual wills] which cancel each other out, what is left as the sum of the differences is the general will (Rousseau, 1998, p. 29). Rousseau is firmly in the counting not the talking camp, as he believes deliberation should be *in camera* – quarantined behind the doors of the (aristocratic) council chamber.

Perhaps the first thinker since Aristotle to adopt the conception of *deliberative* collective wisdom was John Stuart Mill, via his argument for the epistemic merits of government by discussion and popular participation (Landemore, 2013, p. 75). But Landemore is more inclined to describe Mill as an epistemic liberal (with an elitist inclination) rather than a deliberative democrat as 'the function of the democratically elected legislature is merely to vote up or down on legislation that a committee of experts write' (*ibid.*, p. 81). Mill does, however, make the epistemic case for democracy:

When a subject arises in which the labourers as such have an interest, is it regarded from any point of view but that of the employers of labour? I do not say that the working men's view of these questions is in general nearer to the truth than the other: but it is sometimes quite as near; and in any case it ought to be respectfully listened to,

¹⁹ For an overview of the epistemic/proceduralist debate on Rousseau's general will see (Bertram, 2012). Whereas proceduralists claim that the outcome of the vote *defines* the general will, epistemic democrats see it as (fallible) *evidence* for it. (Landemore, 2013, p. 45)

instead of being, as it is, not merely turned away from, but ignored.²⁰
(Mill, 1991, p. 246)

Note that 'respectfully listened to' might be taken to suggest that active deliberation is an elite function, with the representatives of labour being afforded the status of expert witnesses (rather than equal participants), and popular participation is primarily lauded for its 'educative' and 'protective' rather than epistemic function. Mill's plural voting system, with multiple votes allocated to those with a university degree and freely-elected members of learned societies, was more liberal than democratic. Nevertheless he was probably the first modern thinker to make the epistemic case for deliberation and to couch it in terms of the whole citizen body:

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error. (Mill, 1991, p. 21)

The deliberative assembly should be a 'Congress of Opinions' and it should be comprised of 'a fair sample of every grade of intellect among the people' rather than 'a selection of the greatest political minds in the country' (Mill, 1991, p. 284, cited in Landemore, 2013, p. 81), and it is for this reason that Mill is correctly cited as the first modern advocate of democratic reason (collective wisdom).

Landemore recruits John Dewey (1859-1952) to the talking wing of the collective wisdom dichotomy – as an 'epistemic deliberative democrat' – on account of his model of embodied social intelligence, whereby everyone benefits from 'the knowledge contributed by many people, in however small amounts, crystallized and fixed for the future of public knowledge' (Landemore, 2013, pp. 83-4). The

²⁰ The above passage would have been understood by Mill's contemporary Karl Marx in terms of the representation of interests, as opposed to the search for truth, see p. 163, above.

development of embodied intelligence presupposes that all citizens engage in face-to-face community deliberation, as the important thing about democracy is not voting per se, but the public discussion that precedes it. However, when it comes to his discussion of political institutions in *The Public and Its Problems* (Dewey, 1954 [1927]), the traditional distinction between elites and the public is preserved:

Dewey suggests that even if the public is not necessarily the best problem solver, it is nevertheless the best judge of where the problem lies; hence the need to consult it. (Landemore, 2013, p. 82)

In fact Dewey's division of labour between elite and public (the former talking and the latter voting) bears more affinity to the counting model outlined in the previous section:

It is not necessary that the many should have the knowledge and skill to carry on the needed investigations; what is required is that they have *the ability to judge the bearing of the knowledge supplied by others upon common concerns*. It is easy to exaggerate the amount of intelligence and ability demanded to render such judgments fitted for their purpose. (Dewey, 1954, p. 208, my emphasis)

It would appear that, for Dewey, popular deliberation should be reserved for the informal public sphere as opposed to being part of the institutions of governance, so he can be viewed as a precursor of the modern deliberative democracy movement, prior to the change of focus introduced by (Habermas, 2006).

Landemore concludes her 'selective genealogy of the epistemic argument for democracy' with a discussion of Hayek, but only to illustrate her argument that the *agora* and the *panyx* need to be kept separate.

In summary, although some of the writers that she engages with do flirt with talking, the majority (Mill being the key exception) focus primarily on counting and draw a distinction between the proposers and the disposers, the talkers and the counters. Landemore's selective genealogy of the epistemic argument for democracy provides little support for the talking approach to collective wisdom, so her case must stand or fall on its own intrinsic merits.

6.2.1 Exchanging reasons – vs – weighing reasons

Following Bernard Manin, Landemore identifies two forms of simple deliberation:

1. The action of deliberating, or weighing a thing in the mind; careful consideration with a view to decision.
2. The consideration and discussions of the reasons for and against a measure by a number of councillors (e.g. in a legislative assembly).
(Manin, 2005, p. 14)²¹

Yves Sintomer (2010, pp. 36n; 47) goes further and describes these as two *alternative* forms of deliberation, with different etymologies. The first derives from the Latin *liber* (weight), so the role of *de-liber*-ators is to ‘weigh’ arguments in their minds before *disposing* (deciding the outcome of the debate):

Deliberation is nothing else but a weighing, as it were in scales, the conveniences, and inconveniences of the fact we are attempting.
(Hobbes, *De Cive*, XIII, 16)

The second (Habermasian) form of deliberation (good discussion) is derived from the German for ‘deliberative voice’, and is at the core of the *proposing* function (see Chapter 5.1.1, above). The ‘weighing’ variant pertains to the previous section of this chapter (and the general thrust of this thesis), as the counting approach requires prior mental evaluation before voting. The silent deliberation privileged by Robert Goodin, Simon Niemeyer and James Fishkin presupposes the Latin derivation (although Fishkin does make some token concessions towards Habermasian norms in the small-group deliberation stage of the DP). But proposing is a prerequisite for disposing and you can’t really have the one without the other. Dividing the two forms of deliberation between two institutions (as in the judicial separation of advocates and jury) protects against corruption, and it’s not clear why randomly-selected disposers need to participate in the speech acts that are the defining characteristic of the proposing function (see Chapter 4, above).

²¹ Manin’s source was the *Oxford English Dictionary*. For further discussion of this distinction, see Chapter 5.1, above.

Indeed Landemore suggests distinct cognitive mechanisms corresponding to each form of deliberation. The ‘argumentative theory of reasoning’ (conceptualized by Dan Sperber and developed with the evolutionary psychologist Hugo Mercier) hypothesizes that reasoning serves two distinct survival-related functions: a) convincing people and b) evaluating the arguments of others – ‘thereby allowing communication to proceed even when trust is limited’ (Landemore, 2013, p. 126). The theory – developed as an evolutionarily-plausible alternative to the classical (Cartesian) model of reasoning as a way of updating and correcting one’s *own* beliefs – is based on the distinction between performing speech acts and evaluating the performative utterances of others:

According to this theory, individual reasoning works best when used to [a] produce and [b] evaluate arguments during a public deliberation. It predicts that when diverse opinions are discussed, group reasoning will outperform individual reasoning. (Mercier & Landemore, 2012, p. 243)

According to Mercier and Landemore the argumentative theory of reasoning privileges intra-group exchanges as opposed to individual ‘deliberation within’. However they appear to agree with (Goodin, 2000) that ‘internal deliberation can sometimes be very similar to public deliberation’ (Mercier and Landemore, 2012, p. 251). What matters is that ‘exposing people to disagreement and debates increases their ability to entertain different opinions . . . either by witnessing a debate or by being part of one’ (*ibid.*, p. 252). The important factor is not *participation* in speech acts so much as ‘the presence or expression of *dissenting* opinions in deliberative settings’ (*ibid.*, p. 254, my emphasis). (Mercier & Sperber, 2017) also point out that as a species we are much better at evaluating reasons than producing them – I may not be able to see the beam in my own eye, but I can find the mote in yours. Appeals to authority underlying this claim cited in *The Enigma of Reason* includes William Blackstone’s arguments on the value of juries, backed up by field work demonstrating that they do a good (epistemic) job. Laboratory studies also indicate that we are better able to find the flaws in our own reasons *when we believe those reasons to have been produced by someone else*, thereby supporting the case for the division of labour between persuaders and evaluators at the core of this thesis (*ibid.*), as it’s very hard to change one’s mind about one’s ‘own’ (i.e. indigenous) convictions.

Bernard Manin, in his brief review of experiments in Deliberative Polling, argues that the success of the DP in avoiding group-think and polarization is on account of the 'presence of diverse *and* conflicting views amongst deliberators'. He conjectures that the introduction of the *graphe para nomon* into Athenian democracy was because 'the adversarial proceedings were required during the second hearing on grounds of their superior epistemic merits', (Manin, 2005, pp. 8, 17).

Given that the argumentative theory of reasoning suggests *two* distinct mechanisms this would also suggest two categories of persons in a deliberative context – proposers and disposers. The former category

should only be concerned with . . . [arguments] that increase the plausibility of a conclusion one is trying to defend, or those that decrease the plausibility of a conclusion one is trying to rebut.

Representations that have the opposite effect are of no direct value if one wants to convince one's interlocutor. Reasoning should therefore be directed towards these valuable representations, and, as a result, it should display a *strong confirmation bias* (Mercier and Landemore, 2012, p. 241, emphasis in original)

The confirmation bias, however, 'mostly affects the production, and not the evaluation of arguments' and can be 'checked, compensated by the confirmation bias of individuals who defend another opinion', hence the necessity for 'the presence or expression of dissenting opinions in deliberative settings' (*ibid.*, pp. 251, 253, 254). The requisite cognitive tool for those whose task is to *evaluate* communicated information (i.e. disposers) is 'epistemic vigilance', the polar opposite of the confirmation bias (Mercier, 2013; Sperber et al., 2010).

Mixing the two cognitive styles in the same persons, as Landemore and most deliberative democrats advocate, is sub-optimal as while 'reasoning is mostly truth oriented when it come to *evaluating* arguments, it is still biased by the function of *producing* arguments' (*ibid.*, p. 127, my emphasis). Whilst it is *possible* for the same agents to oscillate between the two different cognitive styles . . .

After reviewing and weighing for ourselves the reasons for and against a given action, we come to a conclusion. We then take a position.

However, when we speak in public in the course of deliberation, we share only the part of information that supports our position. (Manin, 2005, p. 16)

. . . nevertheless, cognitive dissonance theory would suggest that it is *more* difficult to modify one's evaluation of an argument once having expressed an opinion. E.M. Forster's dictum 'how do I know what I think until I [hear] what I say' could be taken as contributing to the confirmation bias – it's much harder to change your mind once you *know* what you think. Speech acts intended to persuade (whether oneself or others) are inherently partisan and Landemore makes a good case for the confirmation bias as a valuable cognitive tool for *proposers* and other rhetorical persuaders (but not for *disposers*). This would also suggest a dialectical approach to truth-proposing, whereby different parties institute 'an exchange of arguments for and against something' – as in a judicial trial (Landemore, 2013, p.140).

Habermas's focus on the *force* of the argument (albeit an 'unforced' force) illustrates the relevance of speech-act theory to the *proposing* function (and also the evolution from war-war to jaw-jaw). Inverting Clausewitz, why go to the risk and expense of fighting when the same result can be achieved using purely rhetorical ordinance? Just as battles tend to have two sides, this tends to be equally true of argumentative exchanges and debates – legislative or otherwise – as most proposals can be reduced to a binary format – which has the added advantage of a simple resolution mechanism via up/down majority vote (Risse, 2004). By contrast, deliberative and epistemic democracy – which makes no distinction between proposers and disposers – would appear to adhere to the classical (Cartesian) model of reasoning as the revision and updating of one's own beliefs. The fact that human agents do not appear to be endowed with cognitive mechanisms designed for the impartial updating/correction of their own beliefs would suggest that this is largely a set of ideal procedures – 'a normative theory of democracy initially developed at a highly abstract level by philosophers and political theorists' (Mercier and Landemore, 2012, p. 243), rather than a form of reasoning that comes naturally to human beings, and explains why attempts to implement deliberative democracy are heavily reliant on the use of procedural rules, along with trained moderators and facilitators.

Gary Remer (1999) has criticized the preference of deliberative democrats for the conversational style of reasoning (*sermo*), arguing (with Cicero) that while this is appropriate for private and philosophical discussions it has no place in political deliberation, which is essentially forensic and agonistic (*contentio*):

The contentious character of political speech is suggested by the fact that the Greek word *agon* not only means 'contest' or 'struggle' but also denotes the 'public assembly' and 'assembly place' (Remer, 1999, p. 43)

Political oratory was sometimes viewed as an athletic competition – 'a contest in which man exhibits something of his manliness' (Kennedy, 1974, p. 189) – whereas Cicero and Quintilian adopt 'the metaphor of the orator as soldier, vanquishing his enemies on the battlefield. . . [however] regardless of the metaphor chosen, athletic or military, rhetoric is represented as a struggle in which one side wins and the other side loses' (Remer, 1999, p. 43). Needless to say deliberative democrats abhor the agonism of classical thought and claim that the distinction of Cicero and other elite Roman republicans between the best class of citizens (*optimates*) and the passion-driven commoners (*populares*) is no longer relevant. But Cicero's distinction between rhetorical styles was more domain-specific and numerical than based on social class: 'oratory is directed to action in a way that conversation is not, and politics depends on action',²² and Cicero argued that deliberative rhetoric, rather than conversation, was also the appropriate style even when addressing one's own peers in the Senate on account of the size of the audience – 300 members before Sulla's reforms and 600 thereafter (Remer, 1999, p. 53). Note that, from a modern democratic perspective, groups of this size – while unmanageably large for a conversation – would be necessary to ensure a decision-making body that is a 'portrait in miniature' of the population that it seeks to describe.

²² Sir John Chilcot, in his forensic analysis of the decision-making process leading up to the Iraq war, focused his ire on the conversational sofa-style chummocracy that characterized Tony Blair's style of government, rather than his rhetorical skills in Parliament.

The focus on reasoning as a persuasive speech act is not unlike the role of courtroom advocates – Cicero argued that the deliberative and judicial styles of political oratory ‘possess some common characteristics’ (Remer, 1999, p. 41) – but all trials (should) have a jury and this is where the second pole of the argumentative theory of reasoning comes into play. Evolution has equipped us with both the cognitive tools to persuade and the (converse) ability to evaluate the arguments of others.²³ This requires a different set of cognitive tools – the argumentative theory of reasoning would recommend a separation between the proposers and the disposers and, if the experience of Britain’s 2016 Brexit referendum is anything to go by, there would be no shortage of advocates volunteering for the former role. Disposal, however, should be in the hands of a statistically-representative body, and both evolutionary psychology and the wisdom of crowds suggest that a randomly-selected group of ordinary citizens would have the necessary cognitive tools to perform this function on behalf of the population that it ‘describes’:

Despite the wishes of deliberative democrats, the distinction between speaker and audience cannot be made to vanish. That speaker and listeners are not equal, however, does not exclude listeners from the political process. Ultimately, it is the audience, not the speaker, that must deliberate, in the literal sense of ‘weighing’ the competing arguments and deciding between them. Although such deliberation may not conform to the [utopian?] dictates of ‘rational-critical’ discourse, it is participation nevertheless’ (Remer, 1999, pp. 57-8)

Bernard Manin – whose seminal paper ‘On legitimacy and political deliberation’ (Manin, 1987) is often cited as the manifesto for the modern deliberative democracy movement – is in agreement:

²³ Landemore notes that ‘it is possible for even a lone reasoner to *find arguments for an opposite point of view than hers*’, thereby lending unintended support to Goodin and Niemeyer’s case for silent deliberation within (2013, pp. 127-8, emphasis in original). Although Landemore acknowledges this as possible, she finds it implausible, as it is ‘not what our brains are designed to do’ (private communication), although our brains are certainly designed to decide between the merits of competing arguments (the role of the silent deliberator).

Debate format – in which speakers address an audience that merely listens to them – is a more promising set-up for exposure to conflicting positions²⁴ than interactive personal engagement amongst holders of opposing views, as people tend to avoid face-to-face disagreement. ... speakers should be primarily policy experts, group leaders, moral authorities. Politicians may be involved too, but on the condition that their participation is decoupled from electoral campaigns. ... The cleavages articulated in these debates would differ from partisan cleavages on two accounts: 1) cleavage on an issue-by-issue basis, rather [than] multiple item platforms; 2) disconnected, as far as possible, from competition for office. (Manin, 2005, pp. 18-19)

The mixed constitutional proposal outlined in Chapter 8 of this thesis is fully compatible with Manin's strictures.

* * *

Landemore's approach is, for analytic simplicity, to focus on 'pure' [and somewhat unworldly] models of decision-making, i.e.

models where the deliberative and aggregative phases are either oligarchic through and through or democratic through and through – so I will not consider the epistemic properties of mixed combinations, where the deliberation takes place among the few and then the vote takes place among the many. (Landemore, 2013, pp. 146-7)

However, both her own literature review of the genealogy of political deliberation and the two different cognitive mechanisms involved would suggest that the hybrid mixed constitution model is just as relevant to modern so-called 'democracies' as it was at the time of Aristotle or Polybius (Hansen, 2010; Manin, 1997).²⁵ The

²⁴ Cf. Landemore, 2013, p. 122: parties should be 'exposed to *conflicting* viewpoints, not just a variety of viewpoints' (my emphasis).

²⁵ Landemore (private communication) accepts Richard Tuck's observation that the so-called sovereign is fast asleep most of the time (Tuck, 2016), but argues that the model

proposal function (isegoria) has been (effectively, if not always formally) a property of political elites since the founding of democracy, whereas the judging function (isonomia) has always involved the counting of votes – either within the whole citizen body or a statistically-representative subset, however inconvenient that may be from an analytically pure perspective.

6.2.2 Cognitive diversity – vs – the wisdom of crowds

Individual cognitive diversity is of value to proposers, whereas the aggregate wisdom of crowds appertains to disposers. Landemore's principal case study for the role of cognitive diversity in practical problem-solving – the New Haven neighbourhood watch committee (Landemore, 2013, pp. 100-101) – required extending the diversity of the group membership sufficiently in order to identify just *two* people responsible for proposing the 'right' answer to the problem of night-time muggings on a bridge (solar lighting), as the knowledge of how best to finance the lights (Federal stimulus funding) might well have come from a regular city hall official. In principle one person would have been enough. I would argue that the relationship between cognitive diversity and political democracy (either electoral or lot-based) with respect to the proposal aspect of problem-solving is purely contingent – crowd-sourcing, e-petitions, innovation/knowledge markets²⁶ and public competitions might be a better way of establishing case-specific²⁷ cognitive

has run its course and is undemocratic. The view of this thesis is that it is better to accept Manin and Hansen's mixed constitution model as an accurate description of modern 'democracies', but to re-establish genuine popular sovereignty in decision making via the use of randomly-selected legislative juries (see Chapter 8, below).

²⁶ Landemore does seriously consider political information markets such as the short-lived DoD Policy Analysis Market in which punters were invited to bet on future options such as the political instability of Iran and the likelihood of terrorist attacks and political assassinations as an alternative (or supplement) to democratic policy making. She makes the interesting point that the Athenian practice of ostracism, in which citizens were invited to identify through a vote the prominent political figure likely to be a threat to the city was a 'proto-information market' (Landemore, 2013, pp. 179, 183; c.f. Ober, 2008, p. 161).

²⁷ Unlike Landemore, my model for sortition-based legislative juries is ad hoc (as in 4th-century Athens), with the innovation, continuity and accountability functions met by other institutions of governance (see Chapter 8, below). As such her concerns that 'it is

diversity than a group of elected or randomly-selected persons, few of whom would have any relevant knowledge to contribute directly to the proposal function. The public competition which led to clockmaker John Harrison's solution to the longitude problem would be a better model for generating public policy innovations than a random selection of citizens.²⁸ Her New Haven neighbourhood committee was comprised of a self-selecting group of citizens with a particularly strong interest in resolving a local problem (mugging incidents on a poorly-lit bridge), and it's difficult to see how such a perspective could be easily scaled up for the general political arrangements of large modern states.²⁹ As for her other two examples of 'democratic reason': French députés (pp. 99-100) would not normally be viewed as a case of cognitive diversity (elected politicians are normally viewed as the paradigm example of rich, white, male lawyers), and *Twelve Angry Men* (pp. 98-9) is a Hollywood movie.

Landemore's thesis is heavily reliant on the mathematical models of the complex systems theorist Scott E. Page and the economist Lu Hong and it's important to understand that (unlike the empirical evidence for the wisdom of crowds cited by

impossible to identify in advance all the questions that any given representatives will have to deal with over the several years of her tenure' do not apply, as they assume, as is generally the case, that a sortition-based legislative assembly would parallel one generated by preference election (Landemore, 2013a, p. 1219). According to this thesis, that would be neither possible or desirable.

²⁸ Athenian political oratory could also be viewed as a competition for gold crowns and other public honours and perquisites. (Hansen, 1999, pp. 274-5)

²⁹ Landemore acknowledges (private communication) that specific problem-solving assemblies designed in non-random ways could be more epistemically efficient, but insists that random selection is the optimal way for selecting all-purpose assemblies like legislatures because of the fundamental uncertainty of politics: 'If the goal is to staff a generalist Congress as opposed to a multitude of issue-specific assemblies, it is clear that we will never be able to identify universal knowers as no one can have the amount and diversity of knowledge required to address all possible political issues' (Landemore, 2014, p. 171). This thesis endorses the view of democracy as a combination of isegoria and equal voting power (isonomia) outlined in her article, but assigns these two functions to separate bodies with random selection only pertinent to the latter. Whilst the cognitive diversity of a randomly-selected Congress would still only extend to several hundred individuals (most of whom would have little to contribute to the debate), this thesis proposes no restrictions whatsoever on the isegoria right (see Chapter 7, below).

Surowiecki) their oft-quoted ‘Diversity Trumps Ability Theorem’ – which claims that, given certain conditions, ‘a randomly selected collection of problem solvers outperforms a collection of the best individual problem solvers’ – only has the status of an a priori ‘*logical truth*’, i.e. heavily dependent on its premises (S. Page, 2007, pp. 162, my emphasis). According to Page:

The veracity of the diversity trumps ability claim is not a matter of dispute. It’s true, just as $1 + 1 = 2$ is true. (Page, 2007, p. 165)

Moreover the theorem, originally outlined in a paper in the *Proceedings of the National Academy of Sciences* (Hong & Page, 2004) has been subject to robust criticism on account of its equation of mathematical entities like computer algorithms with human agents and of computational randomness with human diversity:

the paper . . . contains a theorem that has neither mathematical content nor real-world applications, and a contrived computer simulation that illustrates the well-known fact that random algorithms are often effective. What the paper emphatically does not contain is information that can be applied to any real-world situation involving actual people. (A. Thompson, 2014)

Once ‘unnecessary technicalities’ are removed and ‘basic’ mathematical errors corrected ‘the theorem is revealed to be little more than a straightforward restatement of its hypothesis’ (*ibid.*, p. 1025). Although tautology is an inherent property of mathematical theorems, Hong and Page’s paper has been widely cited and used by a number of high-profile institutions in order to justify a ‘diversity-first’ recruitment policy over one putting a greater emphasis on ability – an example, according to Thompson, of the misuse of mathematics in the social sciences.

Page published a rejoinder to Thompson’s criticisms (S. E. Page, 2015) and his 2007 book includes an updated version of the theorem (the version cited by Landemore in *Democratic Reason*). Jason Brennan, however, argues that even if the theorem is correct ‘it cannot be used to defend most realistic democratic decisions, and it presents no serious challenge to [elite] epistocrats’ (Brennan, 2016, p. 182). Whilst Brennan and Ilya Somin’s *Democracy and Political Ignorance* (Somin, 2013) agree that diverse views and abilities can be better than small

expert groups, they are sceptical that this has any relevance to democracy [either elective or sortition-based] as, although ‘sometimes two heads are better than one, that doesn’t mean that all the heads [or a statistical sample thereof] are always better than some of them’ (Brennan, 2016, p. 182). Landemore likens democratic reason to a group of people trying to work out the best way of exiting a maze, but ignores the fact that most people will have little or no relevant knowledge to contribute to the solution, and are likely to follow the lead of those with the linguistic and cryptographic skills to decode the pictograms and equations written on the maze wall indicating the way to the exit (Landemore, 2013, p. 3). Although the WW2 Enigma Code was broken at Bletchley Park by a cognitively diverse group, including mathematicians, classicists, linguists, chess champions, cryptologists, archaeologists and crossword-puzzle enthusiasts, they were all *experts* in their chosen domain. Page’s theorem also presupposes that, as in a maze, there is a definitive answer to the problems likely to be encountered in democratic societies, whereas in modern pluralistic societies it’s hard enough for everyone to agree on the nature of the general good, let alone the path best followed to attain it. This is the problem that Gerald Gaus has termed ‘The Fundamental Diversity Dilemma’:

As we increase diversity of perspectives we can bring the ideal closer to our world, but as diversity increases we disagree about the justice of alternative social worlds, including the ideal. (Gaus, 2017, p. 131)

Although more sympathetic to Landemore and Page’s case for cognitive diversity, Gaus concludes that it is only applicable to political contexts where the group concurs on the domain of options ‘and the scores of each option are known by (or agreed to by) all (*ibid.*, p. 116). The theorem would in fact only apply to the ideal (Habermasian) deliberative context, as

In this pure problem-solving context, we implicitly assume the existence of an oracle, namely a machine, person, or internal intuition, than can reveal the correct ranking of any proposed solutions.
(Landemore and Page, 2015, p. 234)

If such an oracle were discovered, then ‘politics’ would become redundant.

Despite her protestations of analytic purity, Landemore's case for collective intelligence is in fact a hybrid model³⁰ 'that explicitly connects the epistemic properties of a *liberal* society and those of *democratic* decision procedure':

I argue that in an *open liberal society*, it is simply more likely that a larger group of decision makers will be more cognitively diverse, and therefore smarter, than a smaller group. (Landemore, 2013, p. 7, my emphasis)

It should be noted that such an argument could also apply to a large group of oligarchs – 'an aristocratic regime may itself benefit from this doctrine' (Waldron, 1995, p. 564) – and that the connection with democracy is entirely contingent. Although such a group is *likely* to be constituted by a democratic procedure (such as election or sortition) cognitive diversity could also be established by non-democratic means. As such this thesis's criticisms of Michael Saward's representative claim model as liberal rather than democratic would also apply (see p. 269, below). Landemore frankly admits that her concerns are purely epistemic/consequential and do not address the case for democracy in terms of intrinsic procedural norms such as fairness, equality and representativity (Landemore, 2013, p. 8).

Landemore freely acknowledges that her focus on epistemic considerations (prediction of the most effective solution) distances her from the conventional focus on preference aggregation and the adjudication between competing interests. Her (analytical) assumption that all forms of government seek to rule in the interests of the people (rather than those of the rulers) is in order to 'avoid complicating the comparative issue of epistemic competence (the kind of knowledge one has) with the problem of moral competence (the kind of intentions one has) (*ibid.*, p. 11). This leads her to adopt an analytic framework somewhat removed from empirical political behaviour:

³⁰ Landemore views her model as incomplete rather than hybrid, and is content with the limited claim that 'given a liberal society, a democracy works better than expert rule' (private communication).

[T]he epistemic framework of the argument presented in this book assumes that people are voting what they think is right for the common good, *no matter how unpleasant it is for them, whether ideologically or economically*. (Landemore, 2013, pp. 196-7, my emphasis).

Whilst, as a former student of Richard Tuck, one might expect Landemore to back his campaign to remove the tanks of the rational-choice economists from the neatly-mown lawns of Harvard's Department of Government (she devotes a long section of her book to a polemic against Bryan Caplan's *Myth of the Rational Voter*), this is taking Rousseauian civic obligation well into Buzz Lightyear territory.³¹

6.2.3 Authority, legitimacy and consent

Landemore states that the issue of democratic authority (the principal concern of both David Estlund's eponymous 2008 work, as well as this thesis) is 'a maze that I do not wish, or need, to enter':

Whether epistemic properties add to the legitimacy of democratic decisions in general or simply provide prudential reasons to abide by them is a question I will thus leave unaddressed. (*ibid.*, p. 47)

Like most deliberative democrats, Landemore has little interest in the question of 'who ought to be included among the participants of deliberation in the first place. It is simply assumed that democratic deliberation is inclusive'³² (Landemore, 2013, p. 96). Needless to say such a perspective is problematic from the point of view of this thesis. David Estlund's proposal for 'epistemic proceduralism' addresses both elements (democratic legitimacy and epistemic outcomes), although his standard for outcomes is minimalist (merely better than random), and his procedural

³¹ 'To Infinity and Beyond'.

³² Note that the issue is not the *extent* of the demos – geographical constraints or the principle of all affected interests – but legitimacy in the sense of ensuring that deliberators accurately represent the beliefs and preferences of the demos, however it may be construed (it being assumed that it is impractical for all citizens to participate directly).

approach Rawlsian (qualified acceptability criterion), which is arguably more liberal than democratic (Estlund, 2008, p. 116). His example of the trial jury puts equal emphasis on legal and moral force – ‘Owing partly to its epistemic value [as well as its respect for trial procedures], its decisions are (within limits) morally binding even when they are incorrect’ (Estlund, 2008, p. 8), and this has implications for an epistemic approach to democracy:

If we can see why people would be obligated to consent to the authority of a jury system, I believe that a strikingly analogous argument suggests itself for thinking that people would be obligated to consent to epistemic proceduralist democracy. (*ibid.*, p. 10)

Note that in Estlund’s argument the epistemic factors are subservient to proceduralist considerations (‘morally binding even when they are incorrect’). Estlund relies on the jury analogy throughout the book, and courtroom procedures (evidence, testimony, cross-examination, adversarial equality, and collective deliberation by a jury) are central to the moral and epistemic authority of trial verdicts (*ibid.*, p. 8). From the perspective of authority/legitimacy the analogy between the trial jury and democracy is apposite:

[b]oth systems serve urgent collective tasks with institutions that can publicly be seen to have some decent tendency (better than or at least nearly as good as any other and also better than random) to produce good or correct decisions. (Estlund, 2008, p. 137)

The practical proposals outlined in the final chapter of this thesis draw on judicial practice for their legitimacy, and attempt to combine the epistemic and procedural benefits of the trial procedure, with a particular emphasis on the representational claims of the principle of trial by a random sample of one’s own peers. This is a key reason why all citizens are deemed to consent to the verdict of jury trials. As such I anticipate that my proposals pass Estlund’s tests for democratically legitimate

authority – substantive justice, demographic neutrality,³³ collective wisdom, and better outcomes than nondemocratic alternatives (Estlund, 2008, p. 157). In this respect I'm encouraged by his conclusion that 'decision making by a small randomly chosen set of voters' would not be 'offensive or contrary to the moral spirit of democracy if it turned out to have pragmatic advantages' (*ibid.*, p. 182).

6.3 The exception that proves the rule?

Whilst Landemore concludes her book with the claim that democracy is a 'gamble worth taking', Surowiecki argues in his conclusion that the *one exception* to his 'wisdom of crowds' thesis is democratic politics, his final sentence reading:

The decisions that democracies make may not demonstrate the wisdom of the crowd. The decision to make them democratically does.' (Surowiecki, 2004, p. 271)

I would argue that Surowiecki's scepticism regarding the applicability of his thesis to democratic innovations is on account of the conflation of talking and counting within the literature. Although I have used James Fishkin's programme in Deliberative Polling as a paradigm example of the wisdom of crowds (counting) tradition, Fishkin tries to have his cake and eat it, as both his methodology (which includes the exchange of reasons within small moderated groups of deliberators) and general normative framework (focusing on the public good rather than merely the aggregation of preferences) crosses into the territory occupied by epistemic and deliberative democrats. Although Fishkin defines the term 'deliberation' in a Surowieckian sense (aggregate judgment via the 'weighing' of arguments), the term, when used by political theorists, generally means the free exchange of reasons between equals. This, combined with Fishkin's insistence (private communication) on the essential role of the exchange of reasons in the DP small-group sessions, and his frequent departure from the language of preference

³³ Mill's case for the 'epistocracy of the educated' fails on account of the demographic objection. (Estlund, 2008. p. 222)

expression into Rousseauian territory causes Surowiecki to dismiss the Deliberative Polling programme as 'quixotic':

Fishkin's project is a profoundly optimistic one, predicated on a kind of deep faith in both the *virtue* of informed debate and the ability of ordinary people to govern themselves (Surowiecki, 2004, p. 260, my emphasis).

Whilst Surowiecki's scepticism regarding the 'virtue' (in both the strong and weak senses of the word) of informed debate might well be expected, his dismissal of the 'ability of ordinary people' is profoundly at odds with the rest of his book. If the aggregate judgment of ordinary people is the best way of coming to the truth in most non-specialist knowledge domains, then why should political decision-making be any different? My perspective on political decision-making is derived from the view that politics is just 'the activity of attending to the general arrangements of a set of people whom chance or choice have brought together' (Oakeshott, 1962, p. 113). Why should 'the people' (or a well-informed and descriptively-representative subset thereof) not be the best judge of their own 'general arrangements'? If not then who? Surowiecki prefers Judge Richard Posner's view that 'it is far more difficult to form an informed opinion about what is good for society as a whole than it is to determine where one's self-interest lies' (*ibid.*, p. 261). True, but the Deliberative Poll, stripped of its occasional drift into Rousseauian waters, would be compatible with both – allotted citizens would be entirely free to use their (secret) vote for the general good or their own preferences (or a combination of the two) as they see fit. Given that we (allegedly) get the government we deserve, this strikes me as entirely appropriate.

The focus of this thesis so far has been primarily isonomia and has concluded that the aggregate judgment of large randomly-selected juries can (under certain strict conditions) be both democratically legitimate (Chapter 5) and epistemically benign (Chapter 6). The next chapter moves on to isegoria – the 'opinion' element of the democratic diarchy.

CHAPTER SEVEN

7. Isegoria: The Representative Claim

The demos must have the exclusive opportunity to decide how matters are to be placed on the agenda of matters that are to be decided by means of the democratic process. (Dahl, 1989, p. 113)

In Chapter 8 of *Democracy and Its Critics*, Robert Dahl concluded that decision-making by a randomly-selected body of citizens would not be incompatible with the requirement for 'voting equality at the decisive stage' (*ibid.*, pp. 109-11). But his fourth criterion for democratic equality, cited above, is that citizens must *also* have 'adequate and equal opportunities for placing questions on the agenda' (*ibid.* p. 109). In the Athenian direct democracy this was ensured by the principle of *ho boulomenos*, whereby any Athenian citizen 'who so wished' could propose a change in the laws. Although this was usually via the medium of *probouleusis* – where the council (assembly secretariat) drew up the agenda – *any* citizen could propose a new law and speak for or against any other motions in the assembly. In keeping with its conceptual origins in classical democracy this thesis has adopted the Greek term *isegoria* (equal speech rights) for both agenda setting and advocacy (for or against) a political proposal. But this is where it gets *extremely* difficult – how might this equal right of agenda setting and policy advocacy be instituted in large modern states where direct participation (*ho boulomenos*) is impossible on account of issues of scale? Dahl immediately qualifies his fourth criterion (democratic agenda setting) by insisting that the demos need only have the *final* say in the agenda-setting process, thereby (potentially) legitimizing indirect and representative forms of *isegoria*. But what are the appropriate representational principles for *isegoria* – agenda setting, advocacy and other such speech acts?

