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**Randomness and Legitimacy in Selecting Democratic  
Representatives**

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**Randomness and Legitimacy in Selecting Democratic  
Representatives**

by

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## **Dedication**

To Wyatt and Nash, who make it matter.

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The author would like to thank my sons, for their inspiration and patience. I would also like to thank my parents, who set an example for me, and all the members of my extended families, for their patience. I owe a special debt of gratitude to the members of my dissertation committee: Sanford Levinson, Russell Muirhead, David Braybrooke, Benjamin Gregg, Gary J. Jacobsohn, and Paul Woodruff, for their guidance, attention, and comments. I would also like to thank the Department of Government at The University of Texas at Austin for the chance to complete this work, as well as the Department of Political Science and Geography at The University of Texas at San Antonio for the opportunity to teach political theory while doing so. Many others have also played an important role in the process, offering suggestions, concerns, and exhortations. I could not possibly name you all here, but you know who you are, and I thank you.

# **Randomness and Legitimacy in Selecting Democratic Representatives**

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Abstract: The addition of random selection to our arsenal of methods for selecting political officials would enhance performance against norms of representative democracy. I employ historical and analytic methods to explore the nature of sortition and its relation to political equality, rational decision-making, and legitimate representation. Sortition both expresses a democratic commitment to political equality and facilitates improved performance under this democratic norm. It can be rational to eschew reasons in the process of selecting political officials, and decision-making bodies chosen randomly can be expected to make good decisions. I also address concerns stemming from representative norms, surrounding random selection of officials, arguing that random selection can enhance the resemblance and responsiveness of representatives. Finally, I detail some possibilities for institutional arrangements that would deliver the benefits of sortition while addressing the challenges it presents.

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## Chapter One: Introduction

*In those days there was real concern for liberty among the people. They wanted, that is, to keep things under their own control and to govern the Republic themselves. Now, on the other hand, the people seem to despair of themselves. They submit to an alien will and let the wishes of certain people subvert their lives.*

- Alamanno Rinuccini (1479, 207)

*The dissonance between ideal and reality can be summarized under four catch-phrases, relating to the four things that have always represented a peril for democracy: concentration of power, elite recruitment, political profit and professionalism.*

- Mogens Herman Hansen (1991, 271)

Contemporary notions of democracy tend to identify it with the institution of elections. Yet election is merely one of several means by which we might choose our political leaders. Meanwhile, the role elections play in the dubious performance of modern, representative democracies towards the ideals we avow as democrats has led reformers to consider alternative selection mechanisms as one possible avenue for reform. I consider herein arguments for and against random selection, sometimes referred to as lottery or sortition. Past political uses and contemporary analyses of random selection suggest that it is best characterized by the impartiality and unpredictability that it bestows upon the



process. Both characteristics offer positive and problematic possibilities in the context of democratic selection. For example, an equiprobable lottery for selecting political officials would express an understanding of humans as equal, but with the possible loss of expertise and accountability among those chosen in this manner. An examination of the criteria for political legitimacy suggests a need for more careful thinking about ways in which selection by lottery might be deployed to take advantage of its benefits while mitigating the effects detrimental to legitimacy. This dissertation argues that the increased use of random selection in selecting our political officials would contribute to the legitimacy of representative democracy by: enhancing political equality, creating conditions conducive to better decision-making by our representatives, and selecting representatives who resemble us and are more responsive to us.

This dissertation explores the nature of sortition and considerations of its relationship to three aspects of political legitimacy: political equality, rational decision-making, and legitimate representation. Each of these three relationships is explored in its own chapter, beginning with Chapter Three. In this way, I isolate the contributions of sortition, beneficial and detrimental, to political legitimacy. The lessons that emerge are deployed in sketching some institutional uses - and uses to avoid - for random selection in modern, representative democracies. The effort promises four distinct contributions to political science. First, it contributes to normative understandings of representative democracy and

political legitimacy. Second, the consideration of the contribution randomness offers to performance towards democratic ideals serves to aid our self-understanding: to what extent might random selection promise improved performance under the democratic ideal, and given this how are we to understand our democratic commitments in light of our persistent devotion to election and appointment in modern democracies, to the virtual exclusion of lottery? We are left to conclude either that the shift away from randomness in modern liberal democracies was a mistake to rectify, or that we are not meaningfully committed to the democratic ideals that we assume as citizens and articulate as democratic theorists. Perhaps both. Third, while random selection plays a prominent role in research on deliberative democracy as well as in proposals for institutional reform that feature deliberative aims, the scope of that work is limited by the lack of a narrative regarding the legitimacy of bodies selected randomly. Can randomly selected representatives make binding political decisions, and if not, does this limit the deliberative democratic program? I argue that randomness alone cannot assure legitimate representation, but that the deliberative democratic program can still benefit from uses of random selection in combination with other selection mechanisms. Fourth, as democracy spreads across the globe, a great deal more reflection as to which institutions work and which are in need of replacement or improvement is warranted. A focus on the beneficial characteristics of lottery, along with an awareness of its weaknesses, should contribute to constitutional

development and the reform of existing institutions, strengthening reform proposals and setting the table for developing more effective institutions in new democracies.

### **Why Elections?**

It bears noting here that there is nothing quintessentially democratic about using a lottery, even an equiprobable one, for selecting democratic representatives. Despite the historical affinity between lottery and democracy, a lottery is no more inherently democratic than is an election. If democracy is rule by the people, then what makes a lottery, or for that matter an election, democratic is the role that the people play in governance, and the ability of each citizen to have a meaningful impact on the decisions involved. The list of those eligible for selection, as of those eligible to vote, and the eventual relationship between those selected and the rest of the citizenry, are what determine whether a selection process and the regime it supports are democratic. Indeed, there is no shortage of examples of non-democratic uses of either selection mechanism, such as the use of lottery in the medieval republican city-states of Italy or the single candidate elections held more recently in former Soviet bloc nations.

To understand whether and how modern representative democracies might benefit by including random elements to complement existing selection processes, we must first consider some of the more likely reasons for the shift in modern

democracies towards election as the selection mechanism of choice. This shift is important because a historical understanding of democracy that predates its modern instantiation does not privilege election to this extent. Selection by lottery had, arguably, pride of place in ancient democracies, and by any account it served as a "significant political decision-making device" (Duxbury 1999, 16), safeguarding democratic values in ancient Athens and checking factions and facilitating citizen participation in the medieval and early modern Italian city states. So why is it neglected in the modern incarnations of democracy?

A variety of possible explanations exist. Some of the modern sentiment in opposition to lottery can be traced to religious concerns, such as those of Ian Bamford, who "maintained that *any* lottery demanded an immediate exercise of power by God" which no one is entitled to invoke "at will or whim" (Goodwin 1992, 168).<sup>1</sup> The American Puritans exhibited a similarly-based hostility to lottery, and the association between lottery and gambling continues to trouble those motivated by religious beliefs or concerns surrounding its impact on the work ethic. Not limited solely to straightforwardly religious concerns, these objections are also suggestive of a larger ethical argument. The encouragement of a "gambling spirit" might, among other results, have an "anti-meritocratic" effect. By disregarding deservedness in favor of randomness, over time the work ethic is

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1. Barbara Goodwin cites I. Bamford, *A Short and Plaine Dialogue concerning the unlawfulness of Playing at Cards, or Tables, or any other Game consisting in Chance* (London, 1593, repr. 1623).

undermined (Goodwin 1992, 169-70).<sup>2</sup> Whether due to its association with gambling or its broader potential to lead to ethical deterioration, this view sees lottery as an opening for corrupt practice. The tendency of lottery to distort individuals' assessments of their chances of winning prompts Adam Smith to declare "that there would never be a fair lottery."<sup>3</sup>

However, these sorts of discomfort with lottery were not universally shared, even amongst the clergy. Aquinas allows that "divination by the casting of lots is not forbidden by natural law," but cautions that since "lotteries can be 'misapplied'" they should be reserved for situations "where there appears to be no other way of discovering the correct course of action" (Duxbury 1999, 17-18).<sup>4</sup>

Thomas Gataker produced what are widely considered the first modern, systematic and English-language treatments of lottery, in which he argued that not all lotteries invoke divine will, and that some lotteries are simply under the control of human beings, subject to natural rather than divine law (Gataker 1627). He held that such "civill" lotteries, dealing as they did in games and matters of relative unimportance, were entirely appropriate uses of chance (Gataker 1627,

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2. Goodwin cites an anti-lottery resolution put before the House of Commons that was grounded in part on this argument, referencing J. Ashton, *A History of English Lotteries* (London: The Leadenhall Press, 1893).

3. Adam Smith, *The Wealth of Nations*, ed. A. Skinner Harmondsworth: Penguin, 1974 [1766], p. 210, cited after Goodwin (1992, 169). Duxbury (1999, 19) provides the basis for this interpretation. He quotes Smith, "[t]here is not ... a more certain proposition in mathematics, than that the more tickets you adventure upon, the more likely you are to be a loser," citing *Wealth of Nations*, I. x. b. 27.

4. Neil Duxbury quotes from and cites Aquinas, *Summa Theologiae*, II. ii. 95. 8.

130). Gataker treats the political use of lottery explicitly, deeming it interchangeable with majoritarian election (Gataker 1627, 61, 118).

Gataker's arguments, along with increasing uses of lottery in other spheres (see, for examples, Goodwin 1992, 169-70), suggest that other reasons beyond religious objections must explain the banishment of lottery from the modern political landscape. The objection to political uses of lottery is no longer about blasphemy (Duxbury 1999, 22n43). Far from abusing divine will in order to make earthly choices, from a secular perspective the use of chance to make decisions more weighty than those involved in gaming may "trivialize important issues" (Duxbury 1999, 17). This concern is motivated by an expectation that important decisions should be made by use of reason. More so perhaps than the religious concerns, this set of objections characterizes the underlying difficulty we have in modern, liberal society with the use of randomness in lieu of rationality. Appeals to lottery are seen as "a failure to comprehend, an inability to understand," (Duxbury 1999, 22). Indeed, "[a]ccording to the freedom-responsibility doctrine, the use of a lottery ... subverts man's control over his own affairs, denies his proper role as a moral agent, and otherwise constitutes a step backward into the dark ages ..." (Fishburn 1976, 137). William Godwin portrays sortition as an act of "contemptible cowardice" (Godwin 1971, 241-43). I note

here that the continued use of quasi-randomness in populating juries stands as something of an exception to this aversion to lottery.<sup>5</sup>

Working in tandem with this shift in thinking about our responsibilities as rational agents are differences between late moderns and the ancients in the ways fundamental political concepts like equality, sovereignty, representation, and citizenship are understood. In contrast with the ancient Athenian understanding of democracy as government by the people, the modern, contractarian narrative puts citizen consent (Locke 1690), rather than direct participation, at the core of political legitimacy. Although equality is still central to this narrative, it reflects a shift in the prevalent understanding of political equality, from the ancient emphasis on an equal opportunity to rule, to the modern requirement of an equal right to express consent to those ruling on our behalf (Manin 1997, 92). This shift is consistent with a move toward privileging election in a democracy, where the act of voting is itself viewed as the renewed expression of consent.<sup>6</sup> By comparison, even egalitarians criticize lottery as expressing an overly simplistic understanding of equality (Walzer 1983, 305; Barry 1995, 226-28), and it does not carry that same badge of legitimacy (Manin 1997, 83-88).

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5. I am primarily interested here with the random element in the selection of juries, the democratic nature of which is treated at length by Jeffrey Abramson (1994). But lot-casting by criminal trial juries themselves, in attempting to reach a verdict, was not unheard of in medieval times (Duxbury 1999, 20).

6. I thank Melissa S. Williams for stressing this point to me in a personal conversation in Chicago, April 12, 2007.

This disregard of citizen participation in forms beyond the point of consenting, the result of privileging election, is also reflective of declining expectations of citizens. First, because the role of the citizen has become one of authorizing, rather than of participating directly in the process of self-governance, citizens are now viewed as uninterested in doing more. The contrast between today's political apathy (Duxbury 1999, 33) and yesteryear's widespread participation gives pause to anyone advocating a scheme that relies on high levels of citizen involvement.<sup>7</sup> Second, the expectation has arisen that citizens are not only unwilling, but also unable to engage in self-governance. This thinking may stem from a perceived increase in the level of difficulty of the task, and it also may indicate a lower assessment of the capacities of the common man.<sup>8</sup> If politics is a profession, and one that - as we tend to think of it - requires special expertise,<sup>9</sup> then both the randomness and short terms associated with sortition create problems that election ostensibly addresses. Though it reflects the prevalent

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7. Then again, disagreement exists as to how eager even Athenians were to participate in the political process.

8. John Burnheim (1985, 10) credits both the rise of contractarian thinking and the trustee model of representation for the association of democracy with elections. In the latter case, he finds "classical utilitarianism" at work, whereby elections are designed "to give electors the chance of choosing those who are best equipped to make good decisions, *those who possess all the knowledge and skill that the electors themselves clearly lack* [emphasis added].

9. The modern exception that proves the rule are the "populist" agendas that led many states in the late 19th century to establish "amateur" legislatures who must continue to pursue other forms of livelihood. The Texas legislature, which conducts regular sessions of only 120 days every two years, a job for which legislators are paid only \$7000/year, is a prime example.



political model today, where we look for our representatives not only to represent our interests, but to do so with some skill (Duxbury 1999, 34), the view that politics should be reserved for professionals cannot be dismissed as merely a modern way of thinking (Plato 1968). That said, unlike today this position was not reflected in the design and conduct of political institutions in the heyday of Athenian democracy, in which a genuinely democratic spirit was at work (Ober 1989). The received skepticism of ancient philosophers for democracy represents the minority view, not the last word on the matter. Though skepticism about democracy is nothing new, the relatively recent re-casting of election as democratic represents a silent victory for the skeptics.

Other differences of thought and circumstance between Athens and modern democracies are often pointed to as well. Election's role in ensuring the accountability of representatives (Pitkin 1967; Mansbridge 2003) to those they represent is a theme often voiced in response to any discussion of the viability of lottery in modern democracy. This argument is not a terribly convincing one, however (see Maloy 2008). For my purposes here it suffices to say that even though the idea of representative democracy was foreign to Athenian democrats, the idea of accountability of their leaders certainly was not. Where the specter of electoral sanction was not in play, the Athenians employed a battery of other devices designed to make leaders answerable for their actions to the citizenry (Elster 1999). Indeed, it may be that our modern thinking about the association of

election and accountability has colored our thinking about what accountability means and how it can be assured.<sup>10</sup>

In another argument contrasting modern circumstances with those faced in Athens, many point to the concerns over the size of the new American republic, again in contrast to the typical size of the city-states such as Athens in which democracy was born and lottery widely employed, as a reason for choosing election over sortition. While size is most evidently treated in the thought of the American founders as a bulwark against the tyranny of faction (Madison 1787, 40-46; Madison 1788a, 251-55), there is also an argument to be made in favor of election over lottery on this basis.<sup>11</sup> Neil Duxbury suggests that the implications of size for random selection have more to do with numbers than space. Both population and the proportion eligible for political participation have increased to the extent that the likelihood of being chosen randomly to serve is "extremely remote" (Duxbury 1999, 32-33).<sup>12</sup> And if the argument for random selection is in part predicated on the notion that this will create a sense of participation based on a realistic expectation of being selected, it must be acknowledged that any such

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10. I thank Paul Woodruff for making this point during my proposal defense in Austin, April 2, 2007. I return to it in Chapter Five.

11. Indeed, San Marino is said to have been able to continue using lottery to select governors into the twentieth century due only to its small size, which is comparable to that of ancient and medieval city-states (Duxbury 1999, 33fn97).

12. Oliver Dowlen (2006) explicitly disputes any argument for or against sortition on the basis of the size of the republic, calling size a red herring.

sense of participation will be severely attenuated as the odds of selection in one's lifetime approach zero.<sup>13</sup>

It seems likely that the American founders were at least cognizant of these concerns when they opted to privilege election as their selection mechanism of choice. But it is far from clear whether or not election was chosen primarily for these reasons. For example, there is considerable disagreement as to whether Publius defended election as a way of selecting those best equipped to represent the general interest (Madison 1787, 44), or simply as a means of adding a degree of separation between the people and their government, in order to facilitate the selection of those most likely to protect elite interests (Nedelsky 1990). Rather, and despite the appeal of the conceptual understandings as presenting a clear "choice" of election, there is no doubt an important historical element as well, in this shift to elections.<sup>14</sup> Manin himself acknowledges the role of history in these shifting concepts, but he perhaps underemphasizes the gradual nature of this shift, as a historical product of both time and place, rather than a simple choice made at the time of the American founding.

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13. However, the argument from participation can cut both ways. It would be a relatively simple matter to point at low levels of participation, or even voter turnout, in contemporary American democracy, as an indication of either modern lack of interest in participation or as an expression of attenuated popular consent. But I am more concerned to argue the theoretical capabilities of election and/or lottery rather than engage in any empirically-based critique. I will return to these considerations of the implications of each selection method for participation and consent later in this chapter, and in Chapters Three and Five, respectively.

14. This was emphasized to me by Jane Mansbridge, in a conversation in Chicago, Sept. 1, 2007.

The scholars who make a more contextual argument tend to find the precursor of modern thinking on representative government not in Athenian democracy, but in the republican thinking of medieval and early modern Italian city states. "The marginalisation of sortition is not unconnected to the rise of representative government," and in both America and Britain, "Athens was reborn as a democratic paradigm .... but without overt advocacy of sortition and with the substitution of representation for direct democracy" (Dowlen 2006, 9). The choice being made by French and American founders alike was not one between different visions of representative government. Rather it was a rejection of the monarchical traditions (Turner 1981), yet with an understanding of the common man that owed more to feudal roots than to Athenian influence. In this respect, it should hardly be surprising that the Founders inherited from their formerly monarchical tradition, rather than receiving their understandings of political legitimacy, equality, and citizenship directly from Athens. It is the possibility that something was lost in translation that motivates this project. It may be that the tension between modernity and the conditions conducive to robust democracy is a misdiagnosis, based on a misunderstanding of democracy.

### **What is the Problem and What about Electoral Reform?**

There is an "inevitable tension between the declared right of all citizens to office and the actual situation on the ground" (Dowlen 2006, 264). This is not

merely an empirical problem. The shift to using election at the expense of any role for lottery in modern democracies leaves us looking to election to deliver on functions for which it is not equipped to handle, even in the ideal. First, although we are today quite comfortable with a notion of equality that allows for rewarding natural differences between us, often referred to as “careers open to talents,” this conception of equality is more liberal than democratic. Elections are intended to foster “equality of political opportunity rather than strict political equality” (Mulgan 1984, 547). By contrast, the Athenian view of political equality stipulated that all have an equal right to hold, and not simply run for, office, and that all are equally equipped to do so (Woodruff 2005, 131-32). Consistent with this *ethos*, lottery facilitates a "prospect-regarding equality of opportunity," where "nothing about the people affects the result" (Rae et al. 1981, 65-66). This understanding of equality and democratic commitment was motivated by a conception of humanity as by nature sharing both the need and ability to self-govern (Woodruff 2005, 133).

With its intent to differentiate, election flies in the face of this ancient understanding of human nature, equality, and democracy. Of course, neither the equality of opportunity that election ostensibly reflects, nor the impossibility of deeply descriptive representation under an electoral system, is uniformly considered problematic to the democrat committed to political equality. There is still an intuitively compelling argument that election would facilitate better

government based on the premise that we are not strictly equal in our capacities. Since some are better suited to governance than others, the argument goes, choosing those best equipped to rule is simply efficient, and need not be inconsistent with the guiding democratic principle of political equality. Partiality between candidates is a virtue where their differences are relevant.

Whether election is equipped to distinguish the relevant from the irrelevant differences, much less the superior from the inferior candidates, is another matter. For while election seeks to select the candidate who is superior in the right ways, all that we can say objectively is that elections select candidates who are different, both from the *demos* and from the other, losing candidates. The claim for superiority of chosen candidates is “merely perceived or subjective.” The selection of criteria by which the choice should be made is inherently contestable, as are assessments of a candidate's performance under any criterion upon which we all might agree. Not only does the differentiating function of election ensure unequal opportunities to hold office, but because of its goal of differentiating it also “cannot, by its very nature, result in the selection of representatives who resemble their constituents” (Manin 1997, 149). By choosing for distinctiveness, election ensures that those who rule in our stead will be different from us. Whether we see this as problematic for democracy by election may depend on the particular conception of equality to which we subscribe, a discussion I take up in Chapter Three.

This is not to say that such selection is incompatible with political equality, as long as voters are “free to determine which qualities they value positively and to choose from among these qualities the one they regard as the proper criterion for political selection” (Manin 1997, 158). However, neither aspect of this caveat is self-evidently the case. Most obviously, money intrudes into the political sphere, and in part confers power because of the cost of disseminating information (Manin 1997, 159). Like Michael Walzer, I recognize the acceptability, or inevitability, of some levels of inequality in the various spheres, but in his telling even complex equality is jeopardized when a monopoly in one sphere becomes dominant in another (Walzer 1983, 17). Walzer is himself quite concerned with the ability of money to bleed into other spheres and buy things that should not be for sale, like elections (1983, 127-28). The dominance of money over the political sphere allows those with its advantage to drive the discussion, priming, framing, and setting the agenda to feature the characteristics that define their preferred candidates. Wealth can influence voters' determinations of the qualities that are admirable and the salience of these qualities to vote choice, thus undercutting Manin's requirements for elections and political equality.

While Walzer suggests that we must confront the problematic relationship between the spheres of money and politics, he ultimately provides no concrete prescription for a remedy, stipulating only that complex equality requires

“strenuous defense” of the boundaries between spheres (Walzer 1983, 318). Others who identify this problem recommend campaign finance reform as the way to solve it, bringing election back into service of good government and political equality (Ferguson 1995). However, it is not clear that the matter can be solved simply by regulating private spending, for two reasons. First, it seems unlikely that campaigns could be so controlled as to prevent money from playing any role whatsoever in their outcomes. The aftermath of the latest round of campaign finance reforms speaks anecdotally to this intuition.<sup>15</sup>

Second, and perhaps more importantly for my argument, the problem of external dominance of other spheres, leading elections inexorably to create political inequality, is not limited to dominance by money. Manin suggests as much when he allows that “freedom of choice is not secured if the specific content of the superiority [upon which elections are selecting] is determined solely by external factors and circumstances.” He calls for, but does not specify, further change beyond campaign finance reform, to allow political equality to coexist with elections (Manin 1997, 160). Any understandings of superiority inherent in societal or cultural value-systems represent a potential influence on the political decisions of the voter. In this way, election facilitates the entry of inequalities from every sphere into the political. Since these understandings of

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15. The *Citizens' United* ruling allowing unlimited corporate campaign contributions is of course devastating to any prospect of political equality, but it would hardly be fair to hold the institution of election responsible for the decisions of an appointed court.



superiority, no matter the source, are necessarily subjective, voters' choices by definition result in the political marginalization of some portion of the citizenry for potentially illegitimate reasons.

It is essential to election campaigns that differences between candidates are highlighted, but it is not at all essential that these differences be meaningful to assessing differences in prospective job performance. Likewise, as a consequence of the combined effects of the shortcomings just discussed, those selected by election are not necessarily equipped to generate productive discourse once inside the political process. First, their election is to some extent a recognition of how they talk to the public, but may tell us little about how they will talk to each other. Second, to the extent that cultural cues of superiority transcend district boundaries even somewhat, the same process dynamics that select representatives who are different from us are likely to lead to the selection of representatives who are similar to each other. As a result, not only do our representatives seem unrepresentative of their constituents, but they lack the diversity of backgrounds crucial to productive discourse (Elster 1989, 97). I stress that this is a not a problem with the way we conduct elections, it is endemic to the very nature of election.

As such, the problem is not something that can be "reformed" from within. Neither reforming campaign finance nor revamping the electoral system can overcome it. The ability of democratic representation to "represent" is widely

called into question. Implying some doubt about this, Jane Mansbridge asks, “whether the criteria of non-manipulation, interest clarification, and retrospectively approvable transformation that justify unequal access to influence are being met or at least approached” (Mansbridge 2003, 520). Simply moving from plurality-based elections to proportional representation, for example, may increase representation of various groups, but does it not eliminate the problem, shifting the lack of representation to a different group. Some groups will inevitably be left out, and PR-based electoral systems can only do so much to make representatives look like their constituents and introduce minority voices. While there may be reasons for stratifying representation on the basis of certain demographic characteristics, even those who are members of an identified group may not see themselves in that group's candidates. We are, individually and collectively, bundles of an infinite number of characteristics, and PR can only address a tiny number of those. In addition, even in minority groups, we still see the development of hierarchies (Michels 1962).

Similarly, proposals designed to make democracy more "direct" by giving all citizens an opportunity to weigh in directly on policy matters, such as the recent proliferation of referenda and citizen initiatives at the state level, along with proposals to employ the internet to facilitate deliberation and/or voting, may address one or more of the problems identified above with elections and representative democracy, but none of these can simultaneously combat the

problems of subjectivity and domination for reasons external to the political. Initiatives can generally be traced back to one or another interest group, for example, and the internet can hardly be touted as a likely source of Habermasian discourse ethics. In short, these reforms simply exchange problems we face in a representative democracy for those associated with direct democracy. I, however, subscribe to the notion that representative democracy is not the problem, but rather a solution (Urbinati 2006), and that what is called for are attempts at making representative democracy both more representative and more democratic. Accordingly, it may behoove us to look more closely at alternative ways of selecting leaders in a representative democracy, rather than alternatives to representation altogether.

### **What Lottery Can and Cannot Do**

We tend to view the qualities that we consider essential to a legitimate democracy through an electoral lens. We point to the expansion of the franchise and the widespread eligibility to run for office as hallmarks of political equality and participation. Indeed, we view voting as one of the very few obligations we share as citizens, perhaps along with paying taxes, jury duty, and adherence to the law. We consider election campaigns to be the most effective means for facilitating a rational choice of competent, even expert leaders. And we see those elected as being representative of us in a number of important senses. As a

consequence of our votes, we have indicated our consent to be ruled by those we have chosen, and we likewise consider them accountable to us *via* their desire for our votes in the future. Because *we* have chosen them, we see them as representing our interests. While we tend to think of election as best suited for delivering on all the above qualities, we should not overlook the possibility that our understanding of the importance of elections to democracy affects our understanding of political legitimacy, and not just the reverse.

However, even contemporary practice serves to remind us that random selection of representatives can serve democratic ends, too. The jury trial is the most immediate example of a continued role for randomly selected citizens in giving expression to our democratic values and making decisions to which we ascribe legitimacy (Abramson 1994). The democratic potential for random selection is further bolstered by the persistent presence of lottery in other respects at the margins of democratic theory and practice, examples of which are discussed in Chapter Two. While the contemporary democratic "canon" may neglect to the point of silence the potential for lottery as a democratic selection mechanism to the point of silence, there is no shortage of discussion on its potential for social and political use (Barnett and Carty 1998; Buchstein 2010; Callenbach and Phillips 1985; Carson and Martin 1999; Dowlen 2006; Duxbury 1999; Elster 1989; Engelstad 1989; Goodwin 1992; Greely 1977; Leib 2004; Mueller et al. 1972; Mulgan 1984; O'Leary 2006; Sintomer 2010; Stone 2000; 2011, 119-44;

Sutherland 2004; Zakaras 2010). Random selection has gained prominence of late in practice and the public consciousness as well. Citizens juries (Crosby 1995), planning cells (Dienel and Renn 1995), and deliberative polls (Luskin et al. 2002; Fishkin 1991; 1996; 1997) all employ random selection to some extent, and most recently, calls to fill a constitutional convention in California by lottery from amongst its citizens have been aired in the mainstream media (Hill 2009).

Some quite provocative proposals for employing randomness in constitutional settings have been offered in recent years. I will conduct an extensive review of these proposals in Chapter Two. Here, a few examples suffice. One is the recent reform proposal offered by Kevin O'Leary (2006), in which he calls for "true representation" in the form of a deliberative assembly of "super-citizens" who would be chosen randomly from within each extant congressional district, and who would not only advise their congressperson but also collectively have some legislative authority of their own. As compelling as this reform proposal might be, it falls prey to the mistake of simply ascribing "representativeness" to a randomly chosen body. Others who have advanced lottery-based reform proposals at one time or another have fallen prey to this mistake (Burnheim 1985; Callenbach and Phillips 1985).

More recently, the journal *Constellations* ran a four-piece symposium in 2010 on "Randomness and Representation." Yves Sintomer considers the uses of random selection in both medieval Florence and in the British Columbia Citizens'

Assembly. He contrasts the two contexts in order to explore the relationship between "random selection and deliberative democracy" (Sintomer 2010, 473). Yet he sees randomly selected "mini-publics" only as a "second-best" alternative to self-government. This leads him to call for randomly selected, consultative bodies whose decisions are subject to the binding authority of elected representatives or direct, popular referenda (2010, 482-83). While there are certainly circumstances that warrant such a coupling, this should not be the only way in which we consider using sortition, nor should we be unreflectively deterred by concerns of legitimacy from putting random selection to more robust use.

In the same symposium, Alex Zakaras expresses dismay at this tendency, observing that "even among democratic theorists" there exists a "pervasive skepticism about lottery," driven in part by legitimacy-based concerns (Zakaras 2010, 459). Zakaras contends instead that lottery is consistent with values "central to the justification of democratic government" (ibid.). Surprisingly, given this orientation, Zakaras then proceeds to offer a proposal that exhibits much of the same skepticism he decries. Zakaras proposes "citizens' chambers" whose responsibilities would be limited due to "epistemic objections," primarily by making them voting-only counterparts to another, elected chamber, in which would reside legislative agenda control (Zakaras 2010, 458). Though Zakaras is correct that a randomly selected body of officials would lack experience (2010,

467), this is no reason to cede the epistemic argument to elections. As Zakaras himself notes, our expectations for the capacity of elections to choose the most competent officials are dubious, an idea to which I will return in Chapter Four, and warrant further testing.

More willing to offer true, binding, political authority to randomly selected officials is Hubertus Buchstein, who proposes a variety of uses for randomness in the government of the European Union.<sup>16</sup> While highlighting the advantages random selection holds for deliberative groups, Buchstein deplors the lack of "courage" on the part of the likes of Dahl and Fishkin when it comes to assigning advisory-only roles to their randomly selected groups (Buchstein 2010, 444). Instead, Buchstein argues, negative experiences with randomly selected groups, such as low participation and difficult discussions, are driven by their "non-binding status." He contends that having some influence on politicians helps motivate the participants (2010, 445). For Buchstein, random selection helps "bridge" different models of democracy, featuring both participatory and epistemic benefits (2010, 449). In particular, Buchstein and Michael Hein propose that lotteries be used to determine which member nations would have seats in a smaller European Commission, to fill various committee positions in the European Parliament, and to create a second, randomly selected chamber of the EP (2010, 138-51).

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16. These are mentioned briefly in his *Constellations* piece (Buchstein 2010, 449-50), and at greater length in Buchstein and Hein (2009; 2010).

Building on this work, along with that of others to be discussed at greater length below, one of my objectives is to construct a more careful synthesis of what characterizes lottery and those selected randomly, and what are mistaken or unreflective assumptions about the nature and effects of sortition. Randomness is especially central to the work being done by deliberative democratic theorists and researchers, as well as to actual experiments in democratic reform such as those being conducted by citizens' assemblies in a number of Canadian provinces (Warren and Pearse 2008). I envision this work as contributing to those efforts, by supplying a theory that would legitimize their broader deployment. Reformers who wish to employ lottery as a way of choosing representatives, and researchers who see the value of random selection to more efficacious deliberation but who have been reluctant for reasons of legitimacy to empower those so chosen, all stand to benefit from an examination of the relationship between randomness and legitimacy. For while the temptation to conflate randomness with representativeness can weaken otherwise compelling proposals for democratic reform and the return of lottery to its place in the pantheon of democratic selection mechanisms, there are other characteristics of randomness that are worthy of consideration for their potential to contribute to democratic selection. Chief among these are impartiality and uncertainty.

