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The Two Sides of the Representative Coin

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ABSTRACT *In Federalist 10 James Madison drew a functional distinction between "parties" (advocates for factional interests) and "judgment" (decision-making for the public good) and warned of the corrupting effect of combining both functions in a "single body of men." This paper argues that one way of overcoming "Madisonian corruption" would be by restricting political parties to an advocacy role, reserving the judgment function to an allotted (randomly-selected) microcosm of the whole citizenry, who would determine the outcome of parliamentary debates by secret ballot—a division of labour suggested by James Fishkin's experiments in deliberative polling. The paper then defends this radical constitutional proposal against Bernard Manin's (1997) claim that an allotted microcosm could not possibly fulfil the "consent" requirement of Natural Right theory. Not only does the proposal challenge Manin's thesis, but a 28th Amendment implementing it would finally reconcile the competing visions that have bedevilled representative democracy since the Constitutional Convention of 1787.*

Introduction

This paper follows the example of Hanna Pitkin (1967), Bernard Manin (1997) and James Fishkin (2009) in adopting a hybrid approach to the study of political representation. The reader will thus be taken on a roller-coaster ride, involving a combination of the history of political thought and analytical political philosophy alongside a consideration of some recent social science experiments in the practice of deliberative democracy. Although the focus is a practical proposal for constitutional change, the paper starts by attempting to clarify the concepts involved.

All good sermons begin with a quotation from canonical scripture, and my chosen text is the Epistle of St. James [Madison] to the New Yorkers, in the tenth chapter, beginning at the eighth verse:

> [a] body of men are unfit to be both judges and parties at the same time . . . Yet the parties are, and must be, themselves the judges; and the most numerous party, or, in other words, the most powerful faction must be expected to prevail (*Federalist Papers*, vol. 10, para. 8).[2]

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In this important passage "Publius" (James Madison) outlines two opposing aspects of political representation—"judgment" (disinterested decision-making) and "parties" (interests)—that, when combined in a single "body of men," have a tendency to corrupt each other: for legislative decision-makers are also "advocates and parties to the causes which they determine" (*Federalist*, 10, para. 8). Madison's view on political *judgment* appears to be that of a classical republican who believed in the possibility of virtue in human affairs (Banning, 1988, pp. 194-195); but from the point of view of *parties* (interests) he is a proto-liberal, "concerned with men who are pursuing their own interests, sometimes rationally calculated, in a system that is more amoral than immoral" (Howe, 1988, p. 108). Liberal, that is, until one considers the *passions* that underlie those interests, at which point Madison's pessimism regarding the need to impose controls on the evil inclinations of man is close to Thomas Hobbes or even John Calvin.

But how can one writer be all these three creatures—republican, liberal and Calvinist/Hobbesian—at one and the same time? Madison, like many of his eighteenth-century peers, was steeped in "faculty" psychology,[3] which posited an ascending hierarchy of human nature: from the "mechanical" through the "animal" to the "rational" (Howe, p. 109). According to this school of thought, the passions were part of man's animal nature but "interest" inhabited a precarious half-way house—"passionate" when parties are motivated by short-term *self*-interest, "prudential" when motivated by long-term and *general* considerations. At the top of the pinnacle stood reason and conscience: collective, dispassionate, wise and virtuous. Unfortunately, as Alexander Pope realized, "the ruling passion conquers reason still," leading Madison to the Calvinist conclusion that the "stern virtue [reason] is the growth of few soils" (*Federalist*, 73, para. 1). This is one reason why he advocated the enlarged republic, as it would provide a deeper pool from which to elect "a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations" (*Federalist*, 10, para. 16), thereby ensuring that *judgment* was exercised by "the elect"—representatives of "enlightened views and virtuous sentiments" (*Federalist*, 10, para. 21).

Madison deplored the formation of *parties* or "factions"[4] because they seduced interests away from long-term and general considerations (*Federalist*, 50, para. 6); furthermore he acknowledged that parties were likely to predominate, owing to the strength of the passions, and would thus tend to corrupt the constitution. Hence the second role of the extended republic, over and above that of ensuring the judgment of a virtuous elite: "extend the sphere, and you take in a greater variety of parties and interests" (*Federalist*, 10, para. 20). In an extended republic, with large constituencies, the multiplicity of interests balances out as "ambition counteracts ambition" (*Federalist*, 51, para. 4). *Divede et impera*: divide interests and reason will—given sufficient time—conquer all.