In Chapter 5 of this thesis we concluded that, in order to preserve the *isonomia* of all the citizens who are *not* included in the legislative microcosm, it would be necessary to limit the remit of the randomly-selected assembly to silent 'deliberation within' followed by the secret vote – agenda setting and advocacy being provided exogenously. This is because there is no reason to believe that the illocutionary force of the speech acts of randomly-selected individuals would accurately mirror the preferences, beliefs and knowledge of the target population

as ‘these are frequently “arbitrary” and can be deeply antidemocratic, particularly when those who are shy, more thoughtful, or less confident “cede political power to arrogant loudmouths whom no one chose to represent them”¹ (Young, 2000, p. 125, cited in Disch, 2004, pp. 5-6). This would suggest that random selection – for anything other than aggregate (isonomic) functions – contravenes basic equal opportunity norms and could have *no legitimate role to play when it comes to agenda setting and advocacy*. Democratic norms presuppose that discursive advocacy (isegoria) in large (indirect) democracies assumes a completely different representational form, as it cannot be left to the purely aleatory composition of a small randomly-selected group, as the ‘descriptive’ representativity of the group is predicated on the law of large numbers and this only applies to collective acts (i.e. voting).

This chapter explores how the representative principle should be applied to advocacy and agenda setting, including speech acts (of elected officials and others), direct-democratic initiatives, mass media and other forms of discursive input. Equal speech for all citizens (including, in particular, *the overwhelming majority who choose not to speak*) is the goal, and the sheer scale of modern democracy requires that this should be achieved by representational means, because if everyone chose to exercise their isegoria right directly then the resulting cacophony would far surpass that of the Tower of Babel.

In electoral systems the silent majority exercise their speech rights by choosing a candidate or political party whose speech acts and choice of discourse best approximates what they would have said had they the opportunity and rhetorical gifts themselves. ‘Best approximates’ acknowledges the fact that – particularly in single-member plurality systems – the need to aggregate disparate issues into an electorally-viable package will mean voters have, on many occasions, to block their ears (and hold their noses) against speech acts by their ‘own’ representatives that

¹ Note that a similar criticism could be made regarding the self-selecting *rhetores* and *demagogoi* who chose to address the Athenian assembly; however, in the classical example, *all* citizens had the right both to speak and to judge the speech acts of those who availed themselves of this right – not so in large modern states.

they dislike. However the system still strives to empower the silent majority to speak vicariously, via the principle of 'representative isegoria'. In the 2016 presidential election a near plurality of American voters decided, rightly or wrongly, that Donald J. Trump was speaking for them (or, at least, more so than the competing candidate).

But how would the principle of representative isegoria be preserved in a minipublic-based legislative system? Who would assume the role of gatekeeper for the assembly, deciding who should and should not speak and (most importantly) who should speak for the (dispositionally or circumstantially) mute? What is the relevant filtering principle? If I cannot speak myself then my 'representative' (a chosen person, a political party, a pressure group, a 'discourse', a newspaper or whatever) needs to speak on my behalf and the illocutionary force of the resulting speech act should be 'proportionate' – both in the modern (statistical) and classical sense of proportional equality of 'worth'. But how is it possible to reconcile these two very different – or even contradictory – forms of equality, both conceptually and in practice? Whereas representative isonomia is simple to formulate (by statistical theory) and operationalize (by proportional sampling), representative isegoria is a far more challenging problem and the solution will, unfortunately, be anything other than simple and elegant. As a result, this chapter has potential for a PhD thesis in its own right. All that can be attempted within the constraints of a single thesis is to outline the relevant issues (with the aid of illustrative examples), in the hope that future researchers might fully examine the role of (for example) competitive media as a source of representative isegoria.

7.1 Numerical (arithmetic) and proportional (geometric) equality

According to Aristotle, there are two kinds of equal justice, numerical and proportional:

One kind [numerical justice] is exercised in the distribution of honor, wealth, and the other divisible assets of the community, which may be allotted among its members in equal or unequal shares. . . . [However] all are agreed that justice in distributions must be based on desert of some sort [proportional justice], although they do not all mean the same sort of desert; democrats make the criterion free birth; those of

oligarchical sympathies wealth, or in other cases birth; upholders of aristocracy make it virtue. Justice is therefore a sort of proportion; for proportion is not a property of numerical quantity only, but of quantity in general, proportion being equality of ratios. (Arist., *Nich. Eth.*, 1130b-1132b)

Or, as Plato put it:

There are two kinds of equality which, though identical in name, are often almost opposites in their practical results. The one of these [numerical equality] any State or lawgiver is competent to apply in the assignment of honors – namely, the equality determined by measure, weight and number – by simply employing the lot to give even results in the distributions; but the truest and best form of equality [proportional equality] is not an easy thing for everyone to discern. It is the judgment of Zeus, and men it never assists save in small measure, but in so far as it does assist either States or individuals, it produces all things good; for it dispenses more to the greater and less to the smaller,² giving due measure to each according to nature; and with regard to honors also, by granting the greater to those that are greater in goodness, and the less to those of the opposite character in respect of goodness and education, it assigns in proportion what is fitting to each. Indeed, it is precisely this which constitutes for us ‘political justice,’ which is the object we must strive for. (Plato, *Laws*, VI.757b-c)

Note that both philosophers assume distribution by lot to be the natural mechanism to institute numerical (arithmetic) equality, hence my equation with the isonomic equality of the representative minidemos. But Thucydides’ rendering of Pericles’

² Cf the Parable of the Talents: ‘For to everyone who has will more be given, and he will have an abundance. But from the one who has not, even what he has will be taken away’. (*Matt.*, 25:29, ESV)

Funeral Oration shifts the focus of the Athenian *demokratia* from numerical to proportional equality:

[W]hile the law secures equality of all alike in their private disputes, the claim of excellence is also recognised; and when a citizen is in any way distinguished, he is generally preferred to the public service, not in rotation, but for merit. (*Thuc.*, 2,37,1, trs. Jowett revised Brunt).

‘Pericles is claiming, in fact, that the opponents of democracy were wrong in their assertion that democracy was so obsessed with [numerical] equality that it ignored all other considerations’ (Harvey, 1965, p. 102). Here David Harvey, like his Marxist mentor G.E.M. de Ste. Croix, is claiming that ‘proportional’ equality is in fact inequality dressed up in sheep’s clothing; however he acknowledges the origin of proportional equality, along with its application to political philosophy, in Pythagorean geometry (*ibid.*, p 146). And this classical distinction has carried through to modern usage – according to the ‘equality’ entry in the *Stanford Encyclopedia of Philosophy*:

[A] distribution is equal *numerically* when it treats all persons as indistinguishable, thus treating them identically or granting them the same quantity of a good per capita. That is not always just. In contrast, a . . . distribution is *proportional* or relatively equal when it treats all relevant persons in relation to their due. (Gosepath, 2007)

Although the focus of the SEP article is distributive justice, the principle applies to the distribution of political goods, especially as this is a common use of the term *isonomia* in the classical literature (see p. 49, above). In the case of *numerical* equality the ‘good’ being distributed is political decision power, operationalized as the vote (each vote has equal causal weight); whereas the *proportional* equality of the speech acts of the ‘relevant person’ equates to their ‘worth’ or ‘merit’ – whether conceived in terms of wisdom, virtue, knowledge, military prowess, wealth, birth, education, socio-economic status, rhetorical/demagogic skills, personal charisma, good looks or whatever. According to the classical view of proportional equality, the views of ‘worthy’ people (in the above sense) are due more consideration than others.

The two forms of equality (numerical and proportional) are sharply opposed and, according to the present thesis, need to be theorized (and operationalized) separately (the focus of this chapter being proportional equality). The thesis claims that there is an isomorphism between the two classical components of democratic freedom (equal lawmaking power and equal speech rights) and the Greek notions of numerical and proportional equality:

Variant of democratic freedom	Form of equality
isonomia	numerical
isegoria	proportional

Table 7.1: Freedoms and equalities

Numerical equality is a straightforward concept – all citizens should have equal decision power (voting) over the laws that govern them, and all votes count exactly the same. Add the votes up and the result is isonomic (numerical) equality, albeit mediated by the majoritarian principle and the particular decision rule in place. The argument is equally applicable to direct, indirect and stochastic (random sample-based)³ democracy and is unproblematic from the perspective of this thesis and dealt with in detail in Chapter 5. Classical philosophers were (on the whole) hostile to isonomic equality as it meant rule by the poor and uneducated, as there were a lot more of them.⁴

However equal speech rights and proportional equality (the subject of this chapter) are anything but straightforward. This is doubly problematic in so far as distribution is governed by the mathematical principle of ratio: ‘more to the greater and less to

³ The fact that ‘stochastic’ (sortition-based) democracy is proportional in the modern (statistical) sense – there being a high probability that a large random sample will be comprised of approximately the same proportion of, say, males and females as the target population – should not be conflated with the classical meaning of proportionality as equality of ‘worth’.

⁴ Marx’s class-based political sociology has its foundations in Aristotle, although each philosopher attributed diametrically-opposed valence to the different forms of equality involved: ‘For it is [proportional – i.e. true] equality for the poor to have no larger share of power than the rich, and not for the poor alone to be supreme but for all [classes] to govern equally.’ (Arist., *Pol.*, 1318 A 3-8, trs. H. Rackham)

the smaller', but the concept of 'greatness' and 'smallness' are *not* derived mathematically and it 'is not an easy thing for everyone to discern':

It is the judgment of Zeus . . . it dispenses more to the greater and less to the smaller, giving due measure to each according to nature; and with regard to honors also, by granting the greater to those that are greater in goodness, and the less to those of the opposite character in respect of goodness and education. (Plato, *Laws*, VI.757b-c)

Note that once 'goodness' has been determined, the allocation criterion is a mathematical ratio as 'it assigns in proportion what is fitting to each'. In a small direct democracy (such as classical-era Athens) any citizen who chose to could propose new laws and argue for or against proposals. But, in practice, the effectiveness of the speech acts would be proportional to the 'merit' of the citizen in question. The 'merit' of each speaker was judged in real time by the audience (in theory the whole citizen body) and the proportional equality of Pericles and Demosthenes would have greatly exceeded that of poor and uneducated citizens who, even if they had the temerity to speak, ran the risk of being howled down. This would have been entirely appropriate from the perspective of proportional equality as some animals (like Pericles and Demosthenes) are by 'nature', 'goodness' and education a lot more equal than others, as David Harvey, citing Orwell, points out (Harvey, 1965, p. 101)

But at least each and every citizen *could* speak, if he so chose, and his audience would have been the whole assembly. It has been argued that the internet has recreated the isegoria of classical Athens as anyone who wishes to can now set up a blog and speak to everyone else. However this overlooks the fact that most blogs have no significant audience (this problem reflects sheer information overload and has nothing to do with the merit of individual bloggers.) Large-scale democracy necessitates representation and how should proportional equality in large-scale societies be instantiated, given the plethora of competing voices? From the perspective of numerical equality it might be argued that the representative isegoria of a leading article in the Sun (circulation 2.2 million at the time of writing) is 'worth' more than a leading article in the Independent (circulation c. 40,000 prior to its demise), but such a perspective presupposes an arithmetic criterion in that

each subscriber is viewed to be of equal worth (irrespective of ‘nature’, ‘goodness’ and education).

In fifth-century Athens the two forms of proportional equality overlapped – the period is (in part) characterised as the ‘Age of Pericles’ as the (intrinsic) ‘worth’ of Athens’ first citizen (as a general and a statesman) automatically translated into demotic support. But modern ‘audience’ democracies bear a closer similarity to fourth-century Athens, when the *rhetores* were no longer *strategoí*. Fourth-century statesmen, like their modern equivalents, were often lampooned as demagogues, in that they lacked intrinsic ‘worth’, so there was considerably less overlap between the two forms of equality. This is even more problematic in modern societies where politicians rank with telemarketers and car dealers in terms of public esteem (only political lobbyists rank lower). More Britons now trust their hairdresser (sixty-nine percent) than their politicians (twenty-one percent) (Hosking, 2014). Which voices are ‘worthy’ of inclusion and what numerical weight should be assigned to each? Classical societies were characterized by *homonoia* (same-mindedness) and there was little clash of competing ‘discourses’, so *homonoia* left little space for anything more than *ad hominem* attacks.⁵ Can the sheer heterogeneity of voices in modern multicultural societies provide a solution? ‘Discourse theory’, alas, provides no easy answer, as the power arrogated to the men in white coats to determine which discourses should be included via social science Q methodology (see section 7.4.3.2, below) is clearly undemocratic and runs the risk of drowning out the silent (hegemonic) majority with the sheer plethora of subaltern voices. This is unsurprising, given that discourse theory is ‘the rightful heir of the early Frankfurt School [of cultural Marxism]’ (Scheuerman, 2006, p. 86). ‘The devil has the best tunes’⁶ (and a lot more of them) – Dryzek pointing out the plethora of different

⁵ ‘Athenian democracy at its core relied on the possibility that the cultural homogeneity of its male citizenry, bound together by myths of autochthony and loyalty to the artificial tribes to which Cleisthenes had allocated their demes, could override the divisive class interests that otherwise might lead to faction and civil war. Some of the most powerful appeals in Greek rhetoric, from Pericles’ funeral speech to Themistocles’ appeal to the Greeks before Salamis, are to similarity and shared culture.’ (Atack, 2017, p. 585)

⁶ An aphorism illustrated by the different common-language valence of buzzwords like ‘progressive’ and ‘liberal’, as opposed to ‘conservative’ and ‘reactionary’.

approaches of environmental activists, including wildlife management, conservation, preservation, reform environmentalism, deep ecology, environmental justice and ecofeminism. It's all very well arguing that 'for policy-making rationality all relevant discourses should get represented, regardless of how many people subscribe to each' (Dryzek & Niemeyer, 2008b, p. 482). However if Q methodology is to determine which discourses to include then each would have the same isegoric rights as the hegemonic perspective shared by most citizens (and not just business corporations) that the earth is a resource intended primarily for the benefit of its human occupants. While discourse theory may well make for 'policy-making rationality', it sits uneasily with standard models of democratic equality, as we see when we remind ourselves of Dahl's insistence that 'the demos must have the *exclusive opportunity* to decide how matters are placed on the agenda' (Dahl, 1989, p. 113, my emphasis). Why should the demos include an arcane discourse on the agenda that it's never even heard of, purely at the behest of Q (James Bond allusion intended)?

Whereas the modern incarnation of isonomia is relatively straightforward, the uneasy trade-off between the two senses of proportionality – the intrinsic 'value' of a discourse and the number of people supporting it (or who have even heard of it) – would suggest that the solution to the problem of representative isegoria will, of necessity, be an *untidy compromise between proportionality in the ancient (meritocratic) and modern (statistical) sense*. Deliberative and epistemic theorists are often content for solutions to emerge from the free exchange of reasons and the problems with this from the perspective of democratic equality have been addressed in Chapter 5. However, from the point of view of the present chapter, the problem is simply how to package up the blooming, buzzing confusion that constitutes the competing discourses of the public sphere in modern multicultural societies into clear options that can be chosen between on the basis of the isonomic equality of the sovereign minipublic. How is it possible to decide which discourses are both 'worthy' of inclusion (classical proportional equality) and at the same time ensure that the discourses represent the views of a significant proportion of citizens (proportional equality in the statistical sense)? The answer will, of necessity, be messy and pluralistic – as befits the representative isegoria needs of modern polyarchic societies. Bear in mind that the 'worth' of the speech acts will be judged by the 'audience' of the 'representative claim' (see section 7.2,

below) – whether that be voters in a general election or subscribers to a national newspaper – according to whatever criteria the audience deems fit, thereby providing a filter in line with Dahl’s requirement that the demos should (ultimately) set the agenda. Given that the final up/down decision will reflect the isonomic equality of votes in the minidemos, this might be seen to provide a double dose of mathematical equality, so we might well choose to relax Dahl’s (conveniently vague) fourth criterion and lean slightly in the direction of discourse theory – thereby allowing rare flowers to bloom that would normally be snuffed out by the sheer weight of more popular options in the competitive ecosphere of representative isegoria. If this sounds like a vague and overly complicated answer this merely reflects the intractable nature of the question. In the words, once again, of the godfather of democratic theory:

Perhaps the greatest error in thinking about democratic authority is to believe that ideas about democracy and authority are simple and must lead to simple prescriptions . . . if you think there are simple prescriptions, then we cannot hope to understand one another. (Dahl, 1990, p. 73)

The messy, imprecise and pluralistic nature of the solution requires that this chapter briefly reference literature from empirical political science, sociology and media studies, and that the criteria will need to be applied differently in different contexts – representative mechanisms that convert isegoria *directly* into political power will need to lean more towards the statistical pole, whereas discourse opportunities that are restricted to the informal *public sphere* can afford to take a more qualitative perspective, as they will still be subject to selection via a series of isonomic filters. However, a diverse and inclusive approach like this requires a clear conceptual framework, for which I am indebted to the recent work of Michael Saward, arguably one of the most successful (and influential) recent attempts to extend the remit of representation theory beyond the electoral model. Whilst this thesis does not fully endorse Saward’s ‘Representative Claim’ – indeed I argue in section 7.5 below that the claim model fails on the criterion of democratic legitimacy – nevertheless Saward’s analytical model provides an invaluable tool to help structure the blooming, buzzing confusion that characterizes representative isegoria in large-scale multicultural societies.

7.2 The ‘Representative Claim’

Given the grounding of this thesis in principles abstracted from classical Athenian democracy, there is no reason to limit political representation to the modern preference-election variant or, indeed, any other form of personal agency – media, ‘discourses’ and other public-sphere phenomena can also be representative – so the overall framework of this chapter is loosely based on Michael Saward’s inclusive and highly influential ‘representative claim’ model (Saward, 2006, 2010). Although the representative claim has been adopted as a loose template for this chapter, it is *not* intended as a detailed exposition and/or critique. Indeed the decision to purloin Saward’s model for my own purposes should be taken as a compliment regarding both its adaptability and widespread influence on the current debate on representation beyond the confines of traditional models of electoral democracy. The chapter also endorses Lisa Disch’s suggestion (Disch, 2014) that Saward’s ‘constructivist’ approach applies only to claim-*making*, other mechanisms being required to ensure that representative claims are received and *judged* in a democratically-legitimate fashion. Saward is right to insist that, as in classical Athenian *ho boulomenos*, anyone should be able to advise the people by making the claim to represent their interests (‘who wishes to address the assembly?’), but his book does little to suggest how the resulting claims should be evaluated under conditions of isonomic equality, as would have been the case in the classical *demokratia*, in which *all* citizens could (in principle) attend the assembly and vote on the competing claims – in Aristotelian terminology the proportional equality of isegoria tempered by numerical (isonomic) equality. However, following Saward’s own methodology, I will leave the problem of the evaluation of representative claims (and by what ‘constituency’) until the end of this chapter (7.5).

The topic of this thesis is primarily the isegoria/isonomia diarchy within the *formal* (institutional) organs of governance, as opposed to the traditional focus of deliberative theorists on the role of opinion in the informal public sphere (Habermas, 1992), discussed at length in Chapter 1, above. In classical parlance, my primary interest is the *panyx* (forum of the legislative assembly) rather than the *agora* (gathering place for the market and the centre of athletic, spiritual and (informal) political life). Nevertheless the formation and representation of public opinion, although of secondary interest to this thesis, is a vital component of a well-functioning democracy, so deserves to be discussed in a chapter devoted to

representative isegoria. Indeed, to Nadia Urbinati, democracy is ‘government by means of opinion’ and the rightful focus is ‘the *extra-institutional* domain of public opinion’ (Urbinati, 2014, p. 2, my emphasis). Urbinati, like Habermas (1992), is concerned with the formation of opinion in the informal public sphere and the ‘disfigurations’ of democracy that her book outlines include ‘power concentration in the sphere of political opinion formation’, along with ‘polarized forms of consensus’ (*ibid.*, p. 3). One of the factors that prompted Urbinati to write *Democracy Disfigured* was her concern over the ‘Berlusconi effect’, whereby a single politician was able to dominate the political landscape by corrupting public opinion via his control of large sections of the Italian media (Urbinati, 2014, p. 4).

Given J.S. Mill’s argument regarding the role of newspapers in extending the democratic *agora* beyond the reach of the herald’s voice, Saward’s book is strangely silent on the key role of the media in representative isegoria, so the public-sphere section (7.4) of this chapter attempts to correct this lacuna by evaluating Mill’s argument in the light of subsequent developments in communications technology and media ownership. The section also evaluates the potential role of deliberative, discursive and associational democracy in the informal sphere of public opinion.

Saward’s model for the representative claim is both abstract and comprehensive:

A *maker* of representations (‘M’) puts forward a *subject* (‘S’) which stands for an *object* (‘O’) that is related to a *referent* (‘R’) and is offered to an *audience* (‘A’). (Saward, 2010, p. 36).

The high level of abstraction means that the model is applicable to a wide range of phenomena, including the representative claims of a) members of parliament, b) political parties, c) political visionaries (Marx being Saward’s chosen example), and d) antiglobalization demonstrators; the audiences of the claim-makers being, respectively, a) the MP’s constituency, b) the full electorate, c) the working class⁷

⁷ Saward distinguishes between ‘intended’ and ‘actual’ audiences – in practice the actual audience for the representative claims of political visionaries like Marx has been middle-class intellectuals, students and activists rather than the ‘proletariat’.

and d) Western governments (*ibid.*, p. 37). It's important to note that the only mention of 'constituency' is in the first example (the standard Westminster model), as Saward chooses to defer all evaluation of normative legitimacy (how and by what constituency the claim is evaluated and according to what decision rule) until the final chapter of the book. This is largely on account of the constructivist epistemology underlying his thesis, which is critical of the notion of pre-existing constituencies, preferring instead the view that they are constructed or 'constituted' by the very act of claim making:

The active sense of constituency – to constitute – has [wrongly] taken a back seat to the passive sense – a fixed territorial group of people or voters – in modern democracy. (*ibid.*, p. 52)

This suggests that there is no essential difference between political and aesthetic representation and that Hanna Pitkin's dismissal of symbolic representation as 'fascist' is unwarranted (Pitkin, 1967, pp. 107-9). Saward recruits Pitkin's footnote (Pitkin, 1967, pp. 254-5, n. 14) – where she acknowledges that a Wittgensteinian version of her book would have been very different to her Austin-inspired natural-language approach – in support of his constructivist epistemology: 'the whole thrust of my approach to representation is linked to a constructivist's skepticism about the ready accessibility of the "real"' (Saward, 2010, p. 69), even though he is reluctant to embrace radical *linguistic* constructivism. Saward's constructivism is derived from the 'radical democratic pluralism' perspective that representation is necessary to constitute the represented as a *democratic subject* (Laclau & Mouffe, 1985).

Postponing as he does until the last chapter his evaluation of how to judge the democratic validity of any particular claim, Saward is relaxed in principle about non-elective forms of representation, including the singer and activist Bono's claim to 'represent a lot of people [in Africa] who have no voice at all' (*ibid.*, p. 82). This thesis shares, in part, Saward's laid-back attitude to non-electoral isegoria, not on account of an epistemological commitment to constructivism but on account of the radical democratic diarchy of isegoria and isonomia – so long as the decision function (the evaluation and legitimisation of the representative claim) is in the hands of a statistically-representative sample of all 'constituents', then the criteria for the democratic provenance of the proposals being judged can be less exacting. So long as the separation between the proposers (those making the representative

claim) and the disposers (those judging the claim) is rigorously maintained and so long as the numerical equality of the demos (via representational fidelity) is fully protected (see Chapter 5, above), then the origin of a legislative proposal is less important – as the numerical equality of the judges trumps the proportional equality of the advocates. This being the case, Saward’s distinction between ‘audience’ and ‘constituency’ is, in the final analysis, elided in my use of his model, as the disposing minidemos is *both* the audience for the claim-making and the legally-constituted judge of the legitimacy of the claims. And even at the earlier stage of agenda-setting (the topic of this chapter), voters – the audience for representative claim-making – determine the success of the competing claims through returning politicians via existing territorial constituencies. Unlike Saward, my concern from the start is the old-fashioned one of evaluating the democratic legitimacy of competing representative claims, rather than examining how such claims are constructed in real time.

As this thesis, unlike Saward’s book, includes a chapter (8) in which institutional structures to implement the isonomia/isegoria distinction are outlined, albeit in a sketchy form, it is necessary to distinguish between forms of isegoria that could play a formal role in the legislative process and those limited to the formation and representation of opinion in the public sphere. The next two sections deal with these in turn. The first (*prnyx*) section (7.3) considers the various forms of formal representative isegoria that are available in large modern states, including electoral representation, direct-democratic initiatives, along with (more controversially) pressure groups and single-issue advocates. As these are extensively covered in the political science literature (and in Saward’s book) they are only sketched in outline here. The second (*agora*) section (7.4), on the informal public sphere, outlines in brief the representative claims of the ‘fourth estate’ (overlooked in *The Representative Claim* and an equally controversial topic from a political science and media studies perspective). The section also includes an outline of proposals for policy-generation by randomly-selected demarchic committees (John Burnheim) and agenda panels (Terry Bouricius), along with an assessment of the role of deliberative, discursive and associational democracy in the formation of public opinion. The chapter concludes with an examination of Lisa Disch’s argument that Saward’s model only really applies to representative claim-making,

and is deficient when it comes to an assessment of the democratic legitimacy of representative claims.

7.3 Pnyx: Representative isegoria in formal political institutions

The following subsections outline and evaluate candidates for representative claim-making as part of *formal political institutions*. This being the case, the standards for acceptable claim-making are more exacting than those in the informal public sphere (section 7.4).

7.3.1 Electoral representation

Men have differed in opinion, and been divided into parties by these opinions, from the first origin of societies, and in all governments where they have been permitted freely to think and to speak, the terms whig and tory belong to nature as well as to civil history.
(Jefferson, 1907, p. 279)

Political parties function both as a medium for organizing public opinion and also as a means of selecting political decision makers.⁸ At the time of the foundation of modern representative governance the combination of these two analytically-distinct functions was necessary on account of issues of geographical scale and limited communications technology – it was necessary to first select a political representative whose opinions/interests best mirrored one's own and then put him on a horse and send him off to the forum of the nation to judge and/or implement policies on the basis of those opinions/interests. Political parties emerged from these two requirements within a very short period of time. This thesis proposes the analytical and institutional separation of these two functions (opinion and judgment) and acknowledges that the political party has an essential role to play in the development and representation of opinion (policy advocacy), while devolving judgment to a stochastic sample of the citizen body, so the focus of this section is on the formation of election manifestos rather than the process of parliamentary or

⁸ And, in parliamentary regimes, appointing government ministers.

congressional decision making. Needless to say the literature on political parties conflates these two analytically-distinct functions, hence the need at this stage for disambiguation – *my concern is purely the 'isegoric' function of the political party*, so references in citations from the political science literature to 'government enactments', 'administrations' and the like should be ignored. The claim of this section is that political parties are an *essential means for organizing public opinion and setting the legislative agenda*, but that they should *not* continue to play a role in decision making or putting the decisions into practice – in this respect my earlier polemic on this topic, *The Party's Over* (Sutherland, 2004), was guilty of over-egging the pudding. Although the focus of this section is on opinion, I make no attempt to refute the (cynical) claim that opinion is little more than interests dressed up in fancy words; the distinction here is purely between proposing (the proper function of a political party in a large-scale democracy) and disposing (the proper function of the deliberative minidemos).

In the wake of the post-1960s focus on 'participation' and the 'deliberative turn' in democracy studies during the 1980s, it is fair to say that the study of political parties has been of little interest to democratic theorists. For a rare modern defence of partisanship as a means of civilizing the natural cleavages described in the opening citation of this section – to 'move from militarism to militancy, from private armies to verbal attacks' – see (Rosenblum, 2008, p. 123). Regulated rivalry is 'an alternative or preventative to civil war' (*ibid.*, p. 363), and party rivalry is 'constitutive' as 'through parties interests and opinions are organized and brought into opposition', parties being a 'principal source of political *creativity* (*ibid.*, pp. 456-7, my emphasis). '[N]o open society over the past three centuries has lacked party and partisanship' (Muirhead, 2006, p. 715). Robert Goodin argues that 'the *essence* of democracy lies in a community's being "self-legislating", understood as "giving laws to itself", and struggles to imagine how 'a coherent *ratio* for government enactments . . . required in "giving laws to ourselves"' would be possible in the absence of political parties (Goodin, 2008, pp. 212, 216). Electoral politics without parties would be personalistic, clientelist, administrative and patronage- and identity-based (*ibid.*, pp. 209-10). Goodin's focus on *ratio* (the 'why' rather than just the 'what', leads him to endorse Burke's view that 'party is a body of men united for promoting by their joint endeavours the national interest,

upon *some particular principle* in which they are all agreed' (Burke, 1886 [1770], pp. 119, my emphasis).

Although parties are, on the whole, only of marginal interest to political theorists, it is a truism of political science that parties winning a plurality of votes in a general election have thereby secured a democratic mandate for their representative claims – at least with respect to the commitments made in their election manifesto. Such claims were hard to deny in two-party political systems when each party had a distinctive philosophy underwriting its policy proposals and/or appealed to a distinctive and relatively homogeneous socio-economic support base – i.e. during the era of 'party democracy' (Manin, 1997, pp. 206-218). Such claims are more difficult to justify in PR-based electoral systems where the policies of coalition administrations bear only a loose relationship with election manifestos and small parties may exert a disproportionate influence. Electoral claim-making is also harder to evaluate in postmodern 'audience' democracies (Manin, 1997, pp. 218-234) where the core identity/ideology of a political party is more difficult to pin down – the representative claim of a political party as an expression of pre-existing constituencies (ideas, identities and interests) is easier to evaluate than a party seeking to construct a 'reflexive' position purely in terms of its electoral attractiveness (and which may well camouflage a different agenda). Jeremy Corbyn's claim to represent core Labour Party values and ideology during the 2015 leadership election was easier to evaluate than those of leadership candidates whose primary claim was their electoral appeal (i.e. seeking to mirror public preferences reflexively as opposed to 'nailing one's colours to the mast').

In addition to the problem of postmodern 'audience' democracy, another concern of political theorists is the manipulation of public opinion by elites for partisan reasons as 'elites educate constituents as they recruit them to positions that work to elites' own advantage in an interparty struggle for power' (Disch, 2011, p. 100; cf. Gerber & Jackson, 1993). Although empirical political scientists now acknowledge that voters are more competent to hold coherent and stable political views than thought at the time of Philip Converse's sceptical analysis of political beliefs in mass publics (Converse, 1964), these views are 'framed' or even constituted by party elites for partisan reasons, including the control of the political agenda (Althaus, Edy, Entman, & Phelen, 1996; W. L. Bennett, 1990; W. L. Bennett & Manheim, 1993).

These empirical findings bring into question the widespread ‘bedrock’ perspective on political representation (Disch, 2011, p. 100) – the commonsense notion that democratic representatives should take citizen preferences as the ‘bedrock for social choice’ (B. I. Page & Shapiro, 1992, p. 354), along with the idea that representative government is defined by the ‘continuing responsiveness of the government to the preferences of its citizens’ (Dahl, 1971, p. 1).⁹ This ‘traditional model of promissory representation’ (Mansbridge, 2003, p. 518) is *unidirectional* as, in democratic representation, the ‘representative must be responsive to [the constituent] rather than the other way around’ (Pitkin, 1967, p. 140). However the empirical findings about preference formation (and the resultant agenda setting) referenced above

sit uneasily with this norm because they defy this static portrait of preferences together with this linear dyadic model of influence. They reveal, instead, that the representative process is dynamic and interactive. Representatives look backward to preferences that have been expressed, and orient themselves forward in a speculative mode toward what their constituency might want or be induced to want at the next election. In short empirical research reveals political representation to be *constitutive*: legislators do not simply respond to constituent preferences but are ‘active . . . in searching out and sometimes creating them.’ (Mansbridge, 2003, p. 518, cited in Disch, 2011, pp. 100-101)

Disch argues that the seeds of Mansbridge’s ‘reflexive’ model of political representation can be found in Pitkin’s 1967 work, which is not quite as unidirectional as generally believed, representation being more of a system property than a simple principal-agent relationship. Representation is an ‘emergent’ property of ‘the over-all structure and functioning of the system’ (Pitkin, 1967, pp. 221-2):

⁹ Dahl in fact acknowledged that political leaders under modern pluralistic conditions ‘do not merely *respond* to the preferences of constituents; leaders also *shape* preferences’. (Dahl, 1961, p. 164)

[R]epresentation may emerge from a political system in which many individuals, both voters and legislators, are pursuing quite other goals. . . . Legislators often pattern their actions not on what their constituents ought to want but on what they anticipate their constituents will want (in all their ignorance). (Pitkin, 1967, pp. 224, 167)

However, a representative system in which politicians look forward to what their constituencies might/will/ought to want in the next election is open to manipulation:

[A]s soon as representation becomes anticipatory (rather than merely responsive) it opens up the possibility for political elites to change voters' preferences. Pitkin, like Mansbridge, is inclined to parse this possibility in terms of what she presents as an opposition between 'leadership' and 'manipulation'. (Disch, 2011, p. 108)

But there is a fine line between leadership and manipulation, so Disch chooses the more neutral term 'mobilization' to describe how voter preferences are 'constituted' by political elites, hoping thereby to bridge the gap between the warring tribes of Downsian public-choice theorists, Dahlian pluralists and post-Marxist elite theorists (Lukes, 2005).

However, from the point of view of this thesis, it matters little whether political parties reflect or mobilize public opinion as they clearly have an important role to play in the representation of voter preferences in proportion to their prevalence within the electorate, even if it is no longer tenable to argue that the relationship is of a simple dyadic and unidirectional nature. The distinction between promissory, anticipatory and responsive representation (Mansbridge, 2003) is purely temporal and doesn't affect the argument that the political party is still seeking to shape and/or respond to – 'refine and enlarge' – the 'public views' (Madison, *Federalist*, 10).

Political theorists of a 'deliberative' persuasion are uneasy with the representative claims of electoral democracy on account of the blurring of 'communicative' and 'strategic' action by political leaders. According to the norms of (Habermasian) deliberative democracy, voter preferences should be formed in the context of the give and take of *reasons*, not threats, bribes or other strategic factors:

The discourse ideal casts suspicion on preferences that are formed in information contexts where power is at stake and where unstated motives exist – the very conditions of preference formation [in electoral democracy] according to empirical scholarship. (Disch, 2011, p. 101)

Given the need of political parties to win competitive elections, the manipulation of voter preferences for strategic purposes is inevitable. However, the binary nature of the constitutional proposal outlined in Chapter 8 ensures that the final decision on policy proposals will be taken in a fully deliberative context by a representative minidemos. As such the thesis, while not discounting the manipulation of voter preferences by the ‘crafted talk’ (Jacobs and Shapiro, 2000, p. 17) that constitutes partisan isegoria, has confidence that any such biases will be, at the very least, ameliorated at the final decision stage. The combination of communicative and strategic action leads to the ‘dilemma of democratic competence’ – whereby the educative effect of political discourse is tarnished by the self-interested communication needs of elites (Disch, 2011, p. 101), which can only be overcome by a two-stage political process that involves a separation of isegoria and isonomia, the two distinct elements of the democratic diarchy. Without such a separation ‘one form of incompetence simply replaces another’. (Druckman, 2001, p. 239)

In addition to the problem of the manipulation of political education for strategic (party political) purposes, in *Power: A Radical View*, originally published in 1974, Steven Lukes raised the problem of policies that were deliberately *excluded* from the political agenda. Dahl’s ‘behaviourist’ analysis of New Haven politics ‘may be highly misleading if power is being exercised within the system to limit decision-making to acceptable issues’ (Lukes, 2005, p. 39). Lukes’ analysis was based on Matthew Crenson’s study of air pollution in Gary, Indiana, a one-company town dominated by US Steel, with a strong party organization which managed successfully to keep the problem of air pollution off the political agenda for over a decade longer than steel towns like East Chicago that had a number of steel companies (Lukes, 2005, p. 45): ‘A polity that is pluralistic in its decision-making can be unified in its non-decision-making’ (Crenson, 1971, p. 179). Although Dahl might well have responded that the politics of a town built by a single company and responsible for its prosperity was the exception that proved the polyarchic rule, nevertheless the political class is perfectly capable of keeping policies it sees as beyond the pale off the political agenda – witness the three-party politically-correct

consensus underpinning high levels of immigration in the UK for more than a decade at the turn of the twenty-first century. This is one of the reasons that this thesis endorses the 'open access' approach to agenda-setting characterized by the representative claim model, in which political parties are only one agent amongst others.