Where lottery has been given serious attention as a democratic selection mechanism in recent centuries, failure to recognize these benefits in combination



with problems, real and imagined, that randomness might create or exacerbate has quickly led to its being discarded from consideration. And in fairness, many consequences of randomness militate against its unlimited application for the purposes of democratic selection. Superficially, expertise, experience, accountability, the opportunity to consent, and other aspects of legitimacy would suffer under a wholly random regime. While there may be some instances where lottery is suited for use on its own, there are likely many more opportunities to benefit from its use in conjunction with other, extant selection methods. The key to deploying random selection profitably is in understanding the circumstances and institutional arrangements under which it can make a positive contribution to legitimacy without creating unacceptable costs in the process.

Jon Elster characterizes "rational action" as involving three operations of optimization: "finding the best action, for given beliefs and desires; forming the best-grounded belief, for given evidence; and collecting the right amount of evidence, for given desires and prior beliefs" (1989, 4). In a political context, we might say that the dynamics of selecting representatives could be described in similar terms, and in fact it is part of Elster's argument that random selection can sometimes be a rational way of deciding, where indeterminacy exists between various candidates or alternatives. This is only part of a larger argument for incorporating randomness into the political selection process, but it is a powerful place to start. Elections, or policy votes, may sometimes ask us to choose

between candidates or solutions that are not materially different from the perspective of satisfying our desires, independently or collectively, even in the cases where our desires are known in a meaningful sense. Elster considers two types of such scenarios: where there are multiple "optimal" options, or none (1989, 8-9). Elections may fall into either category, and random selection should be viewed as an equally attractive alternative to election in either case. Our attachment to elections as a way to choose between candidates can be partially attributed, in addition to the other legitimacy-related motivations already discussed, to "hyperrationality," rather than to any real benefit attached to the result of the process (Elster 1989, 25-26). Meanwhile, lottery may be more efficient, saving us the cost of collecting evidence that has no likelihood of helping us identify a significantly more optimal solution. It also offers a "sanitizing effect" (Stone 2009). Where no good reasons exist on which to base a decision, the impartiality and uncertainty of lottery help ensure that decisions are not made for *bad* reasons. Unfortunately for proponents of putting lottery to greater use, according to Elster "we have a strong reluctance to admit uncertainty and indeterminacy in human affairs, and as such we prefer the "rituals of reason" to admitting its "limits" (1989, 37). And the decision to use a lottery requires, at least in part, just this sort of admission.

Moreover, Elster recognizes that while this argument suggests "we might as well use a lottery," that is not the same as showing "that a lottery is rationally

or morally required." It could just as easily be concluded from this much that we could arbitrarily choose any other means or criteria by which to decide. This work is in part motivated by an interest in exploring such positive arguments for lottery, from the perspective of various considerations of political legitimacy. Among such arguments are those that I will explore further in the remainder of this work: the value of equality to democracy, the potential for improved deliberation and decision-making on the part of groups chosen randomly, and the contributions random selection offers to representativeness. As already noted, this approach promises to strengthen efforts of deliberative democrats in employing random selection in political contexts. Along the way, lottery also offers a heuristic for understanding where ideal and practice differ, and what this says about our understanding of democracy: our commitments and priorities, as theorists, as social scientists, and as practicing democrats. Additionally, this analysis should pave the way for any number of possible uses of randomness in democratic reform and constitutional design.

## **The Arguments**

Having only briefly alluded in this *Introduction* to the various mathematical, philosophical, and historical works on randomness and lottery, I turn to these at length in **Chapter Two, *On Lottery***. There, I substantiate the democratic pedigree of lottery, its historical uses in political contexts, up to and

including the way we select jury pools today, and what these uses suggest about how an argument for lottery might address modern concerns of equality, participation, rationality, competence, interests, accountability, and consent. A systematic treatment of the characteristics of randomness, gleaned from its historical uses, from previous analytical work, and from the expectations of reformers and even fictional/utopian accounts, also suggests the ways in which an argument for lottery might be strengthened, and identifies the uses for which it is best suited. The resulting conceptual understanding of the characteristics of random selection is carried forward through the remainder of the work, not only to guide the discussion of the democratic potential of lottery, but also to suggest specific ways in which lottery might be employed in making representative democracy more representative and more democratic.

**Chapter Three, *Sortition and Equality***, begins with a presentation of the procedural view of democracy as articulated by Joseph A. Schumpeter (1942). The minimalist democratic narrative carried forward by the likes of Adam Przeworski (1999) depicts modern democracy as nothing more than a system of elections designed to ensure secure, stable government, and the bloodless transition between regimes. This understanding of democracy forsakes much of what many consider to be the fundamentally important aspects of democratic rule. Equality is unnecessary, and even the meaningfulness of popular participation in self-governance, the etymological root of democracy (Pitkin 2004), is disregarded

in this model. William H. Riker (1982) in particular adopts Arrow's economic premises to question the ability of elections to articulate anything that could meaningfully be called the "popular will." According to this telling, the very concept of popular will is devoid of meaning, thereby hollowing out any understanding of democracy.

In view of this most reductionist understanding of democracy, sometimes referred to as the "aggregative" model (Fung 2007), it is worth considering why Riker and company prefer election to any other selection mechanism. It is not clear that they identify election so closely with democracy for any reason other than historical contingency and a predilection for the status quo. Were peaceful transition of rulers our sole democratic aim, lottery could certainly serve just as well as an alternative to aggregation, and with a more impressive pedigree.

The chapter, however, goes on to argue for more robust expectations of democracy, following Thomas Christiano in articulating the importance to democracy of committing to values such as equality (1996). Many conceptions of democracy, especially those that fit into a more robust liberalism than the one offered by Riker, agree with the minimalists that expectations for aggregation reaching the common good are indeed incoherent. Still, there is an alternative to concluding that this makes democracy "meaningless." One might well share some skepticism about the ability of aggregative models to divine the public will, much less the common good, without renouncing the possibility that democracy

has value. It might instead be found in an alternative to, or at least a supplement to, aggregation itself. Jon Elster suggests (1983) that the collective will might best be achieved not simply by adding up individual preferences, but by leaving room for them to change (Gutmann and Thompson 2004). This premise is at the heart of deliberative conceptions of democracy, and such understandings of democracy are conceived in support of substantive values the likes of which we commonly associate with democracy, such as the equal opportunity of all citizens to contribute meaningfully to self-governance.

Having argued for the importance of a substantive conception of democracy, I go on to argue that introduction of lottery into the selection process might facilitate a fairer political environment, recasting the role and identity of citizens and making possible a degree of political equality that is precluded by the use of election as the prevalent mode of selection. This chapter tackles the objection that lottery traffics in too simple a version of equality and builds on defenses of lottery's use as a tie-breaker (Saunders 2008b; Stone 2007) to argue that the lot offers the potential for performing towards a more robust set of democratic commitments than those ascribed to democracy *qua* election. Lottery can do more for democracy than break ties, it can express differences, without impeding prospect-regarding equality.

Having affirmed the possibility of a more robust democracy among equals, as facilitated by lottery, and having acknowledged the concerns that such

equality represents a contestable version of fairness, I confront the argument on behalf of election based on these concerns in **Chapter Four, *Random Selection and Rationality***. This portion of the argument proceeds in two parts. First, I argue for the rationality of deciding to put random selection to greater political use, building on Jon Elster's work on indeterminacy (Elster 1989). We expect too much of election. Whatever merit, desert, or expertise we expect election to reward is subjective, as noted above. Election cannot adequately sort out competing claims, and to deploy time, effort, and resources in choosing the "best" candidate is a manifestation of Elster's "hyperrationality." The differences between candidates may be overstated during electoral campaigns, and election reinforces differences between candidate and citizen that do not comport with democratic rhetoric (Woodruff 2005). Instead, I argue that our differences are irrelevant to the strengths of our respective claims to office, and our claims to office are thus roughly indeterminate (Broome 1984b). Accordingly, our selection process is in need of impartiality, not reason.

Second, representative groups populated by processes employing random selection may be better equipped to make rational, defensible, and competent decisions. Even were we to concede that election chooses individuals who are more qualified for office than the average citizen, this is not sufficient reason to cede the argument to epistemic concerns over randomly chosen representative groups. Lottery would provide the heterogeneity needed for healthy deliberation

that is lacking from the bodies populated exclusively by way of election or appointment today. Not only can lottery facilitate a fairer political environment, as argued in Chapter Three, but under certain circumstances it can facilitate better decision-making as well.

**Chapter Five, *Randomness and Legitimate Representation***, turns to an examination of the implications of lottery for the concepts central to representative legitimacy. The concerns raised here are under-explored in the more ambitious proposals for lottery-based reform, while the very awareness of these concerns renders deliberative democratic practitioners unreflectively and overly wary of expanding their project more squarely into constitutionalized political settings. By way of addressing concerns surrounding random selection related to representative legitimacy, I synthesize from the literature on legitimate political representation two considerations: resemblance and responsiveness, which affect representative legitimacy, and I explore the ways randomness interacts with them. More generally, I offer a set of lessons for maximizing the benefits of randomness for representation while minimizing its drawbacks. Consistent with these lessons, I conclude with several illustrative examples that incorporate randomness into selection processes for various political officials. While the lottery is not appropriate for filling all offices, under certain conditions selection processes that include a random component can improve representative legitimacy over that achieved by more familiar alternatives, such as election.



Having explored the positive potential of lottery for considerations of legitimacy, and remaining explicitly cognizant of lottery's limitations, **Chapter Six, *Institutional Possibilities***, applies the lessons from previous chapters, sketching in detail the sorts of circumstances under which randomness might be deployed beneficially, along with the other, complementary, institutional arrangements necessary to minimize its costs. With each scenario, I present a holistic view of the implications of such a change, taking into account the impact this would have on political parties, opportunities for political participation, relationships between the constitutional branches and between the different levels of the Federal government, and so on. Throughout, I keep in view how the fundamental aspects of legitimacy that oriented the work to this point would be affected by such a change. In the process, I emphasize a recognition of the limitations of lottery, but continue to emphasize the opportunities offered by its continued consideration in the context of political legitimacy. The result is an exercise in constitutional and electoral system design, featuring several distinct opportunities for an increased constitutional role for randomness, in combination with other selection mechanisms and institutions.

## Chapter Two: On Lottery

*"And they cast lots for them, and the lot fell on Matthi'as; and he was enrolled with the eleven apostles."*

- Acts 1:26

*"[D]ecision-making by lot has more social and legal potential than we have been prone to assume, [and] it is an idea which deserves to be taken seriously."*

- Neil Duxbury (1999, 12)

A consideration of the possibilities for selection by lottery must begin with an examination of the characteristics of the device itself. In this chapter I seek to ascertain the chief and most pertinent characteristics of lottery both via a cataloging of its uses, past, present, and proposed, and by exploring the analytical work conducted on the nature of randomness by others in such diverse fields as mathematics, economics, analytical philosophy, political theory, and even utopian fiction. As a result of this inquiry, I establish a working understanding of what we can, and cannot, expect from random selection in a political context. Namely, by dint of its "arationality" (Dowlen 2006), its "sanitizing effect" (Stone 2009), lottery is both impartial and unpredictable. These characteristics promise potential contributions to democratic values and difficulties for democratic politics. Impartiality may enhance political equality and opportunities for

political participation from a broader swath of the citizenry. Unpredictability may militate against corruption and create conditions more conducive to more effective deliberation. These qualities may also create obstacles to the selection of political experts and experienced leaders.

## Terms

I use lottery, and random selection, more or less interchangeably with "sortition." The latter, generally taken to mean a use of a lottery for the purpose of selecting a political official, is perhaps the most precise word for the usage I am generally interested in herein, although I do not use it exclusively, because it is also the least familiar. Lottery, while the most familiar way of referring to random selection, is a somewhat imprecise term. Lotteries may be equiprobable or weighted, and may refer to a natural event as well as any number of artificially contrived events. They may be open to all or stratified to include only those possessing certain characteristics. I am not so concerned with parsing the potential types of lotteries that I feel compelled to adopt and adhere rigorously to any particular conception of "lottery."<sup>17</sup> I will rather adopt a sufficiently general and intuitive usage of the word as roughly indicating a device designed to make a random selection from a defined set of options.<sup>18</sup> Wherever circumstances require

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17. But see Peter Stone (2010) for a treatment.

18. Irrespective of whether said "device" is "natural" or "artificial" (Elster 1989, 40).

a more careful use of the word, or a more careful choice of words, I will endeavor to make my meaning clear. Likewise, randomness is a more complex concept than it might at first appear, and it has in turn received a great deal of attention, particularly with respect to distinctions between randomness that is mechanically generated and that which is inherent to a selection, and between actual and perceived randomness (Elster 1989, 39-40).<sup>19</sup> These considerations are not central to my argument, however.

I employ the term "random selection" to indicate an equiprobable process, "for all intents and purposes," for selecting from amongst a set of options. Such a definition may appear simple, but it has two very important implications, both of which are crucial to an analytical consideration of the properties of random selection, or lottery. An equal allocation of probabilities to all possible outcomes means that the selection process is "impartial." Any characteristics relevant to the selection process would be employed, and exhausted, in populating the pool of candidates, and prior to the operation of the random element, or lottery. Once the options are defined, an equiprobable process disregards any differences between candidates, dispensing with any partiality on those bases. Likewise, such a selection process is indeterminate, which is to say that because of the equiprobability of each outcome, the result cannot be known in advance. There

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19. The difficulty in establishing a logical or mathematical proof for randomness is evidenced by the surprising amount of attention devoted to the concept. See as examples (Bennett 1998; Rescher 1961; Kirschenmann 1972; and the paradigmatic Chaitin 2001).

exist, of course, what are commonly known as "weighted" lotteries, for which neither of these conclusions would hold. For this reason, and without engaging here the question as to whether sortition should allow for differentiated probabilities, in the absence of any further specification I will simply use the term "lottery" to indicate one where all possible outcomes are equiprobable. In any circumstance where weighted probabilities might come into play, I will again endeavor to make my usage clear. As I will show at greater length later in the chapter, the historical and analytical literatures on lottery commonly identify these two characteristics, impartiality and indeterminacy, as fundamental to random selection.<sup>20</sup>

For the remainder of the chapter, I will consider other work on lottery, from historical, analytical, mathematical, economic, and utopian sources, with an eye towards demonstrating both the general characteristics of random selection and what these have to say about its applicability specifically to selecting democratic representatives. This background work on the concept of random selection serves to lay the groundwork for exploring the considerations necessary in advancing an argument on behalf of democratic selection by lottery. In the

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20. The exact words used may vary, but the upshot is similar, as in Dowlen's emphasis on the "arationality" of lottery, which in turn begets its impartiality, equality, and unpredictability (2006, 27-30). Alternately, the concepts may be parsed more finely, as when Elster associates the use of lotteries with "uncertainty, indifference, indeterminacy and incommensurability" (1989, 38), but here as well I would argue that these can be rolled into two concepts without significant loss of explanatory power.

process, shortcomings in existing proposals are treated, at the same time as possible improvements to those works are identified. Likewise, pathways for constitutional reform and/or design of new democratic constitutions are highlighted. And all the while, looking at democracy through the lens of lottery sheds new light on our commitments to democratic values, and our understanding of what democracy means. To the lottery.

### **Uses of the Lot: Historical Highlights**

The history of lottery points to ways that might not otherwise be obvious to the modern liberal steeped in an understanding of representative democracy *qua* election, whereby political legitimacy and governance for the common good can accompany random selection. Lotteries have been put to broad and copious use throughout history. Early social uses of the lottery can be traced as far back as the historical record allows. In the biblical tale of Jonah and the whale, the decision to throw Jonah overboard was done by casting lots (Jonah 1). This use of the lot highlights one of the early rationales of employing lottery, not as a random device, but instead as a way of ascertaining the divine will (Goodwin 1992, 52). A good deal of the history of lottery reflects this sort of religious attachment. Consider for example the use of lottery by Roman emperors to

distribute "gifts"<sup>21</sup> during Saturnalia.<sup>22</sup> But the association of the lottery with religious purposes is not without controversy. For example, scholars differ over whether the use of random selection for political purpose in ancient Athens was motivated by religious beliefs. And while the religious aspect is evident when the lot is employed by the Delphic Oracle (Robbins 1916) or used as a means for appointing priests (Headlam-Morley 1891, 5), many scholars argue vigorously that this was not the underlying motivation for selecting political officials in Athens more generally. Latter day debates over the motivations for using lotteries in Athens reflect a tension between the idea that lot was an "indication of divine will,"<sup>23</sup> or that it rather reflects a pragmatic attachment to safeguarding democracy (Headlam-Morley 1891, 12, 31). More than a minor disagreement, the different explanations of motivation for using lottery would change the significance of its historical use to our contemporary purposes. A religious use of lottery would make it "not so much a random choice as a decision referred to the gods" (Mulgan 1984, 543). It is this understanding of lottery that led to its castigation in early modern, Anglo-American contexts. Puritanical clergy, for example, considered it an abuse of God's will to "force God's hand."<sup>24</sup> A notable exception to this position was taken by Thomas Gataker, who catalogued the religious uses of

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21. To use the word loosely, as such prizes may have included anything from precious metals, to camels, to dead dogs.

22. Thomas Gataker describes the festival gift lotteries of Heliogabalus (1627).

23. Oliver Dowlen offers a reading of Plato's *Laws* in defense of this position (2006, 48).

24. Quoted after Elster (1989, 51).

lottery and left room for the possibility that such uses of lot might be proper "when expressly commanded by God" (Gataker 1627, 14-25).<sup>25</sup>

And to be sure, lottery has a secular history as well, as exemplified by modern instantiations of "the lottery," whereby prizes were awarded to random entrants with no religious significance attached to the event. Such lotteries may be sponsored by the state as with the lottery established by Queen Elizabeth I of England in 1566, devised as a revenue-generating device (Goodwin 1992, 169), or they may be run privately. And lottery is of course not just for distributing pleasant, or humorous, goods. One of its primary uses is as a "useful way of making unpleasant choices" (Goodwin 1992, 53). The military draft comes to mind (A Harvard Study Group 1967). Two further examples serve here, both involving decisions under duress at sea where the importance of the lot is evident by its absence. In the case of the English *Mignonette*, the sailors' decision to cannibalize the cabin boy was found to be murder because lots had not first been drawn (Simpson 1984, 140). Similarly, the United States Supreme Court decided that a decision to throw passengers overboard was unfair because the victims were not chosen by lot (Holmes 1820). This recognition of the role lotteries can play in making fair decisions underscores our desire for impartial and incorruptible decision-making mechanisms.

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25. Aquinas and Augustine are similarly permissive. Jon Elster references Aquinas's *Summa Theologica* in noting that lot might be appropriate "where due reverence is observed," and he notes the precedent in Augustine's *Ep. Ad Honor* (1989, 52).



And rather than become mired in the debate between religious and secular understandings of or bases for randomness, Mulgan opines that in all likelihood, it would be overly simplistic to ascribe the motivation for using lot entirely to either purpose (1984, 544). Some historical instances show both a religious basis and desire for expediency operating side by side as motivation, such as in Agamemnon's selection of an opponent for Hector.<sup>26</sup> As Oliver Dowlen observes, we need not draw "too sharp a distinction between the sacred and the secular," but rather follow Headlam in examining the "practical rationale for employment of sortition" (Dowlen 2006, 47-48; Headlam-Morley 1891, 2-10). Original sources give little by way of the *why* of the lottery,<sup>27</sup> so the search for rationales is to a large extent an analytical task of reconstruction. By looking at uses of lottery across a variety of historical and purposive contexts, I hope to bring into clearer focus the common benefits - and difficulties - its use has delivered.

Beyond the selection of religious officials by lot, mentioned above, other social uses of lottery abound throughout history.<sup>28</sup> Land has been allocated by lottery, from biblical times (Numbers 26:52-6; 33:54) to the white settlement of America (Dale 1983). Decimation, whereby only one of ten convicts is chosen at

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26. Dowlen (2006, 47) references Homer's *Iliad*, Book 7.

27. Herodotus is an exception. See especially the speech in which Otanus identifies accountability and the rule of the people with appointing magistrates by lot (Herodotus 1998, 205).

28. This section draws in part on uses catalogued by Gataker (1627), Elster (1989), Duxbury (1999), Carson and Martin (1999), Goodwin (1992), Dowlen (2006), and Stone (2011), among others.

random for execution, is often cited (Elster 1989, 64) as an example of an efficient use of capital punishment as deterrent. Already mentioned are choosing draftees or victims for cannibalization. Lotteries have also been used, or reputedly used, for the assignment of places in heaven to angels, in divvying the responsibility among priests in Geneva to visit those infected during epidemics, at Massada, for the assignment of land to till in Egypt, in selecting the victims of cannibalism among Cambises's army, and as a truth-seeking exercise by a Nestorian abbot (Gataker 1627, 61, 66, 89, 104, 110, 330).

Having merely scratched the surface of the broader social possibilities for lottery, I turn in earnest to the historical examples of political uses of lottery. The topics are, after all, intimately related. Indeed, Jon Elster reports that "ordinary lotteries," by which he means the state-sponsored variety conducted as a source of revenue where people bet on numbers, actually originated in a political context. People bet on the prospects of individual candidates for office in Genoa, and eventually the candidates' names were replaced with numbers (Elster 1989, 36n3). Most famously, lottery was featured extensively as a democratic selection mechanism for hundreds of years in ancient Athens, and just as importantly it was employed across an equally lengthy period of time in various medieval Italian city-states. Other examples of its historical political use of randomness include the "shout" in Sparta, in which the order of presenting candidates to a crowd for expression of approval was determined randomly (Aristotle 1998, 1271a; Staveley

1972, 74).<sup>29</sup> And, conversely, the order in which tribes voted was determined randomly in Roman elections (Staveley 1972, 152-6, 230-2). Likewise, the tribe with which the Latins voted was also determined by lot (Elster 1989, 86). Barcelona chose councillors by lot in 1430's, and Raetia historically employed lottery for political selection as well (Barber 1984; Duxbury 1999, 30).

These historical uses of lottery in political settings show any number of variations by which lottery might be employed for democratic selection, and a number of these examples highlight the potential for creatively combining randomness and election within the same process, in order to capture the best characteristics of each. It is only in the last few centuries that the perceived relationship between randomness and political selection has become attenuated, a point to which I alluded in Chapter One and to which I will return later in this chapter. Thanks to the longevity and scope of their uses of lotteries to select political officials, a more detailed consideration of political lotteries in Athens and Italy may prove the most useful.

### **The Lottery at Ancient Athens**

The lottery's role in selecting political officials to the earliest democracies on record. And though democracy emerged in many parts of Greece in the late 6th century B.C., we know the most about democracy in Athens (Hansen 1991, 3,

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29. We see candidates being presented in random order on ballots even today.

34).<sup>30</sup> While the timing and motivation for the initial uses of lottery for selection in ancient Athens are both somewhat in dispute,<sup>31</sup> scholars generally agree that the Athenians employed lottery for large parts of the 5th and 4th centuries B.C. to fill a staggering number of political positions. Offices filled by one or another use of the lottery included the *nomothetai*, the chief legislative body in 4th century Athens, the jurors, roughly 600 of the magistrates, arbitrators of the People's Court, and the archons (Hansen 1991; 1991, 167-8, 180, 198, 226-31). Likewise, the boards of magistrates as well as Council of 500, or *boule*, were selected by lot. Additionally, the *prytaneis* who ran the *boule* rotated ten times a year, with the order determined by lot, and each day the head of state was selected by lot from within the *prytany* in office. Later, the *proedroi*, also selected by lot, presided

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30. Among the works detailing the workings of Athenian democracy, including but not limited to its use of lottery, prominent examples include Aristotle (1996), Hansen (1991), Headlam-Morley (1891), Herodotus (1998), Jones (1957), Raaflaub et al. (2007), and Sinclair (1988). This section relies heavily on the list of Athenian uses of lottery compiled by Hansen.

31. These disputes are intertwined, as "whether one believes or disbelieves that the Athenians were using lot as early as Solon really depends on one's conception of the original purpose of the lot as a process of selection" (Hansen 1991, 50). Hansen favors an interpretation of lottery as motivated by democratic principles rather than as an appeal to divine intervention, and contends that this interpretation is better supported in the primary literature (51). But even accepting this, room exists for disagreement as to the nature of democratic commitment that led Athens to settle on selection by lot. Whether, for example, it was motivated by a concern for impartiality, participation, or equality, and if the latter, what kind of equality, are all subject of some contemporary debate. Hansen, for instance, contends that the Athenians' motivation for choosing jurors by lot was not equality but rotation (in service of participation) and the prevention of corruption (Hansen 1991, 81-4, 183). He goes on to suggest that it was the critics of democracy, such as Isocrates, who linked selection of lottery "with their notion of the democrats' ideal of equality (Hansen 1991, 235).

over Assembly and Council meetings (Hansen 1991, 250, 265, 314). Only approximately 100 magistrates whose tasks were technical or required some specific expertise, such as financial officials or generals, were elected.<sup>32</sup>

Some of the selection processes were quite complex, and many involved multiple lotteries. For example, the selection of the jurors for the People's Court and assignment of their respective roles took no less than four successive lotteries, so as to insure as equal a split between tribes as possible, to equalize chances of selection, and to prevent bribery. The process is worth re-telling. Each year, a standing pool of 6000 were selected by lot from among citizen volunteers. This pool comprised those eligible to serve in the People's Court for the year (Hansen 1991, 181).<sup>33</sup> On any given day, arrivals from amongst this group would be segregated by tribe. Upon going into his tribe's respective entrance, a jury candidate would place his plaque into one of ten chests, according to the letter on the plaque. For each tribe, an archon would then select one plaque from each of the ten chests, and the hundred men so selected were jurors. The selection process was just beginning, however:

... their first task was to each take the chest with his letter on it and stand in alphabetical order, five at each of the two *kleroteria* set up at the gate [one gate for each tribe]. A *kleroterion* was a *stele* of marble, of a man's height, with five columns of slots corresponding

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32. As related, for example, by Duxbury (1999, 27), who cites Aristotle's assertion in *The Politics* that democracies select by lot all offices "but those which require experience and skill."

33. The following is drawn from Hansen (1991, 197-99).

to the size of a jury plaque. Each man with a chest was given a column of slots into which he put all the plaques from his chest starting at the top. Beside the *kleroterion* ran a narrow vertical tube, and into this tube were put black balls and white balls (the white balls numbering exactly a fifth of the total of jurors from that tribe needed for the day). The balls were then let out of the bottom of the tube one at a time. If the first ball was white the possessors of the first five plaques from the top were accepted as jurors; if it was black, those five at once got back their plaques and went home. The procedure continued until the last white ball came out, at which point the required number of jurors from that tribe had necessarily been reached (Hansen 1991, 198).

This was only the first of four steps. A second step, involving acorns and staves along with the plaques, was conducted to distribute jurors between courts. The third step matched a color-coded ball representing each court with a ball representing the magistrate to chair that court for the day. And finally, within each court random selection was conducted to assign jurors to man the clock, count the votes, and pay the jurors.

Similarly, to assure geographic representation, the Council was selected in a two-stage process, first at the *deme* level, and then for each tribe, and the archons were selected in a two-stage process as well. Boards of magistrates were selected centrally where presumably one board member was chosen to represent each tribe by means of what we might describe as a stratified random sample (Dowlen 2006, 54-55).

These complexities in the use of lottery appear to have served the dual purpose of militating against manipulation and spreading participatory (dare I say

representative) opportunities as widely as possible. Additionally, other "constitutional" arrangements served these ends while mitigating the potential challenges faced by such a democratic regime. These included restrictions on the pool eligible for selection, as well as the relationships between different offices chosen in different manners. Terms of office were short, generally a year, and participants were subjected to a scrutiny of their eligibility (Duxbury 1999, 27). Though generally the Athenian political system was predicated on the presumption that the vast majority of the populace was fit to govern,<sup>34</sup> and as a consequence, the primary criterion for political participation "was that of citizenship" (Dowlen 2006, 44), the scrutiny served to ensure eligibility for office on the basis of some limited criteria.<sup>35</sup> For example, eligibility was restricted to those over 30 years of age<sup>36</sup> and followed class lines in the cases of some offices. Office-holding was voluntary, but an *ethos* of public service existed. Additionally, the magisterial offices were "subject to strict annual rotation." No one could hold the same magisterial position twice, nor be on the *boule* more than

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34. Elster (1989, 80) comments that "virtually everyone was supposed to possess the competence required for governing the city," and Woodruff (2005, 133) makes a similar observation, as noted elsewhere.

35. Some debate exists as to the true intent and scope of the scrutiny (see Duxbury 1999, 27; Elster 1989, 80). While *dokimasia*, or scrutiny, was ostensibly intended to verify citizenship and other qualifications such as religious piety not directly related to expertise on the job (Staveley 1972, 56-60), it was allegedly used in the 4th century to ideological ends, to exclude supporters of the previous tyrannical regime.

36. This was perhaps more significant a restriction than it is today, given that life expectancy then is thought to have been roughly 25.

twice, nor hold lot-selected office in two consecutive years (Dowlen 2006, 50-52). Accountability of officeholders was secured by the succeeding mechanisms of ostracism and later *eisangelia* (Elster 1999, 259-63). As further examples of checks and balances between offices, the *boule* "was to prepare items for the Assembly and receive instructions from that body" (Dowlen 2006, 51; see also Headlam-Morley 1891; Sinclair 1988).

Some question persists as to how democratic Athens could possibly have been, given its limited conception of citizenship and its economic reliance on human slavery. These are valid criticisms, to be sure, albeit grounded in a thoroughly modern perspective. But these critiques do not speak to the role or effectiveness of lottery in selecting from among the citizenry. I return to this point in Chapter Three. And we need not dismiss the Athenian use of lotteries as a simple product of a simpler time (Ober 2008, 30-31). The complexities of the selection mechanisms were pointedly employed to protect against manipulation of the processes, and the interaction between various offices reflects a sophisticated understanding of the general need for checks and balances and specific requirements for varying levels of technical knowledge and political experience.

Other critics of the democratic sentiment reflected by the Athenians' broad use of lottery date to its contemporaries, most notably philosophers the likes of Socrates, Plato, Xenophon, and Aristotle,<sup>37</sup> who questioned not whether Athens

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37. For a catalog of their evolving views, see Hansen (1991, 16).



was democratic, but whether this was a good thing (Woodruff 2005, 23-24). This has led many latter-day chroniclers of the practice to uncritically relate these ancient arguments (Ober 1996, 7). Duxbury emphasizes, echoing Aristotle, that "positions of major political responsibility were not randomly selected" (Duxbury 1999, 27; see also Jones 1957, 48; Walzer 1983, 305-06). These two points are often used to argue against the suitability of lot for modern usage. But not only were the political roles that Athenians reserved for selection by means other than lottery relatively few, the differences actually underscored the Athenian commitment to democratic equality and highlight the potential for combining selection methods today in service of democratic values. Included among the few offices of significance that were not chosen by lottery were the Assembly and a minority of magistrate positions. The Assembly was open on a first-come basis, hardly reflected an understanding of the people as unfit to rule. Moreover, the existence of a few offices chosen by election serve to underscore the potential for combining election and lottery across different offices, in the process securing and expressing both democratic commitments and the recognition that some special skills should be utilized where appropriate. In Athens, these elected roles ran primarily to the tasks of the *strategoí*, or military command, and the weightiest financial offices, along with the vestigial Areopagus, and a few other assorted officials.<sup>38</sup> Rather than emphasizing the presence of election in Athens, as

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38. Including military trainers, religious functionaries such as those in charge of the Eleusinian Mysteries, and the Superintendent of the Water supply. For these

Aristotle did, its relatively limited use and the complex combination of selection methods across different offices should be taken as instructive for lottery's potential contemporary usage.

