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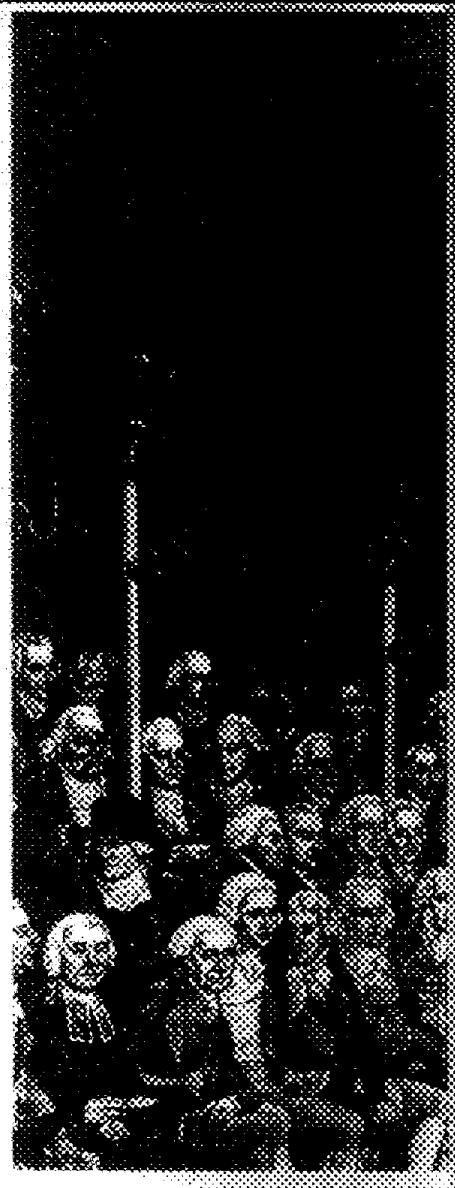

# THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT

BERNARD MANIN

# *Introduction*

Contemporary democratic governments have evolved from a political system that was conceived by its founders as opposed to democracy. Current usage distinguishes between "representative" and "direct" democracy, making them varieties of one type of government. However, what today we call representative democracy has its origins in a system of institutions (established in the wake of the English, American, and French revolutions) that was in no way initially perceived as a form of democracy or of government by the people.

Rousseau condemned political representation in peremptory terms that have remained famous. He portrayed the English government of the eighteenth century as a form of slavery punctuated by moments of liberty. Rousseau saw an immense gulf between a free people making its own laws and a people electing representatives to make laws for it. However, we must remember that the adherents of representation, even if they made the opposite choice from Rousseau, saw a fundamental difference between democracy and the system they defended, a system they called "representative" or "republican." Thus, two men who played a crucial role in establishing modern political representation, Madison and Siéyès, contrasted representative government and democracy in similar terms. This similarity is striking because, in other respects, deep differences separated the chief architect of the American Constitution from the author of *Qu'est-ce que le Tiers-Etat?* in their education, in the political contexts in which they spoke and acted, and even in their constitutional thinking.

Madison often contrasted the "democracy" of the city-states of Antiquity, where "a small number of citizens ... assemble and administer the government in person," with the modern republic based on representation.[1] In fact, he expressed the contrast in particularly radical terms. Representation, he pointed out, was not wholly unknown in the republics of Antiquity. In those republics the assembled citizens did not exercise all the functions of government. Certain tasks, particularly of an executive nature, were delegated to magistrates. Alongside those magistrates, however, the popular assembly constituted an organ of government. The real difference between ancient democracies and modern republics lies, according to Madison, in *"the total exclusion of the people in their collective capacity* from any share in the *latter*, and not in the *total exclusion of the representatives of the people* from the administration of the *former*."[2]

Madison did not see representation as an approximation of government by the people made technically necessary by the physical impossibility of gathering together the citizens of large states. On the contrary, he saw it as an essentially different and superior political system. The effect of representation, he observed, is "to refine and enlarge the public views by passing them through the medium of 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."[3] "Under such a regulation," he went on, "it may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose."[4]

Siéyès, for his part, persistently stressed the "huge difference" between democracy, in which the citizens make the laws themselves, and the representative system of government, in which they

1 Madison, "Federalist 10," in A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers* [1787], ed. C. Rossiter (New York: Penguin, 1961), p. 81.

2 Madison, "Federalist 63," in *The Federalist Papers*, p. 387; Madison's emphasis.

3 Madison, "Federalist 10," in *The Federalist Papers*, p. 82. Note the dual meaning of the phrase "a chosen body of citizens." The representatives form a chosen body in the sense that they are elected but also in the sense that they are distinguished and eminent individuals.

4 *Ibid.*





entrust the exercise of their power to elected representatives.[5] For Siéyès, however, the superiority of the representative system lay not so much in the fact that it produced less partial and less passionate decisions as in the fact that it constituted the form of government most appropriate to the condition of modern "commercial societies," in which individuals were chiefly occupied in economic production and exchange. In such societies, Siéyès noted, citizens no longer enjoy the leisure required to attend constantly to public affairs and must therefore use election to entrust government to people who are able to devote all their time to the task. Siéyès mainly saw representation as the application to the political domain of the division of labor, a principle that, in his view, constituted a key factor in social progress. "The common interest," he wrote, "the improvement of the state of society itself cries out for us to make Government a *special profession*."[6] For Siéyès, then, as for Madison, representative government was not one kind of democracy; it was an essentially different and furthermore preferable form of government.

At this point we need to remind ourselves that certain institutional choices made by the founders of representative government have virtually never been questioned. Representative government has certainly seen changes over the past two hundred years: the gradual extension of voting rights and the establishment of universal suffrage being the most obvious among them.[7] But on the other hand several arrangements have remained the same, such as those governing the way representatives are selected and public

5 *Dire de l'Abbé Siéyès sur la question du veto royal* [7 September 1789] (Versailles: Baudoin, Imprimeur de l'Assemblée Nationale, 1789) p. 12; see also Siéyès, *Quelques idées de constitution applicables à la ville de Paris* [July 1789] (Versailles: Baudoin, Imprimeur de l'Assemblée Nationale, 1789), pp. 3–4.

6 Siéyès, *Observations sur le rapport du comité de constitution concernant la nouvelle organisation de la France* [October 1789] (Versailles: Baudoin, Imprimeur de l'Assemblée Nationale, 1789) p. 35. On the link between the advocacy of representation and that of division of labor and modern "commercial society," see Pasquale Pasquino, "Emmanuel Siéyès, Benjamin Constant et le 'Gouvernement des Modernes'," in *Revue Française de Science Politique*, Vol. 37, 2, April 1987, pp. 214–28.

7 A detailed and penetrating analysis of this change and in particular of its symbolic significance in France is given in Pierre Rosanvallon, *Le sacre du citoyen. Histoire du suffrage universel en France* (Paris: Gallimard, 1992).

decisions made. They are still in force in the systems referred to as representative democracies today.

The primary goal of this book is to identify and study those constant elements. I shall call them principles of representative government. By principles I do not mean abstract, timeless ideas or ideals, but concrete institutional arrangements that were invented at a particular point in history and that, since that point, have been observable as simultaneously present in all governments described as representative. In some countries, such as Britain and the United States, these arrangements have remained in place ever since their first appearance. In others, such as France, they have occasionally been abolished, but then were revoked all of a piece and the form of government changed completely; in other words, the regime ceased, during certain periods, to be representative. Finally, in many countries none of these arrangements was ever put in place. Thus, what was invented in the seventeenth and eighteenth centuries, and has not seriously been challenged since, was a particular combination of these institutional arrangements. The combination may or may not be present in a country at any given time, but where it is found, it is found *en bloc*.

In the late eighteenth century, then, a government organized along representative lines was seen as differing radically from democracy, whereas today it passes for a form thereof. An institutional system capable of sustaining such divergent interpretations must have an enigmatic quality about it. One might, of course, point out that the meaning of the word "democracy" has evolved since the rise of representative government.[8] Undoubtedly it has, but that does not get rid of the difficulty. In fact, the meaning of the word has not changed entirely; what it meant then and what it means now overlap to some extent. Traditionally employed to describe the Athenian regime, it is still in use today to denote the same historical object. Beyond this concrete common referent, the modern meaning and the eighteenth-century meaning also share the notions of political equality among citizens and the power of the people. Today those notions form elements of the democratic idea, and so

[8] On this point, see Pierre Rosanvallon, "L'histoire du mot démocratie à l'époque moderne," and John Dunn, "Démocratie: l'état des lieux," in *La Pensée politique, Situations de la démocratie* (Paris: Seuil-Gallimard, 1993).





they did then. More precisely, then, the problem appears to lie in discerning how the principles of representative government relate to these elements of the democratic idea.

But genealogy is not the only reason for looking into the relationship between representative institutions and democracy. Modern usage, which classifies representative democracy as one type of democracy, when looked at more closely reveals large areas of uncertainty regarding what constitutes the specific nature of this type. In drawing a distinction between representative and direct democracy, we implicitly define the former as the indirect form of government by the people, and make the presence of persons acting on behalf of the people the criterion separating the two varieties of democracy. However, the notions of direct and indirect government draw only an imprecise dividing line. In fact, as Madison observed, it is clear that, in the so-called "direct democracies" of the ancient world – Athens, in particular – the popular assembly was not the seat of all power. Certain important functions were performed by other institutions. Does that mean that, like Madison, we should regard Athenian democracy as having included a representative component, or ought our conclusion to be that the functions of organs other than the assembly were nevertheless "directly" exercised by the people? If the latter, what exactly do we mean by "directly"?

Furthermore, when we say that in representative government the people govern themselves *indirectly* or *through* their representatives, we are in fact using somewhat muddled notions. In everyday parlance, doing something indirectly or through someone else may refer to very different situations. For example, when a messenger carries a message from one person to another, we would say that the two persons communicate indirectly or through the messenger. On the other hand, if a customer deposits funds in a savings account, charging the bank with the task of investing his capital, we would also say that the customer, as owner of the funds, lends indirectly or through the bank to the companies or institutions that are borrowing on the market. There is obviously, however, a major difference between the two situations and the relationships they engender. The messenger has no control over either the contents or the destination of the message he bears. The banker, by contrast, has

the task of choosing what in his judgment is the best investment possible, and the customer controls only the return on his capital. Which of these two types of indirectness – or indeed what other type – best represents the role of political representatives and the power the people have over them? The modern view of representative democracy as indirect government by the people tells us nothing here. In reality, the information provided by the usual distinction between direct and representative democracy is meager.

The uncertainty and poverty of our modern terminology, like the contrast that it presents with the perception of the eighteenth century, show that we do not know either what makes representative government resemble democracy or what distinguishes it therefrom. Representative institutions may be more enigmatic than their place in our familiar environment would lead us to believe. This book does not aspire to discern the ultimate essence or significance of political representation; it merely sets out to shed light on the unobvious properties and effects of a set of institutions invented two centuries ago.[9] In general, we refer to governments in which those institutions are present as "representative." In the final analysis, though, it is not the term "representation" that is important here. It will simply be a question of analysing the elements and consequences of the combination of arrangements, whatever name we give it.

Four principles have invariably been observed in representative regimes, ever since this form of government was invented:

1 Those who govern are appointed by election at regular intervals.
2 The decision-making of those who govern retains a degree of independence from the wishes of the electorate.
3 Those who are governed may give expression to their opinions and political wishes without these being subject to the control of those who govern.
4 Public decisions undergo the trial of debate.

The central institution of representative government is election,

[9] In this the present work differs from two books that particularly stand out among the many studies of representation: G. Leibholz, *Das Wesen der Repräsentation* [1929] (Berlin: Walter de Gruyter, 1966) and H. Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967).





and a large part of this book will be devoted to it. We shall also be analysing the principles that shape the policies pursued by those who govern and the content of public decisions. A final chapter will look at the different forms assumed by the principles of representative government from the time of its invention to the present day.

# I

# *Direct democracy and representation: selection of officials in Athens*

Representative government gives no institutional role to the assembled people. That is what most obviously distinguishes it from the democracy of the ancient city-states. However, an analysis of the Athenian regime, the best-known example of classical democracy, shows that a further feature (one less often commented on) also separates representative democracy from so-called direct democracy. In the Athenian democracy, many important powers were not in the hands of the assembled people. Certain functions were performed by elected magistrates. But what is particularly remarkable is that most of the tasks not done by the Assembly were entrusted to citizens selected by a drawing of lots. By contrast, none of the representative governments set up in the last two centuries has ever used lot to assign even one modicum of political power, whether sovereign or executive, central or local. Representation has only been associated with the system of election, sometimes in combination with heredity (as in constitutional monarchies), but never with lot. So consistent and universal a phenomenon ought to invite attention and indeed scrutiny.

It cannot be accounted for, as can the absence of the popular assembly, by material constraints alone. To explain why representative governments grant no role to the assembly of citizens, authors usually talk about the size of modern states. It is simply not possible, in political entities so much larger and more populous than the city-states of Antiquity, to bring all the citizens together in one place to deliberate and make decisions as a body. Inevitably, therefore, the function of government is performed by a number of individuals





smaller than the totality of citizens. As we have seen, the practical impossibility of gathering the whole people together was not the prime consideration motivating such founders of representative institutions as Madison or Siéyès. The fact remains that the sheer size of modern states had the effect of making it materially impracticable for the assembled people to play a part in government. Moreover, this is likely to have counted for something in the establishment of purely representative systems. On the other hand, it cannot have been the size of modern states that prompted the rejection of the lot system. Even in large, densely populated states it is technically feasible to use lot to select a small number of individuals from a bigger body. Whatever the size of that body, lot will always make it possible to extract therefrom as small a group of individuals as is required. As a method of selection, it is not impracticable; in fact, the judicial system still makes regular use of it today in constituting juries. So this exclusive recourse to election rather than lot cannot stem from purely practical constraints.

The political use of lot is virtually never thought about today.[1] For a long time lot has had no place in the political culture of modern societies, and today we tend to regard it as a somewhat bizarre custom. We know, of course, that it was used in ancient Athens, and this fact is occasionally remarked upon, though chiefly in tones of amazement. In fact, that the Athenians could have adopted such a procedure seems to be the major puzzle. However, we may benefit from an inversion of the usual point of view whereby the culture of the present constitutes the center of the world. It might be better to ask: "Why do not we practice lot, and nonetheless call ourselves democrats?"

It might, of course, be objected that there is not a great deal to be learned from such a question and that the answer is obvious. Lot, it can be argued, selects anyone, no matter whom, including those with no particular aptitude for governing. It is therefore a manifestly

[1] Recently, a few works have helped revive interest in the political use of lot. See in particular Jon Elster, *Solomonic Judgements: Studies in the Limitations of Rationality* (Cambridge: Cambridge University Press, 1989), pp. 78–92. It has also been suggested that a citizen selected at random might elect the candidate of his choice to represent a constituency (see A. Amar, "Choosing representatives by lottery voting," in *Yale Law Journal*, Vol. 93, 1984). However, this suggestion gives lot only a limited role: it is used to select a voter, not a representative.

defective method of selection, and its disappearance requires no further explanation. This is an argument, however, in which the obviousness of the premise ought to cast doubt on the soundness of the conclusion. The Athenians, not generally regarded as unsophisticated in political matters, must have been aware that lot appointed people indiscriminately, yet they continued to use the system for two hundred years. The fact that selection by lot risks elevating unqualified citizens to public office is not a modern discovery. Incompetence in office was as much a danger in Athens as it is in present-day polities. Moreover, if Xenophon is to be believed, Socrates himself ridiculed the appointment of magistrates by lot on the grounds that no one chose ships' pilots, architects, or flute-players by this method.[2] That means, however, that the question we should be asking is whether the Athenian democrats really did have no answer when faced with this objection. Possibly they saw advantages in lot that, all things considered, they felt outweighed this major disadvantage. Possibly, too, they had found a way of guarding against the risk of incompetence through supplementary institutional arrangements. Concerning lot, it is by no means clear that the danger of incompetence is the last word. We cannot pronounce this selection method defective and destined to disappear before we have carefully analysed how it was used in Athens and how democrats justified it.

In any case, whatever the reason lot disappeared, the crucial fact remains that Athenian democracy employed it to fill certain posts, whereas representative regimes give it no place whatsoever. The difference can hardly be without consequence on the exercise of power, the way it is distributed, and the characteristics of those who govern. The problem is identifying the consequences with any precision. So if we wish to throw light on one of the major differences between representative government and "direct" democracy, we need to compare the effects of election with those of lot.

Analyses of representative government typically contrast election with heredity. In part, such a viewpoint is justified: elected governments directly replaced hereditary governments, and there is no doubt that, in making election the chief basis of political legitimacy,

[2] Xenophon, *Memorabilia*, I, 2, 9.





the founders of our modern representative republics were above all rejecting the hereditary principle. Modern representative systems are certainly characterized by the fact that in them power is not inherited (not in essence, anyway). But what also distinguishes them, even if it receives less attention, is the complete absence of the use of lot in the assignment of political functions exercised by a restricted number of citizens. The contrast between election and lot might reveal an aspect of representative government that remains hidden so long as the hereditary system constitutes the sole point of contrast.

A study of the use of lot in Athens is in order, not only because lot is one of the distinguishing features of "direct" democracy, but also because the Athenians employed it side by side with election, which makes their institutions particularly well suited for a comparison of the two methods. Moreover, the recent publication of a superb study of Athenian democracy, remarkable in both its breadth and precision, has thrown fresh light on these points.[3]

The Athenian democracy entrusted to citizens drawn by lot most of the functions not performed by the Popular Assembly (*ekklēsia*).[4] This principle applied mainly to the magistracies (*archai*). Of the approximately 700 magistrate posts that made up the Athenian

[3] I refer to M. H. Hansen, *The Athenian Democracy in the Age of Demosthenes* (Oxford: Basil Blackwell, 1991). This is a condensed version, translated into English, of the very much larger work that Hansen originally published in Danish (*Det Athenske Demokrati i 4 årh. f. Kr.*, 6 vols., Copenhagen, 1977–81). Hansen deals primarily with the Athenian institutions of the fourth century BC (from the second restoration of democracy in 403–402 to its final collapse in 322). Indeed, he points out that the sources are very much more plentiful and detailed for this period than for the fifth century, and he stresses that we do not really know much about how the Athenian democracy functioned in the age of Pericles. The institutional histories that focus on the fifth century (on the grounds that it was then that Athens reached the zenith of its power and artistic brilliance), as well as those that deal with the period from the reform of Ephialtes (462) to the final disappearance of democracy (322) as a single entity, are thus obliged to extrapolate on the basis of data that actually relate to the fourth century. Through his choice of period, Hansen avoids such extrapolation, which he regards as unjustified (*The Athenian Democracy*, pp. 19–23). This does not prevent him, however, from touching on certain features of the institutions of the fifth century.

[4] On lot and election in Athens, see also, in addition to Hansen's book: James Wycliffe Headlam, *Election by Lot at Athens* [1891] (Cambridge: Cambridge University Press, 1933); E.S. Staveley, *Greek and Roman Voting* (Ithaca, NY: Cornell University Press, 1972); Moses I. Finley, *Democracy Ancient and Modern* (New Brunswick, NJ: Rutgers University Press, 1973), and *Politics in the Ancient World* (Cambridge: Cambridge University Press, 1983).

administration, some 600 were filled by lot.[5] The magistracies assigned by lot (*klēros*) were usually collegial.[6] The term of office was one year. A citizen was not permitted to hold a given magistracy more than once, and while he might be appointed to a number of different magistracies during his lifetime, the timetable for rendering account (no one might accede to a fresh post before having rendered account for the previous one) meant that a person could not in practice serve as a magistrate two consecutive years. All citizens thirty years of age or older (about 20,000 persons in the fourth century) who were not under penalty of *atimia* (deprivation of civil rights) might accede to these magistracies.[7] Those whose names had been drawn by lot had to undergo examination (*dokimasia*) before they could take up office. This test examined whether they were legally qualified to be magistrates; it also checked whether their conduct towards their parents had been satisfactory and whether they had paid their taxes and had performed their military service. The test had a political side to it, too: an individual known for his oligarchical sympathies might be rejected. In no way, however, did *dokimasia* seek to weed out incompetents, and usually it was a mere formality.[8]

Nevertheless, the Athenian system did offer certain safeguards against magistrates whom the people decided were bad or incompetent. In the first place, magistrates were subject to constant monitoring by the Assembly and the courts. Not only did they have to render account (*euthynai*) on leaving office, but during their term of office any citizen could at any time lay a charge against them and demand their suspension. At Principal Assemblies (*ekklēsiai kyriai*)

[5] These figures do not include the Council (*boulē*), although it was a board of magistrates. In fact, the powers of the Council were significantly different from those of other magistracies, so it is preferable to consider it separately (see below).

