Why Hybrid Bicameralism is Not Right for Sortition

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Abstract

In this paper I examine structural problems with simply incorporating sortition into a traditional bicameral system. I argue that utilizing an all-purpose legislative chamber, modeled on existing elected chambers, is a mismatch for sortition, and that combining many different sorts of mini-publics with different characteristics and functions is preferable. I argue that the purported benefits of maintaining partisan elections alongside sortition are illusory. I then argue that any alleged benefits of maintaining parallel elected and sortition chambers within a hybrid bicameral system are outweighed by a variety of harmful effects, including negative effects on; agenda setting, active aptitude, descriptive representativeness, diversity, and resistance to corruption. Further more, even if these harms are not substantiated, the continued existence of an elected chamber dealing with the same bills as the sortition chamber will likely lead to the delegitimation of the sortition chamber. I conclude with a proposed alternative way forward for sortition by peeling away topic areas one at a time from elected bodies and transferring them to sortition bodies.

Introduction

Proposals for incorporating sortition into the law-making process frequently envision a hybrid bicameral legislature with the members of one of the chambers selected by lot.[1] This could be a transitional model on the path to a fully sortition-based legislature—sort of a trial run to see if such a body can behave in a competent manner. But for many theorists it is the final goal. Gastil and Wright argue that despite the host of problems with election-based representation, there are important beneficial aspects of an elected chamber that would be lost in an all-sortition system. I will argue that the purported benefits of maintaining elections are illusory. Also, the all-purpose legislative chamber design is a mismatch for sortition, which would sabotage sortition's hoped for

1 See for example Gastil and Wright, "Legislature by Lot: Envisioning Sortition within a Bicameral System," *Politics & Society* 2018, Vol. 46(3) 435– 451, which is the paper to which this paper was written as a response, Arash Abizadeh, "Representation, Bicameralism, and Sortition: Reconstituting the Senate as a Randomly Selected Citizen Assembly," (paper presented at bicameralism workshop, Draft of 2016-12-02, McGill University, 2016). also Anthony Barnett and Peter Carty. *The Athenian option radical reform for the House of Lords* (Exeter: Imprint Academic, 2008). and Keith Sutherland, "The Two Sides of the Representative Coin," *Studies in Social Justice* (2011).

benefits and delegitimize a sortition chamber. I will conclude by arguing that there are better ways to evolve into a virtually all-sortition law-making system.

Purported benefits of maintaining an elected chamber

In this section, I will examine several commonly asserted benefits of maintaining an elected chamber alongside a sortition chamber. Citizens would be loath to forfeit an elected chamber for fear of losing at least five presumed benefits: the societal benefits of parties; the utility of having elected officials as authorized negotiators; the political leadership cultivated by electoral politics; and the political expertise provided by elected officials. In turn, I will cast doubt on the existence, or importance, of each.

Benefits of parties

Without elections it is suggested that parties would atrophy, yet parties ideally play an important role in formulating political programs, educating the public about policy alternatives, and mobilizing citizens. Others argue that US parties "have become little more than political labels behind which well-financed candidates organize their electoral bids."[2]

Parties would inevitably change in an all-sortition system, but they would not necessarily atrophy. Active political parties have organized across the globe under non-electoral regimes, even when outlawed. Rather than contending in elections, parties would aim to influence the general public, who would form the minipublics. And, of course, political parties are not the only avenue for important social mobilization, with Black Lives Matter, Occupy Wall Street, or the Pro Life movements in the US being examples. With parties stripped of their unique electoral significance, such popular mobilizations might be more common and effective under a sortition system.

2 Frank Fischer, *Democracy and expertise reorienting policy inquiry* (Oxford: Oxford Univ. Press, 2009), 61.

But let's focus in on the effects of eliminating the competitive electoral function of political parties in an all-sortition democracy. Anthoula Malkopoulou argues that voting in elections "offers a real and continuous relationship between government and citizens that, aided by the excitement of competition, produces a higher incentive to stay informed and form an opinion about general political issues."[3] She speculates that "sortition does away with the momentum of discursive interaction and contestation, which the experience of election provides."[4]

We need to scrutinize the nature of the "discursive interaction" of partisan politics, and not presume that it is inherently beneficial for society. As with most news coverage, the engagement focuses on the tactics of the partisan contest itself, rather than the ideas that are presumed to underlie that contest. Not all electoral democracies experience the level of partisan animosity present in American politics, but the divisions within society into warring factions of us vs. them certainly have some negative consequences that would carry over into civil society and hence into a minipublic. We need to consider whether incompatible interests result in antagonisms that in turn get expressed through political parties, or if political parties fan, or even manufacture, differences to frighten and mobilize constituencies. Both occur, but as I discuss in the next section, elections are not the only—nor necessarily the best—way to manage incompatible interests.