The other problems with electoral representation (touched on in the introduction) – including ideological factionalism, the construction of artificial cleavages in order to secure success at the polls, Arrow's impossibility theorem, pork-trading, and the alienation between the political class and the electorate (owing to the inability of the legislature to mirror the sheer diversity of modern pluralized, fragmented and 'disenchanted' societies) (Weber, 1946) – are so well-known as to need no further elaboration. The 2015 events in Greece – when a party, elected on the basis of a clear manifesto, was subsequently obliged to pursue policies that it fundamentally opposed – further complicates the problem of evaluating the legitimacy of electoral representative claim-making. Although at the time of writing Syriza appears to be the exception that proves the rule, ongoing economic and fiscal trauma throughout Western democracies, leading possibly to an increased role for unelected and non-governmental organisations, may well make for similar incidents to the Syriza case.

Notwithstanding all the above caveats, this thesis argues – uncontroversially – that political parties that gain the requisite number of votes in a general election have the democratic right to have the representative claims of their manifesto commitments converted into parliamentary bills for consideration by the randomly-selected legislature. Michels' 'iron law' of oligarchy is of secondary interest because 'democracy is not to be found in the parties but between the parties' (Schattschneider, 1942, p. 60). Or, as Robert Dahl put it:

Michels made an elementary mistake. If political parties are highly competitive, it may not matter a great deal if they are not internally democratic or even if they are internally rather oligarchical. If parties are actively competing for votes in elections, the party that fails to respond to majority concerns will probably lose elections, while a party that does respond to majority concerns will probably win elections. (Dahl, 1990 [1970], p. 5)

The precise nature of the electoral algorithm (the threshold of votes required for the right to make legislative proposals) is not the concern of a thesis in political theory – the point is only that the separation of function in the democratic diarchy of isegoria and isonomia (along with the radical separation of executive and legislative powers outlined in Chapter 8.3.5, below), suggests that there would be no need for initiative rights to be limited to those with a simple plurality of the votes counted. As such, electoral representation is an essential component of democratic isegoria, but electorally-mandated advocates should not be the judge in their own cause (for Madisonian reasons outlined in Chapter 4.2, above). As the audience for the representative claim of the political party happens to be the same as the legal constituency, the party is (uncontroversially) an essential element in the institution of representative isegoria.

7.3.2 Pressure groups and single-issue advocates

7.3.2.1 New political parties

The membership of established political parties declined catastrophically during the second half of the twentieth century, particularly in the UK. The Conservative Party had nearly three million members during the 1950s but the figure in September 2014 was only 135,000 – a 95.5% decline.¹⁰ The story with new political movements is somewhat different – both the UK Independence Party and the Scottish National Party were founded as single-issue campaign groups but subsequently extended their remit beyond their foundational issue. Whilst the SNP lost the 2014 Scottish independence referendum it won almost all Scottish parliamentary constituencies in the 2015 Westminster election on the basis of a *general* manifesto. Membership levels for the SNP are currently (April 2015) 105,000, challenging the UK Conservative Party in sheer membership numbers,

¹⁰ The supporters of Jeremy Corbyn like to argue that his 2015 ‘landslide’ victory as Labour Party leader provided him with an unprecedented mandate, but this was on the basis of 251,417 votes, including a large number of ‘affiliate’ members paying a one-off fee of £3.00 to vote – less than half (121,751) of Corbyn’s votes were from full Labour Party members. The Corbyn phenomenon demonstrates that there is still a demand for genuine party democracy as opposed to the reflexive audience variant.

despite the SNP's enormous demographic disadvantage in terms of potential members. This would indicate that the distinction between campaign groups and general-purpose political parties is becoming more blurred, particularly in the case of populist and 'reflexive' political movements:

Parties may become 'mutants' or 'hybrids' . . . Parties that edge toward claiming to be representative primarily in the reflexive¹¹ model have already gone some way down that road (Saward, 2010, p. 136).

Mutant/hybrid parties can (uncontroversially) make a representative claim and expect it to be received in an identical way to long-established political parties, notwithstanding the party's recent provenance as a single-issue pressure group or as a medium for reflexive 'audience' democracy. Depending on the electoral decision rule in place, successful mutant/hybrid organizations would have the same rights to initiate legislative proposals as 'traditional' political parties and for their representative claims to be judged in an identical manner by a randomly-selected legislature. According to Ian Budge's proposal for legislative decision-making by randomly-selected minipublics (Budge, 2000, p. 201), confining agenda-setting and debating rights to political parties would have the advantage of moving beyond the elitist 'university seminar' model advocated by most deliberative democrats to a 'forensic' (courtroom) model better suited to evaluation by randomly-selected juries:¹²

Party participation thus transforms seminar discussions into courtroom dramas. The object in forensic debate is not to make up your mind on whether or not your case is a just one. That is already given by your remit. The object is to win the case. That does not eliminate

¹¹ 'Reflexive' political parties are those that devise policy proposals on the basis of their assessment of 'consumer' demand, using market research tools like focus groups. Philip Gould, Tony Blair's pollster, was adamant that the primary purpose of focus groups and public opinion surveys was 'bottom-up' (reflexive) policy making as opposed to the top-down imperative to 'get the message out' in a voter-friendly manner. (Gould, 1998)

¹² See p. 184, above, for discussion of the distinction between deliberative and forensic rhetoric.

deliberation and debate, but it does change its purpose. The object now is to put forward arguments which will induce third parties – judge, jury or electors – to come down on your side. (Budge, 2000, pp. 201-2)

Although Budge's model of forensic (adversarial) rhetoric will be greeted with horror by deliberative purists, it is, arguably, better adapted to the agonism that is the defining characteristic of democratic politics (Mouffe, 2013). Budge views his proposal as a hybrid – 'deliberative, and direct democracy – and political parties!' (*ibid.*, p. 208). The view of this thesis is that Budge's proposal for decision-making by large randomly-selected juries is a form of descriptive representation (stochation)¹³ rather than direct democracy. However this is an argument over terminology rather than over principle or institutional design.

7.3.2.2 *Single-issue advocates*

While the rolls of most mainstream political parties have been in free fall, membership of Greenpeace, Oxfam, the Royal Society for the Protection of Birds (RSPB) and other single-issue pressure groups has soared, with the RSPB alone claiming over a million members (primarily in the UK). In the 'standard model' of democracy (Castiglione & Warren, 2005), such organizations would be viewed as advocates, lobbyists and pressure groups on behalf of the particular issue that they campaigned for – the environment, famine victims, wildlife etc. – but Saward and other constructivists invite us to consider their advocacy in terms of a *representative claim*.

This approach has been subject to extensive criticism (Nasstrom, 2011): for example Jennifer Rubenstein, in her study of the work of Oxfam and other INGOs (international non-governmental organisations), responds to the *Economist* headline 'Who Elected Oxfam' (*Economist*, 2000) that the problem is in fact the misuse of advocacy and quasi-governmental power, *not* bad representation. Rubenstein takes issue with the claim that Oxfam is a 'non-elected representative

¹³ For full definition of 'stochation', see glossary, p. 338, below; also Appendix II, p. 337.

of poor Ghanaians' (Rubenstein, 2014, p. 206). Her claim is that (constructivist) representation theorists overstate their case:

When one has a hammer, everything can look like a nail. Likewise, when one studies representation, everything can look like representation. I have argued that democratic theorists, especially theorists of representation, need to take off our representation-coloured glasses and look anew at *advocacy* through the lens of power, and not only representation. (Rubenstein, 2014, p. 230, my emphasis).

This thesis agrees with Rubenstein that INGOs are better described as advocates than 'unelected representatives' and, as such, have no inherent right to introduce legislative proposals without going through the direct-democratic filter described in section 7.3.4, below. A pressure- or advocacy group would otherwise need to morph into a general-purpose political party (the most relevant examples being the Green Party and UKIP) and secure broader public support prior to gaining initiative rights (subject to a suitably accommodating electoral algorithm). Nevertheless the knowledge and skills of such advocates would naturally fall under the remit of the advocacy house outlined in Chapter 8 (below).

7.3.3 Representation of 'all affected interests', non-human life, the environment and future generations

One of the key factors leading to the recent surge of interest in deliberative democracy has been the inability of national legislatures to do little more than respond 'reflexively' to the short-term interests of their territorial constituents (Dobson, 1996; Eckersley, 2000). The acidification of Swedish lakes was a direct consequence of UK industrial policy, but Swedish citizens have no representation in the UK national parliament (Dobson, 1996, p. 128), and rainforests (along with their non-human inhabitants) and unborn generations don't get to vote.

Considerations like this have led to the argument that rather than limiting the *demos* geographically, ‘everyone who is affected by the decisions of a government should have the right to participate in that government’ (Dahl, 1990, p. 49).¹⁴ However ‘the set of persons who are affected often varies from one decision to another’ (*ibid.*), so it’s unclear how to establish stable and coherent governance¹⁵ on the basis of the principle of all affected interests. Added to that, in a globalized world the principle of all affected interests ‘understood in a suitably expansive “possibilistic” way would mean giving virtually everyone everywhere a vote on virtually everything decided anywhere’. (Goodin, 2008, p. 153)

Although the principle of all affected interests is generally cashed out in terms of ‘who is entitled to vote’, of greater interest from the point of view of this chapter is ‘who is entitled to a say’ (Goodin, 2008, p. 129). Deliberative democrats claim that their (speech-oriented) approach is better suited to the problem of all affected interests as

[O]lder models always saw the first task in their application as specification of the boundaries of a political community. Deliberation and communication, in contrast, can cope with fluid boundaries, and the production of outcomes across boundaries. For we can now look for democracy in the character of political interaction, without worrying about whether or not it is confined to particular territorial entities. (Dryzek, 1999, p. 44)

To Dennis Thompson, the switch from aggregative to deliberative democracy would have normative entailments for policymakers in an increasingly global society:

[P]ublic officials must consider not only their electoral constituents but also what may be called their *moral* constituents, all those individuals

¹⁴ C.f. (Mill, 1991; Dahl, 1989, pp. 93-95, 119-31).

¹⁵ Note the earlier disclaimer (p. 211, above) that references to ‘government decisions’ etc should be ignored, as the focus of this chapter is on the representation of the underlying views and interests that give rise to the decisions, rather than political authority per se.

who are bound by the decisions they make, whether de jure or de facto. (D. Thompson, F, 1999, p. 120)

However if deliberative democracy is going to be anything more than a set of normative ideals (what public officials *should* do), it needs to come up with proposals as to how best to put the deliberative norms into practice, and here Thompson only makes outline suggestions:

[A] state could establish forums in which representatives could speak for the ordinary citizens of foreign states. . . . The responsibility could even be formalized by establishing a special office – a kind of Tribune for non-citizens. (Thompson, 1999, pp. 121-2)

Moreover the switch of focus to deliberative democracy does little to resolve the outreach problem, on account of Dahl's back-of-the-envelope calculation of the exponential time cost to deliberative democracy of increasing the range of participants (Dahl, 1990, p. 54).¹⁶ This being the case then

substituting discursive accountability for electoral accountability does nothing to cure – rather, it exacerbates – the problems arising from genuinely including all affected interests among those to whom we must be accountable. (Goodin, 2008, p. 149)

If this is the case, then the problem of all affected interests might well be better addressed by extra-democratic constitutional safeguards, discussed below (section 7.3.3.2), as opposed to democratic innovations, deliberative or otherwise.

7.3.3.1 The environment, non-human animals and future generations

According to Green political theorist Andrew Dobson (Dobson, 2014), political theory has been unduly shaped by Aristotle's emphasis on political *speech*:

¹⁶ Taking his own home town (pop. 20,000) – 'the largest in Connecticut to retain some of the old town meeting system' as an example, Dahl calculates that 'allowing two minutes for each speaker in a meeting lasting six hours, less than 1 percent of the citizens would have the opportunity to speak.' (*ibid.*)

Nature, as we say, does nothing without some purpose; and for the purpose of making man a political animal (*zoon politikon*) she has endowed him alone among the animals with the power of reasoned speech. . . Speech . . . serves to indicate what is useful and what is harmful, and so what is right and what is wrong. (Arist, *Pol.* Bk. 1, c.2)

Western political theory is little more than a footnote to this observation, Hobbes, for example, arguing that:

[T]he most noble and profitable invention of all other was that of SPEECH, consisting of *Names* or *Appellations*, and their Connexion; whereby men register their Thoughts, recall them when they are past; and also declare them one to another for mutual utility and conversation; without which there had been amongst men neither Common-wealth, nor Society, nor Contract, nor Peace, no more than amongst Lyons, Bears, and Wolves. (Hobbes, 1996, p. 24)

Animals ‘cannot speak and therefore cannot make contracts’ and are thereby excluded from the political process (Dobson, 2014, p. 141); they ‘cannot enter into contractual agreements, or make promises’ (Feinberg, 1974, p. 46). Like the earlier arguments for deliberative and discursive democracy, Dobson’s response is largely normative – Aristotle’s political animal should *learn how to listen* – concluding that

[W]e need to replace Aristotle with Epictetus, so to speak: ‘Nature has given men one tongue but two ears, that we may hear from others [and nature] twice as much as we speak’. (Dobson, 2014, p. 196).

In a similar vein:

Recognition of agency in nature therefore means that we should listen to signals emanating from the natural world with the same sort of respect we accord communication emanating from human subjects, and as requiring equally careful interpretation. (Dryzek, 2000, p. 149)

Green political theorists ‘necessarily attach value to naturally-occurring objects, independently of the values which we humans (presently) attach to them’ (Goodin, 1996, p. 835). If this is the case then it follows that ‘natural objects are shown to have interests as deserving of protection as are those of natural individuals of the

human sort' (*ibid.*, p. 836). The problem, of course, is that the language of interests, politically speaking, only makes sense when couched in terms of the interests of members of a specific political community (and their dependents). Although Green theorists respond with the analogy of the past exclusion of the interests of slaves, coloured people and women, it remains the case that their interests were only properly respected when they became full members of the political community and it is hard to see how this might be possible in the case even of chimpanzees (with whom we share 98.4 percent of our DNA (Goodin, Pateman, & Pateman, 1997, p. 831)), let alone rainforests.

The style of listening that Dobson advocates is 'apophatic' in that the listener lays aside the prefigured and domineering categories of 'closed ear' cataphatic speech and is 'still' and attentive to the 'speaker' (Garrison, 2010, pp. 2770-2771): 'apophatic listeners allow categories to emerge from what they hear' (Dobson, 2014, p. 146). The use of inverted commas around 'speaker' is intentional because apophatic listening is applicable when 'speakers' are either non-human animals or nature – we need to listen to the drip-drip of melting glaciers, or a river or a troop of elephants as political 'propositions' (Latour, 2004, p. 83; c.f. Bennett, 2010).

How might apophatic (empathetic) listening work out in practice? Dobson uses the example of the autistic savant, Temple Grandin:¹⁷

[A]utistic people can think the way animals think . . . Autism is a kind of way station on the road from animals to humans, which puts autistic people like me in a perfect position to translate 'animal talk' into English. I can tell people why their animals are doing the things they do.¹⁸ (Grandin, 2005, pp. 6-7)

¹⁷ Autism, ironically, is associated with *low* levels of empathetic listening vis-à-vis other human beings.

¹⁸ Grandin's work in the cattle-handling industry is pertinent from the perspective of Jeremy Bentham's extension of the realm of political consideration to the animal world: 'the question is not, Can they reason? nor, Can they talk? but, Can they suffer?' (Bentham, 1970, pp. 311, fn.)

The approach of the epistemologist Bruno Latour is to ‘smear’ together the Aristotelian distinction between nature and politics: both things and people have ‘spokespersons’, and it is this that shows the ‘profound kinship between representatives of humans (in the political sense) and representatives of non-humans (in the epistemological sense)’ (Latour, 2004, p. 250). But how will the spokespersons or ‘actants’¹⁹ be selected, given that out of Latour’s proposal for two assemblies – the House of Science and the House of Politics – only the latter is amenable to a *democratic* mandate. The ‘hard question’ of the political capacity of actants remains:

[W]e have to acknowledge that the notion of the spokesperson lends itself admirably to the definition of the work done by scientists in lab coats . . . the lab coats are the spokespersons of the nonhumans, and, as is the case with all spokespersons, *we have to entertain serious but not definitive doubts* about their capacity to speak in the name of those they represent. (Latour, 2004, pp. 64-5, emphasis in original)

Similar to Latour’s House of Science and House of Politics is Daniel Bell’s neo-Confucian proposal for a meritocratic house with veto powers over the democratic house outlined in his book *The China Model*:

A Huang²⁰-style meritocratic house composed of representatives selected on the basis of competitive examinations can be combined with a democratic house composed of representatives selected by competitive elections. The democratic house would have the task of representing the interests of voters, and the meritocratic house would have the task of representing the interests of nonvoters affected by the policies of government, such as foreigners and future generations.

¹⁹ Latour’s term for human and non-human actors, derived from actor-network semiotic theory, is endorsed by political theorist Jane Bennett in her book *Vibrant Matter* (J. Bennett, 2010, p. ix). However, as the book title suggests, Bennett’s concern is ontology rather than epistemology.

²⁰ The reference is to the seventeenth-century Confucian scholar Huang Zongxi’s proposal for a ‘parliament of scholars’.

Deputies of the meritocratic house could be chosen on the basis of examinations that test not just for knowledge of the classics [the Confucian procedure], but also for knowledge of international relations and environmental science. To ensure that the interests of nonvoters are not systematically marginalized in the political process, the meritocratic house could have veto power over any policies that it judges harm the interests of future generations. (Bell, 2015, p. 51)

However, as Bell acknowledges, veto power for such a house would be impossible to implement in a democracy (hence his interest in autocratic regimes such as China). In the absence of Confucian scholars, autistic savants and other specially-endowed empathetic listeners, the need to represent the interests of nature, non-human animals and the unborn has led to the call for ‘proxy’ spokespersons for non-human species and future generations,²¹ who would be elected from campaigning and lobby groups by a randomly-selected subset of all voters (Dobson, 1996, p. 133).²² Proxy or trustee representatives would have clear advocacy and initiative rights and the reference to ‘lobbyists’ is a clear indication that this topic falls under the remit of the current chapter, but it remains unclear as to how such a proposal would work in practice.

If the audience for the representative claims of proxies for non-human animals, the environment and the unborn finds a claim persuasive it will need to convert the claim into the manifesto commitments of a political party (either Green or of a more traditional colour) in order to demonstrate the requisite level of statistical proportionality that the claim presupposes. John Burnheim’s proposal for

²¹ A number of theorists still share Burke’s Confucian view of society as a compact between the living, the dead and unborn generations. (Bergstrom, 2005; T. Mulgan, 1999)

²² Also of relevance is Hubertus Buchstein’s proposal for an ‘Aleatory Kid’s Vote’, which leaves the child’s actual representative up to chance. As Buchstein acknowledges, the normative case for such a form of representation ‘is based on the republican belief that a voter who receives the right to represent the “will” of a child unknown to her or him develops more openness to participate in the public debate about what is good for children and their future before he or she casts the vote as a children’s representative’ (Buchstein, forthcoming, p. 10 [proof]). Given that this might require the ‘Kid’s voter’ to decide against her own immediate interest, this might well prove somewhat optimistic.

demarchic councils (discussed in section 7.4.2, below) is better suited to address the concerns outlined in this section than the election of proxy representatives. The geographical extent of each specialist council would be determined by its remit – thus representation on a demarchic committee for the environment would extend a long way beyond the territorial boundaries of the Westphalian state. And the voluntary principle would enable the participation of a wide range of experts and activists (winnowed down to a workable deliberative forum by the sortition-based sampling involved). As the committees are firmly located in the informal sphere of public opinion (they would have no legislative powers), there would be no risk of undermining the isonomic equality of all citizens and Burnheim makes no claim that demarchic councils perform a representative function (in the political sense of the word). (Burnheim, 2016)

7.3.3.2 *Rights, duties and constitutional safeguards*

The language of rights assumes the entities under consideration are ‘beings with interests of their own’, presupposing, ‘at least rudimentary cognitive equipment [as] interests are compounded out of desires and aims’ (Feinberg, 1974, p. 52). This analysis encourages Feinberg to argue that the language of animal rights is at least coherent. But how animal rights are best instantiated is a non-trivial question – the rights of minors and the mentally incompetent *can* be represented by principal–agent trustee relationships as it is possible to anticipate how the principal might choose (or have chosen) given the similar cognitive equipment possessed by the agent. But the argument doesn’t apply to non-human animals (except, perhaps, in the Temple Grandin example given above) and, although perhaps applicable to individual unborn foetuses, the application to hypothetical ‘future generations’ is complicated by the ‘paradox of potentiality’ (*ibid.*, pp. 67-8). This leads Feinberg to the modest conclusion that we have ‘*duties* to future human beings, duties derived from our housekeeping role as temporary inhabitants of this planet’ (*ibid.*, p. 56, my emphasis).

It’s hard to disagree with this commonsense claim, but the shift from the representation of rights to the language of duties would suggest that the protection of the interests referred to in this sub-section would best be achieved by constitutional checks and balances:

Underage heirs, incompetent elders, and princes away on crusades all have rights deserving of protection, even though they are practically or legally unable to press these claims for themselves. We standardly assign guardians or trustees to protect their interests . . . Guardians or trustees can [subject to the aforementioned caveat] speak for the great apes [or other non-human species, nature in general, and future generations] in similar fashion. (Goodin, Pateman and Pateman, 1996, p. 838)

Although this is couched in terms of speech acts ('speaking for the great apes'), it is as misleading to view this as a form of political representation as it is to speak of the relationship between a lawyer and her client as a political one, hence my conclusion that trustees for nature, non-human animals and future generations are best understood in terms of extra-democratic constitutional safeguards.

While much of the focus on the need to safeguard the rights of unborn generations has been on environmental degradation, of equal concern is the current practice of all but the most fiscally prudent (i.e. German) governments to run a long-term (structural) budget deficit, aided and abetted by all-time-low interest rates. Such an approach could well be viewed as financing current expenditure by mortgaging our children's and grandchildren's future. The intention of the (UK) Fiscal Responsibility Act (Labour), the Office for Budget Responsibility (Lib/Con Coalition) and the Charter for Budget Responsibility (Conservative) is to bind the hands of elected politicians by quasi-constitutional legislative safeguards to ensure that governments run a surplus in 'normal' times. Unfortunately the first principle of the UK 'constitution' is that no government can bind the hands of future governments, so such developments have rightly been greeted with skepticism – and this has been borne out by the decision of the Conservatives in 2017 to postpone the balanced budget target until 2025.

However the US Constitution has shown itself (for better or worse) to be a highly effective way of entrenching fundamental principles, and there is no reason why medium-term fiscal balance should not be one of them. Another such safeguard might well be the 'precautionary principle', beloved of environmental activists (Mills & King, 2000). Constitutional safeguards clearly have no obvious relevance to

isegoria (equal speech), so will be discussed further in Chapter 8, on the ‘mixed constitution’.

7.3.4 Direct-democratic initiatives

In the fifth-century Athenian democracy, any citizen who wished to could speak at the meetings of the general assembly although, in practice, the right to speak was only taken up by a small minority. Similarly any citizen could propose a new law or decree – although this was generally via the mediation of the council, this was because the council was the secretariat for the assembly and recorded the agenda.

Elements of this aspect of direct democracy have been replicated in the modern age. The ‘progressive era’ reforms in the USA (1890s to 1920s) included ‘citizens’ initiative’ measures – in 1902 Oregon became the first state to introduce the initiative and referendum process whereby any citizen could propose new state laws or constitutional amendments, followed in 1911 in California with Governor Hiram Johnson’s ‘Initiative, Referendum, and Recall’. Similar reforms were introduced in other states and now approximately half of US states have some form of direct-democratic provision.

The Swiss federal constitution – a mixture of representative and direct democracy – has long included a popular initiative (*Eidgenössische Volksinitiative*) provision, and between 1893 and 2014 approximately 11% of the petitions that achieved 100,000 signatures were adopted at the subsequent ‘votation’ referendum. A similar principal applies at the canton and municipal level.

The government of the Canadian province of British Columbia passed the Recall and Initiative Act into law in 1995, but the high initial threshold (the signatures of 10% of all registered voters) has meant that only one referendum has been held as the result of a successful citizen initiative. Many other countries – including Finland, France (at the local assembly level), Germany (at the state but not the federal level), New Zealand and the Philippines have some sort of procedure for citizen initiatives.

In the EU the 2007 Treaty of Lisbon introduced the European Citizens’ Initiative (ECI), designed to address the perceived democratic deficit of the EU institutions, which enabled petitions attracting in excess of one million signatures over seven

member states to call directly on the European Commission (which has the right of initiative) to implement a legislative proposal in areas where the member states have conferred powers. As of the time of writing there have been fourteen successful initiatives but there is little evidence at this early stage that ECIs have had any impact on EU legislation.

Developments in internet technology have led to a growth in email and web-based e-petitions, including the Scottish Parliament's e-Petitioner system (1999), the German Bundestag's *Petitionen* portal (from 2005) and the Obama administration's We The People platform (2011). In 2011 the UK Coalition Government relaunched the e-petitions system it inherited from the previous administration – from that time on a petition that garnered 10,000 signatures would receive a response from the government, with petitions exceeding 100,000 signatures 'considered' for a debate by the petitions committee (composed of eleven backbench MPs).

As this is a thesis in political theory rather than comparative political science I have only provided a brief outline of the citizen initiative in the modern era, my goal being merely to indicate that this is an instrument of direct-democratic isegoria that is already in widespread use, albeit with limited efficacy. The criticisms of the citizen initiative have much in common with criticisms of direct democracy in general, including the ease of participating (leading to casual and poorly-considered enrolment), the ability of well-resourced lobby groups and activists to hijack the agenda, and the lack of consideration of externalities – i.e. how single issues fit into the overall ecology of governance, including fiscal considerations. A successful initiative in the State of California can cost well in excess of \$1 million (largely the cost of employing 'mercenary' signature gatherers and soft-focus TV advertising). In addition there is unease that when the petitions system is being hosted by the government itself that this is little more than a public-relations exercise. The most effective petitions have been organized by independent campaigning organizations like change.org or 38 Degrees, whose online petition led to the reversal of UK government policy on forestry ownership.

The above criticisms would suggest that the citizen initiative could only play a supplementary role in isegoria and that significant checks and balances would be required. The practical proposal outlined in Chapter 8 includes a direct-democratic initiative system loosely modelled on the UK government e-petition system, with a

threshold of 100,000 signatures. In order to prevent the hijacking of the legislative agenda by activists, popular media and pressure groups the next step would involve a Swiss-style 'votation' in which *all* citizens rank their choices from the successful e-petitions received during that year. The top x selections in the annual votation would then be converted into parliamentary bills and subject to the same isonomic legislative scrutiny as bills arising from political parties. Only direct-democratic initiatives that pass the necessary threshold in the public votation would constitute a validated representative claim.

7.4 Agora: The informal public sphere

This section is devoted to forms of representative isegoria that have no formal proposal and advocacy rights in the legislative system outlined in Chapter 8. The mass media, 'demarchic councils', and discursive and (public sphere) deliberative democracy can only (legitimately) influence public opinion indirectly, rather than having a formal constitutional prerogative. Where a formal right is claimed (as in the case of associational democracy and 'agenda councils') this will be seen to be democratically wanting. Nevertheless the formation and representation of public opinion is an *essential* component of a well-functioning democracy, so deserves to be discussed in a chapter devoted to representative isegoria. Indeed, to Nadia Urbinati, democracy is 'government by means of opinion' and the rightful domain for isegoria is 'the *extrainstitutional* domain of public opinion' (Urbinati, 2014, p. 2, my emphasis). Urbinati, like the early Habermas, focuses on opinion in the informal public sphere and the 'disfigurations' of democracy that her book outlines include 'power concentration in the sphere of political opinion formation', along with 'polarized forms of consensus' (*ibid.*, p. 3).

7.4.1 The 'Fourth Estate'

There were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a Fourth Estate more important far than they all.²³

²³ Attributed to a 1787 parliamentary speech by Edmund Burke. (Carlyle, 1841)

Partisan media are the lifeblood of any deliberative system designed along adversarial lines to advance the flow of information and insight through the marketplace of competition in ideas. (Mansbridge et al., 2012, p. 20)

Saward's book is strangely silent on the representative claim of the media, even though the 'fourth estate' has often been viewed in the UK as a more effective form of political advocacy than the parliamentary variant. The word 'media' does not feature in the index to *The Representative Claim*, and references to the media in the text are primarily disparaging – for example Manin's claim that 'in contemporary media-driven politics "the electorate appears, above all, as an *audience*"' (Saward, 2010, p. 55). The discussion of new media technologies is focused on the (top-down) ability of 'statal' political parties to get their message out to targeted audiences (p. 133), rather than as a (bottom-up) form of representative isegoria – a good example of the excessively long tail of Harold Lasswell's propaganda-based model of media power (Lasswell, 1949), which still appears to exert a strong influence on the views of political theorists. Given Saward's effective dismissal of the representative claims of the mass media, this topic would need to be discussed in much greater depth than other, less controversial, forms of representative isegoria. The theoretical perspective of this thesis, broadly speaking, is that newspapers, in particular, do more to represent public opinion than to create it, and that, as such, *the media have (or should have) an essential role to play in representative isegoria*. The essential role of the competitive media in representative isegoria is primarily a normative claim – based on the Miltonian doctrine (see p. 243, below) – and it is hard to conceive of a well-functioning democracy in the absence of such a feature. Although some tentative evidence is introduced to *illustrate* this claim, formal evaluation of the degree to which existing media adequately perform this function is beyond the remit of a thesis in political theory.

7.4.1.1 UK media – competitive and marginally profitable

The argument for the fourth estate as a maker of representative claims assumes the commercial needs of newspaper and other media companies to enhance circulation.²⁴ The model used here relies on Richard Epstein's general thesis that competitive markets pressure people to do what is cost-effective, which generally means selling to any willing customer who is able to pay. The hypothesis is that over time competitive markets tend in a rough and ready way to come close enough to satisfying formal equality of opportunity. (Epstein, 1995, Chapter 1)

According to this thesis, the political apostasy of the Sun in 1997 (when the paper switched its support from the Tories to New Labour) was 'based on Murdoch's commercial considerations rather than political affinities' (Norris, Curtice, Sanders, Scammell, & Semetko, 1999, p. 26) – and presupposes that newspapers will be motivated, for business reasons, to modulate their editorial policies to *better reflect the views of their readers*:

Perhaps The Sun's change of allegiance [in 1997] was a response to a change of mood that had already occurred amongst its readers, and was designed not in the hope of persuading readers to change their vote but because of a fear that otherwise they might stop reading the newspaper. (Curtice, 1999, p. 11)

According to this (bottom-up) perspective 'the media, like elections, constitute an important sluice between public opinion formation and state "will formation"' (Baker, 2007, p. 7). Note that the word 'sluice' presupposes a *mediating* role between public opinion and will formation as opposed to the media being an independent

²⁴ A good example of Bernard Mandeville's argument that public benefits are to be derived from private vices like greed (Mandeville, 1732). According to the Mandevillian perspective it is because Rupert Murdoch is a 'Dirty Digger' that his publications can be relied on to mirror the preferences and beliefs of their readers. No doubt the inhabitants of Fleet Street would retort that workers in the marketplace of ideas operate more in accordance with Adam Smith's notion of virtuous self-interest but, given the low public regard for 'hacks' (as opposed to the butcher, the brewer, the baker or the candlestick-maker), they might be better to rely on Mandevillian cynicism.

causal factor.²⁵ Baker's perspective is a modern gloss on Herodotus's claim that *isegoria* is an equal prerequisite alongside *isonomia* in the constitution of a form of government that qualifies as democratic: 'a country is democratic only to the extent that the media, as well as elections, are structurally egalitarian and politically salient' (*ibid.*), making Saward's silence on the role of the media in representative claim-making even more puzzling.²⁶

Curtice's analysis of the data from the 1997 British Election Campaign Study leads him to the conclusion that newspapers merely shifted their support to better *represent* public opinion, as 'readers choose to read a newspaper that chimes with their own views'. (*ibid.*, p.4). This view of the 1997 election result is shared by analysts including Pippa Norris – 'The Sun's conversion did not evidently bring the Labour Party new recruits . . . the ability of the press to switch their readers' political leanings are extremely limited' (Norris, et al., 1999, p. 168; 184).

The attempt by the Express to transform itself from a right-wing tabloid into a left-wing 'voice of the new millennium' under the ownership of Labour-supporting Lord Hollick (and the editorship of Rosie Boycott) failed dismally, forcing the sale in 2000 to right-wing UKIP supporter Richard Desmond. If the popular press is predominantly Eurosceptic and anti-immigrant this is better explained as a reflection of the preferences of its readers. In the light of the political earthquake resulting from the triumph of UKIP in the 2014 European parliament election (and the Brexit results), Saward might well choose to modify his dismissal of Tory leader Michael Howard's 2005 anti-immigration 'dog-whistle' politics as 'misguided'. Although Howard's representative claim may not have led to election victory, this was more likely because the claim was crowded out by other factors deemed more

²⁵ The Sun's former political editor told the present author that both he and his proprietor regretted the newspaper's claim that it was 'The Sun Wot Won It' for John Major in 1992. The claim was not just hubristic but factually incorrect. (Kavanagh, 1995)

²⁶ Exactly how the mass media in large modern states can be 'structurally egalitarian' is a non-trivial problem that Baker's book fails to adequately address. Arguably this is an impossible demand and, given the proportional equality entailed in the concept of *isegoria*, inappropriate as well – (structural [numerical] equality being the defining characteristic of *isonomia*).

salient by voters rather than being *rejected* by a large part of the audience (Saward, 2010, p. 46).

Note that the skeptical tone of this section is limited to the ‘Lasswell thesis’ (the top-down influence of newspaper propaganda on voting behaviour); the positive focus of this section is on the media as a form of representative (i.e. bottom-up) isegoria. Given J.S. Mill’s view of the key role of newspapers (the only relevant broadcast medium in 1861) in extending the democratic forum beyond those able to hear directly the cry of the *polis* herald (Mill, 1991, p. 210), it is puzzling that Saward appears to view the media as the problem rather than an important part of the solution. The theoretical perspective of this thesis is that the media are (or at least should be) the *most* important source of representative isegoria in modern democracies and that the commercial factors leading to the catastrophic decline of a vibrant and competitive free press pose a serious danger to representative isegoria.²⁷ Would governments be as (rightly) terrified of a bad headline in the Daily Mail if the newspaper did not provide representative isegoria for some 3,833,000 weekly readers²⁸ (most of whom fall into the demographic that are likely to vote in elections)? Although the Mail reports extremely healthy traffic on its (free) website – hence its relative attractiveness to advertisers – how many of the 13,635,561 daily online browsers²⁹ (primarily of its TV and Showbiz celebrity gossip section) even notice the political headlines (unavoidable with the paid-for print edition)? If he who pays the piper calls the tune, then the imperatives of advertisers to maximize their audience will trump the political preferences of internet browsers. Peter Osborne’s resignation in February 2015 as chief political commentator for the Daily Telegraph over the influence of HSBC advertising revenue on editorial policy is an indication of the decline in representative isegoria resulting from the internet-fuelled subscription crisis in the newspaper industry.

²⁷ According to the Office for National Statistics’ 2017 Prodcon report, the sales value of UK daily newspapers declined from £445.8 million in 2008 to £137.6million in 2014 and to £122.0 million in 2015.