[6] The word *klēros* is a noun, the corresponding verb being *klēroun* (to draw lots). The fact of obtaining a post by lot is indicated by the verb *lanchano*, used in the aorist tense and occasionally qualified by a determiner: *tō kuamō lachein* (to have been appointed by lot using a bean) or, in an earlier period, *palō lachein* (to have been appointed by lot drawn from a helmet).

[7] Fourth-century Athens had around 30,000 citizens who had reached their majority (i.e. were 20 or over). In the fifth century, the number was probably 60,000 (see Hansen, *The Athenian Democracy*, pp. 55, 93, 232, 313). These figures do not, of course, include women, children, metics (aliens with some civic privileges), or slaves. There is a tendency today to exaggerate the smallness of Athens. Granted, the city was not large, compared with modern states, but neither was it a village.

[8] Hansen, *The Athenian Democracy*, pp. 218–20, 239.





voting on the magistrates was a compulsory agenda item. Any citizen might then propose a vote of no confidence against a magistrate (whether appointed by lot or by election). If the magistrate lost the vote, he was immediately suspended and his case was referred to the courts, which then had the responsibility of either acquitting him (whereupon he would resume his functions) or condemning him.[9]

Since these arrangements were common knowledge, every citizen was aware in advance that, if he were to become a magistrate, he would have to render account, face the constant possibility of impeachment, and undergo punishment if the case went against him. But – and this deserves particular attention – only the names of those who wished to be considered were inserted into the lottery machines, the *klēroteria*. Lots were drawn not among all citizens thirty and over, but only among those who had offered themselves as candidates.[10] In other words, when the selection of magistrates by lot is placed in its institutional context it looks far less rudimentary than is commonly supposed today. The combination of the voluntary nature of such service and this advance knowledge of the risks incurred must in fact have led to self-selection among potential magistrates. Those who did not feel up to filling a post successfully could easily avoid being selected; indeed, they had strong incentives to do so. The whole arrangement thus had the effect of giving every citizen who *deemed himself* fit for office an opportunity of acceding to the magistracies. Anyone taking up that opportunity exposed himself to the virtually constant judgment of others, but that judgment took effect only *a posteriori* – after the candidate had begun to act in office. Chance apart, access to office was determined only by the assessment each candidate made of himself and his own abilities. In the case of elective magistracies, on the other hand, it was the judgment of others that opened the way to public office. It follows that such judgment was exercised not only *a posteriori*, as in the case of magistracies assigned by lot, but also *a priori* – that is,

[9] The Assembly met ten times a year as *ekklēsia kyria* (once in each prytany, or five-week period), out of a total of forty meetings annually.

[10] Hansen, *The Athenian Democracy*, pp. 97, 230–1, 239. Note that there was even a verb (*klērousthai*) meaning "to present oneself for selection by lot"; see Aristotle, *Constitution of Athens*, IV, 3; VII, 4; XXVII, 4.

before the candidates had had a chance to prove themselves (at least for candidates who had not held office previously).

Like magistracies assigned by lot, elective offices were also constantly monitored by the Assembly. Any citizen aged thirty or over might stand for an elective post. However, there were several differences between elective magistracies and those assigned by lot. In the first place, while the elective offices were annual, like the others, a person might be re-elected to the same office several times in succession; there were no term limits. In the fifth century, Pericles was re-elected general (*stratēgos*) for more than twenty years. The most famous of fourth-century generals, Phocion, held office for forty-five years. Moreover, the Athenians reserved appointment by election for magistracies for which competence was judged vital. These included the generals and top military administrators from the fifth century onwards and the chief financial officials created or reformed in the fourth century (particularly the Treasurer of the Military Fund, the administrators of the Theoric Fund, and the Financial Comptroller).[11] The elective posts were also the most important ones: the conduct of war and the management of finance affected what happened to the city more than any other function. (Athens in fact spent most of the fifth century at war; periods of peace were the exception.) Lastly, it was in the elective offices, rather than among the magistracies filled by lot, that persons of eminence would be found.

In the fifth century, the most influential politicians were elected as generals (Themistocles, Aristides, Cimon, Pericles). The practice was to speak of orators and generals (*rhētores kai stratēgoi*) in the same breath. Although orators were not public officials, it was they who carried most weight in the Assembly. The bracketing together of orators and generals thus suggests that in certain respects they were seen as belonging to the same group, what might today be termed "political leaders." In the fourth century, the link between orators and generals loosened, and orators as a category came to be associated more with the financial magistrates, who were also elected. Also, a social change took place around the time of the

[11] The Theoric Fund was originally set up to distribute payments to citizens enabling them to buy theater tickets for public festivals. In the fourth century, the fund was gradually extended to cover the financing of public works and the navy.





Peloponnesian War: whereas the generals and politicians of influence in the fifth century belonged to the old families of the landed aristocracy (Cimon, for instance, came from the famous Lakiad family, while Pericles was related to the Alcmaionid clan), in the fourth century political leaders tended to be recruited from wealthy families of good standing, whose fortunes were of more recent date and derived from slave-manned workshops.[12] Throughout the history of the Athenian democracy, there was thus a certain correlation between the exercise of political office and membership in political and social elites.

In general, the magistrates (whether elected or selected by lot) did not exercise major political power; they were above all administrators and executives.[13] They prepared the agenda for the Assembly (*probouleuein*), conducted preliminary investigations prior to lawsuits (*anakrinein*), summoned and presided over courts, and carried out the decisions made by the Assembly and the courts (*prostattein, epitattein*). But they did not hold what was regarded as decisive power (*to kyrion einai*): they did not make the crucial political choices. That power belonged to the Assembly and the courts. In this respect, the contrast with modern political representatives is manifest. Moreover, even if in their capacity as chairmen the magistrates drew up the agendas of decision-making bodies, they acted at the request of ordinary citizens and put down for discussion motions that those citizens proposed.

The power to make proposals and take initiative was not the privilege of any office but belonged in principle to any citizen wishing to exercise it. The Athenians had a special expression to denote one who took political initiative. A person who submitted a proposal to the Assembly or initiated proceedings before the courts was called *tōn Athēnaiōn ho boulomenos hois exestin* (any Athenian who wishes from amongst those who may) or *ho boulomenos* (anyone who wishes) for short. The term could be translated as "the first comer," though it had no pejorative connotation in the mouths of democrats. Indeed, *ho boulomenos* was a key figure in the Athenian democracy.[14] He could in fact be anyone, at least in principle, but that was precisely what democrats prided themselves on. "You

[12] Hansen, *The Athenian Democracy*, pp. 39, 268–74. [13] *Ibid.*, pp. 228–9.
[14] *Ibid.*, pp. 266–7.

blame me," Aeschines replied to one of his opponents, "for not always coming before the people; and you imagine that your hearers will fail to detect that your criticism is based on principles foreign to democracy? In oligarchies, it is not anyone who wishes that may speak but only those who have authority [*en men tais oligarchiais ouch ho boulomenos, all'ho dynasteuōn dēmēgorei*]; in democracies, anyone who wishes may speak, whenever he wishes [*en dēmokratiais ho boulomenos kai otan autō dokei*]."[15] Probably it was only a small minority that dared come forward to address the Assembly, with the vast majority confining themselves to listening and voting.[16] In practice, a process of self-selection limited the numbers of those taking initiative. But the principle that anyone wishing to do so was equally able to submit a proposal to his fellow-citizens and, more generally, to address them (*isēgoria*) constituted one of the highest ideals of democracy.[17]

At any rate, the magistrates had no monopoly of political initiative, and their power was, generally speaking, strictly limited. Evidently, then, as Hansen observes, there is an element of deliberate ignorance or even sophistry in the remarks that Xenophon attributes to Socrates. In ridiculing the practice of selecting magistrates by lot on the grounds that no one would choose a ship's pilot, an architect, or a flute-player by that method, Socrates was deliberately missing the crucial point that, in a democracy, magistrates were not supposed to be pilots.[18] That is not the end of the matter, however, because the magistracies, in the strict sense, were not the only offices assigned by lot. Most historical studies choose to discuss the implications of the use of lot in the Athenian democracy only in connection with the appointment of magistrates.[19] However, given that the magistrates wielded only limited power and that the

[15] Aeschines, *Against Ctesiphon*, III, 220.

[16] Hansen, *The Athenian Democracy*, pp. 143–5.

[17] Here the distinction between ideal (one might also say ideology) and practice is only a blunt albeit convenient instrument. The process of self-selection that in practice limited the number of speakers actually received explicit recognition, at least in part, in the ideology of the first comer; *ho boulomenos* denoted anyone *wishing to come forward to make a proposal*, not simply anyone.

[18] Hansen, *The Athenian Democracy*, p. 236.

[19] Hansen is no exception here: the main discussion of the relationship between lot and democracy occurs in the chapter about magistrates (see Hansen, *The Athenian Democracy*, pp. 235–7).





responsibilities of those magistracies filled by lot were less than those filled by election, such a choice has the effect of downplaying the importance of lot in Athens. Functions much more important than those of the magistrates were also assigned by lot.

Members of the Council (*boulē*) were appointed by lot for a period of one year, and no citizen could be a member of the Council more than twice in his lifetime. The Council comprised 500 members, who were thirty years or older. Each of the 139 districts of Attica (the demes) was entitled to a certain number of seats in the Council (the number was in proportion to the population of the deme). Each deme nominated more candidates than it had seats to fill (it is not clear whether lot was used at this initial stage of the selection process). Lots were then drawn among the candidates for each deme to obtain the requisite number of councilors. On days when the Council sat, its members were paid by the city. Aristotle regarded payment for such political activities as participation in the Assembly, the courts, and the magistracies as one of the essential principles of democracy. In Athens, that principle also applied to the Council.[20]

Legally, Council membership was a magistracy (*archē*), and like most magistracies was collegial. However, certain features set it apart. In the first place, only the Council could indict its own members: once indicted, a councilor was tried in the courts, but the Council first had to vote on arraigning him before the courts.[21] More important, the *boulē* constituted the most decisive magistracy (*malista kyria*), as Aristotle wrote, because it prepared for the agenda for the Assembly and carried out its decisions.[22] Whereas the

[20] Aristotle, *Politics*, VI, 2, 1317b 35–8. The object of such payment was to enable people to take part who would otherwise have been put off political activity by the prospect of losing working time or more generally to attract citizens of modest means. In the fifth century, Athens paid its magistrates, members of the Council, and judges or jurors (citizens who sat in the courts). Judges received three obols (half a drachma) per day they sat. On the other hand, participation in the Assembly was at that time unpaid. In the fourth century, payment of magistrates was probably abolished, but that of councilors and judges was retained, and payment (likewise of three obols) was also introduced for attendance at the Assembly (see Hansen, *The Athenian Democracy*, pp. 240–2). Note, by way of comparison, that at the end of the fifth century the average wage for a day's work stood at one drachma. The allowance for participating in the courts and subsequently in the Assembly was thus equivalent to half a day's pay (see *ibid.*, pp. 150, 188–9).

[21] *Ibid.*, p. 258.

[22] Aristotle, *Politics*, VI, 8, 1322b, 12–17.

activity of the other magistracies was connected with the courts, the Council was linked directly to the *ekklēsia*. The Council deliberated about which proposals were to be considered by the Assembly (*probouleumata*). Some proposals would be formulated in detail; others would be more open, inviting motions from the floor on a particular problem. About half the decrees voted on by the Assembly seem in fact to have been ratifications of precise measures put forward by the Council; the other half stemmed from proposals made directly in the Assembly.[23] The Council had further major responsibilities in the field of external affairs. It received all ambassadors and decided whether or not to bring them before the Assembly, first negotiating with them before submitting the results of such talks to the people in the form of a *probouleuma*. The Council also performed important military functions, being responsible in particular for the navy and for maritime administration. Finally, it had a role of general supervision of public administration, including, very importantly, finance; and in this respect it exercised a degree of control over the other magistrates. Thus the *boulē*, which was appointed by lot, occupied a central position in the government of Athens. Its role may not have been that of a pilot, but neither was it a subordinate one.

However, to assess the full importance of lot in the Athenian democracy we must look at yet another body: the *hēliastai*. Each year, 6,000 persons were chosen by lot from a pool of *volunteers* thirty years or older. The citizens whose names were drawn took the heliastic oath, pledging to vote in accordance with the laws and decrees of the Assembly and the Council, to decide in accordance with their own sense of what is just in cases not covered by law, and to give both defense and prosecution an impartial hearing.[24] From then on, for the space of a year those citizens formed the body of the *hēliastai*. Their being older than the citizens who made up the Assembly, and hence putatively wiser and more experienced, meant that they enjoyed special status.[25] It was from among the *hēliastai* that the members of the people's courts (*dikastēria*) and, in the fourth century, the *nomothetai* were recruited.

[23] Hansen, *The Athenian Democracy*, pp. 138–40. [24] *Ibid.*, p. 182

[25] Citizens had merely to have reached their majority (probably twenty years of age) to take part in the Assembly.





Every day that the courts were in session, any of the *hēliastai* who so desired might present themselves outside the courtroom in the morning. The judges or jurors (*dikastai*) needed for that day were then chosen by lot from among them. Note again the voluntary nature of such participation. Since a number of courts sat simultaneously, another lottery then determined (at least in the fourth century) in which court each judge should sit.[26] A court might comprise 501, 1,001, 1,501, or even more *dikastai*, depending on the seriousness of the matters before it.[27] *Dikastai* received an allowance of three obols per day (which as we have seen was approximately equivalent to half a day's pay). For the most part, it was the poor and the elderly who sat in the courts.[28]

The term "courts" is potentially misleading as regards the nature of the functions thus assigned by lot, and we need to go into more detail here. The fact is, the courts performed important political functions. Disputes between individuals were often settled by arbitration, the courts becoming involved only if one of the parties appealed the decision. Many criminal cases, too, were dealt with outside the people's courts (murders, for example, were judged by the Areopagus). Thus, political trials accounted for most of the activity of the people's courts.[29] Such trials were in no way exceptional. In fact, they were an important element in everyday government.

This was above all the case with the criminal action for illegality (*graphē paranomōn*). Any citizen could bring an action for illegality against a proposal (whether for a law or for a decree) submitted to the Assembly.[30] The charge was against a named person: the individual who had made the offending proposal. Only the initiator was subject to prosecution; a citizen could not be prosecuted for a vote he had cast (which again highlights the special status of the act

[26] Hansen, *The Athenian Democracy*, pp. 181–3.

[27] Note, by way of comparison, that on average around 6,000 persons took part in the Assembly (see *ibid.*, pp. 130–2).

[28] *Ibid.*, pp. 183–6. [29] *Ibid.*, pp. 178–80.

[30] Actually, it was only in the fifth century that the Assembly voted on both laws (*nomoi*) and decrees (*psēphismata*); in the fourth century, voting on laws was the exclusive province of the nomothetai. In the fifth century, then, the *graphē paranomōn* could target either laws or decrees, while in the fourth century it applied only to decrees, a rather different procedure (the *graphē nomon mē epitēdeion theinai*) being used to challenge laws.

of initiating in the Athenian democracy). More importantly, it should be noted that an action for illegality could still be brought against the proposer of a decree or a law that had already been adopted by the Assembly, even unanimously. When a decree or a law that the Assembly had already passed was challenged as illegal, it was immediately suspended until the courts delivered their verdict. The action for illegality thus had the effect of placing the decisions of the Assembly under the control of the courts: every measure passed by the *ekklēsia* might be re-examined by the courts and possibly overturned, if someone so requested. Furthermore, an action for illegality could be brought not only for technical reasons (for instance, if the proposer had been under penalty of *atimia*), but also for substantive reasons (if the law or decree at issue contravened existing legislation). In the fourth century, substantive reasons included any conflict with the basic democratic principles underlying the laws. This meant that proposals might be challenged purely on the grounds that they were detrimental to the public interest. To that extent, the *graphē paranomōn* quite simply gave the courts political control over the actions of the Assembly.[31] It appears to have been in frequent use: the sources suggest that the courts may have considered as many as one a month.[32]

When a proposal that had already been put to the Assembly was re-examined by the courts through such an action for illegality, the second examination presented certain specific features differentiating it from the first, and accounting for its greater authority. To start with, there were fewer *dikastai* than there were members of the Assembly. They were older, and they had taken an oath. But in addition to this the procedure followed by the courts differed from that of the Assembly. A whole day was set aside for examining a decision that had been challenged as illegal, whereas during an *ekklēsia* session (half a day), it was customary for a number of decisions to be taken. Court procedure was necessarily adversarial, with the person who had proposed the suspect measure being required to defend it and the plaintiff to attack it. Moreover, the two parties had had time to prepare their cases. The Assembly, on the other hand, might make a decision without debate and on the spot,

[31] Hansen, *The Athenian Democracy*, pp. 205–8.

[32] *Ibid.*, pp. 153, 209.





provided that no one objected to the proposal concerned. Finally, voting in the Assembly was by show of hands in all but exceptional cases. No precise vote count was taken: with 6,000 people attending, on average, a count would have taken a very long time. In the courts, by contrast, secret ballot was the rule (making nobbling and corruption more difficult there), and votes were counted exactly.[33] So even when they were performing what was properly speaking a political role, the courts constituted an organ that differed substantially from the Assembly in terms of size, composition, and method of operation.

At the end of an action for illegality, if the *dikastai* handed down a verdict in favor of the prosecution, the Assembly's decision was quashed and the assemblyman who had initiated it fined. In some instances the fine was minimal, but it could amount to a substantial sum, making someone a debtor to the city for the rest of his days, thus stripping him of his civil rights (*atimia*). The possibility of incurring this penalty had one important consequence: while, as we have seen, anyone (*ho boulomenos*) could make a proposal in the Assembly, all members were aware that, in doing so, they ran a considerable risk. On the other hand, the system was also designed to discourage frivolous accusations: if an accuser withdrew his complaint before the courts had pronounced on it, he was sentenced to a fine of 1,000 drachmas and banned from ever again bringing an action for illegality. Also, apparently, as with other public accusations (*graphai*), the plaintiff incurred a 1,000 drachma fine and partial *atimia* if his complaint secured fewer than one-fifth of the votes.[34]

The courts also considered denunciations (*eisangeliai*). These were of various kinds. They might be directed either at magistrates accused of maladministration, in which case they were put to the Council before being dealt with by the courts (*eisangeliai eis tēn boulēn*), or at any citizen (including magistrates) for political offenses. In the latter case, the complaint was first laid before the Assembly (*eisangeliai eis ton dēmon*). The notion of political offense

[33] Hansen, *The Athenian Democracy*, pp. 147–8, 154–5, 209–12.

[34] To gain some idea of the size of a 1,000 drachma fine, bear in mind that the average wage for a day's work in the late fifth century was one drachma (see n. 20 above).

covered three types of act in the main: treason, corruption (accepting money to give "bad advice to the people of Athens"), and attempted overthrow of the government (i.e. democracy). However, these categories were rather loosely interpreted and in practice permitted a wide range of behavior. The *eisangelia eis ton dēmon* was used mainly against generals. This was the type of legal action used to condemn to death the victors of the naval battle of the Arginoussai (406/5) on the grounds that they had neither picked up survivors nor honored the dead after the victory. Several generals suffered denunciation for having lost a battle or led a fruitless campaign. Such denunciations were frequent: it would appear that one general in five would face an *eisangelia* at some point in his career. Finally, it was the courts that conducted the preliminary examination (*dokimasia*) of magistrates before they took up office and their rendering of accounts (*euthynai*) on leaving it.

The people's courts, whose members were drawn by lot, thus constituted a truly political authority. In the fourth century, a further body appointed by lot was particularly important in the government of Athens, namely the *nomothetai*. When democracy was restored following the oligarchic revolutions of 411 and 404, it was decided that, in the future, the Assembly would no longer pass laws but only decrees, and that legislative decisions would be left to the *nomothetai*. It was then that the distinction between laws (*nomoi*) and decrees (*psēphismata*) was worked out in detail. In the fifth century the two terms had been used more or less interchangeably. After democracy was restored, a law meant a *written* norm (in the fifth century the word *nomos* could refer to a custom), that enjoyed *greater validity than a decree*, and was *equally applicable to all Athenians* (whereas a decree might apply to an individual). These three characteristics were explicitly set out in a law defining laws, adopted in 403/2.[35] Other sources show that at that time a fourth characteristic was added to the definition of a law: *validity for an*

[35] The fullest quotation from this law defining laws is found in Andocides's speech *On the Mysteries* (§ 87): "Law: magistrates must under no circumstances use unwritten law. No decree voted on by the Council or the people may have higher validity than a law. No law may be passed that applies only to a single individual. The same law shall apply to all Athenians, unless otherwise decided [by the Assembly] with a quorum of 6000, by secret ballot" (quoted in Hansen, *The Athenian Democracy*, p. 170).





*indefinite period*, with the term "decree" being reserved for norms of limited duration, which exhaust their content once their purpose has been fulfilled.[36] In 403/2, the existing laws were codified, and henceforth any change in the code of laws had to be decided by the *nomothetai*.

