

The Equal Opportunity to Be a Legislator: Why Randomly Selecting Legislators Is More Democratic Than Electing Them

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An exciting and recent development in the history of democracy is the use of mini-publics for political decision-making. Mini-publics are assemblies composed of randomly selected citizens and convened for the purpose of arriving at a collective decision through deliberation. Most prominently, mini-publics have been used in Ontario and British Columbia to arrive at proposals for electoral reform which were subsequently put to popular referendums,¹ and in Ireland a mini-public has been convened to deliberate about the repeal of the country's constitutional ban on abortion, which was also subsequently put to a referendum.² Additionally, mini-publics have been employed in Belgium, Denmark, France, the Netherlands, Poland, and the US state of Oregon for various public purposes. These applications have been precipitated by the great deal of positive attention which mini-publics have received from political scientists over the past thirty years.³

Much has already been said about the epistemic virtues of mini-public deliberation as a method of decision-making. These bodies are cognitively diverse and genuinely deliberative, which are both important for quality group decision-making.⁴ These bodies are maximally inclusive in that they resemble the whole public in miniature, and as a result of this these bodies impartially aim at the whole public's interest.⁵ These bodies are comparatively incorruptible, with their limited tenure and random selection making them very resistant to illegitimate influences on their decision-making.⁶ These epistemic virtues are particularly impressive when compared to those possessed by elected legislative bodies, which do not deliberate

within the legislature and are not very cognitively diverse, do not tend to be very inclusive or impartial, and are comparatively far more susceptible to corruption and illegitimate influence.⁷

As a result of this, several proposals have been created for the replacement of elected legislatures with legislatures composed of randomly selected citizens.⁸ The most promising of these proposals, such as Alexander Guerrero's and Terril Bouricius', do away with the generalist nature of elected legislatures and convene many mini-publics, some for setting the legislative agenda and other tasks, and some single-issue legislatures which deliberate and vote about one issue and then disband.

At present, there is an unfortunate disconnect between advocates for political random selection and their detractors. Advocates for political random selection argue persuasively about the epistemic merits of this method of decision-making, and the instrumental value which their preferred procedures have for producing good laws. The most compelling critics of political random selection argue that legislation by random citizens is undemocratic, either because randomly selected representatives are not authorized by the people they represent,⁹ or because it makes the opinions of the people not sitting in the randomly selected body irrelevant to the legislative process.¹⁰ Accounts of political random selection's value which give only instrumental reasons to prefer political random selection lack the resources to adequately respond to these objections because they have no force whatsoever in a purely instrumentalist framework.

To respond to its most persuasive critics, political random selection first needs a defense which is grounded in a non-instrumental conception of democracy's value. In this paper I shall demonstrate that on an equality-based conception of democracy's value, political random selection is more democratic than election for selecting legislators.

WHAT IS AN EQUALITY-BASED THEORY OF DEMOCRACY'S VALUE?

When I say an equality-based theory of democracy's value, I have in mind the sorts of theories put forward by Thomas Christiano, Niko Kolodny,¹¹ Jaques Rancière, Charles Bietz, and some other democratic theorists.¹² Equality-based theories, while quite diverse in many respects, share some central commitments and themes. Each is committed to these structural principles: (1) it is normatively required that citizens be (in some respect) treated equally by the state, and this puts constraints on what types of institutions and government conduct are normatively acceptable, and (2) these constraints require that states be governed democratically.

These ideas about the nature and requirements of democratic equality are central to many equality-based theories: (1) democratic equality requires that the lawmaking procedure produce compelling justifications for the law that answer to each citizen's interests. (2) Democratic equality requires that decisions be made in a non-hierarchical way that gives each equal standing to contest the law & the authority of

their rulers. (3) Democratic equality requires everyone's judgements about what the law ought to be to be treated equally through the lawmaking procedure. These points are highly interrelated. Each of these three requirements on their own require the process of legislating to be democratic, according to the theorists who posit them.

WHY JUSTIFICATIONS FOR ELECTION BASED ON DEMOCRATIC EQUALITY FAIL

Christiano and Kolodny both offer up justifications for election based in equal treatment. Both are unsuccessful in ways that are instructive for understanding why equality-based theories, as a rule, will fail to justify election.