And despite the received knowledge of Athenian democracy and lottery as problematic, we also know that other writers at the time were more prone to defend it.<sup>39</sup> Given the circumstances of the time, the democratic era in Athens was marked by a greater degree of political stability and commitment to democratic ideals than it is typically credited for (Hansen 1991, 23-26; Ober 1989, 17-35). Lot helped in mitigating the competition and thus conflict and faction that tend to accompany election.<sup>40</sup> Additionally, the short terms typically associated with Greek use of lottery meant fewer opportunities and reduced incentive to corrupt officeholders, as well as having the effect of enhancing humility of officeholders (Montesquieu 1748, 11n1).<sup>41</sup> Also significant is lottery's capacity to combat oligarchic tendencies.<sup>42</sup> Much as today, democracy was seen

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lists, see Duxbury (1999, 27) and Hansen (1991, 233, 288-95), both of whom rely on Aristotle's *Athenian Constitution*.

39. Prominent examples being Herodotus, Aeschylus, and Euripides (Hansen 1991, 24; Ober 2008).

40. In *The Politics*, Aristotle suggests that "electors were in the habit of choosing their own partisans" at 1303a 15-16 (1996, 124). See also Duxbury (1999, 28) and Engelstad (1989, 30). It must be noted, however, that factions were not entirely eliminated even in the case of the ancient Greeks (see, for example, Mulgan 1984, 548).

41. See also Duxbury (1999, 28-29).

42. Although the basis for this point varies, and is the subject of some contention. Some, such as Duxbury, contend that lottery succeeded by systematically weakening the political power of officeholders chosen randomly, in the process safeguarding the power of other branches, especially the ultra-democratic

by the public as exclusively a positive value, and unlike today, there is no evidence that Athens was dominated by a hidden power structure. The true political elite was really *ho boulemenos*, or "anybody who wishes" (Hansen 1991, 297-98).

To be sure, there is contemporary disagreement as to the relevance of the use of lot in Athens for modern purposes. Debates persist over whether lottery was an expression of democratic and egalitarian conceptions of humanity (Woodruff 2005), or simply a mechanism designed to make impartial selections, which predated and in turn facilitated the rise of democracy (Dowlen 2006),<sup>43</sup> Or even more skeptically for my purposes, one that sought simply to diminish the power of the offices filled by lottery. And to be sure, there are doubtless differences between Athens and modern society, in terms of structure,

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Assembly, which might otherwise suffer at the hands of more powerful and experienced magistrates (1999, 29). In advancing this argument, Duxbury references Headlam (1891, 180) and Hansen (Hansen 1991, 84), but this is a dubious reading of their positions. Others make the opposite argument directly (Mulgan 1984; Ober 1989).

43. Dowlen argues it is a mistake to identify lottery as a reflection of democratic values or as an exclusively democratic mechanism. He finds Rousseau, Montesquieu, Hansen (1991, 50), Headlam (1891, 12) guilty of this error. Aristotle's association of lottery with democracy, and election with oligarchy, is perhaps the most famous (1996). Election by lot was the "hallmark of democracy for the Greeks (Finley 1983, 71), p. 71, citing Aristotle, *Rhetoric*, 1365b, 30-31). Dowlen attributes this error to a mistaken understanding of Herodotus's description of the government as "*isonomy*, or equality before the law," wherein magistrates are appointed by lot and "all questions are put up for open debate." Instead, Dowlen argues, lottery served a "complex and subtle role in the earlier political consolidation of the *polis*, which in turn contributed to the rise of democracy (Dowlen 2006, 46).

circumstance, and motivation, that would preclude a direct adoption of the Athenian model. But the Athenian example nonetheless shows that lottery may be employed to select a variety of political officials, via a dizzying array of mixed methods. As well, the Athenians recognized and tackled many of the more problematic aspects of the use of lottery for democratic selection. For instance, accountability, which we today associate strictly with election, was handled *via* a series of devices employed to maintain a watch on the performance of randomly selected officials before, during, and after their tenures in office (Elster 1999; Hansen 1991; Zakaras 2010). It is also clear that lottery in Athens featured impartiality in selecting from within whatever pool was made eligible for a given office. For an illustration that lot need not be limited to democracies or the service of equality, one need look no further than its use in the city-states of medieval Italy.<sup>44</sup>

### **The Lottery in Medieval and Renaissance Italy**

The uses of lottery in selecting officials in these largely aristocratic republics were generally inspired as responses to practical problems at hand (Dowlen 2006, 94). The examples provided by Venice and Florence are instructive for my purposes in that they illustrate the potential for combining election and sortition within the same selection process. Moreover, in addition to

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44. On lottery in Rome, see Staveley (1972) and Finley (1983).

the impartiality that featured so prominently in the Athenian use of lot, and which plays a role here as well, the unpredictability of lottery comes to the fore here, serving to militate against control of the process by factions.

*Brevia* was used to fill "all posts that were deemed contestable ... including councils, consuls, *podesta*, and other officers" in the governments of Bologna, Parma, Ivrea, and Brescia, as well as Venice.<sup>45</sup> The *brevia* amounted to a form of indirect election. Indirect elections emerge as a result of problems with direct elections, presumably including corruption, intimidation, the specter of chaos. The role of elector was compulsory, electors were made to swear their independence, and their random selection both helped to insure their selection remained independent of any affiliations, and also restored the link "between those making the electoral choices and the general body of citizens or guild members." The Venetian use of lot to select nominators, which originated in the 13th century *popolo* governments and persisted there until the 18th century, was specifically intended to prevent the reemergence of the nobility, balancing power between different subsets of the population by means of a mixture of selection methods.

The selection of the Venetian *doge* provides a striking illustration of the complexities and vagaries at play in the *brevia* process.<sup>46</sup> The ducal selection

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45. This paragraph relies on Dowlen (2006, 97-110).

46. The following relies on Finlay's synopsis of the process (1980, 141-43). The process is sufficiently striking as to have been related in some detail in a number of other accounts. including those of Dowlen, Duxbury (1999, 30), Elster (1989,

took place in ten phases over five days. From the Great Council, 30 members of at least 30 years of age were chosen by lottery. In a separate room, this group of 30 then reduced itself to nine, again by lot. These nine elected forty men as "nominees," with each selection requiring at least seven votes. The nine returned, announced their list of 40 nominees, and the 40 were checked to make sure no one clan had more than one "representative" in the group. The forty then assembled in a separate room and reduced themselves to twelve by lot. This twelve again conducted an election, where seven votes were again required, to choose 25 men. The 25 could not include any of the twelve, but the group could include others who had been in the 40. These 25 were winnowed to nine by lot, and the nine elected 45, again requiring seven votes. The 45 were reduced by lot to the *Undici* ("Eleven"), who elected the *Quarantuno* ("Forty-one"). This final group had the honor of electing the *doge*, by a minimum of 25 votes. There is some disagreement among scholars whether the aim was to prevent manipulation of the process,<sup>47</sup> and in practice it appears that the process was controlled by the *Primi*, but it was at least somewhat successful as a means of preventing control of the process by any discrete faction, barring "an overwhelming majority or substantial good luck" (Finlay 1980, 144). The intricate combination of steps would have made it difficult for any one man to be "certain of remaining in the electoral colleges" or of "retaining his supporters through the election." Far from

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81), and Stone (2011, 130), all of whom rely on Finlay.

47. Dowlen says yes (2006), and Duxbury no (1999, 30).

democratic, the process still prevented any one unscrupulous group, such as the "lower nobility" or a "powerful clique" from controlling the process (Duxbury 1999, 30-31).

In contrast to the *brevia* was the *scrutiny*, best exemplified by its use in Florence from 1328-1424, although it was also used in Siena, Pistoia, Perugia, and Lucca (Dowlen 2006, 97-98; Duxbury 1999, 31).<sup>48</sup> The *scrutiny* amounted to an inversion of the *brevia*, and in the *scrutiny* lottery was employed to select from nominees who had already been chosen through an election (Dowlen 2006, 111). Magistrates were chosen randomly from a "pre-elected pool" for short terms, as brief as two months in duration (Najemy 1982, 14-5, 30). These short terms are an indication that the Florentines trusted no one to hold office for too long, although they also contributed to difficulties surrounding continuity, stability, and legitimacy (Elster 1989, 82). The combination of randomness and voting provided an impartial source of authority, and the uncertainty of the random selection, which was done in advance for many terms at the same time in order to preserve stability (Najemy 1982, 99-125; Elster 1989, 83-84) and with the results being kept secret, preserved the widespread sense that it might be anyone's turn next (Duxbury 1999, 32). The impartiality and unpredictability of lottery are central here, as a "spirit of inclusiveness" and the cooperation of the citizenry

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48. Communities that had resisted the rise of the dominant governmental form of the day, which featured a powerful *signore*.

were sought to counteract tensions between the mercantile class and the feudal nobility (Najemy 1982, 99-125).

What is typically called simply the *scrutiny* actually involved five stages: nomination, *scrutiny* or secret ballot, *imborsazione* or the placing of selected names in bags, the drawing of names as vacancies came up, and the *divieto* to exclude members of the same family from holding office or in close succession.<sup>49</sup> But as is no doubt evident, this process "bears little resemblance to a genuine lottery," amounting instead to a secret list.<sup>50</sup> From another perspective, the drawing from a bag of pre-selected names could be construed as a lottery, but from a very limited pool. In either case it shows how random selection is only as democratic as the process by which candidates for the lottery are identified. Participation was effectively very narrow. And while Elster attributes this system to a desire to prevent power from accumulating not only in family units but also in corporate and guild-based interests (1989, 83), the system neither reflected public opinion nor encouraged an increase in eligibility.<sup>51</sup>

Comparing the *brevia* and the *scrutiny* is instructive. *Brevia* is election assisted by lot, while *scrutiny* merely uses lottery to distribute, not select or reject,

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49. The description is from Dowlen (2006, 120), quoting from and relying on Najemy (1982, 101-03). Elster (1989, 82) also provides a description of the process that differs in small details.

50. McCormick (2006a, 157n9) presents a conflicting, and more optimistic, interpretation of the nomination and *scrutiny* stages, following Guicciardini in arguing that the sheer number of names being selected at this stage would mitigate the aristocratic effect associated with elections.

51. The *scrutiny* was conducted by a small minority (Dowlen 2006, 123).



the elected office-holders; in the former case, those not in power "select those who are to govern," while the latter allows those in power to "select those they regard as suitable" (Dowlen 2006, 128).<sup>52</sup> In this respect, the use of lot in the later Florentine republics provides a useful contrast. The *resorgimento* of 1465-66 used sortition for all public offices as part of a three plank platform that also included open government and free speech. Republican reformers passed a law in 1466 calling for selection of "all offices save a few" by sortition. Rinnucini argues that this was to address problems with the appointments of the Medicis, which resulted in the selection, not of "men noted for prudence and ability," but rather of "satellites of the powerful" (Rinuccini 1479, 206). This inverts the ancient aristocratic claim that "lot denies office to the capable," contending instead that "neither election nor appointment could be trusted as a means of producing office-holder of integrity or ability" (Dowlen 2006, 148-49).

In the Second Florentine Republic, sortition replaced voting in 1499. Under this model, nominators were drawn by lot, their nominees voted on by the council, and the remaining names drawn at intervals. The role of lottery in selecting nominees, a change versus the *scrutiny* of the First Republic, served to spread support for candidates in more unpredictable fashion. But beyond the unpredictability of the nominations, it is also important that the process was

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52. Here again, McCormick provides a competing and in this case more pessimistic, interpretation. In the Venetian *brevia*, McCormick argues, "lot ... serves an oligarchic function" because of the restriction of the candidates by the presumptively wealthy nominating body (2006a, 158).

driven from the bottom up, rather than from top down, as in the earlier version of the *scrutiny*. A greater chance of popular input, and a more public process, were likely results of this shift (Dowlen 2006, 159). A return to lottery was seen as a way to fulfill the desire of the middle-class for a wider distribution of offices, to say nothing of the ease of implementing a sortition system (Dowlen 2006, 160).

But given the enthusiasm with which it adopted lottery, the Second Florentine Republic also provides a handy reminder the sorts of concerns typically raised regarding the use of sortition. Among the undesirable consequences, Bruni counts the possibility of drawing "unworthy persons" into the magistracy, and the elimination of "any motivation for prudent conduct" that might otherwise have been expected of an official facing the prospect of reelection.<sup>53</sup> Elster suggests that this loss of motivation occurs in two ways, both pre-scrutiny, where the incentive for good behavior was reduced by the "time and uncertainty" involved in the process, and post-scrutiny, where incentives were removed by the random element of the subsequent selection (Elster 1989, 85). Additionally, Savonarola, a priest and popular figure of the day, was disdainful of sortition, labeling it an abdication of moral responsibility, as he considered it a citizen's duty to pass judgment on candidates (Dowlen 2006, 157). These concerns with the relationship between the people and randomly chosen representatives persist today, and I return to them in Chapter Five.

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53. Najemy (1982, 313) and Elster (1989, 85) make reference to Bruni's 15th century writings on the matter.

## Potentially Random: Modern Proposals

Lotteries experienced a rather steep decline in usage, particularly in political contexts, during the early modern period and outside the Italian republics, and this neglect persisted until a resurgence in awareness of the lottery's potential began in the latter third of the 20th century. During this lull, the lot continued to be put to some relatively minor uses, but its story lay largely in the grander proposals for its political implementation that fell by the wayside. In particular, the decision to forego sortition as a key part of the selection processes for political representatives during the formative years of the early modern democracies was a crucial one, as suggested in Chapter One. And no doubt we would be having a very different conversation today about modern democracy and democratic principles had random selection been included in the modern, liberal democratic toolkit.

Some lotteries persisted, generally as components of mixed processes. In 17th century England, local officials including the mayor in Great Yarmouth were chosen by electors who had been selected randomly from among the Aldermen and Common Councillors, in an "inquest" comparable to the procedures of a deliberating jury (Dowlen 2006, 192-94; Kishlansky 1986, 36).<sup>54</sup> The arationality of lottery was put to use in order to prevent corruption and present the local government as impartial (Dowlen 2006, 194), and the deliberative aspect of the

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54. Dowlen relates the accounts of Manship (see also Manship 1854, 24, 358) and Palmer (1856, 51-59).

process suggests that communities "sought consensus rather than competition in their choice of representatives" (Kishlansky 1986, 11). Elsewhere as well, lottery was still employed to select leaders, as in Basel (Engelstad 1989, 26, 35) and Raetia (Barber 1974, 176).

But by contrast to this relatively limited list of actual political uses for lottery in the early modern era, it remained alive in the form of ambitious, even utopian, proposals. Prominent among these works is James Harrington's *Oceana*, which proposes a highly ritualistic variant of the Venetian-style balloting process, where nominators are selected randomly and their nominees voted on by secret ballot (Harrington 1977, 63, 123, 215).<sup>55</sup> Harrington adds a variety of wrinkles to this process at different electoral levels. In selecting representatives at the Galaxy level, lots determine which group of potential nominators should "approach the urns first," while at the Hundred level, lots are cast to determine which lots will be used (1977, 86, 90). Parish representatives are all to be chosen by a single nominator, chosen by lot. By contrast, the seven officers of the Hundred are chosen by seven nominators, each of whom nominates three candidates who are in turn ratified by majority vote of the nominators before forwarding the names to the secret ballot. And at the tribal level, four groups of electors are chosen by lot, with each group member nominating for only one office. These choices require approval of the majority of the group, which then submits its choice(s) for

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55. This paragraph relies on Dowlen's discussion of Harrington (2006, 203-05).

election in competition with the nominees for that office from each of the other groups (Harrington 1977, 78, 83-5, 91, 95). Harrington's proposed uses for lot reach beyond the filling of political offices, extending to include the appointment of positions for researching the constitution, the choice of tribe names, the assignment of horses (or the lack thereof) to captains, and the assignments of soldiers and officers (1977, 69, 87, 88, 124, 194, 208).

Still, perhaps the most compelling, and certainly the most concrete, tale of lottery in the modern period comes from the proposals for its use made by those with a voice on the political stage of their day. I will focus here, briefly, on the lottery-related proposals for the Florentine Republic offered by Machiavelli and Guicciardini and the treatment of lotteries during the American and French democratic foundings.

### **Machiavelli and Guicciardini: The Lot in Florence**

In the time of the Second Florentine Republic, which as already noted featured an "openness" in terms of popular participation and access to political institutions that evoked the Athenian *ethos*, Machiavelli was still concerned that the balance of power was tipped too far in favor of the few. In his "Discourse on Remodeling the Government of Florence" (ca. 1520), Machiavelli proposed a set of institutions that would "satisfy the aspirations of all classes."<sup>56</sup> While parts of

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56. This paragraph relies on Dowlen (2006, 164-65). John McCormick also writes at length about this proposal and others of the time from both Machiavelli

this proposal actually ceded some of the governmental branches to the elite classes, notably including a *Signoria* appointed for life, Machiavelli also reserved some institutions for the lower classes. He deemed the overt distinction between and accommodation of classes to be in the best interest of a stable republic. Not surprisingly, lottery and rotation played a significant role in populating some offices in Machiavelli's proposal. Evoking the Roman plebeian tribunes, Machiavelli proposed a separate branch of *provosts*, to be granted veto power over the actions taken by the *Signoria*, and to be chosen randomly from amongst the elected *gonfaloniers* to serve one month terms. Perhaps most interesting for our purposes was the creation of a lower class "Great Council" (McCormick 2006b, 152), which was to be populated by lottery from amongst a pool that was to include the entire citizenry. The Council would also have the power of appointing future members of the upper and middle-class (respectively) *Signoria* and "Select Council." Elements capturing the benefits of performance, experience, and accountability are all present, as Machiavelli draws on influences from Athens, Rome, and Florence, using appointment, election, rotation, and sortition.

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and Guicciardini. See especially (McCormick 2006a), in which he points not only to the potential for mixing lottery and election and the importance of overtly class-specific checking institutions to the republic's stability evinced by Machiavelli's proposal, but also for the importance of "extra-electoral" measures to insure accountability of representatives, to which I will return at length in Chapter Five.

At roughly the same time, Guicciardini, a member of the aristocratic *ottimati*, offered his own proposals for reforming the Florentine republic.<sup>57</sup> These take the form of simulated debates between two interlocutors, and are interesting both for their ostensibly even-handed candor in recognizing the merits of the argument for lottery, and for drawing a link between popular republicanism and election. His basic premise was that "efficiency and liberty go hand in hand" and that efficiency requires the most capable in the highest offices. More than his predecessors, Guicciardini emphasizes the importance of merit, which is "to be measured by voting." Sovereignty and authority are linked to electoral choice. The interlocutor who advocates for elections further contends that lottery stifles virtue and industry, and that its amoral/arbitrary nature conflicts with the "idea of justice as proportionate to moral goodness." Lot is an abdication of political responsibility, and thus is morally degenerate, contributing to the petty ambitions and indulgences of the middle class.

Guicciardini offers up surprisingly strong counter-arguments on behalf of random selection in the form of a second interlocutor, who advances the belief that all citizens have a right to hold office, and that elections are divisive. Without meaningful access to office, some citizens are being held in a permanent state of servitude. Selection by lot is "fair, just, and natural," and the speaker both reflects the tradition of popular government and the modern awareness of class

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57. This account relies on Dowlen (2006, 167-81).

struggle in Florence. Election allows wealthy elites to accrue credibility and build power, their advantage stemming from "luck and sharp practice," not from virtue, their power maintained by "lobbies, slates, and coalitions." This hegemony is maintained with the consent of the voters, a concept that this speaker claims is a disguise for the loss of the right to hold office. Lottery is not the radical position, it is a middle way between aristocracy/oligarchy and rule by the poor. Sortition gives all an equal chance, yet merit is not entirely removed, preserved instead by the continued practice of *scrutiny*.

But Guicciardini emphasizes the degree of equality between citizens created by voting, and he advocates a division of labor that has the randomly chosen Council doing little legislating, and more ratifying of the Senate's work and voting on other potential office-holders. And with the fall of the Florentine republic in 1530 came the loss of practical knowledge on the use of lottery in a republican context, leaving the more aristocratic Venetian electoral system as the model for future representative governments (Dowlen 2006, 187).

### **Modern Democratic Foundings: Leaving Lotteries Behind**

Nowhere is the failure to appreciate the potential of sortition for democracy more evident than in the new democratic foundings of the late 18th century. There are reasons to think James Harrington was influenced by the aristocratic, Venetian model of republican government, and his work had a



strong influence on the colonial constitutions in America. Dowlen highlights in particular the possible connection between New Jersey, South Carolina, and Pennsylvania constitutions with writers who would have known Harrington's work, as well as specifically reminiscent constitutional features, including "Agrarian law, the division between a deliberating senate and a resolving representative body, the secret ballot and the use of lot" (Dowlen 2006, 211). In East New Jersey, "the most complete of all attempts to introduce *Oceana* in the colonies (Russell-Smith 1914, 163)," nomination was to be conducted by sortition, as was the choice of jurors and members of the Court of Appeals. The selection of the Grand Council also involved lot, using it to select both the nominees and the electors, and the Governor's Council may also have involved lot (Dowlen 2006, 215-16). While the use of sortition here is aimed at preventing concentrations of power, the restricted list from which nominees and electors were chosen shows this as an aristocratic use of lot, to "*exclude* all but a small group of citizens from office" (Dowlen 2006, 219).

But the secret ballot soon becomes divorced from the lottery. With the loss of the openness and Athenian *ethos* manifested in the Second Florentine Republic, what was left of the role of lottery in the political selection process in Venice was also lost in the colonial translation from the *brevia* to the secret ballot (Dowlen 2006, 255). In Pennsylvania's early constitution, sortition was used to select juries, rotation for members of the governor's council, and secret ballot for

elections to government offices and elections within government (Pennsylvania 1976, 160). While sortitive, rotative, and secret balloting procedures are still being used, they are not intermingled into complex processes, but are rather put to distinct uses for separate offices. The secret ballot, presumably alone, was seen as sufficient for "establishing electoral impartiality" (Dowlen 2006, 211).

Despite driving a conceptual wedge between lottery and secret ballot, these colonial constitutions did continue using randomness, now to select juries, first in South Carolina, in 1682, and thereafter in many of the colonies (Dowlen 2006, 191-92). Jury selection in America still features an element of randomness today, perhaps the most visible remaining venue for sortition in modern democracy, so I will return this topic at greater length, under its own heading below.

However, beyond colonial constitutions and outside of juries, proposals for the political use of lotteries in the new United States moved to the periphery. Consider as illustrative the following two proposals for the manner in which the American president should be selected. In *Common Sense*, Thomas Paine advocates for choosing at random the colony/district that will provide the president for the year:

When the delegates [Congress] are met, let a colony be taken from ther whole thirteen colonies by lot, after which let the whole Congress choose (by ballot) a president from out of the delegates of *that* province. In the next Congress, let a colony be taken by lot

from twelve only ... and so proceeding on till the whole thirteen shall have had their proper rotation (Paine 1776, 90-91).

Paine's proposal ensures "no qualitative distinction is made between the states," and the impartiality of the coordinating process. In this context, rotation and the lot also serve to prevent any "one powerful individual<sup>58</sup> [from dominating] the process of selection," and a lottery is "a complement to, rather than a substitute for, choice based on merit" (Dowlen 2006, 228).

Another proposal for using randomness in selecting the president comes from the Constitutional Convention of 1787, James Wilson suggested during the Cthat the Executive be chosen by a number of the members of the legislature chosen by lot, thereby avoiding intrigue and enhancing the independence of the process (Madison 1966, 359). Elbridge Gerry and Rufus King objected that this left too much to chance, and courted the possibility of an "'unworthy executive'" (Madison 1966, 361-62).<sup>59</sup> The potential benefits of both these proposals include reduced opportunities for corruption and the role of faction and an increased likelihood that the office will rotate more widely. Yet it is also notable that both these proposals are nominally more aristocratic than the Electoral College that ultimately emerged as the process by which America selects its President, as both

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58. Or state.

59. The nature of Gerry's objection is not surprising, given his legacy as the namesake of the "gerrymander" whereby electoral results are very removed from the domain of chance.

remove the citizenry even from the process of selecting the electors for President.<sup>60</sup>

### **Revolutionary France**

In contrast to the Anglo-American awareness of the Venetian model, the French thought on random selection seems primarily informed by its Athenian critics. This tendency is evident in the thinking of Montesquieu and Rousseau. Both discuss sortition, but based in an 18th century understanding of classical democracy, rather than with awareness of its more recent practice. Montesquieu associates sortition firmly with democracy, which he equates with equality. Indeed, for Montesquieu, "suffrage by lot" is "defective" and must be amended so as to prevent those interested in office, as well as the "utterly unqualified," from being eligible. Likewise, Athenian-style examination of suitability prior to service and *post hoc* judgment of officials' conduct would be necessary to ensure accountability (Montesquieu 1748, 11-12). Rather than touting sortition as a tool for facilitating the conditions necessary for democracy, Rousseau considers it only as a measure employed by an already existing democracy, and one of the purest forms at that, which he considers a practical impossibility (Rousseau 1762, 153). In other words, for Rousseau it is appropriate for use only where citizens

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60. Later, Paine and subsequently Thomas Jefferson also proposed using lots to divide congressmen into the two respective chambers, to divide the labor for better decision-making (Paine 1792, 299; Paine 1805, 534) and "to break up all cabals" (Jefferson 1984, 1492).

are already strict equals, and cannot facilitate enhanced political equality. But by restricting lottery to use where equality pre-exists would be to forsake its potential for impartial treatment (Dowlen 2006, 261), as well as the potential for randomness to create egalitarian effects.

Despite this skepticism born of the lot's democratic pedigree, the Thermidorian coup did put the lottery and rotation into practice for populating some governmental institutions, if only briefly and as part of an effort to sustain the republic and preserve the sense of political legitimacy (Dowlen 2006, 283-84).<sup>61</sup> Jurors on the Revolutionary Tribunal were selected, and judges and suits were assigned to its two sections, by lotteries. Members of the bicameral legislature were assigned to their respective chambers by age and by lot (Aston 2004, 48). Membership in the legislature was to be rotated out randomly, with one-third to step down annually, to be replaced by election. Similarly, the Directory was to retire one member per year, to be chosen by lottery.

With the end of the French revolutionary periods comes the end of any widespread usage of randomness in the selection processes for political officials in modern, representative democracies. And it went out with a fizzle, rather than

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61. The moderate Girondin constitution, which was drafted in 1793 by committee that included Condorcet, Thomas Paine, and Abbe Sieyes among others and which was later rejected by the Jacobins, had proposed a limited role for random selection. Grand jurors and trial jurors were to be selected randomly, albeit from lists drawn up by government officials. Also, a legislative bureau with reporting and re-drafting responsibilities was to be filled "by drawing thirteen Departments by lot and then asking each of these to nominate one of its members" (Dowlen 2006, 274-79). The following paragraph draws from Dowlen (2006, 284-89).

a bang, due to the relatively tepid way that the revolutionary French regimes embraced its use. However, it is worth noting that this was not a reflection of a French rejection of lottery borne of familiarity. French republicans were not seeking to improve on the Italian republican model, they were instead simply rejecting the feudal model with which they were more familiar. Their failure to embrace lottery is more a reflection of their lack of familiarity with its appropriate uses and potential benefits (Dowlen 2006, 293).

### **Contemporary Uses of Random Selection**

This is not to say that we have no use for randomness in contemporary society. Random selection is put to a wide array of social uses outside the selection of political officials and beyond the familiar understanding of lotteries as randomly awarding money to a subset of participants. Drug tests are administered randomly in a number of sports, drivers are stopped randomly for sobriety testing in some countries, and the IRS uses "spot checks" in deciding whom to audit (Elster 1989, 63; Duxbury 1999, 44). These uses highlight the contribution of randomness to controlling behavior of large groups, without having to bear the expense of testing all members (Goodwin 1992, 255). Other uses that highlight the efficiency of lottery, along with its impartiality, include land lotteries,<sup>62</sup> oil-drilling leases, and the South Indian *padu* for fishing locations

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62. As in colonial New Zealand and during the westward expansion of Anglo-

(Goodwin 1992, 256-57), as well as lotteries for public housing.<sup>63</sup> University places in the Netherlands are allocated by weighted lottery, as a compromise between "open" admissions and strictly merit-based ones, by avoiding the need for "fine-tuning," and with sufficient "blindness" to create access for traditionally disadvantaged groups.<sup>64</sup> The use of lottery in allocating scarce medical resources, such as vaccines and haemodialysis (Duxbury 1999, 45), has likewise received a good deal of scholarly attention.<sup>65</sup>

The lottery for green cards may be "the largest and most popular lottery in the world."<sup>66</sup> Lottery is used to regulate inheritances in some countries.<sup>67</sup> And lottery is of course put to many uses in sports and games, generally as a way of determining the ordering of turns or of draft picks.<sup>68</sup> Lottery is also used: in

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Europeans into North America (Duxbury 1999, 44n9; see also Dale 1983, 2-41). Duxbury also mentions the medieval English "open field" system in this context.

63. Such as that conducted by Israel (Elster 1989, 63).

64. Goodwin (1992, 257), citing *The Times* 6.09.03, p. 1 & *Times Online* 14.09.03, and Boyle & Elster *Local Justice*, 100. Duxbury (1999, 44n19) points to Hofstee on the weighted lotteries with which the Dutch medical school admissions process has experimented. Duxbury also relates that such a practice has been considered in the US. An increasing amount of attention is being devoted to utilizing lottery in admissions for secondary schools in the UK: Duxbury points to Abrams, and the method has actually been put to use in deciding admissions to The Federal City College (Wolfle 1970). See also, generally, Hylland and Zeckhauser (1979).

65. Elster (1989, 62) and Duxbury (1999, 45n18).

66. Awarding roughly 50,000 visas a year in this manner, according to Goodwin (1992, 258), who cites <http://uscis.gov/graphics/hodoi/divlott.htm>. See also Duxbury (1999, 44) and Elster (1978, 57-9, 72).

67. Elster (1989, 62).

68. Elster (1989, 63n91) points specifically to the NBA draft lottery and credits Kishlansky with pointing it out, and Stone has similarly referenced this practice, as has Duxbury (1999, 43). One need not read these works, however, to learn

recruiting employees, to assign judges to cases, to determine sexual partners and mates (Pines and Aronson 1981; Franklin 1771), to assign church pews, charity proceeds,<sup>69</sup> liquor<sup>70</sup> and broadcasting licenses, and event tickets.<sup>71</sup> And of all the contemporary, non-political, uses of lottery, perhaps the one most widely known is the military draft. The draft by lottery has been used from the 17th to 19th centuries by France,<sup>72</sup> and by the United States intermittently in wars from the Civil War to Vietnam.<sup>73</sup>

But despite the bevy of social uses to which lottery is still put, a look at contemporary uses for lot in democratic selection underscores its continued diminished stature in selecting political officials. San Marino chose its governors by lot into the mid-20th century. The "election" of San Marino's two *capitani regenti* was conducted as follows:

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about the practice. One might instead simply read any newspaper sports section late in the NBA season, or tune into TNT for their annual "draft lottery special." 69. The foregoing are listed by Duxbury at (1999, 44), with detail at footnotes 5, 7, 8, 11, and 12.

70. Duxbury (1999, 45n10) references *Hornsby v. Allen* (5th Cir. 1964, 330 F.2d 55).

71. The latter two are listed by Duxbury (1999, 45) at notes 14 and 16, respectively.

72. As proposed by Thomas Paine (Dowlen 2006, 237).

73. See Duxbury (1999, 43n2) and (Fienberg 1971) for surveys of the literature on the military draft. Paine had proposed that lottery be used in choosing members of the armed forces, both in order to prevent influence on the process and in the interest of expedience (Dowlen 2006, 237). Elster points to the Harvard Study Group as offering perhaps the paradigmatic contemporary argument on behalf of using lottery for the draft (Group 1967; Elster 1989, 62n85), although another body of literature considers more directly the ostensible randomness of the draft mechanism itself.