In the fourth century, then, legislative activity assumed the following forms. At the beginning of each year, the code of existing laws was submitted for the approval of the Assembly. If a law currently in force was rejected by the Assembly, anyone might propose a fresh one to take its place. The Assembly then appointed five citizens to defend the existing law, and the two parties argued their respective cases before the *nomothetai*. In addition, at any time throughout the year, a citizen might propose that a particular law be abolished and replaced by another. If he secured the backing of the Assembly, the procedure would then be the same as in the first case. Lastly, six magistrates (the *thesmothetai*) were charged with constantly keeping an eye on the laws. If they found a law invalid, or if two laws seemed to conflict,[37] they brought the case before the Assembly. If that body so decided, the process of revision by the *nomothetai* was then set in motion. In other words, legislative activity invariably took the form of revision, with the Assembly retaining the initiative, but the final decision being taken by the *nomothetai*, following adversarial proceedings. When the Assembly decided that there was occasion for revision, it set up a committee of *nomothetai*, fixing their number in accordance with the importance of the law (501 was the minimum, but the figure was often 1,001, 1,501, or even higher). On the morning of the day set for the review, the requisite number of *nomothetai* was drawn by lot from among the *hēliastai*. It seems that, as with the courts, lots were drawn among those *hēliastai* who had turned up on the day. So in the fourth century, legislative decisions as such were in the hands of an organ distinct from the Assembly and appointed by lot.

Today, when we distinguish between representative and "direct" democracy we usually imagine that in the latter all important political powers were exercised by the assembled people. Closer examination of the institutional system used in ancient Athens

[36] *Ibid.*, p. 171.

[37] See, Aischines, *Contra Ctesiphon*, III, 37–40.

shows this image to be false. Even apart from the magistrates, three institutions other than the Assembly, namely the Council, the courts, and the *nomothetai*, exercised a political function of the first importance. The people's courts and the Council merit particular attention. For both institutions played a key part throughout the history of the Athenian democracy. Certain powers of the courts even belonged to what was regarded as decisive power (*kyrion*), notably their ability to overturn decisions of the Assembly.

In his definition of citizenship, Aristotle actually placed participation in the courts on the same level as participation in the Assembly. He made it clear that members of the courts, like members of the Assembly, had "the most decisive power [*kyriōtatoi*]."[38] At the same time, the courts, as we have seen, constituted an organ that was clearly distinct from the Assembly. What is more, in terms of beliefs and perceptions, it was the *ekklēsia* that was regarded as the *dēmos*, not the courts. The latter no doubt acted on the city's behalf (particularly in their political role) and hence on behalf of the Athenian people (*ho dēmos tōn Athēnaiōn*), the city being a democracy. But they were not perceived as the people itself. There appears to be no source in which the term *dēmos* denotes the courts. When the word is applied to a political institution, it never refers to anything other than the Assembly.[39]

As for the Council, despite the fact that it acted on behalf of the city and the Athenian people, it too was never identified with the *dēmos*. A distinction was drawn between decrees enacted by the Council (*boulēs psēphismata*), which did indeed enjoy certain limited

[38] Aristotle, *Politics*, III, 1, 1275a 28. This statement is in fact part of a more complex argument. The concept of the citizen put forward in the *Politics* applies in principle to all regimes, but Artistotle adds that the citizen, as he defines him, "exists primarily under democracy" (*Politics*, III, 1, 1275b 5–6). The citizen is defined by his "participation in the power of judgement and the power of command [*metechein kriseōs kai archēs*]" (*Politics*, III, 1, 1275a 23). According to Aristotle, the power of command belongs to the magistracies as such, which may be held only for a time, but it also belongs to functions that may be performed with no time limit, namely those of assemblyman (*ekklēsiastēs*) and of judge (*dikastēs*). For, he went on, it would be "ridiculous to deny that those rule who hold the most decisive power [*geloion tous kyriōtatous aposterein archēs*]" (*Politics*, III, 1, 1275a 28–9). At first, Aristotle appears to place the power of the magistrates proper in the same category as that of the Assembly and that of the courts (which radical democrats disputed), but he later reserves the term *kyriōtatos* for members of the Assembly and the courts.

[39] Hansen, *The Athenian Democracy*, pp. 154–5.





powers of its own, and decrees enacted by the Assembly, only the latter being referred to as "decrees of the people" (*dēmou psēphismata*). Moreover, when the Assembly was merely ratifying a detailed proposal put to it by the Council, the decision was prefaced by the words: "It has been decided by the Council and by the people ..." (*edoxē tē boulē kai tō dēmō*). On the other hand, when the decision taken stemmed from a proposal that had originated in the Assembly (the Council having merely placed an item on the agenda by means of an open *probouleuma*), the Assembly's decision began with the words: "It has been decided by the people ..." (*edoxē tō dēmō*).[40] In the Athenian democracy, then, the populace did not itself wield all power; certain important powers and even a portion of the decisive power belonged to institutions that were in fact, and were perceived to be, other than the *dēmos*.

But then what, in that case, does "direct democracy" mean? Anyone insisting that such institutions as the Council and the courts were organs of "direct" government is forced to admit that this directness consisted in the way their members were recruited, which was by lot, rather than from their being identical to or identified with the people.

For a time historians believed that in Athens, the origins and significance of lot were religious. This interpretation was first put forward by N.-D. Fustel de Coulanges and subsequently taken up, with certain variations, by G. Glotz.[41] For Fustel de Coulanges, appointment by lot was a legacy from the archaic period and the priestly quality with which rulers were then endowed. The sacerdotal royalty of the archaic period had been hereditary. When it disappeared, Fustel wrote, "one searched to replace birth with a method of election that the gods should not have to disavow. The Athenians, like many Greek peoples, put their faith in the drawing of lots. However, we must not form a false impression of a process that has been used as a subject of reproach against the Athenian

[40] Hansen, *The Athenian Democracy*, pp. 255–6, 139.

[41] Nicolas-Denis Fustel de Coulanges, *La Cité antique* [1864], Book III, ch. 10 (Paris: Flammarion, 1984) pp. 210–13. See also Fustel de Coulanges, "Recherches sur le tirage au sort appliqué à la nomination des archontes athéniens," in *Nouvelle Revue Historique de droit français et étranger*, 1878, 2, pp. 613 ff.; Gustave Glotz, "Sortitio," in C. Daremberg, E. Saglio, and E. Pottier (eds.), *Dictionnaire des antiquités grecques et romaines*, Vol. IV (Paris, 1907), pp. 1401–17; G. Glotz, *La Cité grecque* [1928], II, 5 (Paris: Albin Michel, 1988), pp. 219–24.

democracy." "To the people of antiquity," he went on, "lot was not chance; lot was the revelation of divine will."[42]

For Fustel as for Glotz, the religious interpretation of lot offered a solution to what they both saw as the principal enigma of the process, namely its bizarre, if not absurd, character in the light of modern political thinking. Glotz wrote: "Appointing rulers by lot seems so absurd to us today that we find it difficult to imagine how an intelligent people managed to conceive of and sustain such a system."[43] Neither Fustel nor Glotz could conceive that the Athenians practiced lot for political reasons or, to be more precise, for reasons whose political nature might still be apparent to the modern mind. Since the appointment of magistrates by lot struck them as so alien to the world of politics, they assumed that it must have belonged to a different world, that of religion. They concluded that politics for the Athenians must have been different from politics in the modern age, not merely in content and order of priorities, but also in ontological status. Politics for the Athenians, they surmised, must have been a blend of the here-and-now and the hereafter.[44]

The religious explanation of the Athenian use of lot was certainly based on the interpretation of certain sources. It also rested on an argument by analogy: various cultures have in fact looked on lot as giving signs from the supernatural world. Nevertheless, the theory was challenged in a pioneering work published by J. W. Headlam in 1891,[45] and it no longer enjoys currency among today's specialists.[46] "All in all," Hansen writes, "there is not a single good source that

[42] Fustel de Coulanges, *La Cité antique*, pp. 212–13.

[43] Glotz, *La Cité grecque*, p. 223.

[44] The idea that the only way to understand the institutions of antiquity was with reference to their religious origins and dimension runs through the whole of Fustel's book. Note that the author was also pursuing an explicit objective in terms of political pedagogy: in setting out "above all to highlight the fundamental and essential differences that will forever distinguish these ancient peoples from modern societies," he hoped to help discourage imitation of the ancients, which in his eyes was an obstacle to "the progress of modern societies." Echoing Benjamin Constant's famous distinction, Fustel declared: "We have deluded ourselves about liberty among the ancients, and for that reason alone liberty among the moderns has been jeopardized" (*La Cité antique*, Introduction, pp. 1–2).

[45] Headlam, *Election by Lot at Athens*, pp. 78–87.

[46] See Staveley, *Greek and Roman Voting*, pp. 34–6; Finley, *Politics in the Ancient World*, pp. 94–5.





straightforwardly testifies to the selection of magistrates by lot as having a religious character or origin."[47]

On the other hand, countless sources present lot as a typical feature of democracy.[48] What is more, lot is described as *the* democratic selection method, while election is seen as more oligarchic or aristocratic. "What I mean," wrote Aristotle, "is that it is regarded as democratic that magistracies should be assigned by lot, as oligarchic that they should be elective, as democratic that they should not depend on a property qualification, and as oligarchic that they should."[49] The idea of lot being democratic and election oligarchic no doubt strikes us as odd. Aristotle clearly believed otherwise, though, because he brought it into an argument relating to one of the central concepts of the *Politics*, that of the mixed constitution (*memigmenē politeia*).

Aristotle thought that, by synthesizing democratic and oligarchic arrangements, one obtained a better constitution than regimes that were all of a piece. Various combinations of lot, election, and property qualifications allowed just this kind of synthesis. Aristotle even suggests ways of achieving the mixture. One might, for example, decide that magistracies should be elective (rather than assigned by lot) but that everyone, regardless of any property qualification, could vote or stand for election, or both. Another mixture might consist in assigning offices by lot but only within a particular class of citizens defined by a property qualification. Or again, certain posts might be filled by election and others by lot.[50] According to the philosopher, these different combinations produced constitutions that were oligarchic in some respects and democratic in others. For Aristotle, then, election was not incompa-

[47] Hansen, *The Athenian Democracy*, p. 51 (for a detailed discussion of the theory advanced by Fustel and Glotz, see *ibid.*, pp. 49–52).

[48] See, for example, Herodotus, *Histories*, III, 80, 27 (the speech of Otanes, a supporter of democracy, in the debate about constitutions); Pseudo-Xenophon, *Constitution of Athens*, I, 2–3; Xenophon, *Memorabilia*, I, 2, 9; Plato, *Republic*, VIII, 561b, 3–5; Plato, *Laws*, VI, 757e 1–758a 2; Isocrates, *Areopagiticus*, VII, 21–2; Aristotle, *Politics*, IV, 15, 1300a 32; VI, 2, 1317b 20–2; Aristotle, *Rhetoric*, I, 8.

[49] Aristotle, *Politics*, IV, 9, 1294b 7–9. On the aristocratic nature of election, see also Isocrates, *Panathenaicus*, XII, 153–4: the ancestral constitution, Isocrates claimed in essence, was superior to the present constitution, since under it magistrates were appointed by election (rather than by lot) and it therefore included an aristocratic element alongside its democratic features.

[50] Aristotle, *Politics*, IV, 9, 1294b 11–14; IV, 15, 1300a 8–1300b 5.

tible with democracy, although taken in isolation it was an oligarchic or aristocratic method, whereas lot was intrinsically democratic.

To understand the link that the Athenians established between lot and democracy, we must first take a look at a key feature of Greek democratic culture: the principle of rotation in office. Democrats not only recognized the existence of a difference of role between the governors and the governed, they also recognized that, for the most part, the two functions could not be exercised by the same individuals at the same time. The cardinal principle of democracy was not that the people must both govern and be governed, but that every citizen must be able to occupy the two positions alternately. Aristotle defined one of the two forms that liberty – "the basic principle of the democratic constitution" – might take as follows: "One of the forms of liberty [*eleutheria*] is to rule and be ruled in turns [*en merei archesthai kai archein*]."[51] In other words, democratic freedom consisted not in obeying only oneself but in obeying today someone in whose place one would be tomorrow.

For Aristotle, this alternation between command and obedience even constituted the virtue or excellence of the citizen.[52] "It would appear," he wrote, "that the excellence of a good citizen is to be capable of commanding well and obeying well [*to dynasthai kai archein kai archesthai kalōs*]."[53] And this dual capacity, so essential to the citizen, was learned through alternating the roles: "It is said, and quite rightly, that no one can command well who has not obeyed well [*ouch estin eu arxai mē archthenta*]."[54] The phrase used by

[51] Aristotle, *Politics*, VI, 2, 1317a 40–1317b 2. The same idea was expressed by Euripides when he had Theseus say that the fact of taking turns to govern was a fundamental characteristic of the Athenian democracy (*Suppliant Women*, v. 406–8). For Aristotle, the other form of democratic liberty had nothing to do with participating in political power; it was "the fact of living as one likes [*to zēn hōs bouletai tis*]" (*Politics*, VI, 2, 1317b 11–12). The fact that freedom understood as the ability to live as one wishes constituted one of the democratic ideals is also vouched for by Thucydides, both in the famous funeral oration that he has Pericles deliver (*Peloponnesian War*, II, 37) and in the remarks he attributes to Nicias (*ibid.*, VII, 69). This is not the place to discuss Benjamin Constant's distinction between the liberty of the ancients and that of modern man or to enter into the numerous discussions, whether scholarly or ideological, raised by Pericles's funeral oration.

[52] The Aristotelian concept of the citizen particularly applied (as Aristotle himself acknowledged) to the citizen of a democracy (see above note 38).

[53] Aristotle, *Politics*, III, 1277a 27.

[54] *Ibid.*, 1277b 12–13. Aristotle mentions the same idea several times in the *Politics*. In another passage, he explains that alternating command and obedience and having citizens fill the two roles by turns is a just solution (if not in absolute terms the best) when all citizens are equal or deemed to be such, as is the case in democracies (*Politics*, II, 2, 1261a 31–1261b 7). In Book VII, dealing with the unconditionally best constitution, he writes: "Since every political community is made up of rulers and ruled, we must examine whether the rulers and the ruled should change or remain the same for life ... Undoubtedly, were some to differ from others as much as we believe the gods and heroes differ from men, being endowed with great superiority, perceptible first in their bodies and subsequently in their minds, such that the superiority of the rulers over the ruled is clear and unquestionable, obviously it would be better in that case that the same people, once and for all, should govern and be governed. But since such a situation is not easily found, and since it is not the same here as among the inhabitants of India, where according to Scylax kings do differ so greatly from their subjects, clearly it is necessary, for many reasons, that all should share in the same way in ruling and in being ruled, by taking turns [*anankaion pantas homoiōs koinōnein tou kata meros archein kai archesthai*]" (*Politics*, VII, 14, 1332b 12–27). However, when it comes to the unconditionally best constitution, Aristotle attempts to reconcile the principle of rotation and the requirement that differences of function be based on nature. One thing permits such a reconciliation: age. The same individuals need to be ruled when nature most inclines them to that role, i.e. when they are young, and to be rulers when nature makes them more capable thereof, namely in later life. Aristotle adds that this alternation based on age satisfies the principle that "he who is destined to govern well must first have been well governed" *ibid.*, 1333a 3–4). So even when Aristotle is describing the best constitution, he remains attached to the principle that command is learned through obedience.





Aristotle was proverbial. Its origin was attributed to Solon, which gives some indication of its importance in the political culture of Athens. The expression "to command well" should here be understood in its fundamental sense: to exercise the activity of command in conformity with its essence and perfection. Generally speaking, a task may legitimately be entrusted to someone capable of performing it to perfection. Rotation in office thus provided the basic legitimation of command. What gave a right to rule was the fact of having once been in the opposite position.

It has often been pointed out that rotation reflected a view of life according to which political activity and participation in government were among the highest forms of human excellence. But alternating command and obedience was also a device for achieving good government. It aimed to produce political decisions that accorded with a certain type of justice, namely democratic justice. Insofar as those giving orders one day had been obeying them the day before, it was possible for those in power to make allowance, in reaching their decisions, for the views of the people whom those decisions affected. They were able to visualize how their orders

would affect the governed, because they knew, having experienced it for themselves, what it felt like to be governed and to have to obey. Furthermore, those in office had an incentive to take the views of the governed into account: the man giving the orders one day was discouraged from lording it over his subordinates, knowing that the next day he would be the subordinate. Admittedly, rotation was no more than a procedure; it did not dictate the content of decisions or determine what were just orders. But the procedure itself was nonetheless conducive to substantively just outcomes, creating as it did a situation in which it was both possible and prudent for the governors, when making decisions, to see the situation from the viewpoint of the governed.

In the theoretical outline that Rousseau put forward two thousand years later, justice was to be guaranteed by the universality of law: each citizen, voting on laws that would apply to himself as to everyone else, would be induced to will for others what he willed for himself. In the rotation procedure, a similar effect was produced through the medium of chronological succession: those who governed were led to decide by putting themselves in the place of their subjects, for it was a place they had known and would know again. The democrats of Athens were not content merely to preach justice, exhorting those in power to imagine themselves in the place of the governed: they gave them the means and the motivation to do so.

Rotation was of such importance to democrats that it was made a legal requirement. Not only was the power relationship reversible in principle; it was ineluctably reversed in fact. That was the purpose of the various restrictions mentioned above (e.g., the magistracies assigned by lot could not be held for more than one term, one could not be a member of the *boulē* more than twice). Because of these restrictions, several hundred new individuals had to be found each year to fill the posts of magistrate and councilor. It has been calculated that, among citizens aged thirty and over, one in two must have been a member of the *boulē* at least once in his life. Moreover, there was also a de facto rotation in attending the Assembly and the courts. The *ekklēsia* never assembled more than a fraction of the citizenry (averaging 6,000, as we mentioned, from a total of 30,000 citizens in the fourth century), and it is unlikely to have been the same citizens taking part each time. The Assembly





was identified with the people not because all citizens attended, but because all of them *could* attend, and because its membership was constantly changing. As for the courts, we have clear archaeological proof to the effect that the *dikastai* changed a great deal.[55]

The Athenian democracy was thus to a large extent organized, in practice as well as in theory, around the principle of rotation. This fundamental principle made selection by lot a rational solution: since a substantial number of individuals were to be in office anyway, one day or another, the order in which they acceded to those offices might be left to chance. Moreover, the number of citizens being fairly small in relation to the number of posts to be filled, the rotation requirement made lot preferable to election. Election would in fact have reduced even further the number of potential magistrates by limiting it to people who were popular with their fellow-citizens. The Athenians, it might be said, could not afford to reserve the posts of magistrates and councilors for those citizens whom their peers judged sufficiently able or gifted to elect them: that kind of restriction would have inhibited rotation.

But we need to go even further: there was a potential conflict between the elective principle and rotation. The elective principle entails that citizens be free to choose those whom they place in office. Freedom to elect, however, is also freedom to re-elect. The citizens may want the same person to occupy a particular office year after year. It must even be assumed that if a citizen has succeeded in attracting votes once, he has a good chance of attracting them again. The only way to provide an absolute guarantee of rotation in an elective system is to limit the electorate's freedom of choice by deciding that certain citizens may not be elected because they have already been elected. This can be done, of course, but it means establishing a compromise between two principles implying potentially opposite consequences. By contrast, combining compulsory rotation with selection by lot presents no such danger: the rotation requirement carries no risk of thwarting the logic of the lot. The Athenians were aware of the potential conflict between the elective principle and the principle of rotation, which is why holding the same elective magistracy several times in succession was not prohib-

[55] Hansen, *The Athenian Democracy*, p. 313.

ited. The system of prohibitions applied only to those magistracies that were filled by lot. In the Athenian democracy, then, appointment by lot reflected above all the priority given to rotation.

Second, the combination of rotation and the drawing of lots stemmed from a deep distrust of professionalism. Most magistrates as well as all councilors and judges were not professionals but just ordinary citizens. The Athenians recognized the need for specialized professional skills in certain cases, but the general presumption was to the contrary: they reckoned that every political function was performable by non-specialists unless there were compelling reasons to think otherwise. The absence of experts or, at any rate, their restricted role was designed to safeguard the political power of ordinary citizens.[56]

The assumption was that if professionals intervened in government they would inevitably dominate. The Athenians probably sensed that, in collective decision-making, having knowledge and skills that others did not possess constituted by itself a source of power, giving those who possessed the skills an advantage over those who did not, no matter how their respective powers might be defined in law. A Council of professionals or professional magistrates would have a hold over the Assembly; the presence of experts in the courts would have reduced the importance of the other *dikastai*. Historians frequently assert that the chief objective of appointment by lot was to curtail the power of the magistrates.[57] However, the assertion is ambiguous and in any case applies to only one of the uses of lot, namely the selection of magistrates proper. In fact, appointment by lot did not affect the formal definition of functions or powers. The formal powers of magistrates were indeed limited, but this was because they were subject to constant monitoring by the Assembly and the courts. Selection by lot guaranteed more specifically that individuals serving as magistrates would not enjoy extra power by virtue of their expertise. Indeed, having the *dikastai* appointed by lot was not intended to reduce the formal power of the courts: they were invested with a power that was explicitly deemed decisive. That is why it is so important to look at

[56] Staveley, *Greek and Roman Voting*, p. 55.
[57] This is true of Staveley, *Greek and Roman Voting*, but also of Hansen, *The Athenian Democracy*, pp. 84, 235–7.





the courts in any analysis of how Athens utilized lot. In the courts, the use of lot to select judges and the complete absence of professionals were intended to guarantee that the voices of experts did not outweigh those of ordinary citizens.