Researchers have found that people who are deeply engaged in partisan political issues and follow the news are also likely to have an elevated, yet false, sense of their own level of understanding of the issues,[5] This leaves them ill-prepared for the meaningful give-and-take of deliberation. Disturbingly, it turns out that voters informing themselves (reading the newspapers, watching TV news, etc.) to keep up on public issues do not become more adept at evaluating candidates or policy choices. A study by Brendan Nyhan of Dartmouth found that those with a favorable opinion about a particular political figure and who also had more political knowledge (in

3 Malkopoulou, 250.

4 Malkopoulou, 247.

5 Brendan Nyhan and Jason Reifler, "When Corrections Fail: The Persistence of Political Misperceptions," *Political Behavior* 32, no. 2 (2010).

that they followed the news, etc.) were more immune to factual corrections that contradicted their bias than were people who also had a favorable view of the politician but were less-well informed. Indeed, the factual corrections tended to harden the erroneous beliefs of the "better informed" participants, presumably as a sort of psychological defense mechanism.[6]

Thus, even balanced presentations, in a partisan environment fueled by competitive elections, may not lead to a common understanding of reality by citizens, as each chooses which facts to accept and which to reject. Partisan loyalty trumps reality. This "discursive interaction and contestation" frequently consists of parroting talking points generated by partisan propagandists, and may have more in common with the insult-yelling of die-hard fans of sports teams, than the republican virtues hoped for by some theorists. In sum, the vaunted "discursive interaction and contestation" in a party-based environment may make citizens *less* capable of learning and deliberating if selected to serve in a minipublic.

Authorized negotiators

Some issues are not amenable to the common-ground-seeking process of deliberation. Deliberation is based on the idea of participants being open to revising their opinions and preferences as they deliberate. However, as pluralists note, some public policy choices pit incompatible interests against each other and will inevitably have winners and losers. Negotiated compromise between conflicting interests is widely seen as the better way of resolving such conflicts compared to simply counting heads. Parties and elected representatives are seen to have legitimacy as bargaining agents empowered to cut deals on behalf of conflicting interests, whereas randomly selected citizens, not being authorized agents for constituencies, do not.

Because negotiation is such a prevalent part of decision-making in elected chambers (and elsewhere), it is common to assume that negotiation is the appropriate way to resolve conflicting interests. However, negotiation is not the only, nor necessarily the best, alternative to deliberation.

6 Nyhan.

Negotiation reflects relative power, and often involves threats as well as inducements. S*hould* public decisions necessarily be a manifestation of relative power? Even when power is more equal, negotiation often devolves to horse trading on completely unrelated policy matters. Negotiation and bargaining among elected legislators can mean: you get that amendment, which benefits your group but hurts society as a whole, and I get this other amendment, which benefits my group but hurts society as a whole. Indeed, legislators are especially motivated to negotiate deals when their sought after policies cannot be justified as beneficial to society.

One alternatives to both deliberation *and* negotiation (when incompatible interests clash) is arbitration with an impartial entity serving as judge in pursuit of fairness or justice.[7] This tool is "off the table" as an option in elected chambers, which evince relative power (rather than fairness). One can imagine a dispute resolution process in which each interest group on a particular issue offered their optimal compromise and a minipublic selected from among the possible compromises offered, using fairness, rather than power, as their standard. This process might deliver poor outcomes from time to time, but there is no reason to think results would be as bad as negotiated settlements within elected chambers today.

Cultivating political leaders

Gastil and Wright also assert that "elections create the possibility for political careers and the development of skillful politicians as political leaders."[8] I question the assumption that this variety of political leaders are, on balance, a positive thing for a democracy.[9] Leadership derives from the human proclivity for followership, which prompts citizens to suspend independent judgment and defer to leaders to whom they may have some emotional attachment. Followership is grounded in

7 Some interesting and practical suggestions for such an approach can be found in William Ury's book, *The Third Side: Why We Fight and How We Can Stop* (New York: Penguin Books, 2000).

8 Gastil and Wright.

9 I subscribe to the social construct analysis of political leadership advanced by Murray Edelman, that "belief in leadership is a catalyst of conformity and obedience." *Constructing the Political Spectacle* (Chicago: University of Chicago Press, 1988), 37. Narratives about the accomplishments of leaders should be treated with extreme skepticism, as explained by Philip M. Rosenzweig, *The halo effect: how managers let themselves be deceived* (London: Pocket Books, 2008).

fast, “automatic,” non-rational thinking.[10] Research suggests opinion leaders may lead people astray more often than to the best answers.[11] A leader may lead well on one matter, but also be followed on many unrelated matters about which the leader has no clue. Elected leaders also exhibit the dilemma of the package deal; a candidate with desirable leadership skills or personality traits may champion bad policies and vice versa, but the voters can't recombine these to create their ideal candidate.