"The *arengo* [San Marino's 60 Man Council] designates twelve nominees that again designate their candidates. They vote for candidates by means of white and black balls, and the six who receive [the] most white balls are further divided into three pairs of candidates. These three pairs are then led in a procession to the cathedral where the archbishop receives them. Then an innocent child of San Marino draws from an urn one of three scraps of paper furnished with two names - and the republic has been provided with two new governors" (Aubert 1959, 16).

Lotteries are still used as a means of breaking electoral ties. Ties in electoral races for Parliament in the United Kingdom are resolved by lottery (Duxbury 1999, 24n49), as are ties in South Dakota's congressional elections (Elster 1989, 62-3n89).<sup>74</sup> More common are the tie-breaking uses of lottery at the local level in American municipal and mayoral elections.<sup>75</sup> Using lottery specifically as a tie-breaker has received a good deal of scholarly attention in recent years.<sup>76</sup> The brief list of contemporary political uses of lottery also includes its use in determining which "private member bills" are brought forward in the British Parliament (Elster 1989, 79n156).

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74. And in Sweden, in 1973 (Elster 1989, 63).

75. Duxbury (1999, 24n49) references three articles in *The New York Times*, each dealing with a different example.

76. I will return to this literature later in this chapter. Those who consider this sort of use of lottery more extensively, and from a general and analytical perspective, include Fishburn (1972a; 1972b), Zeckhauser (1969), and Stone (2007).

## **The Trial Jury**

We must also acknowledge here the role of randomness in jury selection, and the concomitant contribution that juries make to modern, liberal democracy. From the Magna Carta we see the role of the English jury as embedding justice in the community and protecting against arbitrary power (Dowlen 2006, 239). And by the late 17th century, "the jury had established itself as the most representative institution in the realm and the strongest line of defence for the individual against the coercive power of the state. The Levellers held that the jury was a "law-making body" (Dowlen 2006, 239), in order to defend the rights and process of common law from the "tyranny of Parliament," and Lilburne considered the selection of juries to be a part of this role. Juries stand for the people as the practical manifestation of popular sovereignty (Dowlen 2006, 240).

This assessment of the role of the jury predates, in modern times, its connection to sortition. The role of the jury as interpreter of the law was instead due to its perception as an "impartial institution ... achieved by judicious selection and the right to multiple challenges by the accused" (Dowlen 2006, 241-42). The addition of random selection to the modern jury model, beginning with South Carolina and subsequently in other colonies and in the English Act of 1730 was seen as adding equality to an already impartial process (Dowlen 2006, 243), and as a way to ensure that juries would consist of members from all classes, and not

just the poorer ones, who were seen as being more susceptible to corruption.<sup>77</sup>

This spreading of the duty to participate marks a way in which lottery can also define the role of the citizen in terms of his public obligation (Dowlen 2006, 250-52).

More than an organ of community justice, the jury is part of public governance, and the adoption of the randomly-selected jury by South Carolina made it into a "republican institution" because of the link to the republican practice of sortition and its "potential to organise the role of the citizenry in public government" (Dowlen 2006, 252). Arguments for choosing juries randomly include the "equal chance argument," in which all are given an equal chance at the privilege and concomitant educative effects of serving on a jury, the "incentive effect argument," which contends that random selection of jurors discourages attempts at externally manipulating jury members,<sup>78</sup> and finally the "fairness argument" which relies on the sense that defendants are entitled "to be judged by an impartial and representative group of his peers."<sup>79</sup> And fairness in the end state

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77. Dowlen (2006, 243) quoting Tindal (uncited). The possible corruptibility of "indigents" and concerns about the potential for "knavish lawyers" to "pack juries" both raise questions about the impartiality of jury selection prior to the addition of randomness, and underscore its perceived role in contributing positively to impartiality and incorruptibility, as well as equality.

78. Which according to Elster shows a greater level of concern for "good decision" (1989, 95), although it is not clear to me how randomness prevents bribery or threats once the jury is composed (see "Runaway Jury").

79. Elster notes here that this argument suggests that the jury, and not the panel from which it is selected, should be constructed so as to be a "cross-section of the community" (1989, 95)

has value not only for procedural reasons, but also because of the expectation that the results will be better if the "jury contains a variety of viewpoints" (Elster 1989, 97). Elster draws a distinction between this consideration (which is evocative of the arguments made by deliberative democrats) and the value to the defendant of having someone on the jury with similar background and understandings (Hans and Vidmar 1986, 50).

By adding randomness to the selection process, juries thus become an expression of equality, at the same time disincenting manipulation and promoting fairness.<sup>80</sup> According to pamphleteers of the time, juries are also an expression of popular sovereignty.<sup>81</sup> And the requisite common sense is made available to the jury via random selection. There is in these pamphlets a link between the ideas of popular sovereignty and random selection, supplementing the Leveller view of justice flowing from the community with a "sharper focus on issues of impartiality and incorruptibility" (Dowlen 2006, 249).

The decision to add randomness in order to bolster impartiality is consistent with our reading to this point of impartiality as one of the fundamental characteristics of randomness. And as a result of the participatory role that average citizens play in interpreting the law as part of randomly selected juries,

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80. Jury as "'watchdog' against the excesses of corruption and tyranny." Dowlen (2006, 246) relates Blackstone's sentiment.

81. For Morris this amounts to a social contract argument: no one is more interested than juries in preserving peace and order, as government is established for this security. Dowlen (2006, 248).

the jury is seen as perhaps the most fundamentally democratic institution in the modern, liberal, representative democratic state, embodying as it does the expectation that all citizens are "equally competent to do justice" (Abramson 1994, 1-2).

Yes, in the context of assessing the viability of employing randomness in selecting political officials, the example of the jury selection process is often discounted because of a perceived difference between the expectations of jurors as contrasted with those of other political officers. The "relationship between jury and state limits the potential political role of the jury" (Dowlen 2006, 8), it is said, and thus limits the applicability of jury selection to an argument for expanding the role of randomness in our political selection processes. Specifically, the jury is presented with and constrained by a set of options, and a reactive, defensive role (Dowlen 2006, 249), rather than being faced with an open-ended and forward-looking problem to solve (Jacobsohn 1977, 75); and jurors serve only for a relatively brief time, in which they consider only a single fact-centered question; and finally, jurors are not "accountable" in any traditional sense (Jacobsohn 1977, 82).

However, these differences, and thus the argument that jury selection is not relevant to considerations of using random political selection more broadly, may be overstated, and the distinction between the jury as a judicial institution and the arms of the government more readily perceived as "political" unfounded.

After all, the "jury is, above all, a political institution" (de Tocqueville 1945, 293). The possibility of nullification by the jury is just one example of the jury's capacity to operate outside the narrow strictures of the judge's instructions. And the distinction between facts and values in legal settings may be overblown (Jacobsohn 1977, 80). In any case, the blurring of facts and values in the course of a jury's interpreting the law, in addition to the potential that the jury might be more or less willing to enforce a law, both serve to underscore how the role of juror may be less straightforward than is thought by those who argue for the relative simplicity of the role. Policies, and policy-affecting decisions, "are not made 'in situational vacuums.'"<sup>82</sup> Additionally, jurors have been shown to be more sophisticated deliberators than is typically expected (Jacobsohn 1977, 89), again reinforcing the possibility that the jury example is not so far removed from other political roles. If juries can "make policy," no matter how attenuated this role may be (Jacobsohn 1977, 76, 78), then why would we be so reluctant to allow randomness into the selection process for other policy-making officials?

There is also the question of just how random and/or representative jury selection is. As it stands, the randomness by which the pool is populated is tempered by the *voire dire* process. And to the extent that accountability is impacted, or arguably nonexistent, under random selection, the importance for legitimacy of "representativeness" is heightened (Jacobsohn 1977, 93). The

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82. Jacobsohn (1977, 77).

concern is not about equality among prospective jurors, but rather the aim to "give the accused the right to be tried by a cross-section of his peers."<sup>83</sup> The means generally suggested to accomplish this aim include some sort of stratified sampling, to assure that certain sets of interests are represented on the jury. But as to the notion of stratification itself, Elster notes the objection that the number of jurors limits the dimensions on which stratification can occur (1989, 97).

Moreover, even a strictly randomly chosen jury would be checked by the judge, as well as by the prospect of appeal (on guilty verdicts, at any rate). Moreover, characterizations of the jury selection process as giving an "equal" chance to all citizens, in service of a "representative" jury, is confronted by another difficulty: the segment of the population not included on the lists (Goodwin 1992, 195).<sup>84</sup> All of which is to say that characterizing the jury as an example of "unmixed" randomness is misleading. That said, the qualified randomness of the jury does not serve to caution us against taking it as inspiration for increasing the role of randomness in our selection processes. Rather, it should serve as an object lesson in the potential for randomness when introduced under controlled and mixed circumstances.

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83. Goodwin (1992, 194), referencing Elster (1989, 95-96).

84. Thanks to Benjamin Gregg for emphasizing to me how this is a concern in any context where random selection is expected to deliver a "representative" sample with equal prospects for the selection of each and every citizen. Inevitably, those most in need of a voice will be left off the list of candidates to begin with.

## **Citizens' Assemblies**

Recent decades have seen a rise in citizen-centered groups, filled randomly and asked to deliberate on and provide public input into specific policy questions or political choices. Such groups have arisen in a number of contexts, from the research-driven deliberative polling, to policy-driven planning cells, citizens' panels, assemblies, and juries. A brief description of these various participatory forms serves to highlight some differences and some common themes. Deliberative polling is perhaps the most widely known project researching and advocating for the potential of "randomly" selected bodies of citizens to study and discuss questions of public policy. The bodies are of varying size, but generally in the range of a few hundred, and while the manner in which these groups are selected is typically not explicitly discussed, we can infer that these groups are actually selected with an eye towards producing a final group that is a "representative" cross-section of the source population, despite the ultimately voluntary nature of participation. Fishkin trumpets the poll as an assemblage of a "full-scale, statistically representative microcosm" (Fishkin 1996, 135), evoking Adams' "portrait in miniature," and suggesting a selection method involving stratified sampling.<sup>85</sup> Stratified sampling is of course not strictly random in the equiprobable sense, but it does presumably facilitate a continued approximation of "representativeness," even in the face of the inevitable

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85. Fishkin simply alludes to the utilization of "the sampling methods of survey research" (1996, 136).



"attrition" for which the polls are criticized (Denver et al. 1995, 149).<sup>86</sup> Fishkin is concerned with establishing the representativeness of his samples, so he tracks and compares them ideologically to the general population (Fishkin 2009, 114). Populating the group thusly, along with the results claimed for the deliberative process itself,<sup>87</sup> leads Fishkin and his colleagues to claim for deliberative polling the ability to represent "the views the entire country would come to if it were populated by ideal citizens" (1996, 137).

Although they make the same claims about representativeness and the ability to generate considered judgments, citizens' juries and planning cells are typically<sup>88</sup> distinguished from the deliberative polling research by their smaller size. Playing up the analogy to legal juries, citizens' juries are often populated

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86. There is some disagreement as to the success of the effort at making these groups "representative" even in the descriptive sense in which the claim is made. Fishkin claims, for instance, that the 300 participants in a "Manchester event" were "in every important respect, indistinguishable from" the baseline group, and so "the weekend microcosm was fully as representative of the entire country as the baseline survey sample" (1996, 136). This elides somewhat the charge by critics that the voluntary nature of participation leads to "discrepancies" between participants and the electorate (Denver et al. 1995, 151).

87. Fishkin and other deliberative democratic theorists and researchers contend that the deliberative process offers an improvement over traditional polling in that it counters the problems of "rational ignorance" and "nonattitudes" (Fishkin 1996, 133), in which engaging the issues and debating them leads to "new, considered judgments" that represent "what the public would think if it actually had a better opportunity to think about the issues" (1996, 137). This claim is disputed as well, by those who counter that political ideas are essentially fixed (Denver et al. 1995, 152-55).

88. This distinction is not hard and fast. Simon Threlkeld describes citizen juries as ranging in size from "100 to 1,000 [sic] citizens," observing that a larger random sample offers a "more accurate" cross-section (Threlkeld 1998, 7).

with twelve members (Brown 1997, 171; Crosby 1990), while planning cells are similarly small, numbering "about 25" (Dienel and Renn 1995, 122). The smaller size, while allowing for more direct comparisons to legal juries and possibly a cleaner setting for deliberation, opens up these efforts to criticisms with respect to their statistical ability to have participants who represent anyone but "themselves" (Brown 1997, 171). This emphasis on representativeness points to a more fundamental difficulty that randomly selected groups have in establishing their legitimacy as political decision-making bodies. This difficulty manifests itself in one of the most significant difference between citizen juries and legal ones: a difference that also characterizes the gap between deliberative groups in general and the more traditional political institutions. Deliberative groups in general produce "verdicts" that are advisory, rather than binding decisions (Dienel and Renn 1995, 129; Brown 1997, 171). Decisions taken by deliberative groups are generally then passed along for consideration by the real decision-making authority, whether that be the politicians or the electorate.<sup>89</sup>

The citizen's assemblies convened in order to consider and recommend reforms to the electoral systems in British Columbia and Ontario are perfect examples of this dynamic. These assemblies met over an extended period of weekends, in order to study, evaluate, and discuss potential electoral reforms for

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89. Critics also point to the differences in whether the verdict is concerned with fact or action, and how rules for presenting evidence and gathering information differ (Brown 1997, 171).

their respective provinces. These assemblies were larger than the typical planning cells or citizens' juries, resembling more closely the groups in Fishkin's deliberative polls. A marked difference exists between the assemblies and the polling groups, in that the assemblies met over a relatively extended period of time, meeting for several days a month over the course of a year, as opposed to the 3 day weekend of the deliberative polls. But despite this additional time during which the participants learned more and thought more and debated more about electoral systems than vdoes the typical citizen, their recommendations were then subjected to popular referenda. Not surprisingly, given the lack of familiarity on the part of the electorate with the dynamics surrounding the proposed changes, the referenda failed in both provinces. This highlights one major difficulty faced by deliberative democrats. Surely, given the amount of time, effort, and information that goes into a deliberative group, advocates for deliberative democracy must wish that the fruits of their labor could be made into law or policy without any additional obstacles. It seems unfortunate that, in virtually all deliberative contexts, the final decision-makers are not exposed to the same information that the deliberative groups used to formulate their recommendations (Seiler 1995, 149).

The fact that deliberative democratic projects do not generally contemplate or seek full political authority for their randomly selected groups, on

par with that of elected officials,<sup>90</sup> reflects a recognition that randomly selected groups would suffer from a deficit of political legitimacy. Dienel and Renn are more forthcoming than most on this difficulty, noting that the problems with planning cells include questions of whether randomly selected citizens can "represent" minority constituencies they do not resemble or be held accountable without the sanction of election, as well as questioning the impact of short, single terms on long-range planning (Dienel and Renn 1995, 129). Additionally, there is the inevitability of the information presented to panels being biased (ibid.), as well as a number of other issues, some of which I have already mentioned, that might affect the people's trust for such groups and willingness to adhere to their decisions, such as questions of authorization, publicity (Seiler 1995, 148), and the numbers of citizens involved. Another major problem for advocates of expanding the role of deliberative groups in political decision-making is the lack of a role for those who were not selected, the equal prospects of being selected notwithstanding (Seiler 1995, 143, 154; Brown 2006).<sup>91</sup> Additionally, as the jury

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90. As indicated in Chapter One, the recent deliberative reforms proposed by Leib and O'Leary are the exceptions that prove the rule. These works, focused as they are on equality and participation, give scant attention to the question of whether and why their randomly selected legislative bodies would (not) be perceived as legitimate political actors by the citizenry.

91. Of the most enthusiastic advocates for deliberative reform, O'Leary and Burnheim grapple most visibly with this problem. O'Leary's approach is to expand the assemblies to include tens of thousands of citizens at a time, while Burnheim suggests simply replacing the entire state with a network of committees, all randomly selected. This would presumably also require tens of thousands of participants, if not more.

analogy suggests, there is a difference between considering a single issue in isolation, and the recognition that policy considerations involve many other "inter-connected" problems (Seiler 1995, 142).<sup>92</sup> Yet, even to the extent that most deliberative democrats are implicitly aware of these limitations, many still talk despite themselves in terms of their groups being "representative" in a statistical or descriptive sense (Fishkin 1997; Crosby 1995; Dienel and Renn 1995; Knag 1998; Burnheim 1985; O'Leary 2006, just to name a few). Before deliberative democracy can bring its lessons into the arena of binding political decision-making, it must account for these sorts of concerns, all of which would impact the legitimacy of randomly selected political bodies.

## **Contemporary Treatments of Sortition**

### **Utopian Fiction**

Nonetheless, we collectively exhibit a continued, intuitive fascination with the promise that random selection holds for fairness. Utopian proposals abound for expanded uses of lottery. Housing lotteries are proposed in Thomas More's *Utopia* (1516, 73).<sup>93</sup> Other utopian works advocate rotation, which is historically and analytically closely associated with sortition. This is Aristotle's democracy: democratic over time. In addition to Robert Owen, Goodwin also discusses

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92. I address these sorts of concerns in Chapters Four and Five.

93. Barbara Goodwin discusses these and other examples (1992, 156-7, 205).

Goodwyn Barmby's *Platonopolis* (1846), John Macnie's *The Diothas* (1883), Marge Piercy's *Woman on the Edge of Time* (1979), and Ursula LeGuin's *The Dispossessed* (1974). Another utopian, Morgan in *Revolt of the Bees*, shows how rotation of political work is a special case of the larger rotation of work in general. Rotation here is intended to allow "all occupations to achieve equal respect," and "to maintain the interest of all the members of the community in the gradual reduction of manual hard labor" (Goodwin 1992, 161; Muirhead 2004). Goodwin attributes this enthusiasm for lottery to a "disappointment at the failure of grassroots participation," a concern with the "oligarchical tendencies" of liberal democracy, and its "susceptibility to financial influence" (see also Goodwin 1992, 183). This is evident even in popular writing.

In the 20th century, G.K. Chesterton's *The Napoleon of Notting Hill* (1978) tells a quasi-utopian tale set in an England where the king is chosen randomly. Similarly, Philip K. Dick's *Solar Lottery* (1976) describes a galaxy whose emperor is chosen by lot, and Arthur C. Clarke's *The Songs of Distant Earth* (1986) depicts a Head of State chosen randomly from amongst those who have not expressed interest. Other depictions of lottery reflect a more morbid fascination with random selection, such as those on display in *The Lottery* and *Babylon*.<sup>94</sup> Shirley Jackson's *The Lottery* (1949) depicts the choice of a stoning

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94. Both cited by Elster (1989, 66-67), and the latter also by Goodwin, at length. Interestingly, Borges's story serves overtly as inspiration for Goodwin's more prescriptive, even utopia-flavored treatment of lottery.

victim from amongst the inhabitants of a New England village, wherein the lottery is part of a periodic ritual and the social order (Elster 1989, 67). And Jorge Luis Borges' "The Lottery in Babylon" (1962) provides a rather pessimistic depiction of the results of the wholesale organization of society around the lottery.<sup>95</sup> But in contrast with Jackson's story, where lottery is part of the social order, the key in the latter story(es) is the arbitrary and capricious nature of randomness (Elster 1989, 67). And in *The Dice Man*, Luke Rhinehart (1972) tells of a psychiatrist who seeks to break free from convention by letting the dice dictate his actions. Commentators note, however, that Rhinehart's character is still obliged to generate the options from which his dice are to select, and thus his random life choices are neither random nor liberating.

### **Concept of Randomness: Proposals for & Analyses of Lottery**

But far from being limited to the realm of fiction, contemporary treatments of lottery also range from proposals that advocate for its untrammelled use in place of election to select high-profile political officials, to analytical considerations of the nature of randomness, in which consideration of any potential practical use for lottery is either secondary or not on offer at all. These categories are not mutually

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95. Elster speculates that Borges' story might have been inspired by Gataker's tale of Heliogabalus (Gataker 1627), and tells of the modern version of this story, *Doctor Fischer of Geneva or the Bomb Party*, by Graham Greene (1980), where the regularity of an institution (a la Jackson) is combined with an unpredictable outcome.

exclusive, overlapping in some cases where careful consideration of lottery goes hand in hand with optimism as to its potential applications.

Some of this recent attention comes from within the mathematical community, concerned with capturing the very properties of randomness (Chaitin 2001) and the prognosis for our ability to actually generate something truly random (Elster 1989, 40-45). This discussion is not by and large of interest to us here, aside from providing the general takeaway that the challenges faced in generating truly random selections is not as important as the ability to make choices that are credibly random and perceived as random (Elster 1989, 43; Sher 1980).

More directly in the political realm are treatments of the possibility of using lottery as part of the legal/judicial process. Randomness might be employed at any of three stages, from choosing judges and/or jurors randomly, to choosing verdicts or sentences randomly, to finally choosing randomly whom (among those convicted) to punish. Of course, our jury selection process currently has a random element, as already discussed. But the potential for random selection of judges receives relatively less attention, though the selection of Athenian magistrates and Roman tribunes amount to early precedents for such a use of randomness.<sup>96</sup> In Norway, judges are assigned to cases in an essentially random fashion (Elster 1989, 93), while in the wake of *Brown* American appeals

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96. MacDowell (1978, 40), dates the practice to one century after the random assignment of jurors.



judges are assigned to panels in a process kept independent from the scheduling of cases to the calendar, which amounts to random assignment, barring some common influence to both processes.

By contrast, random selection at the decision stage is by and large deemed a non-starter. Elster offers the possibility that some civil cases, such as difficult child custody decisions, might best be decided in this manner (1989, 100), but recognizes the difficulty where "judges must and therefore can reach a clear-cut decision," and offers no argument for randomly deciding criminal cases (101). Meanwhile a separate possibility is the assigning of sentences randomly, although in legal contexts, Elster notes, randomness is generally equated with arbitrariness, which, while it may be inevitable at the point of selecting judges, is resisted when it comes to sentencing. Relatedly, once a sentence is decided, the decision of whether to carry it out might also be made randomly (1989, 102-03). Elster points at the practice of decimation as a real-world example, and notes that this practice honors both the objective of minimizing loss of life, where that is the motivation for capital punishment and that of saving tax money in the case of prison sentences (Elster 1989, 103). However, the practice would carry drawbacks such as reduced deterrence and inevitable moral uproar. Elster follows Broome in observing that "an expected punishment is no more a form of punishment than the expectation of a good is in itself a good" (see Broome 1984b). Such a proposal would fail to satisfy the "irreducible retributive element in the system of justice."

Andrew Rehfeld (2005) suggests creating new, random “constituencies,” in an attempt to replace other group identities with a synthetic identity that could then be represented. However, this move would leave elections subject to the same difficulties I have already mentioned. Though compelling in other ways, Rehfeld's proposed, randomly assigned, permanent constituencies are not intended to address marginalization of candidates based on their performance against subjectively selected and assessed criteria.

Another source of pro-lottery sentiment in recent decades has been by way of response to calls for a more participatory democracy (a call coming from, for example, Pateman 1970, 103-11). Participatory democrats, faced with the challenges of in making a representative democracy in a liberal society more participatory, have turned their attention to modifying the representative system wholesale.<sup>97</sup> Many reformers see lottery as a way of equalizing the opportunity to participate in self-governance. Some, like Burnheim (1985), and subsequently Carson and Martin (1999) see random selection as a way of populating bureaucratic bodies that could supplant the state altogether. Others see a role for random selection within the American constitutional polity, providing a new branch to act as an alternative to representative government (Leib 2004) or to improve representation (O'Leary 2006). The most ambitious would have lottery replace election altogether for the purposes of selecting some existing legislative

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97. Goodwin (1992, 172fn11) cites Philip Green (1985).

body. In this group fall Callenbach and Phillips (1985), who talk of a randomly selected "Peoples' House," Keith Sutherland (2004) who offers a randomly chosen House of Commons as a way to minimize the role of parties in British politics, and Barnett and Carty (1998), who instead suggest that the House of Lords be randomly chosen. While these proposals may seem far-fetched, they share their interest in an increased popular role in democracy with proponents of randomly selected advisory groups such as "Citizens' Juries" (Crosby et al. 1986; Dienel and Renn 1995; Dienel and Renn 1995), planning cells, and citizens assemblies. All owe a debt of inspiration not only to ancient democracy and medieval representative government, but also to early more recently to the likes of Robert A. Dahl (1970, 149-53; 1989), and those studying randomly-selected deliberative democratic groups (Fishkin 1997; Gutmann and Thompson 1996). Deliberative democrats, in particular, seem to be the "final destination" of ideas of using lottery for selection (Dowlen 2006, 12).

Another group of scholars tends to focus on the properties of randomness as it pertains to political decision-making, resulting in processes that are impartial and unpredictable, which in turn have the benefits, for example, of hindering factions and preventing manipulation or corruption.<sup>98</sup> R.P. Wolff offers up such an alternative in the form of random selection of policy choices submitted by

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98. Oliver Dowlen (Dowlen 2006, 15) cites as his inspiration for considering lottery's political potential the unpublished work of Nilsen and his *Society for Democracy including Random Selection*, found online at: [www.sortition.org.uk](http://www.sortition.org.uk).

representatives which would serve to mitigate majority dominance in policy-making (Wolff 1976, 45-47). Bruce Ackerman's "responsive lottery" expands the opportunity to express policy preferences to the entire citizenry, satisfying the condition of "minimal decisiveness" while also according "each citizen's ... political judgments ... equal respect" (Ackerman 1980, 285-89).

Not dissimilar to Ackerman's idea is the lottery vote as suggested by Akhil Reed Amar, except here Amar proposes choosing the representatives themselves by a scheme that would select randomly which popularly-cast ballot would determine the outcome of an election. A hybrid of lottery and voting, championed by Akhil Reed Amar (1984) among others,<sup>99</sup> assigns a probability to each candidate based on the percentage of votes that candidate respectively receives. "Lottery voting," as Amar terms it, promises "justice for minorities" by approaching proportional representation over time, by eroding the two-party structure where it is prevalent, by rotating officeholders, and by reducing "wasted votes (Amar 1984, 1283). As with Ackerman's proposal, Amar's makes each citizen equally likely to determine the outcome,<sup>100</sup> which reaffirms a commitment to equality, encourages voting, weakens parties along with strengthening

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99. Bruce Ackerman had previously offered a similar proposal for reaching social decisions directly, which he calls the "responsive lottery" (1980, 285-89), and Ben Saunders has more recently studied the potential for making policy decisions in this fashion (Saunders 2008a).

100. Although presumably susceptible to objection based on Arrow's conditions of non-dictatorial decisions and the independence condition (Riker 1982, 143).

proportional representation, facilitates minority parties, mitigates majority dominance, preserves local representation, and creates a rotating legislature, which would be less expert, but more responsive (Goodwin 1992, 185). Additionally, according to Elster this proposal promises to combine honesty with self-interest in the electorate. There is no strategic incentive to vote dishonestly, in contrast with other, aggregative voting schemes.<sup>101</sup> In social choice terms, lottery voting is the only voting procedure that is "Pareto-optimal, non-dictatorial, and strategy-proof" (Elster 1989, 87).<sup>102</sup>

But Elster also chronicles the disadvantages of lottery voting as a "lack of continuity among power-holders," a "lack of accountability," and the likelihood of an increase in the power of the bureaucracy (Goodwin 1992, 188). But beyond the concerns leveled at lottery voting from the perspective of the modern, pragmatic, electoral democrat, Amar's proposal also has other shortcomings relevant to my argument. For starters, though it overcomes concerns raised by social choice theorists related to Kenneth Arrow's impossibility theorem (1963), it does not overcome the problems associated with campaigns and elections that I have already highlighted. Amar also shows the same tendency as many who have more recently advanced proposals for lottery-based reform, unreflectively

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101. This point is also made by Gibbard (1977) and Riker (1982, 143), as catalogued by Duxbury (1999, 39n118).

102. It is not clear why Elster differentiates this process from what he later terms a "random-dictator" process (Elster 1989, 88), although Estlund more explicitly treats the latter with his hypothetical "queen for a day" (Estlund 1997).

conflating randomness with representativeness. These objections must be addressed, either by argument or by institutional safeguards, in any proposal to involve randomness in the process(es) for choosing representatives. Marrying lottery with election has great promise for representative democracy, as history would suggest and as already discussed. Amar's particular mode of implementation, however, is far from the only possible combination of the two methods, and in fact may not be the most attractive one. I will return to this point at length.

Also cognizant of the limitations of wide-scale national lotteries, Benjamin Barber proposes in *Strong Democracy* "election by lot" at the local level, which could combat "the oligarchical tendencies of representative institutions" and preserve the "democratic nature of public service," by upholding principles of representation, neutralizing wealth, and encouraging engagement. Barber limits his proposal however, by pitching it at local use, by allowing the selection from a pool of volunteers, who may then opt out (Goodwin 1992, 186). Similarly, Mulgan touts the democratic potential of lottery on the local level. Mulgan is concerned that because lottery selects "typical" representatives, it sacrifices "expertise and accountability." He does insist, however, that a failure to consider lottery reflects a "counter-belief in inequalities of ability and their relevance to office-holding." Moreover, and as caution to those like Barber who would allow citizens to opt out of the lottery, the principle of voluntarism leads to

self-selection, potentially with oligarchical results (Mulgan 1984, 554-57; Duxbury 1999, 39).

Other proposals for modest, circumscribed uses of randomness under the current American political setting include legislative committee assignments (Thaler 1983, 72), the timing of elections, and the setting of district boundaries.<sup>103</sup> Randomized assignments have the advantage of breaking up sources of entrenched power in the committee structure, such as seniority, but also bring a loss of continuity and the inability to place committee members according to expertise or interests. Elster sees this as a manageable risk, however, given that legislators should be "generalists rather than specialists" and that they have staff to help manage transitions from one area to the next (Elster 1989, 92). Lindbeck's proposal that elections be randomly timed is intended to "prevent or dampen the 'political business cycle.'" The resulting unpredictability, though, would prevent planning, weaken expectations of stability, and might even make governments more, not less, concerned with reelection, given that it would always be a lurking prospect (Elster 1989, 91). Finally, Elster considers random redesign of electoral districts, in order to better ensure "equal influence of all voters" (1989, 92).<sup>104</sup> Elster acknowledges Amar's claims (Amar 1984, 1294-96) that lottery voting could also

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103. These are listed both by Goodwin and Elster (1989, 91). See also Kishlansky (1986, 36) as citing an earlier resembling Thaler's, but for the British House of Commons in the 17th century.

104. Andrew Rehfeld (2005) has more recently offered a proposal that captures some of the same benefits.

be expected to have this benefit, but Elster considers the redistricting proposal to have fewer drawbacks. Elster sees this as a means to break alliances and create Jefferson's "periodic renewal of politics" (1989, 92).

Jon Elster presents an argument on behalf of lottery as a decision-making device and distribution mechanism, specifically where conditions of indeterminacy prevail (1989), and Stone (2007) further develops a "theory of lottery" where its use is justified for allocative decisions where relative strength of competing claims is indeterminate. These works follow in the wake of Sher (1980) and Broome (1984a), who also consider the conditions under which using a lottery is "fair." These defenses of lottery under conditions of indeterminacy, however, do not amount to arguments for abdicating reason. Indeterminacy of claims is in fact a rational justification for resorting to randomness. Duxbury attributes our reluctance to cease looking for reasons to assist in making a decision where none exist to "pseudo-rationalism," in which the "reasoning process is valued above the quality of decisions" (Duxbury 1999, 14, 175). Elster contends that "use of lotteries ... is an honest admission of the role of indeterminacy, uncertainty, and chance in our lives" (Elster 1989, 121).

