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## SECOND OPINIONS

Adrian Vermeule

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Harvard Law School  
Cambridge, MA 02138

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# Second Opinions

Adrian Vermeule\*

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\* John H. Watson Professor of Law, Harvard Law School. Thanks to Glenn Cohen, Rosalind Dixon, Richard Fallon, Jack Goldsmith, Louis Kaplow, Frank Michelman, and Mark Tushnet for helpful comments, and to Janet Kim for helpful research. Thanks to the John M. Olin Center.

## Second Opinions

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In many settings, decisionmakers seek second opinions, and are wise to do so. Sometimes decisionmakers do not seek second opinions when they should have, or seek them when they should not have. In yet other settings, legal rules require decisionmakers to seek second opinions before taking consequential action.

There is a burgeoning literature on second opinions in professional contexts, as when patients or clients seek advice from doctors or lawyers.<sup>1</sup> My aim, by contrast, is to analyze second opinions as a central feature of public law. I will try to show that many institutional structures, rules and practices have been justified as mechanisms for requiring or permitting decisionmakers to obtain second opinions; examples include judicial review of statutes or of agency action, bicameralism, the separation of powers, and the law of legislative procedure. I attempt to identify the main costs and benefits of these second-opinion mechanisms, to identify conditions under which they prove more or less successful, and to consider how the lawmaking system might employ such mechanisms to greater effect.

Part I provides an analytic taxonomy of second-opinion mechanisms and introduces some conceptual distinctions. Part II analyzes the main benefits and costs of second-opinion mechanisms, and then ties the benefits and costs together with some comparative statics, attempting to identify general conditions under which second-opinion mechanisms are desirable or undesirable. Part III applies the analysis to legislative structure and procedure, judicial review for constitutionality, and *stare decisis*. I claim, among other things, that Alexander Bickel's justification of judicial review as a "sober second thought" is untenable, and that the Supreme Court should adopt a norm that two successive decisions, not merely one, are necessary to create binding law.

### I. Second Opinions: A Taxonomy

I will begin, in I.A., by lumping together a range of examples and arguments, whose common theme is that institutional arrangements are said to be justified as second-opinion mechanisms. These examples are somewhat heterogeneous, and the reader will be impatient for distinctions. I.B thus moves from lumping to splitting, offering some taxonomy that will clarify the similarities and differences among second-opinion mechanisms.

To be clear, here and throughout I analyze lawmaking institutions only insofar as they are justified on second-opinion grounds. In many cases, there are also entirely different justifications for the relevant institution; I do not claim that the second-opinion

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<sup>1</sup> In law, see Michael Klausner, Geoffrey Miller and Richard Painter, *Second Opinions in Litigation*, 84 VA. L. REV. 1411 (1998); David Heyman, *A Second Opinion on Second Opinions*, 84 VA. L. REV. 1439 (1998). In health, see Heyman, *supra*; Richard Bayliss, *Second Opinions*, 296 BRIT. MED. J. 808 (1988). Economic treatments include Wolfgang Pesendorfer & Asher Wolinsky, *Second Opinions and Price Competition: Inefficiency in the Market for Expert Advice*, 70 REV. OF ECON. STUDIES 417 (2003); Miklos Sarvary, *Temporal Differentiation and the Market for Second Opinions*, 49 J. MARKETING RESEARCH 129 (2002).

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rationale is the exclusive justification, or the most important one. Indeed, in several cases I do not even believe the second-opinion justification succeeds. The idea is not to figure out the best justifications for the relevant institutions, but to identify and assess second-opinion arguments in a range of institutional settings.

### A. Examples

Bicameralism. A stock defense of bicameralism is that a second legislative chamber can supply a second, superior opinion. In one version, the idea is simply that “[a] second chamber, regardless of its level of expertise and wisdom, constitutes ... a quality-control mechanism” that both encourages lawmakers to proceed more carefully in the first instance, and also helps to “discover mistakes after they have been committed.”<sup>2</sup> In a stronger version, however, the second or “upper” chamber is said to be epistemically superior, by virtue of its design and composition, to the first or “lower” chamber. In politics in which the lower chamber is constituted in a populist fashion, with short terms and population-based representation, elites tend to argue that the upper chamber offers a calmer and more detached perspective. Publius argued that the U.S. Senate, whose members were to be indirectly elected for long terms, would amount to a “temperate and respectable body of citizens” who could “defen[d] ... the people against their own temporary errors and delusions.”<sup>3</sup> Here the implied charge is that members of the lower House will either be drunk with popular emotion or, by virtue of the electoral connection, will be constrained by self-interest to behave as if they are.<sup>4</sup> Making explicit the association between electoral representation and drunkenness, Sir John A. Macdonald, Canada’s first prime minister, famously described Canada’s appointed Senate as an institution of “sober second thought.”<sup>5</sup>

Separation of Powers. An analogous but more general argument is that the separation of legislative, executive and judicial powers functions as a “‘second opinion’ structure ... [based on] the principle, embodied in the Constitution, that independent affirmation by more than one branch of government is appropriate when proposed actions seriously affect fundamental rights or change the nature of society itself.”<sup>6</sup> In the context of war powers, a standard view is that “authorization [of war-making] by the entire Congress was foreseeably calculated ... to slow the process down, to insure that there would be a pause, a ‘sober second thought,’ before the nation was plunged into anything as momentous as war.”<sup>7</sup>

Advise and Consent. When the President nominates certain classes of federal officials, Senate confirmation is required. Charles Black argued that Presidents do and should consider the “policy orientations” of nominees, and that the Senate can and should

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<sup>2</sup> George Tsebelis & Jeannette Money, *Bicameralism* 40 (1997).

<sup>3</sup> Alexander Hamilton et al., *THE FEDERALIST PAPERS*, No. 63, 382 (Clinton Rossiter ed., 1961).

<sup>4</sup> For relevant mechanisms, see Jon Elster, *The Night of August 4, 1789: A Study of Social Interaction in Collective Decision-Making*, 45 *REVUE EUROPÉENNE DES SCIENCES SOCIALES* 71 (2007).

<sup>5</sup> *Parliamentary Debates on the Subject of the Confederation of the British North American Provinces* 35 (1865).

<sup>6</sup> Joel Yellin, *High Technology and the Courts: Nuclear Power and the Need for Institutional Reform*, 94 *HARV. L. REV.* 489, 497 (1981).

<sup>7</sup> William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 *U. PA. L. REV.* 1, 20 (1972).

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do so as well: “The Constitution certainly permits, if it does not compel, the taking of a second opinion on this crucial question, from a body just as responsible to the electorate, and just as close to the electorate, as is the President. Is it not wisdom to take that second opinion in all fullness of scope?”<sup>8</sup>

Constitutional amendment. In the United States, “[t]he [Article V] process of garnering significant support at both the federal and state levels imposes significant transaction costs and time delays, which allow ample time for sober second thoughts.”<sup>9</sup>

Two-enactment requirements and three-reading rules. Some constitutions require constitutional amendments, or certain types of legislation, to be enacted at two successive legislative sessions to take effect (perhaps with an intervening election).<sup>10</sup> Among the possible rationales for such requirements, one is that the lapse in time allows for sober second thought.<sup>11</sup> Unlike the similar justification for bicameralism, this is a strictly intertemporal argument that might apply even within a unicameral legislative body. Moreover, individual legislative chambers, whether in a unicameral or bicameral legislature, sometimes have “two-reading rules” or “three-reading rules” that purport to institutionalize sobriety.<sup>12</sup> However, when such a rule is not constitutional but is instead created by the chamber itself, the rule is not genuinely entrenched and can be waived by (super)majority vote when passions run high.<sup>13</sup>

Sunset clauses. “Sunset clauses” in legislation have been justified in similar terms.<sup>14</sup> They differ from two-enactment requirements in the nature of the default position: under sunset clauses, the interim status quo is that the legislation goes into effect when initially enacted and is then subject to reapproval, whereas under two-enactment requirements, the legislation does not go into effect unless approved in the second session. Despite this difference, the sunset clause pushes the question onto the legislative agenda a second time and thus encourages the legislature to take a second look at the policy questions.

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<sup>8</sup> Charles Black, *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 YALE L.J. 657, 660 (1969).

<sup>9</sup> Doni Gewirtzman, *Our Founding Feelings: Emotion, Commitment, and Imagination in Constitutional Culture*, 43 U. RICH. L. REV. 623, 646-7 (2009).

<sup>10</sup> See, for example, Article 138 of the Italian Constitution and Section 88 of Denmark’s Constitutional Act.

<sup>11</sup> See Jon Elster, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000).

<sup>12</sup> In some chambers, procedures differ somewhat on different readings, in which case the chamber does not issue successive opinions on the same question, strictly speaking.

<sup>13</sup> Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 431-34 (2004). For a two-reading rule entrenched by the constitution, see France Const Art 45; for a three-reading rule created by the legislative chamber, see U.S. House of Representatives Rule XVI, cl. 8. For Bentham’s analysis and defense of three-reading rules, see *THE COLLECTED WORKS OF JEREMY BENTHAM: POLITICAL TACTICS*, ch. XI, at 131 (James, Blamires, and Pease-Watkin ed., 1999); for an argument that Bentham overlooked the commitment problems that such rules create, see Vermeule, 71 U. CHI. L. REV. at 433.

<sup>14</sup> Jacob Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 266-73 (2007); Kent Roach, *The Role and Capacities of Courts and Legislatures in Reviewing Canada’s Anti-Terrorism Law*, 24 WINDSOR REV. LEGAL & SOC. ISSUES 5, 6 (2008).

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Judicial Review of Statutes. Many theorists have attempted to justify judicial review on grounds similar to the justification for upper chambers in a bicameral legislature. As Alexander Bickel argued, quoting Harlan Fiske Stone, judicial review is a mechanism for ensuring a “sober second thought” in the lawmaking process.<sup>15</sup> Whereas the argument for upper chambers pictures the lower and more populist legislative chamber as supplying the unsober first thought, the Stone/Bickel justification for judicial review pictures the “political branches” as a whole – House, Senate and President – as supplying the unsober first thought. In a variant, judicial review has also been said to supply simply a “second opinion”<sup>16</sup> – a justification that casts no implicit aspersions on the sobriety of the first opinion.

“The Passive Virtues.” Whereas Bickel justified judicial review as a mechanism of sober second thought by the judges, he also advocated legal techniques that would in effect require the legislators themselves to reconsider an issue.<sup>17</sup> By construing statutes narrowly to avoid constitutional questions, by invalidating statutes on procedural rather than substantive grounds, and through other exercises of “the passive virtues,”<sup>18</sup> Bickel thought that courts could encourage or force legislatures to squarely face and deliberate on constitutional objections to their enactments. In some cases this deliberation may occur before the enactment of a statute, but in other cases the legislature may reconsider the statute after a remand from the judges on constitutional or quasi-constitutional grounds, and the reconsideration yields something like a second legislative opinion. These ideas can cut in the opposite direction as well; it has been argued, somewhat mischievously, that “[t]he reenactment of a statute already held unconstitutional can be justified as providing the courts with an opportunity for sober second thought.”<sup>19</sup>

Judicial Review of Agency Action: In a twist, judicial review of agency action is not usually defended as a mechanism for ensuring sober second thought, perhaps because agencies are not usually seen as populist bodies that might become politically intemperate. Rather, judicial review of agency action is defended as a cure for the pathologies of expertise: “the wisdom of obtaining a ‘second opinion’ from nonexperts – which is at the heart of judicial review of agency action – acts as a hedge against the tunnel vision that can easily limit an expert agency’s perspective.”<sup>20</sup> The picture is not

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<sup>15</sup> Alexander M. Bickel, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 26 (2nd ed., 1986)(quoting Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 25 (1936)). Other theorists made the same claim before Bickel. See, e.g., Albert M. Sacks, *The Supreme Court: 1953 Term: Foreword*, 68 HARV. L. REV. 96 (1954). Yet other theorists have renewed the claim since Bickel. See, e.g., Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory*, 34 U. RICH. L. REV. 509 (2000-01). Yet Bickel’s version is the best-known, and I will use it as a synecdoche for the intellectual tradition.