²⁸ <https://media.info/newspapers/titles/daily-mail/readership-figures>

²⁹ <http://mailadvertising.co.uk/uploads/files/MailOnline-ABC-June-2015.pdf>

When he purchased his daily newspaper the man on the Clapham omnibus was adding his own voice to his chosen vehicle for representative isegoria – not so with those casually browsing the world-wide web. A positive gloss on A.J. Liebling’s sarcastic remark that ‘freedom of the press belongs to those who own one’ might be that the freedom extends to each of the millions of subscriber ‘owners’ who pay the cover price for their chosen newspaper (assuming a healthily competitive media marketplace in which the customer calls the shots). As Baker puts it: ‘members of all groups [should] experience themselves as being served and represented by mass media that are in some sense “their own” – the scare quotes around ‘their own’ and emphasis on ‘service’ and ‘representation’ indicating that this desideratum undermines the subtitle of his own book (‘why [proprietary] ownership matters’). So long as the newspaper represents the views of its readers, what does it matter who the proprietor is?’³⁰

Given the need for *representative* isegoria in large-scale societies, talk of the web democratizing the freedom of speech is entirely misleading – although the Athenian *ho boulomenos* principle is fully respected by the world wide web (anyone who wishes to may now *speak*), the relevant issue is who gets to be *heard*. The vast majority of amateur online blogs and tweets have negligible readership levels and are somewhat akin to mounting a soap-box in the middle of the Sahara Desert rather than at Speakers’ Corner in London’s Hyde Park:

The Internet is likely to lead to much more diverse content being more easily available to those who seek it and to many more *sources* of information (and opinion), but overall, concentration of *audiences* in the Internet world will be great and likely to be even greater than in the older offline world. (Baker, 2007, p. 105, my emphasis).

³⁰ An interesting gloss on the focus on media ownership is that in the 2016 EU Referendum campaign the Times backed remain and the Sunday Times leave (both newspapers were owned by Rupert Murdoch’s News Corp); whereas the Daily Mail backed leave and the Mail on Sunday remain (both owned by Lord Rothermere’s DMGT). It might be stretching Machiavelli too far to argue that this was a deliberate attempt by both media moguls to hedge their bets, especially as subscribers to the weekly and Sunday publications would have been irritated by the inconsistency.

During the 2016 US presidential election an increasing number of voters relied on the internet and social media to inform themselves on political issues and most of these were highly partisan in nature.³¹ Whereas newspapers have generally attempted to create a patina of impartiality, ‘alt-right’ media sites like Breitbart News pride themselves in their partisan affiliations and make no attempt to offer any sort of balanced assessment. Hillary Clinton’s supporters have gone so far as to claim that the election was stolen by a combination of ‘fake news’ reports on Facebook sites, internet trolls and manipulation by external parties (especially Russia) with an interest in securing the victory of the Republican candidate. By comparison with this, the partisan commercial media (MSM) – who have to draw readers from a wider political spectrum (in order to be financially viable) and are subject to various forms of regulation – would appear to be relatively benign.

In addition to reflecting and (ideally) refining and enlarging the political preferences of their readers, newspapers also have a key role to play in investigative journalism (as we are reminded by the 2018 Steven Spielberg movie on the role of the Washington Post in exposing decades of government dishonesty regarding the Vietnam War).³² For a comparable UK example, The Sunday Times (along with the now-defunct News of the World) has a long-established reputation for in-depth (and expensive) investigative journalism. The newspaper was responsible for bringing the attention of the public (and the US and Swiss prosecuting authorities) to the possibility that FIFA decisions on hosting the (football) World Cup have been

³¹ According to the 2016 report of the Reuters Institute for the Study of Journalism, 28% of the UK 18-24-year-olds surveyed cited social media (primarily Facebook) as their main news source, compared with 24% for TV. <http://www.bbc.co.uk/news/uk-36528256> In terms of overall users the first news source for UK smartphone users was 33% social media (the corresponding figure for the US being 48%). This is particularly alarming in the light of Facebook’s January 2018 decision to overhaul its algorithm thereby *reducing* the percentage of news posts from 5% to 4% of each user’s customized News Feed. Given the reluctance of users – especially women and young people – to pay for online news content (*ibid.*), it’s hard to be optimistic for the future of democracy based on well-informed voters.

³² The resignation of Richard Nixon as a result of the Watergate affair can also be indirectly attributed to the Washington Post, and applications for journalism schools reached an all-time high in 1974 (the year of Nixon’s resignation). It is, of course, far too early to assess the role of the mainstream media in holding to account the Trump presidency.

heavily influenced by bribes. The newspaper was also responsible for revealing doping scandals in cycling and athletics and for exposing the fraudulent research underlying the connection between the MMR vaccine and autism. Important earlier features included in-depth investigations of the double agent Kim Philby and the manufacture of nuclear weapons by Israel, along with a campaign for compensation for thalidomide victims. As such Baker's hypothesis that 'dispersed ownership results in owners who are more likely to devote a significant portion of these profits to media products that produce valuable positive externalities rather than maximize the bottom line' (Baker, 2007, p. 73) is not confirmed, given that there is no sign that the output of the Insight team of investigative journalists decreased after the acquisition of the newspaper by Rupert Murdoch's conglomerate in 1981.

The principal challenge to in-depth investigative journalism is the drop in subscriptions and advertising revenue, unrelated to the issue of the concentration of media ownership: 'the consumer shift to Internet access to news could reduce the resources available to support serious commercial journalism' (*ibid.*, p. 116) as 'the economic base supporting the most difficult and expensive journalistic undertakings is eroding' (Attitudes, 2005). This is largely because there is a 'relatively fixed pot of advertising revenue', the vast bulk of the online share going to internet search engines and social media platforms rather than content providers (Baker, 2007, pp. 117-8). Since 2005, 189 local newspapers have closed in Britain, whereas US newspaper publishers have lost more than half of their employees since 2001, while industry turnover has also halved. *Ninety-nine percent* (sic) of US advertising growth in 2016 was soaked up by the Google/Facebook duopoly³³ – the income for the latter growing 51% in the first quarter of 2017 to \$7.9bn.³⁴

In addition to investigative journalism, newspapers could also claim to provide a related form of representative isegoria. Given that the Sunday Times has been for

³³ 'We're the free fuel powering Facebook', Sunday Times Business Supplement, July 30 2017, p. 12.

³⁴ 'Have they got news for Facebook!', Sunday Times Business Supplement, May 7 2017, p. 5.

some time the UK's top-selling Sunday broadsheet, its subscribers may well choose to believe that campaigns by the newspaper are a democratically-valid way of influencing government policy – i.e. that the newspaper is making a bona fide 'representative claim' on their behalf. For example the newspaper has campaigned vigorously for a 24/7 National Health Service to replace the current arrangements under which doctors, including hospital consultants, are able to opt out of weekend working, leading to significantly higher mortality rates for patients admitted at weekends. NHS medical director Sir Bruce Keogh applauded the newspaper's campaign,³⁵ and legislation proposed by the Conservative government in 2015 has closely mirrored the newspaper's recommendations. This is a clear example of media isegoria leading directly to legislative change³⁶ – whether the government was convinced by the newspaper's *arguments* or encouraged by the *subscription figures* (or a combination of the two) is open to conjecture. Camilla Cavendish, the columnist who campaigned most forcefully on this topic, was appointed head of the prime minister's policy unit in May 2015 (and ennobled in 2016).

The ABC circulation figure of a newspaper is clearly an important factor in its influence – all governments are said to be terrified of a critical headline in the Daily Mail, but more relaxed about the editorial priorities of The Morning Star (circulation: c. 13,000). The editorial policy of the larger-selling tabloids, in particular the Mail and the Express, has been a serious constraint on the socially-liberal cosmopolitanism espoused by many members of the political class. However representative isegoria is a form of proportional, as opposed to numerical equality (in the Aristotelian sense), so even a newspaper with a relatively small subscription base has a rightful claim to a representative *voice* – for example the success of the Guardian and Independent in championing the rights of minorities and other totemic liberal causes is entirely at odds with their modest circulation figures.

³⁵ 'Sir Bruce Keogh praises the media as Sunday Times claims victory in campaign for seven day services' <http://www.england.nhs.uk/2013/10/28/keogh-7ds/>

³⁶ It would be hard to make the case that the newspaper was merely acting in the interests of its proprietor and/or senior editorial team, who would have had easy access to private healthcare services, neither was the newspaper acting as an advocate for the private sector as the campaign was over the contracts of NHS employees.

Compared to the US – which tends to be dominated by local monopolies – the UK has a vibrant and competitive *national* newspaper industry. Given the migration of significant advertising (both display and classified) revenues online, the commercial fortunes of UK newspapers depend on maintaining subscription levels. Profitability is, at best, marginal – Times Newspapers Ltd. posted a £1.7m operating profit (but pre-tax loss) for the year ending 30 June 2014, but it was the first profit recorded in thirteen years. The Guardian and Observer made a loss of £30.6m in the year to April 2014 and exist on the revenue strength of other GMG assets and the beneficence of the Scott Trust; annual losses at the late-lamented Independent being around half that of the Guardian. The only UK broadsheet publisher that is consistently profitable is the Telegraph Media Group.³⁷

The fortunes of the broadsheets are mirrored by the decline in tabloid subscriptions, operating profits at Rupert Murdoch's Sun declining from £62.1m (2013) to £35.6m (2014). At the Mirror Group, substantial cost-cutting and growth in digital revenues helped offset an 11.6% drop in publishing revenue, so that pre-tax profits only declined by 2.5% in 2015.³⁸ The Mirror is clearly following the lead of DMGT, whose Mail Online website income increased 50% in the year to September 2013 and who boasted nearly 200,000,000 unique monthly visitors in December 2014.

From the viewpoint of representative isegoria, the shift from print subscriptions to free online access is a retrograde step, as uncommitted casual internet browsing cannot be taken as an indication of readers' endorsement of the editorial position of the publication, entirely supported as it is by advertising revenue. Only readers who are prepared to 'put their money where their mouth is' can claim 'ownership' of the medium from the perspective of representative isegoria – in the absence of a subscription commitment, the speech acts of the publication are under the control of the advertisers. If this is the case, then newspaper groups that have an online paywall policy could continue to make a representative claim on behalf of their

³⁷ <http://www.pressgazette.co.uk/telegraph-cements-place-only-profitable-mainstream-quality-daily-%C2%A3584m-surplus-2012>

³⁸ <http://www.bbc.co.uk/news/business-33755674>

subscribers (not so with those offering free online access), so there is no reason in principle for the isegoria role of the press to disappear in the digital age. If editors of online publications with significant news value (as opposed to celebrity tittle-tattle, *schadenfreude* and voyeurism) depend on a loyal subscription base, then they will be motivated to reflect the preferences, beliefs and ideologies of their target audience rather than the dictates of advertisers, i.e. 'the threat to press performance and to distortion of its contents resulting from the press's dependence on advertising support' (C. E. Baker, 2007). In a similar vein the revenue model for the open-access BBC News website (the licence fee) means that content is dictated by the editorial priorities of the journalists and their managers, so no representative claim can be derived from the large number of visitors (see section 7.4.1.3, below for a sceptical reading of the claim that public-service broadcasters are in possession of a dispassionate 'god's eye' perspective).

7.4.1.2 *American [and Italian] exceptionalism?*

However the intense competition and marginal profitability of UK national newspapers is not mirrored in the US. With the exception of USA Today, Wall Street Journal, New York Times, and Washington Post, most newspapers are primarily local in nature,³⁹ and are often natural monopolies, on account of geographical constraints on subscription and advertising markets – 'geographically dispersed media entities . . . do not compete against each other for audiences' (Baker, 2007, p. 13):

[T]he nature of monopolistic competition sometimes means that only one can succeed. The most obvious example of this is in respect to daily newspapers, which in most American cities constitute a local monopoly. The town will usually support only one daily newspaper, no matter whether it has a Republican or Democratic orientation – leaving the choice of orientation to the owner. (*ibid.*, p. 92)

³⁹ American publications clearly did not feel the need to follow the example of the (Manchester) Guardian in dropping the prefix when it went national. Although the Los Angeles Times has a higher circulation than the Washington Post, it still predominantly services a Californian, rather than national, readership.

The other difference is that in the US ‘newspapers are [or were] overwhelmingly profitable . . . the newspaper industry had average profit margins [in 2005] of 19%, double that of the Fortune 500’ (*ibid.*, pp. 32-3). Both these factors (local monopolies and high profitability) insulate newspaper proprietors from the need to mirror the beliefs, values and preferences of their target readership, leading to a diminution of the isegoria function of the mass media.

Baker’s response to this problem is that media ownership should be as widely dispersed as possible. However, although this would clearly operate as a ‘structural safeguard’ against the ‘Berlusconi effect’⁴⁰ (*ibid.*, pp.18-19), it is not entirely clear how ownership dispersal per se would help. Consumers in domains as varied as mobile telephony and grocery provision benefit from the intense competition between a tiny number of huge corporations and the same applies, in principle, to the marketplace of ideas. Baker acknowledges that:

An egalitarian distribution of actual communicative power is inconsistent with the very idea of a ‘mass media’, which almost inevitably contemplates a limited number of entities, a limited number of speakers, communicating to many. (Baker, 2007, p. 10)

If this is true then the meaning of Baker’s ‘democratic distribution principle for communicative power’ (*ibid.*, p. 7) is unclear in any respect other than the structural safeguard (against the Berlusconi effect) sense. In a state comprising (say) sixty million citizens, it makes little difference whether the ownership of media is distributed between five, five hundred or five thousand proprietors – it will still be only a tiny proportion of all citizens who have a (proprietary) voice. And there is no good reason to believe that there is a necessary relationship between the number of media outlets/proprietors and benign epistemic outcomes: ‘I am not aware of any systematic study of the proposition that “truth” is more likely to emerge from

⁴⁰ ‘Silvio Berlusconi, apparently Italy’s richest individual, formed his own party, Forza Italia, and used massive media power – his Mediaset controls about 45 percent of national television along with important print media – to catapult himself into the Prime Minister spot in 1994 and then again in 2001, heading Italy’s longest lasting government since World War II’ (Baker, 2007, p. 18).

debate among a greater number of speakers than from fewer' (Owen, 2004, p. 10). If this is the case, then – assuming a robustly competitive marketplace of ideas – a small number of media outlets can make competing representative claims, their success (like political parties) being dependent on the extent to which they reflect the preferences and beliefs of the audiences that they are competing for – 'members of groups who can experience themselves as being served and represented by mass media that are in some [non-proprietary] sense "their own"' (*ibid.*, p. 11). Considerations of scale necessitate that politics in a mass society is representative and one might well anticipate a correspondence between the number of political parties and the range of newspapers available for subscription – although the latter would likely be at least twice the former, due to the need to cater for both highbrow and lowbrow sensibilities. This is roughly true in the case of England (the other nations of the United Kingdom having their own media). Although it is beyond the scope of this thesis, a comparison with a country with a proliferation of tiny parties (Israel, for example) might well predict a larger array of media to reflect the isegoria needs of a very different form of democratic representation.

Although an extensive range of media might well be empirically associated with a wide ownership base, the issue of proprietorship is secondary – the claim of the market-based approach of this thesis being that, given a lack of local monopolies, and marginal levels of profitability, media will naturally tailor their products to the interests, beliefs and preferences of their target readership. Baker refers to the (liberal) marketplace of ideas approach to the problem of representative isegoria as the 'Miltonian' doctrine, a reference to John Milton's petition to the Long Parliament seeking repeal of its censorship laws:

[T]hough all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple;

who ever knew Truth put to the worse, in a free and open encounter?⁴¹

A key advocate of the Miltonian doctrine is Stanford economist Bruce M. Owen, who builds on the classical origin of the name of Milton's petition (the *Areopagus* was the hill on which the Athenian court responsible for censorship was located):

Competition among ideas means that 'speakers' make their views available to others as if in the Athenian agora (marketplace), hoping to attract audiences and perhaps adherents. In the modern world the agora must be metaphorical but the metaphor remains useful. (Owen, 2004, p. 10)

This citation indicates a clear parallel between the Athenian *isegoria* principle – where *rhetoires* and *demagogoi* exercised their democratic speech rights to persuade their fellow citizens in the physical marketplace (*agora*) and assembly (*ecclesia*) – and the modern 'marketplace of ideas', where media owners and editors seek to persuade citizens that their own publication best represents their readers' voice. As in Athens, this right should be available to *ho boulomenos*, but Owen is perhaps a little over-zealous in his claim that 'evidence that people do in fact use the Internet to acquire ideas and information effectively ends the discussion of the media concentration problem from a political perspective' (ibid., p. 21). Unlike in a direct democracy, *representativity* is the relevant principle for *isegoria* in large-scale societies and, as Baker rightly argues, the internet – with its vast array of sources that nobody reads – may well serve to *reduce* this, the other problems being that internet usage today tracks the usual class patterns:

[W]e have found little evidence that the association between SES [socio-economic status] and political activity is any different on the Internet . . . among Internet users, there is a strong positive relationship between SES and – with the possible exception of political

⁴¹ John Milton, *Areopagitica* (1644).

social networking – every measure of Internet-based political engagement we reviewed. (Schlozman, Verba, & Brady, 2010)

Moreover the new technologies ‘facilitate niche or echo-chamber communication’ in which the like-minded only talk with one another (Sunstein, 2002). Given that both Baker’s and Saward’s books were written long before the era in which many American voters obtain their political information from ghettoised social media (including the President’s own hyperactive Twitter feed), they might now view the partisan nature of the mainstream commercial media as the lesser of two evils.

7.4.1.3 *Public media*

Baker, however, is unimpressed by agonistic market- and profit-based arguments for media diversity, with their associated (negative) ‘externalities’ (the elimination of ‘socially desirable’ expenditures). His preference is the Habermasian model of ‘public’ media devoted to the pursuit of the ‘common good . . . an *inclusive* discourse, involving the whole society’, his model for ‘inclusive’ discourse being the ‘democratic remit of the BBC’ (*ibid.*, pp. 8-9). This would certainly correspond to the original Reithian ideal of the BBC – that broadcasting should ‘educate, inform and entertain’, entirely free of commercial considerations – but updated for a more demotic age. However a recent book by Roger Mosey, former head of BBC television news and editor of Radio 4’s *Today* programme and now master of Selwyn College, Cambridge, confirmed many of the suspicions of right-wing critics of the BBC – that although the corporation *strives* to be impartial, the predominately liberal metropolitan/cosmopolitan mindset⁴² of the Oxbridge-educated management and editorial team⁴³ tends to view populist and

⁴² In the terminology of David Goodhart’s *The Road to Somewhere*, such people are ‘anywheres’ rather than ‘somewheres’ – representing, at best, 25% of the UK population (Goodhart, 2017).

⁴³ A July 2017 socio-economic census of the BBC found that 17 percent of all staff attended fee-paying schools and 61 percent had parents in the ‘higher managerial and professional occupations’. Ofcom chief executive Sharon White told the Royal Television Society convention in Cambridge: ‘It’s a really important issue because you want diversity of thinking not just visible diversity. We are in a creative industry where you want great ideas from people of different backgrounds, different classes, different colours, different

conservative perspectives on topics like immigration, gay rights and the EU as simply beyond the pale:

I believe most people in the BBC are fair-minded individuals, and journalists in particular have a professionalism that means they steer well clear of any party political bias. I have never had the problem of an editor who skewed an agenda in favour of Conservatives, Labour or any other party. But there can be a default to ‘groupthink’ – a set of assumptions that seem reasonable to everyone they know. (Mosey, 2015)

This groupthink often led to the winnowing out of vox pop interviewees who expressed politically-incorrect opinions at the editing stage, leading in one immigration-related example to ‘an unacceptably sanitized piece of reporting . . . a textbook example of how not to put together a report with vox pops’ [deleted copy] (*ibid.*). Rod Liddle, Mosey’s successor as editor of the Radio 4 *Today* programme (1998-2002) pulls even fewer punches than his predecessor:

This [liberal bias] is perhaps even more true of the BBC today than it was 20 years ago. . . It treats with hostility and contempt any individual or organisation who might dare to suggest that diversity is anything other than a bloody good thing. Its attacks on UKIP during the election campaign — no other party warranted such treatment, remember — were an utter disgrace and, I would suggest, in breach of its charter.⁴⁴

Even after discounting Liddle’s rhetorical excesses, it would appear that the ‘inclusive’ discourse of the public-service broadcasting model is a less reliable

parts of the country, Scotland as well as north London.’ (Matthew Moore, ‘Middle-class BBC ordered to reveal social background of its staff’, *Times*, September 15 2017)

⁴⁴ <http://www.spectator.co.uk/columnists/rod-liddle/9565052/roge.r-mosey-and-the-questions-you-dont-ask-at-the-bbc/>

source of representative isegoria in a diverse modern society than the competitive agonism of the commercial marketplace of ideas:

[H]ighly partisan rhetoric, even while violating some deliberative ideals such as mutual respect and accommodation, may nonetheless help to fulfil other deliberative ideals such as inclusion . . . Some politically partisan media are of low deliberative quality, but in conjunction with other media of equally low deliberative quality bring out information and perspectives that television stations or newspapers aiming at the middle of the road do not raise or address. (Mansbridge, et al., 2012, pp. 3, 7)

Public attitudes on the issues that Mosey and Liddle highlight (immigration, multiculturalism and the EU) have been better championed by the so-called Red Top ‘gutter press’ than public-service broadcasters like the BBC, who’s editorial policy committee claimed that public prejudice against asylum-seekers was ‘being led by an angry tabloid agenda and extreme right-wing views’, to which Mosey responded in an email that ‘the asylum debate is one where we’ve done rather badly in reflecting the concerns of our audiences’ (Mosey, 2015). When he saw Mosey’s email, former BBC business editor Jeff Randall commented:

‘Does anyone in the BBC’s policy unit/Thought Police read [Mail columnist] Richard Littlejohn? They should. He reflects popular opinion far more accurately than the views of those whose idea of a good night out is reading the Indy [Independent] over a vegetarian meal in a Somali restaurant.’ (Mosey, 2015)

Whilst this subsection does not offer any quantitative assessment of political impartiality at the BBC, it’s important to recognise that the criticisms come from their own senior editors and journalists, *Newsnight*’s former long-serving presenter, Jeremy Paxman, sharing a similar perspective:

‘There is political correctness at the BBC. . . Why is the story always about the disabled refugee from Syria, rather than the demands that the disabled refugee from Syria might make upon our taxpayers? It’s all too common. It’s a metropolitan-elite problem.’ (quoted in Liddle, 2017, p. 10)

To summarise the argument of this section, isegoria in large modern states requires a representative mechanism and, as J.S. Mill argued, the mass media have a vital role to play. Although the notion that the appropriate media for the ‘public sphere’ are dispassionate and inclusive ‘public service’ broadcasters is at first sight attractive, the example of the BBC might suggest that commercial subscription-based media better reflect (in aggregate) the multiple voices that characterize large modern states. Although one of the pathologies of partisan media is the likelihood of misinformation and fact-bending, ‘the partisan media may contain their own partial corrective to this pathology, as the other side is always looking for the false move of its adversary’ (Mansbridge et al., 2012, p. 21). The existence of local media monopolies in the US and national ones in Italy does not negate the *principle* of the representative claim of mass media, and the example of the robustly competitive (and marginally profitable) British newspaper industry demonstrates that the principle can work in practice. The recent growth of free-access internet news sites (both commercial and public service) may well be harmful to the process of representative claim-making, as they undermine the working of the media marketplace, where proprietors and editors are obliged to attract a broad following for purely commercial reasons. The effective impartiality of public service broadcasters is open to question and, more recently, many voters are informed more by highly partisan social media platforms, many of which have been accused of disseminating ‘false news’ and other forms of disinformation.

The criterion of statistical proportionality would suggest that the representative claim of the Sun should count for more than that of the (now deceased) Independent. Nevertheless the sensibilities of the educated political class in general are likely to favour the latter (along with the Guardian) and this brute fact will automatically ensure that less populist voices continue to be disproportionately influential. While this may (arguably) be of epistemic benefit to the overall body politic, it has undoubtedly led in the past to a consensus within the political class (in the UK regarding issues such as immigration and relations with the EU) that has failed to reflect popular preferences and beliefs. Given that, under the constitutional proposals outlined in Chapter 8, ultimate decision power would be in the hands of a randomly-selected minidemos, it could be argued that it is possible to be more relaxed regarding the disproportionate influence of media with a modest circulation

than with our existing forms of governance in which the political class judges its own speech acts. The argument for the essential role of commercial media in representative isegoria (the 'Miltonian doctrine') is a normative one and the examples are chosen for purely illustrative purposes – a comprehensive study of the empirical literature being beyond the remit of a thesis in political theory.

7.4.2 Randomly-selected demarchic committees and agenda panels

One of the early milestones in the renaissance of interest in sortition was John Burnheim's 1985 book *Is Democracy Possible?* (Burnheim, 2006 (1985)). Burnheim's proposal is for policy-making by small 'demarchic'⁴⁵ committees focused on specific functional domains (the principle underlying departmental sub-committees in the UK parliament), comprised of persons selected by lot from all those whose interests are directly affected by the particular issue under consideration. The principle of 'all affected interests' would be operationalized by stratified sampling from a pool established by a combination of self-nomination and delegation from civil society and advocacy groups operating in the particular policy domain. As many issues in the modern, globalized world transcend national boundaries, the composition of each committee would vary depending on the outreach of the issue under consideration.⁴⁶ The demarchic principle involves a 'representative sample of the people concerned' (*ibid.*, p. 7), but does not presuppose a statistically-accurate sampling of the target population, due to its focus on the principle of 'all affected interests'. The role of sortition is to ensure the impartiality of the sampling process rather than to achieve a statistically-accurate microcosm, thereby relying on the principle of the 'blind break', rather than the 'invisible hand' of stochation (see Appendix II, below). In any case the voluntary principle inevitably makes it a selective sample, assuming that many people would not want, or be able, to give up a substantial amount of time to an exercise of this sort.

⁴⁵ Although the term is taken from Hayek's *Law, Legislation and Liberty*, Burnheim's usage is somewhat different.

⁴⁶ Although Burnheim has no particular regard for the nation state, his voluntarist sensibilities are closer aligned to anarchism than Kantian cosmopolitanism.

Statistically-accurate sampling would be impossible with a small committee and also undesirable in that the force of arguments would be overruled by the weight of numbers. Demarchy is a compromise between these two principles in that, while the deliberative style is discursive, the focus is on achieving a working compromise between the competing interests represented on the committee. In political parties and coalitions, policies are normally the result of deals between factions or interest groups in which support for policies is bought and sold in exchange for support on other matters that are quite irrelevant to the merits of the policy for which support is sought. Also, politicians are constrained to pay special attention to key segments of voters and financial supporters, often at the expense of more diffused interests. Since each demarchic committee is only concerned with one specific problem area, and the members have no political careers at stake, the only concessions they can offer each other are relevant to the issues. The committees claim no authority in virtue of their constitution. Their only claim to acceptance is that they conduct all their discussion in public, mostly online, and produce a set of recommendations that has a clear claim to take full account of the considerations people put to it. The point of their work is to arrive at the best solution they can devise to the problems they address by a transparent process of deliberation. The point of having a predominance of people who are directly affected is to bring the theorists and dreamers down to earth and ensure that the solutions they advocate are acceptable to those who have to bear their consequences. They are not there as advocates of particular interests, although their being strongly affected will contribute to their capacity to assess the practical effects of proposals. In this connection it is important to recognise that on most matters of public policy people do not have a single interest, but share competing or conflicting interests. Once they realise this, they should come to see that the problems they face are shared problems, and that their overriding interest is in getting as good a solution to them as possible. In any case, the process presupposes a lively public debate and their conclusions can have no standing except in so far as they represent a plausible adjudication of the merits of the considerations brought forward in that debate. Demarchic committees attempt to derive a practical conclusion from an extensive public discussion, putting it forward on that basis.

In his latest book (Burnheim, 2016), the author makes clear that demarchic committees are an aspect of civil society, rather than the machinery of government

– their role being the (early) Habermasian one of developing well-informed opinion in the public sphere (i.e. opinion rather than will) – so, in the terminology of this thesis, they are an aspect of isegoria, rather than isonomia. Burnheim’s hope is that as a result of their composition (a stratified sample of all affected interests) they will be seen to be impartial (or at least balanced) and that the policy outcomes will be of high epistemic value. The role of elected politicians will be to take up the more successful representative claims of demarchic committees and to convert them into legislative proposals that would be subsequently judged according to the isonomic criteria outlined elsewhere in this thesis. Given the intermediation by elected politicians, Burnheim’s proposal for representative isegoria by demarchic committee is fully compatible with the mixed system of governance championed by this thesis. The only power that these committees would have would arise from their procedures becoming an accepted feature of public life, with the result that there could be strong community pressure, particularly from swing voters, on politicians to embrace their recommendations. Burnheim envisages them as being financed and organised by public foundations supported by voluntary contributions, with a well-established reputation for transparency and experience in this kind of work.

A similar proposal has been made by Terry Bouricius as part of his model for ‘democracy by multi-body sortition’ (Bouricius, 2013). The proposal includes agenda councils, interest panels, review panels and policy juries, along with rules and oversight councils. Each body (with the exception of interest panels) is constituted by random selection, but the term of office and the selection principle (voluntary or quasi-mandatory) varies according to the role of the particular body.

One of the principal agents of isegoria in Bouricius’s proposal is the agenda council, constituted by a ‘two-tier lottery system of the willing’ (*ibid.*, p. 9). This is described as a ‘meta-legislative body’ in that its role is to ‘seek out problems needing attention, rather than merely react to media or special interest group pressures’. Bouricius’s proposal also allows for public petitions ‘in the spirit of *isegoria*’ that would provide ‘an alternate means for agenda setting’ (*ibid.*), along with ‘interest panels’ open to anybody who wished to join one on any issue and try to help craft a proposal in a small group to offer to a review panel. Interest panel members would not be chosen by lot, but would either be ‘self-organized groups’ or volunteers who could be randomly combined into a group (to

enhance diversity).⁴⁷ There would be as many interest panels as the number of volunteers required (each having perhaps no more than a dozen people) and, as such, offer a modern analogue of the classical principle of *ho boulomenos*.

Such a proposal would clearly be compatible with direct democracy, and appears to have its origins in the institutions of Athenian politics. However it's not clear that it fulfills the requirement for large-scale *representative* isegoria, as Bouricius's proposal for multi-level voluntary and sortition bodies makes no provision for mass endorsement by election, votation or public referenda and, as such, there is no way of checking whether the proposals generated adequately reflect the raw preferences of the wider public. Without such checks, Bouricius's model is likely to lead to policymaking by activists, as there is nothing to prevent the domination of the agenda and interest committees by self-organised extremist groups like the Tea Party, NRA, Occupy etc. *Isegoria* in classical-era Athens was equally partisan, but all citizens (in principle) would have judged the competing claims directly in the assembly, a mass-democracy filter that is rejected in Bouricius's proposal.

The focus on voluntarism makes Bouricius an unwitting fellow-traveller with Madison's project for the 'total exclusion of the people in their collective capacity, from any share in [American governments]' (*Federalist Papers*, No.63). Madison was making the positive case for (electoral) representation, rejected by Bouricius on account of being susceptible to domination by powerful interests (primarily financial and media). Bouricius might well retort that final decision-making by quasi-mandatory policy juries fulfills the need for representation by stochation. But this only applies to the isonomic aspect of democratic decision-making and the argument of this chapter is that isegoria in large modern states needs to be equally representative. This function is fulfilled in Burnheim's proposal by the intermediation of elected politicians (responsive to public pressure); not so in Bouricius's combination of voluntarism and 'pure' sortition. This is clearly incompatible with the 'mixed' constitution advocated by this thesis and, given the

⁴⁷ (Bouricius, private communication, 4th October 2015). This aspect was dropped from the published article on account of space considerations.

long and bloody struggle for universal franchise, might well be seen as both undesirable and unachievable. Although Bouricius provides some very important insights into the dysfunctions of electoral and direct-democratic systems, his proposal for 'pure' sortition would have to be viewed as ideal-typical, if not entirely utopian. This being the case, then demarchic committees, but not agenda panels, would pass the overall representative isegoria test.

7.4.3 Deliberative, discursive and associational democracy

7.4.3.1 Deliberative democracy

The extensive criticisms of deliberative democracy in Chapter 5 of this thesis have focused on the constraints on deliberative style that would be necessary for randomly-selected bodies that exercised an *institutional* role in the legislative process. This is on account of the need to ensure that randomly-selected legislative bodies retain their descriptively-representative mandate – the conclusion being that this presupposes a highly constrained deliberative style that is a long way removed from the ideal speech situation that provides the normative ideal for most theorists working in the field of deliberative democracy. However most of the work in deliberative democracy is concerned with deliberation in the *informal public sphere*, so the focus of this section is on public deliberation as a democratically-legitimate way of enriching the formation of public opinion, where the outcome of the deliberations do not directly affect the process of political will formation. While Habermas's later theory of deliberative democracy (Habermas, 1996) is dualistic in that it concerns itself both with deliberation in the informal public sphere as well as elite deliberation in parliamentary bodies, the focus here is on the former. The connection between public deliberation and political will formation is indirect in so far as it is mediated by the standard mechanisms of electoral democracy:

Informal public opinion-formation generates 'influence'; influence is transformed into 'communicative power' through the channels of political elections; and communicative power is again transformed into 'administrative power' through legislation. (Habermas, 1994, p. 8)

As this model clearly respects the diarchy of opinion and will formation (as one would anticipate from the author of *The Structural Transformation of the Public Sphere*), then deliberative democracy in the public sphere clearly has an

uncontroversial role to play in the field of isegoria. Serious questions remain regarding the privileging of those possessing the requisite rhetorical skills to participate in the ‘university seminar’ mode of discourse underlying the deliberative democracy model (Budge, 2000, pp. 197, 200), but these have already been covered in Chapter 5 (above).

7.4.3.2 *Discursive democracy*

Although Habermas frames his model of public deliberation in terms of ‘discourse theory’ (Habermas, 1994, p. 8), John Dryzek seeks to distance himself from the later ‘liberal constitutionalist’ Habermas by staking a prior claim to the term – ‘given that I coined the term “discursive democracy” (Dryzek, 1987, 1990), I now claim proprietorial rights⁴⁸ (Dryzek, 2000b, p. 78). Whilst acknowledging Habermas’s earlier contribution to discourse theory in his account of communicative action (Habermas, 1984, 1987), Dryzek dismisses the later Habermas (exemplified in the 1994 citation above) as a ‘sellout to liberal constitutionalism’: ‘a very conventional model of democracy; not so distant from a cardboard cut-out, civics-textbook version of how democratic government should work’ (Dryzek, 2000, p. 82). He is also alarmed at Habermas’s refocusing of deliberation away from the public sphere, ‘constituted in large part by social movements and actors in confrontation with the state’ to ‘authentic deliberation within the institutions of the liberal state’, ‘notably courts and legislatures’ (*ibid.*, pp. 81, 82).

Insofar as the focus of this section is on isegoria – opinion in the public sphere – Dryzek’s arguments are persuasive, the only rider being that the Frankfurt School emphasis on social movements in confrontation with the state might suggest that the resultant isegoria would, on the whole, be unrepresentative of public opinion – which tends to reflect the hegemonic values of the centre ground, as opposed to the ‘subaltern’ discourses privileged by critical theory:

⁴⁸ Dryzek does not go quite so far as James Fishkin, with his decision to trademark the term ‘Deliberative Polling’.