In the final analysis, the Athenian democrats perceived a conflict between democracy and professionalism in political matters.[58] Democracy consisted in placing decisive power in the hands of amateurs, the people the Athenians called *hoi idiōtai*. Magistrates, when they came to render account, frequently pleaded lack of expertise in excuse for their mistakes.[59] That kind of rhetorical strategy obviously presupposed that those listening saw it as normal and legitimate that ordinary citizens should occupy magistracies. To gain public favor, even an orator and political leader of the stature of Demosthenes would on occasion, particularly in the early days of his career, present himself as "an ordinary person, like one of you [*idiōtēs kai pollōn humōn heis*]."[60]

The myth that Plato has Protagoras recount undoubtedly gives expression to a key element of democratic thinking. Plato, of course, had no sympathy for democracy and regarded Protagoras as an opponent whose ideas had to be refuted. However, he does seem to have felt a certain respect for Pericles's sophist friend. Moreover, the remarks he attributes to Protagoras accord too well with Athenian practice to have been a mere caricature designed to facilitate refutation. In the *Protagoras*, Socrates expresses surprise that the Assembly behaves very differently when dealing with buildings or ships to be constructed than when discussing the government of the city (*peri tōn tēs poleōs dioikēseōn*). In the former case, the Assembly calls builders or shipwrights, and, if anyone not regarded as an expert presumes to offer his opinion, the crowd makes fun of him and shouts him down. But when general city matters are under discussion, "we see the floor being taken indiscriminately by smiths, shoemakers, merchants, and seamen, rich and poor, high-born and commoners, and nobody thinks of rebuking them, as one would in the former case, for their attempt to give advice with no training obtained anywhere, under any teacher."[61] Protagoras has then

[58] Hansen, *The Athenian Democracy*, p. 308. [59] *Ibid.*, p. 308.
[60] Demosthenes, *Prooemia*, 12. In some editions, this Prooemion is numbered 13.
[61] Plato, *Protagoras*, 319 D.

recourse to a myth to defend Athenian practice: Zeus granted political virtue to all men, for had it been reserved for some, as technical skills are, cities would be unable to survive; they would be torn apart by conflict, their members would be dispersed, and humanity would perish.[62] This myth constitutes a defense of the principle of *isēgoria*: so far as government is concerned, any citizen, no matter who, is sufficiently qualified for his opinion to merit at least a hearing.

Lot was also associated with the principle of equality, but this link is more difficult to interpret. Contemporary historians disagree on the subject. Some, like M. I. Finley, see the practice of drawing lots as an expression of the equality so dear to the Athenian democrats.[63] Others echo Hansen in claiming that it was chiefly authors hostile to democracy (Plato, Aristotle, Isocrates) who established a link between lot and the democratic ideal of equality, rather than the democrats themselves. Hansen further points out that the view of equality that these authors attributed to democrats did not correspond to the reality of Athenian democracy.[64]

Hansen's argument is hard to follow and conceptually weak. He uses the modern distinction between two conceptions of equality: equality of outcome, in which individuals have equal shares of everything, and equality of opportunity, in which everyone shares the same starting line, the final distribution being determined solely by individual merit.[65] Hansen demonstrates that the concept of equality actually championed by the Athenian democrats was not equality of outcome. Whatever Aristotle might have said, they did not claim that all must have equal shares in everything. Now the use of lot was not about equality of opportunity since it obviously did not distribute power in accordance with talent. Hansen infers that its only justification could be equality of outcome. Since this was not the view of equality held by democrats, the conclusion is that democrats did not defend lot in the name of their vision of equality.

The argument presupposes, however, that the distinction between

[62] Plato, *Protagoras*, 322 C 1–323 A 4.
[63] M. I. Finley, "The freedom of the citizen in the Greek world," in *Talanta: Proceedings of the Dutch Archaeological and Historical Society*, Vol. 7, 1975, pp. 9, 13.
[64] Hansen, *The Athenian Democracy*, pp. 81–5. [65] *Ibid.*, p. 81.





equality of outcome and equality of opportunity, as understood today, exhausts the possibilities so far as concepts of equality are concerned. Certainly, talent played no part in selection by lot, but it does not follow that lot could embody only the notion of equality of outcome. It may be that the use of lot reflected a concept of equality that was neither equality of outcome nor equality of opportunity in the modern sense.

In fact, as Hansen himself acknowledges, it is not only in texts that are critical of or have reservations about democracy that the egalitarian nature of lot is stressed. It also appears in Herodotus, in the famous debate about constitutions (though this is not specifically about Athens), and above all in Demosthenes, who cannot be suspected of having been either hostile to Athens or unfamiliar with the city's political culture.[66] It would appear, then, that selection by lot was regarded as a particularly egalitarian procedure. The problem is knowing to which version of the complex notion of equality it was attached.

Greek culture distinguished two types of equality: arithmetical equality on the one hand, achieved when the members of a group all receive equal shares (whether of goods, honors, or powers), and geometrical or proportional equality on the other, which was reached by giving individuals shares whose value corresponded to the value of the individuals concerned, assessed according to a particular criterion, whatever it might be. To put it another way, if two individuals, *A* and *B*, had shares *a* and *b* in a particular asset assigned to them, arithmetical equality was said to obtain if *a* equaled *b* and geometrical equality if the ratio of values between the two individuals equaled the ratio of values between the shares ($A / B = a / b$).

Plato linked the drawing of lots to the arithmetical concept of equality in a passage in the *Laws* that merits attention because, in it, lot is not purely and simply rejected. Plato's position on the subject of democracy is not reducible to the emphatic attacks expressed in the *Republic*. In the *Laws* he attempts to combine monarchy and

[66] In the debate about constitutions, Otanes, who argues in favor of democracy, associates the use of lot with political equality (the word used is *isonomiē*): Herodotus, *Histories*, III, 80, 26. Demosthenes, for his part, speaks in one of his private orations of appointment to a post by lot as being something "shared by all equally {*koinou kai isou*}" (Demosthenes, *Against Boiotos*, I, XXXIX, 11).

democracy or rather, to be more precise, to find a middle way between those two forms of government.[67] Many analyses and commentaries have sought to account for this variation in Plato's political thinking. This is not the place to enter into such interpretative discussions, but whether the *Laws* reflects a chronological development of Plato's thought or whether that dialogue pursues a different objective than the *Republic*, the fact is that in the later work Plato is not unrelentingly critical of democracy.[68] Without showing any enthusiasm for the system, he concedes that it is probably prudent to pay a certain amount of attention to democratic views and institutions. This is particularly apparent in his remarks on lot. The Athenian Stranger starts by distinguishing two types of equality: equality of "measurement, weight, and number" and equality of "giving to each in proportion to his person." The first, he points out, is easily effected in distributions by lot. The second, which is more divine and the only real form of equality, requires the assistance of Zeus.[69] The founder of the city must aim primarily for true justice in the strict sense of the word, that is, proportional equality. "However," the Stranger adds, "the city as a whole must inevitably, on occasion, take these expressions in a somewhat altered sense as well if it wishes to avoid rebellions in any of its parts, for equity [*to epieikes*] and indulgence are always distortions of full exactness at the expense of strict justice; this makes it necessary to fall back on the equality of lot in order to avoid popular discontent [*duskolias tōn pollōn heneka*], once again calling upon divinity and good fortune that they may steer fate in the direction of the greatest justice."[70]

More amenable to democracy than Plato, Aristotle likewise associates lot with the arithmetical or numerical concept of equality.[71] He

[67] See, for instance, the passage in the *Laws* where the Athenian Stranger (the author's voice) justifies his proposed method of appointment for members of the Council: "Such a system of elections seems to fall midway between monarchy and democracy, and it is always between those two forms that the constitution must hold its course" (*Laws*, VI, 756 E 8–9).

[68] For one interpretation of the place occupied by the *Laws* in the body of Plato's political thought, see Glenn R. Morrow, *Plato's Cretan City. A Historical Interpretation of the Laws* (Princeton, NJ: Princeton University Press, 1960) esp. ch. V, pp. 153–240.

[69] Plato, *Laws*, VI, 757 B.

[70] *Ibid.*, 757 D–E.

[71] Aristotle, *Politics*, VI, 2, 1317b 18–1318a 10.





also, in his theory of justice, gives a more detailed philosophical elaboration of the distinction between arithmetical equality and geometrical or proportional equality. Aristotle considers that the true (most universal) definition of justice is geometrical equality, the arithmetical kind being simply one particular version of it, for individuals that are reckoned absolutely equal or equal in every respect. Indeed, if $A$ and $B$ are regarded as absolutely equal ($A/B = 1$), then application of proportional justice results in a distribution whereby $a/b = 1$, and hence in the arithmetical equality $a = b$.[72] Democrats, Aristotle declares, believe that since citizens are equal in one respect (all are freeborn), they are equal in every respect. The democratic conception of justice thus comes down, according to Aristotle, to arithmetical equality: democrats, deeming citizens absolutely equal (or equal from all points of view), define justice as "the fact of each person possessing an arithmetically equal share [*to ison echein apantas kat'arithmon*]."[73] Although this definition constitutes a particular version of the true concept of justice, Aristotle nevertheless calls it incorrect. The democrats' error, he says, is to exaggerate the implications of the actual equality: they are right to regard citizens as equal from a particular standpoint (that of free birth), but wrong to infer from this that citizens are equal in every respect.[74]

Isocrates, for his part, establishes a link between the drawing of lots and arithmetical equality, then rejects that concept of equality immediately on the basis of a somewhat rudimentary argument: arithmetical equality assigns the same thing to the good as to the

[72] Aristotle, *Politics*, III, 9, 1287a 7–25; see also *Nichomachean Ethics*, 1131a 24–8. For further discussion, see the analysis of the Aristotelian theory of justice presented by Cornelius Castoriadis in his essay: "Value, equality, justice, politics: from Marx to Aristotle and from Aristotle to ourselves," in *Les carrefours du labyrinthe*, (Paris: Seuil, 1978), pp. 249–316; English edition: *Crossroads in the Labyrinth* (Cambridge, MA: MIT Press, 1984), pp. 260–339.

[73] Aristotle, *Politics*, VI, 2, 1318a 5.

[74] *Ibid.*, III, 9, 1280a 7–25. According to Aristotle, oligarchs and aristocrats commit a symmetrical error: rightly considering citizens unequal on one point (wealth or virtue), they infer that the members of the city are unequal in every respect (and should therefore receive unequal shares). The conclusion that appears to flow from this argument is that, for Aristotle, citizens are equal in some respects and unequal in others, meaning that it is necessary to allow for both their equality and their inequality. This position justifies Aristotle's preference for a mixed constitution blending democratic characteristics with oligarchic or aristocratic characteristics.

wicked. In his view, geometrical equality alone constitutes true justice.[75]

The problem is knowing whether the association of lot with arithmetical equality was justified or whether it was simply a means of disqualifying the use of lot by contending that it sprang from an inferior conception of equality and justice. The question particularly arises in connection with the passage in the *Laws* just cited, where Plato concedes that room must be made for an institution beloved by democrats. This is even more so for Aristotle, whose concern was not merely to establish and defend the true conception of justice, but also to analyse and account for the different views of justice reflected by existing institutions in one place or another.

Granted, in one sense the phrase "an arithmetically equal share for all" [*to ison echein apantas kat'arithmon*], taken literally, does not entirely cover the use that the Athenian democracy made of lot. However, we need only inflect the phrase somewhat or make it slightly more specific to understand how Aristotle was able to see it as a reasonably accurate description of Athenian practice. First, we must recall a point that we have already looked at but that now assumes greater importance. The names drawn by lot were those of volunteers only. A person needed to be a "candidate" or to have presented himself outside the court in the morning for his name to be placed in the lottery machine. The system, in other words, did not exactly effect a distribution among all citizens without exception, but only among those who wished to hold office. But if selection by lot is looked at in conjunction with the principle of voluntarism, a crucial point emerges: the combination of lottery with voluntarism reflected the same concept of equality as *isēgoria* (the equal possibility of taking the floor in the Assembly or making a proposal), which was the key value of the political culture of democracy. In both cases, it was a question of guaranteeing anyone *who so desired* – the "first comer" – the chance to play a prominent part in politics.

Aristotle's portrayal of democratic equality, in that it omitted the voluntary element, was thus in a sense incomplete. However, there was not a huge difference between the principle of arithmetical

[75] Isocrates, *Areopagiticus*, VII, 20–3.





equality for everyone and that of arithmetical equality for everyone wishing to play a prominent political part. What is more, the Aristotelian expression usually translated as "an equal share" was actually, in Greek, a substantivized neuter adjective (*to ison*), that is, "something equal." One might, therefore, point out that there was some justification in using that "something" to mean the *possibility* of exercising power, in which case, the voluntary dimension was included in Aristotle's formula: it was quite correct to say that drawing lots made equally available to everyone the possibility of exercising power if they wished to do so.

But the notion of "arithmetically equal shares" applied to the use of lot invites even further refinement. It is clear that, when magistrates, councilors, or jurors were selected by lot, not everyone who presented himself obtained an equal share of power. Although it is true that rotation guaranteed all volunteers that one day they would fill the offices for which they stood, lot by itself (i.e. without regard to rotation), would on a given occasion elevate only some of them to office. In this respect there was a difference between lot and *isēgoria*. Any citizen might address the Assembly and submit a proposal if he so wanted. Speech and initiative were thus equally shared among all who cared to have them, though not in the case of magistrates or judges, where only some people acceded to the offices they sought. What was distributed equally by lot was not power exactly, but the (mathematical) probability of achieving power.

The Athenians were of course unaware of the mathematical concept of probability, which was not identified until the seventeenth century. The idea that chance might conform to mathematical necessity and random events be susceptible of calculation was alien to the Greek mind.[76] Yet it may not be out of the question that, even in the absence of the proper conceptual tools, 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. Since the state of mathematics did not

[76] See for example S. Sambursky, "On the possible and the probable in Ancient Greece," in *Osiris. Commentationes de scientiarum et eruditionis rationeque*, Vol. 12, Bruges, 1965, pp. 35–48.

make it possible to distinguish clearly, within numerical equality, equality of shares actually assigned and the equal probability of obtaining a desired object, Plato as well as Aristotle was naturally led to confuse equality of lot with the equality of shares actually distributed. In that sense but in that sense only their characterizations of lot are defective.

The equality achieved by the use of lot was certainly not equality of opportunity as we understand it today, since it did not distribute offices in accordance with talent and effort. Neither was it the same as what we call equality of outcome: it did not give everyone equal shares. However, this double difference does not prove that lot had nothing to do with equality, because equality may also assume a third form, which modern theories of justice overlook, namely the equal probability of obtaining a thing.

It is harder to explain why Aristotle saw election as an expression of geometrical or proportional equality and, hence of the aristocratic or oligarchic conception of equality. One can point out, of course, that in an elective process the candidates do not all have equal chances of acceding to office because their election depends on their merits in the eyes of their fellow citizens and because they do not all possess the qualities others prize. An analogy thus appears between election and the aristocratic concept of justice, which would have goods, honors, and power assigned to each according to his value, seen from a particular viewpoint. Furthermore, the actual practice of election among the Athenians resulted, as we have seen, in elective magistracies usually going to the upper classes. So the intuition that election might be linked to oligarchy or aristocracy is understandable. Aristotle's formula gave expression to that intuition.

From a different angle, though, in an elective system in which citizens are at liberty to elect whomever they like (as was the case in Athens), there is no objective, fixed, universally accepted definition of what constitutes political value or merit. Each citizen decides according to his own lights what features make one candidate better qualified than another. The probability of his acceding to office will certainly depend upon his popularity; but unlike the criteria generally invoked by oligarchs or aristocrats (wealth or virtue), popularity does not exist independently of other people's esteem. It is a quality that only the free decision of all other people can confer. There is





thus no obvious reason why the "first comer" should not be or become more popular than the other candidates, if the people so decide. It also follows that there is no obvious reason why, in a system in which elections are free, all citizens should not have equal chances of achieving that greater popularity. Establishing elections as an aristocratic procedure would have required demonstrating that, when people vote, preexistent objective criteria limit their choice and in fact prevent them from bestowing their favors on whomever they wish. Aristotle neither provided such proof, nor explained why the elective magistrates more often than not came from the higher social classes. Thus, his statement about the aristocratic or oligarchic nature of election was no more than an intuition, plausible and profound, but never explained.

Two main conclusions emerge. First, in the foremost example of "direct" democracy the assembled people did not exercise all powers. Substantial powers – sometimes greater than those of the Assembly – were assigned to separate, smaller bodies. However, their members were mainly appointed by lot. The fact that representative governments have never used lot to assign political power shows that the difference between the representative system and "direct" systems has to do with the method of selection rather than with the limited number of those selected. What makes a system representative is not the fact that a few govern in the place of the people, but that they are selected by election only.

Second, selection by lot was not (contrary to what is sometimes stated even today) a peripheral institution in the Athenian democracy. It gave expression to a number of fundamental democratic values: it fitted in unproblematically with the imperative of rotation in office; it reflected the democrats' deep distrust of political professionalism; and above all, it produced an effect similar to that paramount principle of democracy *isēgoria* – the equal right to speak in the Assembly. The latter gave anyone who so wished an equal share in the power exercised by the assembled people. Lot guaranteed anyone who sought office an equal probability of exercising the functions that were performed by a smaller number of citizens. Even though they could not explain how it was so, democrats had the intuition that elections did not guarantee the same equality.

system in which differences and distinctions among citizens can manifest themselves freely. And those differences can be utilized for political ends.

> In addition to the advantage of the distinction between the two powers [Sovereign and Government], it [aristocracy] has that of the choice of its members. For in popular government all citizens are born magistrates; but this type of government [aristocracy] limits them to a small number, and they become magistrates only by *election*, a means by which probity, enlightenment, experience, and all the other reasons for public preference and esteem are so many guarantees of being well governed.[93]

Because it is possible, in an aristocracy, to make political use of differences in talent and worth, elective aristocracy is the best form of government.[94]

While Montesquieu's discussion of lot in the *Spirit of the Laws* is remarkable for its historical insight, it is rigor of argument that stands out in Rousseau's *Social Contract*. Indeed, Rousseau himself regarded Montesquieu's account of the democratic properties of lot as poorly argued, though basically sound. His own account, however, for all its subtlety and impeccable logic, owed more to the idiosyncratic definitions and principles laid down in the *Social Contract* than to historical analysis. It might be pointed out that, given its complexity, the precise reasoning by which Rousseau linked lot to democracy probably exercised only the most limited influence on political actors. That may well be so, but the important points lie elsewhere.

The first thing to note is that, even as late as 1762, a thinker who undertook to lay down the "Principles of Political Right" (as the *Social Contract* was subtitled) would make a place for lot in his political theory. Both Montesquieu and Rousseau were fully aware that lot can select incompetents, which is what strikes us today, and explains why we do not even think of attributing public functions by lot. But both writers perceived that lot had *also* other properties or merits that at least made it an alternative worthy of serious

[93] *Social Contract*, Book III, ch. 5 (my emphasis; the term "election" here means election in the modern sense – what in other contexts Rousseau calls "selection by choice [*l'élection par choix*]."

[94] *Ibid.*, Book III, ch. 5.





consideration, and perhaps justified that one should seek to remedy the obvious defect with other institutions.

The other notable fact is that political writers of the caliber of Harrington, Montesquieu, and Rousseau should, each from his own standpoint and in his own manner, have advanced the same proposition, namely that election was aristocratic in nature, whereas lot is *par excellence* the democratic selection procedure. Not only had lot not disappeared from the theoretical horizon at the time representative government was invented, there was also a commonly accepted doctrine among intellectual authorities regarding the comparative properties of lot and election.

Scarcely one generation after the *Spirit of the Laws* and the *Social Contract*, however, the idea of attributing public functions by lot had vanished almost without trace. Never was it seriously considered during the American and French revolutions. At the same time that the founding fathers were declaring the equality of all citizens, they decided without the slightest hesitation to establish, on both sides of the Atlantic, the unqualified dominion of a method of selection long deemed to be aristocratic. Our close study of republican history and theory, then, reveals the sudden but silent disappearance of an old idea and a paradox that has hitherto gone unnoticed.