<sup>16</sup> Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715 (2008).

<sup>17</sup> Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 77-78 (1961). See also Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575.

<sup>18</sup> Bickel, *supra* note 17, at 40.

<sup>19</sup> Robert F. Nagel, *Disagreement and Interpretation*, 56 LAW & CONTEMP. PROBLEMS 11, 13 (1993).

<sup>20</sup> John S. Applegate, *A Beginning And Not An End In Itself: The Role of Risk Assessment in Environmental Decision-Making*, 63 U. CIN. L. REV. 1643, 1652 (1995).

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that the agency is drunk while the judges are sober, but that the agency is myopic while the judges are broadminded.

Precedent and Multiple Opinions. In the currently prevailing version of *stare decisis*, a single decision by the high court of a jurisdiction suffices to create binding precedent. However, in an older approach, a single decision was not enough. Only a string of two or more judicial opinions would be taken to establish a binding legal rule.<sup>21</sup> These might be opinions from different courts, or from the same court at different times.

The “Two-Court” Rule. As a rule of prudential administration, the Supreme Court says that it will typically accept factual findings concurred in by two lower courts (district court and appeals court).<sup>22</sup> However, the Court has departed from this rule when the findings at issue require “broadly social judgments” with constitutional implications.<sup>23</sup>

Federal Habeas Corpus. In substance, although not in terms, it has been argued that broad rights to habeas corpus review of state-court decisions in federal court are desirable because federal habeas review supplies a second opinion, by a high-quality tribunal.<sup>24</sup> When Justice Holmes argued for federal habeas review of sham trials in which southern juries were terrorized by racially inflamed mobs, the implicit argument was that federal review supplies a sober second thought.<sup>25</sup>

Government lawyering. The Office of Legal Counsel (OLC) supplies formal written opinions to the President on matters of law. Within OLC, there is an unwritten norm – the “two-deputy rule” -- that the head of the office obtains a first draft opinion from one deputy, and then obtains a cold review of the draft from a second deputy with no previous involvement.<sup>26</sup>

### B. Distinctions, Assumptions, and a Definition

Given the heterogeneity of this list, some conceptual distinctions will help to map the terrain, clarify assumptions, and define the class of second-opinion mechanisms that I will analyze.

Aggregation and counting: how many opinions? It is apparent that many of these arguments implicitly count institutions as single opinion-givers. The House is counted as giving one opinion, the Senate another, and so on. This implicitly aggregates the opinions of many individuals into one. But why should this be so? If a legislative chamber has hundreds of members, and a court has a handful, should they each be counted as giving one opinion? If so, should each opinion be given the same weight? (As we will see, statistical principles of aggregation suggest that the number of

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<sup>21</sup> Todd Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559, 579 (2008).

<sup>22</sup> *United States v. Appalachian Electric Power Co.*, 311 U.S. 377, 403 (1940).

<sup>23</sup> *Baumgartner v. United States*, 322 U.S. 665 (1944).

<sup>24</sup> See Gary Peller, *In Defense of Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579 (1982).

<sup>25</sup> See, e.g., *Moore v. Dempsey*, 261 U.S. 86 (1923) (per Holmes, J.) (granting federal habeas corpus and suggesting that “counsel, jury and judge were swept to the fatal end by an irresistible wave of public passion”).

<sup>26</sup> See Principles to Guide the Office of Legal Counsel (2004), available at [http://www.acslaw.org/files/2004%20programs\\_OLC%20principles\\_white%20paper.pdf](http://www.acslaw.org/files/2004%20programs_OLC%20principles_white%20paper.pdf).

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individuals in a group can strongly affect the quality of the group's collective judgments). Perhaps all or most second-opinion arguments are fundamentally spurious, because they equate unlikes, and because they rest on implausible aggregation rules.

In what follows, I will generally bracket and set aside this external critique of second-opinion arguments. My aim is to evaluate the internal logic of such arguments, taking them on their own terms. So I will accept the implicitly aggregative premises of the arguments and then ask whether the arguments succeed, even if institutions can be treated as single opinion-givers. In any event, I believe that it can sometimes make sense to aggregate in that way, at least for certain purposes. Almost all multimember institutions use formal or informal voting rules or practices of consensus designed to ensure that the institution "speaks with one voice." Moreover, as we will see, cascades and other processes of opinion-formation within groups of individuals can radically reduce the independence of voting members, especially when hot emotions are engaged, and this can cause multimember institutions to behave as though possessed of a single mind. None of this implies that it always makes sense to treat institutions as single-opinion givers, let alone to give all institutional opinions equal weight. It is just to say that a blanket dismissal of second-opinion arguments on such grounds is equally implausible.

Judgment aggregation vs. preference aggregation. The very idea of a "second opinion" implies that opinion-givers are expressing judgments rather than preferences about the question at hand. The arguments canvassed earlier appeal, even if implicitly, to the idea that additional opinions might produce better answers; they suppose that there is a fact of the matter, about which opinions are offered. My hope is to explicate, evaluate and improve those arguments, taking them on their own terms. So I will accept their premises and assume that the opinion-givers have common preferences, values or goals, and the collective problem is to make the best possible use of the dispersed bits of information or expertise that each of them possesses.

The plausibility of this assumption varies with the nature of the institution and the decision. Where members of a decisionmaking group or institution have common aims but imperfect information, decisionmaking is an exercise in the pooling or aggregation of diverse factual, causal or instrumental judgments. Administrative agencies, expert advisory bodies, and courts often engage in this sort of epistemic voting. Legislatures often amount to a forum for bargaining among political parties with different aims, but there are always substantial domains in which the major parties have common aims. Second-opinion arguments rest upon an epistemic assumption that is not always plausible, but is sometimes indispensable.

Although on this conception all second-opinion arguments are epistemic, the converse does not hold; an epistemic argument need not rest on the benefits of second opinions. One might, for example, argue in favor of paramount and exclusive judicial authority to interpret the Constitution, on the ground that a division of epistemic labor between legislatures who specialize in policy questions and judges who specialize in legal questions would produce the best array of decisions overall. Whatever the (de)merits of this argument, it is epistemic but does not cite the benefits of second opinions. To the contrary, it argues for a single opinion on constitutionality.



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Again, I make no suggestion that judgment aggregation is the exclusive rationale for the institutional arrangements I consider, or even the most important rationale. Bicameralism, for example, is often best analyzed in a model of preference aggregation and bargaining between different social, economic, geographic or political groups or interests, who compromise by designing a legislature with two chambers, each of which is dominated by one group. But insofar as institutional arrangements are (said to be) justified as second-opinion mechanisms, I will consider the conditions under which such a justification might be valid, whatever other rationales there might be for the relevant institution.

Simultaneous vs. sequential opinions. Multiple opinions might be rendered either simultaneously or sequentially. In medical and legal contexts, patients and clients usually obtain a second opinion only after obtaining a first, but they might instead obtain multiple opinions simultaneously from several doctors or lawyers. Where two chambers must both approve a bill in order for it to become law, nothing prevents both chambers from voting simultaneously on the same text, although for practical reasons this rarely happens. That said, the institutional dynamics of sequential opinion-giving are importantly different from simultaneous opinion-giving; sequential opinion-giving, for example, gives rise to both a distinctive benefit and distinctive risk. The benefit is that second or subsequent opinion-givers may learn from the first opinion, while the distinctive risk is that the second or subsequent opinion-giver will copy the first or otherwise render an opinion that lacks sufficient independence to add value to the decisionmaking process (the risk of information cascades, discussed below). I will focus, for the most part, on the sequential case, as second-opinion mechanisms in real-world legal systems usually take this form.

Whole vs. partial opinions. The second opinion might consider all the issues considered in the first, or only a subset of those issues. When a patient obtains the opinion of both a general practitioner and a specialist, the second opinion is partial. Somewhat analogously, judicial review considers only a subset of the questions posed by the legislative or agency action under review. I will consider both types of second opinions, as the context warrants.

Ex ante vs. ex post opinions. In many cases, a second opinion is obtained before the relevant decision is taken, at least if the decision is costly to reverse. In an extended sense, however, “second opinions” or “second thoughts” sometimes refer to reconsideration after a decision has been taken. In this sense, petitions for judicial rehearing and legislative motions to reconsider might be understood to fall within the ambit of second opinions. Under the doctrine of stare decisis, courts typically adhere to the rule or rationale of previous decisions, yet a court might reconsider and overrule a precedent, citing the need for a “sober second thought” or the desirability of following even wisdom that comes too late.<sup>27</sup>

The difference between reconsideration of a binding decision, on the one hand, and second opinions, on the other, may be illustrated by contrasting the usual doctrine of stare decisis with an older version of common-law precedent, mentioned above. Under

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<sup>27</sup> *Henslee v. Union Planters Nat'l Bank*, 335 U.S. 595, 600 (1949)(Frankfurter, J., dissenting) (“Wisdom too often never comes, and so one ought not to reject it merely because it comes late.”).

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modern stare decisis, the court issues a binding decision in the first case but may reconsider it later. The older approach, by contrast, held that multiple judicial opinions were required in order to establish binding law in the first place. “The key distinction is that under a principle of stare decisis, a single case authored by an authoritative court standing alone is binding in all subsequent cases; whereas precedent, as traditionally applied, arose only through a pattern of several cases decided in agreement with one another ....”<sup>28</sup>

Constitutional judicial review can take either an ex ante or an ex post form. In a classic ex post model, exemplified by the “case or controversy” requirement of Article III of the U.S. Constitution, judges do not issue a constitutional opinion before the statute goes into effect; review does not occur until a binding statute is challenged in a litigated case. However, organizational litigants often monitor pending legislation and obtain preliminary relief against the operation of a constitutionally controversial statute as soon as the statute goes into effect, so the classic model only partially corresponds to modern realities. In other legal systems, legislators or other actors may obtain a judicial opinion on constitutionality before a statute is enacted or before it becomes legally effective. I will use “judicial review” to refer to either the ex ante or ex post version, noting the difference where relevant. More generally, I will consider not only cases in which a second opinion is obtained before any consequential decision is taken, but also cases in which the second opinion is a reconsideration of an action that has already occurred.

The same opinion-giver vs. different opinion-givers. Some second-opinion mechanisms require two opinions from different individuals or institutions. This is the typical case in private-law settings, where a patient or client obtains a first opinion from one professional and then obtains a second opinion from a third party. By contrast, other second-opinion mechanisms obtain two different opinions in succession from the same opinion-giver, either under different procedures or after a lapse of time. Two-enactment rules or two-reading rules, for example, can be justified as an attempt to obtain a sober second thought from the same legislative body that produced the first decision.