Per Christiano, in an idealized version of an elective democracy citizens set the *ends* which the elected legislature ought to pursue through the election process, and once in office elected legislators deliberate about the *means* for the achievement of those ends, and enact them. Elected legislators have a responsibility to respect the judgement of their constituents about the appropriate ends to pursue, and it would be a breach of their duty to their constituents to deliberate about these ends and change their mind about them. (Christiano 169-70) Conversely, if an elected representative's judgement about the appropriate means is at odds with the constituents' conceptions, then those constituents have no complaint against their representative (Christiano 170).

Christiano's structure anticipates the worry that political equality is violated by having elected representatives count for far more in the legislative process than ordinary citizens. Per Christiano, legislators qua legislators have no role in that process at all, and they are duty-bound not to use their position of power in ways which undermine the equal voice of all citizens in the process of setting ends.

The main issue with this proposal relates to the role of equality in Christiano's argument. Christiano has not adequately explained why equality entitles citizens to have input in the process of determining who shall sit in the legislature. His process requires that citizens have equal input into the determination of ends, however it is fine for the elected politicians to have a greater influence on the decision about the means than those who elect them—this is why they are expected to deliberate amongst themselves about the means. If all political equality requires is equality in the determination of the ends pursued by legislators, then the actual legislators could just as well be appointed by technocrats or a monarch. Christiano would have to show that the best way to discover the legislators most capable of realizing the public's ends is to have citizens identify them via election. Because these legislators are only permitted to deliberate about means they are not importantly different from the kinds of policy-making bureaucrats which real-world elected legislatures normally delegate regulative tasks to. These bureaucrats do not need to be selected through a democratic process and are not political representatives of the public—we should think the same is true of Christiano's elected legislators.

Christiano's argument establishes that the equality of persons requires equal influence for each citizen over the ends pursued through public policy, but it has failed to establish that they must have an equal influence over who shall sit in the legislature, and thereby has failed to justify election. This is illustrative of a broader struggle which equality-based theories will have with justifying the institution of election: elected officials wield special powers over political processes which ordinary citizens do not, and without a special justification that cannot be provided for election, this is at odds with political equality.

In "Rule Over None II" Kolodny gives a very straightforward argument for election which, unfortunately, is directly contradicted by a far more compelling argument he gives in "Rule Over None I". For Kolodny, democratic governance is valuable because it is an integral component of a society that does not have social inequality, both because it does not involve putting some people in relations of social subordination to others, and because all other social hierarchy is moderated when an egalitarian government can limit and regulate it (Kolodny, "Rule Over None II" 303-7).

Per Kolodny, in order for a government to be democratic, citizens need to have an equal opportunity to influence political decisions—if the opportunities were unequal then that would establish a social hierarchy between citizens. Kolodny, "Rule Over None II" 308-10). Per Kolodny, elections ensure this. However, while under a reasonably idealized election-based democracy, people do have the equal opportunity to vote in elections, it is evidently untrue that people have an equal opportunity to achieve political office, in Kolodny's sense. In fact, under election the equal opportunity to influence political decisions is essentially impossible, because voters vote on the basis of judgements about the merit of candidates. One might reasonably object at this point that with a conventional understanding of the meaning of equal opportunity, as long as our society is constituted such that people have the equal opportunity to achieve the kind of merit which is the basis of the voter's decisions about who to elect, then all citizens do indeed have an equal opportunity to be elected. However, if this was all that political equal opportunity required, then we could, without any harm to democracy, apply broad restrictions on who is permitted to cast a vote. If we lived in an egalitarian society where everyone had the equal opportunity to become a tenured professor, and then restricted the voting franchise to tenured professors, it would still be the case that everyone had an equal opportunity to vote.¹³ This is an absurd consequence.