## THE TRIUMPH OF ELECTION: CONSENTING TO POWER RATHER THAN HOLDING OFFICE

What is indeed astonishing, in the light of the republican tradition and the theorizing it had generated, is the total absence of debate in the early years of representative government about the use of lot in the allocation of power. The founders of representative systems did not try to find out what other institutions might be used in conjunction with lot in order to correct its clearly undesirable effects. A preliminary screening, along the lines of the Florentine *squittinio*, aiming to obviate the selection of notoriously unqualified individuals, was never even considered. One could also argue that by itself lot gives citizens no control over what magistrates do once in office. However, a procedure for the rendering of accounts, coupled with sanctions, would have provided some form of popular control over the magistrates' decisions; such a solution was

never discussed either. It is certainly not surprising that the founders of representative government did not consider selecting rulers endowed with full freedom of action by drawing lots from among the entire population. What is surprising is that the use of lot, even in combination with other institutions, did not receive any serious hearing at all.

Lot was not completely forgotten, however. We do find the occasional mention of it in the writings and speeches of certain political figures. In the debates that shaped the United States Constitution, for instance, James Wilson suggested having the President of the United States chosen by a college of electors, who were themselves drawn by lot from among the members of Congress. Wilson's proposal was explicitly based on the Venetian model and aimed to obviate intrigues in electing a president.[95] It provoked no discussion, however, and was set aside almost immediately. In France, a few revolutionaries (Siéyès before the revolution, Lanthenas in 1792) thought of combining lot with election. And in 1793 a member of the French Convention, Montgilbert, suggested replacing election by lot on the grounds that lot was more egalitarian.[96] But none of these suggestions met with any significant level of debate within the assemblies of the French revolution. In 1795 the Thermidorians decided that each month the seating arrangement within the representative assemblies (the *Cinq Cents* and the *Anciens*) would be determined by lot.[97] The measure was aimed at inhibiting the formation of blocs – in the most physical sense. Lot was still associated with preventing factionalism, but in an obviously minor way. In any case, the rule was never observed.

The revolutionaries invoked the authority of Harrington, Montesquieu, and Rousseau, and meditated on the history of earlier republics. But neither in England, nor America, nor France, did anyone, apparently, ever give serious thought to the possibility of

[95] See M. Farrand (ed.), *The Records of the Federal Convention of 1787* [1911], 4 vols. (New Haven, CT: Yale University Press, 1966), Vol. II, pp. 99–106. I owe this reference to Jon Elster, who has my thanks.

[96] The suggestions of Siéyès and Lanthenas, together with the pamphlet written by Montgilbert, are quoted by P. Guéniffey in his book *Le Nombre et la Raison. La révolution française et les élections* (Paris: Editions de l'Ecole des Hautes Etudes en Sciences Sociales, 1933), pp. 119–20.

[97] See Guéniffey, *Le Nombre et la Raison*, p. 486.





assigning any public function by lot.[98] It is noteworthy, for example, that John Adams, one of the founding fathers who was most widely read in history, never considered selection by lot as a possibility, not even for the purposes of rejecting it.[99] In the lengthy descriptive chapters of his *Defense of the Constitutions of Government of the United States of America* devoted to Athens and Florence, Adams briefly notes that those cities chose their magistrates by lot, but he does not reflect on the subject. When representative systems were being established, this method of choosing rulers was not within the range of conceivable possibilities. It simply did not occur to anyone. The last two centuries, at least up until the present day, would suggest that it had disappeared forever.

To explain this remarkable, albeit rarely noted, phenomenon, the idea that first springs to mind is that choosing rulers by lot had become "impracticable" in large modern states.[100] One can also argue that lot "presupposes" conditions of possibility that no longer obtained in the states in which representative government was invented. Patrice Guéniffey, for example, contends that lot can create a feeling of political obligation only within small communities in which all members know one another, which he argues is "an indispensable prerequisite for their accepting a decision in which they have played no part or only an indirect one."[101] Selection by lot also requires, the same author continues, that political functions

[98] This claim ought to be accompanied by a caveat. I certainly have not consulted all the historical works available, let alone all the original sources relating to the three great modern revolutions. Moreover, the political use of lot has so far received a very limited amount of scholarly attention; it cannot be ruled out, therefore, that future research may reveal additional cases of lot being discussed. Nonetheless it seems to me reasonable, given what I know at present, to maintain that selecting rulers by lot was not contemplated in any major political debate during the English, American, and French revolutions.

[99] This is true at least of his three main political works, namely *Thoughts on Government* [1776], *A Defense of the Constitutions of Government of the United States of America* [1787–8], and *Discourses on Davila* [1790]. See C. F. Adams (ed.), *The Life and Works of John Adams*, 10 vols. (Boston, MA: Little Brown, 1850–6), Vols. IV, V, and VI.

[100] It is odd that Carl Schmitt, one of the few modern authors to devote any attention to the selection of rulers by lot, should adopt this point of view. Schmitt comments that lot is the method that best guarantees an identity between rulers and ruled, but he immediately adds: "This method has become impracticable nowadays." C. Schmitt, *Verfassungslehre*, § 19 (Munich: Duncker & Humblot, 1928), p. 257.

[101] Guéniffey, *Le Nombre et la Raison*, p. 122.

be simple and not need any special competence. And finally, Guéniffey claims, for it to be possible to select rulers at random, an equality of circumstances and culture must "pre-exist among the members of the body politic, in order that the decision may fall on any one of them indifferently."[102]

Such comments contain grains of truth, but they are defective in that they obscure the element of contingency and choice that is invariably present in every historical development, and that certainly played a part in the triumph of election over lot. In the first place – and this point has been made before, but it bears repeating – lot was not totally impracticable. In some cases, such as England, the size of the electorate was not as large as some might think. It has been calculated, for example, that in 1754 the total electorate of England and Wales numbered 280,000 persons (out of a population of around 8 million).[103] There was nothing practical preventing the establishment of a multiple step procedure: lots could have been drawn in small districts, and a further drawing of lots could then have taken place among the names selected by lot at the first level. It is even more remarkable that no one thought of using lot for local purposes. Towns, or even counties of the seventeenth and eighteenth centuries could not have been much larger or more populous than ancient Attica or Renaissance Florence. Local political functions presumably did not present a high degree of complexity. Yet neither the American nor the French revolutionaries ever contemplated assigning local offices by lot. Apparently, not even in the towns of New England (which de Tocqueville was later to characterize as models of direct democracy) were municipal officials chosen by lot in the seventeenth and eighteenth centuries; they were always picked by election.[104] In those small towns of homogeneous popula-

[102] Guéniffey, *Le Nombre et La Raison*, p. 123.

[103] See J. Cannon, *Parliamentary Reform 1640–1832* (Cambridge: Cambridge University Press, 1973), p. 31.

[104] Here again, the assertion needs to be advanced with caution. I have not consulted all the historical studies dealing with the local government system in New England during the colonial and revolutionary periods. Moreover, instances of the use of lot may have escaped the attention of historians. It seems, however, that even if the practice existed here and there, it was certainly neither widespread nor salient. On this question, see J. T. Adams, *The Founding of New England* (Boston, MA: Little Brown, 1921, 1949), ch. 11; Carl Brindenbaugh, *Cities in Revolt. Urban Life in America 1743–1776* (New York: A. A. Knopf, 1955); E. M. Cook Jr, *The Fathers of the Towns: Leadership and Community Structure in Eighteenth-century*





tion and limited functions, where common affairs were discussed by all the inhabitants in annual town meetings, conditions today put forward as necessary for the use of lot must have been approximated. The difference between the city-republics of Renaissance Italy and the towns of colonial and revolutionary New England did not lie in external circumstances, but in beliefs concerning what gave a collective authority legitimacy.

It is certainly true that political actors in the seventeenth and eighteenth centuries did not regard selecting rulers by lot as a possibility. Electing them appeared as the only course, as indicated by the absence of any hesitation about which of the two methods to use. But this was not purely the deterministic outcome of external circumstances. Lot was deemed to be manifestly unsuitable, *given* the objectives that the actors sought to achieve and the dominant beliefs about political legitimacy. So whatever role circumstances may have played in the eclipse of lot and the triumph of election, we have to inquire into which beliefs and values have intervened to bring this about. In the absence of any explicit debate among the founders of representative government as to the relative virtues of the two procedures, our argument inevitably remains somewhat conjectural. The only approach possible is to compare the two methods with ideas whose force is otherwise attested in the political culture of the seventeenth and eighteenth centuries. This will allow us to determine what kinds of motivation could have led people to adopt election as the self-evident course.

There was indeed one notion in the light of which the respective merits of lot and election must have appeared widely different and unequal, namely, the principle that all legitimate authority stems from the consent of those over whom it is exercised – in other words, that individuals are obliged only by what they have consented to. The three modern revolutions were accomplished in the name of this principle. This fact is sufficiently established for there to be no need to rehearse the evidence at length here.[105] Let us look at a few illustrative examples. In the Putney debates (October 1647)

*New England* (Baltimore, MD: Johns Hopkins University Press, 1976). The analysis by de Tocqueville to which I refer may be found in *Democracy in America*, Vol. I, part 1, ch. 5.

[105] On the role of the idea of consent in Anglo-American political culture in the eighteenth century, see among others, J. P. Reid, *The Concept of Representation in*

between the radical and conservative wings of Cromwell's army, which constitute one of the most remarkable documents on the beliefs of the English revolutionaries, the Levellers' spokesman Rainsborough declared: "Every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not at all bound in a strict sense to that government that he hath not had a voice to put himself under." Replying to this, Ireton, the chief speaker of the more conservative group, did not dispute the principle of consent but argued that the right of consent belonged solely to those who have a "fixed permanent interest in this kingdom."[106] One hundred and thirty years later, the American Declaration of Independence opened with the words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness, – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."[107] Finally, in France, a key figure in the early months of the revolution, Thouret, published at the beginning of August 1789 a draft declaration of rights that included the following article: "All citizens have the right to concur, individually or through their representatives, in the formation of the laws, and to submit only to those to which they have freely consented."[108]

This belief that consent constitutes the sole source of legitimate authority and forms the basis of political obligation was shared by all Natural Law theorists from Grotius to Rousseau, including Hobbes, Pufendorf, and Locke. This too has been sufficiently established, and we may confine ourselves to a single illustration. It is taken from Locke, the intellectual authority who enjoyed the

*the Age of the American Revolution* (Chicago: University of Chicago Press, 1989), esp. ch. 1, "The concept of consent."

106 "The Putney debates," in G. E. Aylmer (ed.), *The Levellers in the English Revolution* (Ithaca, NY: Cornell University Press, 1975), p. 100.

107 "Declaration of Independence" [4 July 1776], in P. B. Kurland and R. Lerner (eds.), *The Founders' Constitution*, 5 vols. (Chicago: University of Chicago Press, 1987), Vol. 1, p. 9.

108 Thouret, "Projet de déclaration des droits de l'homme en société" [1789], in S. Rials (ed.), *La déclaration des droits de l'homme et du citoyen* (Paris: Hachette, 1988), p. 639.





greatest ascendancy in England, America, and France alike.[109] In his *Second Treatise of Government*, Locke wrote: "Men being, as has been said, by Nature, all free, equal, and independent, no one may be taken from this Estate and subjected to the Political Power of another but by his own *consent*." He further wrote: "And thus that, which begins and actually *constitutes any Political Society*, is nothing but the consent of any number of Freemen capable of a majority to unite and incorporate themselves into such a Society. And this is that and that only which did, or could give *beginning* to any *lawful Government* in the World."[110]

Once the source of power and the foundation of political obligation had been located in this way in the consent or will of the governed, lot and election appeared in a completely new light. However lot is interpreted, whatever its other properties, it cannot possibly be perceived as an expression of consent. One can establish, to be sure, a system in which the people consent to have their leaders designated by lot. Under such an arrangement, the power of those selected for office at a particular in time would be ultimately founded on the consent of the governed. But in this case, legitimation by consent would only be indirect: the legitimacy of any particular outcome would derive exclusively from the consent to the procedure of selection. In a system based on lot, even one in which the people have once agreed to use this method, the persons that happen to be selected are not put in power through the will of those over whom they will exercise their authority; they are not put in power by anyone. Under an elective system, by contrast, the consent of the people is constantly reiterated. Not only do the people agree to the selection method – when they decide to use elections – but they also consent to each particular outcome – when they elect. If the goal is to found power and political obligation on consent, then obviously elections are a much safer method than lot. They select the persons who shall hold office (just as lot would), but at the same time they legitimize their power and create in voters a feeling of

109 For an excellent presentation of the ideas of the Natural Law School, see R. Derathé, *J.-J. Rousseau et la science politique de son temps* [1950] (Paris: Vrin, 1970), *passim*, esp. pp. 33 ff., 180 ff.

110 J. Locke, *The Second Treatise of Government*, ch. VIII, §§ 95, 99, in Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1960), pp. 330, 333 (original emphasis).

obligation and commitment towards those whom they have appointed. There is every reason to believe that it is this view of the foundation of political legitimacy and obligation that led to the eclipse of lot and the triumph of election.

The link between election and consent was not in fact a complete novelty at the time representative government was established. Nor was it the invention of modern natural law theorists to hold that what obligates all must have been consented to by all. The expression of consent through election had already proved itself as an effective way of generating a sense of obligation among the population. The convening of elected representatives for the purpose of fostering this sense, particularly in regard to taxation, had been used successfully for several centuries. The "Assemblies of Estates" and the "Estates-General" of the Middle Ages (and the modern period) were based on this principle. Some historians stress the differences between the medieval "Assemblies of Estates" and the representative assemblies that became the locus of power in the wake of the three great revolutions. The differences are indeed substantial. However, they should not obscure the elements of continuity. The fact is that the English Parliament after the revolutions of 1641 and 1688 was also the descendant of the Parliament of the "ancient constitution" – and was seen as such. The American colonies, too, had experience of elected representative assemblies, and the slogan of the 1776 revolution ("no taxation without representation") testifies to the prevalence of the ancient belief that the convening of elected representatives was the only legitimate way to impose taxation. In France, the break may have been more abrupt, nonetheless it was a financial crisis that led the monarchy to convene the Estates-General, reviving an institution which was known to be effective at creating a sense of obligation. Moreover, there are good grounds for thinking that the electoral techniques employed by representative governments had their origins in medieval elections, both those of "Assemblies of Estates" and those practiced by the Church (rather than in the elections of the Roman republic, for example).[111]

[111] See especially Léo Moulin, "Les origines religieuses des techniques électorales modernes et délibératives modernes," in *Revue Internationale d'Histoire Politique et Constitutionelle*, April–June 1953, pp. 143–8; G. de Lagarde, *La Naissance de l'esprit*





In the Middle Ages, the use of election went hand in hand with the invocation of a principle that, according to all evidence, crucially affected the history of Western institutions. This was the principle of Roman origin: *Quod omnes tangit, ab omnibus tractari et approbari debet* ("What touches all should be considered and approved by all"). Following the reemergence of Roman law in the twelfth century, both civil and Canon lawyers spread this principle, though reinterpreting it as applying to public matters, whereas in Rome it belonged to private law.[112] The principle Q.O.T. was invoked by Edward I in his writ summoning the English Parliament in 1295, but recent research has shown that by the late thirteenth century the phrase already had wide currency. The expression was also used by the French king Philip IV when he summoned the Estates-General in 1302, and by Emperor Frederick II when he invited the cities of Tuscany to send delegates (*nuntii*) with full powers.[113] Popes Honorius III and Innocent III likewise made quite frequent use of it. One should note that the 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. The involvement of the will and consent of

*laïque à la fin du Moyen Age* (Leuven/Louvain: E. Nauvelaerts, 1956); L. Moulin, "'Sanior et Major pars', Étude sur l'évolution des techniques électorales et délibératives dans les ordres religieux du VI$^{ème}$ au XIII$^{ème}$ siècles," in *Revue Historique de Droit Français et Etranger*, 3–4, 1958, pp. 368, 397, 491–529; Arthur P. Monahan, *Consent, Coercion and Limit, the Medieval Origins of Parliamentary Democracy* (Kingston, Ontario: McGill-Queens University Press, 1987); Brian M. Downing, *The Military Revolution and Political Change. Origins of Democracy and Autocracy in Early Modern Europe* (Princeton, NJ: Princeton University Press, 1992).

[112] The formulation of this principle (usually known as "Q.O.T." for short), found in Justinian's *Codex* of 531 (*Cod.*, 5, 59, 5, 2), became the source for medieval commentators, such as Gratian, who mentions it in the *Decretum* (*circa* 1140; *Decretum*, 63, post c.25). On the original meaning of "Q.O.T.," see G. Post, "A Roman legal theory of consent, *quod omnes tangit* in medieval representation," in *Wisconsin Law Review*, Jan. 1950, pp. 66–78; Y. Congar, "Quod omnes tangit, ab omnibus tractari et approbari debet" [1958], in Y. Congar, *Droit ancien et structures ecclésiales*, (London: Variorum, 1982), pp. 210–59. On other developments of this legal principle, see A. Marongiu, "Q.O.T., principe fondamental de la démocratie et du consentement au XIV$^{ème}$ siècle," in *Album Helen Maud Cam*, 2 vols. (Leuven/Louvain: Presses Universitaires de Louvain, 1961), Vol. II, pp. 101–15; G. Post, "A Romano-canonical maxim, 'Quod omnes tangit' in Bracton and early parliaments," in G. Post, *Studies in Medieval Legal Thought* (Princeton,NJ: Princeton University Press, 1964), pp. 163–238.

[113] See Monahan, *Consent, Coercion and Limit*, pp. 100 ff.

the governed in the selection of delegates gave to the resolutions of the representative assemblies a binding force that the decisions of men selected by lot would not have possessed. 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." There was in election something like a promise of obedience.

Invoking the Q.O.T. principle did not imply that the consent of the governed was deemed the sole or principal source of legitimacy – a basic difference from modern representative assemblies. Rather it meant that a wish from "above" had to meet with approval from "below" in order to become a fully legitimate directive that carried obligation.[114] Nor did the principle entail any notion of choice among candidates by the people or proposals by the assembly. It was rather that the people were being asked to give their seal of approval to what the authorities (civil or ecclesiastical) had proposed. Often that approval took the form of a mere "acclamation."[115] But even in this form, the principle implied, at least in theory, that approval could be withheld. Repeated use of the Q.O.T. formula undoubtedly helped to propagate and establish the belief that the consent of the governed was a source of political legitimacy and obligation.

At this point, we should open a brief parenthesis. It has been claimed on occasion that the Church took the lead in bringing the practice of lot to an end by banning its use in the selection of bishops and abbots at a time when the procedure was still current in the Italian city-republics.[116] It is true that Honorius III did, by a decretal promulgated in 1223 (*Ecclesia Vestra*, addressed to the chapter of Lucca), prohibit the use of lot in ecclesiastical

[114] On the combination of the "ascending" and "descending" conceptions of authority in medieval thought and practice, the basic works remain those of Walter Ullmann; see in particular his *Principles of Government and Politics in the Middle Ages* (London: Methuen, 1961).

[115] On the essentially acclamatory nature of elections of representatives in pre-revolutionary England, see M. Kishlansky, *Parliamentary Selection: Social and Political Choice in Early Modern England* (Cambridge: Cambridge University Press, 1986), esp. ch. 2.

[116] Moulin, "Les origines religieuses des techniques électorales modernes et délibératives modernes," p. 114.





appointments.[117] Previously lot had occasionally been employed in filling episcopal positions.[118] But it was understood to manifest God's will. And it was the use of lot as an appeal to divine providence that *Ecclesia Vestra* banned. The decretal can be found in the *Liber Extra*, under the heading *De sortilegiis* (Of Sortileges) (Tit. XXI) among prohibitions of other divinatory practices deemed superstitious. So, the Church voiced no objections to the purely secular use of lot, that is, where it was not given supernatural significance. This interpretation of the Church's prohibition finds confirmation in the *Summa Theologiae*.[119] In a detailed argument (that merits no elaboration here), Thomas Aquinas distinguishes a number of possible uses of lot: distributive lot (*sors divisoria*), consultative lot (*sors consultatoria*), and divinatory lot (*sors divinatoria*). The important point is that, according to Aquinas, the distributive use of lot to assign "possessions, honours, or dignities" does not constitute a sin. If the outcome of lot is seen as no more than the product of chance (*fortuna*), there is no harm in resorting to it "except that of possibly acting in vain [*nisi forte vitium vanitatis*]." So there is no doubt that the Church was not opposed to the use of lot for assigning offices, provided that no one accorded any religious significance to the procedure. This explains, in fact, why the highly Catholic Italian republics continued to use lot after *Ecclesia Vestra* without the practice giving rise to any controversy

[117] *Corpus Juris Canonici*, E. Friedberg edition, 2 vols. (Tauschnitz, 1879–81), Vol. II, p. 823 (*Liber Extra*, Tit. XXI, cap. III). I owe this reference to Mr. Steve Horwitz of California, an expert in canon law and antique books, with whom I got in touch via electronic mail on the Internet and whom I should like to thank here. Léo Moulin (in the article referred to in note 116 above) mentions the existence of the decretal but without giving either a precise reference or an analysis of its content. My questions to a number of experts on canon law as well my own research in the *Corpus Juris Canonici* had proved fruitless. Paul Bullen, whom I should also like to thank, then suggested that I put the problem to a group of experts on medieval and canon law who subscribed to the Internet. In this way I was eventually able to consult the text of the decretal, the precise content of which is important, as we shall see. Possibly I should also pay homage to the technology which has today extended the republic of letters to cover the entire planet!