Even if we accept, for the sake of argument, that good leaders are beneficial, elections are a poor mechanism for selecting and promoting desirable ones. The skills, motivations, and traits needed to win elections, including public relations skills and extreme self-confidence, are not necessarily the optimal attributes for socially-beneficial leaders. Elections tend to advance ego-driven men (meaning males) who are ill-suited for the give and take of deliberation. A candidate's projection of confidence—whether justified or not—can carry the day in elections. It is cliché to suggest that the accrual of power also has a tendency to corrupt, even if the candidate isn't sociopathic at the outset. Dr. David Owen, former British Foreign Secretary and member of parliament in the UK has even proposed that the medical community recognize a diagnosis of “hubris syndrome”—a sort of intoxication that can be brought on by serving in high office.[12] In a hybrid bicameral system, the persistence and prominence of power-motivated elected political leaders would tend to sabotage the benefits of sortition, as these leaders’ influence would extend beyond their elected chamber to influence its counterpart.

Political expertise

Another argument for maintaining elections is the presumed political expertise of elected officials. I am not aware of any compelling evidence that elections are effective at selecting individuals with unique competence at governing. James Surowiecki, in *The Wisdom of Crowds*, points out that we

10 Daniel Kahneman, *Thinking, fast and slow* (New York: Farrar, Straus and Giroux, 2015).

11 Joshua Becker, Devon Brackbill, and Damon Centola, “Network dynamics of social influence in the wisdom of crowds,” *Proceedings of the National Academy of Sciences* (June 2017).

12 David Owen, The hubris syndrome: Bush, Blair and the intoxication of power (York: Methuen & Co., 2012).

shouldn't believe people are more expert simply because they assert as much.[13] A feeling of certainty that one is right just as often signals a lack of intellectual humility. Failure to recognize one's ignorance impedes deliberation and stunts the growth of actual expertise.[14]

Moreover, we should not conflate *political* expertise and *policy* expertise. Often legislators' policy expertise is superficial or narrowly confined to a handful of issues with which their particular committees deal. In fact, most expertise resides in the professional staff and lobbyists (who draft nearly all bills), rather than in the politicians themselves.[15] One problem with *electing* representatives is that they have a distorted interest in consulting fundraising and campaign experts more than genuine policy experts and shaping policies accordingly.

By contrast, a sortition minipublic would presumably recognize the need to employ and consult genuine policy experts. Just as legislators hand off the details of drafting and negotiating legislation to staff, the sortition body would do the same—but without giving special consideration for lobbyists who want to tailor those details to their own purposes.[16]

Even assuming allotted citizens start out with cognitive biases comparable to those of elected representatives, it is far more feasible for a minipublic to require a well-designed deliberative architecture to dampen "the known cognitive biases of human beings,"[17] rather than exacerbate them. Citizen deliberators can also more feasibly be required to have training that minimizes psychological traps. Carey Morewedge and colleagues found that training can

13 James Surowiecki, The wisdom of crowds: why the many are smarter than the few and how collective wisdom shapes business, economics, society and nations (London: Little, Brown, 2004).

14 Studies have found no significant difference between liberals and conservatives in this regard, but it seems likely that the subset of individuals from across the political spectrum who are willing to run for office tend towards harmful "intellectual arrogance" rather than beneficial humility. See Mark R. Leary, Kate J. Diebels, Erin K. Davisson, Katrina P. Jongman-Sereno, Jennifer C. Isherwood, Kaitlin T. Raimi, Samantha A. Deffler, Rick H. Hoyle, "Cognitive and Interpersonal Features of Intellectual Humility," *Personality and Social Psychology Bulletin* (43, no. 6, 2017).

15 Victoria F. Nourse and Jane S.Schacter, "The politics of legislative drafting: A Congressional case study," *New York University Law Review* (77 no. 3, June 2002).

16 In his 2009 memoir, Senator Ted Kennedy estimated that 95% of the drafting and negotiating in congress is done by staff rather than legislators. Edward M. Kennedy, *True compass: a memoir* (New York: Twelve, 2011), 486.

17 Hélène Landemore, Democratic Reason: Politics, Collective Intelligence, and the Rule of the Majority (Princeton NJ: Princeton University Press, 2013), 122.

successfully reduce cognitive bias in both the immediate and long term.[18] Overcoming cognitive biases, motivated reasoning, and automatic judgments creates a more competent decision-making body.

Benefits of sortition are lost with continued elections

My concern is that the hoped for beneficial effects of sortition in one chamber would be overwhelmed by negative bleed-through from the elected chamber. In this next section, I will argue that if an elected chamber deals with the same bills as its sortition counterpart, this would sacrifice many of the potential benefits of sortition.

Agenda Setting

Politicians who are constantly preparing for the next election seek out and bring to the fore those issues that they believe will help them in the next election. Important long-term issues (but with less public salience) often fail to make it onto the agenda until they become a crisis that cannot be ignored.

In a hybrid system, the agenda setting priorities of the elected chamber will still monopolize the news, public awareness, and—unless artfully shielded—the attention of members of the sortition chamber. A substantial portion of the sortition chamber's agenda will be established by what bills the elected chamber sends them. As Murray Edelman explained in *Constructing the Political Spectacle*, “Perhaps the most powerful influence of news, talk, and writing about problems is the immunity from notice and criticism they grant to damaging conditions that are not on the list.”[19] A sortition chamber in a hybrid system may be able to raise some issues, but political gravity will constantly draw it back to agenda favored by elected politicians.