While Publius was advocating the positive benefits of the *enlarged* republic, his Antifederalist opponents argued that the preservation of republican *virtù* required *small* political units and a primarily agrarian economy.[5] They rejected the aristocratic hierarchy of merit assumed by faculty psychology, arguing instead the democratic case that the legislature should represent all "classes" (occupations) "descriptively": "the farmer, merchant, mecanick and other various orders of

people, ought to be represented according to their respective weight and numbers" (Dry, 1985, p. 125).

Unfortunately events such as Shays's rebellion[6] meant that the delegates at the US Constitutional Convention were more than a little nervous about Antifederalist plans for the legislature accurately to reflect the weight and numbers of the *demos*, so Publius won the ratification battle. However he lost the war. All the calamities that Madison predicted through combining judges and parties in a "single body of men" quickly came to pass. Partisan interests and the corrupting influence of money, media and celebrity quickly put paid to his hope that an enlarged republic would produce enlightened and virtuous representatives. The unanticipated seizure of power by political parties during Madison's own lifetime meant that his hopes that the enlarged republic would balance out interests by allowing "ambition to be made to counteract ambition" (*Federalist*, 51, para. 4) were dashed by the forces of factionalism. Interests and judges became well and truly fused in an electoral system dominated by factional political parties. Madison's "republican remedy for the diseases most incident to republican government" (*Federalist*, 10, para. 23) turned out be more akin to a dose of quack medicine.

A Binary Solution to the Representative Conundrum

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

> One of the reasons why [the legislature] is so prone to the evils of factionalism, Publius argues, is that legislators are constantly being cast in the dual role of advocates and judges in the causes before them (*Federalist*, 10, para. 8). Their self-interest corrupts what should ideally be a disinterested pursuit of the common good (Howe, 1988, p. 124).

But if Madison is right—judgment and the advocacy of interests are impossible to combine in one "body of [fallen] men"—then why not have *two* bodies (judges and advocates) created by two entirely different systems of representation?[7]

According to Hanna Pitkin (1967), the primary duty of a representative is active advocacy—looking after the *interests* of her constituents. Active representation does not require that an elected representative should resemble her constituents in any respect, only that she should act as a trustee or advocate for their interests, in a similar manner to a lawyer representing the beneficiaries of a trust fund. Competitive elections are the time-honoured way to choose advocates to act on behalf of voters' interests. In politics, however, we expect our advocates also to be judge and jury (and, in the case of fused parliamentary systems like the UK, executioner as well). But how can a member of the tiny elite of "natural" aristocrats returned by the elective process overcome her own self-interest and that of the faction she represents, so as to judge impartially on behalf of the whole nation? [8] According to the Antifederalist view, this would require an aggregate solution: the legislative assembly should be "an exact portrait, in miniature" of the whole citizenry (Adams, 1988, para. 13), one that represents the nation "descriptively": the "farmer, merchant and mecanick" (Dry, 1985, p. 125), rather than predominately white, male lawyers (and Oxbridge PPE graduates). Where better to

look for a descriptively-democratic mechanism than fourth-century Athens, the birthplace of democracy?

Ancient Remedies for a Modern Disease

The legal process is indifferent to *who* the advocates are (they are chosen purely on their competence and rhetorical ability) but we insist that final judgment be reserved to a randomly-selected lay group (the jury) whose verdict represents the considered judgment of the whole community. But if this works for the law courts, then why not the High Court of Parliament? Most readers will share Antifederalist scepticism about the dispassionate, rational judgment of a "natural aristocracy of wisdom and virtue" (Howe, 1988, p. 117) magically transcending partisan interests.[9] Modern sensibilities are better represented by James Surowiecki's (2004) and Philip Tetlock's (2005) arguments that the aggregate "wisdom of crowds" is a more reliable and democratic way of judging most issues than reliance on experts and aristocrats, natural or otherwise. If there is such a thing as the "general will," then the best way to capture it is via the mechanical principle of Condorcet's "jury theorem" regarding the probability of a group of individuals arriving at a correct decision, rather than by privileging the "god's eye" view of an aristocratic elite (Grofman & Feld, 1988; Urbanati, 2006, Ch.6). This principle of the "wisdom of crowds" has its origins in Aristotle's *Politics*:

> The many, of whom each individual is but an ordinary person, when they meet together may very likely be better than the few good, if regarded not individually but collectively, just as a feast to which many contribute is better than a dinner provided out of a single purse. For each individual among the many has a share of virtue and prudence, and when they meet together, they become in a manner one man, who has many feet, and hands, and senses; that is a figure of their mind and disposition. Hence the many are better judges than a single man. (Aristotle, 2008, III.11.1281b)

The only way of harnessing the wisdom of crowds in a large nation state is via descriptive representation and, as the polling industry has demonstrated, the best way of ensuring accurate descriptive representation of large populations is through probability sampling using a randomly-selected microcosm (Levy, 2008) a process known, when applied to political representation, as *sortition*. Although the mechanism has its origins in fourth-century Athens (they even invented a sortition engine, the *kleroterion*) it has not fallen entirely out of use: in addition to the Anglo-American jury, the deliberative polling (DP) experiments of James Fishkin (2009) and his colleagues have shown that a randomly-selected group of ordinary citizens conforms to Condorcet's jury theorem: it can judge an issue just as rationally as any elite body—at least when supplied with balanced expert advocacy.

On the other hand *election* is the best—or perhaps the only—way of ensuring the active representation of interests. As Bernard Manin (1997) has argued, elections produce elites: "It is no accident that the terms 'election' and 'elite' have the same etymology and that in a number of languages the same adjective denotes a person of distinction and a person who has been chosen." (Manin, 1997, p. 140) This is because elections are designed to select the *best* candidate (*hoi aristoi*). Manin's

observation on the elite nature of the electoral process applies universally, irrespective of the extent of the franchise and the opportunity for everyone to stand as a candidate, so the term "elective democracy" is oxymoronic.

As we have argued above, the crucial question is how to combine the two distinct aspects of representation—judgment and parties—without incurring the factional evils that Madison deplored. A radical answer would be a binary division of roles within the legislature, as James Harrington proposed in his *Commonwealth of Oceana* (1656). Harrington's proposal was based on the Venetian ballot, which involved a combination of election and sortition. Harrington presupposed the complete separation of executive[10] and legislative powers and advocated a further separation *within* the legislature—responsibility for policy proposals being allocated to the "aristocratic" (elected) element in the legislature and voting rights restricted to the democratic (randomly-selected) element: "An equal commonwealth is a government founded upon balance . . . a senate debating and proposing, a representative of the people resolving, and a magistracy executing" (Harrington, 1992, p. 25).

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

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

Harrington's functional distinction between the role of the few and the role of the many resonates with Athenian political practice, for example Pericles' funeral oration: "Although only a few may originate a policy, we are all able to judge it" (quoted in Popper, 1950, p. 181). Harrington illustrates the natural justice of his binary constitution with the example of two girls dividing a cake equally:

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

In my own reworking of Harrington's proposal (Sutherland, 2008) both elements—*hoi aristoi* and *hoi polloi*—sit within the same house: the elective element proposes and debates legislative alternatives and the sortive element decides the outcome by voting, in a similar manner to a trial jury. The right of elected politicians (*hoi aristoi*) to introduce legislative proposals are restricted to the manifesto commitments of the political party or parties that won the most votes in the general election.[11] Given that the winners of the election are not forming a government but only putting forward policy proposals, a nationwide system of proportional representation would most accurately mirror the raw preferences of the electorate.

Allotted members have the monopoly of the vote but cannot propose legislative alternatives, as descriptive-democratic legitimacy applies only in aggregate, rather than to individual members. In this respect elected members correspond to Harrington's cake divider, whereas the allotted members correspond to the girl who chooses which slice of cake to eat.

A constitution along broadly similar lines has been proposed by Marcus Schmidt, who runs the largest Danish opinion poll organization (Hansen, 2005, pp. 54-55). Schmidt's proposal is for a 70,000-strong Electronic Second Chamber, selected annually by lot. As Denmark has only four million electors, this means that most citizens would serve for one year during their life, thereby emulating the rotation effect of Athenian-style sortition—"rule and be ruled in turn" (Aristotle, 2008, VI.1.1217b). The first chamber of parliament, elected on a party-political basis, continues to prepare all bills. Working members of the second chamber have a paid day off every week to study and debate the proposals and then vote by pincode-activated telephone (every vote is rewarded by a tax credit). In Schmidt's bicameral constitution, if the votes in the elected and allotted chambers fail to reach unanimity, then the proposal is put to a general referendum. However, the functional distinction within Harrington's legislature—between debating/proposing and resolving (known as "parties" and "judges" in Madison's terminology)—does not require a bicameral solution. Indeed the trial jury analogy suggests that both elements would need to meet in plenary as it is hard to understand how a jury could adequately judge a case without first hearing the evidence.[12]