Individual vs. collective decisionmakers. The decisionmaker who obtains two or more opinions before acting may either be an individual, such as a patient or client, or else a collective body, such as a multimember agency or court. In the former case, the individual may obtain two or more opinions from experts, but may also obtain two or more opinions from herself before taking action. Standard maxims of practical decisionmaking urge this course, as in the advice to “think twice” before making serious decisions. Formalizing and testing this sort of pragmatic advice, a small but growing literature examines the possibility that an individual decisionmaker may sample an internal probability distribution in order to generate two or more estimates of an uncertain quantity.<sup>29</sup> This procedure has been shown to produce better quantitative estimates, somewhat akin to averaging multiple estimates within a group; the individual thus draws

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<sup>28</sup> Zywicki & Sanders, *supra* note 21, at 579.

<sup>29</sup> See Edward Vul & Harold Pashler, *Measuring the Crowd Within: Probabilistic Representations within Individuals*, 19 PSYCHOLOGICAL SCIENCE 645 (2008); Stefan M. Herzog & Ralph Hertwig, *The Wisdom of Many in One Mind: Improving Individual Judgments with Dialectical Bootstrapping*, 20 PSYCHOLOGICAL SCIENCE 231 (2009).

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upon a sort of internal “wisdom of crowds.”<sup>30</sup> The accuracy benefit is especially large if the self-sampling individual allows substantial time to elapse between the estimates.<sup>31</sup>

Mandatory vs. optional second opinions. In many cases second opinions are optional, but in some cases they are mandatory. Where patients fund their own medical care, a second opinion is strictly optional, yet under some health-insurance plans, a second opinion is mandatory for certain procedures.<sup>32</sup> Likewise, under the Oregon Death with Dignity Act, patients could obtain a prescription for drugs necessary for self-euthanasia, but only if two doctors agreed that the patient was terminal.<sup>33</sup> Under the constitutional requirement of advise and consent, Senate approval is indispensable to presidential appointment of certain classes of officers, while under bicameralism, both chambers must agree before the law is changed.

Advisory vs. binding opinions. Even if the second opinion is mandatory, it may be advisory or instead binding. In the binding case, the usual default rule is that the proposed action cannot be taken unless both opinion-givers approve it; below I will illustrate both that case and some alternative default rules. In the advisory case, law makes it mandatory to obtain a second opinion, but does not require the decisionmaker to follow either opinion, and in particular does not require that the two (or more) opinion-givers agree. Statutes often require administrative agencies to consult with other agencies or officials, or with advisory committees, thus obtaining a second opinion before taking action. However, these statutes do not usually give the party consulted a veto over the decision or require the decisionmaking agency to follow the consulted party’s opinion (although the decisionmaking agency may have to give reasons, on the record, for refusing to do so).<sup>34</sup>

Second-opinion mechanisms: a definition. Given these distinctions, I am now in a position to define the class of mechanisms that I will analyze. I will generally define a second-opinion mechanism as an institutional arrangement that either permits or requires two successive opinions on some issue of fact, causation, policy, or law from some decisionmaking body or bodies. On the dimensions given above, this definition focuses on (1) judgment aggregation through (2) sequential opinions. On other dimensions, my analysis will be catholic; I will consider cases involving (3) whole or partial opinions issued either (4) ex ante or ex post the relevant decision, (5) by the same and different opinion-givers, (6) by individual or collective decisionmakers, (7) in mandatory or optional opinions, and (8) in advisory or binding opinions. Obviously one might delimit the subject-matter differently. The basic motivation for the choices embodied in the definition is strictly pragmatic; I believe it accounts for the main cases of interest to constitutional and institutional designers, and captures the common meaning of “second opinions.” However, the proof of that claim must be in the pudding, and in any event, I

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<sup>30</sup> See Vul & Pashler, *supra* note 29; Herzog & Hertwig, *supra* note 29. For the wisdom of crowds in group settings, see James Surowiecki, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES, AND NATIONS* (2004).

<sup>31</sup> Vul & Pashler, *supra* note 29, conjecture this is due to the gradual erosion of an anchoring effect, which compromises the independence of guesses made in close succession. See 19 *PSYCHOLOGICAL SCIENCE* at 646.

<sup>32</sup> Bayliss, *supra* note 1, 296 *BRITISH MED. J.* at 808.

<sup>33</sup> ORE. REV. STAT. § 127.800(8).

<sup>34</sup> For examples, see Adrian Vermeule, *The Parliament of the Experts*, 58 *DUKE L.J.* 2231 (2009).

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will consider other cases for purposes of comparison and contrast as the analysis proceeds.

### II. Benefits, Costs, and Comparative Statics

From the standpoint of actors within the institutional system, when and why might it be desirable to obtain a second (or third or nth) opinion before taking action? From the standpoint of an institutional designer, when and why might it be desirable to create institutional arrangements that permit or require second (or third or nth) opinions before in-system decisionmakers take action? This Part attempts to lay out the main benefits (II.A) and costs (II.B) of second-opinion mechanisms, and to develop some comparative statics (II.C) – the conditions under which second-opinion mechanisms are most or least successful.

#### A. Benefits

##### 1. Cooling-off and the “sober second thought”

Second-opinion justifications often point to the benefits of cooling off: the first opinion is assumed to be emotion-laden or otherwise overheated, while the second opinion is more temperate. Sometimes the sober second thought is literally that:

Wrongfully condemned by king Philip [of Macedon] when he was in liquor, [a woman] cried out that she appealed the judgment. When he asked to whom she appealed, “to Philip,” she said, “but to Philip sober.” She dissipated the fumes of wine as he yawned, and by her ready courage forced the drunkard to come to his senses and, after a more careful examination of the case, to render a juster verdict.<sup>35</sup>

Yet sobriety can also be contrasted, metaphorically, with political passion and intemperance. When upper legislative chambers are said to provide a sober second thought, the implicit image is aristocratic: lower chambers are awash with politically intemperate popular representatives, while the senators or lords can hold their political liquor. Similarly, in a famous (and apocryphal) anecdote about bicameralism, upper chambers are said to lower the political temperature:

When Jefferson returned from France he was breakfasting with Washington, and asked him why he agreed to a Senate. “Why,” said Washington, “did you just now pour that coffee into your saucer before drinking it?” “To cool it,” said Jefferson; “my throat is not made of brass.” “Even so,” said Washington, “we pour our legislation into the Senatorial saucer to cool it.”<sup>36</sup>

The cooling-off justification for second opinions is fraught with contestable assumptions, inter alia about the role of emotions in both individual and collective decisionmaking. The relevant literatures are large and heterogeneous, and I will make no attempt to summarize them. But there is reason to think that emotions are

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<sup>35</sup> Valerius Maximus, *FACTA ET DICTA MEMORABILIA (MEMORABLE DOINGS AND SAYINGS)* 27 (Shackleton Bailey trans. 2000).

<sup>36</sup> Thomas Wentworth Higginson, *The Birth of a Nation*, 68 *HARPER’S NEW MONTHLY MAG.* 238, 242 (1884). For the apocryphal character of the anecdote, see *RESPECTFULLY QUOTED* 60 (Suzy Platt, ed., 1992).

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indispensable to good decisionmaking, in part because emotions short-circuit excessive deliberation that neglects the opportunity costs of indecision.<sup>37</sup> Emotions, that is, have two effects, not one. To the extent that they distort decisionmaking, compared to cool deliberative reason, they supply motivational punch that pushes decisionmakers to take action. In situations where speed trades off against accuracy, so that even a somewhat inaccurate decision is better than indecision, the benefits of the second effect may outweigh the costs of the first.

Another puzzle for cooling-off justifications is whether the first, overheated thought has any epistemic value at all. In cases of individual decisionmaking, skipping the first thought is often impossible, but is that just a lamentable fact, or does the unsober first thought have any positive epistemic value? Under bicameralism, if the upper house supplies the sober second thought, why have a politically intemperate lower house in the first place?

However, a decision-procedure that combines a first hot opinion with a second cool opinion may be superior overall to a single cool opinion. Laurence Sterne, the author of *Tristram Shandy*, suggested that a combination of drunken and sober deliberation was best:

The ancient Goths of Germany ... had all of them a wise custom of debating everything of importance to their state, twice; that is, once drunk, and once sober: drunk – that their councils might not want vigour; and sober – that they might not want discretion.<sup>38</sup>

Although it seems unlikely that the Goths hit upon a desirable decision-procedure, Sterne's serious suggestion is that sober-mindedness or "discretion" is only one deliberative or epistemic virtue among others, and that the best possible decision-procedure overall might combine discretion with "vigour"—hot elements as well as cool.<sup>39</sup> Vigour might mean that hot deliberation supplies motivational power that helps to overcome the inertial bias towards inaction; perhaps cool deliberation tends to passivity. Alternatively, vigorous or hot deliberation may be less likely to accept apparent constraints and more likely to generate new ideas, giving the filtering processes of the sober second thought more material from which to select the best possible course of action.

A different suggestion is just that hot deliberation is more honest. In the original source of Sterne's account, Tacitus recounts that the Germans

frequently deliberate at [drunken] feasts on reconciling feuds, forming marriage connections, and appointing chiefs, and even the question of peace or war. At no other time, they think, is the heart so open to frank thoughts or so warm towards noble sentiments. This people is neither cunning nor subtle: in the freedom of such surroundings their inmost feelings are still expressed. Hence every man's thoughts are open and laid bare. On the next day the subject is

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<sup>37</sup> Antonio R. Damasio, *DESCARTES' ERROR: EMOTION, REASON AND THE HUMAN BRAIN* (1994).

<sup>38</sup> Lawrence Sterne, *THE LIFE AND OPINIONS OF TRISTRAM SHANDY, GENTLEMAN, Vol. II*, 80 (1894)(emphasis added).

<sup>39</sup> Cf. Don Herzog, *Romantic Anarchism and Pedestrian Liberalism*, 35 *POL. THEORY* 313 (2007).

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discussed again, and account is taken of both occasions. They debate while they are incapable of deceit and take the decision when they cannot make a mistake.<sup>40</sup>

In contrast to Sterne, Tacitus suggests only that in vino veritas. Drunken deliberation prevents falsification of preferences or judgments, while sobriety is necessary for accuracy. Both Sterne's and Tacitus' rationales, however, imply that the sober decision must come second.

### 2. Epistemic diversity

A different justification for second-opinion mechanisms points to the value of epistemic diversity.<sup>41</sup> Unlike the cooling-off justification, this does not require an assumption that the second opinion is superior to the first, deliberatively or otherwise. The picture is just that the two opinions are delivered from different angles, and that the difference is itself epistemically valuable, because it can help the decisionmaker triangulate on the truth. This idea can rest on either of two related mechanisms: statistical aggregation or perspectival aggregation.