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18 Carey K. Morewedge et al., "Debiasing Decisions Improved Decision Making With a Single Training Intervention," *Policy Insights from the Behavioral and Brain Sciences* 2, no. 1 (2015).

19 Edelman, 14.

Rational Ignorance and active aptitude

When compared to mass voting, whether in candidate elections or issue referendums, sortition is often touted for its ability to overcome *rational ignorance*. When a citizen has one vote out of millions, there are no rational grounds for investing significant effort into learning the ramifications of the various choices on a ballot.[20] Elections and opinion polls reflect inevitably ignorant, off-the-cuff public opinion. But if placed within representative minipublics, where it is reasonable to believe that one's vote could really matter, lay participants would have motivation for a conscientious performance of duty—what 17th -18th Century philosopher Jeremy Bentham called "active aptitude."[21]

The fruition of sortition's hoped for benefits is dependent on the political environment and the institutional design of the minipublic (term of office, volunteer or quasi-mandatory service, size, etc.). Jon Elster adopts the terminology of Jeremy Bentham to summarize the desiderata of any minipublic using the example of a constituent assembly tasked with writing a constitution:

> Generally speaking...the assembly ought to be organized to promote the moral aptitude, intellectual aptitude, and active aptitude of the framers. By moral aptitude I shall understand impartiality (in the negative form of disinterested and dispassionate decision making). By intellectual aptitude, I shall understand absence of cognitive bias at the individual level and diversity at the collective level. By active aptitude, I shall understand the full attention and concentration of the constitution-makers to their task, by making it seem worthwhile and by eliminating other charges that might occupy them.[22]

When paired with an elected chamber, however, the members of the sortition chamber are less likely to attain active aptitude. When people face a daunting cognitive task and experience uncertainty, it is natural for them to defer to those with higher status who project a demeanor of

20 Anthony Downs coined the term in, *An Economic Theory of Democracy* (New York: Harper & Bros., 1957)., while Bryan Caplan takes it one step further arguing that voters gain psychological utility from irrational loyalty in his book *The myth of the rational voter: why democracies choose bad policies* (Princeton: Princeton University Press, 2007).

21 By "aptitude" he does not refer to an inherent character trait, but the effect of procedures. Jeremy Bentham and Philip Schofield, *Securities against misrule and other constitutional writings for Tripoli and Greece* (Oxford: Clarendon Press, 2009).

22 Jon Elster, *Securities against misrule: juries, assemblies, elections* (Cambridge: Cambridge Univ. Press, 2013) 202.

certainty.[23] Within a partisan electoral environment, where a strong sense of team loyalty or tribalism is fomented, it seems likely that many members of an allotted chamber would adhere to their favored party leaders' platforms The sortition chamber would have a cognitive "social loafing" or "free-rider" problem. When another chamber dealing with the same pieces of legislation, full of articulate and often charismatic people who insist they have figured out the right answer, are pushing members of an allotted chamber to follow their lead, the slow and rational thinking falls by the wayside.

Team loyalty regularly trumps independent rational analysis. In studies conducted by Geoffrey Cohen, partisan voters were asked to evaluate a policy proposal in a news story. Some participants read a version of the story that suggested a policy (for example, a stingy welfare proposal) was favored by prominent Democrats, whereas other participants read a version of the story that suggested it was favored by prominent Republicans. The participants' own evaluations of the policy closely mirrored the suggested preference of the party they generally agreed with, regardless of whether the policy would independently be deemed liberal or conservative.[24]

Partisan leaders have immense influence when it comes to framing public understanding of policies. As one example, look at popular impressions of the 2010 Affordable Care Act (or "Obama Care"). In hopes of gaining some bipartisan support, President Obama jettisoned his earlier support of single-payer health care reform (favored by many health care reformers, especially on the left) and instead advanced a private market-based approach which mandated that Americans purchase insurance or face a tax penalty. This approach was originally advanced by the conservative Heritage Foundation in 1989, enacted in 2006 in Massachusetts and embraced by the Republican Governor Mitt Romney. Indeed, this kind of reform was known as "Romney-Care" before it was repackaged and came to be known as "Obama-care" on a national level. Like the participants in the Cohen

23 Margaret T. Lee and Richard Ofshe, "The Impact of Behavioral Style and Status Characteristics on Social Influence: A Test of Two Competing Theories," *Social Psychology Quarterly* 44, no. 2 (1981).

24 Geoffrey L. Cohen, "Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs.," *Journal of Personality and Social Psychology* 85, no. 5 (2003).

study described above, relying on the heuristic of partisan leadership, most Democrats quickly embraced Romney-care/Obama-care, while Republicans attacked it and even made its repeal a center-piece of subsequent election campaigns. The ideological underpinnings, and operational details of the reform became irrelevant, as the mental short-cut based on team loyalty trumped substance.

The sortition chamber in a hybrid bicameral system may not degenerate to a mere rubber-stamp for the elected chamber's decisions, but the full potential of sortition will not be realized. This loss of active aptitude underlies a whole host of other losses of anticipated sortition benefits.