One subset of this sort of decision-making situation is referred to as "tragic choices," the consideration of which is a mainstay among philosophers (Goodwin 1992, 208).<sup>105</sup> Calabresi and Bobbitt advocate the use of lottery in conjunction

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105. Much of this discussion relies on Goodwin's summaries.



with market or political choices, where "the limits of mindful choice are reached" (1978, 44). The effort to treat everyone the same goes counter to our inclination to recognize differences (42). Similarly, though not limited to choices made under tragic circumstances, Elster observes that the use of lottery reflects an awareness that "some decisions are going to be arbitrary and epistemically random no matter what we do" (1989, 121). For Bernard Williams, some situations simply lie beyond justification (Williams 1981, 18). "Where no rational or moral distinctions can be drawn," "a random choice is fair" and also serves to remind us that some decisions are beyond reason (Goodwin 1992, 209).

The recent trend in analytic scholarship on the lottery culminates in the work of Peter Stone. Stone synthesizes these works to glean one characteristic of lotteries essential to them all: its sanitizing effect (Stone 2009). A lottery is "stripped of human agency" (Duxbury 1999, 13) and its outcome is completely unpredictable. One key consequence of lottery's fundamental characteristics is its impartiality; a lottery is blind to distinctions, even where they exist. Indeed, Stone offers his "lottery principle" as guidance. It makes sense to use a lottery in decision-making, according to Stone, when "it is important that reasons be kept out of decision-making" (2011, 16, 37).

Building on this notion of a lottery as a decision-making tool that ignores difference, I will argue that an equiprobable lottery both flows from and facilitates equality, although the precise nature of the relationship(s) between an

equiprobable lottery and equality is far from a simple matter. What is meant by "equality," both with respect to the sort of equality being given expression by the decision to employ random selection and the sort of equality that is facilitated by selecting randomly, warrants further consideration, as does the matter of whether these sorts of equalities are consistent with the values associated with modern, representative democracy. In this respect, random selection must compete with other, alternate criteria upon which to base the selection of representatives, such as the backward-looking criteria of need or merit, or the forward-looking criterion of expected contribution. I undertake these considerations primarily in Chapters Three through Five. In short, random selection "lacks reasons," and this may prove to be a boon or a bane to democratic selection,<sup>106</sup> depending on context and one's understanding of democracy.

Another key consequence of the fundamentals of lottery lie in its unpredictable outcomes (Stone 2011, 22). This unpredictability brings with it a bevy of implications. Some expect uncertainty to be a check against efforts at

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106. Elster, Duxbury, and Greely argue at length that we rely overly on reasons in decision-making, often where no meaningful differences exist between options. But they and Stone seem to draw the line short of a wholesale decision to abdicate reasons in making political choices. Only Barbara Goodwin is prepared to argue that equality is sufficient justification for discarding other concerns and sets of criteria. I will attempt a middle way, offering an argument that randomness does give expression to a more democratic sensibility than election or appointment, but that some effort must be made to blend these process depending on the office in question and the various considerations that accompany it. In particular, merit and democracy are not incompatible, though this is in part because of the focus that an emphasis on decision-making by merit places on equal opportunity, as I will argue further in Chapter Three.

corrupting the process and/or those selected by it (Duxbury 1999, 3), making the process harder to manipulate and reducing the lead-time available to influence those selected. But this is far from a foregone conclusion.<sup>107</sup> I consider practical considerations such as this one with an eye towards specific potential applications for random selection, in Chapter Six. But the combination of the removal of human agency and the uncertain prospect of anyone's chances have other consequences for representative government. Notably, accountability and consent are impacted. First, without human agency in the selection/decision process, there is no one responsible for the choice. That means we have no opportunity to "authorize" the person being chosen by way of casting a ballot. And second, in a purely random selection process there is no relationship between selection and performance that we typically look to elections to ensure. These consequences have far-reaching implications. We may experience a loss of the sense that these are "our" representatives. Further, there is no incentive for those being selected to devote much energy to learning their job, or to coordinate their efforts with each other, or to engage in any long-term planning. Those being selected may have no particular expertise, and almost assuredly the bodies in general would harbor less

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107. This putative benefit must compete against the expectation that equalizing the prospects of being selected will lead to representative bodies populated in greater part by individuals in life circumstances that make them even more susceptible to corruption than those being elected currently. Depending on the nature of the representative body in question, some additional safeguards may need to be built to protect against this latter tendency and insure the former expectation, and these are the sorts of considerations I undertake in Chapter Six.

experience than do representative political bodies of today. On the other hand, we might arguably find ourselves with more, not less, in common with these representatives, and their lack of concern over reelection prospects may lead them to make the harder decisions in the common interest that those seeking election are famously afraid to make.

Having engaged in such careful and thorough studies of randomness, examining its uses and characteristics and trumpeting its potential for greater use, the likes of Duxbury, Elster, Greely and Mulgan all lay out rather modest programs for its possible future application. Duxbury proposes using the specter (and not the device itself) as a sort of sword of Damocles, to incent judges to make quicker decisions lest they be forced to hand over discretion to the lot. Somewhat more provocatively, Elster suggests awarding child custody in divorce cases by a coin-flip. But he dismisses its potential use for large-scale political selection, as does Mulgan. Greely's assessment of lottery is most suggestive, when he characterizes it as "satisficing" (Greely 1977, 16-17), but even he fails to see how this might be just the ticket for democratic selection, where a great deal of energy and money are currently devoted to choosing between competing alternatives in contrast to the efficiencies promised by lot (Broome 1984a, 41).

These thinkers are no doubt justified in their tendency to discount the possibility of putting random selection to broad use in selecting democratic representatives, given that some of those who have advocated doing so have

offered relatively unreflective arguments as bases. But shortcomings in argumentation are not reasons against the idea. The remainder of this work comprises an attempt at offering a more systematic response to prominent concerns about random selection in modern democratic politics, and the positive case for sortition.

## Chapter Three: Sortition and Equality

*Many democratic theorists profess a belief in human equality and the educational effects of political participation. It is therefore surprising that lot has not been taken seriously as a selection mechanism.*

- Richard G. Mulgan (1984, 556)

*Random selection is the only allocative method which honestly can claim the objective equality of opportunity from which the satisfaction of equality of expectation springs. It is the allocative method which maximizes the goal of equality.*

- Hank Greely (1977, 122)

Advocates of lottery as a means of democratic selection offer up an array of arguments for their position(s), from lottery's capacity to inhibit corruption and faction to the "cross-sectional representativeness" of those it selects.<sup>108</sup> Yet, any argument for an increased use of random selection in selecting democratic officials must begin with a claim that such a change would make the selection

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108. These are but two examples of the myriad rationales offered and critiqued in the various literatures on social and political uses of lottery. The former claim is favored by Sutherland (2004), who suggests choosing the British Parliament randomly as a corrective for the undue power wielded by parties in that political system. The latter claim, on the "representativeness" of randomly selected groups, which is argued by Callenbach & Phillips (1985), Burnheim (1985), and O'Leary (2006) among others, is a particularly problematic one. I treat it and other considerations affecting the potential political legitimacy of decisions made by randomly chosen groups in Chapters Four and Five.

process and resulting institutional arrangements more legitimately democratic. In this chapter I offer such an argument, on the basis of the lottery's expression of and contribution to political equality.

Among calls for lottery-based reform are those that appeal in particular to lottery's potential to contribute to political equality (Greely 1977; Mulgan 1984; Zakaras 2010). The more aggressive of these proposals (see, as examples, Callenbach and Phillips 1985; Burnheim 1985) have been met with skepticism on the part of more prominent, egalitarian political philosophers (examples include Barry 1995; Walzer 1983). The more staid contributions to the literature on the lottery and political equality tend to offer only tepid or limited recommendations for deploying sortition, however, generally due to concerns over the capacity or accountability of randomly selected political officials.<sup>109</sup> Sortition also enjoys an increasing amount of attention from scholars interested in establishing on an analytical basis the fundamental qualities of randomness and its potential for various social uses, including the selection of political officials.

Meanwhile, another body of literature places a particular focus on exploring the circumstances under which a lottery might be employed in a "fair" or "just" manner (Broome 1984b; 1991; Kornhauser and Sager 1988; Stone 2007). The last word in this discussion holds, essentially, that lottery is good only for

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109. For examples of each concern, even among advocates for random selection of political representatives, see respectively Zakaras (2010) and Fishkin (1991). In subsequent chapters I take up these and other objections to an increased role for randomness in selecting democratic representatives.

"breaking a tie" when allocative decisions are to be made between claimants, the relative strength of whose claims are "indeterminate" (Stone 2007, 278, 283). In conjunction with his work on the "sanitizing effect" of the lottery (Stone 2009), this amounts to what I will call a "negative" justification for lottery. Sortition is appropriate, according to this argument, only when there are no relevant differences between candidates, leaving the sanitizing effect of randomness to sweep away only potentially "bad" reasons for choosing between them, without sacrificing any potentially useful distinctions between claimants for an office. Stone stresses that lotteries are not an alternative to allocating according to claims, but rather that a lottery is warranted when claim-based methods of allocation, result in indeterminacy (Stone 2011, 104). Among these claim-based allocative methods are typically included considerations of need, merit, and desert.<sup>110</sup> Stone's argument does not do justice to the storied history of sortition as an effective tool for selecting leaders in democratic and representative governments,<sup>111</sup> nor to its potential for contributing to improved performance towards democratic ideals.<sup>112</sup>

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110. Other bases for making decisions, including markets and queueing, are less relevant to the context of selecting political officials.

111. Like that of ancient Athens (for an exemplary treatment, see Hansen 1991) and the republican city-states of medieval Italy (comprehensive treatments of politics in Florence and Venice are offered by Najemy 1982 and ).

112. In fairness, Stone does stipulate that arguments which incorporate "other values into the decision" are "not arguments about achieving justice with respect to allocation" (2007, 285n21). He leaves room, in other words, for arguments for sortition that proceed on a basis other than the justice of allocating political offices equiprobably. In this and subsequent chapters, I seek to fill this space,



An alternative account of lottery's potential, and a democratic justification for incorporating an element of randomness into the processes for selecting political officials, is warranted. A more nuanced look at the different ways these concepts interact than is typically undertaken by advocates for and critics of lottery rewards us with a rationale for random selection more robust than that offered by those studying the fundamental characteristics of randomness. In what follows, I offer what I term a "positive" argument for the potential of random selection to contribute to the core democratic value of political equality, one that does not relegate lottery to the role of tie-breaker, nor dismiss it as simplistic, while also avoiding too-ambitious claims for its usefulness. The set of claims for the benefits of sortition<sup>113</sup> that I take up in this chapter relate an equality-centric view of democracy with the sort(s) of equality that sortition reflects and fosters.

### **Why Election, Still?**

But before entering that debate, it may be worthwhile to look once more at the reasons for the modern privileging of election as the preferred democratic selection method. And perhaps more tellingly, it may help to consider why students of politics and laypersons alike continue even today to associate

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though I also believe that increased use of sortition would further justice more broadly construed.

113. I will use "random selection," "lottery," and "sortition" more or less interchangeably throughout, although "sortition" is perhaps the most technically appropriate term, as its meaning is specific to political use.

democracy so strongly with election. As noted in Chapter One, a variety of factors are thought to have contributed to the prominent role accorded election by the American founders. While the American founding is to be credited with restoring a greater participatory role to the people than had been granted since the ancients, it is also evident that the election of representatives was seen as part of a bulwark against the political whims of an unstable populace. Nowhere is Aristotle's influence on modern political thought more evident than in the American founders' interest in using the constitution to control (majority) factions (Aristotle 1998, Bk. IV, Ch. 11, 1296a, ln. 6- 7; Madison 1788a, 254). In *Federalist No. 10*, Madison looks to elected representatives to "refine and enlarge the public views (Madison 1787, 44). Running like a blue thread throughout *The Politics* and *The Federalist* is a profound distrust of the majority and the accompanying specter of massive redistribution of property.<sup>114</sup>

Less clear are the reasons that election continues to hold such powerful sway in the minds of contemporary democratic citizens and scholars. Indeed, the holding of "free" elections is often taken as the single best signal of robust democracy, both by those who study such things empirically and by those advocating for a greater global role for democracy. Part of this tendency is explained by the perceived mission of many political scientists to describe, not

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114. Although this is no doubt an oversimplification of the thinking of the American founders that led to their choice of election as the modern democratic selection mechanism. See Turner (1981), Manin (Manin 1997), and Dowlen (2006).

prescribe. And to be sure, when attempting to measure democracy, the presence of elections provides a handy gauge. Yet the tendency to rigidly associate democracy with elections is especially perplexing in the face of so much work by economists and social choice theorists showing that elections are fundamentally unable to deliver on any of the values we associate with democracy. Elections cannot deliver representation, equality, or the popular will (Przeworski 1999). Their results are incoherent (Sen 1995). As a result, the very notion of a substantively meaningful democracy is declared hollow and meaningless (Riker 1982). Democracy is instead favored within that literature for its stability: its capacity to transition between leaders without bloodshed (Przeworski 1999; Schumpeter 1942). As William Riker puts it, the [only] value of electoral democracy is in rotation (Riker 2003, 10). Yet even on these terms, a strong case can be made for sortition. Were we only interested in a democracy *qua* procedure, and one specifically that rotates its officials, we could scarcely do better than random selection. Rotation and sortition were, after all, together at the root of ancient thinking about democracy (Hansen 1991). Certainly, equiprobable lotteries among candidates would rotate winners more effectively than does election.<sup>115</sup> This is so in two ways. First, sortition is likely to produce more

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115. Random selection is congenial to both procedural and substantive understandings of democracy; it promises improvement under either set of conceptions. Having said that, for much of the remainder of the chapter I argue for the plausibility of more substantive understandings of democracy, particularly those emphasizing equality, and the contributions the lottery offers to them.

different winners over time than would election.<sup>116</sup> Second, random selection will tend to choose from all walks of society more so than can election.<sup>117</sup> This expectation that those chosen will not all come from the same social sector(s) also contributes to the sense in which rotation is quintessentially democratic.

But surely we can ask more of democracy than to peacefully rotate officials. Rather than minimize our expectations for democracy as a result of its association with election, why not reconsider the rigid association of the two? These proceduralist arguments are not fully satisfying, in part for the reasons just noted and in part because such arguments inevitably seem to rely implicitly on some sort of underlying value structure. Defining democracy *qua* elections implies an appeal - at a minimum - to the stability that results from peaceable regime change. Even this appeal rests on values; specifically, the value of human flourishing as facilitated by a stable political environment.

### **Why Political Equality?**

Equality, in particular, is hard to escape as being fundamental to democracy. Most popular - that is to say, nonacademic - understandings of democracy rely upon it. Notwithstanding the elitist tendencies of the American Founders, contemporary politicians, and political scientists, there has always been

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116. Though election reforms could implement single-term limits.

117. I consider this claim and its implications at greater depth in Chapter Five.

a counter-current in American politics that places greater emphasis on a central role for the citizenry in modern democracy. Beginning with the Antifederalists and running through a variety of populist movements up to and including today's Tea Party, equality and a concomitant distrust of elites has never been far from the American political consciousness.

Equality is implicit in the notion of human fallibility, one of the more compelling justifications for democratic governance (Woodruff 2005). Democracy is the best form of government, the argument goes, not despite the inevitability of human error, but because of it. Individually, we have limited access to truth, are prone to mistakes in judgment, are biased towards our own interests, and are jealous in our perception of our own status (Christiano 2003b, 3-4). Forms of government other than democracy seek to address these human failings by placing authority in the best hands.<sup>118</sup> But those hands are still human hands, and suffer from the same human frailties, even if to a reduced degree. More than any other form of government, democracy contains a built-in check against the human tendency to err, in the form of numbers. Democracy alone counters these weaknesses by bringing into the decision-making process the highest possible number of sources of information and expertise and the full spectrum of biases and jealousies, the better to maximize the information available and neutralize the incentives to corruption. Importantly for my

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118. This is often seen as the *raison d'etre* for election as well, underscoring its tension with equality.

argument, both these human failings and their democratic solution stem from a conception of humans as fundamentally equal. We may not be precisely the same in our ignorance; we may have different biases. But we all have them, just the same. Likewise, we may not all bring precisely the same benefit to the table when it comes time to make decisions collectively, but there is some added value in the presence of each of us at the table. In these ways, democracy relies on and expresses an understanding of humans as equal.

Often, arguments for equality as the fundamental value of democracy are taken as prioritizing equality over other democratic values, such as liberty and participation. Yet these three values are actually heavily intertwined.<sup>119</sup> Indeed, the most ancient expression of democratic equality, *isegoria*, affirms the centrality of participatory speech to the democratic expressions of freedom and equality (Hansen 1991, 85). Liberty is "obedience to the law one has prescribed for oneself" (Rousseau 1987, Bk. I, Ch. VIII),<sup>120</sup> and it is also "equality of all before the law" (Dowlen 2006, 181, paraphrasing Cicero). And though liberty and equality are sometimes positioned as dichotomous, one coming at the expense of the other, this is only superficially the case. Upon further reflection, it is evident

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119. Consider the centrality of these concepts in perhaps the most familiar passage from the American Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness ..." Consider also the motto of the French Republic: "Liberté, égalité, fraternité."

120. Participation was an integral component of liberty for the Athenians as well. See Hansen (1991, 74).

that some degree of each is important for the attainment and meaningfulness of the other (Cohen 2003). But privileging liberty as the fundamental animating principle of democracy is problematic, not least because such accounts provide no mechanism for resolving disagreements when liberties come into conflict (Christiano 2003a, 39, 46). An emphasis on equality and participation is necessary to make sense of a substantive conception of democracy.

While participatory theorists from John Stuart Mill to Carole Pateman focus on the "educative" effects of participation (Pateman 1970, 29), the centrality of participation to the very meaning of democracy suggests it need not be considered merely for its instrumental value. Participation, and equal participation at that, is a crucial means to good government. If we take seriously the etymological origins of the word "democracy," then participation is also the thing itself. Which is to say, democracy is fundamentally rule (*kratos*) by the people (*demos*). Rule by the people requires popular participation at some level or another. It is both means and end. Yet neither does it stand alone. Equality and participation share a reciprocal relationship, much like that between liberty and equality. Self-governance requires a rough equality in political power, and "the participatory process ensures that political equality is made effective."<sup>121</sup>

Given the centrality of equality to both participation and liberty - without equality, neither of the others is meaningful - I focus on equality in gauging the

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121. Pateman (1970, 36 & 23) paraphrasing G.D.H. Cole and Rousseau, respectively.

lottery's potential contribution to democratic legitimacy. The relationship between equiprobable selection and political equality is not as simple as it might first appear, however. Albeit a "single abstract conception," equality is divided into "several practical notions" when we attempt to bring it from theory into practice (Rae et al. 1981, 4). And political equality straddles many of these notions. Political equality as a commitment to meaningful self-government gives expression to our understanding of humans as fundamentally equal. But while this is a crucially important aspect of the relationship between equality and democracy, our interest in equality does not end with the conception of human nature that justifies democracy. We also expect democratic self-government to result in conditions that accord with a certain kind of equal treatment for all citizens. In other words, self-governance can also contribute to enhanced political equality. And we mean something different by the word "equality" when we think of the conception of human equality that supports the very idea of democracy than we do when we think of equal and meaningful participation in self-governance as facilitating conditions for enhanced equality. For the remainder of the chapter, I consider in turn both the expression and enhancement of political equality that the lottery promises.



## Expressing Equality

Turning first to democracy as a reflection of an understanding of human equality, Joshua Cohen considers it fundamental to democracy that the authorization of state power come from "the collective decisions of the members of a society" (2003, 17). Democratic theory maintains the reasonableness of this requirement as an expectation of "equal political influence based on equal political capacity" (Goodwin 1992, 94). And this expectation of equal capacity, although not uncontroversial, is the product of democratic thinking that dates to the ancients. Athenian democracy was predicated on the notion that "we all know enough to decide how to govern our public life together, and that no one knows enough to take decisions away from us and do a better job of deciding" (Woodruff 2005, 24). This idea is given its most clear and consistent formulation today by Robert Dahl, who advances what he calls the "Strong Principle of Equality." He argues that it follows from "the Principle of Equal Consideration of Interests and the Presumption of Personal Autonomy," variants of the liberty and equality already discussed as central to self-governance, that "every adult member of an association is sufficiently well-qualified, taken all around, to participate in making binding collective decisions that affect his or her good or interests, that is, to be a full citizen of the demos" (Dahl 1989, 105).

But how does this ancient idea of equal capacity cash out today? It should be evident that election does not reflect this understanding of human equality.

Indeed, one of our primary reasons for employing election is to choose the best candidate, a concept entirely foreign to the notion of equal capacity to self-governance. Even to the extent that we soften our expectations of equality, seeking from elections merely a meaningful participatory role for all, election falls short (Coleman 2003, 27). Election also fails to adequately address the human failings that provide the other part of the justification for democracy outlined above. By contrast, an enhanced role for randomness in selecting democratic representatives would better express our understanding of citizens as political equals, and thus enhance democratic legitimacy where democracy is understood as having political equality at its core. In the remainder of this section I detail the precise sorts of equality that lottery expresses, and how.

Comparisons to democratic Athens often garner responses emphasizing the differences between then and now, and by our modern democratic standard, Athens had a very restricted conception of citizenship. The sense of equality just related was not held to apply to non-citizens, such as slaves, women, and aliens (Woodruff 2005, 25). Yet, lest we think that this difference makes any comparison meaningless between the Athenian understanding of political capacity and our own, we should recall Rae's taxonomy of equalities. The class to which the Athenians applied their conception of equality was much more "exclusionary" (Rae et al. 1981, 22-24), but this need not prevent our more inclusive concept of citizenship from carrying with it the same expectation of equal capacity within the

category of "citizen," however defined. A change in one part of the structure of equality does not necessitate changes in the others. Meanwhile, the relation of sortition to our understanding of human equality highlights yet another area where "equality" might be meant in a number of ways. To the extent that this equality is viewed as "absolute," and the political capacity of all "fully equal" (Rae et al. 1981, 105), then claims to political influence would most definitely be strictly indeterminate. This would trigger even a very narrow justification for an equiprobable<sup>122</sup> lottery *qua* tie-breaker such as that offered by Peter Stone.

### **Stone on The Lottery and Impartiality**

To be sure, Stone's reliance on the importance of impartiality in indeterminate situations for justifying the use of lottery is consonant with the widespread inclusion by analysts of impartiality on a very short list of

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122. For the sake of simplicity, I will generally equate randomness and lottery with equiprobability. To be sure, lotteries can be "weighted," and the potential for doing so in order to "stratify" the selected sample as a means of ensuring, say, minority group representation in bodies chosen by lottery is often touted by advocates of lottery as a means of ensuring representativeness. Though their claim is problematic, the distinction between weighted and equiprobable lotteries is an important one, and the role either might play in representation is a consideration that I take up at length elsewhere. For my purposes here, however, I will simply note that a stratified sample is neither impartial nor totally uncertain (probabilities for each outcome can be assessed, at a minimum). Not only does this mean sacrificing the very benefits that fundamentally characterize lottery, but a weighted lottery's relationship to equality differs from that of an equiprobable one, as well. Accordingly, for the purposes of this paper, when I say "lottery," I mean an equiprobable one, except where I specify otherwise.

fundamental characteristics of lottery.<sup>123</sup> But Stone conceives of impartiality as being distinguishable from absolutely equal treatment by the addition of a consideration of "legitimate" reasons for treating someone differently. In other words, impartiality only demands that we not favor one claim over another for an illegitimate reason (Stone 2007, 284), which amounts to saying that some differences in claims are relevant and others are not. As just observed, an argument from full equality of claims, as narrow a possibility as that might be when it comes to human capacities and interests, would of course meet the standard of indeterminacy, and the impartiality it would trigger would be total. However, the Athenian conception of human equality and Dahl's Strong Principle of Equality need not be so absolute, and yet still might be accommodated under Stone's impartiality. This would require categorizing any and all differences between people's claims of political capacities and interests as effectively irrelevant to the question of allocating political influence.

But of course, whenever there is some difference between candidates, there will be disagreement as to whether the difference is material to the strength of the claims being made on behalf of those candidates. Dworkin distinguishes between "equal treatment" and "treatment as an equal," and comes down on the side of the latter, where differences between people are taken into consideration.

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123. This list generally amounts to some variation on "impartiality" and "uncertainty" of results. See as illustrative (Elster 1989; Duxbury 1999; and Dowlen 2006).

Viewed in this way, coin flips fail to show "equal concern" (Dworkin 1978, 227).<sup>124</sup> Though arguments vary as to what personal characteristics warrant such concern, generally the list involves some combination of considerations that include, at a minimum, differences in talents and needs (Duxbury 1999, 62). The reply offered by the most dogmatic egalitarians is that the recognition of differences such as these in evaluating strength of claims, often in service of a form of equality billed as "equality of opportunity," actually renders any form of equality a practical impossibility. Taking these "natural" endowments into consideration amounts to rewarding the "uncontrollable manifestations of chance occurring at birth" (Goodwin 1992, 31-32). While Goodwin's position may seem extreme, and it certainly attracts its share of skeptics (see for example Williams 1981), the widespread presence, if not universal acceptance, of "compensatory" policy measures suggests that the position is not completely anathema to our liberal world-view.

Meanwhile, the very existence of the debate just outlined underscores the difficulty with Stone's "impartiality." Stone's usage, while not facially unreasonable, throws wide the door to subjectivity, creating the insoluble problem of settling upon what constitute relevant differences (Barry 1995, 228). Though we might intuitively see the equality of prospects that an equiprobable lottery

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124. This is Rae's "person-regarding" equality (Rae et al. 1981, 92). While a secondary point here, it should be noted that this concern would hold not only for lotteries, but also for elections.

offers as being eminently appropriate when claims are for all intents and purposes equal, differences will always be present that might arguably affect the relative strength of claims. Often, argument for differentiating claims to office will take the form of arguing that one candidate is the more meritorious or deserving. This is why the conception of random selection as delivering prospect-regarding equality (Rae et al. 1981, 66) is so quickly dismissed, even by egalitarians. Walzer disparages the choice of office holders by lot as "simple equality in the sphere of office" (Walzer 1983, 305), and Barry considers randomness "an abuse" of equal treatment (Barry 1995, 226). Similarly, Calabresi and Bobbitt worry that "lotteries deify absolute equality, but in so doing offend other conceptions of egalitarianism" (Calabresi and Bobbitt 1978, 49).

But as august as that group of scholars is, they may be too hasty to castigate lottery, in two respects. First, focused as they are on the "negative" argument for just use of lottery in resolving only arguably non-existent indeterminate claims, these egalitarians fail to appreciate the possibility that overlooking small differences in claims with an equiprobable lottery might still offer a net benefit to claimants, and even more so to society in general, that outweighs whatever slight is caused by the failure to weight a slightly stronger claim in accordance with its strength.<sup>125</sup> Advancing his own positive argument for

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125. Stone considers "social utility" to be a competitor for merit in allocative decisions, but not as a justification for resorting to a lottery. Indeed, for Stone, "where social utility is the source of indeterminacy, the case for lottery is not present" (Stone 2011, 105). I must admit to being puzzled by Stone's repeated

lottery, Broome makes his "case for fairness," suggesting that benefits may follow from fairness (Broome 1984a, 42), even where claims are only "roughly equal" (Broome 1991, 99). Whether we adopt Broome's particular justification for lottery in the face of the possibility that claims are not precisely equal,<sup>126</sup> it opens the door for the possibility of balancing other considerations that might militate for assigning equiprobable chances even where claims are not of precisely equal strength.

### **Equality as Aspirational Value, not Fact**

One such consideration is the value of equality as its own justification for lottery. Goodwin offers an account of lottery as a "primal just distribution," distinguishing her argument as more "truly egalitarian" than those that weigh claims and consider the relevance of differences (Goodwin 1992, 92). She argues that although needs and desires may be dissimilar, they ought to be counted equally, and that an understanding of humans as equal should hold as long as it is "approximately true of most people in crucial respects" (93). This of course puts

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claim that an argument for sortition cannot be based in utilitarianism (see also Stone 2007). It strikes me that the opposite is quite plausible: even where claims to office are demonstrably unequal, there may be a benefit to the public good from disregarding those differences and choosing our officials randomly. I will expand on this below, in the remainder of Chapter Three and in Chapter Four. 126. His argument is not totally compelling. Suggesting that considerations of "fairness" might diverge from a consideration of claims of different strengths is counter-intuitive, to say the least. Adding to the difficulty is Stone's charge that Broome's defense is based in circular reasoning (Stone 2007, 276n2).

us back into the realm of debating whether and which claims are relevant, though Goodwin does rightly note that systems based on only partially true views of human nature are still capable of success, pointing in particular to the modern Anglo-American jury as an example of an institution successfully predicated on the premise of equal human political capacity (1992, 93-94).<sup>127</sup> In response to arguments that differences between people's political capacities are anything but irrelevant, and have implications for the efficacy of the political system, Goodwin counters by quoting none other than Adam Smith, who famously claims that "the difference in natural talents in different men, is, in reality, much less than we are aware of ..."<sup>128</sup> Similarly, she decries the use of Lockean equality as the basis for justifying inequality, and stakes her position on the claim that equal basic needs and equal respect for desires would demand that we not provide different rewards, even given the possibility of unequal talents and abilities or in the face of "systemic needs." It is worth some potential loss of efficiency to attain the benefits that would flow from according equal treatment (Goodwin 1992, 96-98).

Stone dismisses as "implausible" Goodwin's characterization of the appropriateness of lotteries as preceding "the acceptance of any particular conception of justice" (Stone 2007, 279n9). He has a point, although Goodwin counters in her defense that she is not alone in privileging equality.<sup>129</sup> However,

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127. For an extensive account of the lessons "the jury teaches us about ourselves and our capacity for self-governance," see Abramson (1994, 5).

128. Adam Smith (2002), cited after (Goodwin 1992, 96).

129. Goodwin singles out "rational and neutral dialogue," as suggested by



even to the extent that privileging of equality might be seen as begging the question in a general, allocative setting, it is certainly not inappropriate in a democratic context. After all, were the efficiency of our political system to trump considerations of political equality, there are plenty of regime-types other than democracy from which we might choose.

The difficulty, of course, is that Goodwin seems to be advocating what amounts to equality of outcomes, compensating for any and all actual inequalities. This is problematic, both as a virtual practical impossibility, and as anathema to our modern, liberal sensibilities. Having said that, equality of outcomes is not what lottery attempts to deliver. As already noted, lottery is facially about equal prospects, or chances, as distinct from "direct equality" of outcomes (Rae et al. 1981, 64). Were we dedicated to equal outcomes, we would not be considering the best way to allocate political roles in the first place; we would give them to everyone to share equally.<sup>130</sup>

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Bruce Ackerman (1980), at (Goodwin 1992, 101). She might have pointed to the "veil of ignorance" (Rawls 1971) as well. Other advocates of lottery also emphasize its role in affirming "the value of equality" (Greely 1977, 114).  
130. A word about rotation as distinguished from sortition. Though often used in conjunction, the premise for each as a standalone selection mechanism differs slightly. Rotation "presupposes that *everyone* will hold office at some point," while "sortition implies that *anyone* may be selected" (Engelstad 1989, 24). Some argue that the rotative ideal animated Athenian selection, on the basis that the sheer number of offices to be filled, in combination with the participatory *ethos*, led to a realistic expectation that everyone would hold office (at least) once in their lifetime (for a discussion of Athenian participation and rotation, see for example Hansen 1991, 313-14). It is said to have been this norm, and not that of sortition, that motivated Aristotle's (in)famous characterization of democratic freedom as "being ruled and ruling in turn." Under such a conception, sortition

Rather, lottery specifically, and prospect-regarding equality generally, is a form of equality of opportunity (Rae et al. 1981, 65-66), to which we are of course much more sympathetic as liberals. The extent to which lottery is motivated by opportunities, and not outcomes, is embodied in the Athenian political motto *ho boulemenos*: "anyone who wishes" (Hansen 1991, 266). This might not perhaps be initially evident because of a certain sloppiness in our thinking, but Rae distinguishes within equality of opportunity between prospect-regarding equality and means-regarding equality. Just as importantly for my purposes, it is worth noting that an emphasis on merit is not incompatible with a privileging of equality as the value most important to our political decision-making. The extent to which democratic theory leaves room for considerations of merit is in part reflective of our commitment to equality of opportunity. To the extent that equality of opportunity might exist, it makes sense in some instances to favor the claims of those who make the most of their situations. It is not clear, however, that the choice of political office is one of these instances. And perhaps more importantly, it is safe to say that the means-regarding variant of equality of

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would complement the rotative process more or less by choosing the order in which everyone serves. Given this, there are those who do argue that Athenian selection was motivated by an expectation of equal outcomes, over time (Finley 1983; Mulgan 1984). But without diminishing the importance of this universalist aspect of the Athenian participatory *ethos*, and the odds that accompanied the sheer number of political roles, it is also important to note that there were no formal steps taken to ensure that literally everyone participated. Participation was encouraged, sometimes financially, when norms of citizenship were not sufficient to fill offices (Hansen 1991, 314), but it was not mandated, *per se*.

opportunity does not and cannot exist in a complex society, particularly one governed by elections. The lottery thus brings into play the other, prospect-regarding variant of equal opportunity.