Statistical aggregation is standardly illustrated by the problem of estimating a given – fixed but unknown -- quantity. In tasks of this sort, a decision procedure that averages multiple estimates produces clear epistemic benefits. Averaging is beneficial because of a statistical principle: the average error of two estimates will tend to be lower than the error of a single estimate, because averaging washes out random error.<sup>42</sup>

Tasks involving quantitative estimation are simplistic; of course most epistemic tasks that the legal system must undertake are far more complex. However, the estimation task merely illustrates a larger point: where there is a right answer, somehow defined, the average of multiple independent estimates will tend to converge on the truth, for purely statistical reasons. The larger the number of independent estimates, the more likely it becomes that idiosyncratic estimates will be washed out. Some will err on the high side, some on the low side, and the average of the group of estimates will converge on the truth as the number of estimates increases. This statistical point underlies the Condorcet Jury Theorem, which holds, in its simplest form, that where a group votes on a binary choice, where each voter is even slightly more likely to be right than wrong, and where the voters' errors are uncorrelated (the votes are "independent"), then a majority of the group will be more likely to be correct than the individual voter, and the chance that the majority is correct converges on certainty as the size of the group increases.<sup>43</sup>

A related but distinct mechanism involves perspectival aggregation, illustrated by Aristotle's idea of "the Wisdom of the Multitude"<sup>44</sup>:

For the many, of whom each individual is not a good man, when they meet together may be better than the few good, if regarded not individually but

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<sup>40</sup> Publius Cornelius Tacitus, *AGRICOLA AND GERMANY* 49 (Anthony R. Birley trans., 1999)(emphasis added).

<sup>41</sup> See generally Scott E. Page, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (2007).

<sup>42</sup> Vul & Pashler, *supra* note 29; Herzog & Hertwig, *supra* note 29.

<sup>43</sup> For an introduction to the vast literature on the Theorem, and for legal applications, see Adrian Vermeule, *LAW AND THE LIMITS OF REASON* (2009).

<sup>44</sup> Jeremy Waldron, *THE DIGNITY OF LEGISLATION* 92 (1999).

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collectively, just as a feast to which many contribute is better than a dinner provided out of a single purse. For each individual among the many has a share of excellence and practical wisdom, and when they meet together, just as they become in a manner one man, who has many feet, and hands, and senses, so too with regard to their character and thought. Hence the many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole.<sup>45</sup>

In conventional cases, the doctor or lawyer who offers a second opinion may supply a new perspective that helps the patient or client to obtain a well-rounded picture of the problem, akin to the story of the blind men and the elephant. The extreme case of perspectivalism is supplied by Herodotus, who recounted of the Persians that

[i]t is also their general practice to deliberate upon affairs of weight when they are drunk; and then on the morrow, when they are sober, the decision to which they came the night before is put before them by the master of the house in which it is made; and if it is then approved of, they act on it; if not, they set it aside. Sometimes, however, they are sober at their first deliberation, but in this case they always reconsider the matter under the influence of wine.<sup>46</sup>

Herodotus's Persians affirmatively value the drunkard's perspective, to the extent of making it a practice to get drunk for the very purpose of making decisions. In contrast to both Sterne and Tacitus, this radical perspectivalism implies that the drunken stage of decisionmaking may just as well come second.

The mechanisms underpinning the diversity rationale are intrinsically fragile and sensitive to the detailed conditions of decisionmaking. The main issue is the degree to which the opinions are correlated, or instead independent; the greater the correlation, the less the benefit of additional opinions, because the less likely it is that random errors or systematic biases will wash out.

One problem is that common expertise implies common blind spots. Consulting two doctors or twelve will not guarantee epistemic diversity if standardized medical training and "best practices" incorporate a uniform but erroneous belief. The greater the correlation of views across experts, due to common training or a common base of information, the more quickly the marginal benefits from consulting the next expert diminish. One review of laboratory experiments on quantitative estimates finds that typically, three to six opinions exhaust the accuracy benefit that can be obtained from additional opinions.<sup>47</sup> Importantly, that number does not take into account the direct costs and opportunity costs of obtaining further opinions, so the optimal number of opinions will typically be fewer; I return to this point later.

Because the diminishing marginal benefit of additional opinions arises from the correlation of estimates across experts in a given field, it may be desirable, in some settings, to diversify the pool of opinion-givers by introducing different professions or different bodies. Counterintuitively, adding decisionmakers to a voting group can

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<sup>45</sup> *Id.* (quoting Aristotle, *The Politics*, Bk. III, Ch. 11, 66 (1988)).

<sup>46</sup> George Rawlinson (trans.), *THE HISTORY OF HERODOTUS*, Vol. 1, 211 (1889)(emphasis added).

<sup>47</sup> Ilan Yaniv, *The Benefit of Additional Opinions*, 13(2) *CURRENT DIRECTIONS IN PSYCHOL. SCI.* 75 (2004).

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improve the group's overall epistemic performance even if the additional decisionmakers are of lower competence than the initial decisionmakers.<sup>48</sup> The reason is that if the biases of the additional decisionmakers are negatively correlated with the biases of the initial decisionmakers, the group will be less biased overall. "The uninformed voters drive the average correlation down, thus more than compensating for their relative ignorance."<sup>49</sup> Remarkably, this effect can hold even if the additional decisionmakers are not only less competent than the initial decisionmakers, but are actually worse than random, meaning they are more likely to get the wrong answer than the right one.<sup>50</sup> But this is just a theoretical possibility; in any given case the reduction in competence may be so great as to outweigh the benefits of epistemic diversity.

Another problem involves information cascades,<sup>51</sup> in which the failure of independence results not from common training but from rational copying of others' judgments where information is costly. (By contrast, reputational cascades<sup>52</sup> arise when voters are concerned that expressing a certain judgment will incur social opprobrium). An information cascade arises when a second or subsequent opinion-giver rationally ignores her private information and free-rides on opinions given earlier in the sequence, producing a series of highly correlated but unreliable opinions. This problem can be forestalled either by disclosing to the second opinion-giver all of the underlying information possessed by the first, or else by keeping the second opinion-giver ignorant of the existence or content of the first opinion.<sup>53</sup> By contrast, the independence-compromising effect of common professional training and best-practice standards obtains even if the second opinion-giver is unaware of the first.

### 3. Legitimacy and Certainty

Finally, a second opinion may provide extra legitimacy to the decision or raise the decisionmaker's certainty that it is correct – at least so long as the second opinion coincides with the first. The relationship between the two notions is that legitimacy can be construed in epistemic terms as public certainty or confidence that a governmental decision is correct; so legitimacy in this sense is really just a special case, albeit an important case, of certainty.<sup>54</sup> As it is tolerably obvious to say that, in general, a second

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<sup>48</sup> *Id.* at 76.

<sup>49</sup> Krishna K. Ladha, *The Condorcet Jury Theorem, Free Speech, and Correlated Votes*, 36 AM. J. POL. SCI. at 629 (1992). In Ladha's example, a group of three decision-makers, each competent at the .8 level, cannot be certain of getting the right answer whatever the voting rule. However, if the group adds two uninformed, worse-than-random guessers, whose competence is a mere .3, then the group is certain to choose the right answer so long as the guesses of the uninformed are negatively correlated with those of the informed. *See id.*

<sup>50</sup> *Id.*

<sup>51</sup> See Abhijit V. Bannerjee, *A Simple Model of Herd Behavior*, 107(3) Q. J. ECON. 797 (1992); Bikhchandani et al., *A Theory of Fads, Fashion, Custom, and Cultural Change as Informational Cascades*, 100(5) J. POL. ECON. 992 (1992); Ivo Welch, *Sequential Scales, Learning, and Cascades*, 47(2) J. FIN. 695 (1992).

<sup>52</sup> See Timur Kuran, *Ethnic Norms and Their Transformation Through Reputational Cascades*, 27 J. LEGAL STUD. 623 (1998); Timur Kuran & Cass Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683 (1999).

<sup>53</sup> Jon Elster, *Concluding Reflections on Collective Wisdom* (2010)(unpublished manuscript).

<sup>54</sup> For an exploration of various senses of legitimacy, see Richard Fallon, *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).



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confirming opinion will increase certainty, I will focus on some examples of legitimation and on its special problems.

Charles Black and Alexander Bickel famously argued that when the judges uphold a statute after judicial review, they confer on it additional political legitimacy over and above the legitimacy it obtains from being enacted by Congress.<sup>55</sup> Although the conception of legitimacy that underpins this argument is unclear,<sup>56</sup> it can be given an epistemic interpretation by saying that an increase in legitimacy amounts to an increase in the confidence of public judgments. Where two chambers of the legislature or (in the case of judicial review) two branches of government are controlled by officials with uncorrelated or negatively correlated biases, yet the chambers or branches agree on a decision, citizens can more confidently infer that the decision is correct, given the (unobservable) state of the world.

Another example involves the series of executive orders that have given the Office of Information and Regulatory Affairs broad power to require agencies (at least executive agencies and perhaps even independent ones) to employ cost-benefit analysis. Although President Reagan's initial order was controversial, subsequent Democratic and Republican presidents have left its basic framework in place, although with minor adjustments that shift over time. It has accordingly been argued that bipartisan approval of cost-benefit analysis now makes it a legitimate and established feature of the administrative state.<sup>57</sup> One interpretation is that the public now has greater reason to be confident that cost-benefit analysis is a beneficial tool of administration overall, despite its real costs.

So construed, legitimacy is hardly an unproblematic notion. For one thing, legitimacy may simply supervene upon, or be parasitic on, other rationales for second opinions; perhaps a second-opinion mechanism has legitimating effect only insofar as it produces other benefits. Yet legitimacy may nonetheless amount to an independent benefit, just as a sentence enhancement is parasitic on an underlying sentence, yet increases its effects. Another problem is that legitimacy in the sense of increased certainty is a double-edged sword: a disagreement between the two opinion-givers may make the final decision less legitimate than it would have been if only one or the other opinion-giver had been consulted. If the House approves a bill and the Senate votes it down, the result may be more public discontent than if the bill had simply been rejected by a unicameral legislature. Although a high court composed of a left-party bloc and a right-party bloc will provide extra legitimacy to decisions on which the two blocs agree, disagreement between the blocs will exacerbate political tensions, perhaps even to a higher level than would occur were the Court dominated by a single viewpoint.

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<sup>55</sup> Alexander Bickel, *THE LEAST DANGEROUS BRANCH*, *supra* note 15, at 29-33 (citing Charles Black, *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY*, 34 (1960)).

<sup>56</sup> Bickel defines legitimacy as "the stability of a good government over time" and says that it is "the fruit of consent to specific actions or to the authority to act."

<sup>57</sup> Cass R. Sunstein, *THE COST-BENEFIT STATE* (2002).

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### B. Costs

So much for the main benefits of second opinions.<sup>58</sup> The main costs are the opportunity costs of decisionmaking and the risk of indeterminacy if the two opinions differ. These costs imply an optimization problem, as illustrated by the words of the Master:

Chi Wen Tzu [an official] thought three times before he acted. Hearing of this, Confucius said, “Twice is enough.”<sup>59</sup>

Each successive reconsideration of a given problem has diminishing marginal benefits and increasing marginal costs; Confucius may be suggesting that in practice two thoughts or opinions are typically optimal.<sup>60</sup> Whether or not that is so, the consumer of opinions or the designer of second-opinion mechanisms must generally trade off the marginal benefit of consulting another opinion-giver, which diminishes due to the partial correlation of biases, against the marginal direct costs and opportunity costs of obtaining additional opinions. Furthermore, there is the question what to do if the opinion-givers disagree with one another. I will consider these issues in turn.

#### 1. Opportunity Costs

Samuel Johnson illustrated both the opportunity costs of inaction and the indeterminacy problem, in the following way:

[T]ake the case of a man who is ill. I call two physicians; they differ in opinion. I am not to lie down and die between them: I must do something.<sup>61</sup>

Whatever the best course of treatment may be, doing nothing is clearly worst of all. Johnson’s “lie down and die between them” gestures at Buridan’s Ass, who failed to understand opportunity costs and starved to death between two equally tempting haystacks.