Other benefits lost

The descriptive representativeness and diversity of cognitive styles touted by sortition advocates would be significantly harmed by the continuation of an elected chamber. [25] A chamber selected by lot would still *look* diverse, but the loss of active aptitude will mean that the private knowledge and perspectives distributed across that diverse membership will be less likely to be expressed by those members. Status deferral and information cascades will short-circuit the wisdom of crowds.[26]

The anti-corruption potential of sortition, integrated into carefully designed assembly rules that promote "securities against misrule, is one of its most appealing characteristics."[27] Continued elections, however, risk corrupt the law-making process as a whole. It is possible that the sortition chamber could draw attention to that corruption, but contrary to the maxim that "sunlight is said to be the best of disinfectants, " experience suggests this is not an effective deterrent. Shining a light on institutionalized corruption is not enough.[28]

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25 Ernest Callenbach, and Michael Phillips, *A citizen legislature* (Berkeley, CA: Banyan Tree Books, 1985).

26 Cass R. Sunstein, *Why societies need dissent* (Cambridge, MA: Harvard University Press, 2003.)

27 Jon Elster (echoing Jeremy Bentham), has stressed this "defensive" potential of sortition in his *Securities against misrule: juries, assemblies, elections*. Also see Bentham, and Oliver Dowlen, *The political potential of sortition: a study of the random selection of citizens for public office* (Exeter (GB): Imprint Academic, 2009).

28 Well-illuminated corrupt politicians such as Rep. Chrales Rangel and Rep. Michael Grimm frequently win re-election. These and other examples can be found on the Open Secrets web site online.

Danger of delegitimation

In this section, I will set aside the concerns raised above and assume that all of the negative consequences of maintaining an elected chamber could be dealt with through careful design. If the sortition chamber is not a rubber stamp, what happens when the two chambers disagree about an important bill? In cases where both chambers are elected, they tend to have a nearly equal power relationship. But what would happen when one chamber is made up of people identified as chosen leaders, and one is made up of a random assortment of ordinary people? We can get an inkling by looking at countries where one chamber is elected and the other is not, such as the House of Lords in the UK or the Senate in Canada. In these cases, the bodies are *not* equal. The elected chamber is preeminent, even though the lesser body has the ostensibly prestigious title of "upper house."

What are some likely consequences of the sortition chamber rejecting a bill passed by the elected chamber? The two chambers would have a fundamentally different, and conflicting basis for claiming legitimacy, which might be summarized as the "principle of distinction"[29] and the "principle of equality and likeness." When in conflict with an allotted chamber, the members of the elected chamber would have a compelling strategic incentive to undermine the legitimacy of the sortition chamber. In contrast, the allotted members would not be protecting personal careers in politics, since they would shortly be "out of power" regardless. Unlike the allotted citizens, the elected members would tend to be highly practiced, articulate public speakers with exceptional public relations skills. Portraying themselves as champions for their constituents, the elected leaders would likely play the "natural aristocracy" card. It is easy to predict the themes they might use—dismissing the sortition chamber as "a random gaggle of dishwashers and hairdressers who are completely unaccountable to you, the people, because they never have to face you in an election."

29 Bernard Manin, *The principles of representative government* (Cambridge: Cambridge University Press, 2010).

Worse still, the natural hostility of elected representatives towards the sortition threat to their power in a hybrid system makes the evolution towards a sortition democracy unachievable. If sortition begins in a hybrid system, it may die there.

A better beginning for sortition

To avoid these problems, I propose a system that allows elections to coexist with sortition, though not in a bicameral design. In time, this could give way to an all-sortition system. Below, I explain why sortition should eschew an all-purpose chamber, use multiple citizen bodies, steer clear of elections, and extend its reach to the executive branch.

Avoiding an all-purpose legislative chamber

An all-purpose legislative chamber is a mismatch for sortition, whether in a unicameral or hybrid bicameral system. All-purpose elected bodies manage a huge variety of issues by dividing into smaller committees. The chamber as a whole does not meaningfully deliberate, or even understand the nuances of most of the bills they nominally debate and vote on. Instead, members rely on one of a few heuristics. Commonly, they simply defer to the judgment of the members of their own party who serve on the committee of reference.

This approach has shortcomings for elected chambers, but is even less appropriate for a sortition chamber. Even if members of the allotted body organized into partisan caucuses (undercutting one of the benefits of sortition), small committees would have a greater likelihood of being unrepresentative of the population, simply owing to smaller sample sizes. Deferring to even a conscientious committee could result in very unrepresentative decisions. The sheer number of bills under consideration by a bicameral chamber precludes dealing with them all in a committee of the whole. Hypothetically, this problem might be resolved with a vast chamber with hundreds of

members on each committee, but this has not generally been advocated by advocates of of hybrid bicameralism.[30]

Anthoula Malkopoulou notes that "lotteries may offer valuable improvement to current practices of democratic selection, but only if special measures are taken to compensate for the limitations they entail."[31] The special measures she intimates (e.g., limiting the role and power of minipublics) are nearly the opposite of those I favor, but we agree that one must fit the design to the unique character of minipublics.