The vote in the general election—the "raw preferences"—would inevitably be unreflective, as Anthony Downs's principle of "rational ignorance" still applies: an elector in a mass democracy has no reason to study the issues in depth because her individual vote has in effect no causal power. The power of the individual elector to change the outcome of elections is infinitesimally small: in modern democracies the extension of the suffrage cannot in the end empower individuals because once the democratic "cake" has grown past a critical size each voter's slice becomes so small as to be causally irrelevant. This is because, unlike other public goods such as street lighting, the causal efficacy of the vote suffers from diminishing returns as the franchise is extended. However, the democratic mythology hides this fact so that democracy is not believed to suffer from diminishing returns. When people see through the myth, and discover voting is causally irrelevant, apathy results (Graham, 2002) a result accurately predicted by Hegel (2010, para. 311).

However, the victorious party or parties in the election (*hoi aristoi*) would still need to convince the legislature through the force of their arguments, as voting rights would be restricted to the randomly-selected members (*hoi polloi*). It would no longer be possible for a victorious party to steamroller through a policy that was buried in an election manifesto that few had bothered to read or that was deliberately concealed before the election. But given it is the same electorate that is being balloted[13] in two complementary ways (preference elections and sortition) one would anticipate that the party/parties that won the election would also have a reasonable probability of winning the parliamentary vote. However—and this is the point—the victorious political parties would need to ensure that their policies won both the electoral (*unconsidered*) vote and the *considered* verdict of the same population, sampled descriptively—populism checked by deliberative rationality.[14]

The Problem of Consent and the Triumph of Election

A constitutional proposal along Harringtonian lines would inoculate the body politic against Madisonian corruption and would honour in full the distinction between "descriptive" and "active" representation. A randomly-selected legislature is a "portrait in miniature" (Adams, 1988, para. 13), one that mirrors the whole population "descriptively"—like one of Fishkin's deliberative polls; however, because the democratic legitimacy of such an assembly only applies in aggregate, it would be impossible for it to perform the *active* function of individual political representation, such as the initiation of legislative proposals, advocacy, and remonstration. But there is no reason why a descriptively-representative assembly should not *determine the outcome* of a debate, as the aggregate vote would reflect the considered views of the whole population. Fishkin points out that the etymological root of "deliberation" is the Latin *libra* (weighing) (2009, p. 35) so when a randomly-selected assembly member "like me" weighs up the arguments and judges accordingly then *I* am descriptively represented. But is it possible to take this further and argue that I thereby *consent* to the judgment of a randomly-selected assembly? The argument for this further claim would need to take the following lines (paraphrasing Fishkin, 2009, p. 194):

1. Someone "like me" would, *ex hypothesi*, exercise judgment in the same way that I would myself. The argument does not require a definition of the likeness criteria (age, gender, occupation, political preferences etc.), as the randomization process in principle reflects the incidence of *any* quality in the general population.
2. The number of representatives "like me" in an allotted assembly would be proportionate to the number in the general population. If the sample were not sufficiently fine-grained to reflect accurately the distribution of any quality deemed to be salient to the exercise of political judgment then the sample numbers would need to be increased accordingly. Only a relatively small sample would be needed to provide an accurate gender balance, whereas the proportional representation of, say, albinos or molecular microbiologists would require a larger sample. The rapid growth of the polling industry is a testimonial to the accuracy and validity of the probability sampling principle.
3. Therefore the aggregate judgment of the allotted assembly would represent the considered judgment of the whole population.[15]
4. *All* electors are currently deemed to consent to the results of a general election, whether or not "their" candidate was victorious; so the same principle should apply to the result of a vote in an allotted assembly, the only difference being the employment of one or other of the two mechanisms—election or sortition—that constitute a ballot. Although one might argue that the consent involved is at best tacit or hypothetical, the same is true in *both* instances of the ballot.