If opportunity costs are sufficiently high, even a second opinion might be undesirable, let alone a third. In medicine, if time is of the essence, obtaining a second opinion might amount to a fatal blunder. The reason why there is only one captain of the ship, and the main argument for a “unitary executive,”<sup>62</sup> is that in emergencies there

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<sup>58</sup> One might also point to the benefits of reassurance: a second opinion, at least so long as it confirms the first, raises the decisionmaker’s confidence that she has explored the alternatives and has settled on the right course of action. However, unless it is just a synonym for certainty, reassurance is a tricky notion. One cannot counsel a patient to get a second medical opinion solely on the ground that she will feel better if the second opinion confirms the first. If the first opinion suggested that she has a fatal illness and the second confirms the first, their concurrence will raise her certainty but not reassure her. And even if both opinions are favorable, she will be reassured only to the extent she has independent reason to think that two opinions are more likely to be correct than one, so some other epistemic benefit of second opinions must be present.

<sup>59</sup> *Lun Yu*, chap. 5 verse 19 (William Cheung ed., 1985)(available at <http://www.confucius.org/lunyu/lange.htm>).

<sup>60</sup> In a different yet compatible gloss, Confucius is suggesting that repeated deliberation amounts to vacillation rather than prudence. See E. Bruce Brooks & A. Takeo Brooks, *THE ORIGINAL ANALECTS: SAYINGS OF CONFUCIUS AND HIS SUCCESSORS* 26 (1998).

<sup>61</sup> James Boswell, *THE JOURNAL OF A TOUR TO THE HEBRIDES WITH SAMUEL JOHNSON*, LL. D. 29 (1860).

<sup>62</sup> See Alexander Hamilton’s argument in Federalist No. 70, *THE FEDERALIST PAPERS*, *supra* note 3, at 421-28. I use the phrase “unitary executive” in one of its many senses; in another, more technical legal

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is no time for second opinions or for decisionmaking by committee.

### 2. Indeterminacy

A more complex problem is that second-opinion mechanisms create indeterminacy where the two opinions differ. If the opinion of the second doctor is diametrically opposed to that of the first, Johnson observed that the patient must do something; but what exactly? And if the two chambers of a bicameral legislature are at loggerheads, what should the political default rule be? There are several general approaches to the indeterminacy problem; each approach embodies further costs, benefits and tradeoffs.

Where opinions are strictly advisory rather than binding, indeterminacy lacks any legal significance. The decisionmaker simply obtains opinions from the advisers and uses them as inputs into her own decisionmaking. Here several strategies for coping with indeterminacy are common. Where the first and second opinions differ, the decisionmaker can in some circumstances simply average them. As we have seen, for purely statistical reasons, averaging will improve on the decisionmaker's own estimate or on a strategy of randomly choosing between the estimates of advisers. Averaging tends to wash out the random errors or even systematic biases of any particular adviser, and thus is more likely to approximate the true value.

However, while averaging works well in the case of purely quantitative estimates of a continuous variable such as a projected future rate of economic growth, it is inapposite for "lumpy" issues, where the decisionmaker cannot split the difference. One example is the allocation of indivisible goods, such as a healthy organ to be allocated between two claimants. If the decisionmaker wishes to give the organ to whichever patient will benefit the most, and experts disagree over which patient that is, it makes no sense to give half the organ to each patient, or to give the organ to each patient half of the time. In situations of this sort, "averaging" may produce incoherent compromises.

Where averaging is incoherent, several other strategies are possible. The decisionmaker may simply ask the expert advisers for their reasons and try to assess them, although the same expertise gap that made the opinions necessary will also make them difficult for the layperson to evaluate. Alternatively, the decisionmaker may fall back on second-order considerations by deciding based on the relative qualifications of the advisers or their known biases.<sup>63</sup> The decisionmaker may also postpone decisionmaking in order to obtain a third opinion, perhaps adopting whatever approach commands a majority among the advisers, although this increases the opportunity costs of the decisionmaking process. In cooling-off situations, a common decisionmaking strategy is to use a default rule set in favor of inaction: one should not join the army, get married or sign a mortgage unless the first impulse is confirmed by the sober second thought.

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sense, it refers to the question whether all officials exercising executive power must be removable at will by the President. Compare *Myers v. United States*, 272 U.S. 52 (1926) (yes) with *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (no).

<sup>63</sup> For analysis of such considerations in administrative principal-expert settings, see Vermeule, *Parliament of the Experts*, *supra* note 34, at 2266-74. For a more general analysis, see Cass R. Sunstein & Edna Ullmann-Margalit, *Second-Order Decisions*, 110 ETHICS 5 (1999).

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Where opinions are binding, by contrast, default rules are the standard instrument for preventing indeterminacy. Here too, default rules typically mandate inaction unless all opinion-givers share the same view. Bicameralism means that no statutes are made unless both legislative chambers agree, while judicial review ensures that no valid statutes are made unless all branches agree. In a variant procedure, if the first opinion-giver rejects a proposal, no second opinion is even obtained, but if the first accepts the proposal, a second approval is required. An example is Tacitus' account of religious divination among the Germans:<sup>64</sup>

They attach highest importance to the taking of auspices and the casting of lots. . . . If the lots forbid an undertaking, there is no deliberation that day about the matter in question. If they allow it, further confirmation is required by taking the auspices.

Although setting the default rule in favor of the status quo is the most common tiebreaker, there is no logical necessity to do so. Until 1988, the Italian Parliament would sometimes hold both an open vote and a secret vote, in succession, on bills designated as issues of confidence, meaning that the government would fall if the bill were defeated. The background norm was apparently that the government would fall if the bill failed on either the open or the secret vote.<sup>65</sup> Likewise, in some legal settings a claim will succeed if any one of several opinion-givers supports it. Suppose that a defendant causes an accident that hurts hundreds of individual plaintiffs, P1, P2 ... Pn. If P1 sues on a particular legal theory in one court and loses, nothing prevents an identically-situated P2 from suing the same defendant on the same theory in the same or a different court; indeed, under U.S. law, the constitutional guarantee of due process entitles P2 to do so.<sup>66</sup> Unless the potential plaintiffs are aggregated into a class-action lawsuit, an eventual finding of liability in some court or other is all but inevitable.

### C. Comparative Statics

In order to summarize these benefits and costs, I will try to state some conditions under which second-opinion mechanisms will prove most or least useful.<sup>67</sup>

#### 1. Direct costs and opportunity costs

As we have seen, the process of obtaining a second opinion has both direct costs and opportunity costs. In private settings, the direct cost is that the patient or client (or an insurance company or government agency acting as an insurance company) must pay out of pocket for the time spent by the second doctor or second lawyer in formulating her opinion. The opportunity cost is that the patient or client must postpone a decision until the second opinion is obtained, and in the meantime the disease may be making headway, or the legal situation may be deteriorating.

Direct costs are sometimes important in public settings as well. A system in which two juries sat in succession, to ensure a second opinion on every case that goes to

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<sup>64</sup> Tacitus, *supra* note 40, at 42.

<sup>65</sup> Or so I understand the explanation in David Hine, *GOVERNING ITALY: THE POLITICS OF BARGAINED PLURALISM* 190-91 (1993).

<sup>66</sup> See *Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971).

<sup>67</sup> For a somewhat similar list, tailored to professional settings, see Klausner et al., *supra* note 1.

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trial, would simply be too expensive. Yet in many public settings, opportunity costs loom larger than direct costs. The direct costs of obtaining a second opinion from, for example, a panel of judges reviewing agency action is small; there are legal fees, and the litigant must pay a modest filing fee, but access to the system is at least formally open to all and parties do not directly pay judges or other officials for their time. Rather public opinion-providers in effect use a system of nonprice rationing through waiting time. The main cost of obtaining judicial review of agency action is not litigation cost, but delay – it can take months or years to obtain a final judicial ruling. As I will suggest below, the opportunity costs of second opinions are a major consideration in many public-law applications.

### 2. Accuracy of the initial decisionmaker

As the accuracy of the initial decisionmaker increases, the benefits of second and subsequent opinions diminish.<sup>68</sup> If the lower chamber is highly accurate – if it uses causal models that are not only unbiased but that closely approximate the truth, and thus votes for policies that tend to promote the interests common to all concerned -- then bicameralism is less beneficial than it would otherwise be (bracketing the nonepistemic arguments for bicameralism). If Congress as a whole usually gets constitutional law right, at least in domains where constitutional law admits of right answers, judicial review is less likely to be necessary. If the appointees to federal office can be sorted into two types, high-quality and low-quality, and if President almost always chooses high-quality types, then a requirement of Senate confirmation will be less likely to weed out low-quality types, just because there is less weeding-out that can be done. This point should not be overstated. Where the initial decisionmaker is highly accurate, it is possible that a second opinion will make the decision still more accurate. Yet all else equal, highly accurate decisionmakers benefit less from multiple opinions.

### 3. Marginal benefit of the second (or nth) opinion

Quite obviously, as the accuracy of the second opinion increases, the benefits of obtaining it increase. Yet obtaining a second opinion may be beneficial even if it is no more accurate, or indeed less accurate, than the first opinion, due to the statistical logic of averaging. Across individuals, averaging tends to wash out both random error and even systematic error, so long as the systematic biases of different individuals are uncorrelated with one another.<sup>69</sup> Within individuals, averaging of different estimates made in succession at least washes out random error. The greater these effects, the greater the marginal benefit of the second (or nth) opinion. However, the benefits of averaging decrease as the number of opinions increases.

### 4. Correlation of errors

As the correlation of errors across opinion-givers increases, the benefit of obtaining additional opinions decreases. In cases where the question is how many expert opinions to obtain, the marginal benefit diminishes because of the inherent

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<sup>68</sup> In the context of estimation tasks, “the width of the gain range [i.e. the gain from taking a second opinion and averaging it with the first] decreases as the error of the first estimate decreases.” Herzog & Hertwig, *supra* note 29, at 232.

<sup>69</sup> Herzog & Hertwig, *supra* note 30, at 232; Richard P. Larrick & Jack B. Soll, *Intuitions About Combining Opinions: Misappreciation of the Averaging Principle*, 52(1) MGMT. SCI. 111, 112 (2006).

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correlation of opinions among experts in the same field.<sup>70</sup> A review of relevant psychology experiments finds that in typical cases of estimation, “as few as three to six judgments might suffice to achieve most of what can be gained from averaging a larger number of opinions.”<sup>71</sup> This speaks only to the issue of accuracy; if the direct costs and opportunity costs of obtaining additional opinions are also factored in, the optimal number of opinions will almost always be fewer. At the limit, it might be that in many practical settings two opinions are the most that should ever be obtained, in accordance with Confucius’ dictum that even if thinking twice is desirable, thinking three times is overkill.