Elected legislators constitute a full charge governing body. They create the public agenda, propose policies, nominally draft bills, advocate for and against bills, amend and perfect those bills, and finally sit in judgment of the bills they have developed to decide whether they should pass into law. This violates a widely recognized principle that the bias caused by pride of authorship requires that the author should not also be the judge of the final product. Bicameralism allows a separate group of representatives to duplicate these vertically integrated tasks, but Gastil and Wright's proposal makes no attempt to divide responsibilities between the two chambers based on the relative strengths of each one's design. A better solution requires more sortition bodies, with distinct purposes for each one.

Multi-body sortition

I envision an interconnected network of minipublics, each with a specific legislative function and a specific topic or issue. In addition to being a more desirable end state, unlike a full-charge chamber, the means of transition is built into the model itself. The only substantial experience we have with

30 David Owen and Graham Smith call for a large pool of randomly selected citizens, and they divide up tasks among subgroups in a way that bears some resemblance to this idea—but without an all-purpose chamber.

31 Anthoula Malkopoulou, "The Paradox of Democratic Selection: Is Sortition Better than Voting?" *Parliamentarism and Democracy Theory Historical and Contemporary Perspectives,* ed. Kari Palonen and José María Rosales, (Leverkusen: Budrich, Barbara, 2014), 230. Gastil and Wright do specify a number of reasonable, though modest, modifications to standard legislative chamber practices for a sortition body, but these do not seem sufficient to me. Karl Marx in evaluating the Paris Commune noted that "the working class cannot simply lay hold of the ready-made state machinery, and wield it for its own purposes." An all-sortition legislature would constitute a fundamental change of class control (whether one thinks of elected legislators as a "political class" or servants of a "capitalist class"), though expressly not in a Leninist "vanguard party" sort of way.

modern-day sortition is with minipublics that have a single function and topic. It is questionable how well they inform us about how well a full-charge sortition chamber might function.

Peeling away issue areas one at a time not only allows communities to learn from the experience of recent experiments in terms of process, but also it avoids the danger of an elected chamber and a sortition chamber opposing each other head-to-head on a given bill, which could trigger at the aforementioned delegitimation. I will first describe how a transition to a sortition-based democracy could occur, and then describe a possible model for a mature version.

The division of legislative tasks among distinct bodies, mostly selected by lot, overcomes many design dilemmas: mandatory service improves representativeness but would create members unwilling to perform their duties; a long term of office increases expertise but also concentrates power and invites corruption; and a smaller group facilitates meaningful give and take deliberation but would compromise statistical sampling accuracy. The impulse is to seek out the "sweet spot" between merits and liabilities such as these., The better solution uses multiple bodies, each designed to maximize the benefits of certain attributes and counter the negative effects of that design decision with a check and balance from a separate body using countervailing design features..[32]

This single issue and single function minipublic design is pragmatic and also provides a path for evolution to an all-sortition democracy. By peeling away one issue area at a time from the traditional elected legislature and entrusting it to a compound sortition process, it might be possible to transfer power to a sortition wing of government step by step. There are certain inviting issue areas where this might begin, such as issues in which elected legislators either have a conflict of interest (election laws, as in the case of the British Columbia Citizens' Assembly,[33] ethics oversight, etc.), or "hot potato" issue areas that elected officials are happy to be rid of because they are no-win

32 The ability of multiple mini-publlics to address various dilemmas of sortition design is described in Terrill G Bouricius, "Democracy Through Multi-Body Sortition: Athenian Lessons for the Modern Day," *Journal of Public Deliberation*: 9, no. 1 (2013):.Available at: http://www.publicdeliberation.net/jpd/vol9/iss1/art11

33 Mark Warren, Designing deliberative democracy the British Columbia citizens assembly (Cambridge, MA: Cambridge Univ. Press, 2012).

topics (such as the nuclear waste issue tackled by a minipublic in South Australia). Initially, bills with no substantial budget impacts are most appropriate, as coordinating conflicting budget requests is a higher order challenge for a system based on separate minipublics.[34]

The goal is to institutionalize the transfer of an issue area on an ongoing basis. The authority of the sortition process must be decisive, rather than merely advisory. This must also be combined with verifiable independence, such that a minipublic is not subject to manipulation by the elected government through control of their staff or information flows. In the short term, this might be accomplished through facilitation by an impartial non-governmental organization, such as Australia's newDemocracy Foundation or a university. Ultimately, however, there must be a budget and staff not beholden to the elected representatives. The staff and functioning of the sortition process should be overseen by a minipublic devoted to these tasks.

If the public appreciates the fruits of these minipublics, governments could feel a growing pressure to try this model for other issues, especially following scandals that crop up among elected representatives. This approach allows for baby steps, with a gradual popular assessment that might grow more favorable with each process refinement along the way. Creating an all-purpose sortition chamber dealing with all bills would require a greater leap of faith.