[118] See Jean Gaudemet, "La participation de la communauté au choix de ses pasteurs dans l'Eglise latine: esquisse historique," in J. Gaudemet, *La société ecclésiastique dans l'Occident médiéval* (London: Variorum, 1980), ch. 8. Gaudemet indicates that in 599 the Council of Barcelona decided, "among the two or three candidates that the clergy and the people have chosen by agreement," the bishop might be appointed by lot (*La société ecclésiastique*, pp. 319–20).

[119] Thomas Aquinas, *Summa Theologiae*, IIa IIae, qu. 95, art. 8, I. Again, my thanks to Paul Bullen for drawing this passage to my attention.

with the ecclesiastical authorities. If the medieval Church contributed to the decline in the political use of lot, it was purely in so far as it propagated the principle of consent, not because it prohibited the assignment of "dignities" by lot.

The seventeenth- and eighteenth-century authors familiar with the history of republics realized that the appointment of representatives by election owed more to feudal than to republican tradition. On this point too, Harrington, Montesquieu, and Rousseau were in agreement. Commenting on the use of lot to choose the prerogative century in Rome, Harrington wrote: "But the Gothic prudence, in the policy of the third state [stage of history], runs altogether upon the collection of a representative by the *suffrage* of the people [election]."[120] Harrington, for all his republicanism, preferred election to lot (as we have seen). Thus, election was probably the only principle of "Gothic prudence" to be retained in a scheme wholly oriented towards reviving the principles of "Ancient prudence." Montesquieu's famous phrase about the origins of the English government points in the same direction: "This marvellous system was found in the woods" – the woods of *Germania*, that is, which had also given birth to "Gothic" customs and the feudal system.[121] Finally, it would be wrong to read only invective in the well-known passage of the *Social Contract*: "The idea of representatives is modern: it comes to us from feudal government, from that iniquitous and absurd government in which the human race is degraded and the name of man dishonoured. In the old republics, and even in monarchies, the people never had representatives."[122] The expression, the "name of man," refers, with impressive if implicit historical accuracy, to the feudal oath by which the vassal made himself his lord's "man" by pledging allegiance to him. For Rousseau, it was a

120 Harrington, *The Prerogative of Popular Government*, p. 477 (original emphasis).

121 Montesquieu, *Spirit of the Laws*, Book XI, ch. 6. A passage in the *Pensées* confirms that Montesquieu saw a close link between the laws of England and the Gothic system: "Regarding what Mr. Yorke told me about a foreigner being unable to understand a single word in Lord Cook and in Littleton, I told him I had observed that, as regards the feudal laws and the ancient laws of England, it would not be very hard for me to understand them, any more than those of all other nations, because since all the laws of Europe are Gothic they all had the same origin and were of the same nature" (Pensée 1645, in *Oeuvres complètes*, 3 vols. (Paris: Nagel, 1950), Vol. II, p. 481).

122 *Social Contract*, Book III, ch. 15.





dishonor to the human race to associate its name to an act of subordination.

At the time when representative government was established, medieval tradition and modern natural right theories converged to make the consent and will of the governed the sole source of political legitimacy and obligation. In such a situation, election suggested itself as the obvious method for conferring power. At the same time, however, the question of legitimacy very much obscured (or at least relegated to the background) the problem of distributive justice in the allocation of political functions. Henceforth, it no longer mattered whether public offices were distributed equally among citizens. It was much more important that those who held office did so through the consent of the rest. It was the manner in which power was distributed that made the outcome acceptable, whatever it was. To be sure, the concern for distributive justice in the allocation of offices had not entirely disappeared. But election as a method for conferring power was seen as substantially fairer and more egalitarian than the principle that had been in place, namely, that of heredity. Compared to the gap that separated election and heredity, the difference between the distributive effects of the two non-hereditary procedures (lot and election) appeared negligible. Since in other respects the notion of legitimacy gave clear preference to one of the two non-hereditary methods, it is understandable that even the most egalitarian revolutionaries never seriously contemplated introducing lot. The difference between the respective distributive effects of lot and election was something that educated leaders, whether conservative or radical, were certainly aware of. Yet it failed to arouse controversy because conservatives were (secretly or not so secretly) quite happy about it, and radicals were too attached to the principle of consent to defend lot.

Admittedly, external circumstances also helped relegate to the background the problem of distributive justice in the allocation of offices. In the large states of the seventeenth and eighteenth centuries, the sheer ratio between the number of offices to be filled and the size of the citizen body effectively meant that, whatever the method of selection, any given citizen had only a minute chance of attaining those positions. The fact remains, however, that if Aristotle, Guicciardini, or Montesquieu were right, lot would have

distributed equally that minute probability, whereas election did so unequally. One can also argue that, this probability being so low, the distribution of offices became a less pressing and politically urgent problem, since the stakes were smaller than in fifth-century Athens or fifteenth-century Florence, even assuming that the value placed on office-holding was the same in each case. It is certainly true that from the standpoint of an individual eighteenth-century citizen, it did not much matter whether his odds were slightly higher or slightly lower than those of his fellow-citizens (since in any case they were quite small). It does not follow, however, that the difference in the distribution of offices achieved by one or the other of the two procedures was inconsequential. It is not, for example, a matter of indifference that a governing assembly contains more lawyers than farmers, even if it is a matter of relative indifference to each individual farmer that a lawyer should have more chance than himself of entering assembly.

Whatever the respective roles that circumstance and belief may have played, when representative government was established, concern for equality in the allocation of offices had been relegated to the background. Here lies the solution to the paradox, noted earlier, of a method known for distributing offices less equally than lot (election) prevailing without debates or qualifications, at the moment political equality among citizens was being declared. By the time representative government arose, the kind of political equality that was at center stage was the equal right to consent to power, and not – or much less so – an equal chance to hold office. This means that a new conception of citizenship had emerged: citizens were now viewed primarily as the source of political legitimacy, rather than as persons who might desire to hold office themselves.

Noting this change opens up a new perspective on the nature of representative government. Two hundred years after modern political representation was established, viewing citizens as the source of power and as the assigners of office appears today as the natural way of envisioning citizenship. Not only do we share the viewpoint that prevailed at the end of the eighteenth century, but we are no longer aware that we are thereby giving precedence to a particular conception of citizenship over another. We have almost completely





forgotten that, even under conditions where it is not possible for everyone to participate in government, citizens can also be seen as desirous of reaching office. We do not even think, therefore, of inquiring into how offices, seen as scarce goods, are distributed among citizens by representative institutions. The history of the triumph of election suggests that by doing so we would deepen our comprehension of representative government.

seen as a "filtration of democracy,"[25] deserves particular mention because it was retained throughout the revolution.

## THE UNITED STATES

### *Philadelphia*

In regard to the franchise, the Philadelphia Convention took a position similar to that of the French in opting for the most open of the solutions considered. The clause of the Constitution alluded to earlier stipulating that "the electors in each state shall have the qualifications requisite for electors of the most numerous Branch of the State Legislature" (Art. I, Sec. 2, cl. 1), applied only to elections to the House of Representatives. For under the draft Constitution of 1787, senators were to be chosen by the legislatures of the different states (Art. I, Sec. 3, cl. 1) and the President was to be chosen by an "electoral college" appointed by the state legislatures (Art. II, Sec. 1, cl. 2). The Presidency and the Senate thus did not require any further decisions concerning the franchise. The most significant debates regarding elections and how they affected the nature of representation focused on elections to the lower chamber. It should also be borne in mind that state franchise qualifications were set by the different state *constitutions*. The federal clause therefore did not amount to leaving regulation of the franchise to the individual state legislatures.

The members of the Philadelphia Convention were fully aware that in some states there were significant franchise restrictions, which meant, in turn, restrictions in the election of federal representatives. However, the decision that the Convention eventually reached needs to be placed in context: it was in fact the most open or, as James Wilson said in the Pennsylvania ratification debate, the most "generous" of the options discussed in Philadephia. For there was also among the delegates a current in favor of a federal *property* qualification for congressional electors, which would have narrowed the franchise in some states (such as Pennsylvania), where only a

[25] Guéniffey, *Le Nombre et la Raison*, p. 41.





low *tax* qualification was in force for state elections.[26] Gouverneur Morris, for example, asked for a property qualification that would have restricted electoral rights to freeholders. His argument was that propertyless people would be particularly susceptible to corruption by the wealthy and would become instruments in their hands. He presented his motion as a guard against "aristocracy,"[27] and on this point, he won the support of Madison. "Viewing the matter on its merits alone," Madison argued, "the freeholders of the Country would be the safest depositories of Republican liberty." As a matter of principle, then, Madison favored the introduction of a freehold qualification. But at the same time he feared popular opposition to such a measure. "Whether the Constitutional qualification ought to be a freehold, would with him depend much on the probable reception such a change would meet with in States where the right was now exercised by every description of people."[28] Madison's speech reveals a certain hesitation and, on the basis of the *Records*, it seems that in the end he advocated a property qualification, but not in the form of landed property. In any case, neither Morris nor Madison carried the day, and the general tenor of the speeches pronounced on that occasion shows that a majority of delegates opposed any restrictions other than those applied by the states. The principal argument seems to have been that the people were strongly attached to the right of suffrage and would not

[26] The radical Pennsylvania constitution of 1776 had abolished the former property qualification for state elections and extended the right of suffrage to all tax-paying adult freemen who had resided one year in their constituencies, which amounted to a large franchise (small tradesmen, independent artisans, and mechanics could vote). In Virginia, by contrast, the right of suffrage was reserved to freeholders, which of course excluded independent artisans and mechanics. The constitution of Massachusetts, to mention another example, had set up a whole hierarchy of property qualifications, but its actual effect was a fairly large franchise (two out of three, or three out of four adult males were enfranchised). See on this, Pole, *Political Representation*, pp. 272, 295, 206.

[27] *The Records of the Federal Convention of 1787*, ed. M. Farrand [1911], 4 vols. (New Haven, CT: Yale University Press, 1966), Vol. II, pp. 202–3. In what follows, references to the Farrand edition will be given as: *Records*, followed by volume and page numbers.

[28] *Records*, Vol. II, pp. 203–4. It should be noted that, when Madison prepared his notes on the Federal Convention for publication (probably in 1821), he revised the speech on the franchise that he had delivered in Philadelphia on August 7, 1787, explaining that his viewpoint had since changed. The foregoing quotations are taken from the original speech. The revised version of 1821, generally known by the title "Notes on the right of suffrage," is an extremely important document to which we shall be returning.

"readily subscribe to the national constitution, if it should subject them to be disfranchised."[29] But no one in Philadelphia proposed that the federal franchise be *wider* than those of the individual states. Clearly, then, the Convention opted for the widest version of the electoral franchise under consideration at the time.

Turning now to the qualifications for representatives, which are more important for our purposes, we find the following clause in the Constitution: "No Person shall be a Representative who shall not have attained the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen" (Art. I, Sec. 2, cl. 2). These requirements are obviously not very stringent and contain no trace of what I have called the principle of distinction. A more egalitarian culture and a more homogeneous population on this side of the ocean perhaps gave representative government a different character from the one in the Old World, marked as it was by centuries of hierarchical organization. However, a close reading of the *Records* shows that behind the closed doors of the Convention the debates on the qualifications for representatives were actually very complex.

On July 26, 1787, George Mason proposed a motion asking that the Committee of Detail (the body that prepared the work of plenary sessions) be instructed to devise a clause "requiring certain qualifications of landed property and citizenship in members of the legislature and disqualifying persons having unsettled accounts with or being indebted to the US."[30] During the debate, Mason cited the example we discussed earlier (see p. 97) of the parliamentary qualifications adopted in England in the reign of Queen Anne, "which [he said] had met with universal approbation."[31] Morris replied that he preferred qualifications for the right of suffrage. Madison suggested deleting the word "landed" from Mason's motion, pointing out that "landed possessions were no certain evidence of real wealth" and further arguing that commercial and manufacturing interests should also have an "opportunity of making their rights be felt and understood in the public Councils";

[29] The formulation is Oliver Ellsworth's (*Records*, Vol. II, p. 201), but it sums up the general tone of a number of speeches.

[30] *Records*, Vol. II, p. 121.

[31] *Records*, Vol. II, p. 122.





landed property should not be granted any special treatment.[32] Madison's motion was adopted by an overwhelming majority of ten to one.[33] The Committee of Detail was therefore asked to draft a clause laying down an unspecified property qualification for representatives.

Discussion within the Convention thus focused purely on the *type* of property that ought to be required for representatives. This hesitation aside, all the delegates apparently agreed that a property qualification of one sort or another was proper. Whereas the Convention had opted for the most liberal course regarding the electors, it clearly leaned in the opposite direction with respect to the elected. Two main arguments were advanced. First, it seemed of the greatest importance to guarantee that representatives had sufficient economic independence to be immune to all corruptive influences, especially that of the executive branch. The weight of this concern (to protect the independence of the legislature in relation to the executive) is also reflected in the clause forbidding senators and representatives from holding federal office during their term (Art. 1, Sec. 6, cl. 2). This latter clause was obviously devised to guard against a "place system" along English lines, which was so odious to eighteenth-century republicans. More generally, the idea that economic independence offered one of the best guarantees against corruption was a central tenet of republican thought, and hence the views of the Philadelphia delegates were in keeping with a wider trend of thought.[34] In the second place, a property qualification for representatives appeared justified since the right of property was seen by all delegates as one of the most important rights, and its protection a principal object of government. It therefore seemed necessary to take specific precautions to ensure that representatives would particularly take to heart the rights and interests of property. In any case, whether property was regarded as a bulwark of republican freedom or as a fundamental right, the federal Convention felt that representatives should be property owners, and consequently of higher social rank than those who elected them, since no such qualification was

[32] *Records*, Vol. II, pp. 123–4.

[33] In the *Records*, votes are counted by states. Ten "Ayes" and one "No" mean that ten delegations voted in favor and one against.

[34] See J. G. A. Pocock, *The Machiavellian Moment*, (Princeton, NJ: Princeton University Press, 1975), *passim*.

required for the right of suffrage. Thus it appears that the principle of distinction was present in Philadelphia too. The question is: why was it not translated into a constitutional provision?

Let us return to the debates to seek an answer. A few weeks later, the Committee of Detail submitted the following clause to the plenary assembly: "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient."[35] The Committee (as explained by two of its members, Rutledge and Ellsworth) had been unable to agree on any precise property requirement, and had decided consequently to leave the matter for future legislatures to settle. Two obstacles prevented the Committee from reaching agreement. First, as Rutledge stated, the members of the Committee had been "embarrassed by the danger on one side of displeasing the people by making them [the qualifications] high, and on the other of rendering them nugatory by making them low." Second, according to Ellsworth, "the different circumstances of different parts of the US and the probable difference between the present and future circumstances of the whole, render it improper to have either *uniform* or *fixed* qualifications. Make them so high as to be useful in the Southern States, and they will be inapplicable to the Eastern States. Suit them to the latter, and they will serve no purpose in the former."[36] The proposed clause may have solved the internal problems of the Committee of Detail, but in plenary session it encountered a major objection: leaving the matter to legislative discretion was extremely dangerous, since the very nature of the political system could be radically altered by simple manipulation of those conditions.[37] Wilson, albeit a member of the Committee, also pointed out that "a *uniform* rule would probably be never fixed by the legislature," and consequently moved "to let the session go out."[38] The vote was taken immediately after Wilson's

[35] *Records*, Vol. II, Report of the Committee of Detail, p. 165. The Committee of Detail consisted of Gorham, Ellsworth, Wilson, Randolph, and Rutledge: see J. H. Hutson, *Supplement to Max Farrand's The Records of the Federal Convention of 1787* (New Haven, CT: Yale University Press, 1987), pp. 195–6.

[36] *Records*, Vol. II, p. 249; original emphasis.

[37] The objection was advanced by Madison, *Records*, Vol. II, pp. 249–50.

[38] *Records*, Vol. II, p. 251; my emphasis.





intervention, and the Committee's proposal was rejected by seven to three. The Constitution would include no property qualification for representatives.

This episode shows that the absence of property qualifications in the 1787 constitution was not due to reasons of principle, but of expediency. The delegates did favor the principle of a property qualification, but they simply could not agree on any uniform threshold that would yield the desired result in both the northern and southern states, in both the undeveloped agrarian states of the west and in the wealthier mercantile states of the east. Thus the absence of any property requirements for representatives in the Constitution, which strikingly departs from the English and French pattern, must be seen as a largely unintentional result. Admittedly, when casting their last vote, the delegates were, in all likelihood, conscious that they were abandoning the very principle of property qualifications, and thus the result was not strictly speaking unintentional. It is clear, nevertheless, that the delegates had been led by external circumstances to make a final vote that was different from (and indeed contrary to) their initial and explicit intention. Furthermore, there is no evidence that they had changed their minds on the point of principle in the meantime. One is tempted to say that the exceptionally egalitarian character of representation in the United States owes more to geography than to philosophy.

The members of the Philadelphia Convention made two further decisions regarding elections. The House of Representatives was to be elected every two years, a term short enough to secure proper dependence on their electors. Paramount was the fear of long parliaments which, on the basis of the English experience, were seen as the hallmark of tyranny. Some delegates argued for annual elections, but by and large the agreement on a two-year term was reached without much difficulty. The Convention also resolved that: "The number of Representatives shall not exceed one for every thirty thousand [inhabitants], but each State shall have at least one Representative" (Art. I, Sec. 2, cl. 3). It was decided that the House would comprise sixty-five members until the first census was taken. The ratio between electors and elected was set with a view to keeping the size of the House within manageable limits, even when the expected (and hoped for) increase in the population would

occur. A vast majority of the delegates were determined to avoid the "confusion" of large assemblies. The Committee of Detail had initially proposed a ratio of one representative for every 40,000 eligible voters.[39] Some delegates, most notably Mason, Gerry, and Randolph, objected to the small size of the representative assembly.[40] But on the whole it seems that this question did not provoke a major debate in the Convention, as Gerry himself was to admit in his correspondence.[41] The delegates were apparently more concerned with the relative weights of the individual states in future federal legislatures than with the ratio between electors and elected.[42]

### *The ratification debate*

Whereas the question of the size of the House of Representatives did not give rise to significant arguments at the Philadelphia Convention, it turned out to be a major point of contention in the ratification debates. Indeed, as Kurland and Lerner note, in the matter of representation, "eclipsing all [other] controversies and concerns was the issue of an adequate representation as expressed in the size of the proposed House of Representatives."[43] The question of the size of the representative assembly (which in some ways was a technical problem of the optimal number for proper deliberation) assumed

[39] *Records*, Vol. I, p. 526.

[40] *Records*, Vol. I, p. 569 (Mason and Gerry); Vol. II, p. 563 (Randolph).

[41] Elbridge Gerry to the Vice President of the Convention of Massachusetts (January 21, 1788), in *Records*, Vol. III, p. 265.

[42] I entirely leave out here the debate on the *basis* for representation and the question of the apportionment of seats, although both figured prominently in the debates of the Convention. The debate about the basis for representation had far-reaching implications, for it entailed a decision on *what* was to be represented. The major question in this respect was: should the apportionment of seats (and hence representation) be based on *property* or *persons*? As J. R. Pole has shown in detail, the final decision to base the apportionment of seats primarily on numbers (even allowing for the "federal ratio" according to which a slave, considered a form of property, was to be counted as three-fifths of a person) "gave a possibly unintentional but nevertheless unmistakable impetus to the idea of political democracy" (*Political Representation*, p. 365). Those who advocated a specific or separate representation of property were thus ultimately defeated. This aspect of the debate, however, has been studied by Pole with all desirable clarity and persuasiveness. His conclusions are presupposed in the present chapter.