### 5. Anticipated Reactions

When the opinion of a first expert will be reviewed by a second expert, and the first expert anticipates that review, what, if anything, will be the effect on the first expert’s opinion? If the decision of one institution is to be reviewed by another, and the members of the first institution know this, will their decisions be better or worse? In such cases several different effects are possible. Studies of mandatory second opinions in medical decisionmaking have sometimes suggested that the main benefit of the mandatory second opinion is a sentinel effect: the first doctor, anticipating review by a second, is more diligent than she would otherwise be.<sup>72</sup> However, anticipation of review might have any of several bad effects instead (or in addition). One is playing it by the book: the first doctor might adopt an excessively conventional or cautious stance, anticipating that another doctor will, on average, be likely to reject any unusual diagnosis. Another is moral hazard: the second opinion might induce the first doctor to make a sloppy or hasty diagnosis, anticipating that the second doctor will catch any errors. Assuming the second doctor is an imperfect detector of the errors of the first, this moral-hazard effect can mean that the system of mandatory second opinions might actually create more errors than it prevents. The general point is that anticipation of review may induce the first opinion-giver to invest too little in acquiring information, or may discourage her from using expertise she already possesses.<sup>73</sup>

The causal mechanisms in these examples generalize to other contexts. As to bicameralism, for example, Joseph Story argued that a second chamber would create a sentinel effect by “operat[ing] indirectly as a preventive” against bad legislation.<sup>74</sup> By contrast, a stock argument for unicameralism invokes moral hazard: “[T]he presence of a second house encourages and enables legislative carelessness--as when one house hastily accepts the actions of the other house on faith, without independent evaluation, or passes ill-conceived legislation, relying on the other house to correct or reject it.”<sup>75</sup> In general, the law of anticipated reactions suggests that the behavior of first opinion-givers will be

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<sup>70</sup> Yaniv, *supra* note 47.

<sup>71</sup> *Id.* at 76.

<sup>72</sup> Suzanne Grisez Martin et al., *Impact of a Mandatory Second-Opinion Program on Medicaid Surgery Rates*, 20 MED. CARE 21, 31 (1982).

<sup>73</sup> Cf. Matthew Stephenson, *Bureaucratic Decisions Costs and Endogenous Agency Expertise*, 23 JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 469 (2007).

<sup>74</sup> Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 556, at 414 (5th ed., 1905).

<sup>75</sup> Minnesota House of Representatives, *Unicameral or Bicameral State Legislatures: The Policy Debate* (1999)(available at [http://www.house.leg.state.mn.us/hrd/issinfo/uni\\_bicam.htm](http://www.house.leg.state.mn.us/hrd/issinfo/uni_bicam.htm)).

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different in a system with second opinions than where no second opinions are obtained, but the nature of the difference is unclear and highly contingent. The most that can be said in the abstract is that as the chance of sentinel effects increases, the benefits of second-opinion mechanisms increase, while as the risk of by-the-book effects or moral hazard increases, the costs of second-opinion mechanisms increase. And in some contexts, the good and bad effects may occur simultaneously.

### 6. Managing disagreement

As we have seen, disagreement among opinion-givers is in a sense costless, so long as their opinions are strictly advisory. Where expert panels give nonbinding advice to administrative agencies, the agency, which is like the patient or client in private settings, can simply treat all the opinions as information and make its decisions accordingly. Disagreement among the panel can itself be highly informative.

Real problems, however, arise when the opinions are binding and some tiebreaking procedure or default rule is needed. Earlier, I canvassed some of the most common and sensible default rules. From the standpoint of institutional design, however, the very need for such a rule is a kind of cost; the optimal rule will frequently be unclear, and decisionmakers may argue about what exactly the default rule is in a certain domain, as when constitutional scholars debate whether the President may or not take action on a certain issue without congressional consent. Advisory second-opinion mechanisms sidestep these problems and are thus preferable, all else equal.

### 7. Stakes

Finally, an important feature of the decisionmaking environment involves the stakes of the choice that the decisionmaker faces. Stakes must be understood in marginal terms, as the difference between the expected outcomes that result from choices rather than the absolute importance of the decision to the decisionmaker. If the decisionmaker can choose either A, with a certain payoff of \$1 million, or B, with a certain payoff of \$1,000,001, then the absolute stakes are high but the marginal stakes are trivial.

The higher the marginal stakes, the more the decisionmaker has to gain from making an accurate choice and the more the decisionmaker should invest in obtaining further opinions, assuming these can be expected to make the decision more accurate on average. The flip-side of this point is that where the decision stakes are low, in a relative sense, accuracy matters less than minimizing the direct costs and opportunity costs of decisionmaking. Suppose the task is to pick a brand of toothpaste in a supermarket. The decisionmaker happens to know that one brand – out of the myriad that confront her – dominates the others, in that it is slightly superior on all dimensions of quality, but the decisionmaker does not know which brand is the best. Because the marginal benefit of making the correct decision is low, it would be silly to obtain several opinions from dentists. (Advertisers may attempt to provide the same information at low cost: “4 out of 5 dentists recommend GlitterPaste!”). In general, where speed and accuracy trade off in a given decisionmaking environment, fewer opinions should be obtained.

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A less intuitive implication is that as marginal stakes decrease, the harms of information cascades and other accuracy-undermining dynamics also diminish. If the right answer is only slightly better than the wrong answer, then it does not matter too much if the opinion-givers have common blind spots and (hence) correlated biases, or if later experts copy earlier experts, resulting in a cascade. Herding is very bad when lemmings run off cliffs, but not so bad if the herding merely causes the decisionmaker to choose A over slightly superior B.

### III. Implications

Having outlined some comparative statics of second opinions, I will apply the analysis to a range of problems and controversies in public law. These applications are intended to be illustrative rather than exhaustive; doubtless there are problems with a similar underlying structure, to which a similar analysis could fruitfully be applied. I begin with the structure of the legislature and voting procedures (III.A and III.B), and then turn to judicial review and judicial precedent (III.C and III.D).

#### A. Bicameralism and Legislative Procedure

The analytics of second opinions yield implications for structuring the procedures used in a bicameral legislature. Earlier, I distinguished two different second-opinion rationales for bicameralism: (1) a cooling-off rationale, holding that the “upper” house, such as the Senate, supplies a sober second thought; (2) a perspectival rationale, holding that two institutional opinions are better than one. What do these rationales imply for the sequence in which the two legislative houses vote?

On the second rationale, the sequence is irrelevant. If the two bodies have different perspectives, and if the default rule is that both must agree in order to change the law, then it is immaterial which body first votes to adopt a given bill. On the first, rationale, however, sequence is all-important: the sober house must decide second. Although a two-stage decision procedure of hot deliberation followed by cool deliberation might be superior to a one-stage procedure of cool deliberation, on the ground that hot deliberation generates alternatives that cool deliberation may sort through, there is no obvious argument for putting the sober body first and the unsober one second.

As one rationale implies that sequence is immaterial and the other implies that the upper house should always render its opinion second, constitutional law should require the upper house to always render its opinion second -- just as judicial review, in American law anyway, always follows legislative action.<sup>76</sup> In fact, however, neither

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<sup>76</sup> This conclusion holds on two other accounts of bicameralism as well. (1) Suppose that bicameralism is not justified on second-opinion grounds at all, but is instead justified on political grounds, as a mechanism for representing different political groups (large states and small states in the American case) by allocating a legislative chamber to each group. On a political representation rationale, sequence is also immaterial -- whichever legislative chamber moves first, both political groups must agree -- and the argument in the text goes through. (2) On one positive model of noncongruent bicameralism, where the two houses are not identically structured, the more numerous house will develop greater expertise across issues. Its members can divide the total policy space into smaller slices, which reduces the costs of acquiring information. On this model, the larger house should initiate legislation, and in fact the data are consistent with this model. See James Rogers, *Bicameral Sequence: Theory and State Legislative Evidence*, 42(4) AM. J. POL. SCI. 1025 (1998).



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Madison nor the other U.S. framers drew this conclusion, even though they subscribed to the cooling-off rationale. There is no general requirement in the U.S. Constitution that House approval of a bill must come before Senate approval. As part of a political deal between small and large states at the Convention, there is an Origination Clause, which requires that bills for raising revenue must originate in the House; to this modest extent the Constitution prescribes the sequence in which bicameralism must operate. But this only covers a small portion of the federal legislative terrain. The genesis of the clause seems to have been a bargained-for compromise between small and large states: the large states agreed to an equal basis of representation in the Senate (two senators for each state) in return for control, through the populist House, over the introduction of bills for raising money.<sup>77</sup> The bargaining at the federal convention, in other words, produced a sequencing rule that cannot be derived from any of the epistemic rationales for bicameralism.

### B. Open-Secret Voting<sup>78</sup>

The next application is to the voting procedures used in decisionmaking groups, in particular the choice between open voting and the secret ballot. I focus for concreteness on Jeremy Bentham's proposal for a hybrid system in which a legislative assembly would take an open vote and a secret-ballot vote in succession, on the same issue (open-secret voting). I believe that Bentham's rationale for the proposal fails, but that it can be justified as a second-opinion mechanism that obtains two informative judgments from the voting body.

In his book on Political Tactics<sup>79</sup>, Bentham briefly argued for a hybrid system of open-secret voting (PT 147-49).<sup>80</sup> Because open voting can induce the voters to falsify their preferences or judgments, the secret ballot provides a kind of "appeal from the apparent to the real wish of the assembly."<sup>81</sup> Somewhat similar procedures have actually existed in historical assemblies. As I mentioned previously, in the 1970s and 1980s, the Italian Parliament would take successive open and secret votes on bills designated as issues of confidence.<sup>82</sup> In Athens, under a procedure called *proboule*, prosecutions for offenses at festivals would first go before the assembly for an open vote, and then before a jury for a secret-ballot vote.<sup>83</sup> Although the assembly and jury were not technically the same voting body, their memberships overlapped considerably.<sup>84</sup> In other cases, the sequence is reversed (secret-open voting). When voting on internal tenure cases, the University of Michigan law faculty takes a secret-ballot straw poll and then, after deliberation, an open vote (open to the participants anyway).<sup>85</sup>

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<sup>77</sup> Charles Warren, *THE MAKING OF THE CONSTITUTION*, 274-77, 664-71 (1929).

<sup>78</sup> This subsection adapts material from Adrian Vermeule, *Open-Secret Voting* (2010), available at SSRN.

<sup>79</sup> Bentham, *THE COLLECTED WORKS OF JEREMY BENTHAM: POLITICAL TACTICS*, *supra* note 13.

<sup>80</sup> *Id.* at 147-49.

<sup>81</sup> *Id.* at 148.

<sup>82</sup> Hine, *supra* note 65, at 190-92.

<sup>83</sup> Demosthenes, *Against Meidias*, 13-17 (Douglas MacDowell trans., 1990).

<sup>84</sup> For a summary of the qualifications for assembly and jury attendance, and for the question how much the memberships of the two bodies overlapped, see Josiah Ober, *THE ATHENIAN REVOLUTION: ESSAYS ON ANCIENT GREEK DEMOCRACY*, 111-13 (1996).

<sup>85</sup> Don Herzog, personal communication.

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These dual voting procedures are theoretically significant. Stock debates about transparency and secrecy, about “unveiling the vote”<sup>86</sup> versus protecting the integrity of voting processes, tend to assume that open voting and secret voting are mutually exclusive. But perhaps these positions present a false alternative; perhaps open and secret voting can sometimes be employed as complements in a larger decision-procedure.