Key for the advance of a sortition-based democracy is the use of sortition in forming constitutional conventions or review bodies. A randomly selected constituent assembly seems far more likely than an elected chamber to transfer powers from elected bodies to other sortition bodies. There have already been precedents that suggest this strategy has potential. When the legislature of British Columbia established the Citizens' Assembly, it set up a process that allowed the Assembly's recommendations to go directly to referendum without further involvement of the elected

34 Although it has huge budgetary impacts, the 2017 impasse on "repeal and replacement" of Obama-Care could have been an opportunity, especially with a non-traditional disruptor like Donald Trump. If there had been far more on-the-ground experience with sortition experiments in the US it is possible to imagine how major chunks of public policy on health care could have been handed off to a sortition process. Conservatives don't trust government bureaucrats making decisions about their healthcare, and liberals don't trust insurance executives. But it might be that both sides could agree to let a large representative sample of ordinary citizens hear from a range of experts on the issue, and make decisions on their behalf.

legislators. Ireland and Iceland have incorporated random selection in recent constitutional review bodies, although in an advisory role, explicitly interposing the elected legislature between the minipublic and the opportunity for referendum on the minipublic's proposals. Neither of these are the precise model needed, but they hint at the possibility.

Some sort of oversight minipublic (or commission, as Gastil and Wright propose) could adopt rules and procedures to improve the functioning of the sortition legislative process over time. Unlike an elected chamber, a minipublic can readily accept procedures and rules developed in advance by a separate minipublic devoted specifically to the challenge of assuring future minipublics will be well-informed and as free of cognitive biases as possible. When designing procedures for others to use, especially when not knowing what issues will be tackled, there is a strong incentive to devise methods that minimize cognitive bias and misinformation.[35]

Sortition without elections

To see how this would work, consider this design for a sortition-based legislature with no electoral element. In this example, I distinguish among an agenda council, interest panels, review panels, policy juries, and rules/oversight councils.

An Agenda Council selected by lot (with stratified sampling) would do risk analysis, hear suggestions, employ researchers to investigate societal problems and decide which issues needed legislative attention in the next period. Unlike electoral systems, the incentives for spectacle, ill-informed voter salience, and vilification of opposing parties would no longer dominate. This council would probably serve multi-year terms with staggered rotation. Due to the length of service and workload, it is likely that many citizens would decline to serve, so its descriptive representativeness would be poorer than a short duration jury (though superior to any existing elected legislature). Because this council would not be adopting any policies, it would not be prone

35 This is similar to John Rawls's "original position" thought experiment. By separating people choosing the procedures from the concrete policy matters by a virtual "veil of ignorance," they have an incentive to propose a fair and epistemically solid process for other minipublics to use. If the same body is both deciding on rules and dealing with policy, the incentive is to create rules that will favor the current majority in adopting their preferred policy.

to bribes. For example, a special interest seeking a tax break that bribes the item onto the agenda might end up with a tax *increase* at the end of the process, after entirely distinct bodies work through the issue. To complement this body, it might be desirable to also have a petition route to place topics on the agenda.[36]

The Agenda Council would issue a call for the creation of Interest Panels to prepare proposals to address the selected issues. The members of Interest Panels would be self-selected, with a new discussion group forming for every twelve citizens who volunteer. This allows any citizen who wants to participate in the democracy to do so without waiting for a lottery call, and it mirrors the Ancient Greek principle of *ho boulomenos*. Interest Panels might be face-to-face or virtual, using sophisticated online crowdsourcing platforms. It doesn't matter if Interest Panels favoring a given policy far outnumber those opposing it, since their sheer number has no significance. Diversity of input is the goal. Because participants would know their draft proposals would have to pass muster of subsequent sortition bodies, participants would be motivated to develop proposals that could pass muster with well-informed minipublics.

Ongoing sortition Review Panels would exist for each major issue area. To gain more knowledge about the topics covered, the Review Panels would serve for multiple years, with perhaps one third of their members rotating off each year. Because citizens would not be compelled to serve, stratified sampling and strong incentives would be required to keep these bodies as descriptively representative as possible. Each of these panels would take expert testimony and work through—amend, recombine, etc.—the raw material coming from the Interest Panels to develop a single legislative proposal.

These Review Panels bear a passing resemblance to traditional legislative committees. Unlike elected legislators on committees, the Review Panels would prioritize deliberation among

36 Careful examination by the Agenda Council may suggest a particular issue doesn't warrant the calling of Interest Panels, but even an objectively unworthy topic that can muster a significant petition interest might be important to have a Review Panel examine, even if no policy change gets advanced, so that the public is assured it was adequately looked at.

diverse perspectives. Without the distractions of campaign public relations and fund-raising, these professionally staffed panels would have the potential to be better versed than typical committees made up of elected politicians. The fact that these Review Panels do not have final authority to pass laws, reduces their value to would-be bribers.

