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OPEN-SECRET VOTING

Adrian Vermeule^{*}

Stock debates about transparency and secrecy usually assume that open voting and secret voting are mutually exclusive. But these positions present a false alternative; open and secret voting can be employed as complements in a larger decision-procedure. In what follows I will propose a hybrid or dual procedure of open-secret voting, and attempt to specify the conditions under which that procedure works well. I suggest that open-secret voting can best be justified as an institutional means of obtaining a second opinion from the voting group. A second opinion of this sort might produce informational benefits either for the members of the voting group itself, for outside parties, or for both. (This is a companion paper to Adrian Vermeule, “Second Opinions,” available on SSRN).

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Open-Secret Voting

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Although the major costs and benefits of both open and secret voting are tolerably well understood in the abstract, it is difficult to know which mode is better in particular institutional environments. To take only one dimension of the problem, which type of voting minimizes corruption overall? After a scandal at the 2002 Olympics, the International Skating Union switched to a system of anonymous voting by figure-skating judges. The rationale for the switch was to reduce the advantage to skaters of having a compatriot judge on the panel – an advantage resulting from some mix of home-country bias (say, judges from the U.S. giving higher marks to U.S. skaters) and vote-trading on panels (say, U.S. and Canadian judges colluding to give higher marks to Canadian and U.S. skaters, respectively). After the switch to secrecy, however, the compatriot-judge advantage increased, probably because anonymous voting reduced public monitoring of corrupt judgments.¹

Yet sometimes the opposite effect occurs. In 2006, the new Democratic majority in the U.S. Congress, having campaigned against “earmarks” (targeted expenditures), began to publish which lawmakers had voted for and obtained them. Here transparency, not secrecy, yielded perverse results: earmarks increased, in part because legislators saw what other legislators were getting and demanded more, in part because interest groups could more easily monitor whether legislators were delivering the goods.² Sometimes it seems that open and secret voting are each inferior to the alternative.

But perhaps we need not choose between the two modes. In Political Tactics (“PT”), Bentham briefly argued that in some cases it is advantageous for an assembly to take an open vote and a secret-ballot vote in succession, on the same issue (PT 147-49). 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” (PT 148). In what follows I will ask whether this procedure of open-secret voting has anything to recommend it, and under what conditions.

¹ Zitzewitz (2010).

² Andrews and Pear (2007): A1.

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Somewhat similar procedures have actually existed in historical assemblies. In the 1970s and 1980s, the Italian Parliament would take an open vote followed by a secret vote on bills designated as issues of confidence;³ sometimes the two votes would show dramatic discrepancies, as I will discuss below. In Athens, under a procedure called *probole*, 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.⁴ Although the assembly and jury were not technically the same voting body, their memberships overlapped considerably.⁵ 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).⁶

These dual voting procedures⁷ are theoretically significant. Stock debates about transparency and secrecy, about “unveiling the vote”⁸ 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. Such a procedure might constitute a useful mechanism of democracy⁹ – a small-scale trick of institutional design that might have outsized and desirable effects.

I focus for concreteness on Bentham’s proposal, and I argue that it can succeed only on very different grounds than the ones Bentham suggested. While the proposal itself is promising, Bentham’s own rationale is hopelessly flawed. In an attempt to

³ Hine (1993): 190-92.

⁴ Demosthenes (1990): 13-17.

⁵ 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 Ober (1996): 111-13.

⁶ Don Herzog, personal communication.

⁷ A related-yet-distinct possibility involves dual deliberation procedures. Under open-secret deliberation, there is a stage of open deliberation and a stage of closed deliberation, but only one vote is ever taken. The sequence can of course be reversed; Elster (1998): 117 proposes a secret-open deliberative procedure for constitution-making. As I will attempt to show, the analysis of dual voting procedures and dual deliberation procedures overlaps to some degree, yet there are important differences as well, as the occurrence of two distinct votes may have important consequences. In between dual voting procedures and strictly deliberative procedures, an intermediate approach involves straw polling, in which the group takes an initial open or secret “straw” vote that is tentative, nonbinding and strictly informational. The possibility of straw polling shows that there is in fact a continuum of intermediate techniques.

⁸ Brennan and Pettit (1990).

⁹ Vermeule (2007).

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reconstruct a better rationale, I suggest that open-secret voting can best be justified not as an appeal from the “apparent” to the “real” wish of the voting group, but simply as an institutional means of obtaining a kind of second opinion.¹⁰ A second opinion of this sort might produce informational benefits either for the members of the voting group itself, for outside parties, or for both.

Section I lays out Bentham’s proposal and his rationale; Section II critiques the latter. Section III sketches an alternative rationale, which portrays open-secret voting as an epistemically valuable second-opinion mechanism.

I. Bentham’s Proposal

Chapter XIV of *Political Tactics* contains a famous section “Of open and secret voting.” Bentham considers the benefits of costs of open and secret voting in different institutional settings, and argues for the secret ballot in mass elections but open voting in “political matters” (PT 147), which refers principally to voting in legislative assemblies. (In this section, Bentham gives no sustained consideration to voting in juries, courts, administrative bodies or other committees). At the very end of the section, however, Bentham changes tack by suggesting a hybrid procedure:

The adoption, however, of one of these methods, does not exclude the other. There are cases in which it is advantageous to combine them, by making them follow upon the same question. The result of these two operations, whether they coincide or whether they differ, would always furnish very instructive indications. (PT 147).