Yet dual-voting procedures cannot be justified on the ground that Bentham advanced: that the secret ballot allows an “appeal from the apparent to the real wish of the assembly.”<sup>87</sup> The problem is that Bentham is advocating a dual voting procedure, but this contradicts the internal logic of his argument, which simply condemns the open vote as a falsehood. If the secret-ballot vote yields the “true” wishes of the assembly, why should there be an open vote anyway? Either the open vote will reach the same outcome as the secret vote, or a different outcome. On Bentham’s premises, the open vote is otiose in the former case, while in the latter case the open vote should be dismissed as a sham – an agglomeration of potentially falsified preferences or judgments. In either case, it lacks any social value. Indeed, under Bentham’s procedure the worthlessness of the open vote will be, in part, an endogenous product of the procedure itself. Where open voting precedes secret voting and all concerned know that the secret vote trumps in case of a conflict, the open vote may then become a throwaway vote that legislators treat as an occasion for cheap talk, posturing, and expressive or symbolic politics. If this occurs, the open vote will indeed be worthless, but only because the voting procedure made it so.

Although Bentham’s rationale fails, an open-secret voting procedure can be defended on epistemic grounds, as a second-opinion mechanism that obtains two informative judgments, produced under different procedural conditions, from the same decisionmaking committee. Indeed, Bentham himself observes en passant that “the result of these two operations [i.e. open and secret voting], whether they coincide or whether they differ, would always furnish very instructive indications.”<sup>88</sup> Although Bentham does not develop the thought, it supplies a rationale for his procedure that manages to do without the strong assumption that the secret ballot alone yields “true” preferences or judgments. Rather, a dual open-secret voting procedure can supply useful information both to the members of the voting group themselves, and also to outside parties.

This rationale comes in two versions, one static and one dynamic. In the static scenario, the first (open) vote is assumed not to affect the second (secret) vote. Here the hypothesis is that different transparency rules in effect produce collective judgments from two different standpoints or perspectives. On this hypothesis, open and secret voting cause the voters to adopt different stances towards the decision, in one case voting with an eye to how other voters or outside parties will judge their voting behavior (for good and for ill), in the other case voting without regard to the judgments of others (for good and for ill). The hope is that the open vote will induce maximally responsible judgments while the secret vote induces maximally autonomous judgments, and that the combination will prove superior to either taken alone. By combining the two different

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<sup>86</sup> Geoffrey Brennan and Philip Pettit, *Unveiling the Vote*, 20 BRIT. J. POL. SCI. 311 (1990).

<sup>87</sup> THE COLLECTED WORKS OF JEREMY BENTHAM: POLITICAL TACTICS, *supra* note 13, at 148.

<sup>88</sup> *Id.* at 147.

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transparency rules, the institutional designer can attempt to have the cake and eat it too. The designer may say with the Millians that the open vote will supply the benefits of responsibility due to public scrutiny, and then turn around and say that the secret vote will supply the benefits of freedom from external influence.

Of course each mode has the vices of its virtues. Open voting can induce posturing,<sup>89</sup> political correctness,<sup>90</sup> or, what is equally bad, bending over backwards to signal that the voter is not politically correct;<sup>91</sup> it also makes possible credible commitments to corrupt bargains with other voters or third parties. Secret voting can free voters to pursue self-interest and may actually increase corrupt bargains by diminishing public monitoring. But there is no need to take an ultimate stand on the net comparative costs and benefits of the two types of voting. Rather, a procedure that uses both types of voting in combination may, in a given environment, be superior to a procedure that uses either type alone.

In the dynamic scenario, the open vote affects the voters' decisions in the subsequent secret ballot. Voters may draw information from the first, open vote about how others have voted, and then cast the second secret ballot. Seeing how others have voted will sometimes amount to useful information for voters, not only for strategically rational individuals but also for sincere individuals and (hence) for the group. The votes of others may teach us that our judgments are eccentric or biased, or we may see that others, whose epistemic competence we regard highly, have voted differently.<sup>92</sup> Patently, these educative effects of open voting risk an information cascade and reduce the independence of votes, but the good effect may outweigh the bad. If some voters copy the votes of others because the copiers have high regard for the epistemic competence of those copied, the overall epistemic competence of the group may increase,<sup>93</sup> depending upon whether the copiers make good second-order judgments about the epistemic competence of others. The copiers "may be poor meteorologists, but good judges of meteorologists."<sup>94</sup>

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<sup>89</sup> David Stasavage, *Polarization and Publicity: Rethinking the Benefits of Deliberative Democracy*, 69 J. Pol. 59, 63 (2007).

<sup>90</sup> Stephen Morris, *Political Correctness*, 109 J. POL. ECON. 231 (2001).

<sup>91</sup> Justin Fox, *Government Transparency and Policymaking*, 131 PUB. CHOICE 23 (2007).

<sup>92</sup> Melissa Schwartzberg, *Shouts, Murmurs and Votes: Acclamation and Aggregation in Ancient Greece*, J. POL. PHIL. (forthcoming, 2010) gives a similar account of the Athenian practice of *cheirotomia*, in which open acclamation through "shouts and murmurs" influenced the subsequent decisions of jurors casting secret ballots.

<sup>93</sup> David M. Estlund, *Opinion Leaders, Independence, and Condorcet's Jury Theorem*, 36 THEORY & DECISION 131 (1994).

<sup>94</sup> David Coady, *When Experts Disagree*, 3 EPISTEME 68, 72 (2006). The same static and dynamic rationales might, with suitable modifications, also support a regime of secret-open voting. The static scenario is unaffected; by hypothesis, the two votes are independent of one another and on a perspectival rationale their sequence is irrelevant. Although the dynamic version of the rationale would have to take a somewhat different form, there may also be an educative effect of secret voting, at least within the group to which the results of the secret vote are reported. In the Michigan Law faculty's three-stage procedure for tenure decisions – a secret straw poll followed by deliberation and then open voting – the result of the first stage sometimes alerts supporters and the undecided to the existence of opponents, which sparks a more searching discussion of the merits at the second stage and perhaps even a change in outcomes at the third stage. (Don Herzog, personal communication).

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None of the foregoing arguments implies that open-secret voting is always and everywhere desirable. Most obviously, the institutional designer must trade off the benefits of a dual-voting procedure against its clear direct costs and opportunity costs in a given environment. The direct cost is simply that the body must vote twice, not once. The opportunity cost is that the voting body will be able to process less business overall, or will process the same amount of business less quickly.<sup>95</sup> I believe, although I cannot prove, that these costs will typically be minor.

A more serious issue is that indeterminacy arises if the open and secret votes reach different results. If the vote is advisory, indeterminacy is usually unproblematic. When advisory committees of scientists or other experts make recommendations to administrative agencies, the agency alone makes the actual decision, in most cases.<sup>96</sup> If the two votes coincide, both the voting members of the advisory committee and the agency can be satisfied that the decision is supported both by the experts' publicly responsible judgment and by their privately autonomous judgment. If the two votes diverge, suggesting that the issue by its nature looks different from the standpoint of responsibility and the standpoint of autonomy, that in itself is informative both to the agency and to others. Here too, as Bentham noted, "[t]he result of these two operations, whether they coincide or whether they differ, would always furnish very instructive indications."<sup>97</sup> A divergence between the open and the secret vote of experts might undermine the public legitimacy of the panel, but a concern with legitimacy seems less weighty in this technocratic setting than in the relatively more visible setting of, say, judicial invalidation of statutes on constitutional grounds.

If the vote is binding, then some tiebreaking procedure or default rule must be invoked. Which tiebreaking procedure or default rule is best will be a highly contextual and information-intensive question, heavily dependent upon the nature of the institution and the issue. From the standpoint of the institutional designer, it is costly to set up procedures to cope with indeterminacy in such cases, and the cost may exceed the benefits of institutionalizing a second-opinion mechanism.

Thus two distinctions are critical: judgment aggregation versus preference aggregation, and advisory versus binding votes. In each pair, the former favors open-secret voting, the latter disfavors it. Collating these two distinctions implies that open-secret voting will generally be most useful for the advisory aggregation of judgments, where the voting procedure can supply useful information both to the voters themselves and to an administrative agency or other outside principal. Open-secret voting will, however, be inapposite for either advisory or binding aggregation of preferences, and will

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<sup>95</sup> One might imagine a technology that allows voters to cast an open vote and a secret vote simultaneously, with simultaneous revelation of the results -- although I am not aware of any real-world examples. Here too, the static rationale is unaffected; the simultaneous dual vote is analytically equivalent to the static scenario, in which the two votes are assumed not to affect one another. The dynamic scenario, by contrast, is not possible where the dual votes are simultaneous; there can be no educative effect of either open or secret voting. Where the expected harms from information cascades or other dynamic phenomena are especially high, then, simultaneous open-and-secret balloting might prove especially useful. Moreover, the opportunity costs of simultaneous voting would be lower, although this benefit is probably quite minor.

<sup>96</sup> See Vermeule, *Parliament of the Experts*, *supra* note 34.

<sup>97</sup> Bentham, *THE COLLECTED WORKS OF JEREMY BENTHAM: POLITICAL TACTICS*, *supra* note 13, at 147.

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have dubious utility for the binding aggregation of judgments. While Bentham's paradigm case for open-secret voting involved legislatures or political assemblies making decisions in domains where the very goals of the group are contested, the paradigm cases for open-secret voting conceived as a second-opinion mechanism will instead tend to involve agency decisionmaking, expert panels and advisory committees, and certain classes of judicial proceedings – cases of common goals but dispersed knowledge or information, in which outside parties stand to gain informational and epistemic benefits from seeing how expert panel members voted under different transparency rules. Although the Food and Drug Administration recommended in 2008 that its advisory panels should use “public balloting” instead of secret ballots, on grounds of transparency and public participation,<sup>98</sup> the FDA and other agencies might do well to consider using public and secret ballots in conjunction.

### C. Judicial Review for Constitutionality

I turn now to judicial power and judicial procedures. In light of the costs and benefits of second opinions, how should we evaluate judicial review of statutes for constitutionality? On a number of dimensions, the only reasonable conclusion is that uncertainty reigns. An example is the question of anticipated reactions. Proponents of judicial review point to the sentinel effect, suggesting that anticipation of judicial review will cause legislatures to take better account of constitutional values *ex ante*.<sup>99</sup> Critics of judicial review point to the risk of moral hazard effects, worrying that anticipation of judicial review actually induces legislatures to treat the Constitution cavalierly.<sup>100</sup> Although the analysis of second opinions at least helps us to get clear about the nature of the issues, uncertainties like these are what make it possible for reasonable minds to differ about judicial review.

Nonetheless, I believe that judicial review cannot be justified as a second-opinion mechanism, whether or not it can be justified on other grounds. When Bickel described constitutional judicial review as a mechanism of “sober second thought,” he overlooked that even without judicial review the U.S. federal lawmaking system is already tricameral: it requires approval from House, Senate and President, each of whom are elected on different cycles from different constituencies. By adding a fourth vetogate, judicial review threatens to create an excessive risk of inaction in the federal lawmaking system.<sup>101</sup> This is so even if the goal of constitutionalism is strictly to minimize overall violation of rights, because federal lawmaking can protect rights from infringements by states or by private parties, and has done so in many historical cases; an example is the

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<sup>98</sup> Food and Drug Administration, U.S. Dept. of Health and Human Services, *Guidance for FDA Advisory Committee Members and FDA Staff: Voting Procedures for Advisory Committee Meetings*, 4 (2008)(available at <http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM125641.pdf>).

<sup>99</sup> Bickel, *THE LEAST DANGEROUS BRANCH*, *supra* note 15.

<sup>100</sup> James Bradley Thayer, *Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

<sup>101</sup> For the growing literature on this issue, compare Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) and Mark Tushnet, *How Different Are Waldron's and Fallon's Core Cases For and Against Judicial Review?*, 30 OXFORD J. LEGAL STUD. 49 (2010) with Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529 (2000) and Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693 (2008).