Subaltern counter publics . . . parallel discursive arenas where members of subordinated social groups invent and circulate counter discourses to formulate oppositional interpretations of their identities, interests and needs (Fraser, 1992, p. 123)

Whereas Fraser classifies interaction in the public sphere as a contestation of publics, Dryzek argues that public deliberation is mediated to the state not through voting but through the contestation of discourses:

We can step back and ask whether democracy does indeed require counting heads. I would argue that a logically complete alternative exists based on a conceptualization of intersubjective communication in the public sphere as a matter of the contestation of discourses. (Dryzek, 2000b, p. 84)

Dryzek is right to argue that the representation of discourses and perspectives (isegoria in the parlance of this thesis) is not subject to arithmetic calculations ('counting heads'), although the language he employs is derived from Burke's doctrine of virtual representation, not Aristotle's distinction between proportional and numerical equality:

The key consideration here is that all the vantage points for criticizing policy get represented – *not* that these vantage points get represented in proportion to the number of people who subscribe to them. When it comes to representing arguments, proportionality may actually be undesirable because it can pave the way to groupthink and the silencing of uncomfortable voices from the margins or across divides . . . For policy-making rationality, then, all relevant discourses should get represented, regardless of how many people subscribe to each. (Dryzek & Niemeyer, 2008b, p. 482)

(Note that Plato *would* have considered this an example of proportional equality, in the sense that discourses are included on the strength of their discursive merit, rather than their numerical support.) The problems with this approach are two-fold: a) who gets to decide which discourses to include? and b) how is the outcome of the discursive deliberation determined? The first problem is caused by the reliance on social science Q methodology questionnaires and in-depth interviews, often

used by those seeking to ensure that recruits for deliberative minipublics adequately represent particular discourses (B. B. Davies, K., & Rauschmayer, 2005). But who gets to choose the survey questions or, as Juvenal put it, who guards the guards? This is particularly problematic in areas such as environmental activism (see above, section 7.3.3.1) in which the sheer proliferation of discourses may serve to drown out the views of the silent majority who may well privilege economic and human interests over the interests of the environment (Dryzek and Niemeyer, 2008b, p. 487). As the authors acknowledge:

In most theories of representation, those represented somehow authorize the representation. The method we have described seems to substitute social science for political process, with the risk of empowering an unaccountable social scientific elite. (*ibid.*)

The arcane language employed by discursive theorists – ‘conceptualization of intersubjective communication in the public sphere as a matter of the contestation of discourses’ – bears witness to the Habermasian understanding of the origin of the ‘public sphere’ in the chatterings of the bourgeois educated classes; such a theory (assuming they could make sense of it) would certainly not have been seen as democratic in classical Athens. For the purpose of this thesis, democracy does, in the final analysis, get down to counting heads, as it’s hard to imagine any other way of operationalizing the power of the people. Even if we accept the terms of Dryzek’s project, the ‘contestation of discourses’ has to be resolved by a decision rule and, absent consensus, the rule requires the counting of votes, and democratic isonomia presupposes all votes to be of equal value. The *proportional equality* characterised by the ‘contestation of discourses’ needs to be judged by the *numerical equality* of the statistically-representative minipublic, otherwise the outcome may well be perceived as no more democratic than the judgment of Zeus (Plato’s way of discerning the merits of different claims for proportional equality).⁴⁹

⁴⁹ Plato, *Laws*, VI.757 b-c.

Ian Budge argues that Dryzek's "contestation of discourses" – in so far as it can be pinned down, seems not very different to newspaper and media discussion of issues at the present day' (Budge, 2000, p. 196), although critical theorists might well point to the hegemonic clustering of the mainstream media (MSM) around the centre ground. Conservatives might also question whether the profound social and cultural changes undergone by Western societies partly as a result of the disproportionate influence of the Frankfurt School have received a democratic mandate. But given that discursive democracy is firmly rooted in the sphere of public opinion formation, it clearly merits inclusion in the scheme of representative isegoria.

7.4.3.3 Associational democracy

Dryzek applauds experiments with deliberative policy forums, insofar as they fall *outside* the liberal constitutional state (i.e. are firmly positioned in the domain of public-sphere isegoria):

[The] distance between deliberative polls and citizens' juries on the one hand and liberal constitutionalism on the other is perhaps secure to the degree that they remain advisory, rather than authoritative, policy-making bodies.⁵⁰ (Dryzek, 2000, pp. 82-3)

Radical theories of 'associational' democracy seek to straddle this divide by claiming that 'mediating forums', representative of civil society associations, might well perform both a deliberative (opinion) *and* legislative (will formation) role (Elstub, 2008). Such bodies would not be constituted by random selection but would be comprised of delegates of secondary associations⁵¹ representing those who would be most affected by legislation in a particular policy domain as there is no good reason why the agency concerned with regulating nuclear power should be the

⁵⁰ In this respect the perspective of Dryzek and this thesis are inverted as the thesis explores the potential of minipublics in terms of representative isonomia (judgment and will-formation), rather than isegoria.

⁵¹ 'Secondary' associations are purposive, voluntary and located in civil society (as distinct from the state and the productive economy).

same agency that deals with food additives, the education system and road networks. (Hyland, 1995, pp. 263-264)

One of the principal benefits that secondary associations can bring is the provision of information (isegoria should ideally be well informed):

[D]ue to their close involvement with their members, associations can provide information that would otherwise be unavailable to the state, such as experiential knowledge (J. E. Cohen & Rogers, 1995, p. 43; C. Davies, 2007, p. 56), which is vital to ensuring inclusion in the deliberative process (Sanders, 1997; Young, 1996). Through these capacities associations can make important contributions to external rationality necessary for autonomous preference formation and decision-making. (Elstub, 2008, p. 123)

The contribution of secondary associations to informed deliberation in the public sphere is uncontroversial:

In exchanging, representing and communicating ideas, information, beliefs and preferences, secondary associations generate deliberation and form a generalized debate in the informal public sphere . . . many try to influence the preferences of the general public by representing and voicing the views and interests of their members, trying to convince these other actors in the informal public sphere of their validity. (Elstub, 2008, p. 125)

So far so good, it is hard to think of a democratic theorist who would take issue with such a perspective. Where Elstub arguably goes beyond the pale is in his radical proposal for 'mediating forums', comprised of delegates from secondary associations representing all those who might be affected by policymaking in a particular domain. Mediating forums bear a close resemblance to John Burnheim's demarchic committees (see section 7.4.2), although members are delegated by secondary organisations, as opposed to being selected randomly. But the radical difference is that, unlike Burnheim's proposal for demarchic committees to have a purely indirect influence (via the response of elected politicians to public opinion), Elstub proposes arrogating legislative rights in the particular policy domain to the relevant mediating forum. Such a move would not just compromise liberal

constitutionalism, it would be more of a coup d'état and is a clear breach of the numerical equality that constitutes democratic isonomia – especially as secondary organisations with huge membership levels would have exactly the same number of delegates as tiny groups of self-selecting activists (Elstub, 2008, pp. 159, 166). Whilst one might hope that the legislative output of the mediating forums would be based entirely on the best arguments (as opposed to the aggregation of preferences) it would be a relatively simple matter for campaigning groups to establish any number of small secondary organisations in a particular policy area in order to dominate the legislative agenda of the mediating forum in an entirely disproportionate way. Even if such entryism could be avoided, Elstub acknowledges that 'inequalities in power and money are perpetuated in associational membership' and 'informal public spheres are plagued by inequality of access . . . enabling the discourses of the powerful to dominate' (*ibid.*, pp. 132, 133) and 'crowd out everyone else' (Mansbridge, 1992, p. 48). Whilst that is an inevitable factor of the proportional equality that characterises isegoria, it is a clear breach of the numerical equality that is the defining characteristic of isonomia, hence my agreement with Dryzek (albeit for entirely different reasons) that opinion and will-formation should be kept separate.

In summary, deliberative, discursive and associational democracy have an important role to play in opinion formation but the role should be quarantined to the informal public sphere. Any move beyond to the domain of democratic will-formation is a contravention of the representative isonomia that lies at the heart of democratic equality. A resolution of Elstub's 'Weberian dilemma – how to ensure that deliberation and democracy are effectively combined so that citizens actively engage in deliberation while ensuring the results of the deliberations are actualized into binding decision' (Elstub, 2008, p. 173) – requires a clear functional distinction, and institutional separation, between deliberation (isegoria) and decision making (isonomia). This being the case then deliberative and discursive democracy would pass the test for representative isegoria, in so far as they were limited to the informal public sphere; not so in the case of any form of associational democracy

that sought to extend its remit into the formal arena of democratic governance. This is because different (and less exacting) standards are appropriate for informal arenas (Estlund, 2008, Chapter X), Habermas accepting Marcuse's⁵² argument that discourse in the informal public sphere should be 'wild', 'anarchic' and 'unrestricted' (Habermas, 1996, pp. 307-308) – a long way removed from the ideal speech situation and the unforced force of the better argument (*ibid.*, p. 306).

7.5 Reception and evaluation of representative claims

Saward's conception of democratic legitimacy (*claim-reception*), explored at length in Chapter 6 of his book, is as constructivist as his notion of democratic *claim-making*. 'Democratic legitimacy in the book is understood as "perceived legitimacy"' (Saward, 2010, p.84). However if that's the case, then it's not clear what the distinction is between democratic and other forms of legitimacy. When the Athenian assembly decided in 411 to abolish itself in favour of an oligarchy, did that make the outcome of the decision *democratically* legitimate? To the Athenians, democracy (rule of the people) required the formal *ongoing* equality of all citizens in the decision-making process, in which every vote carried equal weight so, although the oligarchy was perceived as *legitimate* by Athenian citizens, its rule could not be defined as *democratic*. No doubt seventeenth-century Englishmen perceived the restoration of the monarchy as legitimate but could that outcome be described as *democratically* legitimate (assuming they had voted for it under universal suffrage)? Note that 'perceived legitimacy' to Saward is *not* just that the original social contract should have been determined democratically (i.e. by equal votes in some form of plebiscite, it is 'the acceptance of claims *over time* by appropriate constituencies, under certain conditions' (*ibid.*, my emphasis), i.e. *ongoing* legitimacy. In which case, had the Stuart restoration survived, this would be, according to Saward, an example of democratic legitimacy if it was perceived as such by His Majesty's loyal subjects. The governance of the People's Republic

⁵² Needless to say Marcuse would have had no time for my argument for representative isegoria via (capitalist) media as this would be merely an indication of false consciousness on the part of the subscribers.

of China involves an evaluation of the representative claim of the Chinese Communist Party, perceived as legitimate by most Chinese citizens, but we would be hard pressed to describe the legitimacy as democratic in nature. This would suggest that *formal ongoing isonomia* (mathematical equality), rather than 'perceived legitimacy' is the factor that distinguishes democratic from other forms of political legitimacy. Democracy is a political institution in which the people have power (formally speaking), not a 'perception' or attitude of mind. It is perfectly possible for citizens of a working democracy to view their system of government as entirely *lacking* in perceived legitimacy (for epistemic and other reasons), but this would not mean that it was any less democratic. Saward's final definition of democratic legitimacy is as follows:

[P]rovisionally acceptable claims to democratic legitimacy across society are those for which there is evidence of sufficient acceptance of claims by appropriate constituencies under reasonable conditions of judgment. (Saward, 2010, p. 145).

In line with his constructivist premises, the political theorist 'or any other observer' is denied any privileged perspective as to what constitutes an 'appropriate constituency' as the 'ultimate judge' is the constituency itself (*ibid.*, p. 145). This is partly a consequence of the emphasis of deliberative theorists on the need to include 'all affected interests' (which has the potential to extend constituencies a long way beyond both the territorial limits of the Westphalian state), as against the (classical) notion of citizenship as a territorial birthright or earned privilege. In an increasingly cosmopolitan world this brings into conflict the rights and interests of different groups of empirical individuals.

If constituencies are left to self-define, then who is to adjudicate between any clash of definition? Although the outpouring of charitable giving in response to Live Aid and other calls to address the needs of the people of Africa might give some credence to the representative claims of Geldof and Bono, nevertheless in times of fiscal austerity these have to be set against the competing claims of UK territorial constituents (i.e. taxpayers) and it is hard to see how these competing claims can be adjudicated purely on the basis of (self-defining) 'appropriate constituencies'. UK citizens who contribute towards the 0.7% of GDP international development levy might well argue that their own citizen rights should trump all affected interests.

Another problem with the representative claim model is the underwriting of existing patterns of passive political behavior:

Normatively, the risk is that the 'representative claim' ends up justifying audience-based conceptions of democracy, something that, even if thought inevitable, we ought to resist. (Castiglione, 2012, p. 122)

7.5.1 Justification of anti-democratic practice

Lisa Disch (2014) is happy to endorse Saward's constructivist approach to representative claim-*making* but is sceptical regarding his criteria for judging the democratic legitimacy of the claim. Her argument is that the representative claim approach only applies to the subject matter of this chapter as opposed to the other component in the democratic diarchy:

constructivists . . . pose these problems *not* with respect to the exercise of what Urbinati (2013) calls 'decision' [isonomia] but rather 'opinion' [isegoria] (*ibid*, p. 1).

Prior to the 'constructivist turn' in political representation (Disch, 2014), political representation was viewed in *constitutional* as opposed to constitutive terms⁵³ – 'a constitutional mechanism by which to connect the will of the people with the decisions of representatives. . . . It is the constitution that guarantees political equality in many countries' (Nasstrom, 2011, p. 505). But if one cannot fall back on a legitimate constitution (because it is in a process of real-time construction) then:

it becomes crucial to know how political equality among the actors is to be guaranteed. If not constitutionally, then how? How can we make sure that money, status, gender, race and access to time do not create inequalities among the makers of politics [representative claim-

⁵³ The difference being purely one of tense – 'constitutional' referring to early constitutive acts.

makers], and insofar as they do, can be detected and judged as such?
(*ibid.*, p. 507)

In practice some claim-makers are a lot more equal than others – the representative claims of celebrities like Russell Brand, Charlotte Church, Bono and Bob Geldof being substantially better-resourced than most of their fellow citizens. In the same way that UK citizens are concerned that the Prince of Wales may have undue influence over government ministers,⁵⁴ why should it be that the actress Joanna Lumley should effectively dictate an amendment to UK immigration policy (over the right to settle of Gurkha veterans)? Celebrity thespians like Hugh Grant had considerable influence over government media-regulation policy in establishing the terms of the Leveson Enquiry (M. Hume, 2012). The danger of the representative claim approach is to provide a *patina* of democratic legitimacy to blatantly undemocratic behaviour. More importantly, who is to determine what amounts to ‘reasonable conditions of judgment’ for the acceptance of representative claims – the political theorist or the ‘appropriate constituency’? If the latter (Saward is always reluctant to privilege the judgment of his own peers), and if the constituency is being constructed in real time then we are in danger of begging a very difficult question (Nasstrom, 2011, p. 505). Unlike the great political philosophers who wrote on democracy, we can no longer ‘take for granted that a people has already constituted itself’ (Dahl, 1990, p. 46).

One of the principal criticisms of a supra-national institution like the EU is the lack of democratic legitimacy – for the simple reason that the EU lacks its own *demos* in anything other than the purely formal sense. EU elections generally attract low participation levels and votes are often cast on the basis of extraneous and largely irrelevant factors, in particular in countries with a semi-detached or even hostile relationship with the EU, such as the United Kingdom. The institutions and culture

⁵⁴ The reference here is to the hand-written ‘black spider’ letters from the heir to the throne to government ministers exhorting them to follow the Prince’s own agenda on politically-contentious topics including the funding of alternative therapies by the cash-strapped NHS. <http://www.theguardian.com/uk-news/ng-interactive/2015/may/13/read-the-prince-charles-black-spider-memos-in-full>

of the EU mean that elected government is often superseded by ‘governance’ and political decision-making by ‘ad hoc formations, including specialized and expert bodies, and informal networks’ (Lord & Pollak, 2010, p. 129):

The community that was imagined as Kant’s dream has proven to be Arendt’s nightmare, a public space so entirely overgrown by administration as to be a domain of ‘policies without politics.’ (Disch, 2014, p. 14)

According to Peter Mair, the EU is ‘a political system that has been constructed by national political leaders as a protected sphere in which policy-making can evade the constraints imposed by representative democracy’, ‘safe from the demands of voters and their representatives’ (Mair, 2013, pp. 99, 109). The EU lacks the third of Dahl’s prerequisites for democratic governance (Dahl, 1966, p. xiii) – i.e. an official opposition to the governing institutions (Mair, 2013, p. 138).

Since the Lisbon Treaty, EU officials have enthusiastically taken up Saward’s Representative Claim and other constructivist models in order to counter the perception of the democratic deficit at the heart of their institutions of governance. The goal has been to legitimize the role of civil society organisations (CSOs) within the decision-making structure of the union. Whereas the role of political representatives according to the ‘standard model’ (Castiglione & Warren, 2005) is the transmission of citizens’ opinions and preferences, the constructivist view is that representation ‘anticipates’ or ‘articulates’ such preferences, ‘so as to form a constituency that does not yet (and may never) exist’ (Disch, 2014, p. 15). The purpose of such ‘societal representation’ is to foster a ‘*perception* of participatory governance’ to increase the likelihood that policies will be ‘regarded as legitimate’ by those affected by them (Bellamy & Castiglione, 2011, p. 117, my emphasis). Note the (disapproving) allusion here to Saward’s definitional claim that ‘democratic legitimacy . . . is understood as “perceived legitimacy”’ (Saward, 2010, p.84).

Although ‘societal representation’ might well be a democratically-valid term for the interaction between the *autonomous* groups that compose civil society and governmental institutions, since the Maastricht Treaty, EU CSOs ‘have been solicited and funded by the European Commission itself’ (Disch, 2014, p. 15). In

'representative claim' parlance, the intended audience (the Commission) is also the claim-maker that commissions (pun intended) the subject (the CSO), which is defined in terms of the object (civil society). The only independent element is the supposed referent (the *demos*), the ongoing democratic deficit being the distance between the CSO and the (nonexistent) *demos* that it claims to represent 'societally'. The judge of the fit between the CSO and the referent is the same body that commissioned (and funded) it in the first instance. Disch (citing Lord and Pollock, 2010, p. 131) goes so far as to describe this notion of representation as 'Orwellian':

in that the notion of 'sufficient collective representativity' (which permits EU decision-makers to exclude the European Parliament from decision-making if they 'judge that citizen's interests have been "sufficiently" represented by the CSOs whom the decision-makers themselves selected for inclusion in the process), unelected interest groups are recognized as and fully empowered to *substitute* for elected representation *at the discretion of the decision-makers*. (Disch, 2014, p. 16)

This leads Disch to conclude that 'constructivist accounts of representation could be seen as at once descriptively accurate and normatively troubling' (*ibid.*), a 'caricature' of constitutive representation:

Political 'institution of the social indeed! It is quite literally commissioning – calling for proposals, disbursing funds, and then consulting with – the social forces that it claims to represent while at the same time invoking these forces as 'spontaneous' evidence of an emergent European sociality/popular constituency. (*ibid.*, p. 17).

The critique of the democratic legitimacy of bodies appointed by non-elective means is by no means restricted to the European Union. In global politics the 'advocacy of difference' by NGOs is in the name of 'stakeholders' – i.e. those who have a stake in or are affected by a certain issue. The problem is that under present conditions

the activity in favour of stakeholders is not matched by numerical equality [isonomia] and it is difficult to see how such a system is going

to crystallize in the foreseeable future. The most powerful actors therefore have free rein to voice their interests at the expense of the many who lack a voice in global politics. (Nasstrom, 2011, p. 508)

No doubt Saward would view the EU example discussed above as a gross distortion of the representative claim model but it is a valuable indicator of the need for a *clear empirical separation* between those who make the claim and the audience/constituency that judges it, as well as an illustration of the question-begging involved in viewing the constituency in constructivist (constitutive) as opposed to constitutional terms. Bono can make a valid claim to represent a *discourse* on Africa (Dryzek & Niemeyer, 2008a, p. 481), but his claim to represent 'a lot of people in Africa' should be judged by a constituency (such as a representative sample of the people of Africa) as opposed to an audience (Western donor governments or the audience of a televised pop concert). As Saward himself put it in an earlier work: 'Ultimately, can democratic legitimacy exist absent popular voting on the basis of universal adult suffrage?' (Saward, 2000, p. 69). His answer in 2000 was a clear 'no', but ten years later he appears to have distanced himself from his earlier conservative scepticism.

7.6 Conclusion

Michael Saward's representative claim model has been adopted in this chapter as a loose template to accommodate the speech acts of a wide variety of political agents. However the model fails to provide an adequate standard to evaluate the democratic legitimacy of the claim making. The representative claim model is composed of six variables (maker, subject, object, referent, audience and constituency) and these variables have been shown by the EU example to be anything but independent. Simple binary distinctions – between *isegoria* and *isonomia* (classical Greece), opinion and will (Habermas and Urbinati), opinion and decision (Disch), advocacy and judgment (Madison) – are less open to corruption. They are also more suitable for a democracy – in which *all* citizens should be able to understand the rules under which they are governed, as opposed to restricting it to political philosophers with a sophisticated understanding of arcane analytic terminology. This is not to deny the great value of *The Representative Claim* in broadening the domain of the representation of opinion to include a richer variety of sources over and above elected politicians, merely to agree with Urbinati and

Disch's argument for a *categorical distinction between opinion and decision*, quarantining the representative claim to the former (the subject matter of this chapter). Saward appears at times to agree – for example with his acknowledgement that his perspective on the judgment and assessment of representative claims centres primarily on the notion of the 'open society' rather than democracy:

because [the open society] is a concept that pivots around openness of criticism, claim and response, whereas *democracy pivots around comparatively specific institutional arrangements*. (Saward, 2010, p. 154, my emphasis)

Quite. However it is democratic legitimacy that is the topic of the chapter from which this quotation is taken (arguably the weakest chapter in Saward's book). The thrust of the chapter (Chapter 6: Representation, Legitimacy, Democracy) is an appeal for an open society with the widest opportunities for representative isegoria possible. Citizens should be 'free to advocate, organize, and lobby and to claim to stand for, or speak for, interests broader than their own' (*ibid.*, p. 166); 'particular options or policies will have their champions, advocates or "representatives"' (*ibid.*, p. 161). But there is no *necessary* connection between the open society and democracy – the connection is contingent as the description of citizen rights in the previous sentence could (in principle) be just as pertinent to a liberal monarchical or oligarchic regime. The categorical distinction between monarchy, oligarchy and democracy⁵⁵ is the numerical constitution of the sovereign – who gets to *decide*? (the one, the few or the many), not the extent of isegoria rights. The principal weakness with *The Representative Claim* is the conflation of these two distinctions (both equally necessary to a properly functioning democracy).

Saward acknowledges that the open society bears a closer resemblance to polyarchy than democracy (*ibid.*, p. 155), but polyarchy, although a hybrid of liberal

⁵⁵ Strictly speaking, the comparable term would be demarchy, as at issue is the number of archons (rulers). For the people to have power (democracy) it is necessary for them to have numerical equality (isonomia) along with the equal advocacy rights (isegoria).

and democratic institutions, is still grounded in the view that the will of the people finds its expression in the equal counting of votes in demographically balanced constituencies (*isonomia*). Polyarchy is a descriptive rather than a normative project and the goal of this thesis is to find a more effective version of *isonomia* than the institutions of polyarchy/mass democracy.

The sheer variety of representative claim mechanisms opened up by Saward's model can only enrich democratic *isegoria*, but democratic *isonomia* presupposes the equal numerical voting rights of citizens in *pre-existing geographical constituencies* ('specific institutional arrangements' in Saward's terminology). Although the counting of heads (and their underlying preferences) may offend the (Kantian) internationalist and/or republican sensibilities of radical exponents of 'discursive democracy', this is a *sine qua non* for any system of political institutions that bears the name handed down from the Athenian *demokratia*. Deliberation (*isegoria*) has always been an elite function and perhaps always will be: 'Perhaps an ideal deliberative procedure is best institutionalized by ensuring well-conducted political debate among elites' (J. Cohen, 1996, p. 107). However 'crucial recent innovations in governance modes and policy-making are indeed deliberative, but undemocratic' (Papadopoulos, 2012, p. 129). This is because the *decision rule* (as opposed to mechanisms of policy advocacy) constituting democracy has always been quantitative rather than qualitative, so advocates of alternative systems of political decision-making should use another word, rather than hanging on to 'democracy' purely for the sake of the 'commendary force' of the term (Skinner, 1973, p. 301). Andrew Rehfeld (forthcoming) is clearly right in extending the Skinnerian critique to the analysis of the concept of representation by seeking to strip it of the normative (liberal democratic) baggage with which it has been associated in, for example, the work of Hanna Pitkin. But there is a danger that this, alongside the constructivist turn in representation studies, will provide sustenance to the growing number of political activists who rule out the very notion of electoral representation as intrinsically undemocratic (and, conversely, the growing number of political theorists who view electoral representation under universal suffrage as epistemically unattractive (Brennan, 2016)).

The thesis so far has attempted to bring some theoretical clarity to the conceptual diarchy of *isonomia* and *isegoria*; the final chapter is a very tentative exploration of

some options as to how the diarchy might be implemented in the constitutional arrangements of a large modern state.

CHAPTER EIGHT

8. From Theory to Praxis

Appendix I of this thesis reproduces an article that I published on *Open Democracy* calling for a sortition-based alternative two months before the actual ‘Brexit’ referendum. The surprise result of the referendum vote has led to considerable wailing and teeth-gnashing within both academia and the commentariat regarding the (alleged) ignorant xenophobia of voters – including some calls to consider sortition as a better way to sample well-informed public opinion (Van Reybrouck, 2016b; Whittam Smith, 2016). Others even go so far as to question the wisdom of universal suffrage, a prime example being Jason Brennan’s *Against Democracy* (Brennan, 2016), a Platonist polemic on the danger of putting excessive political power in the hands of *hoi polloi*. My proposal for a sortition-based alternative to the Brexit referendum was originally floated in the *Spectator* in June 2013, three years before the event:

If David Cameron wants the people to decide whether or not to remain in the EU, he should institute an adversarial public enquiry. However, rather than leaving the verdict to a Lord Justice, it should be decided by a randomly selected citizen jury, several hundred strong. There is a growing body of evidence indicating that such juries are capable of deciding complex issues in a sensible way and, crucially, that the majority verdict would represent the considered judgment of us all.¹

If the proposal had been taken up at the time it would certainly have ensured a high impact factor for my research. This thesis is, however, a work of analytical political theory, intended primarily to clarify the meaning of, and normative case for, descriptive and active representation and it is therefore with considerable trepidation that I trespass into areas of political and constitutional reform. The

¹ <http://www.spectator.co.uk/2013/06/letters-285/>

thesis, however, clearly does have implications beyond the ivory towers of academe and its publication is timely, given the widespread view that electoral democracy is undergoing a crisis – both from an epistemic and legitimacy perspective (Brennan, 2016; Crouch, 2004; della Porta, 2013; Hayward, 1996; Norris, 2011; Papadopoulos, 2013; Tormey, 2015; Van Reybrouck, 2016a).

This final chapter, therefore, is an attempt to speculate – albeit somewhat wildly – about possible ways of implementing sortition in the real world. If this looks like kite flying then it probably is. The principal focus of this chapter is the UK – as it is not an exercise in comparative institutional analysis, it would then be up to others to judge whether or not my proposals would be modifiable for other polities.

Published advocates of the political potential of minipublics tend to be all or [next to] nothing – either (8.1) sortition is viewed as an alternative balloting mechanism for selecting political representatives, who would then exercise identical powers to elected politicians, or else (8.2) the role of minipublics is purely advisory – i.e. ‘exercises in “reformist tinkering” rather than “revolutionary reform”’ (Fung, 2003, p. 339). This thesis pursues a *via media* between these two extremes – (c) stochation could, if carefully augmented with existing electoral institutions, lead to significant improvements in both democratic legitimacy and governance outcomes, but it is – *pace* David van Reybrouck and other ‘sortinistas’ – no magic bullet. In tribute to Robert Dahl I refer to my proposed hybrid of electoral, direct-democratic and sortive institutions as Polyarchy III (See Section 8.3, below).

8.1 Sortition as an alternative way of selecting political representatives

I include in this category theorists who envisage allotted and elected chambers operating in parallel as there is no acknowledgement of Hanna Pitkin’s analytic distinction between the entirely *different* (and complementary) functions of descriptive and active representation (see Chapter 4, above). Dahl, for example, envisages two *minipopuli* – one to decide on the agenda of issues and another to judge the outcome as ‘the judgment of the minipopulus would “represent” the judgment of the demos’ (Dahl, 1989, p. 340). This thesis would agree with Dahl regarding the latter claim (assuming a large and quasi-mandatory statistical sample) but would argue that an agenda-setting minipopulus would contravene his

own requirement that ‘the demos must have the exclusive opportunity to decide how matters are to be placed on the agenda’ (Dahl, 1989, p. 113), on account of the imbalances introduced by the differences in the perlocutionary outcome of the speech acts of persons selected at random. A study of widely divergent participation levels in the small-group sessions of Deliberative Polls found that:

[t]hose who participate may not be able to participate on an equal footing. The garrulous, those strongly attached to their views, those who think the issue is important, the self-righteously knowledgeable, among many species, all prefer talking to listening, often at the expense of giving the others the chance to air their views. Then there are those who, even when they have the opportunity to talk, talk very little. (O’Flynn & Sood, 2014, p. 46)

As a consequence, different allotted samples would almost certainly come up with different agendas – the outcome would be random in the pejorative sense – so there would be no way of knowing which agenda represented the informed and considered preferences of the target population. If Dahl had read Pitkin and Austin more carefully he might have designed his proposal – which was little more than an off-the-cuff footnote to *Democracy and Its Critics* – with greater precision.

Other sortinistas seem to be blissfully unaware of Pitkin’s distinction – Callenbach and Philips’ *Citizen Legislature* (2008), Kevin O’Leary’s *Saving Democracy* (2006) and David Van Reybrouck’s *Against Elections* (2016) all argue for parallel chambers with identical powers.² It is assumed that allotted and elected representatives would perform the same functions, merely being selected by, respectively, ‘democratic’ and ‘aristocratic’ mechanisms. The (interim) preservation of elected chambers is largely for prudential or tactical³ reasons.

² Brett Hennig’s *The End of Politicians: Time for a real democracy* takes this approach to the logical extreme, as the title indicates. (Hennig, 2017)

³ Given that (elected) turkeys are highly unlikely to vote for Christmas, these ‘entryist’ authors prefer the Ashanti tactic of caution and guile – ‘softly, softly, catchee monkey’.

There have, however, been a number of proposals for allotted second chambers that would perform a purely checking or monitoring function, as is the case with the delaying, revising or veto role of current upper houses. The majority of such proposals are from journalists or online bloggers, the principal exception being Anthony Barnett and Peter Carty's *The Athenian Option: Radical Reform for the House of Lords* (2008), which is based on the authors' submission to the Royal Commission for House of Lords Reform in 1998.⁴ In many respects concrete proposals for House of Lords reform are pushing at an open door seeing as, since the birth of the American republic, there is little agreement over how upper houses should be constituted, given the perceived illegitimacy of the hereditary principle (Wood, 1998, Ch. VI).

Barnett and Carty's proposal does respect Pitkin's distinction, as the right to initiate and argue for or against legislative proposals is limited to the (elected) lower house, the House of Lords possessing only the right to assess legislation – 'a chamber of scrutiny unable to challenge the legislative will of the Commons' (Barnett and Carty, 2008, p. 17). This would 'preserve the existing relationship between the two houses of parliament, and it would do so in a creative and democratic fashion' (*ibid.*, p. 18).

There is a similarity between Barnett and Carty's model and Harrington's bicameral legislature, the only difference being the inversion of terminology. For Harrington the (elected) Senate had the initiative rights whereas the (part-allotted) lower house (the Prerogative Tribe) determined the outcome. I originally rejected Barnett and Carty's proposal as it struck me as confusing for a lower house to be constituted by an aristocratic method (election) and an upper house by a democratic method (sortition). But this is just a quibble over nomenclature and an upper house of 'People's Peers' or 'Peers in Parliament' (PPs) constituted by sortition would be relatively easy to institute in the current political climate in

⁴ Similar proposals have been made in Belgium, France and Canada.

parliamentary democracies like the UK (*ibid.*).⁵ Needless to say the term of office of PPs appointed by sortition would be extremely short (to stop them from ‘going native’), although overlapping terms of tenure would be necessary in order to ensure adequate familiarity with the legislative process. Although my own proposals go much further than Barnett and Carty, theirs would make for an ideal (and relatively low-risk) testing ground for the experimental implementation of sortition.

8.2 Advisory bodies

However most experiments with minipublics – whether planning cells, citizens’ juries or consensus conferences – are for purely advisory bodies: ‘mini-publics have typically been initiated by policy-makers as *ad hoc* consultative bodies’ (Gronlund, et al., 2014, p. 3). Of the four types of minipublic catalogued by Archon Fung in his 2003 survey article, only one – ‘participatory democratic governance’ – seeks to incorporate direct citizen voices in the determination of policy agendas (Fung, 2003). Unfortunately neither of the examples provided by Fung under this category – participatory budgeting in various Brazilian municipalities and the Peoples’ Campaign for Democratic Decentralization in Kerala, India – use sortition as a selection method.

The Deliberative Polling programme is even less ambitious – ‘deliberative polls are not designed to substantially advance popular control over state action or to improve policy’ (Fung, 2003, p. 355); Deliberative Polls are the only entry in the ‘most restrictive’ category of minipublic (Ryan & Smith, 2014, p. 15). Although Fishkin makes the *theoretical* claim that the decision outcome of a Deliberative Poll would constitute ‘reason-based public-will formation by the people themselves’ (Fishkin, 2014, pp. 30-31), in practice the DP is little more than a (well-informed) public opinion survey with no direct public-policy entailments at all.⁶ Whether the

⁵ Less so in presidential systems like the US where the Senate and Congress possess overlapping prerogative powers.

⁶ The only recorded instance of the decisions of a DP being converted into public policy is the Zegou poll in the People’s Republic of China (Fishkin, 2009, pp. 106-111).

modest claims of the DP programme reflect the reluctance of the bodies that sponsor the polls to undermine their own power, or the marketing strategy of Stanford's Center for Deliberative Democracy (the two factors may be interlinked as Deliberative Polling® is a registered trade mark) is hard to say but, given that Fishkin was a student of Dahl at Yale, this modesty is hard to understand.

The aim of this chapter is bolder – what follows is an attempt to develop Dahl's vision of Polyarchy III (Dahl, 1989, Ch. 23) – a 'sketch for an advanced democratic country' – based on a hybrid of electoral, direct-democratic and DP-style institutions. Given Fishkin's intellectual debt to Dahl (and my own to Fishkin), I hope that my attempt to flesh out Dahl's back-of-the-envelope proposal will be sympathetically received.

8.3 Polyarchy III

Let's begin by reminding ourselves of the democratic diarchy according to Dahl:

The process for making binding decisions includes at least two analytically distinguishable stages: setting the agenda and deciding the outcome. (Dahl, 1989, p. 107)

For the decision process to be considered a democratic one, this presupposes that in the first stage:

The demos must have the exclusive opportunity to decide how matters are to be placed on the agenda of matters that are to be decided by means of the democratic process. (*ibid.*, p. 113)

Whereas at the second stage:

At the decisive stage of collective decisions, each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen. In determining outcomes at the decisive stage, these choices, and *only* these choices, must be taken into account (*ibid.*, p. 109, my emphasis)

According to this thesis Dahl's democratic diarchy is best characterized in terms of the classical Greek concepts of equal political freedom – isegoria for agenda-

setting and isonomia for judging the outcome, the only difference in large modern states being the need for representative mechanisms at *both* stages.

8.3.1 Representative isegoria (agenda setting)

As discussed above (and in detail in Chapter 4), Dahl is wrong to believe that a minipopulus could be responsible for democratic agenda-setting as there is no way to ensure the representativity of the speech acts of randomly selected individuals. Unlike in ancient democratic city-states, where every citizen had the right to speak, large modern states require representation mechanisms to institute isegoria, so Chapter 7 proposes a combination of election and direct-democratic initiative. In the former case the winning party/ies in an election would have the right to set the political agenda according to the electoral formula in place. In first-past-the-post systems the right would be limited to the party that gains a simple plurality of the votes, whereas in PR systems political parties would be authorized to introduce proposals in proportion to their share of the total votes. (The argument here refers to election manifesto commitments;⁷ for legislative needs arising from contingencies that occur between elections, along with statutory instruments, see p. 299, below.) As agenda-setting by preference election is entirely familiar to modern readers there is no need to devote any further space to elaborating or justifying it, over and above re-emphasizing that those who set the agenda should not be the same as those who judge the outcome (as is currently the case in modern electoral democracies).