But according to Bernard Manin, this argument is false: "However lot is interpreted, whatever its other properties, it cannot *possibly* [italics added] be perceived as an expression of consent" (Manin, 1997, pp. 84-85). The only way of

establishing consent is via the mechanism of the preference election. This is on account of the Natural Right theory that was dominant at the time of the birth of representative government. But are preference elections really an effective way of demonstrating consent, given that the aggregated outcome can only approximate the views of the average voter? How can one be deemed to have consented to an outcome that one did not personally vote for? An investigation of the strength of Manin's argument requires a digression into the development of Natural Right theory. If in the end the notion of electoral consent has shaky foundations, then the Fishkinian alternative merits serious consideration, especially as the canonical narrative of electoral consent will be seen to rely on an archaic corporatist perspective of the social orders which is of little relevance in an age that emphasizes the sovereignty of the atomized individual.

Natural Right Theory

John Locke (1632-1704) is the best-known advocate of the principle that all legitimate government rests upon the consent of the governed. Just about the only thing that Locke had in common with his intellectual predecessor Thomas Hobbes was the shared belief that the commonwealth (civic society) was the result of a social contract between subjects and their government. Both writers are vague as to when and where this contract was signed. Hobbes—who did not have a high regard for historians other than Thucydides, whose work he harnessed for rhetorical purposes—argued, following Grotius and Selden, that the social contract was a *logical* deduction from observations on human psychology: given man's innate combination of fearfulness, egoism and pride, the only rational (prudential) course is for all men to exchange their natural freedom for the order and protection of the sovereign. Since each man's imperative is the preservation of his own life, it matters little what form the resultant government takes so long as its sovereignty is unchallenged and peace is preserved. The context for Hobbes's work was the English Civil War, hence his wish for peace at any cost: it is unsurprising that the war-weary should consent to any form of government that will ensure that the pikes can safely be returned to the thatch or, better still, melted down and turned into ploughshares.

What a difference forty years makes. With the turmoil and bloodshed of the Civil War behind them, Locke and his friends and patrons could afford the luxury of desiring not just the protection of their lives, but also their liberty and property. The latter meant that all (property-owning) citizens should *themselves* consent to the tax-raising requirements of the executive.[16] But this is where it all gets a little tricky, as Locke slips, without justification,

> from insisting on the individual's consent to taxation, to assuming the consent of only a majority, or even a majority of representatives. The slippage at [Locke, 1967] para, 140, p. 380 takes place within a single phrase: However fair or necessary taxation is, "still it must be with his own Consent, i.e. the Consent of the Majority, giving it either by themselves, or their Representatives chosen by them." (Hampsher-Monk, 1992, p. 104)

What makes the problem even worse is the historical fact that the parliamentary consent mechanism that Locke was describing had its origins not in the "bottom-up" theorizing of the social contract, but in the "top-down" requirement of medieval kings for the towns and counties of the realm to send knights and burgesses to meet with the king's council. Parliament was created for the convenience of the executive. Attendance was a "chore and a duty, reluctantly performed" (Pitkin, 1967, p. 3) and was in no sense considered a representative function. However "[t]he authorities who thus called for the election of representatives usually insisted that they be invested with full powers (*plenipotentiarii*)—that is to say, that the electors should consider themselves bound by the decisions of the elected, whatever those decisions may be" (Manin, 1997, p. 87). Thus electoral representation started out for the convenience of the executive, in order to establish the "consent" of the ruled:

> Once the delegates had given their consent to a particular measure or tax, the king, pope, or emperor could then turn to the people and say: "You consented to have representatives speak on your behalf; you must now obey what they have approved." (Manin, 1997, pp. 87-88)

Very often the elected representatives of the people were merely asked to give their seal of approval to what the authorities had proposed. There were usually no policy choices involved and the process was often limited to a mere "acclamation" (Manin, 1997, p. 88). Philosophers were then recruited to justify this *political* imperative, resulting in the theory of Natural Rights:

> [M]ost strong rights theories have in fact been explicitly authoritarian rather than liberal. Hobbes is representative, not exceptional. . . It is true that more liberal rights theories grew out of this conservative and authoritarian tradition . . . but the Grotian origins of these liberal theories cannot be ignored, for they were always uneasily close to their authoritarian counterparts. (Tuck, 1979, p. 3)

Given the tiny franchise of the late seventeenth century, and the domination of the Commons by the patronage of landed interests, MPs might very well have been unanimous in their opposition to levels of taxation that constituted an assault on their "natural right" to hold property. Locke was no democrat: "he stands on the whole for the Whig grandees, entrenched in the House of Commons" (Barker, 1971, p. xxvi) and for him, "by clear implication the test of membership is roughly equivalent to the forty shilling freehold" (Franklin, 1981, p. 125). Perhaps this is the reason that he appears not even to notice the conflation in his phrase: "his own Consent, i.e. the Consent of the Majority" (Locke, 1967, para. 140, p. 380). To a modern reader it is clear that one's own consent may or may not coincide with the majority position; but with a small, relatively homogeneous property-owning franchise, it may well have been that parliamentary representation was simply a case of "chaps like us" whom one could rely on to protect the family silver.