[43] P. B. Kurland and R. Lerner (eds.), *The Founders' Constitution*, 5 vols. (Chicago: University of Chicago Press, 1987), Vol. I, p. 386, "Introductory note."





enormous political importance; it involved the relationship between representatives and represented, that is, the very core of the notion of representation. The argument revolved almost exclusively around the consequences of the ratio between elected and electors. Neither the extension of the franchise nor the legal qualifications for representatives was in question, since the Anti-Federalists (those who rejected the plan prepared in Philadelphia) had no objection to the former, and the Constitution did not contain any of the latter. Another point deserves to be stressed: the debate opposed two conceptions of representation. The Anti-Federalists accepted the need for representation: they were not "democrats" in the eighteenth-century sense of the term, as they did not advocate direct government by the assembled people. This has rightly been emphasized in a recent essay by Terence Ball.[44]

The principal objection that the Anti-Federalists raised against the Constitution was that the proposed ratio between elected and electors was too small to allow the proper *likeness*. The concepts of "likeness," "resemblance," "closeness," and the idea that representation should be a "true picture" of the people constantly keep recurring in the writings and speeches of the Anti-Federalists.[45]

Terence Ball's analysis of the two conceptions of representation that were in conflict in the ratification debates is not entirely satisfactory. Using categories developed by Hanna Pitkin, Ball characterizes the Anti-Federalist view of representation as the "mandate theory," according to which the task of the representative is "to mirror the views of those whom he represents" and "to share their attitudes and feelings." By contrast, Ball claims, the Federalists saw representation as the "independent" activity of "a trustee who must make his own judgements concerning his constituents' interests and how they might best be served."[46] Clearly, the Anti-Federalists thought that representatives ought to share the circum-

[44] T. Ball, "A Republic – If you can keep it," in T. Ball and J. Pocock (eds.), *Conceptual Change and the Constitution* (Lawrence: University Press of Kansas, 1987), pp. 144 ff.

[45] On the importance of this notion of "likeness" among the Anti-Federalists, see H. J. Storing (ed.), *The Complete Anti-Federalist*, 7 vols. (Chicago: University of Chicago Press, 1981), Vol. I, *What the Anti-Federalists were for?*, p. 17.

[46] Ball, "A Republic – If you can keep it," p. 145. The work to which Ball refers is H. Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967).

stances, attitudes, and feelings of those whom they represented. It is also true that this concern was virtually absent from Federalist thinking. However, the focus of the debate was not exactly, as is implied by the contrast between "independence" and "mandate," the freedom of action of the representatives with regard to the wishes of their constituents. The charge that the Anti-Federalists repeatedly leveled was not that under the proposed Constitution representatives would fail to act as instructed, but that they would not be *like* those who elected them. The two questions are obviously not unrelated, but they are not the same. The ratification debate did not turn on the problem of mandates and instructions, but on the issue of similarity between electors and elected.

Brutus, for example, wrote:

> The very term representative, implies, that the person or body chosen for this purpose, should *resemble* those who appoint them – a representation of the people of America, if it be a true one, must be *like* the people ... They are the sign – the people are the thing signified ... It must then have been intended that those who are placed instead of the people, should possess their sentiments and feelings, and be governed by their interests, or in other words, should bear the strongest *resemblance* of those in whose room they are substituted. It is obvious that for an assembly to be a true *likeness* of the people of any country, they must be considerably numerous.[47]

For his part, Melancton Smith, Hamilton's chief adversary at the New York ratification convention, declared in a speech on the proposed House of Representatives: "The idea that naturally suggests itself to our minds, when we speak of representatives, is that they *resemble* those they represent; they should be a *true picture* of the people: possess the knowledge of their circumstances and their wants; sympathize in all their distresses, and be disposed to seek their true interests."[48] The tireless insistence on the need for identity or resemblance between electors and elected is among the most striking features of Anti-Federalist pamphlets and

[47] Brutus, Essay III, in Storing (ed.), *The Complete Anti-Federalist*, Vol. II, 9, 42; my emphasis. Hereafter references to Anti-Federalist writings and speeches will be given as: *Storing*, followed by the three numbers employed by the editor, the roman numeral denoting the volume.

[48] Melancton Smith, "Speech at the New York ratification convention" (June 20, 1788), *Storing*, VI, 12, 15.





speeches.[49] Certainly the Anti-Federalists did not form an intellectually homogeneous current. However, although some were conservative, others radical, they were virtually unanimous in their demand that representatives resemble those they represented.

The idea that political representation should be conceived as a reflection or picture, the main virtue of which should be resemblance to the original, had found in the first years of independence one of its most influential expressions in John Adams's *Thoughts on Government*. And although Adams did not participate in the constitutional debate of 1787, his influence on Anti-Federalist thinking can hardly be doubted. "The principal difficulty lies," Adams had written in 1776, "and the greatest care should be employed in constituting this representative assembly. [In the preceding passage, Adams had shown the need for representation in large states.] It should be in miniature an exact portrait of the people at large. It should think, feel, reason and act like them."[50] To use Hanna Pitkin's categories, one could say that the Anti-Federalists were defending a "descriptive" conception of representation. In such a view, the aim is for the assembly, as the people in miniature, to act as the people themselves would have acted, had they been assembled. In this sense, the objectives of the "descriptive" view and of the "mandate" theory of representation are the same. However, in the latter case, identity between the will of the representatives and the will of the people is secured through formal legal provisions (instructions or imperative mandates); while the "descriptive" conception supposes that the representatives will *spontaneously* do as the people would have done since they are a reflection of the people, share the circumstances of their constituents, and are close to them in both the metaphorical and spatial senses of the term.

When Anti-Federalists spoke of "likeness" or "closeness," they meant it primarily in a social sense. Opponents of the Constitution claimed that several classes of the population would not be properly represented, because none of their number would sit in the assembly. Samuel Chase wrote:

[49] See The Federal Farmer, Letter II, *Storing*, II, 8, 15; Minority of the Convention of Pennsylvania, *Storing*, III, 11, 35; Samuel Chase, Fragment 5, *Storing*, V, 3, 20; Impartial Examiner, III, *Storing*, V, 14, 28–30.

[50] J. Adams, *Thoughts on Government* [1776], in C. F. Adams (ed.), *The Life and Works of John Adams*, 10 vols. (Boston: Little Brown, 1850–6), Vol. IV, p. 195.

> It is impossible for a few men to be acquainted with the sentiments and interests of the US, which contains many different classes or orders of people – merchants, farmers, planters, mechanics and gentry or wealthy men. To form a proper and true representation each order ought to have an opportunity of choosing from each a person as their representative ... Only but ... few of the merchants and those only of the opulent and ambitious will stand any chance. The great body of planters and farmers cannot expect any of their order – the station is too elevated for them to aspire to – the distance between the people and their representatives will be so great that there is no probability of a farmer or planter being chosen. Mechanics of every branch will be excluded by a general voice from a seat – only the gentry, the rich, the well born will be elected.[51]

Given the diversity of the population of America, only a large assembly could have met the requirements of an "adequate" representation. In a truly representative assembly, Brutus noted, "the farmer, merchant, mechanick and other various orders of people, ought to be represented according to their respective weight and numbers; and the representatives ought to be intimately acquainted with the wants, understand the interests of the several orders in the society, and feel a proper sense and becoming zeal to promote their prosperity."[52] The Anti-Federalists did not demand, however, that all classes without exception have members sitting in the assembly. They wished only that the main components of society be represented, with a special emphasis on the middling ranks (freeholders, independent artisans, and small tradesmen).

They had no doubt, however, that representation as provided for in the Constitution would be skewed in favor of the most prosperous and prominent classes. This was one of the reasons why they denounced the "aristocratic" tendency of the Constitution (another focus of their fear of "aristocracy" being the substantial powers granted to the Senate). When the Anti-Federalists spoke of "aristocracy," they did not mean, of course, hereditary nobility. Nobody ever questioned that America would and should be without a nobility, and the Constitution explicitly prohibited the granting of titles of nobility (Art. I, Sec. 9, cl. 9). What the Anti-Federalists envisioned was not legally defined privilege, but the social superiority conferred by wealth, status, or even talent. Those enjoying these various superiorities composed what they called "the natural aristocracy" – "natural" here being opposed to legal or institutional. As Melancton Smith put it in the New York ratification debate:

[51] Samuel Chase, Fragment 5, *Storing*, V, 3, 20.
[52] Brutus, Essay III, *Storing*, II, 9, 42.





> I am convinced that this government is so constituted, that the representatives will generally be composed of the first class of the community, which I shall distinguish by the name of natural aristocracy of the country ... I shall be asked what is meant by the natural aristocracy – and told that no such distinction of classes of men exists among us. It is true that it is our singular felicity that we have no legal or hereditary distinction of this kind; but still there are real differences. Every society naturally divides itself into classes. The author of nature has bestowed on some greater capacities than on others – birth, education, *talents* and wealth create distinctions among men as visible and of as much influence as titles, stars and garters. In every society, men of this class will command a superior degree of respect – and if the government is so constituted as to admit but a few to exercise the powers of it, it will, *according to the natural course of things*, be in their hands.[53]

For his part, Brutus noted:

> *According to the common course of human affairs*, the natural aristocracy of the country will be elected. Wealth always creates influence, and this is generally much increased by large family connections ... It is probable that but few of the merchants, and those of the most opulent and ambitious, will have a representation of their body – few of them are characters sufficiently conspicuous to attract the notice of electors of the state in so limited a representation.[54]

As the Pennsylvania Minority stressed: "Men of the most elevated rank in life, will alone be chosen."[55] The Anti-Federalists were not radical egalitarians, denouncing the existence of social, economic, or personal inequalities. In their view, such inequalities formed part of the natural order of things. Nor did they object to the natural

[53] Melancton Smith, speech of June 20, 1788, *Storing*, VI, 12, 16; my emphasis. It is noteworthy that Smith places talents, birth, and wealth on the same footing. This is not the place to embark on the philosophical debates that such categorization might raise, but it is worth highlighting.
[54] Brutus, Essay III, *Storing*, II, 9, 42; my emphasis. On the notion that only the "natural aristocracy" would be elected, see also The Federal Farmer, Letter IX, *Storing*, II, 8, 113.
[55] The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, *Storing*, III, 11, 35.

aristocracy playing a specific political role. But they did not want it to monopolize power.

The Anti-Federalists did not develop a detailed explanation, let alone a clear and simple one, that could be successfully used in public debate, regarding why only the rich and the prominent would be elected. Their ideas had rather the form of profound but incompletely articulated intuitions. The larger the electoral districts, they claimed, the greater the influence of wealth would be. In small settings, common people could be elected, but in large ones a successful candidate would have to be particularly conspicuous and prominent. Neither proposition was self-evident, but the opponents of the Constitution were unable to explain them any further. This lack of articulation explains in part the weakness of their case when confronted with the clear and compelling logic of the Federalists. The Anti-Federalists were fully aware of the argumentative strength of their adversaries' case. And in the end they fell back on the simple but rather short assertion that the Federalists were deceiving the people. In a statement that captures both the core of the Anti-Federalist position and its argumentative weakness, the Federal Farmer wrote:

> the people may be electors, if the representation be so formed as to give one or more of the natural classes of men in the society an undue ascendancy over the others, it is imperfect; the former will gradually become masters, and the latter slaves ... It is deceiving the people to tell them they are electors, and can choose their legislators, if they cannot *in the nature of things*, choose men among themselves, and genuinely *like themselves*.[56]

The accusatory tone and rhetorical exaggeration could not mask the lack of substantial argument. The Anti-Federalists were deeply convinced that representatives would not be like their electors, but they were unable to explain in simple terms the enigmatic "nature of things" or "common course of human affairs" that would lead to this result.

Such a position lay entirely vulnerable to Madison's lightning retort. We are told, Madison declared in an equally rhetorical passage, that the House of Representatives will constitute an oligarchy, but:

[56] The Federal Farmer, Letter VII, *Storing*, II, 8, 97; my emphasis.





> Who are to be the electors of the federal representatives? Not the rich, more than the poor; not the learned, more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States ... Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, or religious faith, or of civil profession is permitted to fetter the judgement or disappoint the inclination of the people.[57]

The Anti-Federalists had no objections to the federal franchise, and they admitted that there were no property or tax qualifications for representatives in the Constitution. Thus, they had no effective counterargument.

After this first defense, the gist of Madison's argument in "Federalist 57" states that the Constitution provides every guarantee that representatives will not betray the trust of the people. Because representatives will have been "distinguished by the preference of their fellow citizens," Madison argues, there are good reasons to believe that they will actually have the qualities for which they were chosen and that they will live up to expectations. Moreover, they will know that they owe their elevation to public office to the people; this cannot "fail to produce a temporary affection at least to their constituents." Owing their honor and distinction to the favor of the people, they will be unlikely to subvert the popular character of a system that is the basis of their power. More importantly, frequent elections will constantly remind them of their dependence on the electorate. Finally, the laws they pass will apply as much to themselves and their friends as to the society at large.[58]

Given all these guarantees, Madison turns the tables on the Anti-

[57] Madison, "Federalist 57," in A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers* [1787–8], ed. C. Rossiter (New York: Penguin, 1961), p. 351. On the qualifications for election as a representative, see also "Federalist 52." There Madison recalls the three qualifications laid down in the Constitution (twenty-five years of age, seven year citizenship in the US, and residence in the state where the candidate runs for Congress) before adding: "Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith" (p. 326). Hereafter references to *The Federalist Papers* will indicate only the essay number and the page in the Rossiter edition.

[58] Madison, "Federalist 57," pp. 351–2.

Federalists and indirectly casts suspicion on their attachment to republican or popular government by asking:

> What are we to say to the men who profess the most flaming zeal for republican government, yet boldly impeach the fundamental principle of it [the right of the people to elect those who govern them]; who pretend to be champions for the right and capacity of the people to choose their own rulers, yet maintain that they will prefer those only who will immediately and infallibly betray the trust committed to them?[59]

Madison implies that these professed republicans in fact harbor doubts about the right of the people to choose for rulers whom they please and their ability to judge candidates. Although Madison stresses to great effect the popular or republican dimension of representation under the proposed scheme, nowhere in his argumentation does he claim that the Constitution will secure likeness or closeness between representatives and represented. He too knows that it will not.

Madison develops instead an altogether different conception of what republican representation could and should be:

> The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government. The means relied on in this form of government for preventing their degeneracy are numerous and various. The most effectual one is such a limitation of the term of appointment as will maintain a proper responsibility to the people.[60]

In this characterization of republican government, it is worth noting, there is not the slightest mention of any likeness between representatives and represented. Indeed, representatives should be different from their constituents, for republican government requires as any other that power be entrusted to those who possess "most wisdom" and "most virtue," that is, to persons who are superior to, and different from, their fellow citizens. This is one of the clearest formulations of the principle of distinction in Federalist thinking,

[59] Madison, "Federalist 57," p. 353.

[60] Madison, "Federalist 57," pp. 350–1.





but Madison expresses the same idea on numerous occasions. In the famous passage of "Federalist 10," in which Madison sets out his conception of the differences between a democracy and a republic, he notes first that the defining characteristic of a republic is "the delegation of the government ... to a small number of citizens elected by the rest ... The effect of [which] is, on the one hand, to refine and enlarge the public views by passing them through the medium of 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."[61] What distinguishes a republic from a democracy, then, is not merely the existence of a body of representatives, but also the fact that those representatives form a "chosen body." Like Guicciardini before him, Madison is clearly playing on two senses of the term "chosen": the representatives are chosen, in the literal sense, since they are elected, but they also constitute the "chosen Few." Thus the complete characterization of the republican mode of designating rulers is that it leaves it to the people to select through election the wisest and most virtuous.

Madison's republicanism, however, is not content with providing for the selection of the wisest and most virtuous; there is no blind faith in wise and virtuous elites. Representatives should be kept on the virtuous path by a system of constraints, sanctions, and rewards. The "most effectual precaution to keep them virtuous" is to subject them to frequent election and reelection. The constant prospect of an upcoming election, combined with the desire for continuing in office, will guarantee their proper devotion to the interests of the people. If, in republican government, the selected and select few serve the common good rather than their own interest, it is not on account of any resemblance to their constituents, but primarily because they are held responsible to the people through regular elections. The Anti-Federalists thought that in order for the representatives to serve the people, the former had to be "like" the latter. Madison responds that representatives may well be different from the people, indeed they ought to be different. They will nonetheless serve the people because they will be kept duly dependent on them

[61] Madison, "Federalist 10," p. 82; my emphasis.

by institutional means. Recurring elections, and not social likeness or closeness, are the best guardians of the people's interests. The full scope of the divergence between the two conceptions of representation is now apparent. The Anti-Federalists did not question the need for recurring elections, but to them, this was only a necessary condition for a genuine representation; similarity and proximity were also required. The Federalists, on the other hand, saw elections as both a necessary and sufficient condition for good representation.

Faced with the objection that the Constitution was aristocratic, the Federalists replied by stressing the difference between aristocracy pure and simple and "natural aristocracy" and by arguing moreover that there was nothing objectionable in the latter. An example of this line of argument can be found in the speeches of James Wilson during the Pennsylvania ratification debate. His defense of the Constitution on this point is particularly significant, because of all the Federalist leaders, he was certainly the most democratically minded. For example, he praised the Constitution for its "democratic" character, something which Madison (much less Hamilton) would never do. Nevertheless, when confronted with the objection that the proposed Constitution leaned in the direction of aristocracy, Wilson was prepared to justify government by a natural aristocracy.

> I ask now what is meant by a natural aristocracy. I am not at a loss for the etymological definition of the term; for when we trace it to the language from which it is derived, an aristocracy means nothing more or less than a government of the best men in the community or those who are recommended by the words of the constitution of Pennsylvania, where it is directed that the representatives should consist of those most noted for wisdom and virtue. [It should be kept in mind that the 1776 Pennsylvania constitution was widely seen as one of the most "democratic" state constitutions; and it constitued anyway a reference for Wilson's audience.] Is there any danger in such representation? I shall never find fault that such characters are employed ... If this is meant by natural aristocracy, – and I know no other – can it be objectionable that men should be employed that are most noted for their virtue and talents?[62]

[62] J. Wilson, speech of December 4, 1787, in John Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as recommended by the General Convention at Philadelphia*, 5 vols. (New York: Burt Franklin, 1888) Vol. II, pp. 473–4.





In his definition of natural aristocracy, Wilson made no mention of wealth, which made his position easier to defend and rendered his argument somewhat more common, but not to the point of triviality. For the argument must be seen in the context of the whole debate and in the light of the other side's accusations. From this perspective, Wilson's argument, in that it explicitly conceded two points made by the Anti-Federalists, is significant. First, representatives would not be *like* their electors, nor should they be. It was positively desirable that they be more talented and virtuous. Second, the representative assembly would consist primarily, if not exclusively, of the natural aristocracy.

After this defense of natural aristocracy, Wilson stressed how greatly it differed from aristocracy proper. An "aristocratic government," he continued, is a government

> where the supreme power is not retained by the people, but resides in a select body of men, who either fill up the vacancies that happen, by their own choice and election, or succeed on the principle of descent, or by virtue of territorial possession, or some other qualifications that are not the result of personal properties. When I speak of personal properties, I mean the qualities of the head and the disposition of the heart.[63]

When confronted with the same objection about the aristocratic character of the Constitution, Hamilton responded first by ridiculing his adversaries' conception of aristocracy.

> Why, then, are we told so often of an aristocracy? For my part, I hardly know the meaning of this word, as it is applied ... But who are the aristocracy among us? Where do we find men elevated to a perpetual rank above their fellow-citizens, and possessing powers independent of them? The arguments of the gentlemen [the Anti-Federalists] only go to prove that there are men who are rich, men who are poor, some who are wise, and others who are not; that indeed every distinguished man is an aristocrat ... This description, I presume to say is ridiculous. The image is a phantom. Does the new government render a rich man more eligible than a poor one? No. It requires no such qualification.[64]

Hamilton came back again and again to the Federalists' favorite

[63] J. Wilson, speech of December 4, 1787, p. 474.
[64] Hamilton, speech of June 21, 1788, in Elliot (ed.), *The Debates* ..., Vol. II, p. 256.

argument: the people had the right to choose whomever they pleased as their rulers. But he went even further, acknowledging that wealth was bound to play an increasingly important part in elections: "As riches increase and accumulate in a few hands, as luxury prevails in society, virtue will be in greater degree considered as only a graceful appendage of wealth, and the tendency of things will be to depart from the republican standard. This is the real disposition of human nature: it is what neither the honorable member [Melancton Smith] nor myself can correct."[65] And although Hamilton lamented this ineluctable development, something more than mere resignation sounded in the following remarks:

> Look through the rich and the poor of the community, the learned and the ignorant. Where does virtue predominate? The difference indeed consists, not in the quantity, but kind, of vices which are incident to various classes; and here the advantage of character belongs to the wealthy. Their vices are probably more favorable to the prosperity of the state than those of the indigent, and partake less of moral depravity.[66]

More than any other Federalist, Hamilton was prepared to advocate openly a certain role for wealth in the selection of representatives. Rome fascinated him and his paramount objective was that the young nation become a great power, perhaps an empire. He saw economic power as the main road to historical greatness, hence he wished the country to be led by prosperous, bold, and industrious merchants. At Philadelphia, in his speech against the plan put forward by the New Jersey delegation, he had stressed the need for attracting to the government "real men of weight and influence."[67] In *The Federalist* he replied to the Anti-Federalists that "the idea of an actual representation of all classes of the people by persons of each class" was "altogether visionary," adding: "Unless it were expressly provided in the constitution that each different occupation should send one or more members, the thing would never take place in practice."[68] Once again, the point was being conceded to the Anti-Federalists: the numerical importance of each of the various classes of society would never find spontaneous reflection in the representative assembly.