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Reconstruction-era legislation that gives citizens the right to sue state officials in federal court for violation of their constitutional rights.<sup>102</sup>

I do not mean to make a substantive claim that the opportunity costs or error costs of judicial review are too high. They may or may not be; the issues are at least partially empirical and the answers unclear.<sup>103</sup> Moreover, in the next section I will propose adding a kind of additional step in the decisionmaking process, by requiring that the Supreme Court must issue two decisions to create binding precedent, not merely one. Rather, my narrow point is that it is misleading to justify judicial review on the ground that it is desirable to obtain a “second opinion” or a “sober second thought.” Whatever the optimal number of vetogates in the lawmaking system, it is revealing that proponents of judicial review never defend it by citing the need for a sober third or fourth thought. If in many private contexts, citizens would think it absurd overkill to obtain four sequential opinions from professionals, even on weighty matters, then it becomes difficult to publicly justify judicial review in parallel terms.

There is a question here about how to aggregate opinions across institutions, parallel to the question discussed in I.B. about how to aggregate opinions within institutions. Bickel implicitly counts the whole federal lawmaking process -- which requires the consent of House, Senate and President (in the usual case) -- as a single opinion-giver, and judicial review as a second opinion. Yet the founding generation justified bicameralism, and the extended tenure and indirect election of Senators, on the ground that the Senate would then supply a distinctive perspective and a sober second thought. Conversely, judicial review has historically been defended as a substitute for a second chamber.<sup>104</sup> At a minimum, one cannot subscribe to second-opinion justifications for bicameralism and the separation of powers, but then turn around to defend judicial review on the same grounds. Second-opinion arguments are not additive; they cannot simply be piled up on top of one another.

This analysis buttresses the critics of judicial review against a charge advanced by the proponents of judicial review.<sup>105</sup> The charge is that critics of judicial review are really unicameralists, or should be; the logic of their criticisms, on this argument, pushes them inexorably down a slippery slope towards vesting all lawmaking power in a single unicameral assembly. Yet one may sensibly defend bicameralism while rejecting quadricameralism (House, Senate, President and judicial review by the Court). The argument would be that bicameralism optimizes the costs and benefits of obtaining further opinions; two legislative opinions may be better than one, but four opinions are too many. Whether or not this view is correct on the merits – and I believe that we simply do not yet possess the information that would tell us whether it is correct -- there is no slippery slope that runs from criticism of judicial review down to unicameralism.

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<sup>102</sup> 42 U.S.C. § 1983.

<sup>103</sup> For elaboration, see Adrian Vermeule, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* ch. 8 (2006).

<sup>104</sup> James R. Rogers, *Judicial Review Standards in Unicameral Legislative Systems: A Positive Theoretic and Historical Analysis*, 33 *CREIGHTON L. REV.* 65, 79 (1999).

<sup>105</sup> Fallon, *The Core of an Uneasy Case for Judicial Review*, *supra* note 101, at 1722-23.

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### D. A Two-Opinion Rule for Stare Decisis

Finally, I suggest that the Court would do well to recast the doctrine of precedent into a second-opinion mechanism.<sup>106</sup> In Mexico, “to establish *stare decisis*, the Mexican Supreme Court ... must issue five decisions on the same point without contradiction.”<sup>107</sup> A less costly version, the one I shall explore, would be to require two consecutive decisions with the same holding, not merely one, in order to create a binding legal precedent; the two opinions would have to be issued in different terms of court, not in close succession. For simplicity I will focus on the U.S. Supreme Court, although a similar proposal could be worked out for intermediate appellate courts, which might adopt a rule that two different panels must concur on a holding to establish a binding circuit precedent.

At the Supreme Court level, a requirement of concurrence by two successive opinions would respond to the common charge that it is undesirable to allow a bare majority of justices, five of nine, to make binding national law in a single decision. That concern might also be addressed by instituting a supermajority rule – say, six of nine justices – in order to create a binding precedent. A two-opinion rule thus has implicit supermajoritarian effect, yet the rule has other effects as well. As compared to a supermajority rule for precedent, a two-opinion rule builds in delay, which allows for cooling-off, critique and counterargument by legal elites and the general public, and for simple rethinking by the judges in the majority. In this sense, the closest analogue of a two-opinion rule is not a supermajority rule, but rather a recent proposal for “notice and comment” opinions from the Supreme Court, in which the Court would release a draft opinion, consider public comments, and then issue a modified final opinion.<sup>108</sup> The main differences between the two proposals are that (1) under a two-opinion rule, the first opinion would be no mere draft, but a legally binding judgment for the parties to the case, although not (yet) a binding precedent for other cases; (2) the delay between the two opinions would be greater, as the two opinions would be issued in different terms of court rather than within the same term.

The positive benefits of this approach derive from all three major rationales for second opinions: cooling-off, epistemic diversity, and legitimation. The cooling-off benefit is obvious; the requirement for two opinions in successive terms would build in time for momentary passions to decay. The epistemic benefits of the approach may be illustrated by a finding of the experimental psychology literature on estimation tasks: an individual subject who makes one estimate, waits, and then makes a second estimate, is more accurate on average than an individual who either produces a single estimate or else produces two estimates in close succession.<sup>109</sup> The superiority of two estimates over one is due to the simple statistical logic of averaging; the individual can be understood as sampling from an internal probability distribution, which produces some of the same

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<sup>106</sup> This suggestion is inspired by an account of precedent discussed in Zywicki & Sanders, *supra* note 21.

<sup>107</sup> U.S. Department of Labor, Bureau of International Labor Affairs, *Study of Mexican Supreme Court Decisions Concerning the Rights of State Employees to Organize in the States of Jalisco and Oaxaca*, available at <http://www.dol.gov/ilab/media/reports/nao/TorrienteStudy.htm#IIB2>.

<sup>108</sup> Michael Abramowicz & Thomas Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965 (2009).

<sup>109</sup> Vul & Pashler, *supra* note 29, at 646.

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benefits as sampling estimates from two different individuals. However, two estimates with an interim delay are even better than two estimates in close succession, because the latter procedure falls victim to an “anchoring” effect: the second estimate is heavily influenced by the first.<sup>110</sup> With a delay, by contrast, the second estimate is relatively independent of the first.<sup>111</sup>

Again, Supreme Court decisions are not like simple quantity-estimation tasks, yet those decisions do include many estimates on matters of fact and causation, and in any event it is plausible, although not yet proven, that a similar effect would obtain for judgment-aggregation tasks beyond simple estimation of quantities. Obtaining two votes from individual justices, with an interim delay, can improve the accuracy of the individual votes and hence the accuracy of the group as a whole. This assumes no turnover in personnel between the two decisions. Plausibly, however, the epistemic benefits of a two-opinion rule are even greater if there is such turnover. Estimates from two or more individuals appear to be better than two estimates from a single individual, even if the latter are produced with an interim delay.<sup>112</sup>

The final benefit of a two-opinion requirement would be increased legitimacy for opinions that are confirmed by a second opinion, and thus become binding law. The legitimation effect would be most pronounced in cases where the Court’s political composition changes between its first and second consideration of an issue, yet the second decision confirms the first. It has been argued with respect to Roe v. Wade<sup>113</sup> that “[w]hen a precedent has been repeatedly reexamined and reaffirmed, over many years by a Court whose composition has changed, that should give us greater confidence that the precedent is correct.”<sup>114</sup> The implicit point here seems to be that justices appointed by both Democratic and Republican presidents have, over time, voted to reaffirm Roe; whatever sociological legitimacy Roe currently enjoys plausibly stems from this mechanism.

The benefits of a two-opinion rule must be weighed against its costs, notably the opportunity costs of failing to authoritatively settle federal law in the first opinion, as happens under the current rule of stare decisis. Yet the justices already trade off the benefits of authoritative Supreme Court settlement against the epistemic benefits of “percolation” – the issuance of several, perhaps conflicting decisions on the same issue by lower federal courts, which are thought to provide useful information and deliberation for the Court’s later opinions.<sup>115</sup> The two-opinion proposal would in effect allow percolation at the level of the Supreme Court itself; if desirable, the Court could then grant certiorari in more cases, without fear of prematurely freezing federal law. Indeed, if opportunity costs of delay, including legal uncertainty, are a large concern, the most straightforward response would be to pressure the justices to take more cases (holding

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<sup>110</sup> *Id.*

<sup>111</sup> Although this decay of anchoring effects, over time, resembles a cooling-off process, the first estimate is cold, not hot.

<sup>112</sup> Vul & Pashler, *supra* note 29, at 646.

<sup>113</sup> 410 U.S. 113 (1973).

<sup>114</sup> David A. Strauss, *THE LIVING CONSTITUTION* 96 (2010)(emphasis added). This assessment is itself bipartisan. See, e.g., *Richmond Med. Ctr. v. Gilmore*, 219 F.3d 376, 376-77 (4th Cir. 2000) (Luttig, J.).

<sup>115</sup> Michael Dorf, *Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV 4, 65 (1998).



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constant the breadth of the rules they issue), and this could be combined with a two-opinion rule for stare decisis. One might also calibrate the two-opinion rule to subcategories of cases in which the opportunity costs of delay, and the direct costs of legal uncertainty to actors in the system, are relatively low. There is an analogue here to the Court's holding, in Payne v. Tennessee,<sup>116</sup> that in the current regime of stare decisis, the force of precedent is strongest in cases involving property and contract rights. Finally, one might distinguish vertical from horizontal stare decisis, stipulating that lower courts are bound by a single decision but that two consecutive decisions are necessary to bind the Court itself in the future. This would reduce, although not eliminate, the legal uncertainties.

Another cost is that there will inevitably be controversies about whether the second opinion really does address the same issue and embody the same holding as the first, except when two successive cases contain identical relevant facts and the two opinions use identical language. Yet an analogue of this cost is already present in the current regime of stare decisis, which predictably results in arguments about whether a given decision respects or instead alters a previous binding precedent. It is unclear which regime will produce more low-value argumentation of this sort, so the comparison between them should be made on other grounds. In any event, a Court majority that knows of the two-opinion rule and agrees with the first decision will have an incentive to cast the second holding in precisely the same terms as the first, so as to be sure of creating a binding precedent.

An interesting variant of the two-opinion rule would require that the two opinions be issued by two different Courts – i.e., Courts with at least one noncommon member, entailing that there be a change of at least one member between the group of nine justices that issues the first opinion and the group of nine that issues the second. Here the idea would be to reduce the chance that the second opinion is simply a rubber-stamp of the first opinion, to marginally increase the epistemic diversity of the overall group of justices that must concur in a legal rule in order to elevate it into binding federal law, and to increase the chances of legitimation through confirmation by a Court whose political composition has changed. Although this variant is not essential, it captures the cases in which the benefits of a two-opinion requirement reach a maximum.

### Conclusion

Second-opinion arguments are ubiquitous in public law, yet have never been analyzed as a class. I hope to have elucidated the structure of these arguments, and to have shown the conditions under which they are more or less plausible. I also hope to have offered useful substantive evaluation of second-opinion mechanisms in various institutional settings. Among these ambitions, the analytic one is primary. If I have identified the relevant considerations, readers can form their own (second) opinions about whether I have applied those considerations correctly in particular settings.

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<sup>116</sup> 501 U.S. 808 (1991).