Regarding direct democracy, citizen initiatives that received a minimum of 100,000 online votes would be put on the ballot paper for an annual public votation, whereby *all* citizens indicate their preferred initiatives, with the top *x* being accepted for deliberative scrutiny in the decision-making forum. This is a direct analogue of the 4th-century Athenian legislative process, whereby the assembly decided (by

⁷ Which would need to be couched in quasi-formal terms, as opposed to vague generalities (Cowley & Ford, 2016), thereby supporting Lord (Alan) Sugar's argument that manifesto commitments should be subject to corporate-style audits and subject to the criminal law ('Manifesto lies must mean jail, says Sugar, *Sunday Times*, 30 July 2017, p. 12).

show of hands) which isegoria-derived proposals were to be referred for scrutiny by the *nomothetai* (allotted legislative panels), and which did not merit further consideration.

Athenian democracy did, however, reserve a role for the allotted *boule* (Council of 500) in the agenda-setting process. As the secretariat for the assembly the council was responsible for drawing up the agenda for meetings, including allocating time for debating new legislative proposals. Modern schemes for the use of allotted bodies to approve or reject popular initiatives are modelled on the Athenian council, a recent example being the 2011 *What's Next California* randomly-selected panel for the deliberative review of citizen initiatives:

A mini-version of the population can engage in extensive face-to-face discussion and weigh the reasons for any proposal being important enough to bring to a public vote. In Ancient Athens, the Council of 500, chosen by lot, set the agenda for everyone's votes in the Assembly. In this case, a representative group of 412 Californians, chosen by lot, set the agenda for everyone's votes in ballot propositions. (Fishkin, 2014, p. 37)

However modern proposals based on the Athenian *boule* overlook the fact that the council was a collegial magistracy (administrative agency), *not* a representative decision-making body (Manin, Urbinati & Landemore, 2008) and its primary role was to protect the sovereignty of the assembly (Headlam, 1891, p. 63):

The council was not, as we are apt to think, a dignified deliberative body, where men met together quietly in order to discuss and prepare schemes for the public welfare . . . It was not deliberative, but an executive body; it was concerned not with policy, but with business. (*ibid.*, p. 57)

It was also the case that most Athenian citizens would have served on the council at least once during their lifetime and everyone would have known someone currently serving, on account of the tribal basis of the sortition pool. In addition, *all* citizens could vote on legislative proposals in the assembly, so the role of sortition in the agenda-setting process was of a purely administrative nature and sortition

advocates (and deliberative democrats in general) are wrong to use the council as a template for a representative agenda-setting body.

It might well be objected that both forms of agenda-setting (electoral and direct-democratic) are open to domination by political, financial and media elites. This is undeniably true (in the case of political elites, tautologically so). However the primary currency of electoral politics is votes, not dollars, and political parties that consistently ignore the preferences of the electorate will, over time, fail. In 2016 all three mainstream political parties in the UK received a bloody nose for ignoring voters' concerns over immigration, and Dahl might well have moderated his anxiety over the power of intellectuals to dominate the policy agenda in the light of Brexit, UKIP, The Tea Party and the Trump phenomenon (Dahl, 1989, pp. 332-5).⁸ Elites are currently taking an electoral bashing in most developed economies and the devolution of the decision function to a representative sample of ordinary citizens might well prove to be the final nail in the coffin of classical Mosca/Pareto/Michels ruling class theory. Besides which, the key prophylactic against elite rule is the *poly* in 'polyarchy' – it should not be forgotten that the original *demokratia* was the accidental by-product of a conflict between different aristocratic factions. Cleisthenes may well have 'recruited the people into his own faction' (Hdt. 5.66.2) but the democratic tail ended up wagging the pedigree dog. In the modern-day Crufts the people are the judges and will pick their own champions according to whatever criteria they deem appropriate.

8.3.2 Representative isonomia (judgment)

At the decisive stage of collective decisions, each citizen must be ensured an equal opportunity to express a choice that will be counted as equal in weight to the choice expressed by any other citizen. (Dahl 1989, p. 109)

⁸ These Anglophone developments are closely paralleled in other mature democracies, for example the support for Marine Le Pen's *Front National* in France, the *Alternative fuer Deutschland* in Germany and the *Partij voor de Vrijheid* in the Netherlands.

In the restored Athenian *demokratia* decisions by large randomly-selected juries were considered a better form of *nomothesia* than the show of hands in the assembly. Whilst the change was largely for administrative convenience it was also considered to have epistemic merit (on account of the lengthy exchange of reasons between advocates, the higher age qualification and the swearing of the Heliastic Oath). Although the claim that the allotted jury constituted a representative sample of the citizen body might well be anachronistic, there is certainly no contemporary evidence that the fourth-century approach to lawmaking was seen as undermining democracy (Cammack, forthcoming). In fact the switch from everyone voting (in the assembly) to a sample of citizens (in the *nomothetai*) drew very little comment – Aristotle not even bothering to mention it in *Ath. Pol.* There is no evidence whatsoever to suggest that the move to legislative decision-making by allotted jury was viewed as undermining the sovereignty of the demos.

A model for Polyarchy III might well benefit from this ancient precedent, along with the relatively high level of confidence in the modern world that the randomly-selected jury is (at minimum) the least-worst procedure for determining the outcome of a judicial trial. If the Athenians decided to extend the procedure of the law courts (*dikasteria*) to the ‘trial’ of new laws, then why not follow the example for the trial of laws in the High Court of Parliament? A reincarnated *nomothetai* system would also benefit from the modern understanding of proportional sampling methodology in terms of the relationship between the absolute number of jurors and the decision threshold necessary to establish sufficient (statistical) confidence in the reliability of the decision vis-a-vis the target population. A number of criteria would need to be applied in order to ensure stochastic representativity:

- Participation would be quasi-mandatory, as is the case with (UK) trial jurors. A generous stipend would be necessary along with child-care and travel allowances. Employers would be expected to permit attendance in the vast majority of cases (see Chapter 4, above).
- The default position regarding exclusion from the sortition pool would be non-citizens and those sectioned under the Mental Health Acts of 1983 and 2007. For consideration regarding convicted felons, see p. 163, above.
- The default minimum age for selection would be 18, as is the case with voting rights. In an earlier work (Sutherland, 2008, p. 148), I argued for a

higher minimum age, based on the fourth-century Athenian argument that lawmakers should be drawn from the ranks of mature citizens, but it would be hard to argue that this would not discriminate against the interests of younger people, already comparatively disadvantaged in comparison to their baby-boomer parents. (Willetts, 2011)

- My earlier proposal also (controversially) included a minimum IQ test (Sutherland, 2008, pp. 143-4). The minimum age threshold is an implicit form of political competence testing, but whereas there is a minimum age requirement for a driving licence, drivers are also required to learn the Highway Code and pass a demanding test before being allowed behind the wheel of a car (Graham, 2002, p. 38). If so, then surely legislative jurors should be tested to ensure they can at least understand the topic that they are being asked to rule over? I have since been persuaded that such a proposal suffers from serious democratic flaws and that – given universal secondary education – the presence of a few *idiotes* as statistical outliers is unlikely to significantly affect the outcome.
- It's a sign of our meritocratic times that elitists like Gordon Graham now propose terms like 'competence' as a prerequisite for the franchise whereas Gladstone spoke of *moral* qualities like 'self-command, self-control, respect for order, patience under suffering, confidence in the law . . .' (Gladstone, 1864, col. 324-5). Given the obvious difficulties involved with a test for moral competence, a case could be made for a modern equivalent of the Heliastic Oath (see p. 60, above).
- The role of the juror is, in Dahl's words 'to express a choice that will be counted as equal in weight'. The role of the jury is to determine the outcome via a secret vote – speech acts would be limited to asking anonymous written questions, as in current juridical practice (see Chapter 5, above). Unlike in current parliamentary democracies where most MPs only enter the chamber on hearing the division bell, attendance throughout the debate would be mandatory.
- The term of service should be as short as possible. Some modern proposals for allotted assemblies consider terms of 1-3 years (in order to ensure an adequate level of experience and continuity), but this assumes that an allotted parliament/congress would operate in a similar manner to an elected one. However the Athenian *nomothetai* – the preferred model

for this thesis – were ad hoc (a different panel was selected every day for each new law). Such a model assumes exogenous information/advocacy and that the continuity and accountability requirements of governance would be provided by different agents/institutions (see section 8.3.5, below).

- The size of Athenian juries varied from 501 to 5001, depending on the importance of the case or the law under consideration. There is no evidence as to whether numerical considerations were related to fears of jury-tampering or pretheoretical intuitions regarding the accuracy of a proportional sample.⁹ Dahl proposed that a minipopulus should comprise ‘perhaps’ 1,000 citizens (1998, p. 340) and this approximates to the minimum advocated by statisticians with a research interest in sortition.¹⁰ Deliberative polls, on the other hand, are generally composed of only 200-300 persons and legislative assemblies 500-600. Leaving aside issues of cost, clearly the larger the sample, the more accurate the descriptive representativity, until the threshold for rational ignorance is exceeded – at which point participants cease to perform the role of an ‘attentive’ (mini)public as the power of their individual vote to determine the outcome is reduced.
- Allied to the sample size is the decision threshold – a simple majority threshold would require an exponentially larger sample than (say) a 60/40 supermajority. Consistency of decision outcome between different samples of the same population would be essential if the minidemos were viewed as a proxy for ‘what everybody would think under good conditions’, so a close decision on an important issue (the UK Brexit vote was 52/48) might well require replication over a number of different samples, either synchronically or diachronically.

⁹ Although there was no notion of mathematical probability in the pre-modern world, every cook knows that in order to reliably sample all the ingredients in an unhomogenized soup a large ladle is likely to be more accurate than a teaspoon.

¹⁰ <https://equalitybylot.wordpress.com/2015/04/01/sortition-and-the-need-for-internal-deliberation/#comment-15835>

As a work of political theory this thesis is only concerned to draw attention to these issues, rather than make any firm recommendation on sample size and decision threshold. If the conceptual distinctions are sound then it is for others with the relevant disciplinary qualifications to flesh out the numbers. Nevertheless some purely illustrative calculations will require a brief foray into statistical theory.

Two factors need to be considered when it comes to calculating the necessary sample size and decision threshold for a proportionately representative body. A ‘confidence interval’ (margin of error) is a range of values that is likely to contain an unknown population parameter. If you draw a random sample many times, a certain percentage of the confidence intervals will contain the population mean. This percentage is the confidence level. For example, suppose all possible samples were selected from the same population, and a confidence interval were computed for each sample, a 95% confidence level implies that 95% of the confidence intervals would include the population parameter.¹¹

Given that it would be *essential* for a legislative minidemos to be an accurate portrait-in-miniature of the target population, the most demanding confidence level of 99.9% is assumed in the following calculations¹² of sample size and decision threshold for a target population the size of the UK electorate (37,831,600) or US electorate (235,248,000):

Margin of error	Decision threshold	Sample size
2%	52/48	6,766
5%	55/45	1,083
10%	60/40	271

Table 8.1: Margin of error, decision threshold and sample size

¹¹ http://stattrek.com/statistics/dictionary.aspx?definition=confidence_level

¹² Computations from the online calculator at <https://www.mccallum-layton.co.uk/tools/statistic-calculators/sample-size-calculator/>. The absolute size of the target population is unimportant (if it is a very large number). Other sample size calculators give slightly different results (for example <https://www.surveysystem.com/sscalc.htm>), but the concern of this thesis is only the statistical principle involved, not the absolute numbers.

It must be emphasized that the sample size calculations presuppose the full independence of each sample member (i.e. active participation limited to voting in secret) and quasi-mandatory selection – any deviation from these principles would involve a sharp decrease in the (statistical) confidence level. The sample sizes involved are in the same ballpark as the Athenian legislative juries and the ancient argument that more important cases required larger juries would certainly pertain, if only for reasons of budgetary constraints –vs– (public) confidence. A minor bill would only require a sample of several hundred, but if the resultant vote fell outside the margin of error for that jury size (10%), a ‘retrial’ would be necessary in front of a larger jury. The Brexit result (52/48) would suggest that a jury of well over 6,000 would have been necessary for accurate representation, possibly divided between a number of parallel sittings. If (say) eight or ten juries of 1,000 had listened to identical balanced briefings from the advocates of the Remain and Leave campaigns and then voted, the aggregate vote could well be taken to indicate the considered will of the whole electorate. If the outcome were closer than 52/48 this would trigger a full public referendum (or, as the precautionary principle might suggest, the maintenance of the status quo).

The adoption of larger juries (1,000+) with mandatory participation would almost certainly preclude the need for stratified sampling, but juries for minor legislative bills, that might only be felt to merit a sample of 200-300 might well require stratification in order to ensure a crudely representative sample. If so then standard polling industry practice would determine the relevant strata (age, gender, census category etc).

8.3.2.1 Advocacy (for and against the legislative proposal)

Fourth-century legislation required new laws to be proposed (twice) in the general assembly, during which any citizen could speak in favour or against the appointment of a nomothetic panel. If the majority assembly decision went in favour of appointing *nomothetai* then the proponent of the new law – if necessary with the assistance of paid *logographoi* (speech writers) – would argue his case in front of the legislative jury, five defenders of the existing law being elected by the assembly. The time allocated to each party was carefully balanced, after which the jury would return its verdict and the new law would either be accepted or rejected, hopefully on the basis of the ‘forceless force of the better argument’.

What might a reincarnation of such a system for a large modern state look like?

The representational equivalent of the proposal function is clearly the electoral and direct-democratic procedures described in Chapter 7, with the advocates for new laws drawn from the winning political party/ies and proponents of direct-democratic initiatives that received sufficient support in online votes and public votation. But what about advocates for the defence?

The obvious defenders of the status quo would be the ministers from the relevant department(s) who would be duty bound (often reluctantly) to put the new law into practice – Brexit being a good example. Ministers would be briefed by civil servants within the departments as to the expected costs and likely entailments for other aspects of public policy. The ‘forces of conservatism’ (Tony Blair) or ‘the blob’ (Michael Gove) would certainly not go unrepresented.

In my earlier work, *A People’s Parliament*, I also floated the idea of a permanent house of advocacy – a true aristocracy of merit – to replace the existing House of Lords:

There is no attempt made in this essay to camouflage the fact that the estate of the Lords Advocate would be unashamedly elitist in its composition – a body of the great and the good. But, at the same time it would be pluralistic and representative of the range of interests and the key professions necessary to comment on the issues that legislation is likely to cover. And the notion of an elite – a true aristocracy of talent, experience and merit – is perfectly compatible with a quota system. Thus quotas would need to be specified for business and the trades unions, science and its environmental critics, transport advocates and countryside conservationists, religion and the military, education, law, health, finance, culture, sport and all the myriad professions that might have something useful to contribute to the national debate. (Sutherland, 2008, p. 137)

To this I would now add think tanks such as the Institute for Fiscal Studies and independent agencies such as the Office for Budget Responsibility. In some respects the proposal would be analogous to the system whereby members of a college or professional body recommend the appointment of new fellows but, as in

the case of the legislative process, the appointment would be subject to ratification by the allotted parliament. Given the essential role of the dissenter, the maverick and the whistle-blower in public life, the position of Lord Advocate should be held for life. Parliament should not be in a position to silence the voice of dissent, however uncomfortable that might prove, except in the case where the Advocate was convicted of having acted in a corrupt manner. Given that Advocates would clearly be targeted by lobbyists, a strictly-policed register of interests would be essential.

A similar approach to Lords reform has been made by the veteran MP Frank Field.¹³ Field points out that, from earliest times, the House of Commons primarily represented group interests.¹⁴ However, the sleaze scandal of John Major's government – leading to the Nolan Report of 1995 – followed by the MPs' expenses scandal of 2009, has effectively barred the representation of interests in the lower house. According to Field this is 'absurd', as 'nations are made up of group interests'. Field argues that House of Lords reform should put the representation of group interests on a formal basis, using the Law Lords¹⁵ and Anglican bishops as a prototype. Field's new aristocracy of merit would be very similar to my own proposal outlined on the previous page:

A radical Lords reform would seek the representation of all the major legitimate interests in our society . . . women's and children's organisations and interests; the interests of trade unions, employers, industrialists and businesses; the cultural interests of writers, composers and communicators; the interests of the professions, and of local authorities so that regions are represented. . . Reform along these lines would ensure that power stays with the electorate –

¹³ Labour MP for Birkenhead since 1979.

¹⁴ A reference, presumably, to the Burkean notion of 'virtual representation' (see p. 99, above).

¹⁵ Field views the quarantining of the Law Lords to the Supreme Court as a highly regressive move, as their expertise is no longer incorporated directly into the legislative process.

through group membership – and is not hived off into the political parties. (Field, 2011)

Given the wide range of areas covered by legislation and the highly pluralistic nature of the Lords Advocate – including a majority still in full time employment – one would expect a great variation in the input that individual peers made to different legislative bills, as is the case in the House of Lords as currently constituted. Thus there would be no full-time salary, although generous payments would be made on a *per diem* basis for Advocates participating in a debate. A general research and correspondence secretariat would be made available to occasional Advocates who would not be able to justify the expense of their own personal office. Access to government information would be granted to Advocates and their civil service staff on the same basis that the prosecution is obliged to disclose evidence to defence lawyers in a trial.

If this is (rightly) seen as little more than hand-waving, I would once again emphasize that this is a thesis in political theory, not constitutional design. I would also point to the ability of the UK political system to evolve by ‘informal constitutional convention’, whereby institutions like the BBC, TUC, CBI and LGA were assimilated into the ‘administrative scheme’ via osmosis rather than formal design (Jennings, 1933). As is the case with quantitative easing, such an approach ‘works in practice, but not in theory’. It should also be remembered that the House of Advocates would have no proposal or voting rights, its function being purely the conservative one of defending the existing laws, so in this respect the role of Lords Advocate is not dissimilar to that of barristers and other hired professionals in the judicial process. The Brexit campaign has also shown the ability of advocacy groups to self-organise over high-stakes decisions.

8.3.3 Parliamentary committees

Randomly-selected laypersons, with a short term of service, would not possess the skills and experience necessary for the detailed scrutiny of parliamentary bills (the remit of standing committees) or the monitoring of government departments (select committees), so these committees would be composed of elected members and Lords Advocate. Regarding the latter, a study group of the Commonwealth Parliamentary Association concluded that the Lords

offered the only really deep analysis of the issues that is available to the parliamentary representatives . . . The Lords' reports are far more informative and comprehensive than those produced by the Commons committee on European legislation. (Grantham & Hodgson, 1985)

Nevertheless, given the risk – indeed likelihood – of the popular will being undermined at the committee stage of the bill, a subset of the allotted house could well be included to monitor proceedings, and the same principle would also apply to departmental oversight – where the danger is the growth of executive power absent the constraints of elected governance. Note that the 'impartial oversight' potential of sortition is advocated by authors who align themselves closer with the 'Blind Break' school of sortition (see Appendix II, below) rather than those arguing the case for stochation (descriptive representation via sortition).

8.3.4 Constituency affairs

Modern MPs spend most of their time dealing with the affairs of their constituents rather than holding the government to account and there is no reason to imagine this would be changed by sortition-based legislative decision-making. In addition to MPs' constituency 'surgeries' (which Winston Churchill scathingly referred to as 'setting up in the medical business'), in 2008 some 40,000 letters came in to the Palace of Westminster every day and the switch to (cost-free) email communication will have increased this volume exponentially. Most of this correspondence is from constituents and deals with local matters such as housing, welfare, planning etc. MPs' influence in these matters is largely confined to writing to local authorities and ministers on behalf of their constituents and there is no reason for the introduction of sortition-based lawmaking to alter this arrangement.

8.3.5 Accountability, consistency, fiscal responsibility and executive governance

The obvious criticism of law-making by ad hoc amateur bodies is that it would be a recipe for chaos, as no single and accountable agency would be responsible for ensuring that the laws were consistent with each other,¹⁶ that there were sufficient funds to pay for them all and other considerations relating to ‘joined up’ government. As the dramatists of the classical era pointed out, the allotted juror was in possession of the harlot’s prerogative¹⁷ (power without responsibility) and the buck had nowhere to stop. In Aristophanes’ *Wasps*, the juror Philocleon tells his son:

‘As far as our power is concerned it is nothing less than a kingship [*basileias*]. What creature is there today more happy and enviable, or more pampered, or more to be feared, than a juror?’ The jurors are supplicated to give certain verdicts, but Philocleon insists that they are able to decide whatever they want, as their power is entirely discretionary. Thus everyone fears them and they fear no one. ‘Do I not wield great rule [*megalēn archēn archō*], in no way inferior even to that of Zeus?’ . . . The jurors hold all others to account, but they are themselves unaccountable: ‘And for doing this we cannot be called to account [*anupeuthunoi*] – which is true of no other public authority [*archē*]. (Hoekstra, 2013, [p. 35, m/s])

It is also the case that most modern legislation consists of a vast number of dreary minor regulations that never appear in big-ticket manifesto commitments and that practical governance has more to do with responding to contingencies in real time (‘events, dear boy, events’, as Macmillan put it), rather than realizing visions of the New Jerusalem. On top of this there is Socrates’ famous objection to appointing

¹⁶ Although the original remit of the boards of *nomothetai* appointed in 403/2 was the revision and codification of the law, I am not suggesting that a corresponding task in a large modern state would be suitable for randomly-selected amateurs.

¹⁷ An accusation also levelled by Stanley Baldwin at press barons Lords Beaverbrook and Rothermere.

pilots and flute-players 'by bean'. If this were true in a small primitive *polis*, then how on earth could a modern large-scale democracy-by-lot be expected to work?

The answer of course is that it would be a disaster – sortition could only ever play a part in a mixed constitution that arrogated administrative powers to fully accountable agencies appointed by other means. Arguably it was always thus – Rousseau's supposedly 'sovereign' assembly of the people spends most of its time fast asleep, leaving the delegated government in charge (Tuck, 2016), and this would certainly be the case with a sovereign legislature appointed by lot.

The focus of this thesis is democratic law-making as opposed to governance, but the system of lawmaking inevitably has entailments for the executive office. In presidential systems the barrier (albeit constructed of wafer-thin and highly porous parchment) between the executive and legislature is such that changes to the system of lawmaking would not – at least in theory – have a significant impact on executive governance. But it would be a serious problem in parliamentary systems, where the government is composed of the largest party(ies) in parliament and would no longer be able to 'get its business' as a direct consequence of the parliamentary arithmetic.

As Rousseau pointed out, there is no necessary connection between the appointment method for governments and legislatures. As far as he was concerned a democratic legislature would need to be composed of all citizens (I argue elsewhere that a large descriptively-representative sample would not in fact contravene this principle (Sutherland, 2012)). A democratic legislature, however, does not mean that an executive could not be constituted by other methods – aristocratic (electoral) or monarchical (appointment).

8.3.5.1 Elected (aristocratic) executive governance

The immediate aftermath of the Brexit referendum has demonstrated that an elected government can, in principle, implement policies determined directly by the sovereign demos, even when the prime minister and leading members of the

cabinet (including the Chancellor) campaigned *against* those policies.¹⁸ Given that negotiations to leave the EU would be the principal task of government ministers for the next few years, the decision by the Conservative government to call a general election in June 2017 was presented as an opportunity for citizens to decide which of the two leading political parties (or, more specifically, their leaders) was most competent to execute *policies with which they both disagreed* – an outcome that Rousseau would have found entirely congenial:¹⁹

[The EU Referendum] has been responsible for the introduction of a new principle into the British constitution — the principle of the sovereignty of the people, a principle that supersedes the sovereignty of parliament. It means that parliament, for perhaps *the first time in its history*, is being required to carry out a policy to which it is radically opposed. (Bogdanor, 2016)

Note that in the case of the Brexit referendum, MPs voted by a margin of six to one to abolish parliamentary sovereignty.²⁰ The foreign secretary, Philip Hammond, proposing the European Union Referendum Act 2015, closed his speech with the argument that

the decision about our membership should be taken by the British people, not by Whitehall bureaucrats, certainly not by Brussels

¹⁸ There is a parallel here to the events of 1782, when George III was obliged (by parliamentary arithmetic) to accept a government that he did not like, although the modern reference is to policies rather than persons. (Hansen, 2010, p. 514)

¹⁹ Rousseau would also have approved of the fact that the referendum was decided on the basis of moral intuition (aka prejudice), with the deliberative exchange being for the most part entirely ignored by voters.

²⁰ In order, paradoxically, to repatriate it from Brussels to Westminster. The word ‘abolition’ is employed somewhat rhetorically as, from a legal point of view, the UK parliament remains the sovereign power. Nevertheless if the government had refused to accept the referendum decision there is a high probability that it would have been voted out of office at the next election. So from a Bagehottian perspective, ‘efficient’ power (on this matter) passed from parliament to the people, and both Bogdanor and the UCL Constitution Unit view this as an (effective) transfer of sovereignty.

Eurocrats; not even by Government Ministers or parliamentarians in this Chamber.²¹

The UCL Constitution Unit agrees with Vernon Bogdanor that the Brexit referendum may well be the prelude to a new era of popular sovereignty:

First, the referendum and its aftermath demonstrate that popular sovereignty, not parliamentary sovereignty, is now the central principle of the UK constitution. The doctrine that parliament is the ultimate sovereign power in the UK (or, at least, in England – Scottish nationalists discern a different heritage north of the border) was asserted by the nineteenth-century constitutional theorist A.V. Dicey. The emergence of referendums since the 1970s had eroded that principle. The referendum in June, however, was the first in which the popular vote went against the clear will of the majority in the House of Commons. That most MPs feel bound to accept that decision shows where ultimate power in UK politics actually lies. There has been great debate over the summer as to whether parliamentary approval is needed to trigger Article 50 of the Lisbon Treaty and begin formal talks on Brexit. But this has been something of a sideshow: even if the courts deem that parliament's consent is needed, it is all but certain to be granted. (Unit, 2016)

Given that legislative decision-making by sovereign minidemos would function in the same way as a referendum (except that the decision would be a) binding and b) better informed), could such a potentially agonistic relationship between sovereign and government apply in the general case? The principal *lawmaking* role of the government would be to explain to the allotted legislature the fiscal implications of changes in the law and the effect of one law on the existing body of statutes. The decision whether or not to build a new commercially-funded nuclear

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<http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150609/debtext/150609-0001.htm#15060939000001>

reactor has clear financial (if not fiscal) implications and has consequences for both the security of energy supply and climate-change policy. The government departments involved would advocate their various positions to the allotted sovereign, and there would be no shortage of advocates against any pro-nuclear policy. So there is no reason in principle why such a policy should not work. George Osborne's Treasury (rightly) played a key role in arguing the conservative case against Brexit, but it simply failed to persuade. So there is no inherent reason why an executive appointed by election should not be able to work in tandem with a sovereign allotted parliament. US presidents have more often than not had to work with a legislature dominated by their political opponents, so there is no reason in principle why a popularly-elected executive should not be able to work in tandem with a legislative assembly selected by lot.

As this is a thesis on lawmaking rather than governance, it could well afford to be agnostic regarding the best way of selecting government ministers (election or appointment). However, recent experiences in both the US and UK increasingly suggests that election is a sub-optimal way of selecting talented executives to implement the popular will. Given my defence of the mixed constitution (see section 8.4, below) it might well be argued that a modern equivalent of the (monarchical) principle of appointing government ministers on merit alone should be considered. This is for two reasons – first of all most modern politicians have, as Denis Healey put it, little or no 'hinterland' in the world of business or public affairs outside politics. The House of Commons in Healey's day reflected a wide range of occupations (MPs viewing their job as effectively part-time) – my own constituency MP for twenty years also worked as the chairman of a motel company. But since then politics has become increasingly professionalized, with many MPs following the career path of Oxford PPE followed by a period as a personal advisor to a serving MP. Leaving aside John Prescott's job as a steward on a merchant ship, one of the few members of Tony Blair's cabinet to have had significant outside working experience was Alan Milburn, who for a short time was the manager of a

Marxist bookshop called Days of Hope.²² Milburn went on to run the NHS, second only in its number of employees to the Indian railways. Election might well have been the best way to fill Athenian magistracies where skill and experience were held at a premium but it is an increasingly suboptimal mechanism for uncovering competent 'aristocrats' (i.e. those most competent for the job) in the modern world.

The other reason for growing scepticism with popular election as the way of selecting government executives is whether or not voters a) have the appraisal tools to distinguish between genuine talent and purely presentational skills and b) will make the choice based on competence rather than other cues. The 2017 UK general election was initially fought over which party leader was deemed more competent to conduct Brexit negotiations. The electorate, however, rejected the (supposedly) 'strong and stable leadership' offered by Conservative leader Theresa May and deprived her of a parliamentary majority,²³ by voting in unexpectedly large numbers for the policy proposals of a Labour Party team that contained few candidates with any kind of ministerial experience. It was also the case that the 'unassailable' polling lead enjoyed by May turned negative over a few weeks on account, in part, of presentational failures – political executives are judged not by what they do but what they say (and how they say it).

The conflation of policy and competence issues is (paradoxically) even more marked in presidential systems – Donald Trump may well have garnered support through presenting himself as the Dealmaker-in-Chief – the government CEO who would get things done – but a lot of his support was on account of his populist legislative policy proposals. Election as a way of choosing government executives will inevitably conflate policy and (apparent) competence so it is worthwhile at least considering the pre-modern alternatives for ministerial selection (even though executive governance is not the principal concern of this thesis). A mixed constitution is only as good as its weakest link, and the radical changes proposed

²² Known to its patrons as 'Haze of Dope'.

²³ In fact the Conservatives could have achieved an absolute majority with an additional 794 votes 'in the right place' (Laura Kuenssberg, *The Triumph that Wasn't*, http://www.bbc.co.uk/news/resources/idt-sh/General_election).

to the legislature will require rebalancing in other areas, hence this brief foray into the field of executive governance.

8.3.5.2 'Monarchical' (appointed) governance

In addition to the problem of competence some scholars have argued that the power of modern political executives would be better described as monarchical than aristocratic:

In a modern democracy the prime minister, in the USA and France the president, has powers that in some respects equal the powers wielded by an absolute monarch in the seventeenth and eighteenth centuries. Prime ministers have full power to appoint the ministers they want to have in their government and to depose them again if they do not live up to the prime minister's expectations. . . . If it had not been Tony Blair who was prime minister in 2003, Britain would not have joined the USA [in the 2003 Iraq war]. And if the president of the USA had not been George Bush, there might not have been a war at all.

(Hansen, 2010, pp. 524-5)

The UK political system has been described as an 'elected monarchy' (Benamy, 1965; Vile, 1967, p. 340) or even an 'elective dictatorship' (Hailsham, 1978). And the analysis is by no means limited to the UK – the term 'delegative democracy' refers to any state with a strong popularly-elected president: 'whoever wins election to the presidency is thereby entitled to govern as he or she thinks fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office' (O'Donnell, 1994, pp. 59-60). This analysis lends support to Rousseau's view that citizens of such states have little (political) liberty in between elections. From the perspective of the separation of powers this is entirely appropriate, given that Montesquieu's *de l'Esprit des Lois* (published in 1748) was based on an idealized and highly abstracted description of the English constitution in which the executive power was vested in the king (and his appointed ministers). The American founders opted for an elected president rather than a hereditary monarch but the use of a common mechanism (preference election) to fill both the legislative and executive powers should not be allowed to confuse the doctrine of the separation of powers (and persons). Whilst elected legislators could be described as (time-limited) oligarchics, elected presidential power is essentially

unitary (i.e. *mon-archical*) – the US president is commander-in-chief and hires and fires his own ministers at will (subject to Senate confirmation). The president is an elected monarch, although only for a defined period and without the right to pass on the baton of power to his own dynasty.²⁴

According to Hansen (2010, p. 526), following the lead of (Foley, 2001), UK prime ministerial power became increasingly presidential towards the end of the twentieth century.²⁵ Given the (effectively) monarchical nature of this power and the limited pool of talent and experience available to the electoral process (where the candidate's presentational and thespian skills tend to count for more) would it not be better just to acknowledge this? In the UK all ministers are appointed in the name of the crown, rather than the governing political party, so the British constitution would lend itself better than most to the appointment of crown ministers on merit, as opposed to election. The convention that government ministers must always be members of the Commons or the Lords stands on no firmer basis than an exchange of correspondence between Peel and Wellington in 1835. In fact the only *formal* requirement is that cabinet ministers should be members of the Privy Council – and this is only because the cabinet is in effect a committee of the Privy Council. So crown ministers appointed on merit alone would involve simply taking the hybrid notion of the 'Crown-in-Parliament' more literally.

This should not be read as a suggestion that reigning monarchs should revert to choosing their own ministers (although the idea might well appeal to a future King Charles III). Given that the executive function in the hybrid constitution suggested in this chapter would be *non-political* (i.e. implementing, rather than advocating [e.g.] Brexit) there is no reason, in principle, why the standard tools of executive recruitment (headhunters, competitive examination, sits. vac. advertising etc) should not be employed for government ministers. The shortlist would be drawn up

²⁴ This founding ideal was immediately confounded – the election for the second presidency being highly politicized and the return of John and then John Quincy Adams being an early precursor of twentieth- and twenty-first century dynastic developments.

²⁵ Michael Foley, *The British Presidency* (Foley, 2001); c.f. Graham Allen MP, *The Last Prime Minister: Being honest about the UK presidency* (Allen, 2003)

by the recruitment agency appointed by the permanent secretary of the department in question, and the candidates would present their case to an allotted minidemos convened for the purpose of making the final selection.

This is not, in fact, a radical departure from current practice. The lack of talent and experience in the electoral gene pool has led in recent years to a ministerial appointment process that increasingly resembles the American spoils system. New Labour ministers Estelle Morris and Ruth Kelly discovered that, notwithstanding their grand title 'Secretary of State for Education and Science', policy was really in the hands of Lord Adonis (never elected and of Liberal Democrat provenance). Meanwhile McKinsey consultants – the 'Jesuits of capitalism' – took over many of the tasks that were once the responsibility of elected politicians. McKinsey partner David Bennett was put in charge of appointing the head of the civil service, Adair Turner was put in charge of pensions policy and Nick Lovegrove forward strategy, leaving the arch-Jesuit John Birt responsible for 'blue skies' thinking at No. 10.

Gordon Brown appointed ex-CBI chief Sir Digby Jones as trade promotion minister (even though he almost certainly voted Conservative) and included Liberal Democrat peers Baroness Neuberger and Lord Lester in his team alongside former Metropolitan Police chief Lord Stevens (international security adviser) and former Navy chief Sir Alan West. What any of this has to do with party politics is unclear but if Tony Blair was going to have a big tent, Brown's was going to be even bigger.

The 2017 Conservative party election manifesto was written by Theresa May's two unelected advisors, Nick Timothy and Fiona Hill,²⁶ and then presented to the cabinet, MPs and party as a fait accompli. When the manifesto was found to be alienating core Conservative supporters, the revisions were contracted out to the Australian political consultant Lynton Crosby. The role of the party, MPs and cabinet in the manifesto was practically non-existent. Government policy in the Blair era was largely crafted in the PM's snug by the triumvirate of Blair, PR-chief

²⁶ With the assistance of junior minister Ben Gummer MP (status: 'also attends Cabinet'), who subsequently lost his seat in the 2017 election.

Alastair Campbell and polling guru Philip Gould; whereas in the Cameron era it relocated to dinner parties in Notting Hill and in the May era to the (unelected) intellectual progeny of Joseph Chamberlain.