Kolodny also offers an argument that elected political representatives are not socially superior to those who do not have political office, which might save his view. Kolodny's explanation is that the relationship of the citizenry to their representatives is one of delegation. This delegation does not create a social hierarchy with political representatives above their constituents because: representatives exercise powers which they acknowledge belong to "the principal" (that which they represent), on behalf of their interests, under the direction of their

expressed will, and the representative can be replaced if they displease the principal (Kolodny, “Rule Over None II” 317-20).

I agree that, in a reasonably ideal elective democracy, as a representative relates to their principal, they can be a social equal. However the principal of an elected representative is not any one of their constituents. I, as a constituent of my member of parliament, do not have the power to remove my representative if her conduct displeases me, nor does she act on my direction or always for the sake of my interests, nor does she exercise powers which she acknowledges belong to me (the power to vote in parliament doesn’t belong to me!). Instead, the principal of a representative is their whole constituency. This should make an important difference to Kolodny, as in “Rule Over None I: What Justifies Democracy?” he objects to the notion that citizens can be collectively in control of the government in a way that we think should matter to individual citizens (Kolodny, “Rule over None I” 209). My representative enjoys a degree of power over political decision making in my country far greater than my own. Again, from this we can see the difficulty equality-based theories have in justifying the unequal access to political office citizens have given their equal access to the right to vote.

Throughout the history of political theory, until relatively recently, elections have been considered to be an aristocratic method of selection, rather than a democratic one. As Aristotle famously said, “[i]t is accepted as democratic when public offices are allocated by lot; and as oligarchic when they are filled by election” (Aristotle 4.1294be). Expressing the same sentiment in a far more modern context, when Rosseau advocated for the election of executive officers he referred to this as an aristocratic element of his form of government (Rosseau 35). The reason for this is that elections select office holders on the basis of their meritorious distinction from and superiority to ordinary citizens, rather than their equivalence to them. The modern impulse in liberal political theory to re-conceptualize elected representatives as one and the same as “the people” and therefor their rule as the rule of “the people” represents a muting of our democratic ambitions. Equality-based theories fail to justify election because elections do not treat citizens as equals.

DEMOCRATIC EQUALITY AND POLITICAL RANDOM SELECTION

In contrast to election, political random selection is the natural fit for equality-based theories. Let’s now reconsider the three important ideas about democratic equality which I had earlier mentioned, and compare political random selection to election in terms of the standards set by these ideas.

First, democratic equality requires that the lawmaking procedure produce compelling justifications for the law that answer to each citizen’s interests. Here, an approximately ideally constituted elective democracy succeeds. If elections were capable of disciplining politicians into producing compelling justifications for their decisions to their constituents on pain of removal from office (which perhaps they

can be), then the process of legislation produces compelling justifications in terms of each citizens' interests. Political random selection would do so as well, although by a more direct mechanism. While elected representatives are cajoled with institutional carrots and sticks into providing public justifications for their decisions, randomly selected representatives reason based on public interest through the process of deliberation within the legislature. Each randomly selected representative has self-interested reasons to prefer some policies to others which correspond to the self-interested reasons of some fraction of the public, and the whole randomly selected legislature in aggregate has self-interested reasons which correspond to the self-interested reasons of the whole public, because they are a representative sample of the whole public (Stone 138-41). Furthermore, the process of deliberation requires citizens to give reasons that appeal not to their narrow private interest, but to the interests shared by the whole public.¹⁴ The result of this deliberation is that the policies which are adopted will be supported by the reasons given through the deliberation, and these can be publicized. Furthermore, the composition of the legislature and the process of its decision-making itself provides ordinary citizens with compelling reasons to believe that the decisions it arrives at are in the public interest.

Second, democratic equality requires that decisions be made in a non-hierarchical way which gives each citizen equal standing to contest the law & the authority of their rulers. As we have seen, this is one area in which elections are doomed to fail. With an elected legislature, decisions are made in a way which does not give each citizen equal standing to contest the law. By contrast, the power of randomly selected legislators is so circumscribed that they can hardly be considered rulers. When randomly selected and put into a single-issue legislature, they consider one issue, and then disband.¹⁵ They have legislative power, but it is impossible to wield that power in a way that differentially affects the citizens and the body, for as soon as the body's members have altered the law they are no longer legislators. Notably the feature of political random selection which is doing the work here is that those randomly selected sit in single-issue legislatures. Randomly selecting a dictator for life would pose a problem for democratic equality. However, it would be impracticable to combine a single-issue legislative structure with election.