The construction of Lockean-style government-by-consent in a mass democracy of atomized individuals with disparate views and interests is a much more serious challenge. Hegel (like Burke) adopted the pre-modern perspective that political representation was conducted through the corporations of civil society: "[deputies] are representatives not of individuals or a conglomeration of them, but of one of the

essential spheres of society and its large-scale interests" (Hegel, 2010, p. 160). However, a representative assembly in a greatly expanded franchise becomes a congress of individual particular interests, so the distinction between the majority and minority positions becomes a very real one. How is it possible to maintain the principle that *everyone* should give their own consent under universal franchise with the inevitable conflict between the interests of a "multitude of the particular men" (Hobbes, 1969, p. 85).

Consent by Proxy

Consent by the mechanism of preference elections is at best partial, tacit and *approximate* as it reflects only the consent of the majority (or at least its corporate representatives) and there is no obvious way for parliamentary representatives accurately to divine what the actual views of their constituents might be.[17] But an alternative approach to electoral approximation, and one better suited to a mass individualist society, is sortive representation by *proxy—I* may not attend (and consent or dissent) in person but, if the sampling process is accurate, there would be people *like* me present who could participate on my behalf, and their presence would be directly proportionate to how many people "like me" there are in the wider population:

> A representative microcosm offers a picture of what everyone *would* think under good conditions. In theory if everyone deliberated, *the conclusions would not be much different* [italics added]. So the microcosm offers a *proxy* for the much more ambitious scenario of what would happen if everyone discussed the issues and weighed competing arguments under similarly favourable conditions. (Fishkin, 2009, p. 194)

But could representation by proxy ever be considered a form of *consent*? Can I be a party to a contract that I did not sign myself? Admittedly this is a difficulty. But it is no greater than that of mythical social contracts that are either the result, in Hobbes's case, of logical deduction of how a rational person would choose to act or, in Locke's case, "speculative economic history" (Hampsher-Monk, 1992, p. 90). And, as demonstrated above, the notion that consent is somehow embodied in electoral representation is true only under the near-unanimous conditions of the tiny property-based franchise of Locke's time. So consent by proxy would have to do very little work to improve on the dubious claims of consent by electoral approximation.

Fishkin's Rome healthcare DP enabled elected officials to argue that the "perceived legitimacy" of the DP results gave them the "cover to do the right thing" (Fishkin, 2009, p. 151): the implication is that electoral success and legitimacy are anything other than synonymous. The crucial issue here is that of perceived legitimacy. A sophisticated knowledge of probability theory is required in order to understand how a sample can truly be representative of a target population. Probability theory was unknown in classical times, casting doubt on the claim that the lot was used as a method of random sampling: Dowlen (2008) argues that sortition was primarily a mechanism to inhibit factionalism and corruption.[18] But that does not rule out probability sampling as a way of representing public

opinion in modern times (otherwise the opinion pollsters would all go bankrupt). All that is needed is to educate the wider public about the perceived legitimacy of the lot.

Participants in a symposium on Fishkin's book noted that careful experiments in deliberative polling are the best way of establishing the perceived legitimacy of majoritarian decision-making by a randomly-selected deliberative forum. Jane Mansbridge describes Fishkin's work as the "gold standard of attempts to sample what a considered public opinion might be on issues of political importance" (Mansbridge, 2010, p. 55). Focussing on the issue of consent, she describes the consent afforded by citizens to electoral representation as "somewhat tacit" and based on "incomplete information, incorrect premises, or manipulated loyalties" (Mansbridge, 2010, p. 57). Her hope is that lot will "make a significant comeback" but that would require both "a nuanced theoretical discussion of its [normative] legitimacy" as a form of representation and "sufficient citizen experience with the institution to make an informed judgment" (Mansbridge, 2010, p. 57). We are only just beginning on this path, Mansbridge concludes, and Fishkin's book is a milestone along the way, although "it will take a while for the public and for the deliberative system as a whole to give Deliberative Polls the credibility and the respect that they deserve" (Mansbridge, p. 60).