There has also been a quiet revolution in (UK) public administration since the introduction of so-called 'Next Steps' government agencies (Child Support Agency, Prison Service, Passport Agency etc), headed by 'chief executives' recruited, primarily, from business rather than politics. As the agencies are not headed by political ministers they are not (directly) accountable to parliament yet provide employment for *three out of five* members of the civil service (Bogdanor, 2003b, p. 268). Government ministers have, in effect, already been moved over to what Bagehot referred to as the 'dignified' side of the constitution, as public administration is increasingly being conducted outside of the ministries. My proposal is simply to accept this de facto development and ensure that the heads of these executive agencies are given ministerial status and appointed and held to account directly by parliament. This is in line with Diana Woodhouse's proposal that officials heading Next Steps government agencies, although not elected politicians, should be responsible to select committees on their own behalf for the responsibilities delegated to them. (Woodhouse, 2004, p. 328)

It might well be argued that it would be hard to distinguish between the proposed new-style ministers and senior civil servants, but the principal difference would be that the former would possess the necessary presentational and advocacy skills to argue the department's case to the legislative assembly. Unlike career civil servants they would not be steeped in the technical knowledge specific to each department of state, but would be more likely to be drawn from industry, commerce, academia or law – although the post-Fulton civil service, replete with business and technical secondments is not so dissimilar (Bogdanor, 2004, p. 266). However, unlike in the *Yes Minister* scenario, the Minister for Administrative Affairs and his permanent secretary would most likely be united in their opposition to initiatives proposed by here-today, gone-tomorrow political advocates and direct-democratic wheezes from *hoi polloi*. But, as the Brexit referendum demonstrated, this does not mean that they would necessarily win the argument – this would be for the (mini)demos to decide. If the minidemos decided in favour of the new law then both the minister and her mandarins would have no choice but to put it into effect.

What about the constant stream of minor regulations that proceeds from both the government and the EU?

Much legislation takes the form of framework laws that leave important details to be filled in by subsidiary government regulations. . . . This kind of delegated or subordinated legislation is called 'statutory instruments' in Britain, 'Erlasse' in German and 'décrets-lois' in France. (Hansen, 2010, p. 515)

Statutory instruments are currently issued by government departments without any form of parliamentary scrutiny. Although this clearly constitutes 'une violation flagrante du principe de separation des pouvoirs' (Chantebout, 2009, p. 292), the issue is orthogonal to the argument of this thesis. Delegated/subordinated lawmaking amounts to a substantial proportion of the legislative casebook (half of all new statutes are EU regulations) and this would remain unchanged by the constitutional proposals outlined in this chapter (irrespective of whether the regulations originated in Brussels or Whitehall).

So where would the buck stop? New-style ministers would meet in cabinet and the likelihood would be that history would repeat itself and the First Lord of the Treasury would assume the title of 'prime' minister, as fiscal considerations are the common denominator between ministries. It is also hard to see how such a random and highly distributed system of ad hoc lawmaking could function without some sort of fiscal compact, legally obliging ministers to balance the government's books over the economic cycle. This was the policy of both principal UK political parties in the aftermath of the 2008 financial crisis – the intention of the (UK) Fiscal Responsibility Act (Labour), the Office for Budget Responsibility (Con-Lib Coalition) and the Charter for Budget Responsibility (Conservative) was to bind the hands of elected politicians by quasi-constitutional legislative safeguards to ensure that governments run a surplus in normal times – 'fixing the roof while the sun shines'. So there's nothing new there – the government would be legally obliged to achieve fiscal parity over the economic cycle, so the cost entailments of any proposed law would have to be presented to the minidemos. If a law required an increase in funding then the allotted parliament would have to agree to an increase in taxes or a reduction of spending in other areas. The government would still introduce an annual, or even six-monthly budget, constrained by the requirement for parity

between income and expenditure over the medium term. The only power ministers would have to enforce the fiscal compact would be the threat of resignation – either individually or en masse and such a resignation threat might well trigger the dismissal of the budget minidemos and a new sortition. In line with current business practice, ministers might also be rewarded with substantial bonuses for achieving departmental targets (fiscal and otherwise).

Ministerial liability

As is currently the case, ministers would be jointly and severally (individually) liable for the performance of their department, and subject to removal by confidence motion. The motion would be initiated by a member of the House of Advocates and the minister's fate determined by an allotted court convened for the purpose. Given that this could result in somewhat shaky tenure, the confidence motion might well require a supermajority to come into effect. It could also be argued that the confidence motion should pass a minimum threshold of support in the House of Advocates before an allotted panel was convened in order to ensure an appropriate balance between accountability and ministerial stability.²⁷

Even at the high point of parliamentary democracy the record of the House of Commons in respect to the doctrine of several ministerial responsibility is patchy and retrospective – there having been only seven ministerial resignations between 1855 and 1914 which could be attributed to the doctrine (Bogdanor, 2003a).

A minister may have cost the country thousands of lives and millions of pounds, by launching an ill-arranged expedition into the heart of a distant continent, too late for it to be of any use; and his defeat may eventually be brought about because his colleagues have decided –

²⁷ For ongoing electoral accountability (whereby political parties are rewarded and punished on the epistemic outcomes of their policy proposals), see Chapter 7.3.1. To repeat my earlier disclaimer, the exercise of executive power is not the subject of this thesis – it would make little difference to the overall argument for the introduction of sortition into the lawmaking process whether government ministers were elected or appointed.

perhaps in opposition to his own wishes – to put an unpopular tax on beer or bread. (Low, 1904, p. 148)

The reason for this was the growth of the party system and the increasingly clearly-marked opposition between the parties (Bogdanor, 2004, p. 14). As a result joint responsibility has become greater and several responsibility far less. In Bogdanor's view this was just as true at the end of the twentieth century. The separation of political party and government proposed in this thesis would bring about the reversal of this position – incompetence in one department of state would not bring down the entire government, but the minister heading the department (or executive agency) would be vulnerable to a censure motion.

It might also be thought that, in the absence of a strong party system, ministers would get an easy ride. But recent experience has shown that government duplicity, incompetence and malpractice is more often than not first highlighted by the press. In the case of the 1997 Blair government it was claimed that the fourth estate was the real opposition. Government ministers are more troubled by the prospect of a savaging by the BBC's John Humphrys or Jeremy Paxman than, as Denis Healey put it, the dead sheep on the opposition benches. The role of the Lords Advocate (who would call the censure motion) would very often be to follow up media-inspired lines of enquiry, making the establishment of a pluralistic print and electronic media even more vital (see Chapter 7.4.1, above).

The changes suggested in this section would lead to a sharp increase in the power of unelected agencies and this would (arguably) be necessary in order to counterbalance the power and (lack of) accountability of ad hoc minidemoi and new-style 'advocacy' parties. It would be difficult to describe the resulting constitutional arrangements as anything other than decidedly *mixed*. But then, if Hansen and Manin are right, this is *already* the case with existing 'democracies'.

8.4 Popular sovereignty – vs - the mixed constitution

An equal commonwealth is a government founded upon balance . . . a senate debating and proposing, a representative of the people resolving, and a magistracy executing. (Harrington, 1986, p. 407)

In a mixed constitution where the mixture is perfect, wrote the Philosopher, one should be able to see both democracy and oligarchy – and neither. Genealogical scrutiny discerns in representative government the mixed constitution of modern times. (Manin, 1997. p. 238)

The idea of the mixed constitution (*memigmenē politeia*) is one of the central ideas of Aristotle's *Politics*:

Aristotle thought that, by synthesizing democratic and oligarchic arrangements, one obtained a better constitution than regimes that were all of a piece. Various combinations of lot, election, and property qualifications allowed just this kind of synthesis. One might, for example, decide that magistracies should be elective (rather than assigned by lot) but that everyone, regardless of any property qualification, could vote or stand for election. (Manin, 1997, p. 27; Arist. *Pol.*, IV, 9, 1294b 11-14)

The last sentence is an accurate description of modern 'democracies', the only difference being that Mogens Hansen views modern 'republican' arrangements as including a key 'monarchical' element²⁸ (monarchy was not widespread in Greece at the time of Aristotle). The later threefold perspective on the mixed constitution is derived from the Greek writer Polybius, living in Rome in the second century BC, who described the Roman political system as a mixed constitution:

The government of Rome, Polybius argued, was a combination of monarchical, aristocratic, and democratic features. The consuls, and magistrates in general, constituted the monarchical element, the Senate the aristocratic element, and the popular assemblies (*comitia*) the democratic element. According to Polybius, it was the balance of these three institutions that gave Rome its exceptional stability. The three powers checked and balanced each other, thus avoiding the

²⁸ Cf. (Hitchens, 2000).

abuses of power that afflicted all pure constitutions (monarchy, aristocracy or democracy). (Manin, 1997, pp. 44-5)

The mixed constitution was superseded in the early-modern era by the doctrine of unitary sovereignty. The modern narrative of democratic governance *qua* popular will has its origins in Bodin's vision of absolute sovereign power, re-theorised by Hobbes and then democratised by Rousseau:

The revolutionary experiences of the 17th and 18th centuries challenged [the mixed constitution]. The English civil war had convinced Hobbes that sovereignty, hence the authorized representative embodying the state, but also the form of government, could not be divided, if not with great peril for the efficacy of political power, and for the security of the social body. Both Gordon Wood and Bernard Bailyn in their reconstructions of the political debates in colonial America from the 1760s to the 1780s insist on how the revolutionaries abandoned the classical trope of mixed government and a balanced constitution, so central to the English monarchy, to move towards a democratic republic founded on the principle of representation, or in the words of Madison an 'unmixed and extensive republic'. (Castiglione, 2017, p. 1, (English m/s))

A parallel development occurred in France with Sieyès' version of unitary representative sovereignty opting for Hobbes's logical possibility that the 'Representative' could be the 'assembly of all' (K. M. Baker, 1990):

'Representative sovereignty is postulated on the unity of the nation and its capacity to act as a unitary agent. Such a capacity for political action, however, like for Hobbes, requires a representative, which at the time of the Revolution he identified in the National Assembly: 'it belongs to it, and to it alone, to interpret the general will of the nation'. (Castiglione, 2017, pp. 16-17 (English m/s))

But is 'popular sovereignty' an oxymoron? According to Judith Shklar

the word sovereignty has scarcely any meaning at all apart from absolute monarchy. It is the chief attribute of the man who can say *tel*

est mon plaisir, and make it stick. . . The 'sovereignty of the people' is a [mere] metaphor containing a negation'. (Shklar, 1969, p. 168)

Since the dawn of Athenian democracy, concerns have been raised that popular rule merely replaces a single tyrant with *demos tyrannos* (Hoekstra, 2013) – perhaps that's the reason why democratic periods were always preceded by tyrannies, rather than moderate constitutionalism. This was why the early-modern critics of democracy argued that mixed government was the best defence against tyranny – the claim of Charles I's *Answer to the Nineteen Propositions of Parliament* (1642). Hansen's 2010 paper relies on a similar argument.

The revolutions of the seventeenth and eighteenth centuries led to the replacement of the ancient doctrine of the mixed constitution with the modern theory of popular sovereignty (Cromartie, 2013), Montesquieu's separation of powers being adopted as the template to slice and dice unitary sovereignty into balancing elements via the construction of 'parchment barriers' (Hamilton, Madison and Jay, 2008, No.48). Montesquieu's taxonomy met the rhetorical needs of the new breed of 'democratic' republicans, as it was no longer possible to appeal to the juxtaposition of the differing interests of the three 'estates' of the realm.

However (Hansen, 2010) argues that both popular sovereignty and the separation of powers are illusions – the ancient theory of the mixed constitution being a more empirically accurate way to describe modern representative democracy:

The separation of powers is an outdated theory. The doctrine of the separation of functions and persons has become so riddled with exceptions that it must be scrapped. Moreover, the subdivision of functions itself into legislative, executive and judicial is clear in theory but does not work in practice. (Hansen, 2010, p. 516)

In addition to the empirical inaccuracy of the theory of the separation of powers, the case for the mixed constitution can also be made on functional or even normative grounds:

The separation of powers is a theory about *division* between three different *functions*: the legislative, the executive and the judicial. The mixed constitution is a theory about *cooperation* between different

types of *institution* of which some are monarchical, some oligarchic and some democratic. . . . The idea is that every task of government requires the cooperation of at least two and often all three elements, and that none of the three elements can take action without the concurrence of the two others. (Hansen, 2010, p. 523, emphasis in original)

The checks and balances of the separation of powers in the US political system frequently induce gridlock in the legislative system and can paralyze government via the so-called 'fiscal cliff', whereby Congress can simply withdraw funding to force the hand of a recalcitrant president. This is generally for partisan reasons and is most common when the legislature is controlled by one party and the presidency by another. Gridlock and paralysis is less of a problem in the mixed constitution as it is 'a theory about cooperation between different kinds of institution of which some are monarchical, some oligarchic and some democratic' (*ibid.*). Harrington illustrated the built-in tendency towards cooperation of his bicameral (part aristocratic, part democratic) legislature with the (proto-cybernetic) example of two girls dividing a cake equally, whereby the divider would be constrained to cooperate with the chooser by cutting the cake in a way that the chooser would find equitable:

For example, two of them have a cake yet undivided, which was given between them: that each of them therefore might have that which is due, 'Divide', says one to the other, 'and I will choose; or let me divide, and you shall choose'. If this be but once agreed upon, it is enough: for the dividant, dividing unequally, loses, in regard that the other takes the better half; wherefore she divides equally, and so both have right. (Harrington, 1992, p. 22)

The mixed constitution might well be described as a system that ensures cooperation via the self-interest of the parties concerned.

Hansen goes on to describe the mixture of 'monarchical', 'aristocratic' and 'democratic' elements in modern states but only devotes one short paragraph to the 'democratic' – the crumbs left under the table after the 'monarchical' and 'aristocratic' feast. The take-home message of this thesis is that it would take a

revival of fourth-century Athenian election by lot (Hansen’s own area of expertise) in order to re-establish a genuinely mixed constitution, wherein all three ‘estates’²⁹ have equal powers, each constituted (ideally) by a unique selection principle, as in the following typology:

	Executive	Legislative	
<i>Estate</i>	Monarchical (Crown)	Aristocratic (Lords)	Democratic (Commons)
<i>Function</i>	Administration	Policy Advocacy	Legislative Judgment
<i>Selection mechanism</i>	Appointment	Election	Sortition

Table 8.2: The mixed constitution³⁰

Let us examine Hansen’s argument in greater detail:

8.4.1 Monarchical

In a modern democracy the prime minister, in the USA and France the president, has powers that in some respects equal the powers wielded by an absolute monarch in the seventeenth and eighteenth centuries. Prime ministers have full power to appoint the ministers that they want to have in their government and depose them again if they do not live up to the prime minister’s expectations . . . Louis XIV is quoted for saying ‘I am the State’. In 2003 Bush and Blair and [Danish prime

²⁹ For the Fourth Estate, see Chapter 7.4.1, above.

³⁰ The model follows Harrington’s neo-classical typology, which assigns advocacy rights to an elected senate and judgment rights to an allotted lower house, as opposed to Barnett and Carty’s (confusing) terminological inversion in their proposal for a House of Lords selected by lot (see p. 274, above). The medieval term ‘estate’ is delineated by scare quotes as some might view this as an inappropriate reification of the analytical distinction between the one, the few and the many. As to whether the usage is justifiable, is it not merely the case that modern ‘estates’ are constituted by principles other than heredity? According to Hansen it is still meaningful to refer to modern presidential and prime ministerial power in the same language as Louis XIV’s personification of state power; and Harringtonian and Madisonian references to elected politicians as members of an aristocratic estate draw on ancient provenance. Journalists are still referred to as members of the Fourth Estate and judges are clearly an estate in their own right. Of course this is all concealed by the democratic smoke-screen.

minister] Rasmussen could have uttered the same words. (Hansen, 2010, pp. 524-5)

Presidents and prime ministers are elected and can be peacefully deposed, nevertheless 'it has become quite common among political scientists to describe the British political system as "elective monarchy" or even "elective dictatorship"' (*ibid.*, p. 525). The majority of the American founders (with the exception of Alexander Hamilton and Robert Morris) were opposed to hereditary monarchy but claimed that election was the best way to appoint a competent commander-in-chief (as in Classical Athens). The US presidential election and the UK party leadership crisis of 2016-17 have led many to question whether election serves this role adequately, hence the argument in section 8.3.5.2 (above) that the *appointment* of executives (as in monarchical systems) might be a more reliable strategy – subject to the checks of the other two 'estates' – the current balance of power being (effectively) tipped in favour of the rule of the one:

In recent years the monarchical aspect of modern democracy has become more and more prominent. The democratic ideal that decisions which concern all members of society must be debated publicly and approved by the largest possible number of citizens has been replaced by the notion of the 'strong leader'. Debates and hearings are increasingly perceived as causes of delay that can be avoided by leadership and top-down management. The autocratic form of leadership practiced in business is held up as an ideal which ought to be copied by the state . . . The rule of the one, viz., the prime minister or the president, has always been an element of modern democracy, but today is far more important and visible than it was a generation ago. (Hansen, 2010, p. 526)

Prime ministerial power is, in many respects, 'far greater than that of a US president' (Gallagher, Laver, & Mair, 2006, p. 35). Ministerial appointments are not generally subject to approval by parliament and the will of the prime minister (and/or her unelected special advisors) generally prevails in cabinet. The prime minister represents the country in the European Council and in the UK 'the monarchical element is further emphasized by the tradition that on some issues the prime minister represents the crown and possesses a number of prerogatives that

allow [her] to take action without asking parliament' (Hansen, 2010, p. 524). In the words of Tony Blair, replying to a 2001 written question from Graham Allen MP:

The Prime Minister's role as head of Her Majesty's Government, her principal adviser and as Chairman of the Cabinet are not defined in legislation. These roles, including the exercise of power under the Royal Prerogative, have evolved over many years, drawing on convention and usage, and it is not possible precisely to define them. The Government has no plans to introduce legislation in this area. (Quoted in Allen, 2003, p. vii.)

According to the doctrine of the mixed constitution it is perfectly proper for presidential and prime ministerial executive powers to be viewed as monarchical; it would be much better, as Allen puts it in the subtitle to his 2003 book for us to be 'honest about the UK presidency' and design the other estates in such a way as to balance this essentially monarchical role. Whilst competent 'monarchs' can be elected there is no reason in principle why they should not be selected by other means, including appointment on the basis of merit alone (see section 8.3.5.2, above).

8.4.2 Aristocratic

Since Montesquieu's 1748 formulation: 'suffrage by lot is natural to democracy, as that by choice is to aristocracy', most political theorists have accepted the ancient argument that election is an inherently aristocratic appointments mechanism. This is little more than a tautology as *aristoi* is Greek for 'the best' and voters (presumably) give their votes to the best candidates, according to whatever criteria they deem apposite. Bernard Manin devotes a chapter of his *Principles of Representative Government* to the 'principle of distinction', whereby 'elected representatives . . . rank higher than most of their constituents in wealth, talent, and virtue' (Manin, 1997, p. 94). The chapter outlines the different ways that the principle of distinction was instantiated in England, France and the US at the time of the birth of representative government, and the rest of the book catalogues how the principle has been retained throughout the 'metamorphoses' of representative government – the parliamentary, party and finally 'audience democracy' stages. Hansen adopts a similar perspective:

the principle of representative democracy is that the people elect parliamentarians who are more skilled, more intelligent, more charismatic, more knowledgeable and more articulate than ordinary people. And elected politicians must [now] be more telegenic than the average citizen. (Hansen, 2010, pp, 526-7)

Election to Harrington's Senate was limited by a property franchise, but he also proposed radical agrarian reforms to ensure that talented citizens could more easily qualify for his proposed aristocracy of merit. John Adams was convinced that all societies grow aristocrats as automatically as a crop of wheat will grow some large ears and some small, and even Thomas Jefferson held that 'the natural aristocracy' was the most precious gift of nature (von Kuehnelt-Leddin, 1990). Although the principle remains the same, the selection criteria for *hoi aristoi* have changed considerably since the eighteenth century and the founders of representative government might well have balked at the telegenic, thespian, demagogic and celebrity criteria privileged by voters in Manin's age of 'audience' democracy, in which a display of 'empathy' and securing eye-catching newspaper headlines is deemed more important than ability for the job.

Whilst this thesis acknowledges election as the appropriate mechanism for the selection of political advocates, the mixed constitution at its heart does have profound entailments for the 'aristocratic' estate. The division of functions (and persons) between the executive and legislature limits the role of elected politicians to policy proposals and advocacy. Voters would no longer judge elected politicians on the basis of their competence to implement policies but political parties would be punished for introducing policies with poor epistemic outcomes in subsequent elections. In addition, successful policy proposals would undergo deliberative scrutiny in the allotted parliament, so the power of elected *aristoi* in a new-style mixed constitution would be subject to serious constraints.

8.4.2.1 *The judiciary*

Whilst the judiciary is one of the three elements in the theory of the separation of powers it does not qualify as an independent estate in the mixed constitution. This is on account of the unitary title of 'executive magistrate' given to the person or persons with the monarchical role in the early-modern typology of crown, lords and commons. The 'magistracy' combined the role of both judge and executioner.

Although the judiciary originally evolved as a sub-set of the executive, Hansen argues that it is now an aristocratic estate, as Supreme Courts are the principal check on (both) executive power and popular (majoritarian) sovereignty. The aristocratic epithet is certainly true in the case of the UK, as the Supreme Court took over the judicial function of the House of Lords in 2009. But this is also true in general as

since the Second World War almost all European countries have had a constitutional court in which the elite of the country's legal profession pass judgment on whether the laws passed by the parliament respect the constitution and in particular the individual rights protected by the constitution. (Hansen, 2010, p. 527)

This is a clear breach of the separation of powers, as it undermines the sovereign rights of the lawmaker – the judges are not elected by (or accountable to) the people, they are appointed by the crown or the president (hence traditionally being seen as part of the 'monarchical' estate). This is particularly the case in the United States where the Supreme Court (appointed by successive presidents) has, since 1803, exercised judicial review of laws and thereby interfered with Congress's power to legislate. However, once appointed, Supreme Courts are often a thorn in the flesh of those who appointed them (or their successors) in both presidential and parliamentary systems.

The 1688 Bill of Rights led directly to the 'long hibernation' of judicial review with its abrogation of Coke's 1610 dictum that 'in many cases, the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void' (*Dr. Bonham's Case*, 8 Co. Rep. 107a, 114a C.P.) The judiciary only started to re-exercise its muscles towards the end of the twentieth century, leading Michael Beloff QC to argue that

one of the most profound recent changes to the Constitution . . . results from the activities of the third branch of government, the judiciary, which have themselves infringed the sovereignty of Parliament – an impregnable given for those reared in the traditions of Blackstone and Dicey. (Beloff, 2000, p. x)

This was largely on account of the European Communities Act of 1972 which ‘gave English judges the right, for the first time since the seventeenth century power – whose legitimacy was beyond doubt – to hold that domestic primary legislation was invalid as incompatible with directly effective community law’ (*ibid.*). Fresh impetus was provided by the 1998 Human Rights Act, which ‘shifted the whole focus of public law from consideration of executive wrong to that of citizens rights’ (*ibid.*, p. xii). As a result the judiciary is now intruding into both the executive and legislative domains. As a result ‘when judges become involved in decisions of a political character (even if not fairly characterized as political decisions), politicians will want to become involved in their selection’ (*ibid.*, p. xii, xiii). This has long been the case in the USA, but the politicization of the judiciary is beyond the scope of the present thesis.

Hansen’s decision to position the judiciary in the ‘aristocratic’ estate makes sense in terms of the modern typology of the mixed constitution. In this he agrees with Jeremy Waldron’s view that leaving it to the judiciary to decide such matters ‘amounts to the people’s embrace of what Aristotle would call “aristocracy” – the rule of the few best’ (Waldron, 1998, p. 280). As this thesis does not include any proposal regarding the judicial function, I am content to follow their lead. Table 8.2 on page 306 is only concerned with the aristocratic estate from the perspective of *lawmaking*, so includes no reference to the judiciary. It might even be argued that the modern judiciary is a separate estate on its own, but this is orthogonal to the main thrust of this thesis. For an examination of the essential role of constitutional checks and balances in the preservation of the rights and interests of minorities, future generations, non-human species and the natural world see Chapter 7.3.3.2, above.

8.4.2.2 *The media*

Although traditionally described at the ‘fourth’ estate, from the perspective of this thesis the media are a subset of the aristocratic estate as its primary role (as with elected advocates) is one of representative isegoria. For details see Chapter 7.4.1, above.

8.4.3 Democratic

Hansen devotes four pages of his essay to the monarchical and aristocratic elements of modern 'democracies', but just *one short paragraph* to the democratic:

To have periodic free and fair elections based on universal suffrage is indisputably a democratic aspect of modern representative democracy. It is also democratic that all citizens possess equal freedom of speech, equal freedom of assembly and equal access to the relevant information that will enable them to make a rational choice. Another democratic aspect is that a fairly small number of discontented citizens can form a new party and that they stand a reasonable chance of having one or more of their candidates elected, at least in countries that have adopted proportional representation. Also the citizens' jury is a democratic aspect of the judiciary in many modern states.

A single paragraph strikes me as meagre fare for a description of what should presumably be the *principal* estate in any political system that claims to be a 'democracy'. As a leading authority on classical-era political systems Mogens Hansen would be acutely aware of the difficulty of reconciling election with democracy. In his words, again:

I suggest that the mixed constitution deserves to be revived as a necessary corrective to the prevailing view that Western states are pure democracies and that democracy is the rule by the people. Ancient political thought is remarkably modern or – rather – modern political thought has much to learn from the Greek and Roman political thinkers. (Hansen, 2010, p. 530)

The take-home message of this thesis is derived from Hansen's reference to the democratic potential of the citizen jury in modern states, and argues that modern 'democracies' would need to undergo a similar development as fourth-century Athens, when legislative courts (*nomothetai*) were established along parallel lines to the people's courts, with the final legislative decision devolved to a large citizens' jury, selected by lot.

APPENDIX I

The Brexit Lottery

**Like all referendums, the ‘Brexit’ vote will be a lottery.
Why not go the whole hog and take the decision by lot?**

**by Keith Sutherland
(originally published on *Open Democracy*, 18 April 2016)¹**

On June 23, Britain will go to the polls to decide whether or not the country should remain a member of the European Union. David Cameron’s in–out referendum on EU membership is, ostensibly, about finding out what the people want. But there is a better, and more democratic, way.

Britain has voted before on the question of EU membership but, judging from the press coverage, it seems many pundits and public figures are concerned that an emotional and uneducated public will give the ‘wrong’ answer this time. Back in 2013, and again in 2104, Peter Mandelson complained that the prime minister’s plans to go to the public on the matter were misguided. Referendums are swayed by irrelevant issues, are “very blunt instruments” and the outcome would be “a lottery”, he said. In a sense, Lord Mandelson is right – the experience of countries like Ireland, where referendums are commonplace, suggests that they are often used to give the government of the day a kicking, rather than deal with the issue at hand. And yet a different kind of lottery could be *more* representative of [informed] public opinion than a referendum vote.

If one takes the prime minister’s claim that the decision is up to the people of Britain at face value, then the question is: how can the decision procedure be sharpened up? We need a more reliable mechanism to allow the people to make an informed decision on such an important issue as EU membership. One option

¹ <https://www.opendemocracy.net/can-europe-make-it/keith-sutherland/brexit-lottery>

would be a public enquiry with a large representative jury selected by lot. Public inquiries have, on the whole, a good track record – the Hutton Inquiry being praised for its balanced and open proceedings. The problem was the lack of democratic participation, as there was no jury to determine the outcome. The inquiry verdict (BBC guilty) was left to a Lord Justice who had cut his teeth in Northern Ireland's jury-free Diplock courts and whose conclusions were coloured by his anti-media prejudice. The Leveson Inquiry can be criticised along similar lines, but its main flaw was the continental 'examining magistrate' inquiry protocol. Although the press was on trial (again), there was no counsel for the defence and Leveson decided the outcome himself (with a little help from *Hacked Off*). How different both inquiries might have been if they had followed standard Anglo-Saxon judicial procedure – adversarial exchanges followed by a jury verdict.

Why not adopt this approach as an alternative to a referendum? There is nothing new about the juristic approach to policy-making. In 403 BC the Athenians, the inventors of democracy, established a system of legislative courts, and every new law had to run the gauntlet of adversarial debate in front of a jury of several hundred citizens selected by lot. The decision of the jury was deemed to represent the considered view of the entire citizen body.

Although Aristotle was hostile to democracy he praised this 'wisdom of crowds', concluding that, under the right conditions, 'the many' (*hoi polloi*) judge certain matters better than individuals or groups of experts. The truth of his claim was demonstrated mathematically in 1785 by the Marquis of Condorcet in his 'Jury Theorem', which proved that a jury is increasingly likely to converge on the 'right' answer as its numbers increase (assuming balanced advocacy, secret voting and a minimal competence threshold). And there is a wealth of modern research showing that the 'cognitive diversity' produced by large randomly-selected juries is the best way to decide important issues. Election, by contrast, selects people of similar backgrounds (lawyers, Oxbridge PPEs, and policy wonks) who are often victims of 'groupthink'. But referendums, as Mandelson pointed out, are a shot in the dark.

Random selection generates a 'mini-public' that represents the entire population 'descriptively' – a sample of just a few hundred would proportionately reflect the age, gender, political leanings and socio-economic composition of the country. And

this is not just a matter for classicists, political theorists and statisticians – Stanford University’s James Fishkin has conducted practical experiments with decision-making by citizen juries for over twenty years. Fishkin’s ‘Deliberative Polls’ show that ordinary citizens can competently judge complex issues after receiving balanced advocacy and deliberating for a couple of days. The success of these experiments has led Fishkin to claim that ‘the microcosm offers a proxy for what would happen if everyone discussed the issues and weighed competing arguments under similarly favourable conditions.’

So why not just provide balanced information and advocacy to all voters before a referendum? The problem is ‘rational ignorance’: it makes no sense for voters to take the time and effort to inform themselves properly as their individual vote makes no difference to the outcome. Not so with a representative jury where every vote really does count.

Fishkin’s polls have mostly been advisory; the only time the results were automatically adopted was in China. In 2005 the Communist Party in Zeguo province commissioned a random sample of 235 citizens to decide infrastructure priorities. Even though the preferences of the citizen jury were radically different from its own, the party leadership implemented them, leading Fishkin to salute the Chinese for developing a new model of democracy that “may set an example for public consultation around the world”.

If we don’t want to be outdone by China in democracy, as well as everything else, we would do well to look seriously at these experiments, and it’s a shame we didn’t start with an issue as important as Brexit. Referendums can reflect poorly-informed preferences – much better to assemble a representative ‘mini-public’ and allow it to weigh the competing arguments on our behalf. No doubt political jury service would be as tedious as its judicial equivalent, but those of us who don’t receive a jury summons can happily leave matters in the hands of our proxies, confident that the majority decision would have been the same if we had ourselves participated.

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APPENDIX II

A2. The Blind Break and the Invisible Hand

A2.1 Overture: sortition and social theory¹

Sortition, or ‘the action of selecting or determining something by the casting or drawing of lots’ (*OED*), is a decision mechanism that has been in use since antiquity and has served a wide variety of purposes, comprehensively catalogued in Jon Elster’s *Solomonic Judgements* (Elster, 1989) and Peter Stone’s *The Luck of the Draw* (Stone, 2011). Archaic uses (category headings in bold print) include **divination and the discovery of God’s will** – ‘the lot is cast into the lap; but the whole disposing thereof is the Lord’s’ (Proverbs, 16:33), and an alternative to the ordeal and duel. According to the Puritan divine Thomas Gataker’s *The Nature and Use of Lotteries* (Gataker, 2008 (1627), pp. 73-74), divination was only legitimate when expressly commanded by God – for example detecting the guilty (Jonah’s disobedience to God’s will was revealed by lot) and dividing conquered land (Num. 26: 52-6; Josh. 18: 6). (This latter use has survived into modernity (Wilms, 1974).) Selection of religious officials and the assignment of sacred offices was often decided by lot, leading to the claim that this was the origin of the juridical and political use of sortition in classical Athens (Fustel de Coulanges, 1984). According to Acts 1:26 sortition was also employed to select a successor to the apostle Judas, and God indicated his choice of scapegoat by lot (Lev: 16: 7-10). Gataker also cites Origen’s claim that angels were placed in heaven by lot, and recounts the tale of a Nestorian abbot who chose between his heretical monks and orthodox bishops by lot.

Archaic (but non-religious) uses of sortition include the **rotation of political officials** (in classical Greece and medieval Italian city states), **impartial allocation of unpleasant fates or tasks** (decimation of hostages and treacherous soldiers,

¹ Readers who are only interested in the political potential of sortition are invited to proceed directly to the next section of this appendix.

choosing [during the siege of Masada] who should kill who, choice of victim(s) for cannibalization, selection of priests to visit the infected at the pest-house, and the choice of who to throw overboard from an overcrowded lifeboat). Lotteries are also widely used for the military draft and deciding job layoffs during an economic downturn. In addition to the intrinsic (and legal), need for impartiality in life-or-death decisions, drawing lots can have **psychological benefits** – if the title character in William Styron’s novel *Sophie’s Choice* (played in the film adaptation by Meryl Streep) had taken the agonizing decision of which of her children to sacrifice by flipping a coin, might she have been spared the guilt and mental anguish that led to her eventual suicide? It is interesting to speculate whether this psychological benefit supports the claim that the lot was religious in origin – especially given the reference by the Auschwitz official to Matt. 19:14 (‘Suffer the little children to come unto me.’) If Sophie had believed the choice was made by God then she might have been less inclined to blame herself for the fate of her daughter.

Other archaic uses of sortition which have continued into modernity include the **selection of trial jurors** (primarily in English-speaking countries); **choosing between equally legitimate alternatives** (regulating inheritance, resolution of child custody disputes, and choosing between equally-qualified job and university applicants (Boyle, 2010; Pluchino, Rapisarda, & Garofalo, 2010)); **allocation of scarce resources** (assignment of land to till, distribution of charity, prime fishing spots, school and summer-camp places, concert tickets, kidney dialysis machines, experimental drug treatments, immigrant permits (‘green cards’), public housing, land allocation to settlers, procreation rights, broadcasting opportunities, oil-drilling leases, and slots for private members’ bills in the UK parliament); **strategic decision making** (hunting practices of the Naskapi Indians, randomized bluffing in poker, investment strategies (Biondo, Pluchino, & Rapisarda, 2014)); **reduction of decision costs** (tiebreakers in some US state elections, resolving tied votes in the Swedish parliament, resolving cyclical majorities, interpersonal decisions ranging from the choice of marital partners to which restaurant to go to); **equal opportunities/social justice** (order of candidates on ballot papers, author name ordering in academic papers, and the guiding principle of the [fictitious] utopian community of Aleatoria (Goodwin, 2005)); **sports and games** (deciding who goes first, or who is drawn against who); **spot checks** (airport passenger screening, IRS investigations, vehicle inspections); **participation in medical experiments**

(treatment and placebo groups assigned randomly); **selection of examination questions**; and **revenue raising** ('ordinary lotteries have their origin in the selection by lot of political representatives in Genoa. Initially people made bets on candidates, whose names were later replaced by numbers' (Elster, 1989, p. 36)).²

A2.2 Sortition and political theory

Although *Solomonic Judgements* touches briefly on the *political* potential of sortition (random timing of elections, random allocation of members to congressional committees, 'lottery voting' (Amar, 1984) and demarchic committees (Burnheim, 2006 (1985)) Elster's principal concerns are social justice, equal chances and the limits of rational choice and Barbara Goodwin's *Justice by Lottery* has a similar focus on social theory. This appendix, however, is primarily concerned with political issues. My understanding of the terms 'political' and 'social' is derived from Jeremy Waldron's distinction between '*political* political theory' (focusing on institutional issues like sovereignty, constitutionalism, representation and consent) and the current preoccupations of 'political' theorists with 'applied moral philosophy . . . Rawls's theory, the 57 different varieties of luck-egalitarianism and global justice' (Waldron, 2013, pp. 6, 21). The latter should really be the province of *social* theorists (Professor Waldron's Oxford chair straddles both disciplines), notwithstanding its domination of politics departments for the last few decades.³ Although *Solomonic Judgements* includes a chapter on politics, the discussion of sortition is confined to the chapter dealing with decision-making in social policy. The concern of this thesis is specifically the *political* potential of sortition – the random selection of citizens for public office (Dowlen, 2008). The literature on the political potential of sortition falls into three distinct categories (detailed in the sub-sections below), the main thrust of this appendix being to clarify the analytical distinction between the three models.