As for equal standing to contest the law, each citizen has an equal chance of sitting in the legislature, which is more than can be said for an elective system. In comparison to some form of direct democracy, it is not at all obvious that an equal chance of effecting the outcome is any less good than an equal piece of the power to affect the outcome. We should not regard an equal chance to sit in the legislature as a deficient substitute for an equal vote in a referendum.¹⁶

Third, democratic equality requires that everyone's judgements about what the law ought to be, be treated equally through the lawmaking procedure. Election, because of its foundational purposes and aims, falls short of the ideal. Elections select candidates on the basis of their merit as legislators. A process which begins

with the conception of some people as better suited to legislate than others, and then endows those people with powers over the law not possessed by their fellow citizens on that basis, does not treat the judgements of all citizens about what the law ought to be equally. It may treat the judgement of all citizens on the question of who is best suited to be a legislator equally, but this is an essentially distinct question with far less relevance to democratic equality. With political random selection, the judgement of each citizen is treated equally in the legislative process not only vicariously by the fact that each citizen is treated as equally worthy of wielding legislative power, but directly by the fact that, because the legislature constitutes a mini-public, we should expect that the perspectives, knowledge, style of reasoning, and any other constituent components of judgement that one might conceive of, are represented as well in the randomly selected body as it would be possible to represent them in a body of that size.

Democratic equality requires at least that all citizens be equal in the legislative process. Election, which evaluates citizens on their merits, and empowers some citizens to make the law on the basis of merit, cannot treat all citizens as equals in the legislative process. When political random selection empowers a citizen, it does so on the basis of their equal citizenship only. For this reason, political random selection better realizes the democratic ideals emphasized by equality-based theories of democracy's value.

NOTES

1. See Warren and Pearse 9-16, for a discussion of these assemblies.
2. See Farrell et al for discussion of this assembly.
3. One contribution to this research of particular notoriety is the deliberative opinion polls invented and subsequently conducted by James Fishkin, which bring together a random and representative sample of citizens to deliberate about a particular policy issue, with informational input into the deliberation from experts, and culminating in a poll of the group's post-deliberation views on the topic. See Fishkin and Luskin.
4. See Landemore, chapter 4.
5. See Fishkin and Luskin.
6. See Stone, chapter 6.
7. See Guerrero.
8. For such proposals see Guererro, Gastil and Writht, and Bouricius.
9. Most examples of arguments of this type are made rather off-handedly. For a thoroughly developed account, see Dahl 122-5. Pettit also develops an account of this criticism rather thoroughly in "Representation, responsive and indicative."
10. For one very well developed objection of this type, see Lafont.
11. See Kolodny "Rule Over None I", and Kolodny "Rule Over None II".
12. Many other democratic theories arguably fall into this camp, or have elements embedded into their democratic theories which commit them to some of the positions which I describe below. Of these, Dahl and Fishkin are particularly notable here.

13. Here one might think to object that I am here equivocating between the equal opportunity for enfranchisement and the equal opportunity to vote. I can see why this might immediately appear suspicious, however the distinction makes no difference here. If we object to this inference on the basis that, although in my hypothetical everyone would have an equal opportunity to become a tenured professor (by stipulation) it would not be the case that everyone had an equal opportunity to vote because in fact not everyone is a tenured professor, we might similarly object to the claim that even if everyone had an equal opportunity to earn a million dollars not everyone has the opportunity to spend that million dollars on a yacht because in fact not everyone has a million dollars. The conventional understanding of equal opportunity requires that equal opportunity to obtain some means is the same thing as equal opportunity to achieve some end which those means could be used to bring about.

14. This is an important descriptive component of what deliberation is, but also an ideal which can be promoted by facilitators of deliberation through a variety of means. See Landemore, chapter 4 and 6. See Goodin and Spiekermann 132-145. See Carson.