A final word on the prospect-regarding variant, by way of comparing the capacity of lottery versus that of election to perform against this ideal. Obviously, and as already noted, both lottery and universal suffrage reflect a commitment to the equal prospect of some degree of participation. Putting aside any empirically-based criticisms of election regarding our own failure to engineer a constitutional system in which having a vote gives every citizen the same voice, it is arguably true that when we enter the voting booth we do all have an equal number of votes, and these will all be counted in the same way.<sup>131</sup> However, this is where the similarity ends. Whether this vote, even in an ideal sense, counts substantially as having a meaningful role in self-governance is dubious. Having emphasized to this point the Athenian concept of *isonomia*, which implies both natural equality

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131. For arguments that even this cannot be said, consider the undemocratic manner in which the U.S Senate is chosen (Sherry 1998) and operates (Eskridge 1998). In a different vein are the arguments that aggregation of votes in many electoral systems leads to votes being "wasted," with some having a less meaningful impact on the result than others (see Rehfeld 2005, 19-23, for a concise and thorough treatment of the concept). These, too are empirically-based problems, however. The latter might be solved, interestingly enough for my purposes, by a hybrid of randomness and voting called "lottery voting." Proposed by Akhil Reed Amar, this system would choose one ballot randomly from all those cast, and the preference on this single ballot would determine the winner. One of the benefits of such a system is that it promises every vote an equiprobable chance of affecting the outcome, thus affirming the "equality of all voters" in a way that other electoral systems do not (Amar 1984, 1302).

and equality of opportunity, "the aspect of equality most cherished by the Athenian democrats was *isegoria*" (Hansen 1991, 83), or freedom of speech. And not only do we see this placed at the center of democratic governance even today, but the emphasis on voice is echoed as well by contemporary advocates of lottery (such as Carson and Martin 1999, 81).

In this respect, one must acknowledge that lottery, more than election possibly can, gives to each an equal prospect to getting into the room where his or her voice can be heard and have a meaningful influence on the political process. Of course, modern democracies give citizens an equal chance of being selected "in a formal sense" (Engelstad 1989, 27). But a consideration of the ideal nature of election, even stripping away its empirical problems, serves to remind us that the very premise of election is founded in differentiation (Manin 1997, 149), not equality.<sup>132</sup> Election seeks to differentiate between candidates and non-candidates, and between one candidate and another, on the basis that some are better equipped to rule than others.<sup>133</sup> Accordingly, and despite the formal equalities already acknowledged, election is by its very nature in conflict with the

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132. And in practice, differentiation on the wrong bases. As John Dewey observes, historically it has been assumed that "certain persons were fit to be rulers because of traits independent of political considerations" (1954, 78).

133. Manin contrasts the subjectivity of assessments of superiority with the objectivity of distinction. The disturbing conclusion is that, while we cannot in any way be sure that our elected officials are better equipped than anyone else for the job, we *can* be sure that they will not resemble their constituents (1997, 145-49).

idea of human equality held by the Athenians, and with Strong Principle of Equality as articulated by Dahl.

### **Facilitating Equal Consideration of Interests**

Moreover, and here we turn (at long last!) to the aforementioned second reason that dismissing lottery's contribution to equality may be hasty, the equal prospect of selection that lottery features also facilitates a particular sort of equality of means. The *isegoria* that accompanies an equally shared chance of being selected for political office brings with it the tools to influence the political process in a way that voting cannot. For democratic theorists who place a premium on equal consideration of interests (see Christiano 2003a, 44), this is a mixed bag. To be sure, there is a trade-off here in the form of increased exclusivity. Though everyone can vote in the current system, not everyone can be selected under a lottery. We must acknowledge as valid concerns about the potentially damaging effects that random selection might have on participation, from the lost opportunity to vote to the diminished impact that constituents might expect to have on their representatives, who are no longer accountable in the electoral sense. This is the sort of practical challenge facing sortition that I would hope to mitigate by combining randomness in various ways with extant selection mechanisms, which I take up in Chapter Six. Here I will simply stress that while I am focusing herein strictly on the implications of random selection, including this

potentially negative one, I am in no way advocating that lottery be used as a wholesale and untrammled replacement for election.<sup>134</sup>

But inasmuch as the democratic use of lottery not only expresses equality, but can foster it (Hansen 1991, 84), the equal possibility of *meaningful* participation for all represents a relative improvement in the extent, at least, of equality (Rae et al. 1981, 107-09). Moreover, as a result of the random operation of a lottery, we should expect to see those selected comprising a more diverse group than can possibly be chosen via election. As mentioned previously, I intend to steer clear in this chapter of any claim that randomly selected groups are more "representative" than elected groups, but it is well established that diversity fosters more effective and inclusive deliberation (see generally Gutmann and Thompson 1996). By bringing a more varied collection of voices into the room, not only does random selection provide a more extensive equality of means for political influence, but it also helps make the "institutions of democracy more friendly to deliberation" (Gutmann and Thompson 1996, 56), and as a

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134. One final musing by way of response to this concern. While lottery might lead to a decline in the number of people who "participate" according to a definition that currently includes the casting of ballots, an argument might be offered that this still represents a relative increase in levels of political equality, according to one or more of Rae's "criteria" of equality. I would not hang my entire argument on this claim (thus the footnote), but in short, lottery might be said to promise an improvement according to the "least difference criterion" as well as the "minimax criterion," although this last may not be a point in favor, given that Rae analogizes it to Tocqueville's "egalitarian tyranny." To the extent that lottery might be viewed as redistributive of political power, rather than contributing to its overall growth, then all four of Rae's criteria would be met. See generally Rae *et al.* (1981, 110-28).

consequence facilitates more effective governance. Inserting everyday people into the discussion stands to create an environment that better fosters "reflexive reciprocity" (see generally Goodwin 1992, 111) and creates conditions more conducive to "reasonable agreement" (Barry 1995, 7).

This in turn makes possible "second-order impartiality" (Barry 1995, 11), despite the skepticism, noted earlier, held by Barry and other egalitarians to the effect that randomness is too simple, and fails to accord person-regarding equality. We should expect the governance by political leaders chosen on an equal basis to result in political decisions that consider more interests more equally, enhancing the voice and circumstances for a greater slice of the citizenry than is managed under extant modes of selection. The result is a process of self-governance that better approaches the equal consideration of interests than could be managed under an(y) electoral system. Taken together then, the argument for lottery's role in facilitating equal governance is that lottery provides an equality of means by way of equal opportunity for political influence, along with the expectation that this equality would result in a government responsive to more interests, and one more conducive to reasonable agreement. Thus, beyond the more straightforward expression of equality by way of equal participation, lottery also promises to strengthen the second arm of the relationship between equality and participation. This second aspect of the argument, by developing the consequences of equal prospects rather than focusing solely on the simple

equality that lottery also represents, answers the skeptical egalitarian objections to randomness.

### **Conclusions: Expressing and Enhancing Equality**

To be sure, we can hardly fault egalitarians for focusing on the first-order implications of randomness. After all, the prevalent argument for just uses of lottery does the same thing, by emphasizing equal treatment only for equal claims. But I have shown here how lottery can be more than a tie-breaker and that it is instead justifiable for its potential to make a positive contribution to core democratic values. Random selection, used judiciously, can enhance political equality both by better expressing our commitment to human equality via more equal prospects of participation and by creating in the process conditions for self-governance that will better foster equal consideration of all interests.

To press the point a bit further, let us return to the procedural/substantive divide in democratic theory with which I began this chapter. There may be a tendency to look upon lottery as a procedural fix, as a mere substitute for election that slots right in to the minimalist model of democracy (Schumpeter 1942; Dahl 1977; Przeworski 1999). Such a view could even be encouraged were one to look solely at the contribution lottery makes to the first aspect of the relationship between equality and participation. And, a lottery is a procedure, to be sure. Similarly, focusing solely on the improvements random selection offers to the



instrumental relationship between participation and equality might lead one to view lottery's contribution strictly in substantive terms, *a la* participatory theorists (Pateman 1970). And clearly, lottery has substantive implications, too. But lottery's full contribution to political equality can be seen only by viewing simultaneously both halves of the circle. In this respect, my argument for lottery's contribution to political equality honors Ian Shapiro's call for a "middle ground" in democratic theory and practice (Shapiro 2003, 150).<sup>135</sup>

In sum, the tendency to associate democracy with any particular procedure is a mistake, and all the more so when that procedure is election, which simply cannot deliver on many of the expectations that led us to privilege it in the first place. Sortition is also a viable way to select democratic officials. This is certainly the case when candidates' claims to office are strictly equal. But it is also arguably the case even where candidates are not precisely equal. Adopting a selection procedure that gives equal chances to contenders for public office has symbolic value as an expression of our understanding of a roughly equal capacity for self-rule. Our democratic commitments should lead us favor sortition for the prospect-regarding equality that it provides. Consider: had history unfolded differently, resulting in the use of sortition as the democratic selection method of choice today, the burden of proof would be on arguments for election.

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135. I owe a nod of thanks to Ed Wingebach for inspiring this last point by way of a question he put to me in Las Vegas, March, 2007.

Proponents of election would be called upon to show both that there are good reasons to differentiate between candidates, and that so differentiating would not be detrimental to performance against political ideals. To be clear, I am not suggesting we ignore reality. Indeed I offer such an argument on behalf of lottery in the next chapter. But it is worth remembering that it is only thanks to historical contingency that this burden now falls to the lottery's advocates.

Yet we need not be devoted to a simplistic view of equality in order to advocate for random selection of democratic officials. Rather, the lottery also promises a second-order impartiality, facilitating conditions more conducive to governance that better delivers on our liberal commitment to equal opportunity, in the form of equal means and the equal consideration of interests. And this benefit could obtain even in some instances where claims to office are not even roughly equal. Accordingly, lottery need not be limited to a tie-breaker role, even in a loose sense. It has democratic value even where claims to office plainly differ in strength.

That said, our commitment to equality, whether prospect- or means-regarding, should not lead us to blindly adopt equiprobable lotteries for all democratic decision-making. Other factors must be balanced, pitting costs against benefits. Where offices or functions clearly rely on specific and rarified expertise, for example, or where some other characteristic is crucial to the decision-making capacity or representativeness of the officials being filled, then the costs of

sortition may outweigh the benefits, if any. On the other hand, as democrats we should perhaps be more reluctant than we are to assume that this is the case. My aim to this point has been to suggest not only that sortition has a rightful place amongst democratic selection methods, but that it should perhaps be the default selection method, to be supplanted or modified only where other costs loom recognizeably large. In the next two chapters, I take up concerns surrounding the putative costs of sortition to decision-making and representation, and I seek to show that these concerns, while valid, may be overstated.

## Chapter Four: Random Selection and Rationality

*Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob.*

- James Madison (1788b, 270)

The argument thus far has turned on the relationship between randomness and equality, and the contributions that sortition would offer to political equality, and by extension democratic legitimacy. While these considerations are relevant to any argument for using random selection in the process of filling public offices, such an argument must consider not only whether it would be more democratic to choose our representatives randomly but also whether it would be rational to do so. Oliver Dowlen characterizes sortition as "arational" (Dowlen 2006), and Peter Stone writes of its "sanitizing effect." To make a decision via a lottery is to make the decision without benefit of reasons (Stone 2009, 376). When would it be rational to abandon reasons in selecting our representatives? This is the question with which I am concerned in this chapter. In what follows I seek to expand upon others' arguments that lottery is justified - and rational - where there are no relevant differences between claimants. While this is correct as far as it goes, I also contend that filling representative, deliberative bodies via random selection

has epistemic benefits that warrant using the lottery even where the strength of claims to office is not equal. In particular, equiprobably lotteries are uniquely equipped to deliver the dispersed knowledge crucial to effective deliberation and group-generated expertise, in a way that even other diversity-producing selection processes - such as PR electoral systems - cannot match.

Jon Elster suggests the possibility of putting the lottery to use, in political contexts and elsewhere, as a strategy for avoiding "hyperrationality" (1989, 25-26), where the options under consideration are "equally and maximally good," or "incommensurable," or "equally good as far as we know" (ibid., 54).<sup>136</sup> However, one of the reasons we give for using elections in choosing our leaders is the expectation that candidates' claims to office are *not* indeterminate. Among other things, an election campaign is an effort by the candidates to distinguish themselves from each other, and our votes are an expression of preference based on this expectation that the candidates do, in fact, differ substantively. To argue for the rationality of sortition is in part to argue against this understanding, and to argue at the least for a rough equivalency of claims to office, for some political roles and amongst some set of possible candidates.<sup>137</sup>

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136. On "pseudorationalism," see also Otto Neurath (1983, 9-11) and Neil Duxbury (1999, 114-39).

137. Stone makes this point (2011, 125). However, he makes it in support of his contention that this leaves (only) the question of when to use sortition as one

But an argument for resorting to the lottery also requires a justification for its use over any other arbitrary way of choosing leaders. Establishing the lottery as an acceptable decision-making mechanism is not an argument for its use. In situations of indeterminacy, random selection is only one of many equally arbitrary means by which we might make a decision (Stone 2003, 248).<sup>138</sup> To argue for using a lottery in certain instances requires reasons for thinking that a lottery would be the best way - or at least a better way - for making the decision (Stone 2009, 378). That the lottery is "fair," one to which the participants themselves would reasonably consent, is important (Stone 2008, 589). But the rest of us also need to have reason to adopt a lottery for selecting our leaders.

Elster offers honesty in the face of "uncertainty and incommensurability" as the chief reason on behalf of favoring a lottery over any other equally arbitrary selection method (1989, 121). In the case of selecting democratic leaders, use of a lottery may be justified if the lottery can deliver other benefits as well. I have

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of determining where (and only where) claims are equal. While I agree that this determination is relevant to deciding where to employ sortition, I also believe it is too limiting, and ultimately impossibly subjective. In Chapter Three I offered an argument for the value to democratic legitimacy of treating claims as equal - and differences as irrelevant - even where differences in claims exist. In what follows, I will make a similar argument for the contribution this would also make to decision-making legitimacy.

138. It is worth noting that, where claims to office are truly indeterminate, election is also an arbitrary way of choosing officials.

already canvassed some of the arguments based on such advantages. With respect to rationality, one reason for thinking sortition to be especially well suited for filling political offices would be if we could then reasonably expect officials selected in this manner to outperform similarly situated officials chosen via other methods. Even where claims to office are not indeterminate, sortition may be justified where its benefits outweigh the costs associated with foregoing the "good reasons" upon which the choice might otherwise be based (Stone 2009, 389, 392).<sup>139</sup>

Thus, my argument proceeds along the following lines. As democrats, we should be prepared to allow for the possibility that at least some offices could credibly be filled by *ho boulomenos*.<sup>140</sup> Our claims - or obligations - as citizens to these offices are equally and maximally strong. For some other set of offices, we might allow for the possibility that claims differ qualitatively though we remain unable, individually or collectively or both, to resolve uncertainty about how to

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139. Perhaps I misunderstand Stone in taking him to suggest the appropriateness of a cost/benefit calculus in determining the appropriateness of a lottery in a given situation. Elsewhere he notes "that wherever everyone is not equally qualified ... or deserving ... or liable ... the use of a lottery would be wrong" (2009, 382). We appear to disagree here, although one way to make sense of this tension is by casting what I am proposing as a loosening of the indeterminacy requirement to allow "roughly" indeterminate claims as justifications for fair lotteries. John Broome makes this suggestion (1991, 99).

140. "Any citizen who wishes" (Hansen 1991, 71).

arrive at a choice on the basis of these claims, for reasons of incommensurability. Further still, there may be instances where the differences in claim strength between candidates are more than offset by the relative costs, in both direct and indirect forms, of acquiring the information needed to make such an evaluation. In some instances of each type, we might also expect the use of a lottery in lieu of an election or some other selection mechanism to deliver additional benefits in the form of better decision-making on the part of the officials chosen by lot. Moreover, at the margins there may be some cases where the benefits of random selection are sufficiently large so as to offset some costs associated with using this decision-making method. That is to say, even where claims to office are not strictly indeterminate, and where there might otherwise be good reasons to differentiate between candidates, there may be other considerations, in the form of better decision-making or significant adverse impacts of choosing in another manner or both, such that the benefits of foregoing reasons outweigh the costs.

## **Indeterminacy of Claims to Office**

### **Equally and Maximally Good Options**

As discussed in Chapter Three, the argument for equal strength of claims to office in a democracy begins with the democratic ethos itself, as given



expression in the Athenian conception of *isegoria*<sup>141</sup> and extending through Robert Dahl's Strong Principle of Equality, according to which "*every adult member* of an association is sufficiently well qualified ... to participate in making binding political decisions that affect his or her good or interests" (1989, 105). Of course, modern, representative democracies provide us equal access to the ballot, at least ostensibly. This is a form of political equality, but it expresses a lesser sort of equality than Dahl's Strong Principle, in that our role as voters presumes us to be "equally good judges of merit, but not ... equally meritorious" (Mulgan 1984, 546-47). Our commitment to democracy is not merely a reflection of our equal right to some attenuated form of political participation, it is an expression of our understanding of humans as sharing an equal capacity for participating in the decisions affecting our own self-governance.

But as already noted, for my present purposes I am not interested in whether it is democratic to think that are all equipped to hold office. Rather, I am concerned with whether it would be rational to select our officeholders on an equiprobable basis. That is to say, following Elster's take on rationality, if our desire is to have officeholders who are equipped to perform their roles optimally, do we have sufficient evidence at our disposal to believe that any and all of us

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141. Equal opportunity for speech (Hansen 1991, 81-83).

could deliver on this expectation in certain roles (Elster 1989, 3-4)?

Certainly, there are offices for which some specialized knowledge, expertise, or experience is called for, even in a democracy. And no less certainly, there are differences between us. From the expectation that we are all equipped to participate meaningfully, it need not follow that we should all be considered as candidates for every political office. But just as we can imagine offices for which a randomly selected citizen might not be up to the task, other examples come to mind for which we are all qualified, and where our differences, though "discernible," do not reflect the presence or absence of traits "*required* for the job in question" (Mulgan 1984, 547). Our role as potential jurors is one way in which this understanding of our equal fitness for self-governance is given expression (Abramson 1994, 1-2).<sup>142</sup> A look at local governing institutions suggests still more examples of offices for which any one of us might reasonably claim to be sufficiently qualified so as to carry out the responsibilities of office in optimal fashion. While an electoral campaign for the offices of precinct chair or homeowner's association president, to name two examples, may uncover differences between candidates, it is not clear that these differences will have any bearing on the candidates' respective capacities to do the job at hand. This is in

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142. At least until *voir dire*.

part a problem with our expectations for election, to which I will return below. Putting aside for the moment a critique of election, reasonable people might still disagree on this point, with some claiming that one candidate is more qualified for the role of dogcatcher than another, while still others might claim that anyone could do the job with a sufficient level of interest and a minimal amount of training. To the extent that disagreement persists as to whether the differences between candidates are or are not germane, we may wonder whether this disagreement is a manifestation of incommensurability. We may also need to consider the relative cost of acquiring the information necessary to distinguish between candidates.

But before moving to those topics, I would like to briefly entertain the possibility that we are all equally and maximally qualified to fill some public offices of even higher stature than those just mentioned. For evidence of our shared capacity to participate in highly complex processes of modern governance, we need look no further than the efforts by researchers and practitioners of deliberative democracy. The deliberative polling conducted by Fishkin *et al.* and the proposals for electoral reform generated by the British Columbia Citizen's Assembly are two such examples. For Bruce Ackerman and Jim Fishkin, deliberative polling demonstrates that "the public has the capability to deal with

complex public issues" (2004, 4). Andre Blais, R. Kenneth Carty and Patrick Fournier conclude from the British Columbia Citizens' Assembly that "it is possible for ordinary citizens to become involved participants making reasoned choices" (Blais et al. 2008, 128).

As a final point, it bears noting that the category of candidates for any given office who are equally and maximally good need not extend to the entire citizenry for there to be compelling arguments on behalf of using a lottery to select amongst them. I have already mentioned interest as one criterion by which the pool of candidates may be winnowed. Beyond that, we might agree that all interested parties passing some additional bar of qualification, perhaps one even higher than that currently necessary to run for election for a given office, could then be considered equally qualified for all intents and purposes. An equiprobable lottery conducted amongst some set of candidates who meet particular criteria may still facilitate broader participation than we currently experience and better decision-making by those ultimately selected.

### **Incommensurability**

For other offices, we we might all agree that not everyone is equally qualified and share a desire to identify the best possible candidate for the job, but

still be unable to do so. One reason for this difficulty may be the variety of considerations that go into each individual's effort at assessing the best candidate. Consider my attempt at deciding how to cast my ballot in a primary race for the state legislature, where the current officeholder is stepping down.<sup>143</sup> I may prefer Adam's position on Xylophone regulations, but that of Boris on Yak subsidies. Where I have a clear sense of which of the two issues I consider to be paramount I may be able to reach a decision, but if I find them both equally important, I am confronted by indeterminacy. To the variety of issue positions I may deem important, add any other factors I feel are relevant in evaluating the candidates, such as past experience, expertise, and so on. When no clear winner emerges in my own attempt at evaluating candidates according to good reasons, I may wind up basing my decision on some arbitrary factor, or worse, bad reasons (Stone 2007, 284).

The problem is compounded when we try to aggregate our votes to make a selection collectively as a constituency. Even if I may have been able to make a reasoned choice according to a clear-cut prioritization of each candidate's respective issue position, we may not all agree as to which factors are relevant to job performance or to their respective prioritization. Indeed, this is not only a

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143. I contrive this example in order to get beyond common voting heuristics such as the economy, party ID, and incumbency.

possibility, it is likely where we are not relying on shortcuts like party membership to make our decision.

To say we resolve this collective incommensurability by voting would be to overstate significantly what voting accomplishes. Counting votes tells us who won, according to whatever choice method we are employing. One finding of social choice theory, that the same set of preferences can return different results according to different decision mechanisms, speaks to the incommensurability problem inherent to the electoral model (Riker 1982). But even putting aside the social choice critique that the winner of an election is a reflection of the decision method and not any sort of "popular will," knowing the winner tells us nothing about why that candidate received the most votes. We may have cast our ballots for Adam for any number of reasons, some valid, some not, some erroneous, some conflicting, and so on. Simply put, as a device for "resolving" incommensurable choices between candidates, election is overmatched, even in the ideal.<sup>144</sup> As Bernard Manin has argued, the basis for any decision on the part

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144. The empirical failings of election are legion. While we as social scientists stop short of using evaluative terms such as "(in)correct" to describe political decisions, some collective decisions defy any palatable explanation. One need look no further than the statewide Republican primary election for Texas Railroad Commissioner on March 2, 2010, in which incumbent Victor Carrillo faced challenger David Porter for this deceptively titled and quite important position (Texas Railroad Commissioners regulate the energy trade and oil extraction, among other things) in the state executive. Despite having an advanced degree in

of voters is inherently a subjective one, even were we able to remove real-world inequities and problems of discourse from the campaign. Elections by their very nature serve to differentiate - candidates from each other and candidates from the rest of us - without necessarily telling us anything meaningful about which choice is better (1997, 130).

### **Information Costs**

Meanwhile, our efforts at distinguishing between candidates, even where their differences are real and legitimately related to their prospective job performance, have costs. Some of these costs are direct, such as the funds spent mounting increasingly expensive and high profile campaigns in the public eye, or the costs to the candidates themselves in the form of scrutiny on their personal lives and the lives of their families, or the costs to voters who must wade through all this information while besieged by debates, television ads, and robocalls.

Other costs are the indirect results of the electoral model, affecting the nature of the relationship between citizen and government. It may well be that the

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Geology and a resume filled with industry and regulatory experience, and having garnered virtually every endorsement, Carrillo lost to Porter, a CPA with no relevant experience or training, 61/39. A look at the results higher up the primary ballot (e.g. Rick's Perry's nomination to a fourth term as Governor) suggests that anti-incumbent sentiment is not the only key driver for this result.

all-too-commonly held, dim view of the capacity of citizens to engage more meaningfully is true enough, but only because citizens tend to live down to the expectations. When liberal society tells citizens that they should not be troubled with the messiness of self-governance beyond their role as voters, if that, it should come as no surprise that people display no inclination or competence for more robust forms of participation. The levels of citizens' judgmental competence that we currently decry may be an effect of, rather than a reason for, current institutional arrangements. Similarly, the dubious motivations of our leaders are in part a product of the process by which they are selected (on both points see Cohen 1986, 35-37). By contrast, the uncertainty of lottery equalizes our sense of the prospects of our own involvement, and it can help representatives remain trustworthy by reducing the opportunities for outside forces to corrupt the selection process or the candidates themselves (Duxbury 1999, 108; Elster 1989, 84).

Additionally, because of its capacity to facilitate the formation of more coherent and single-peaked preference rankings on the part of individuals, reduce the range of options under consideration by the group, and guide the choice of the appropriate decision-rule given the structure of preferences at play, deliberation is hailed as having the potential to overcome the social choice-based critique of



electoral democracy mentioned above (Miller 1992, 60-61). Preferences based on error can be corrected, but what may at first appear to be multi-peaked preferences may also disguise "separate dimensions of choice" (Miller 1992, 65). In disaggregating these dimensions, deliberation has the capacity to ameliorate some of the complications created by what appeared as incommensurability when viewed through the electoral lens..

### **Benefits to Decision-Making**

Beyond the impact of random selection on individuals, there exists the potential for improvements to the collective performance of groups of randomly selected officials. The argument here revolves around the contributions that deliberation promises to democratic decision-making, and the role that random selection plays in contributing to productive deliberation.

An argument for using randomness in selection processes must address concerns that arise from the lottery's disregard for merit and experience.<sup>145</sup> A lottery from a pool of all citizens, it is said, would select a body of inexperienced amateurs, arguably with little incentive to learn their craft (Amar 1984, 1298;

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145. There is a good deal of work in this area already (see especially Buchstein 2010). In this section I sketch the existing arguments, seeking to render plausible the claims I make in Chapter Five about *Consent*.

Duxbury 1999, 25; Elster 1989, 89).<sup>146</sup> This does not fit the view that political offices should be filled by well-qualified professionals (Duxbury 1999, 34).<sup>147</sup>

Our reliance on election proceeds in part from the premise that some are more equipped than others (Montesquieu 1748, 10). But it is not clear that election can meet our expectation that it choose those best suited for the job. As noted above, Bernard Manin observes that whether the differences on which the selection is based make for the correct choice is a subjective matter (Manin 1997, 130). John Ferejohn and Frances Rosenbluth offer a slightly different take, asserting that election will "select the mediocre and not the aristocratic" (Ferejohn and Rosenbluth 2009, 300). Both assessments call into question the assumption that election serves to choose the "best" representatives. At the least, the assumption warrants testing, as does the tendency to assume the incompetence of ordinary citizens.<sup>148</sup>

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146. But then, we should expect the same from term limits (Knag 1998, 202). See the section in Chapter Five on *Trust* for an alternate take on rotation's impact on incentives.

147. A view not universally held. The American case suggests popular ambivalence with regards to the experience or expertise of our leaders. Professional politicians are portrayed as "insiders" or "elites" (Ferejohn and Rosenbluth 2009, 274). Prior to the November 2010 elections, Gallup reported that 57% of likely voters in the United States preferred an unexperienced person as their next representative in Congress over the incumbent (Jones 2010).

148. Alex Zakaras offers up his citizens' chambers as a test case (2010, 466). As previously noted, the Canadian citizens' assemblies and deliberative democratic experiments constitute the first of such tests, while the jury selection process speaks to our willingness to abide by decisions made by ordinary people.

To be sure, there are political roles and decisions that should be reserved for those with the necessary specialized knowledge. We would not, for example, want to populate the Federal Aviation Administration by equiprobable lottery from amongst all citizens.<sup>149</sup> However, this is not the case for all political offices in a modern democracy (and see Goodwin 1992, 46). While expertise of individual officials may sometimes be important, there are many political roles for which common sense or good moral judgment are paramount. Much of the expertise and experience necessary can be learned on the job (Ferejohn and Rosenbluth 2009, 300). Moreover, a great deal of politics involves wrangling over matters for which there is no expert truth, or where experts differ. There is a role both for expertise and for "lay participants" or "value consultants" in most representative environments (Brown 2006, 214; Dienel and Renn 1995, 121). The experiences of deliberative pollsters and the BCCA show how well "ordinary citizens" can translate their "underlying value preferences" into "reasoned choices" (Blais et al. 2008, 128).

Rather than deferring to expertise and experience in all circumstances, theorists and designers of institutions alike would do well to view the common man as being inclined towards justice, with the capacity to make good decisions

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149. Of course, we would not want to elect the FAA, either. When specialized expertise is called for, we often favor appointment as the means of selection.

(Estlund 2008, 12-17). This idea underpins democracy, after all.<sup>150</sup> Self-professed democrats should not dismiss the prospect of self-governance too quickly. To sharpen this point: elected political officials, on average, may well have claims to being more qualified for office than the typical citizen. But granting this point is not a reason to defer to "epistemic concerns" surrounding political uses of lotteries. The qualifications of individuals, on papers, says little about how they effective they will be, collectively, in reaching decisions.<sup>151</sup>

Still, in roles where we think random selection to be appropriate, we must arrange conditions to facilitate effective decision-making. Foremost among these conditions is an environment conducive to effective deliberation (Urbinati 2006, 198). Of course elected bodies also deliberate, but the increased diversity we would expect from a body populated randomly should contribute to a more comprehensive airing of differences, and thus mutual justification and reciprocity (Gutmann and Thompson 1996, 52-55). Diversity makes for more effective deliberation (Abramson 1994, 101; Hayward 2009, 117; Stone 2000, 211, 247). Bringing a "variety of viewpoints" to the table, giving voice in the decision-

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150. Barbara Goodwin observes that equal capacity is both a justification for and requirement of sortition ([1992] 2005, 55).

151. The Texas legislature provides a case in point. As much attention as the body as a whole has received of late for its dubious decision-making, the individual members, on average, appear highly qualified on paper.

making process to members of a greater array of groups, is crucial to deliberation about what serves us best, collectively (Elster 1989, 97). By producing diverse samples more reliably, random selection is an important contributor to the "epistemic quality" of deliberative groups (Buchstein 2010, 438; Sintomer 2010, 482; Stone 2000, 115). The epistemic benefits of diversity extend to producing groups that are impartial and consensual, that are focused on a collective purpose, and that engage in less bargaining (Buchstein 2010, 448).