² For full references for these applications, see (Elster 1989, Ch.II), and (Stone, 2011, pp. 6-10)

³ The term 'social theory' as used here should not be confused with the curriculum of sociology departments, where the focus is on the work of Parsons, Luhmann, Habermas, Foucault, Derrida, Baudrillard, Giddens, Beck etc. I am grateful to Peter King for this point.

A2.2.1 The 'Blind Break'

According to Oliver Dowlen and Peter Stone, the leading theorists of this school, the function of sortition is to protect the political appointment process from partiality, factionalism and corruption.⁴ This approach shares Jon Elster and Barbara Goodwin's aleatorian concerns with impartiality, equality and social justice,⁵ as the 'blind break' (Dowlen, 2008) established by the 'lottery principle' (Stone, 2011) guarantees that the selection process is devoid of reasons (and partial interests), so 'one can count on not being able to count on the outcome' (Elster, 1989, p. 67):

The central feature of [the lottery] is the arational blind break. It represents a break in the chain of reasoned, planned thought and action that accompanies most decision-making procedures. Embodied in the lottery, therefore, is the idea of disconnection. We can think of a lottery decision as taking place in a special zone where it is insulated from the qualities that exist around it and which take place before and after it. (Dowlen, 2008, pp. 13-14).

Because their outcomes are unpredictable, lotteries ensure that decisions are made without any reference to reasons. This includes bad reasons [partiality, factionalism, nepotism, corruption etc.]. And this is the primary virtue that lotteries have. Lotteries provide the *sanitizing effect* of a process independent of reasons. (Stone, 2011, pp. 35-6, emphasis in original).

⁴ Stone's book *The Luck of the Draw: The role of lotteries in decision making* (Stone, 2011) is, unlike Dowlen's *Political Potential of Sortition*, primarily concerned with notions of impartiality in social (allocative) justice. Only one chapter is specifically devoted to the *political* potential of sortition, nevertheless that chapter is the focus of the discussion in this appendix.

⁵ See also (Broome, 1984, p. 40; Williams, 1981).

The function of the blind break/lottery principle is to introduce *indeterminacy*, as the lottery inputs (four squares on left of figure A2.1, below) and the outputs (single square on right) are separated by the two vertical lines.

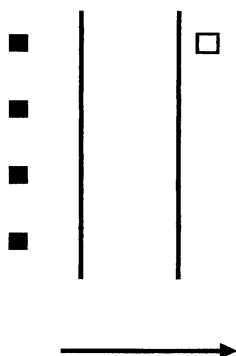


Figure A2.1: *The Blind Break* (from Dowlen (2008), p. 13)

Dowlen and Stone's focus is on protecting the political system from ex-ante partiality and corruption (as opposed to Goodwin's concerns with social justice and the equal rights of citizens), so the function of sortition is more prophylactic than egalitarian. Whilst it's certainly true that sortition distributes the relevant goods/responsibilities (political offices) on an equal-chance basis, in large modern states the ratio between the 'winners' and the 'losers' of the lottery is so great that impartiality, rather than equality, is the relevant norm. Once the draw has taken place and the political offices have been allocated then, as Orwell put it, some animals will become vastly more equal than others, notwithstanding the impartiality of the selection process. This is in marked contrast with the *isonomia* (equal political rights) of fifth- and fourth-century Athens, where *most* citizens would have attained political office at least once in their lifetime, hence Aristotle's claim that rotation by lot – where all citizens take turns to rule and be ruled – was the principal characteristic of democratic freedom (Arist., *Pol.*, 1317a: 40-1317b13). In large modern states, however, political equality can only be achieved by representative mechanisms – the topic of the 'invisible hand' section (A2.2.2) of this appendix.

Needless to say, sortition only protects the impartiality of the *selection* process – once the choice has been made, political officers chosen by lot will be just as subject to potentially corrupting influences as those selected by any other process. Indeed the lack of party discipline or the need to secure re-election might suggest an increased long-term risk of corruption, hence the Athenian institution of *euthynai* – the public prosecution that all magistrates (the majority of whom were selected

by lot) had to undergo at the end of their term of service (Hansen, 1999, p. 392). Reliance on police action, however, is a second-best approach to reducing corruption – compared to structural measures, such as party discipline and the need to secure re-election – and there is a significant risk that an impartial selection process could give rise to an increased risk of corruption over the full office-holding term:

Having to think about re-election . . . is a form of accountability to the electorate without which the temptation to plunder the spoils of incumbency might be overwhelming. (Elster, 1989, p. 89)

Given the problem with ex-post corruption and the impossibility of rotation in large modern states, Blind Break theorists like Dowlen and Stone limit themselves to modest proposals for the lot-based appointment of supervisory, monitoring and advisory bodies.

A2.2.2 The ‘Invisible Hand’

The concerns of the competing ‘invisible hand’⁶ research school⁷ into the political potential of sortition are, however, very different. The mathematics of proportional sampling demonstrates that if a sample is of sufficient size then the ‘law of large numbers’ will introduce a reliable stochastic relationship between the random sample and the target population. For example, a sample of (say) 1,000 persons selected randomly from a population of several million would be likely to return an approximate 50/50 gender balance – if this were not the case, and gender balance

⁶ Although the metaphor ‘the invisible hand’ was coined by Adam Smith, it is used here in an entirely different sense from Smith’s *Wealth of Nations* (or Mandeville’s (earlier) *Fable of the Bees: or, Private Vices, Public Benefits*).

⁷ (Barnett & Carty, 2008; Becker, Szep, & Ritter, 1976; D. Bennett, 2012; Buchstein, 2009, 2010; Buchstein & Hein, 2010; Callenbach & Phillips, 2008; Carson & Martin, 1999; Chouard, 2012; Coote & Lenaghan, 1997; Crosby, Kelly, & Schaefer, 1986; Engelstad, 1988; Fishkin, 2009; Goodin, 2008; Gronlund, et al., 2014; Guerrero, 2014a, 2014b; Hansen, 2005; Landemore, 2010; Levinson, 2010; Lieb, 2004; Lucardie, 2014; Mansbridge, 2010; Mueller, Tollinson, & Willett, 1972; R. Mulgan, 1984; O’Leary, 2006; Schmidt, 2001; Sintomer, 2007, 2010a, 2010b; Smith, 2009; Sutherland, 2008; Warren & Pearse, 2008; Zakaras, 2010)

was deemed to be a salient factor, then the sample size would need to be increased (or stratified sampling adopted).⁸ If this is the case for gender, it can be assumed that the distribution of age, occupational category, socio-economic status, party membership, newspaper subscriptions or *any* other factor associated with the political preferences of the target population would also be captured by a random sample of a sufficient size (Carson and Martin, 1999, p. 34). The outcome is ensured by the ‘invisible hand’ of the law of large numbers (LLN).

One of the criticisms of electoral democracy is that the persons returned by voting (stereotypically rich, white, male lawyers and ‘policy wonks’) have little in common with ordinary voters and, as such, suspicions are raised as to whether elected politicians may be legislating more in the interests of the ‘political class’ and/or affluent donors, than those of their constituents (Crouch, 2004; Gilens, 2012; Hacker & Pierson, 2011; Jacobs & Shapiro, 2000). This has led to calls for improved ‘descriptive representation’ to establish a legislature that would be (ideally) in John Adams’ words ‘an exact portrait, in miniature’, of the whole nation (Adams, 1951), and random sampling is one (or possibly the only) way to achieve it (Guerrero, 2014a). The other criticism of mass democracy is the problem of ‘rational ignorance’ – voters are unlikely to invest the necessary effort into properly informing themselves on political issues as their single vote has negligible causal power (Downs, 1957). However the decisions of a randomly-selected microcosm – where each vote really does count – could well (given balanced information and advocacy) be better informed than the whole population (Fishkin, 2009).

Dowlen argues that descriptive representation constitutes, at best, a ‘weak’ use of the lottery principle:

if lot is used *with the express purpose* of creating some idea of balance or proportion, then this constitutes a weak use because such a task does not require arationality. In these circumstances there is a contradiction between the arational, random lottery, and the idea of

⁸ The arbitrary figures chosen here are for illustration purposes only, as this is a work in political theory, as opposed to the mathematics of proportional sampling.

ratio expressed in the general notion of [proportion]. (Dowlen, 2008, p. 18, emphasis in original).⁹

However, this is only true in the tautological sense that sortition has been *pre-defined* in terms of arationality. Dowlen's book derives from his PhD, a work of political theory that draws on the historical evidence only in so far as it serves to illustrate his pre-ordained philosophical thesis. His methodology is similar to that of Gaetano Mosca, whose sweeping theory outlined in *The Ruling Class* (Mosca, 1939) 'subjects history to the test of his principles' (Meisel, 1962, p. 62). Chapter 2 of *The Political Potential of Sortition* analyses Athenian democracy in terms of his impartiality thesis (with Mosca it was the ruling class thesis), but acknowledges that the source literature, while clear on *how* lot was used is almost entirely silent on *why* (p.32), leaving theorists entirely at liberty to speculate in an unconstrained manner. Dowlen agrees with J.M. Headlam's rejection of sortition as a way of revealing the will of the gods (Fustel de Coulanges, 1984). According to Headlam, the purpose of the lot – in particular the randomly-selected *boule* (Council of 500) was to protect the *ecclesia* (direct-democratic assembly) from domination by aristocratic or partisan forces. This was because, although all major decisions were (in the fifth century) taken by the assembly, it was the council that prepared the agenda, so a 'weak' council selected by lot was necessary in order to protect the primacy of the sovereign assembly (Headlam, 1891). Classical historians, for the most part, agree that the council was little more than a secretariat for the assembly (Manin, et al., 2008; Rhodes, 1972).¹⁰

⁹ Peter Stone takes issue with Dowlen's claim in his review of *The Political Potential of Sortition* (Stone, 2010), but argues that descriptive representation is a by-product of the general lottery principle.

¹⁰ Josiah Ober puts more emphasis on the role of the council in Greek democracy, pointing to an Eritrean decree of 340 BC, 'ordering all citizens to fight without waiting to receive orders if anyone tries to establish "some constitution other than a Council and a prutaneia (a subset of the Council) appointed by lot from all Eretrians" (Knoepfler 2001, 2002; translation from Teegarden 2007)' (Ober, 2008, pp. 73-74). However, this is not incompatible with the key role of the lot-appointed council in defending the primacy of the assembly.

But is there any evidence that the Athenians viewed sortition as a procedure to protect the assembly from partisan forces? Aristotle viewed the lot in terms of democratic freedom and equality, secured by *rotation* – ruling and being ruled in turn:

The underlying principle of democracy is freedom, and it is customary to say that only in democracies do men have a share in freedom, for that is what every democracy makes its aim. There are two main aspects of freedom: 1) being ruled and ruling in turn, since everyone is equal according to number, not merit, and 2) to be able to live as one pleases. (Arist., *Pol.*, 1317a: 40-1317b13).

Euripides also explains the allotted bodies of Athenian democracy in terms of rotation via the claim of Theseus, the mythical founder of the Athenian democracy, that ‘the people rules by turns through annual successions’ (Euripides, *The Suppliant Women*, vv. 406-407). The only other contemporary reference, Plato’s claim that ‘He on whom the lot falls is the ruler, and is dear to the gods’, supports Fustel de Coulange’s thesis on the religious origins of the lot (Plato, *The Laws*, III. 690 vi 759).¹¹ Whilst the functional explanation favoured by Headlam and Dowlen is not incompatible with religious ideologies,¹² it tells us nothing about how the lot was actually conceived in the ancient world. Likewise, as the Greeks had no notion of mathematical proportionality, it was unlikely that they used sortition as a form of

¹¹ M.H. Hansen is sceptical regarding Plato’s connection between the use of sortition and divine choice, arguing that it refers to the selection of priests, not political officers (Hansen, 1999, p. 51). Expelling a citizen chosen by the gods would have been a blasphemy; and screening before the lot would have avoided the scandal. But nobody minded, because the lot was not a religious procedure. Nevertheless, the idea of lot as divine choice was a part of traditional beliefs in the ancient world and, even if it was not a part of conscious democratic principles, it could provide subconscious support for sortition (I am grateful to André Sauzeau for this point). The Protestant fear of the blasphemous use sortition as a way of ‘tempting God’ (Gataker, 2008 (1627)) and the correspondence of election to the Calvinist notion of ‘the elect’ may also help to explain the demise of sortition in the modern world (see Chapter 3.1.6, above).

¹² The sociology of religion and the non-realist school of theology are devoted to functional explanations for religious belief (or, more accurately, the correlation between religious belief and social outcomes).

statistical representation:¹³ ‘the Council was not perceived as standing for the people. The *boule* was just a collegial magistracy’ (Manin, et al., 2008). The truth is we simply don’t know why the ancients used sortition for the appointment of political officers, so analytical and functional political theorists need to take on board the warnings from their historically-oriented colleagues about the danger of anachronism in the interpretation of evidence from the past.

Dowlen argues that descriptive representation could better be achieved by stratified sampling (p. 23) and/or quotas to increasing the ‘politics of presence’ of hitherto marginalised groups (Phillips, 1995). However if politics is, as Michael Oakeshott contends, simply a matter of attending to the ‘general arrangements’ of a group of people thrown together by choice or necessity, then which strata/quotas are relevant? Anne Phillips’s choice of gender, ethnicity and sexual-orientation categories is somewhat arbitrary, largely reflecting the social categories privileged by the ‘New Left’ to replace the urban proletariat as the group most in need of emancipation from oppression. The ‘invisible hand’ of the law of large numbers, by contrast, ensures a proportionate representation of *all* politically salient categories (given a large enough random sample), including *those of which we are entirely ignorant*. This is an entirely rational use of the lot (it’s the *ratio* that we’re interested in), hence my agreement with Dowlen that the two models are ‘contradictory’ (Dowlen, 2008, p. 18). The invisible hand is a very different – indeed polar opposite – use of sortition to the blind break.¹⁴

Dowlen’s insistence that stratified sampling, or ‘weighted’ lotteries, should be avoided at all costs on account of the introduction of the element of predictability is an indication of the divergence of these two approaches to the political potential of sortition. Dowlen defines a weighted lottery as follows:

¹³ Accurate descriptive representation is less of a problem in small homogeneous *poleis* than in modern pluralistic and multicultural states.

¹⁴ This is not to say that the two different functions will not be combined – a group selected by lot will be both statistically representative of the target population and, at the same time, chosen by an impartial mechanism.

We can distinguish between a weighted lottery and an ordinary lottery by the fact that in a weighted lottery the pool is divided into groups rather than consisting of individuals or individual options. Likewise the result is interpreted in terms of its group identity rather than as an individual entity. (Dowlen, 2014, p. 11)

Sub-group predictability is, however, the *only* value of statistical sampling by random selection whereas, from the individualistic perspective of the blind break, it is counterproductive:

Because the winner . . . is judged primarily by . . . group, and not by its status as an individual entity, the winner is not independent from the set to which it originally belonged. (Dowlen, 2008, p. 23)

That may be anathema to blind break theorists but it's the *raison d'être* for proponents of the invisible hand. Sortition for the latter group of theorists is a technique for establishing an automatic weighted lottery (as the decisions as to which groups should be represented, and in what proportion, are executed by the 'invisible hand' of the lottery process):

Were [the members of each subgroup] all alike, there would be no reason for preferring sortition over any other method of selecting from that subgroup (or at least no reason connected to descriptive representation. (Stone, 2011, p. 134)

Indeed, but the reason for using sortition is because we don't know which subgroup is relevant or the prevalence of that subgroup within the population, hence the need for the invisible hand of the lottery process. This is particularly the case as 'stratification presupposes a finite, determinate, and above all *short* list of relevant features for distinguishing subgroups.' Random selection, by contrast 'can ensure descriptive representation in accordance with any characteristics one might name . . . even those not currently deemed important' (*ibid.*, p. 135). 'Sub-group' is, in this context, a purely analytical construct, as what is of interest is really *politically-salient characteristics* – for example a 45-year old, female, churchgoing schoolteacher, married with two children, who subscribes to the Guardian newspaper and abstains from voting in elections could not be described as a

member of a distinct sub-group but combines at least eight politically-salient characteristics (along with other qualities that we are entirely ignorant of).

Stone devotes a section of his book to descriptive representation (Stone, 2011, pp. 132-140), but concludes that descriptive representation is a by-product of his overall 'sanitizing' lottery principle:

Random selection can only accomplish this result [the descriptive representation of all characteristics, even those not currently deemed important] because it does not depend on reasons. A process independent of reasons can ensure (statistically, at least) that all group members are selected in the right numbers, whereas any process dependent on reasons cannot. (p. 136)

Granted the general principle that it is 'well-known (and trivial) that deterministic systems can be embedded in the framework of stochastic systems' (Atmanspacher, 2002, p. 69), Stone's argument for subsuming a particular deterministic principle (descriptive representation) within a stochastic one (random selection) – subsuming therefore a positive principle within a negative (absence of reasons) – is unpersuasive. On top of Stone's 'lottery principle' (arationality), accurate descriptive representation presupposes an additional mathematical theorem (the law of large numbers (LLN)), outlined in Jakob Bernoulli's *Ars Conjectandi* (1713) – otherwise there would be no relationship between sample size and descriptive accuracy. The LLN comes in two forms: strong and weak, which differ in their convergence properties. The invisible hand theory of sortition presupposes the weak form, which specifies that the random variables converge stochastically toward their expectation value. Mathematically speaking, let X_1, \dots, X_n be a set of n independent and identically distributed random variables with finite expectation value. The weak LLN states that their average converges stochastically to their expectation value as $n \rightarrow \infty$.

$$S_n := \frac{X_1 + \dots + X_n}{n}$$

It is true that human ‘reasons’ (such as a weighted lottery) will disrupt the outcome, but the sampling accuracy is the product of the LLN not the ‘lottery principle’. The absence of reasons is undoubtedly a *necessary* condition¹⁵ for the ‘descriptive’ representation achieved by statistical sampling (in the same way that juror independence is a necessary condition for the Condorcet Jury Theorem) but is not sufficient in the absence of the LLN (ditto for the Condorcet theorem). Although lotteries have been in use since antiquity, statistical proportionality is a modern discovery, hence my claim that ‘descriptive’ representation is orthogonal to Stone’s ‘lottery principle’. In mathematical parlance the law of large numbers is a stochastic rather than a deterministic cause or reason, but it is, nevertheless, a ‘reason’. Indeed some recent authors have argued that stochastic processes, far from being *indeterminate*, are a form of ‘crypto-determinism’, derived via natural extensions or ‘dilations’ of stochastic processes (Gustafson, 2002; Misra, 2002; Primas, 2002).

Stochastic determinism was a hot topic among nineteenth-century mathematicians, philosophers and sociologists – the period when the ‘once unthinkable world of chance becomes subject to the laws of nature’ (Hacking, 1983, p. 455). In 1825 the French department of justice started to compile and publish statistics for different categories of crime and rates of conviction, leading Adolphe Quetelet to draw the attention of the public to ‘the terrifying exactness with which crimes reproduce themselves’ (quoted in Hacking, 1983, p. 469). We know in advance ‘how many men will bloody their hands with violent murders, how many will be counterfeiters, how many poisoners, just as one can enumerate in advance the births and deaths that will occur in a given year’ (*ibid.*). Although actual crimes are committed by individual persons, ‘society prepares the crimes and the guilty person is only the instrument . . . the victim on the scaffold is in some way an expiatory victim of society’ (Quetelet, 1832, p. 346). Unlike the slogan ‘It could be you’ accompanying the invisible hand poster for the (UK) National Lottery, stochastic determinism only

¹⁵ This is why the Deliberative Polling methodology presupposes that (ideally) everyone included in the random sample should accept the invitation. In practice this is impossible, but organisers seek to maximise participation by going to great lengths to ensure that participants are adequately compensated for loss of earnings, child-care costs etc.

applies at the societal level, and tells us nothing about *which* individuals will be involved.¹⁶

The term ‘the law of large numbers’ was introduced by the French mathematician S.D. Poisson in 1835, and plays a major role in his probability analysis of decisions by jury (Gelfand & Solomon, 1973). Poisson tried to model mathematically ‘how one could have stable probabilities of mass phenomena even when the probabilities for individuals are not constant’ (Hacking, 1983, p. 466). Poisson’s work led directly to Emile Durkheim’s notion of ‘social facts’ – ‘manners of acting, thinking and feeling external to the individual, which are invested with a coercive power by virtue of which they exercise control over him’ (Durkheim, 1982 [1895]). Durkheim’s landmark study of suicide proved that even this most quintessentially individual act was social in origin, as the suicide rates of a population are stochastically determined by the invisible hand of the law of large numbers (Durkheim, 1951 [1897]).

As this thesis is addressed to an audience in political, not statistical, theory the mathematics is only provided for illustrative purposes. Other factors, such as the existence of (finite) expectation values, the IID (independent and identically distributed variables) requirement, and ‘contextual emergence’ (Atmanspacher & beim Graben, 2009) also come into play, but are beyond the scope of this work. However this paper would definitely side with the (majority) view of mathematicians that the LLN, if it holds, is an epistemic criterion for the *ontic* stability of the system, out there in nature, rather than being purely descriptive (subject to the caveat that we do not see the ensemble directly but only in terms of a collection of individual samples – hence the ‘invisible’ status of the ‘hand’). The fact that repeated multiple casts of a fair die converge on 3.5 (Bernoulli’s Theorem) tells us something about the state of the universe, rather than being merely an epistemic claim. Hacking (1983) argues that the 3.5 outcome would not have been anticipated before the development of mathematical probability theory (i.e. it was epistemically

¹⁶ The knowledge of which individuals were destined to commit each particular crime would have to await Philip K. Dick’s sci-fi short story, *Minority Report* (and the resultant Tom Cruise movie).

unavailable), but if the die-rolling experiment had been done in 400BC or 1200AD the outcome (3.5) would have been the same. So this is an *ontic* claim, although our ancestors might have chosen to explain it in terms of divine equanimity rather than the LLN. This paper therefore agrees with Einstein's preference that convergence to 3.5 should be a natural law rather than a 'statistical law with definite solutions' (Einstein, 1967). It's also the case that if statistical sampling did not reflect ontic regularities in the target population then the public-opinion and polling industry would be put out of business, as their customers might as well consult the Delphic Oracle (Geer, 1996). My purloining of Adam Smith's metaphor of the 'invisible hand' has the advantage of being amenable to both determinate (pre-modern) and probabilistic (modern) epistemic sensibilities.

As stated above, the LLN comes in two forms, strong and weak, with 'almost sure' convergence restricted to the former. The invisible hand of sortition presupposes the weak form, which merely guarantees stochastic convergence, given a large enough sample and an acceptable margin of error. As to what constitutes an acceptable margin of error in political decision-making is a contested point: this thesis argues that if a decision made by a randomly-selected body is to be held to represent the considered verdict of the target population, this requires that a number of different samples of the same population would return the same verdict, within an agreed margin of error (see p. 284, above). This entails – in parallel with the above-mentioned constraints for the operation of the LLN – a number of exacting constraints on the deliberative mandate of the decision body, which are touched on briefly in the 'entailments' section of this appendix (A2.2, below).

Elster's (1989) meditation on lotteries is, like Stone and Downlen, unconcerned with statistical representation. The only reference to representation is in the context of trial juries, where Elster cites the American legal doctrine that 'no defendant has a right to a representative jury, only the right to have a jury drawn from a representative cross-section' (p. 96). Given that a trial jury is composed of only twelve persons, and the final selection from the initial 'venire' (randomly-selected jury pool) is distorted by challenges from both defence and prosecution advocates, such a small group could not be considered representative of the general population (or the 'peers' of the defendant). However if the jury consisted, as in Classical-period Athens, of 501, or even 5001 persons and there were no opportunity to challenge individual jurors, then the law of large numbers would

produce a representative sample of the citizen body. This demonstrates the need for *both* principles to establish a descriptively-representative sample – the elimination of reasons (no right to challenge jurors)¹⁷ coupled with (ideally) no reasons/excuses accepted for anyone whose name is drawn not to attend – *and* the invisible hand of the law of large numbers.

According to most invisible hand theorists, sortition would make a good candidate for the design of a ‘descriptively’ representative legislative assembly, as the aggregated decisions of a deliberative microcosm would act as a proxy for the informed decisions of the larger political community. Maximum sample sizes are constrained by the ‘rational ignorance’ principle (Downs, 1957) – if the group is so large that individual votes will have a negligible effect then members of an assembly constituted by lot will not be motivated to focus sufficiently on the legislative debate in order to make a well-informed decision (they would more likely be playing games on their mobile phones). This sets up a tension between the need for a large enough sample to establish sufficiently fine-grained descriptive representation, but not so large as to exceed the rational ignorance threshold, leading to a typical compromise sample of no more than several hundred persons.

The blind break and invisible hand approaches both focus on *interests* and structural factors – in the former case insulating the political system against corruption by ‘sinister interests’ (Bentham, 1999) and in the latter ensuring that the diverse interests of the citizen body are proportionately reflected in the composition of the legislative body. The approach to the political potential of sortition outlined in the next section differs on account of the consequentialist focus on *epistemic outcomes* (i.e. how to arrive at the ‘best’ decisions).

¹⁷ Although the ‘peremptory’ challenge does not require the attorney to state a reason, nevertheless the challenge is based on unstated reasons, even if this is often little more than the attorney’s hunch that the juror in question might possess hidden biases.

A2.2.3 Democratic reason and the wisdom of crowds¹⁸

A number of theorists working in the field of 'deliberative' democracy have argued that the best way to optimize epistemic outcomes is by increasing the 'cognitive diversity' of a decision-making body (Estlund, 2008; Landmore, 2010, 2013b; S. Page, 2007; Surowiecki, 2004; Tetlock, 2005), and sortition is certainly a way of increasing cognitive diversity. These theorists share the observation of the invisible hand school that the election mechanism generates a legislative assembly from a narrow subset of citizens (the 'political class'), that fails to accurately 'describe' the target population, but their concern is with the impoverished cognitive resources available, not the lack of statistical representativity. The case for cognitive diversity is grounded in a passage from Aristotle's *Politics* (Arist., *Pol*, 3.1281a42-b10).¹⁹ Aristotle's focus is on the aggregate judgment of the group, likening the multitude to a single person with superhuman capabilities. James Surowiecki's *The Wisdom of Crowds* opens with a modern-day example of Aristotle's argument, when visitors to a country fair were invited to enter a competition to guess the weight of an ox. The mean of the group's (787) guesses was 1,197 pounds and the actual weight was 1,198 pounds. According to Surowiecki the reason for the remarkable accuracy of the guesses is a combination of the law of large numbers (LLN) and the cognitive diversity of the participants (coming from a variety of backgrounds and possessing diverse interests).

'Epistemic' democrats, including David Estlund, Hélène Landmore and Scott Page, focus more on the cognitive diversity of the individuals involved than the collectively-representative 'wisdom' generated by the LLN.²⁰ Landmore's monograph *Democratic Reason* (2013) is devoted to the application of cognitive diversity to political problem solving. One of the examples that she provides is

¹⁸ This section is a highly abbreviated summary of Chapter 6, above.

¹⁹ See p. 174, above.

²⁰ Deliberative democracy, of which epistemic democracy is a variant, is fundamentally a procedural programme, privileging fair-mindedness, dispassionate judgment and the rule of reason in the internal procedural rules of the deliberative forum, as opposed to relying on structural factors to ensure the proportionate representation of competing perspectives. Unanimity is the goal and majority decisions are generally considered second best.

when a group made up of citizen volunteers in the Wooster Square neighbourhood of New Haven managed to resolve a problem of recurring muggings that had proved intractable to both City Hall and the police department. The neighbourhood group came up with an effective solution, but the relevance of this example to sortition is not at all clear. The self-selected and highly-motivated participants had a strong personal interest in successfully resolving the problem (nobody wants to get mugged on their way home) and *only three* group members appear to have made an active contribution to the solution. There are better ways of generating cognitive diversity than sortition, such as crowd-sourcing, e-petitions, knowledge/information markets (Landemore, 2013, pp. 173-184), and prize-winning competitions (the motivation for John Harrison's resolution of the longitude calculation problem).

Landemore (2013) argues the case for sortition as follows: permanent legislative assemblies have to deal with a wide variety of political problems, many of which are entirely unforeseeable. As such there is no way of knowing in advance what cognitive skills might be required, so a large assembly constituted by sortition would be the best way of establishing the diverse cognitive pool necessary to ensure the availability of the skills as and when they might be required. This approach, however, overlooks the fact that most people selected at random would be unlikely to have the necessary ability, motivation, self-confidence and rhetorical skills to make *any* innovative policy proposals, so the value of sortition for policy innovation is unclear.

A2.3 Entailments

One of the merits of sortition is that *all* the functions mentioned above – equal opportunities, protection from ex-ante corruption and factionalism, descriptive representation and accessing the 'wisdom of crowds' – apply, irrespective of the reasons for introducing the lottery. Some people advocate sortition in order to implement social justice by undermining rich and powerful elites, whereas others just want to make sure the trains run on time. But the first two approaches to the political potential of sortition – the blind break and the invisible hand – have very different entailments for those involved in the constitutional design of democracies. The former focuses on the disinterested choice of *persons*, whereas the concern of the latter is the *group* level of the sample. Descriptive representation is not the concern of blind break theorists, and most of their work (e.g. Dowlen 2014) focuses

on the random selection of individual citizens to act as impartial monitors and facilitators for the scrutiny and oversight of existing election-based institutions. Their role is to guard against misconduct, so they are ‘tribunes’ and ‘citizen witnesses’, rather than *representatives* of the people.

Advocates of the invisible hand approach, however, need to acknowledge that the descriptive representation that they champion applies *only* at the collective level, not the individuals selected:

For the power does not reside in the juryman, or counsellor, or member of the assembly, but in the court, and the council, and the assembly, of which the aforesaid individuals – counsellor, assemblyman, juryman – are only parts or members. (Arist., *Pol.*, 68: 1282a34-41.

Persons selected by lot are emphatically *not* the aleatory equivalent of elected representatives, selected by an alternative balloting method. This places severe constraints on the mandate of a sortition-based representative assembly and demonstrates the ongoing need for elections and/or direct democratic initiatives to fulfill the need for ‘active’ political representation (the role of persons as opposed to groups). In this respect I’m entirely in agreement with (Dowlen, 2014) that sortition should not be seen as an alternative to election.

Epistemic and deliberative democrats seek to bridge the active/descriptive divide by combining sortition and small-group face-to-face deliberation. However they overlook the fact that jury-room deliberation breaches the representation mandate on account of both the small numbers involved and the biases introduced by imbalances in the speech acts of the participating individuals. Whilst that need not be a problem in a trial jury, where the task is an epistemic one – establishing the fact of the matter (beyond reasonable doubt) – political juries are required instead to indicate their informed preferences in a manner that ensures those preferences statistically represent those of the target population. This imposes severe constraints on the deliberative mandate – the derivation of the term deliberation

from the Latin *liber* (weight) suggests that the role of a political jury should be one of ‘weighing’ competing arguments.²¹ Indeed it is hard to see what ‘descriptive’ representatives could do other than register their preferences/beliefs via voting (all votes carrying exactly the same weight), as the differences in the ‘illocutionary force’ of the speech acts of individual members of such an assembly would destroy its aggregate representativity.

Most of the invisible hand proposals for lot-based deliberative assemblies overlook this constraint, thereby conflating the entirely different functions of active (individual) and descriptive (group) representation. They also rely too heavily on the ability of the blind break to select political officials impartially, thereby overlooking the increased vulnerability to ex-post corruption for political functions other than indicating preferences via voting in secret. Epistemic and deliberative democrats are more concerned with the quality of the decision outcome and the procedural norms governing face-to-face deliberation, representativity not figuring very highly in their priorities. Although small groups constituted by sortition participating in face-to-face deliberation would appear to bridge the gap between the individual and the collective, the law of large numbers no longer applies, so it is hard to understand how the decision outcomes of such groups (which are likely to fluctuate wildly) could be said to represent the considered judgment of the whole citizen body, the *sine qua non* of large-scale representative democracy.

A2.4 Conclusion

The two leading theories on the political potential of sortition – the blind break and the invisible hand – have very little in common. The former deals with the *indeterminate* selection of individual persons for political office whereas the latter deals with the statistical sampling of a target population in order to establish a descriptively-representative microcosm. The blind break is a negative mechanism

²¹ The competing derivation from the German *deliberativstimme* (deliberative voice) is the one privileged by Habermasian deliberative democrats, who have no intrinsic interest in sortition-based representative ‘minipublics’ (Sintomer, 2010a, p. 36). For detailed examination of the differences between the Latinate and Germanic deliberative traditions see Chapter 5.1, above.

(the elimination of causal links) whereas the invisible hand is positive (the distribution of qualities in the target population (stochastically) determining the distribution of those qualities in the microcosm).

Blind Break	Invisible Hand
<i>Indeterminate</i> selection of persons	Stochastically <i>determinate</i> microcosm
Negative – arational elimination of causal links	Positive – <i>ratio</i> of attributes between microcosm and target population

Table A2.2: *The Blind Break and the Invisible Hand*

A good case could be made for adopting separate terms for each of these two mechanisms – ‘sortition’ in the former case and ‘lottocracy’ (Guerrero, 2014), ‘statistical representation’, or ‘stochation’ in the latter. Perhaps only then will theorists in both camps stop talking past each other and/or seeking to subsume one paradigm within the other. Although it is true in principle that selection by lot will ensure both outcomes (descriptive representation and elimination of causal links) simultaneously, the differing practical entailments of the two approaches underwrites the argument for separate terms.

The ‘third way’ provided by the epistemic school of deliberative democracy attempts to bridge the individual/group divide but fails to ensure ongoing statistical representativity. As such it’s hard to understand the relevance of the sortition principle as there are (arguably) better ways of establishing the cognitive diversity necessary for innovative policy proposals. The two factors distinguishing the blind break and the invisible hand – [in]determinacy and [a]rationality) – are orthogonal to the arguments put forward by epistemic democrats so, for this reason, the third option is not included in the table above.

Glossary of frequently used terms

English

Nomothesia: Lawmaking

Rotation: The allocation of public offices by a selection procedure that allows (in principle) all citizens to rule and be ruled in turn.

Sortition: Random selection by the drawing of lots.

Stochation: (*stə'keɪf(ə)n*): 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 στόχος (*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.

Votation: A feature of Swiss democracy, whereby citizens choose from a list of direct-democratic proposals that have exceeded a minimum signature threshold.

Greek²²

Ho boulomenos: 'He who wishes'. In political contexts it denoted a citizen who took a political initiative.

Isegoria: Equal right of speech. The right of every citizen to speak and move proposals in the political assemblies.

Isonomia: The principle of political equality. *Isonomia* does not mean equality before the law, but the equal right of all citizens to exercise their political rights.

Nomothetai: Legislative commission consisting of, for example, 1,000 citizens who had been selected by lot from the panel of 6,000 jurors.

²² Derived from (Hansen, 1999)

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