15. That issue being either the agenda for the other single-issue legislatures, or the issue given to them by the agenda-setting assembly.

16. It is true that when distributing a cake, the appropriate distributive principle is equal slices, whereas when distributing a kidney to equally worthy recipients, the appropriate distributive principle is an equal chance. Distributing legislative power is more like distributing the kidney because there are important practical reasons to prefer a smaller legislature, but even putting those practical reasons aside distributing votes is unlike distributing cake because people value them for different reasons. A cake is pleasant to eat, whereas a vote is only valuable for the sake of bringing about one's desired outcome in the legislature. If we allowed everyone to vote on an issue, but instead of tallying the votes drew one vote out randomly and made our decision according to it, it is not obvious that the voters would be treated unfairly, unequally, or that they in any sense had different levels of power over the outcome (although there may be other reasons to prefer the tallying method).

WORKS CITED

- Aristotle. *Aristotle's Politics*. Clarendon Press, 1905.
- Beitz, Charles R. *Political Equality: An Essay in Democratic Theory*. Princeton University Press, 1989.
- Bouricius, Terrill G. "Democracy Through Multi-Body Sortition: Athenian Lessons for the Modern Day." *Journal of Public Deliberation*, vol. 9, no. 1, 2013.
- Carson, Lyn. "How to Ensure Deliberation Within a Sortition Chamber." *Legislature by Lot: Transformative Designs for Deliberative Governance*, edited by John Gastil and Erik Olin Wright, Verso Books, 2019.
- Christiano, Thomas. *The Rule of the Many: Fundamental Issues in Democratic Theory*. Routledge, 2018.
- Dahl, Robert Alan. *After the Revolution?: Authority in a Good Society*. Yale University Press, 1990.

- Farrell, David, et al. "When Mini-Publics and Maxi-Publics Coincide: Ireland's National Debate on Abortion." *Journal of Representative Democracy*, vol. 55, no. 1, 2019, pp. 1-19.
- Fishkin, James, and Robert Luskin. "Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion." *Acta Politica*, vol. 40, no. 3, 2005, pp. 284-298.
- Gastil, John, and Erik Olin Wright. *Legislature by Lot: Transformative Designs for Deliberative Governance*. Verso Books, 2019
- Goodin, Robert E., and Kai Spiekermann. *An Epistemic Theory of Democracy*. Oxford University Press, 2018.
- Guerrero, Alexander. "Against Elections: The Lottocratic Alternative." *Philosophy and Public Affairs*, vol. 42, no. 2, 2014, pp. 135-178.
- Kolodny, Niko. "Rule Over None I: What Justifies Democracy?" *Philosophy and Public Affairs*, vol. 42, no. 3, 2014, pp. 195-229.
- . "Rule Over None II: Social Equality and the Justification of Democracy." *Philosophy and Public Affairs*, vol. 42, no. 4, 2014, pp. 287-336.
- Lafont, Cristina. "Deliberation, Participation, and Democratic Legitimacy: Should Deliberative Mini-Publics Shape Public Policy?" *Journal of Political Philosophy*, vol. 23, no. 1, 2015, pp. 40-63.
- Landemore, Hélène. *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many*. Princeton University Press, 2017.
- Pettit, Philip N. "Representation, Responsive and Indicative." *Constellations*, vol. 17, 2010, pp. 426-34.
- Rancière, Jacques. *Hatred of Democracy*. Verso Trade, 2014.
- Rose, Jonathan. "The Ontario Citizens' Assembly on Electoral Reform." *Canadian Parliamentary Review*, vol. 30, no. 3, 2007, pp. 9-16.
- Rousseau, Jean-Jaques. *The Social Contract*. Early Modern Texts, 2017. Available at <https://www.earlymoderntexts.com/assets/pdfs/rousseau1762.pdf>. Accessed 12 July 2021.
- Stone, Peter. *The Luck of the Draw: The Role of Lotteries in Decision Making*. Oxford University Press, 2011.
- Warren, Mark and Hilary Pearse. *Designing Deliberative Democracy: The British Columbia Citizens' Assembly*. Cambridge University Press, 2008.