For each bill, the final decision would come from a Policy Jury. These would convene for a duration of a few days or weeks (depending on the complexity of the bill), be large, and have quasi-compulsory service to maximize descriptive representativeness. The members of the Policy Jury would hear pro and con presentations, and could ask questions of experts. In line with the independence requirement for the Condorcet theorem and wisdom of crowds,[37] they would not engage in debate, and would vote by secret ballot to protect against intimidation and bribery. Because of the possibility for passage of incompatible bills by separate Policy Juries, there would also need to be a coordinating minipublic for prioritizing and harmonizing conflicting bills.

Finally, there should also exist some meta-legislative bodies drawn by lot. A Rules Council, perhaps drawn from willing members of previous minipublics, would refine the procedures to improve the system over time. An Oversight Council, also drawn by lot, would oversee staff performance and impartiality, to protect against bureaucratic capture and Michels' "iron law of oligarchy."[38]

The nature of the check and balance in this design is very different than a bi-cameral legislature, which often results in gridlock rather than "balance." Each unit would have full authority within its narrowly circumscribed domain, but have an incentive to consider the views of those who might disagree with them. By dividing up the legislative functions we can protect against concentration of power and corruption. It also enshrines the principle that the authors of a proposal are not competent to also be the judges of their own handiwork.

37 David Estlund, "Opinion leaders, independence and Condorcet's jury theorem," *Theory & Decision* 36, no. 2 (1994) 131-62.

38 Robert Michels, *Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy*, trans. Eden Paul and Cedar Paul (London: Jarrold & Sons, 1916).

Executive selection

Looking beyond the issue of hybrid bicameralism, versus an all-sortition legislature, a diminution of sortition's benefits could also occur if elections were maintained for the executive branch. There would be a severe risk of charismatic elected executives dominating a sortition legislature even more than they might an elected one. Elected politicians in a legislative chamber, with typically elevated egos and concerns about preserving their own power, may jealously seek to defend the prerogatives of the legislative branch and resist a would-be authoritarian executive. Even elected legislatures frequently give up powers to a chief executive (e.g., the unconstitutional war making powers of US presidents).

This risk would be even more pronounced with an allotted legislature. A popularly elected charismatic chief executive with a penchant for self-aggrandizement would have the opportunity to use the "principle of distinction" to claim a popular mandate resulting from the election, while belittling the unelected and unimposing members of the randomly selected legislative branch. A group of randomly selected ordinary citizens lacks the personal investment and political capital necessary to defend the limited prerogatives of a body they will soon leave anyway.

I concur with the witticism of Douglas Adams that "those people who must [*sic*] *want* to rule people are, ipso facto, those least suited to do it."[39] Thus, an optimal sortition democracy should establish minipublics charged with recruiting and hiring a chief executive, who would have an administrative rather than policymaking role (akin to the city manager function advanced by the early 20th Century Progressive Movement). Rather than evaluating self-selected or party nominated candidates, I would suggest a a full-spectrum recruitment process to find a person fully willing to serve, but who did not proactively seek the position. On a regular basis, a new minipublic would be called to evaluate the executive's performance and have the power to remove him or her. To avoid

39 Douglas Adams, *Restaurant at the end of the universe* (New York: Del Rey, 1997), 201.

the motivation to remove a good executive just to choose a particular person as a replacement, the minipublic with removal authority would not be the same one charged with hiring a replacement.

Conclusion: An evolution to sortition

In summary, the model of the all-purpose legislative chamber is not a good fit for sortition lawmaking. A hybrid bicameral system would maintain the harmful aspects of competitive elections, while sabotaging the potential benefits of sortition. The supposed benefits of elections prove illusory, but their harmful effects on a complementary sortition body would be all too real. Most of all, when the two chambers disagreed on policy, the elected representatives would have the motive and skills to delegitimize the sortition chamber.

Instead, I contend that sortition works best when a system separates different legislative functions and assigns them to bodies optimally designed for each task, with new bodies formed for each new issue. Though generally relying on sortition, this design would also broaden participation through self-selected Interest Panels open to all citizens for the purpose of drafting proposals as raw material for minipublics to consider.[40]

Peeling away issue areas and transferring them one at a time from elected to sortition bodies provides a plausible path toward institutional change. Election campaigns and politicians would simply no longer deal with those issue areas that had been removed from their purview. Since they would not be going head to head on the same issue, this would reduce the motivation for elected legislators to challenge the legitimacy of the sortition model.

In this evolutionary vision, elected chambers may never fully disappear—but could recede to the periphery, just as the powerful Council of Areopagus of pre-democratic Athens endured but ended up with severely restricted responsibilities., In a similar way, ceremonial monarchs persist in

40 Bouricius.

many modern electoral democracies, but with few remaining legal powers. Path dependence may preclude the total abolition of electoral representation, but as a fundamentally oligarchic tool, elections should not be championed as necessary or beneficial for democracy.[41]

41 From the time of Aristotle up to the European Enlightenment, elections, through their "principle of distinction." were seen as the appropriate tool for aristocracy or oligarchy, while sortition was viewed as natural to democracy. Manin.

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