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

> The legitimacy arises from both the equal probability that any given person (discounting for minimal baseline qualifications) might have been chosen and the perception by those not chosen that the system of lottery selection assures the relative "representativeness" of the sample chosen. To adopt the language of Bill Clinton, the deliberative assembly will look sufficiently "like America" to provide necessary reassurance that one's own views are not absent from the assembly. (Levinson, 2010, p. 66)

Although Levinson acknowledges that the necessary grasp of probability theory ("representativeness") will require a great deal of sophistication on the part of ordinary citizens, the biggest obstacle is the vested interests of elected legislators. Fishkin's 2007 DP in Zeguo, China, did not suffer from this as the results were eagerly implemented by the local party leaders and People's Congress, thus suggesting that liberal democracy may actually *impede* the institutionalization of the deliberative process. The success of the Zeguo DP has given rise to further projects in China which provide a judicious mix of élite and deliberative democracy, providing the "first glimmerings of another model" which "may set an example for public consultation in many settings around the world" (Fishkin, 2009, pp. 155-156). The response from the political class in liberal democracies has been less enthusiastic: turkeys are unlikely to vote for Christmas because, in the (possibly apocryphal) saying of John Roche (paraphrasing Acton): "power corrupts, and the possibility of losing power corrupts absolutely". As a consequence Fishkin appears to be cautiously promoting the DP as an informed focus group.

This paper, however, has argued that deliberation by an allotted microcosm is a *more* legitimate way of indicating democratic consent than its electoral equivalent. As Fishkin puts it, "consulting the public's considered judgments is a bit like seeking its collective informed *consent* [italics added]" (2009, p. 195). One might

counter that perceived legitimacy is not the same thing as consent, but the legitimating narrative of electoral democracy fares no better on this score: few governments have the electoral majority's vote. If a hypothetical contract (social or otherwise) is not worth the paper that it's not written on, then perhaps we need a new discourse for the age of universal suffrage rather than the notion of consent, which was more appropriate to a corporatist age and a comparatively narrow and homogeneous franchise.

Conclusion

This paper has attempted to refute Bernard Manin's claim that the inexorable "triumph of election" is predicated on the Natural Right consent principle, and to provide an outline sketch of how the sortive alternative of what might be termed consent by proxy would be more relevant for the atomized individualism of modern multicultural societies. Several other sortive proposals have featured in the recent literature (Burnheim, 1989; Callenbach & Phillips, 2008; Lieb, 2004; O'Leary, 2006) but they are all potentially open to corruption on account of their failure to acknowledge and implement Madison's fundamental distinction between "judgment" and "parties." The Federalists won the ratification debate at the Constitutional Convention; a compromise solution would have included the Anti-Federalist proposal for descriptive representation by proxy. Perhaps now is the time for a 28th Amendment to reconcile the Federalist and Antifederalist viewpoints by implementing the proposal for a binary legislature outlined in this paper.

Notes

[1] I am grateful to Conall Boyle, Bob Brecher, Jan-Willem Burgers, John Burnheim, Gideon Calder, Lyn Carson, Oliver Dowlen, Yoram Gat, Gordon Graham, Mogens Herman Hansen, Daniel Howe, Ivo Mosley, Jason Maloy and Peter Stone for comments on earlier drafts of this paper.

[2] In view of the numerous editions of the *Federalist Papers* and other works of canonical scripture, all references are to volume and paragraph rather than to a specific edition.

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

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

[5] Antifederalists preferred the simple and heroic Spartan virtues to the corrupting influence of commerce and trade in unnecessary luxury goods: "Frugality, industry, temperance and simplicity—the rustic traits of the sturdy yeoman—were the stuff that made society strong" (Wood, 1969, p. 52).

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

[7] The generic use throughout this essay of the words *advocate* and *judge* should not be confused with their specific judicial meaning; also *parties*, *interests* and *advocates* are treated as synonyms. Also, although Howe (1988) associates advocacy with self-interest, one can also be an advocate for a cause on the basis of ideological conviction—the motivating claim of many political activists.