Where the public will is absent, underdeveloped, or in tension with local or specific interests, it is the representatives' collective judgment that closes the gap.<sup>152</sup> Random selection and deliberation combine to recreate the judgment process that we might all engage in, were we all afforded the level of engagement, and equipped with the skills and resources, enjoyed by our representatives (Dahl

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152. One benefit of this understanding of the representative process and the role of representatives is that it avoids the difficulties described in work associated with social choice theory and Arrow's Impossibility theorem (Arrow 1963; Riker 1982), as well as concerns about the vague or absent nature of public opinion on certain issues (Converse 1964, 54). Peter Stone expresses concern about the lack of a compelling theory of collective interests or rationality, arguing that this renders impossible the connecting of resemblance to representation (Stone 2000, iv). But this is no more a problem for considering the legitimacy of a randomly chosen decision-making body than for assessing a group selected in another manner, such as election. Indeed, it is less of one. Claims that the concept of collective interest is incoherent, because there is no "correct" way to aggregate individual interests to arrive at it, are less damaging when we conceive of representation as collectively judging the common good, rather than trying to tot up individual conceptions of it.

1989, 340; Fishkin 1991, 1n1). When we look to representatives to "refine and enlarge" the public will (Madison 1787, 44), we are asking them to represent the judgment of the citizenry as to which interests must be developed or prioritized (Urbinati 2006, 16), rather than represent directly any particular set of static interests. That interests may in fact be shaped by the representative process, and not simply reflected, is ultimately an argument for the importance of resemblance to representation (Hayward 2009, 124; Urbinati 2006, 6; Warren and Castiglione 2004, 5). We need representatives to practice good judgment, perhaps more than we need them to hold precisely the same preferences, in the same combinations, as the rest of us. Interests should arise from, rather than drive, this collective good judgment.

And where representatives are chosen randomly, this judgment benefits from more than mere diversity of viewpoints and their contribution to the deliberative process. It is the ability to make use of knowledge dispersed among many people that sets democracy apart from other regime-types (Ober 2008, 2-3). The example of Athens shows how random selection brings to bear latent knowledge dispersed among members of society, many of whom would not be in the conversation were all officials chosen by election. No other model for collective decision-making can effectively integrate "dispersed and latent

technical knowledge with social knowledge and shared values" (Ober 2008, 18). As a result, democratic institutions that successfully marry these different sorts of expertise serve to increase state capacity versus that fostered by other institutional arrangements, mitigating other "costs" of participation emphasized in the conventional narrative (Ober 2008, 21, 37). The importance of dispersed and social knowledge underscores the argument for increased use of sortition in a way that simply focusing on deliberative dynamics does not. A variety of reforms could increase the representative diversity that makes for better deliberation, but randomness is better suited than other methods for delivering dispersed knowledge. Any criterion used to increase resemblance by a mechanism other than random selection, such as proportional representation or stratified sampling, risks sorting out sources of crucial knowledge.

Yet we must consider the impact on institutional knowledge that would accompany a switch from election to random selection. Congress, or the city council, no doubt benefits from having some members with multiple terms' worth of experience in navigating processes and interacting with other governmental entities.<sup>153</sup> Where specific expertise or experience are vital, arguments for random

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153. However, it also bears noting that much expertise and experience in modern, liberal democracies are delivered, not by elected officials, but by their professional staffs or by bureaucrats. This would no doubt still be true under a randomly selected regime. The same dynamic existed in Athens, where

selection must address this. This may mean that some offices simply should not be chosen randomly. Even the Athenians reserved some offices for experts (Hansen 1991, 233). But expertise can also be supplied in other ways, as by experts brought in to testify before deliberative groups. Large bodies may even realize a sufficient presence of relevant expertise simply as a matter of probability, when this knowledge is present in the source population. Institutional knowledge could be passed along by establishing overlapping terms, and additional experience generated by creating the possibility of serving additional terms under certain circumstances.<sup>154</sup> Where it is important that everyone in the group be an interested party or have training in the field, these characteristics may be made prerequisites for eligibility.

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permanent secretaries were likely more familiar with the day to day responsibilities of an office than were the officials they supported for one year at a time (Hansen 1991, 244-45).

154. The opportunity to seek reelection, after being randomly chosen for a first term, would provide institutional knowledge and accountability at least at the same level as they exist today. It is true that subjecting a randomly chosen representative to reelection pressures re-introduces many of the issues that sortition avoids (Zakaras 2010, 463). But the benefits of introducing randomly selected representatives into our political institutions arguably outweigh the costs of later subjecting them to the potentially corrupting influences of a reelection campaign.



## **Conclusion: A Feature of Effective Democratic Decision-Making**

I have offered reasons to think that incorporating sortition into the arsenal of mechanisms by which we choose democratic representatives might be rational, supplementing existing arguments based on the contribution such a reform would offer to democracy, representation, and justice. Our electoral model encourages us to distinguish between candidates, even where their claims to office are not relevantly different. Choosing via election, we also struggle individually and collectively with the incommensurability of candidates' claims. And the use of election to make our selections carries with it costs that may outweigh the benefits gained by distinguishing between candidates. No doubt there remain instances where individual or group expertise is both crucial and uniquely identifiable by the electoral process.

But these cases are less common than is typically assumed, and our reliance on election blinds us to the benefits that random selection might deliver to the decision-making effectiveness of the groups of officials we select. The epistemic benefits of deliberation are well chronicled, as is the role of random selection in generating the diversity that researchers and theorists associate with successful deliberation. In addition, I posit that random selection benefits not only deliberative settings but also democratic institutions more broadly, by

bringing to the table more varied sources of dispersed and social knowledge than can be achieved even by other selection methods that emphasis diversity and resemblance. Taken together these epistemic benefits give additional cause to consider using randomness in selecting representatives, even where claims to office are not indeterminate.

## Chapter Five: Randomness and Legitimate Representation

*It is instructive to imagine what our political system would be like if, instead of elections, we actually conducted random samplings of the population, making Congress a truly “representative body.” Such a change would mean an end to political parties, to professional politicians, to the regarding of elections as an occasion for reviewing policy or authorizing or holding to account.*

- Hanna Fenichel Pitkin (Pitkin 1967, 75)

In her seminal work on representation, Pitkin imagines randomly selecting Congress only to dismiss the possibility.<sup>155</sup> Yet there is more to say about lottery's potential to contribute to legitimate representation. Can we admit the possibility of officials selected via processes involving randomness acting legitimately as our political representatives, full stop? If so, what are the mechanisms by which randomness contributes to legitimate representation? In this essay, I argue that the addition of random selection to our arsenal of selection methods would uniquely enhance representative legitimacy. I synthesize two key groups of norms for democratic representation, resemblance and responsiveness, considering the ways that randomness contributes to each. This fills a gap in the existing narrative

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155. See Pitkin ([1967] 1972, 73-76).

and facilitates generalizable conclusions about the benefits and costs of an enhanced use of randomness in selecting democratic representatives.

Some reform-minded scholars propose populating one or another political institution by a lottery from amongst the citizenry, often listing enhanced representation as one benefit (Callenbach and Phillips 1985; Mueller et al. 1972; O'Leary 2006). Despite these proposals, however, much of the theorizing about modern political applications for randomness is decidedly more circumspect. While the more cautious treatments still reflect an awareness of lottery's promise, they frequently present lottery's drawbacks in equal or greater measure to its benefits (Duxbury 1999; Engelstad 1989; Greely 1977; Mulgan 1984). Even advocates for random selection are typically concerned that political offices filled via random selection "do not have enough legitimacy" to engage in "actual self-government" (Sintomer 2010, 483). As a result, proposals for random selection are generally restricted to populating advisory bodies or checking existing constitutional institutions (Dahl 1970, 150; 1989; Engelstad 1989, 32; Mulgan 1984, 554).

Reflecting a similar dynamic, actual uses of random selection in political settings tend to grant only limited purview to the randomly populated groups. The most visible examples of increased reliance on random selection in modern

political environments are found in its use for filling deliberative bodies.

Deliberative polls (Luskin et al. 2002; Fishkin 1991; 1996; 1997), citizen juries (Crosby 1995), planning cells (Dienel and Renn 1995), and citizen panels (Carson and Martin 1999) all employ some variant of random selection to populate their groups. But reminiscent of Robert A. Dahl's calls for a randomly selected "minipopulus" (1989, 340), these deliberative efforts limit their randomly selected bodies to advisory or edificatory roles (Brown 2006, 203-04).

Some experiments with randomness are taking tentative steps to invest randomly selected bodies with more power. Fishkin, *et al.*, have deployed their deliberative polling to help parties choose candidates (2008). And the Citizens' Assemblies recently conducted in British Columbia and Ontario were extended undertakings in which citizens were chosen quasi-randomly to fashion a proposal for reforming the way provincial leaders are selected (Warren 2008). The Citizens' Assemblies in particular performed a constitutional function and showed "that ordinary people can conduct a serious and deep deliberative process" (Ferejohn 2008, 196). Yet these experiments serve as exceptions that prove the rule. Most theorists and deliberative democrats resist allowing randomly selected groups to make binding political decisions (Buchstein 2010, 444).<sup>156</sup> The

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156. A noteworthy exception to this trend is the work of Hubertus Buchstein, who offers a battery of lottery-based proposals for governing the European Union

Canadian Citizens' Assemblies were limited by predetermined agendas and by the popular referenda to which their proposals were ultimately subjected for ratification. Even proposals decrying this tendency tend to succumb to it. An example of this is Alex Zakaras's proposal to grant binding decision-making authority to a single, randomly-selected legislative chamber, while restricting that chamber's role in setting the legislative agenda or drafting legislation (Zakaras 2010). This is all understandable, given the centrality of election to the prevalent understanding of political legitimacy. Jim Fishkin, for example, circumscribes the role of deliberative polls, rather than risk "seeming undemocratic through some effort to supplant popular elections" (Fishkin 1991, 95; see also Dahl 1970, 150; Warren 2008, 51-52).

While a deeper awareness of the limitations to the representativeness of randomly selected groups would benefit the most ambitious proposals for lottery-based political reform, these limitations do not justify banishing sortition to the fringes of the constitutionalized power structure. To be sure, there are many political contexts or uses in which random selection would be detrimental to the legitimacy of political representation. Chance is arational, and to resort to it is to abdicate the reasons, such as differing qualifications or preferences of the

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(2010).

candidates, we might otherwise employ in choosing officials (Dowlen 2006; Duxbury 1999, 85-89; Elster 1989, 54-5, 76-7; Engelstad 1989, 31-32; Mulgan 1984, 556; Sher 1987).<sup>157</sup> But there are many contexts where employing randomness can uniquely benefit representative legitimacy, given a better understanding of the relationship between randomness and representation. Elections, appointments, and sortition all have costs and benefits from the perspective of political legitimacy. Rather than relying primarily on one selection mechanism, it is a better strategy to mix them, so as to compensate for the defects and amplify the virtues of each. To that end, we ought to consider lottery with a view towards mixing it with existing selection methods, not as a wholesale replacement (Buchstein 2010, 450; Dowlen 2006, 300; Duxbury 1999, 42; Engelstad 1989, 34-39; see also Calabresi and Bobbitt 1978, 44).<sup>158</sup>

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157. For a comprehensive treatment of both positives and negatives of arational decision-making, see Jon Elster (1989, 36-122).

158. For instance, random selection and election might be employed as distinct processes for filling various offices, with these differently populated entities providing institutional checks on each other while also facilitating competing representative claims (Brown 2006, 207; and see Saward 2006; Warren 2008, 55; Zakaras 2010, 464). Or, the process for populating a single office or set of offices might itself be a mixture of lot and election, as was the case in many medieval and renaissance Italian city-states (Finlay 1980; Najemy 1982). Similarly, American founder James Wilson proposed that the President be chosen by an electoral college made up of a group of randomly selected congressmen (Madison 1966, 361). Akhil Reed Amar offers "lottery voting," whereby ballots are cast and counted, and candidates are assigned a probability of winning according to their respective vote shares (Amar 1984; see also Gibbard 1977; Saunders 2008a).

## On Representation and Legitimacy

I am not attempting in this essay to re-theorize representation or legitimacy. Though studying sortition can teach us more about what we should expect from a representative democracy, here I am primarily interested in how random selection would perform in light of prevalent understandings of and expectations for the relationship between representatives and their constituents. Pitkin defines representing as "acting in the interest of the represented, in a manner responsive to them," (Pitkin 1967, 209). Subsequently, much of the thought about political representation is focused on the interaction between representatives and constituents reflected in her definition (Urbinati 2006; Warren and Castiglione 2004, 5).<sup>159</sup> On this conception, representation is democratic when this relationship involves a full exchange of views between parties of the relationship, with constituents enjoying full and equal opportunities to contribute to the exchange (Urbinati and Warren 2008, 396; Warren 2008, 58).

Broadly, political legitimacy is a bundle of "the conditions by which the government, in fact, has the right to make and enforce laws over its people" (Rehfeld 2005, 16). One way to contribute to the attainment of these conditions in a representative democracy would be by strengthening, and granting broader

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159. Putting aside whether that approach captures the essence of representation, it highlights a dynamic most useful to this discussion.



access to, political discourse, thereby making the representative relationship a more democratic one.<sup>160</sup> Herein, I refer to the arrangements that strengthen this relationship, increasing its contribution to political legitimacy broadly understood, as facilitating (greater) performance towards the norms of legitimate political representation. In order to get at the key ways that sortition might contribute to representative legitimacy, I isolate two broad sets of norms that contribute to or arise from the representative relationship. I organize these groups under the headings of resemblance and responsiveness.<sup>161</sup> In what follows, I explore how random selection might contribute differently than election to subsidiary

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160. There are many other contributions to political legitimacy in a representative democracy that one might invoke as part of an argument for using lottery to select representatives. Equiprobable selection might be portrayed as more democratic in its own right, for its contribution to political equality (Buchstein 2010, 438; Greely 1977; Zakaras 2010). Selecting groups by lottery can also help address some of the criticisms directed at work on deliberative democracy (Buchstein 2010, 441-49). These arguments have merit, but here I am concerned specifically with the impact of randomness on the representative relationship.

161. These are not intended to be analytically distinct categories; there is necessarily some overlap between them. Other work on the nature of (legitimate) representation parses the principal-agent relationship more finely. Andrew Rehfeld delineates a five criteria standard for legitimate representation: the representative must be selected according to appropriate decision rules, using appropriate vote weights, he or she must be authorized by the represented, who also can hold him or her accountable, and he or she must have appropriate aims (2005, 180-81). Mark Brown also builds on Pitkin's conception of representation, considering its "five distinct elements" to be "authorization, accountability, expertise, participation, and resemblance" (2006, 207). Far from disagreeing with these lists, I simply group their elements under broader headings.

considerations under these two headings, in order to highlight how sortition would affect the representative relationship, and political legitimately more broadly.

## **Resemblance**

### **Randomness and Resemblance**

We intuitively expect a group selected by equiprobable random sample to resemble the pool from which it is drawn, but the relationship between resemblance and random selection is more complex than this intuition suggests. Factors such as sampling error, eligibility, weighting, and the decision whether to make involvement in the pool compulsory serve to highlight this. Context and priorities should dictate decisions of when and how to incorporate elements of randomness into our selection processes. In aid of this calculus, we must ask what benefits we expect to accrue from making our representative bodies better resemble their constituencies.

It is clear that sortition comes closer to producing representative bodies that resemble the overall population than can elections, which not surprisingly "fail to produce *descriptively* representative legislatures" (Zakaras 2010, 455). Yet while an equiprobable lottery as an estimator may eliminate bias, it cannot

eliminate variance.<sup>162</sup> Over time, the average results of repeated equiprobable lotteries will come to better resemble the source pool,<sup>163</sup> but some difference between each sample and its source population is a statistical certainty, for any given characteristic (Duxbury 1999, 37). This may not pose a concern from the standpoint of generating scientific knowledge over repeated trials, or where our goal is merely some degree of diversity in the sample. But where individual sample results matter, as is the case when we are concerned with the actions of a single political administration, we need to be cognizant of the difference between randomness and resemblance, and the implications of this difference for representative legitimacy.

Whether an equiprobable lottery is an appropriate way to decide between candidates whose claims to office are equally strong may also depend on the size of the sample to be drawn and the extent to which circumstances tolerate sampling error. The larger the group being formed, the more closely we should

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162. See Peter Stone (2000, 108-09) for a formal treatment of this point (also Ferejohn and Rosenbluth 2009, 296).

163. This consideration of the relationship between sample and source pool also suggests the need to recognize whether and how the pool resembles the overall population. Where selection from amongst the entire citizenry is contemplated, this is less of a theoretical problem than a practical one (Stone 2000, 115-16). For example, the lists from which juries and the like are drawn are notoriously incomplete (Warren 2008, 59). We would expect systematic underrepresentation in the source pool of particular sub-populations, such as the homeless.

expect a sample resulting from an equiprobable lottery to resemble the source population (Sintomer 2010, 478; Stone 2000, 111n23; Zakaras 2010, 457).<sup>164</sup> Larger groups reduce variance.<sup>165</sup> Yet random selection need not be limited to filling large groups (pace Dryzek and Niemeyer 2008, 486). Stratified sampling may be warranted for smaller groups, to ensure the presence of certain desired characteristics in the final group (Brown 2006, 220l carsonmartin@90-91). Where a group's role places heightened importance on certain qualifications or characteristics, sampling odds may be "weighted" for these traits (Elster 1989, 68), or the sample pool may be divided up into smaller pools on the basis of

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164. However, past a certain size threshold, a deliberative body becomes unwieldy.

165. Given the tensions between randomness and resemblance, some scholars of randomness fear the worst and suggest stratified or weighted sampling techniques to minimize the impact of sampling error (Elster 1989, 90; Mueller et al. 1972, 63). Similarly, Jim Fishkin speaks of the "sampling techniques" used in deliberative polling to "represent ... a version of all of us," and the British Columbia Citizens' Assembly employed "a *stratified* random sample" to make "the Assembly resemble the province" (Fishkin 1991, 12; 1996, 135; James 2008, 107; see also Zakaras 2010, 459). But in a body the size of the U.S. House of Representatives, with 435 members, the odds of its population by a "problematic" sample are negligible. Responding to the concern by Mueller *et al.* that any group of citizens would have a 100% probability of eventually attaining a majority in Congress by equiprobable sampling (1972, 63), Peter Stone calculates that a group with 1,064,000 members would have only a 50-50 chance every 78 billion years of placing 20 members, much less a majority, in the House at once (2000, 118). Meanwhile, this same million person minority is assured *some* representation, at least one seat in the House in any given session, at a 95% confidence level (Stone 2000, 110-11n21). The minority groups that Neil Duxbury fears "may have a long wait before they find a voice" (1999, 37) in a U.S. House filled by equiprobable lottery would have to be quite small groups.

certain demographic characteristics.

Additionally, a lottery gives equal prospects only if it assigns equal probability to all outcomes, and then only to those eligible for selection. Under some circumstances, it may be appropriate to make all citizens eligible for selection, while in other instances certain criteria might be applied in the process of establishing the pool of candidates eligible for equiprobable selection (Elster 1989, 67; Goodwin 1992, 136-37; Greely 1977, 130). Relatedly, there is the matter of whether or not participation in a lottery for a given office, or acceptance of the role once selected, should be voluntary or compulsory. The desire for a sample that statistically resembles its source population must be weighed against the impact that mandatory service would have on citizens' lives. But stratified and weighted sampling, along with determinations of eligibility, are not without their difficulties. These include the challenge of choosing the characteristics on which to stratify or make eligible (Stone 2000, 116; but see Williams 1998, 197-201),<sup>166</sup> the privileging or ossification of group identities at the expense of open deliberation (Abramson 1994, 102-03), and the loss of the very benefits, such as impartiality and uncertainty, we seek from randomness (Dowlen 2006, 32-38; Duxbury 1999, 76).

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166. This choice creates an opportunity for corruption: a "gerrymandering of the characteristics which qualify people to enter draws" (Goodwin 1992, 115).

IN order to highlight the role resemblance plays in legitimate representation, and thus both the stakes of the choices just discussed and the potential contribution that randomness might offer in this regard, in the remainder of the section I take up *trust* and *capacity*: two broad ways that resemblance can render representation more legitimate.

### **Trust**

Resemblance enhances our trust in our representatives, strengthening the representative relationship and contributing to representative legitimacy, in three senses. First, resemblance increases trust directly. We "trust" representatives who resemble us to represent our interests more effectively - and more faithfully - as a consequence of this resemblance (Gay 2002; Williams 1998, 149-75). Second and third, alignment of objectives and the presence of internal motivation each contribute to representative legitimacy. And random selection can facilitate both, better even than other selection mechanisms devised to improve resemblance.

First, on the direct effect of resemblance on trust: there is a tendency to infer from resemblance a "substantial equality of values and interests" between representative and constituent that makes citizens' trust "meaningful" (Urbinati

2006, 160).<sup>167</sup> This is an empirical claim, irrespective of whether this inclination to trust is warranted or normatively desirable. But it is no less important to legitimacy for this. Public opinion is a legitimating force.<sup>168</sup> And this is how it should be. It would be difficult to argue for the legitimacy of representatives were their own constituents not to concur. For all the other considerations taken up here, whether the people actually see the regime under which they live as a legitimate one is surely just as important as other, more directly normative concerns, in assessing actual legitimacy.<sup>169</sup>

Reform-oriented scholars and theorists of representation seize on this understanding of resemblance as central to representation, along with the expectation that random selection promises improvement in this regard. Ernest Callenbach and Michael Phillips claim that a legislature chosen randomly would feature "automatic and ineluctable" representation (1985, 17). Kevin O'Leary

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167. John Adams famously suggests that "the representative assembly should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason, and act like them" (1851, 205). And Melancton Smith refers to "the idea that suggests itself naturally to our minds," that representatives should "resemble those they represent; they should be a true picture of the people" ([1981] 1985, 340).

168. Walter F. Murphy makes this point, paraphrasing David Hume, presumably from Hume's "On the First Principles of Government" (Hume 1777; Murphy 2007, 74).

169. *Pace* analytic attempts at conceptually distinguishing between normative and empirical accounts of legitimacy (see Lovett 2004, 80n3), I maintain that empirical legitimacy a key component of normative legitimacy.

refers to his randomly selected assemblies as a "representative slice" of the population that could extend "representation deeper into the population" (2006, 67). John Burnheim argues that choosing officials via a random sample controls "the distribution of interests represented" (1985, 115). Philip Pettit stipulates that his indicative representers "be a reliable or representative sample of the representees" (2009, 66).

Less is said about the mechanism by which this intuition is borne out. The second and third senses in which resemblance enhances trust speak to reasons we *should* trust representatives who resemble us. Jane Mansbridge offers "selective" representation as an alternative to relying on sanctions as a way of motivating representatives to do the right thing. Her model emphasizes choosing representatives whose objectives are aligned with those of their constituents, and who are "internally" motivated to further these objectives (Mansbridge 2009, 380).

Regarding alignment of objectives, one imagines the safest way to ensure that representatives take their constituents' objectives or attitudes to heart is to select representatives who share them (Urbinati 2006, 48; Zakaras 2010, 462).<sup>170</sup>

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170. We expect representatives to favor their own interests, not only for reasons of self-interest, but also for sheer lack of any other perspective upon which to draw in a homogeneous deliberative body (Zakaras 2010, 455).



Pettit's "indicative" representation captures this notion, describing a variety of representation whereby representatives share our "general attitudes," and so serve to indicate what the represented would do or think (2010, 427). But in what way can we expect a randomly selected group to "indicate" or align to our attitudes or objectives? Can we infer anything about a representative body's objectives, on the basis of that group's ascriptive make-up? Hanna Pitkin skeptically reminds us that there is "no simple correlation" between "people's characteristics" and "the actions they will take" as representatives (Pitkin 1967, 89). The tendency to assume just such a correlation has been termed "essentialism."

Melissa S. Williams and Iris Marion Young offer a way around the "trap of essentialism," arguing that members of social groups, particularly historically marginalized groups, share perspectives even where their interests may diverge. For this reason we can expect group members to bear in mind the circumstances of those with similar experiences when deliberating or taking political action (Hayward 2009, 116; Williams 1998, 6; Young 2000, 136-48). This is a compelling argument, though it addresses only one of the several difficulties with making assumptions about the relationship between ascriptive characteristics and policy preferences. Mark Brown catalogs five difficulties with expecting such a correlation: the "multiple statistical categories" to which we all belong; the

distinction between our attributes and the way we self-identify; the implication that we are only able to represent the interests of our "own social group;" the potential for members of a particular group to "differ greatly in their political values and interests;" and the tension between an expectation that we have "fixed interests" as group members and the possibility that interests can be shaped as part of the deliberative process (Brown 2006, 218).

Random selection offers a unique way past all these concerns. To understand how requires that we view the representative relationship, not on a one to one basis, but *en toto* (Urbinati 2006, 132; pace Schwartz 1988; and see Sieyes 1789, 5). The emphasis on resemblance is not justified on the assumption that we can represent only those of our "own" group, but the opposite. Just as a nation is more than the sum of its citizens, a representative body is more than the sum of its members. Since we are all affected by the actions taken by political bodies *en toto*, we should think of the entire body as being representative of all of us, when making decisions that affect us. The representative body as a whole must stand for the nation as a whole (Stone 2000, 100-07). The increased diversity of "voices" in the discussion gives us reason to expect representatives to engage in the advocacy crucial to representation, on behalf of those they collectively resemble (Urbinati 2006, 44-48; Williams 1998, 116-48).

We can expect an alignment of objectives, collectively, between a randomly selected representative body and its constituency as a whole, stemming from the infinite characteristics that define each of us and the fact that these go well beyond just those of the observable, ascriptive variety. Random selection will, on average, select a group that resembles the source population for any characteristic (Stone 2000, 113-14). This holds not only for observable characteristics such as height, but also for non-physical ones such as perspectives or objectives. Of course, no individual can hold exact the same combination of characteristics as any other individual. But collectively, and on average, a randomly selected group will come closer to approximating the objectives held across the source pool than can a group chosen by any other method. This is a clear advantage of randomness over all other selection mechanisms, even those designed to produce diverse groups with certain distributions of characteristics.<sup>171</sup>

The third set of reasons we should be able to trust representatives chosen randomly relates to the incentives generated by the selection process itself. Some suggest that random selection would act as a disincentive for planning, due to the lack of any prospects for reelection and the presumed, relatively short terms of

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171. The direct effect of randomness thus allows us to avoid the question of group identity entirely, and still achieve, on average, selection of groups that mirror the population in every conceivable manner (Stone 2000, 113).

office (Duxbury 1999, 25; Elster 1989, 111-12). Yet the one-and-done, rotative nature of random selection should create a heightened awareness on the part of representatives of the effect on their subsequent lives *qua* citizens of actions taken while in office. Randomly selected representatives resemble the citizenry because they were recently, and soon will be again, common citizens themselves. Representatives selected on the basis of resemblance should be internally motivated to further the common good, as this will help them individually as well. By contrast, representatives chosen because they are different than the average citizen (Manin 1997) are likely to be motivated by considerations that differ from those affecting the rest of us.

A representative body selected randomly should be motivated to further the objectives of their constituents for two additional reasons. Random selection stands a better chance than election of selecting those who are internally motivated, and it de-emphasizes external motivation. Regarding the former, elections discourage the selection of people "with integrity and concern for the common good," instead rewarding the wrong sort of ambition (Aubert 1959, 17; Mansbridge 2004, 12; but see Dowlen 2006, 169-75). Random selection from an entire population avoids this problem, selecting those with agendas for personal gain no more often than they appear in the population. Ideally, participation in the

pool would not be voluntary, as "men fitted for public affairs ... refuse to hold any office," and leaving government to those who seek office merely "gives still more license ... to the small group of criminals who harass and ruin the Republic" (Rinuccini 1479, 206). Even where a lottery is to be conducted amongst volunteers, however, it seems reasonable to expect a broader distribution of agendas than we currently encounter across the handful of competitive candidates in an election.

Beyond the differences in the sorts of candidates each system is likely to attract, election creates external motivations that can pervert even the best intentions. A sitting political official facing a reelection campaign is motivated by the desire to maximize his or her reelection prospects (Mayhew 1974). This can lead to pandering to special interests at the expense of the common good, or to short-term thinking (Duxbury 1999, 38; Steele 1995, 40; Warren 2008, 51, 54; Warren and Castiglione 2004, 20). The absence of electoral accountability may actually serve to free representatives to act in the public interest (Goodwin 1992, 116; and see Pitkin 1967, 144-67). And while some might argue that randomly selected representatives might be more susceptible to corruption, due to their average post-service life prospects, it bears remembering that the quest for reelection introduces the possibility of corruption, from political debts, the need to

raise campaign funds, and the access that wealthy interests have to those in seats of power (Zakaras 2010, 456-68). The uncertainty of lottery can help representatives remain trustworthy by reducing the opportunities for outside forces to corrupt the selection process or the candidates themselves prior to their being chosen (Duxbury 1999, 108; Elster 1989, 84).

### **Capacity**

Justifiable trust of the citizenry is not sufficient to insure effective acting in our interests, however. An expectation that objectives and incentives are properly aligned means little if the representative groups in question are not equipped to further these objectives or act on these incentives. As I argued in the preceding chapter, there are reasons to think both that the loss of individual expertise as a result of random selection can be mitigated, and that there are epistemic gains that will develop at the group level, arising from the unique capacity of sortition to access knowledge dispersed throughout society.

In sum, while concerns surrounding the capacity of randomly selected groups are not to be dismissed out of hand, neither should they be accorded undue weight. Institutional arrangements can and should be envisioned to make the world safe for sortition, under a wide variety of circumstances. I now turn to the

second set of considerations under which randomness might offer a positive contribution to representative legitimacy.

## **Responsiveness**

Advocates of random selection must still address concerns surrounding consent and accountability. All representative systems feature some combination of these two aspects of the representative relationship, with one at its "core" and the other at the "periphery" (Mansbridge 2009, 370).<sup>172</sup> No matter how effective our selection method is at choosing indicative representative bodies, responsiveness of sitting representatives is also crucial to legitimate, democratic representation (Urbinati and Warren 2008, 396). It is not clear whether election is equipped to make our representatives responsive, however (Ferejohn and Rosenbluth 2009, 273). I argue instead that the concerns surrounding the potential responsiveness of randomly selected groups are overblown, and that in some respects these groups may be made more responsive than their elected counterparts.

While voting is not the only avenue for political engagement in the

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172. There is an important difference between the work of Mansbridge and Pettit on this point. Pettit claims that "indicative" and "responsive" forms of representation are mutually exclusive (Pettit 2009, 71-75).

modern democratic state, it lies at the heart of the conventional understanding of the relationship between representative and constituent. Even non-voting activities such as protesting or petitioning rely on the implication that votes hang in the balance. And while prospects for participation might be more equal *ex ante* where a lottery rather than an election is conducted from amongst the citizenry, conventional opportunities for each citizen to influence the representative relationship would be affected, and likely lessened for all except those chosen in the lottery (Brown 2006, 213; Duxbury 1999, 25-6, 133). Yet a lottery-based regime could open up new avenues for *meaningful* participation. I do not mean to evoke a citizenry more motivated to engage the issues due to a shared awareness that everyone stands a chance of being chosen.<sup>173</sup> Rather, were we to employ random selection to fill a significant number of political offices, this would open opportunities for participation in self-governance by new portions of the citizenry (Barber 1984, 291; see also O'Leary 2006).

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173. But see Ethan J. Leib's claim that a popular branch chosen randomly and compulsorily from amongst the voting age population would constitute participation by the entire citizenry (2004, 79-80). Mansbridge also refers to the role advisory assemblies play in promoting "active consent, even among non-participants" (Mansbridge 2004, 13).



## Consent

As discussed in the section on *Trust*, the selection process can exert constituent control over those selected in ways that go beyond traditional notions of accountability (Mansbridge 2003; 2004; Pettit 2010, 427). By contrast, sanction-heavy models undermine public-spiritedness, with the presence of "extrinsic incentives, monitoring, and a culture that assumes self-interest" (Mansbridge 2009, 378). Both dynamics speak to the importance of the expression of consent in controlling representatives and making them responsive to constituents. Arguments for the legitimacy of political officials chosen randomly must address the view that replacing elections leaves no opportunity to express consent (Brown 2006, 209; and see Locke 1690, Ch. VIII). We view voting as the definitive expression of this consent, and some (Burnheim 1985, 10; Manin 1997, 83-85) consider this to be a key reason for the centrality of election to our understanding of democracy.