[65] Hamilton, speech of June 21, 1788, p. 256. [66] *Ibid.*, p. 257.
[67] *Records*, Vol. I, p. 299. [68] Hamilton, "Federalist 35," p. 214.





> Mechanics and manufacturers will always be inclined, with few exceptions, to give their votes to merchants in preference to persons of their own professions or trades. Those discerning citizens are well aware that the mechanic and manufacturing arts furnish the materials of mercantile enterprise and industry . . . They know that the merchant is their *natural* patron and friend; and they are aware that however great the confidence they may justly feel in their own good sense, their interests can be more effectually promoted by the merchants than by themselves.[69]

The difference was that Hamilton, unlike the Anti-Federalists, welcomed this "natural" state of affairs.

Not all Federalists shared Hamilton's point of view on the role of commerce and wealth, as the debates and conflicts of the next decade would show. In the 1790s Madison and Hamilton found themselves in opposing camps: Hamilton, then in office, continued to stand up for commercial and financial interests and to defend a strong central power; while Madison joined Jefferson in denouncing what they took to be the corruption associated with finance and commerce, as well as the encroachments of the federal government. The Federalists, however, all agreed that representatives should not be like their constituents. Whether the difference was expressed in terms of wisdom, virtue, talents, or sheer wealth and property, they all expected and wished the elected to stand higher than those who elected them.

In the end, though, the Federalists shared the Anti-Federalist intuition that this kind of difference would result from the mere size of electoral districts (that is, through the ratio between electors and elected). The advocates of the proposed Constitution did not offer an explanation of this phenomenon any more than did their opponents. However, since the Federalists did not usually present it publicly as one of the Constitution's main merits, their inability to account for it was less of a problem for them in the debate than for the Anti-Federalists. The idea, however, occasionally appeared in Federalist speeches. Wilson, for example, declared:

> And I believe the experience of all who had experience, demonstrates that the larger the district of election, the better the representation. It is only in remote corners that little demagogues arise. Nothing but

[69] Hamilton, "Federalist 35," p. 214, my emphasis.

> real weight of character can give a man real influence over a large district. This is remarkably shown in the commonwealth of Massachusetts. The members of the House of Representatives are chosen in very small districts; and such has been the influence of party cabal, and little intrigue in them, that a great majority seem inclined to show very little disapprobation of the conduct of the insurgents in that state [the partisans of Shays].[70]

By contrast, the Governor of Massachusetts was chosen by the state's whole electorate, a rather large constituency. Clearly, Wilson went on, when it came to choosing the Governor, the voters of Massachusetts "only vibrated between the most eminent characters."[71] The allusion to the Shays rebellion of 1786 rendered fairly transparent the socio-economic dimension of what Wilson meant by "eminent characters" or "real weight of character."[72] In his speech of December 11, 1787, Wilson repeated the same argument (with only a slightly different emphasis), before arguing that large electoral districts were a protection against both petty demagogues and parochialism.[73]

Writing in "Federalist 10," Madison too establishes a connection between the size of the electorate and the selection of prominent candidates. Although he is not dealing in this passage with the electoral ratio and the size of the Chamber, but with the advantage of extended republics over small ones, he uses an argument similar to Wilson's: the more numerous the electorate, the more likely the selection of respectable characters.

> As each representative will be chosen by a greater number of citizens in the large than in the small republic, it will be more difficult for unworthy candidates to practice with success the vicious arts by which elections are too often carried; and the suffrages of the people

[70] J. Wilson, speech of December 4, 1787, in Elliot (ed.), *The Debates* . . ., Vol. II, p. 474.
[71] *Ibid.*
[72] The Shays rebellion, which broke out in Massachusetts in 1786, exercised some influence on the framing of the Constitution. It contributed to the animus against "democracy" that was expressed in Philadelphia. The small farmers of the western part of the state had revolted against the policy favorable to the seabord mercantile interests pursued by the legislature in Boston. The legislature had adopted a policy of hard currency and had decided to redeem the public debt, which had led to an increase in the tax burden. In the legislative elections following the rebellion, the forces of discontent scored great successes. On the Shays rebellion, see Pole, *Political Representation*, pp. 227–41.
[73] J. Wilson, Speech of December 11, 1787, in J. B. McMaster and F. Stone (eds.), *Pennsylvania and the Federal Constitution* (Philadelphia, 1888), p. 395.





> being more free, will be more likely to center on men who possess the most attractive merit and the most diffusive and established characters.[74]

In the "Note to his speech on the right of suffrage" (an elaboration on the speech he had delivered at the Convention on August 7, 1787),[75] Madison is more explicit about the benefits he expects from large electoral districts. This note reflects on possible solutions to what he describes at the outset as the major problem raised by the right of suffrage. "Allow the right exclusively to property, and the right of persons may be oppressed. The feudal polity alone sufficiently proves it. Extend it equally to all, and the rights of property or the claims of justice may be overruled by a majority without property, or interested in measures of injustice."[76] The chief objective in matters of suffrage, therefore, is to guarantee the rights of both persons and property. Madison considers five potential solutions. The first two are rejected as unfair: a property qualification for electors in the form of a freehold or of any property; and the election of one branch of the legislature by property-holders and of the other branch by the propertyless. Madison dwells at greater length on a third possibility: reserving the right of electing one branch of the legislature to freeholders, and admitting all the citizens, including freeholders, to the right of electing the other branch (which would give a double vote to freeholders). Madison notes, however, that he is not wholly clear himself about the effects of this third solution, and believes that it could be tried. He then moves to a fourth solution, on which he has apparently more definite views:

> Should experience or public opinion require an equal and universal suffrage for each branch of the government, such as prevails generally in the US, a resource favorable to the rights of landed and other property, when its possessors become the minority, may be found in an enlargement of the election districts for one branch of the legislature, and an extension of its period of service. *Large districts are manifestly favorable to the election of persons of general respectability, and of probable attachment to the rights of property, over competitors depending on the personal solicitations practicable on a contracted theatre.*[77]

[74] Madison, "Federalist 10," pp. 82–3.
[75] See above, note 28.
[76] Madison, "Note to the speech on the right of suffrage" (probably 1821), in *Records*, Vol. III, p. 450.
[77] *Records*, Vol. III, p. 454. My emphasis.

Finally, should even this solution be found unacceptable, Madison sees the final bulwark of the rights of property in a combination of several elements: "the ordinary influence possessed by property and the superior information incident to its holders,"[78] "the popular sense of justice enlightened and enlarged by a diffusive education," and "the difficulty of combining and effectuating unjust purposes throughout an extensive country." The fourth and fifth solutions are obviously embodied in the Constitution.[79] Regarding the effects of large electoral districts, Madison no longer speaks (as he did in "Federalist 10") the language of virtue and wisdom; he states more bluntly that large size will work in favor of property and wealth.

It would be superficial, however, to portray Madison and the Federalist leaders in general as hypocritical and shrewd politicians, who introduced into the Constitution a surreptitious property qualification (large electoral districts), and who publicly argued, in order to gain popular approval, that the assembly would be open to anyone with merit. Conversely, it would be naive to focus exclusively on the legal side of the situation and to claim that, since there were no property requirements for representatives in the Constitution, the Federalists were champions of political equality.[80] The

[78] In *The Federalist*, Madison alludes to the deference inspired by property-holders. In an argument justifying the apportionment of seats based to some extent on slave property (the $\frac{3}{5}$ "federal ratio"), Madison explains that the *wealth* of the individual states must be taken into account *legally* because the affluent states do not *spontaneously* enjoy the benefits of superior influence conferred by wealth. The situation of the states, he argues, is different in this respect from that of individual citizens. "If the law allows an opulent citizen but a single vote in the choice of his representative, the respect and consequence which he derives from his fortunate situation very frequently guide the votes of others to objects of his choice; and through this *imperceptible channel* the rights of property are conveyed into the public representation" ("Federalist 54," p. 339; my emphasis).

[79] The status and date of this Note are not entirely clear. Madison writes at the beginning that his speech of August 7, 1787, as reported in the *Records* of the Federal Convention, does not "convey the speaker's more full and matured view of the subject." The most plausible interpretation would seem to be that the Note sets out what Madison retrospectively (in 1821) regarded as the rationale for the *right of suffrage* laid down in 1787, whereas at the time he had been in favor of a property qualification, as we have seen. It is difficult to date precisely the change in his opinions which he alludes to. It would seem, in the light of the arguments contained in "Federalist 10," that by the end of 1787 at the latest he had realized that large electoral districts would work in favor of property-holders. But he might have discovered this effect earlier (during the debates in Philadelphia, for example).

[80] The "naive" interpretation is manifestly contradicted by the historical documents and there is no point in discussing it.





extraordinary force of the Federalist position stemmed from the fact that when Madison or Wilson declared that the people could elect whomever they pleased, they were voicing an incontrovertible proposition. In this respect, accusing the Federalists of "deceiving the people" was simply not credible. Defenders of the Constitution were certainly stating *one* truth. But there was another truth, too, or more precisely another idea that both parties held to be true (even if they did not understand exactly why): the people would, as a rule, freely choose to elect propertied and "respectable" candidates. Both propositions (and this is the essential point) could be objectively true at the same time. The first could not then, and cannot now, be regarded as a mere ideological veil for the second.

One cannot even claim that the size of electoral districts was a way of offsetting in practice the effects of the absence of formal qualifications. The Federalists did not rely on two elements of the Constitution that were equally true (or deemed to be true), in the belief that the restrictive element (the advantage bestowed on the natural aristocracy by the size of electoral districts) would cancel the effects of the more open one (the absence of any property requirement for representatives). Such a claim presupposes that the concrete results of a formal qualification would have been strictly identical to those of large electoral districts (or perceived as such by those concerned).

It is intuitively apparent that the two provisions were not equivalent. The general principle that laws and institutions make a difference and are not merely superficial phenomena has gained wide acceptance today. Yet neither intuition nor the general principle that law is no mere "formality" is wholly adequate here. It is also necessary to explain precisely why, in the particular case of parliamentary qualifications, legal requirements would not have produced effects identical to those that both the Federalists and the Anti-Federalists expected from the size of electoral districts.

Large electoral districts were not strictly equivalent to a formal property qualification for two main reasons. First, the notion that they would give an advantage to the natural aristocracy was premised on a phenomenon that experience seemed generally to confirm: "experience demonstrates" (as Wilson put it) that in general only "respectable characters" are elected in large constitu-

encies, or (to use the language of Brutus) this effect occurs "according to the *common* course of human affairs."[81] The connection between large districts and the election of the natural aristocracy thus appeared to obtain *most of the time*. A formal property qualification, by contrast, would have been effective *always*. If the advantage of the propertied classes is assured by a statistically proven regularity of electoral behavior, the system offers a measure of flexibility: circumstances may arise where the effect does not obtain, because an exceptional concern overrides voters' ordinary inclination toward "conspicuous" candidates. The situation is different if legislative position is reserved by law to the higher social classes, because the law is by definition rigid. Obviously, the law can be changed, either peaceably or by violent means, but the process is more complicated.

There is no justification for regarding as negligible the difference between what happens always and what occurs only most of the time. The distinction (which Aristotle developed) between these two categories is particularly relevant in politics. It is an error, and indeed a fallacy, to consider, as is often done, that the ultimate truth of a political phenomenon lies in the form it assumes most of the time. In reality, the exceptional case is important too, because what is at stake in politics varies according to circumstances, and the statistically rare case may be one with historically critical consequences. On the other hand, it is equally fallacious to confer epistemological privilege on the extreme case, that is, the one which is both rare and involves high stakes. In politics, ultimate truth is no more revealed by the exception than by the rule.[82] Crises and

[81] One might also recall Hamilton's remark, quoted above: "Mechanics and manufacturers will *always* be inclined, *with few exceptions*, to give their votes to merchants in preference to persons of their own professions or trades" (my emphasis). See above n. 69.

[82] The thought of Carl Schmitt is one of the most brilliant, systematic, and conscious developments of the fallacious principle that the exceptional case reveals the essence of a phenomenon. Schmitt's analyses of extreme cases are for the most part penetrating. But Schmitt unduly (albeit consciously) extends the conclusions that can be drawn from the exceptional case to the general character of the phenomenon under consideration. He writes, for example: "Precisely a philosophy of concrete life must not withdraw from the exception and the extreme case, but must be interested in it to the highest degree ... The exception is more interesting than the rule. The rule proves nothing, the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception." (*Politische Theologie: Vier Kapitel zur Lehre der Souveränität* [1922]; English trans. *Political Theology. Four Chapters on the Concept of Sovereignty*, trans. G. Schwab, Cambridge, MA: MIT Press, 1985, p. 15.)





revolutions are certainly important; one can say that they define the ordinary in that they determine the boundaries between which ordinary situations take place. But it does not follow that they are the truth of ordinary politics and furnish the key to understanding it. In revolutions or crises some factors and mechanisms come into play that are absent from normal situations and, therefore, cannot serve our understanding of ordinary politics. The most powerful political theories are those that make room for both the ordinary and the extraordinary, while maintaining a distinction between the two and explaining them differently. Locke's thought offers a perfect illustration. Most of the time, Locke remarked, people trust the established government, particularly if they elect it; they are not easily "got out of their old forms." Only when a "long train of abuses, prevarications, and artifices, all tending the same way" unmistakably manifest an intention to betray their trust, do people rise up, "appeal to heaven," and submit their fate (quite rightly) to the verdict of battle.[83] It is one of the most notable strengths of the *Second Treatise* that neither the trust of the governed in the government nor the possibility of revolution is presented as *the* truth of politics.

Returning to the American debate, the conclusion must be that, even if large electoral districts and legal qualifications for representatives did favor candidates from the higher social classes, the two cannot be equated. The greater degree of flexibility offered by extended constituencies in exceptional cases cannot be dismissed as insignificant: it is the first reason why the size of electoral districts did not cancel the effects of the non-restrictive electoral clause in the Constitution.

Second, if the advantage of certain classes in matters of representation is written into law, abolishing it (or granting it to other classes) requires a change in the law. That means that a change in the rules has to be approved by the very people who benefit from them, since they were elected under the old rules. Such a system, therefore, amounts to subjecting the demise of a given elite to its

[83] J. Locke, *Second Treatise of Government*, ch. XIX, §§ 221, 223, 242, in J. Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1960), pp. 414, 415, 427.

own approval and consent. If, by contrast, the advantage of a particular social class results only from the electoral behavior of the citizens (as with the advantage of the natural aristocracy resulting from large electoral districts), a simple change in the electorate will be sufficient to overthrow an elite or alter its composition. In this case, then, the demise of the elite in power can be achieved without its approval. This is not to say, however, that the free and deliberate decision of the electorate is sufficient to achieve such a result. For the advantage of the higher social classes in large electoral districts, though a result of the electorate's behavior, actually depends on a number of factors, only some of which are capable of being deliberately modified by voters. For instance, the electoral success of property owners in large districts no doubt owes something to the constraint of campaign expenses. It may also have to do with social norms (deference, for example). Such factors are clearly beyond the reach of the conscious and deliberate decisions of voters; the simple will of the electorate is not in itself enough to do away with the advantage of wealth. Deeper changes in socio-economic circumstances and in political culture are also necessary. Difficult though they may be, such changes do not require the approval of those already in power, whereas that approval would be required under a system of legal qualifications. And there is hardly anything more difficult than inducing an elite to acquiesce in its own diminution of power. This typically requires an inordinate amount of external and indeed violent pressure.

It may be objected that, under a system of legal qualifications, the law that must be changed in order to remove the advantage of the privileged classes is usually not ordinary but rather constitutional. This was certainly the case in the United States. Changing the legal requirements would thus not have depended simply on the approval of the representatives elected under those conditions. The argument put forward here retains its validity, however, since the legislature would have a say in the process of constitutional revision.

On this second count as well, then, legal requirements for representatives and large electoral districts do not have strictly identical effects. The difference is that with a system of large electoral districts, the advantage of wealth could be altered, or possibly even





abolished, without the consent of the propertied elite. This lent itself more easily to political change than did the legal conditions that English and French founders of representative government instituted in their countries.

Thus, the geographical diversity of the American states, which prevented the Philadelphia delegates from reaching an agreement on a wealth qualification for representatives led to the invention of a system in which the distinction of the representative elite was secured in a more flexible and adaptable manner, than on the other side of the Atlantic. In America, following the phases of history and the changes in the social structure of the nation, different elites would be able to succeed one another in power without major upheavals. And occasionally, in exceptional times, voters would even be able to elect ordinary citizens.

We are now in a position to see why the American constitutional debate sheds light on representative institutions in general, and not only on American ones. This broader significance results first from the position defended by the Anti-Federalists. Their views have not been widely studied, but the history of ideas and political theory in general have been wrong to neglect this current of thought. With their unflagging insistence on the "likeness" and "closeness" that must bind representatives and represented in a popular government, the Anti-Federalists actually made an important contribution to political thought. The Anti-Federalists formulated with great clarity a plausible, consistent, and powerful conception of representation. They accepted without reservations the need for a functional differentiation between rulers and ruled. But they maintained that, if representative government were to be genuinely popular, representatives should be as close to their constituents as possible: living with them and sharing their circumstances. If these conditions were fulfilled, they argued, representatives would spontaneously feel, think, and act like the people they represented. This view of representation was clearly defeated in 1787. Thus, the American debate brings into sharp relief what representative government was *not* intended to be. From the very beginning, it was clear that in America representative government would not be based on resemblance and proximity between representatives and represented. The debate of 1787 also illuminates by contrast the conception of

representation that carried the day. Representatives were to be different from those they represented and to stand above them with respect to talent, virtue, and wealth. Yet the government would be republican (or popular) because representatives would be chosen by the people, and above all because repeated elections would oblige representatives to be answerable to the people. More than in France or England, where in the eighteenth century no significant force defended representation based on social resemblance or proximity, it was in America that the combination of the principle of distinction and popular representative government emerged in exemplary form.

Moreover, beyond the constitutional problem of representation, the ideal of similarity between leaders and people proved to be a powerful mobilizing force during the following century. But it was the Anti-Federalists who had first formulated it. Viewed from a certain angle, the history of the Western world can be seen as the advance of the principle of division of labor. But every time that principle was extended to organizations involved in politics (e.g. mass parties, trade unions, citizens' groups), the ideal of likeness and closeness demonstrated its attractive force. In every organization with a political dimension, substantial energies may be mobilized by declaring that the leaders must resemble the membership, share their circumstances, and be as close to them as possible, even if practical necessities impose a differentiation of roles. The power of the ideal of resemblance derives from its ability to effect a nearly perfect reconciliation between the division of labor and the democratic principle of equality.

There is an additional element of general import in the American debate. On this side of the Atlantic, it was realized early on that the superiority of the elected over their electors could usually be achieved, even in the absence of any legal requirements, through the mere operation of the elective method. It took almost another hundred years before Europeans came to see this property of elections, or at least to rely on it in order to ensure distinction in representatives. Admittedly, the protagonists of the American debate regarded the size of electoral districts as the main factor in the selection of prominent candidates. But the Anti-Federalists recognized that, even in smaller districts, voters would spontaneously choose persons whom they regarded in one way or another as superior to themselves. When the Federal Farmer, for example, called for a larger number of representatives, it was "in order to allow professional men, merchants, traders, farmers, mechanics etc., to bring a just proportion of *their best informed men* respectively into the legislature."[84]





There was in Anti-Federalist thinking an unresolved tension between the ideal of likeness and an adherence to the elective principle (which the Federalists did not fail to exploit). In the ratification debate, however, the Anti-Federalist position was not simply inconsistent. For if the Anti-Federalists did accept a certain difference between representatives and their constituents, they were afraid that with vast electoral districts that difference would become too great; they feared that certain categories would be deprived of any representatives from their own ranks, and that in the end wealth would become the prevailing criterion of distinction. In any case, they realized that the elective principle would itself lead to the selection of what they called an "aristocracy." The Federalists undoubtedly shared that belief. The disagreement was a matter of degree: the two sides held different views on what was the proper distance between representatives and represented. Furthermore, they differed on the specific characteristics of the "aristocracy" that it was desirable to select. Reviving, without explicit reference, an ancient idea, both sides believed that election by itself carries an aristocratic effect.

[84] The Federal Farmer, Letter II, *Storing*, II, 8, 15; my emphasis.