[8] Nadia Urbanati also acknowledges the conceptual distinction between advocacy and judgment ("deliberation" in the sense of weighing alternatives) along with Madison's dilemma that "the actors who advocate their cause in the assembly are the same ones who pass judgment" (Urbanati, 2006, p. 47). However her response is purely normative: "impartiality is at most a prescriptive maxim and a moral duty," and relies on Aristotelian and Ciceronian notions of the norms of deliberative rhetoric: "Advocates must 'feel' the force of others' arguments in order to envision the path toward the best possible outcome" (Urbanati, 2006, p. 47). That glosses over three obvious problems. First, classical rhetoricians assumed moral virtue as a prerequisite in debate, whereas their modern equivalents presuppose knavery (Remer, 1995); second, the term *advocate* is drawn from jurisprudence, where the *judging* is performed by a supposedly dispassionate jury; and third, modern UK and similar parliaments are characterized by an almost total absence of deliberation (the outcome of the *debate* being predetermined by the parliamentary arithmetic) whereas in US-style constitutions, pork trading has more influence on judgment than deliberative rhetoric. Compare also Pettit, 2010, p. 65, drawing on Skinner, 2005.

[9] The early-modern republican theorist James Harrington anticipated the modern view that élites were simply better at dressing up their own interests in discursive form. In fact by *wisdom* Harrington does not mean a "Platonic capacity to know metaphysical truths," but simply an ability of the élite to calculate its own interests (Remer, 1995, p. 552): "Reason is nothing but interest, there be divers interests, and so divers reasons" (Harrington, 1992, p. 171).

[10] Although this paper does not address how the executive should be constituted, Harrington's analysis would suggest that it is not a political office. If competence is the foremost requirement then there is no reason in principle for the appointment of government ministers to be any different from the recruitment process for any other senior organisational role. The general argument of this paper—that the distinction between the three aspects of political power (advocacy, judgment and execution) should be maintained by a unique selection mechanism for each role—would rule out using one process (election) for the selection of advocates *and* executives. The founders of the American republic deplored the corruption of the legislature by the executive and would have been equally dismayed by modern presidents acting "politically."

[11] In addition, government ministers would be entitled to introduce bills of a housekeeping nature as secondary legislation is normally viewed as an executive function.

[12] For details of how to ensure balanced expert advocacy to enable a well-informed decision, an essential part of the Deliberative Polling experiments, see Sutherland, 2008, pp. 133-8.

[13] According to the OED, the word *ballot* incorporates both meanings—elections and selection by lot.

[14] The time delay between the original elections and the debate in the allotted chamber would also greatly improve the quality of legislation by allowing space for extended deliberation in the media and the general public, an essential part of Condorcet's constitutional proposal (Urbanati, 2006, Ch. 6).

[15] This was the principle behind the *nomothetai* (legislative courts) introduced in fourth-century Athens. The nomothetai were selected by lot from among the jurors who were over thirty and who had taken the dikastic oath. "It was the wisdom of advanced age combined with the importance of the oath that distinguished the *nomothetai* from the Assembly" (M.H. Hansen, personal communication; c.f. Hansen, 1990, pp. 222-226).

[16] "[M]en must themselves consent (they cannot be bound . . . by the consent of their predecessors)" (Tuck, 1979, p. 172).

[17] "Today, a person is deemed to be politically 'represented' no matter what, i.e., regardless of his own will and actions or that of his representative. A person is considered represented if he votes, but also if he does not vote. He is considered represented if the candidate he has voted for is elected, but also if another candidate is elected. He is represented, whether the candidate he voted or did not vote for does or does not do what he wished him to do. And he is considered politically represented, whether 'his' representative will find majority support among all elected representatives or not" (Hoppe, 2001, pp. 283-284).

[18] Manin, however, argues that "thinking about the political use of lot may have led the Greeks to an intuition not unlike the notion of mathematically equal chances. It was true, in any case, that lot had the effect of distributing *something* equal in terms of number (*to ison kat'arithmon*), even if its precise nature eluded rigorous theorization" (Manin, 1997, p. 39). Tuck notes that the *estimation of probabilities* predates Leibniz and Huygens's mathematical studies—appearing, for example, in the writings of Grotius and the members of the Tew Circle, thereby casting doubt on Ian Hacking's account of the context in which the concept of probability emerged (Tuck, 1979, pp. 104-5).

> Whenever a medieval cook stirred the chunks in a cauldron of soup and then sampled it with a ladle she was expressing a confidence that the ingredients sampled in the spoon would be *proportionate* to the whole cauldron (the variables being the size of the spoon, the size of the chunks and how vigorously the cauldron is stirred). This may also help explain why many mathematically-challenged writers working in this field (including Fishkin and the present author) thought they had dreamed up the idea of sortition through their own sheer intellectual brilliance, only to find out later that they were reinventing a very worn wheel.

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