Let us grant that some form of consent of the governed is necessary for legitimate representative government. Two responses are available to the advocate of sortition. First, though consent may be necessary, voting is not the only way to express it.<sup>174</sup> The initial, collective decision to integrate randomness into our

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174. Indeed, even aristocrat Francesco Guicciardini charged the equating of voting and consent with disguising "what is essentially the loss of the right to

selection processes should constitute explicit consent in the same way that the initial decision to choose leaders by election is seen as having done so (Goodwin 1992, 36, 38; Zakaras 2010, 464). Further, the voluntary inclusion of one's name in the lottery hopper, with the accompanying chance that one will actually be selected, reflects a depth of commitment that far outstrips that required by voting.<sup>175</sup> Yet those opting out of a voluntary lottery present no greater problem from the perspective of consent than do the vast numbers of citizens who choose not to vote, much less run for office, under the current system.

Second, though it may be necessary, consent is not sufficient to connote legitimacy. After all, "illegitimate domination meets with consent, else it would not be able to last" (Habermas 1976, 202). Prior to granting our consent to be governed by those making a representative claim (Saward 2006), we should have good reason for thinking it wise to do so. In the other sections of this paper, I offer reasons for thinking so in certain conditions (and not in others). Instructive here is David Estlund's concept of normative consent, whereby the reasonableness of granting consent is taken as proxy for its expression, whether or not such

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office," (Dowlen 2006, 180).

175. Barber touts this as "institutionalizing the principle of self-selection" ([1984] 2003, 292). And while fewer might opt in than currently vote, presumably more would opt in than currently stand for election.

consent is in fact tendered (Estlund 2008).<sup>176</sup>

This version of consent may have its limits, however, depending on the importance of the symbolic act of expressing consent in a given context. This is the operative point. Where consent is necessary for legitimate representation, in general sortition can accommodate just as can election. Under certain circumstances, however, the symbolic value of voting to legitimacy may be impossible to do without, as is arguably the case with the election of a president. Beyond that limiting case, however, there is nothing analytically distinct in election that expresses consent better than can sortition.

### **Accountability**

Institutional measures devised to make representatives accountable to their constituents are intended both to foster discourse between citizens and their representatives and to sustain the sense that public input is being heeded, bolstered by the possibility of sanctions if it is not. "Accountability" is thus separable into two distinct concepts: "giving an account," and "holding someone accountable" (Brown 2006, 210; Rehfeld 2005, 189). Both forms are necessary

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176. Estlund would likely not approve of this use of his concept, given his tendency to use the epistemic value of coin-flips as a low bar that he expects human decision-making to clear consistently (see, for example, Estlund 2008, 6).

aspects of the representative relationship (Warren and Castiglione 2004, 20), and both forms can be delivered in a random regime as well as or even more effectively than under electoral arrangements.

The former sense, where we expect representatives to explain their views to the citizenry, is ostensibly served in part by election campaigns. But the dimensions of discourse - amongst representatives, amongst constituents, and between the two groups - that make up the deliberative process can also satisfy this explanatory aspect of accountability. The sharing of one's rationale facilitates a "discursive relationship" between democracy and authority (Warren 1996, 47; see also Dryzek and Niemeyer 2008). Publicity and collective discussion are crucial to legitimate representation (Urbinati 2006, 2). Debate is an "accountability device" (Bardach 1981, 489).

These depictions of the contribution discourse makes to accountability assume the presence of elections, but discursive accountability can also be sustained by extra-electoral factors. Jane Mansbridge reminds us of representatives' responsibilities to their peers, in what she terms "network" or "horizontal accountability" (2004, 13; 2009, 385). The lack of any need for long-term bargaining strategies or reelection efforts in a representative body filled by randomly selected, single-term officials might lead to a more open sharing of

reasons between randomly chosen representatives themselves, and between the representatives and their constituents.

Discursive accountability in conjunction with the representation of judgment that random selection facilitates should still contribute to "'policy congruence' between [citizens] and their representatives" (Rehfeld 2005, 189n30), for reasons discussed above in the section on *Trust*. Such congruence is a primary goal behind the idea of accountability. Jane Mansbridge describes "gyroscopic representation" as a model wherein "voters select representatives who can be expected to act in ways the voter approves *without* external incentives" (2003, 520). This amounts to a form of accountability, although Mansbridge acknowledges that it is not accountability "in its classic form" (2003, 526). Yet, accountability to the majority is of little comfort to disadvantaged minorities, who lack access to the resources necessary to either authorize or hold to account (Hayward 2009, 113). It is just this sort of "constituency control"<sup>177</sup> arising from random selection that we give up with elections. It may be that we tend to think of accountability almost exclusively in terms of electoral sanctions not because elections are particularly effective at controlling the actions of representatives,<sup>178</sup>

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177. Warren E. Miller and Donald E. Stokes offer this term to describe a circumstance whereby a representative "so shares [his constituency's] views that in following his own convictions he does his constituents' will" (1963, 50).

178. A dubious proposition both in theory and practice (Dienel and Renn 1995,

but because our reliance on elections makes the presence of sanctions that much more necessary.

Still, there remains an intuitive attachment to the idea of having sanctioning devices in place to "help align the interests of authorities and subjects" (Warren 1996, 47). The punitive sort of accountability is central to popular control (Maloy 2008, 181-83). This need not come only via voting, however (Elster 1999; Mansbridge 2004; Pettit 2010). Already, we tend to rely more than we might at first realize on "extra-electoral" devices to insure accountability. We expect democratic representatives to be subject to their own political actions and to abide by the same laws as their constituents.<sup>179</sup> We bolster this expectation with the threats of impeachment and prosecution, safeguarded with public access to information and the media (Brown 2006, 210). These devices would all play roles, though different ones, in a regime where random selection is put to greater use.<sup>180</sup>

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118; Dunn 1999, 335, 343; Fearon 1999, 56, 68-69; Maloy 2008, 8, 17; Manin et al. 1999, 50).

179. Barbara Goodwin describes this as "reflexive reciprocity" in the context of her "lot-representatives" (1992, 114), and James Madison touts its restraining effect on elected representatives in *Federalist No. 57* ([1788] 2003, 279).

180. Mark Brown distinguishes these mechanisms from the *public* accounting that elections facilitate (2006, 211). I do not see the value in this distinction. While the relationship may operate differently, criminal prosecution and public access to information both seek to control representatives and each is a public function in its own way.

We can look also to Athens as an exemplar of various checks between institutions and sanctions on individuals. Actions of the Assembly were frequently checked by the *graphe paranomon*, a procedure whereby citizens might appeal to the People's Court to nullify decrees and punish their proposers (Elster 1999, 273-75; Hansen 1991, 179, 207; Woodruff 2005, 50). Also common were *euthynai*, or rendering of accounts, and *eisangelia*, both of which involved scrutinizing after the fact magistrates for their actions while in office, for incompetence or simply bad results, as well as for malfeasance (Elster 1999, 267-70; Hansen 1991, 226; Woodruff 2005, 35). Legislative actions of the *nomothetai* could also be overturned, in a *graphe nomon me epitedeion theinai*, which amounted to putting a law through a two-stage process (Hansen 1991, 212). In a modern setting, this list might be adapted to include an ongoing, post-service period of financial scrutiny and restrictions on the sorts of jobs that a sortition-chosen representative would be allowed to take upon leaving public service (Zakaras 2010, 458).

It is also worth recalling that random selection can be used to select bodies that exist to provide accountability, such as tribunates or single legislative chambers.<sup>181</sup> Citizens' chambers or assemblies can be more effective than is the

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181. Notably, random selection in politics has a distinguished record for its usefulness in holding government officials to account (Dowlen 2006; see also

vote for ensuring the accountability of representatives, because of the epistemic benefits of deliberation, discussed above (Zakaras 2010, 461). But even where random sampling is used to choose agents of accountability, it is important to remember that these bodies, too, are representative. We need to make these groups accountable, too.

What is typical of these extra-electoral models of accountability is the isolation of the representative (or policy) for scrutiny and judgment. The process of evaluating the current representative is de-coupled from the choice of a replacement (Maloy 2008, 7-8, 17). And just as arguments for random selection must provide the people with an opportunity to express consent, random selection of political officials heightens the importance of accountability (Elster 1999, 275). Arguments for random selection of representatives must provide for both and address more generally the need for participatory opportunities in a representative democracy. This is not, however, a fatal challenge for proponents of sortition, as I hope I have shown.

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Brown 2006, 211), serving to populate such checking institutions as the Athenian Peoples' Court mentioned above and the Roman tribunals (McCormick 2006a). This function is featured in many reform proposals (Barnett and Carty 1998; Callenbach and Phillips 1985; Carson and Martin 1999; Mansbridge 2009, 392; McCormick 2006a; O'Leary 2006; Poulin-Litvak 2009; Zakaras 2010).



## **Conclusion: Implications for Institutional Design**

To this point, I have explored the relationship between randomness and considerations affecting representative legitimacy largely in the abstract. In the remainder of this essay I offer some possibilities for institutionalizing a greater reliance on randomness in selecting democratic representatives of various sorts.

## Chapter Six: Institutional Possibilities

*For me, signing the Constitution—and agreeing therefore to profess at least a limited constitutional faith—commits me not to closure but only to a process of becoming and to taking responsibility for constructing the political vision toward which I strive, joined, I hope, with others. It is therefore less a series of propositional utterances than a commitment to taking political conversation seriously.*

– Sanford Levinson (1988, 193)

*Mathematics can suggest what approaches are worth trying, but it can't reveal what will suit a particular place, and best deliver what we want from a democratic voting system: to create a government that feels legitimate to people—to reconcile people to being governed, and give them reason to feel that, win or lose (especially lose), the game is fair. The novelty of range and approval voting in modern politics is so great that we can't know how they'll work out without running experiments. At the very least, it would help to know how voters have dealt with such schemes in the past. Perhaps someone should start rummaging around for old ballots in the Doge's Palace.*

– Anthony Gottlieb (2010, 77)

Having explored the ways in which random selection interacts with key aspects of political legitimacy, it may be illustrative to cash out these lessons by considering them in light of some specific potential applications of sortition. This will be an exercise in balancing, as the case for random selection—like that of

election—is seldom clear cut. We must instead determine in any given instance whether the benefits to political legitimacy of inserting randomness into a decision-making process would outweigh the costs. I argue that some decisions, like choosing a policy or a President, do not warrant the use of sortition, while others, such as the choice of a judge, an oversight or advisory group, a constitutional convention, or even a legislative body, would benefit from random selection.

### **The Lessons: Broadly Construed**

From our examination of lottery itself, we know that the lottery serves chiefly as a way of making decisions without reasons. This quality has been termed its "sanitizing effect" or its "arationality." Foregoing reasons can help in making decisions impartially, which is of value where the only available reasons for choosing are bad ones. It can also create uncertainty in advance of the outcome, which may help forestall efforts at corrupting in advance the aims of those who will eventually be selected. Resorting to arational decision-making may facilitate more efficient decision-making, of benefit where reasons may be difficult or costly to identify, or where the differences between candidates are immaterial or incommensurable. Using a lottery to fill a body with multiple

officials can create more diversity than does election, bringing more and different voices and more dispersed knowledge to the table than can any other selection method. In the process, it can also choose a group that better resembles the source pool, lending the group a greater degree of popular trust and better aligning its objectives to those of the population from which it is chosen.

In democratic terms, random selection offers a particular sort of equal opportunity, giving all candidates (indeed, potentially all citizens) an equal chance of being selected, and thus an equal opportunity to influence political decision-making. This equality is only formally present—which is to say it is not present—in democracy by election or appointment. Additionally, random selection not only gives expression to the democratic ideal of equality, it also facilitates it, by increasing the chances that political decisions will be made in the collective interest and in the interest of subgroups heretofore shut out of the discussion.

In decision-making terms, it can be rational to adopt random selection for political decision-making processes, where it would be more efficient to do so and where the epistemic benefits to the political body's capacity would outweigh any increased risks in other respects. And from the perspective of representation, it makes sense to employ sortition where resemblance is an important factor in

enhancing the trust constituents hold for their representatives, or where the alignment of interests between representatives and constituents would be improved. These benefits, however, must be balanced against the lost opportunity for expressing consent or holding accountable via the vote. Where possible, this balancing may be aided by institutional arrangements that generate other aligning, consenting, and sanctioning opportunities.

### **Examples: Poor Uses of Sortition**

The lessons above are useful not only in suggesting where sortition would be beneficial, but they also help identify poor uses of sortition, or uses that are justified on the wrong bases. Let us first consider two examples of situations where random selection would not on balance contribute positively to political legitimacy. I have in mind proposals to incorporate randomness into policy-making decisions, and the prospect of choosing the President of the United States by sortition.

#### **Policy Decisions**

Incorporating random selection into policy-making decisions would be a mistake, as it would fail to take advantage of the lottery's strengths while

introducing new difficulties or failing to solve existing ones. Proposals to put lotteries to this sort of use commonly take two forms. Some social decisions are already made randomly and scholars contemplate increasing the scope of decision-making by lot, as chronicled in earlier chapters. But simply selecting by chance from a set of policy options promises little if any improvement over the decision-making capacity of political representatives, for all but the most cynical observer. David Estlund's tendency, already mentioned, to use a coin flip as the epistemic low bar, which we should expect even the average, solitary decision-maker to surmount, makes this point. Only where the representative system has been completely captured by factional interests would we expect a coin flip to do better than could representatives at picking a policy. Resorting to an equiprobable lottery deprives the policy-making process of any of the deliberative benefits we expect from our representative bodies.<sup>182</sup>

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182. This is as distinct from employing equiprobable lotteries to choose the representatives themselves. The case for the latter is different and arguably stronger, not least because there is little deliberative benefit from an electoral campaign that would be sacrificed by using sortition in its place, and because elections create perverse incentives for the elected representatives. More on this below. There would also still be the lingering question of who chooses the set of policy alternatives. Note that my aversion to randomly selecting policies stems from the normative bent of this work, as reflected in part by my effort to compare ideals to ideals. Were we to consider in a more specific sense whether policy-making by coin flips would better serve the common good than do decisions by a particular legislative or bureaucratic body that is completely corrupted by factional interests, the case for random selection of policies might look more compelling. But this is a low bar indeed. Better to just get better representatives.

By contrast, Bruce Ackerman (1980) and Ben Saunders (2008a) both suggest basing the probability for choosing a particular policy on the outcome of a prior vote. These proposals preserve a role for the people in the decision-making process. Their chief benefit would be the enhancement of minority voices in the decision-making process, as compared to majoritarian decision rules used in both referenda and in legislative bodies. Even proposals that fail to garner a plurality of the votes would still have some chance of being chosen (Ackerman 1980, 286-89; Elster 1989, 65; and see Amar 1984). But these proposals for weighting randomness according to vote percentages do not improve on the lack of deliberation from which the equiprobable policy-making proposals suffer, and they compound this problem by (re)introducing the difficulties that confront election campaigns in general and popular referenda in particular. The campaigns that precede the weighted lottery would no doubt be driven by the same factional interests that plague today's efforts at direct democratic reform. Moreover, as discussed in earlier chapters, weighted lotteries do not sanitize the decision-making process, and so fail to achieve the impartiality and uncertainty on which most arguments for sortition are based.

Both sorts of reform would do little to express or enhance political equality, they would suffer epistemic losses as compared to the performance we

should expect from even a minimally competent legislature, and they would leave us with no one to hold accountable for the decisions.

### **President of the United States**

We also should not want to employ randomness in selecting the President of the United States, notwithstanding proposals for doing so and historical examples of choosing other chief executives via sortition, already mentioned. Under the appropriate institutional conditions, such a reform might offer benefits to some aspects of legitimacy, but these would be outweighed by costs, even under the best of circumstances. Certainly, an equiprobable lottery amongst all citizens would also provide equal opportunity to be President, where nothing of the sort exists today. Were the lottery to be conducted from amongst a smaller pool of candidates, the legitimacy of the presidency might still be expected to benefit from the uncertainty and impartiality that accompany random selection. Much like the selection processes used in Florence, the lottery would reduce the role of money in the selection process, preventing undue influence by certain interests and reducing opportunities for corrupting the process and the eventual winner.

But there would also be several costs to legitimacy, and the accompanying



trade-off would not be favorable. A singular office such as that of the President cannot "resemble" the populace in any meaningful sense, regardless of how the office is filled. One official - even a very average one - will not resemble any other individual constituent in every respect, nor can he resemble a group in any respect. Moreover, the epistemic benefits of random selection, which aid group deliberation and introduce dispersed knowledge, do not extend to a randomly selected, single individual.<sup>183</sup> The American electorate, generally ambivalent about whether political experience is a desirable qualification or an electoral blemish, seems to be generally in favor of their President having some credentials. The office of the president is not generally held up as the place to make our stand for political equality. The stakes involved and the scope of responsibilities held by the President suggest that this is not the office with which we should want to experiment by placing someone with no training or expertise.

But perhaps the biggest factor militating against selecting the President by lottery is the importance of presidential elections in the American narrative of democratic empowerment. This is the only election for which even half of Americans reliably turn up to vote. Many see this vote, every four years, as their

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183. For a comparison of the average cognitive capacities of an individual versus those of a group, see, for example, Harry Kalvan, Jr. and Hans Zeisel's *The American Jury* (1966, 151).

only political responsibility; for many Americans it is their only connection to the political sphere. This is their opportunity to register their consent to the regime, if not to a particular candidate.<sup>184</sup> Additionally, evidence shows that presidential elections are one of the few elections in which American voters are able to successfully and coherently hold their officials to account via the vote. Specifically, I refer to the evidence, as established by political scientists, that the outcomes of presidential elections are largely determined by the state of the American economy in the year preceding the election (Bartels 2008). Of course, it is not always clear that the President deserves sole, or even partial, credit for the state of the economy. But to the extent that Presidential votes do seem to hinge on some factor beyond party ID, and given that sitting Presidents do occasionally lose bids for reelection, whatever role elections can play in holding politicians to account seems strongest here. Were this connection severed, it would tear at the very foundation of the popular understanding of democracy in America. It would be too much to digest; the fact that are all given the opportunity to vote for our

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184. For this reason, I would not favor even the sort of selection process suggested by James Wilson, where randomly selected Congressmen would choose the President, or by some of my advisors, who contemplate choosing the President randomly in the Florentine manner, from amongst a list of candidates assembled by elites. While these proposals promise to reduce corruption while delivering some expertise, they also remove the popular role in the process.

President is one of the most powerful symbols of American democracy.<sup>185</sup>

### **Examples: Advisable Uses of Sortition**

The cost/benefit calculus is not always so opposed to sortition, however. In some cases, there are clear cut benefits to political legitimacy to be had from selecting officials randomly. In other cases, a mixture of institutions based on a robust understanding of the ways that randomness affects legitimacy could offer a net positive, sufficient to warrant experimentation. Here, I sketch reasons to consider selecting a judge, a tribunal, a constitutional convention, and a legislature using randomness.

#### **A Judge**

Consider selecting a single official by use of randomness, as previously proposed by William Bunting (2006). No amount of stratifying could make a single official "resemble" the source population, yet we may still seek the impartiality and corruption-limiting uncertainty that randomness offers. As suggested above, this benefit may not outweigh the cost to consent,

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185. Correctly or not. See Bruce Ackerman's *The Decline and Fall of the American Republic*, in which he decries the office of the presidency as a "constitutional battering ram" (2010, 119).

accountability, and sociological legitimacy in the case of selecting a president, but it might be an acceptable trade-off for choosing a judge, for example. The random selection of judges from amongst those who are certified to practice law, as an alternative to the partisan election of judges as practiced in Texas and elsewhere, holds the promise of improvements to political legitimacy. The requirement of credentials for inclusion in the pool of candidates places a premium on merit, leaving room for a contribution from randomness while choosing between options that all meet the bar (literally) and warrant our consent. The use of randomness in the judiciary is not a new idea. Juries, in America and elsewhere, are chosen via processes that involve an element of randomness. Judges are assigned to trials randomly (Samaha 2009). Scholars have contemplated the use of randomness in reaching verdicts (Elster 1989; Greely 1977), or as a "sword of Damocles," to motivate judges to reach decisions more quickly (Duxbury 1999).

Choosing judges randomly as an alternative to partisan elections or appointments would offer several benefits to legitimacy. Impartiality would be improved in the selection process versus either partisan elections or appointments. This should be expected to result in the delivery of verdicts that better enhance political equality and justice (and see Ely 1980; Lever 2009). Expertise should

not suffer, as the same conditions for candidacy would apply.

Accountability appears to be the sticking point, but it is not very sticky at that. The primary justification for electing judges seems to be the opportunity to hold them accountable, but it is hard to imagine many voters making a vote choice that far down the ballot on the basis of familiarity with the rulings of the incumbent. Seldom are the decisions of a solitary judge so notable as to attract the sort of sustained attention that would inform the vote choice of a significant number of voters. Much work has been done of late to demonstrate the democratic credentials of choosing judges via appointment, and that selection method may have its place, particularly at the highest levels (Zeisberg 2009). But where there is reason to think that current selection processes are a greater source of bias than unique expertise, we should be willing to try random selection.

### **A Tribunal**

Consider now a small, deliberative group, such as a standing tribunal chartered with overseeing a particular bureaucratic agency. Considerations of legitimacy suggest different institutional arrangements when employing randomness to select a group of one or two dozen than with a group with hundreds of members. Unlike with randomly selected larger groups, stratification

or weighting for particular demographic characteristics is warranted here, as the group is not statistically large enough to reliably achieve meaningful diversity without one or the other. We might also combat sampling variance or voluntary drop outs by instituting unanimity-based decision rules to insure minority voices a fair and thorough hearing (Pope 1989, 280-81).<sup>186</sup> Depending on the nature of the agency being watched, some special qualifications may be called for in a body charged with oversight. If the subject matter is sufficiently complex or effective agency oversight requires considerable procedural knowledge, the eligible pool should be modified accordingly and training provided (Barber 1984, 292).

Selecting randomly from amongst a pre-qualified pool of candidates would still allow for the presence of expertise in the tribunal, while militating against the partisan and cronyist tendencies generally featured in appointments and against the role of money and factional interests that often appear when such bodies are elected. While no selection process in this scenario expresses an understanding of all citizens as equals, rendering the selection process impartial from amongst qualified candidates would militate against corruption and enhance the prospects of more equality-oriented outcomes by the panel, and by extension from the

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186. A unanimity requirement for decision-making may also supplement eligibility requirements, stratification, and/or sample weighting, for the same reason.

agency.

The illustrative, Texan counter-example here is the Texas State Board of Education, a fifteen member, elected body whose responsibilities include oversight of the Texas Education Agency, as well as control over Texas primary and secondary school curricula and textbook selection. The Governor of Texas appoints the chair of the Board from amongst those elected to the Board, subject to confirmation by the state Senate. In recent years, the highly partisan Board has made international news with a series of dubious decisions, including: the decision in 2007 to disregard the input of a panel of experts, appointed by the Board, regarding the pedagogy of teaching of English, in favor of guidelines created *ad hoc* by the Board itself; a similar decision regarding the teaching of history, in 2010, that led to the deemphasis of the role of Thomas Jefferson as a Founder; and a 2009 dispute between the Board's chair—at the time, a dentist—and a panel of acclaimed biologists, which led to an edict approved by the Board to teach the "strengths and weaknesses" of evolutionary theory, and later (this week) the contemplation of approving "supplementary materials" in science courses. *Elaborate with anecdotes from yesterday's hearings.* My point in describing these decisions is not to take partisan sides in the debate, but to underscore how the Board itself has done just that, while flouting expert

testimony. A randomly selected Board would be more impartial, while sacrificing nothing in expertise. Indeed, it would presumably be more willing to listen to experts than is the elected Board. Moreover, as with the election of judges, the notion that elections serve to hold officials at this level accountable is far-fetched.<sup>187</sup>

The creation of a tribunal group should include a step that permits the citizenry to express initial consent via commonly accepted decision methods, such as referenda or public hearings. To the extent that the tribunal serves as an accountability device, the check could be made to go both ways, by giving the group subject to oversight some recourse for appeal, perhaps to a legislature. As with O'Leary's mini-congresses, a proliferation of small, politically empowered groups, chosen by stratified sampling, would drive democratic involvement in greater numbers and from amongst more subgroups of the population than is possible where elections or appointments dominate.

### **A Constitutional Convention**

Now, consider a large group, convened *ad hoc* for a singular purpose, such

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187. Except in extreme cases. Don McLeroy, the aforementioned dentist, was not renominated in his district's primary in 2010. However, the rest of his voting bloc remained intact.



as a state constitutional convention.<sup>188</sup> Like the Canadian Citizens' Assemblies, circumstances surrounding a constitutional convention are particularly conducive to meeting expectations of consent and accountability. The process of calling the convention and stipulating its random selection should suffice as an expression of consent (Warren 2008, 57), and the ratification process provides a built-in accountability measure.<sup>189</sup> Moreover, were convention delegates to be chosen equiprobably from amongst the citizenry, the equal chance of selection would go a long way towards expressing a commitment to political equality in a politically meaningful context. Even were the delegates to be selected from a smaller pool, say those with legal training or some constitutional knowledge, the possibility of corruption would be reduced and the prospects of diversity and even political equality enhanced, versus the likely alternative of appointing delegates or having legislators do double duty.<sup>190</sup> It is worth remembering here that sortition can serve

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188. Constitutional conventions to be populated by lottery have recently been proposed in California (Hill 2009) and the United Kingdom (Aitchison 2009).

189. It is noteworthy that the British Columbia and Ontario Citizens' Assemblies' recommendations each failed to achieve the votes needed to pass in referendum (Sintomer 2010, 480). However, these referenda did not benefit epistemically from deliberation to the same extent that the assemblies did in formulating their recommendations. Ratification by another randomly selected, deliberative group would address this.

190. The local example is the effort in 1974 to write a new Constitution for Texas. This was to be done by a constitutional convention, the delegates to which were the state legislators. Predictably, the newly drafted, proposed constitution that emerged became a victim of political pressures placed on the "delegates" by those with the power to affect their reelection prospects in their other roles as

as an alternative or a complement to all existing modes of selection, not just election. Large assemblies create a high likelihood that members of quite small minorities will receive a seat via equiprobable lottery. And larger groups operating under majoritarian decision rules can accommodate sampling error and voluntary drop-outs while still improving diversity and even the presence of dispersed knowledge in the overall decision-making environment.

### **A State Legislature**

Consider as well the possibility of selecting an existing legislative body by a lottery from amongst the citizenry. Such a reform is perhaps the most commonly proposed by advocates of sortition (Barnett and Carty 1998; Callenbach and Phillips 1985; Sutherland 2008; Zakaras 2010). But a failure to systematically examine the impacts such a reform would have on considerations of political legitimacy leads some who propose such a change to do so for poorly considered reasons, and it leads others to circumscribe their proposals, often by watering down the authority of the body to be filled randomly (Zakaras 2010) or by offering such a body as a supplement to existing, elected legislative bodies (Leib 2004). The effect is to minimize the benefits to be had from making such a

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legislators.

change.

As discussed in Chapters One and Five, Callenbach and Phillips exemplify the former tendency in their call to select the United States House of Representatives randomly. Their argument relies heavily on the ways that a randomly selected House would resemble the overall citizenry, without considering why this would make it more representative. As discussed in Chapter Five, the resemblance achieved by equiprobable selection would in fact offer a significant contribution to the representative legitimacy of a House filled in this manner. But this benefit would need to be safeguarded by additional institutional devices for rendering such a legislature responsive.

Zakaras offers a proposal that does seek to contain the biggest risks with such a reform, but he does so all too well, offering in the end a proposal emblematic of the tendency to timidity in the framing of proposals for sortition. While decrying this same tendency among others who propose greater roles for sortition, Zakaras proceeds to circumscribe the role of the randomly selected House so that it winds up being the voting arm of the U.S. legislative branch, with most or all laws to be drafted by the elected, and thus presumably more highly qualified Senate. This is quite similar to the proposal Condorcet offered while helping draft a proposed constitution for France. Unlike Condorcet, however,

Zakaras is rendering sortition as a democracy-enhancing device, while suggesting that the randomly selected chamber have no influence over the options on which it is to vote. Having some popular control over the options on which to vote is central to many accounts of democratic decision-making. And this is not the only way to safeguard a randomly chosen, inexperienced legislature from making potentially catastrophic decisions. We can take a page from Athens in order to align the motives of randomly chosen officials. We might further accountability in such a scenario via a combination of factors, ranging from prosecution for malfeasance to the need to face constituents in the process of running for "renomination," or an up or down "relection."<sup>191</sup>

Where a legislature must confront complex issues or procedural questions, some topical or institutional knowledge may be desirable. As with deliberative assemblies and other deliberative projects, a randomly chosen legislative chamber may rely on the testimony of mutually accepted outside experts to supply specific knowledge. A legislature might look to its staff to supply some of the needed

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191. Zakaras discounts this prospect as sacrificing the benefits of randomness. But a randomly chosen legislature, with members subject later to a retention referendum, would still be more diverse than one filled initially by election. Replacements for representatives voted out could once again be chosen randomly, thereby preventing the referenda from turning into electoral campaigns. There is little reason for any interest group to dump large amounts of money into defeating a legislator when her replacement will be drawn from a hat.

continuity and expertise. The possibility of serving multiple terms and the development of specialized knowledge on committees may be warranted as well.

I would suggest a state legislature as a candidate for filling one or both chambers randomly. Here, the stakes are lower, and so is the bar. The Texas legislature, for example, is constitutionally designed to be a body of amateurs. The body meets only 140 days per session, and regular sessions are scheduled only every other year. Legislators' salaries are set at \$7000 a year. Anyone familiar with the antics of the Texas Legislature in the recently concluded session(s) would be hard-pressed to argue that a randomly selected body could not have managed at least as well. Individually, most of the sitting legislators look quite qualified on paper. But when subjected to the prevailing political dynamics, the influence of interest groups and other political actors, as well as the prospects of seeking nomination again next year, these qualifications did not translate into superior or even adequate outcomes for Texas.

### **Concluding Remarks**

I leave the rest to the readers' imagination. My intent has been two-fold. First, I have shown that the categorical rejection of using randomness to fill existing constitutional offices in modern, representative democracies is overly

hasty, as is on the other hand the fervent call for sweeping use of random selection to fill all our public offices. Second, a more systematic approach to the impact of randomness on political legitimacy, such as that sketched here, helps us understand more generally the ways that randomness contributes to legitimacy, as well as the institutions and contexts in which it should make a net positive contribution.

I close by noting that I am under no illusion that I will have delivered a knock-down argument for sortition as the democratic selection method of choice. As it was recently put to me, this idea will fundamentally divide those who believe in the capacity of average citizens from those who do not. Some of us are simply less democratically inclined than others. The ideas advanced above give expression to an uncommon, but arguably not unjustifiable, faith in the democratic ideal (Levinson 2006, 174-75).

Some of the skepticism surrounding sortition is rooted instead in the familiarity with election. Every modern experience with democracy begins and ends with election. This, however, need not have been the case. Had the American founding gone differently, perhaps with more accord going to the sentiments of the Antifederalists, or Thomas Paine, or James Wilson, we might all have a very different conception of democracy. The burden of proof would then

be on the other side.

However, as the burden is clearly on proponents of sortition, I will echo the calls others have made for more experimentation (Zakaras 2010). Many of the propositions advanced here are empirical ones, relegated to theoretical discourse only for lack of a venue in which to test them. In the critical tradition of democracy, and at this critical juncture in history, it is incumbent upon us more than ever to bring a more open mind to our thinking about the design of democratic constitutions, and to test institutional arrangements other than those with which we have become all too familiar. I offer the state of Texas as a place to start.

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