But why exactly is it beneficial to use an open-secret voting procedure? Bentham’s idea is that secret voting should be used in assemblies when, but only when, “circumstances render a hidden influence suspected” (PT 148). In such circumstances, open voting allows credible commitments by voters to third parties who can corrupt the voters with threats or bribes, and open voting will produce falsification of preferences or judgments. Hence “[t]o demand a ballot, is to appeal from the apparent to the real wish of the assembly” (PT 148).

¹⁰ For a general analysis of second opinions, see Vermeule (2010).

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This rationale yields a clear implication about sequencing: the secret vote must follow the open vote.

Secresy [sic] ought only to be admitted as a kind of appeal [from the open vote]. . . . To take the opposite direction – that is to say, to proceed from secret voting to open voting – would be wrong. The natural order is to pass from the false, or what is suspected to be false, to the true. The real wish once ascertained, what good purpose would be served by taking another vote, which would not be the real vote if it differed from the former? (PT 148)

To illustrate the falsification of preferences or judgments that an appeal to the secret ballot may cure, Bentham gives an extended example from Polish history. A multi-member Council, “intimidated or corrupted, was only the instrument of the will of Russia” (PT 147). On two separate occasions the Council voted first openly and then by secret ballot on whether to raise an army, under leadership independent of the Council, to protect Polish territory. On the first occasion the proposal was defeated by a large margin on an open vote, and lost only narrowly by secret ballot. On the second occasion, “the open vote gave for the independence of the commission 114, against it 148; but the secret vote turned the majority on the other side – for the independence 140, against it 122” (PT 148). On Bentham’s interpretation, threats or bribes by Russia or Russian sympathizers caused the Council members to vote falsely by open ballot but to vote their true (i.e. nationalist) preferences under the secret ballot.

II. Why Bentham’s Rationale Fails

A Bentham-like procedure of dual voting under alternating transparency regimes is useful under certain conditions, or so I will argue in the next section. Unfortunately, I believe that we cannot defend that procedure on the grounds Bentham offers. There are two main problems: Bentham’s diagnosis is tendentious, and his prescription does not follow from that diagnosis.

As to the first problem, it is unclear that Bentham’s initial diagnosis of preference or judgment falsification is correct. To be sure, Bentham’s Polish example captures a real phenomenon. But the correct interpretation of the phenomenon is hardly self-evident.

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Bentham is entirely correct that successive votes by the same body under different transparency regimes sometimes reach strikingly different outcomes. Here are some modern examples, from a range of institutions and groups:

- In the Italian Parliament of the 1970s and 1980s, the practice was that bills designated as issues of confidence by the government would be voted upon first by open ballot, then by secret ballot.¹¹ The results frequently differed. In 1986, Bettino Craxi's government won the open vote of confidence by a margin greater than 100, only to be defeated on the secret ballot. Craxi was forced to resign.¹²

- In 1964, the Universal Postal Union Congress voted on whether to exclude South Africa, in order to take a public stand against apartheid. On an open roll-call vote, a majority voted to exclude (58 ayes, 30 nays, and 26 abstentions). On a subsequent secret-ballot vote, a majority voted against exclusion (56 ayes, 58 nays, and three abstentions).¹³

- In Alaska, a judicial council was charged with merit-based appointment of judges. Until 1967, the council used a secret ballot, but switched to an open ballot after an episode in which all seven members of the council spoke in favor of a candidate, who was then defeated by a secret-ballot vote of 4-3. This example does not, strictly speaking, involve two different votes, but it emphasizes that a similar phenomenon can occur where open deliberation is followed by a secret ballot, at least in groups sufficiently small that all or most members can speak on the record one way or another.¹⁴

- A study of voting procedures in faculty decisionmaking recounts:

Students at one university sought to become members of the university's decision-making body. When they proposed this idea at a student-faculty assembly, the majority of faculty – in an open ballot conducted in front of the students – voted for preliminary approval of the proposal. Two weeks later,

¹¹ Hine (1993): 192.

¹² *Ibid.*

¹³ Schermers (1965): 637.

¹⁴ Ashman and Alfini (1974): 157.

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however, when the faculty voted on the issue formally by secret ballot, they rejected the idea.¹⁵

- In federally-regulated workplaces, employers may agree to recognize a union based on a “card-check” – essentially an open vote. If a majority of employees signal their support for the union at the card-check stage, a formal vote on unionization is held by secret ballot. Where a formal vote occurs, in some 30% of the cases the union obtains a majority of employee cards yet fails to garner a majority of the secret ballots.¹⁶

Yet the striking difference between the first and second votes in these examples does not, by itself, tell us anything at all about which one is “false” and which is “true.” Competing views about the nature and consequences of open voting and the secret ballot will yield competing accounts of where the truth lies. John Stuart Mill, for example, famously argued for open voting on the ground that openness yields “responsibility” to fellow citizens that launders out self-interested distortions of judgment.¹⁷ Modern Millians say that open voting forces voters to act in a fashion that is “discursively defensible.”¹⁸ A Millian might think that, in an important sense, the open votes in all these examples represent the “true” while the secret ballot votes represent the “false”: only the former express freshly-laundered individual epistemic judgments, and are thus more likely to track the truth, in domains where voters are supposed to be giving judgments on the truth of a common problem rather than aggregating private preferences.¹⁹ The Millian’s argument could then run exactly like Bentham’s, just with the opposite diagnosis and the opposite prescription. At the stage of diagnosis, then, Bentham’s argument is tendentious.

The second problem is that Bentham’s prescription does not follow from his diagnosis. 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

¹⁵ Robbins (2007): 273.

¹⁶ See Office of the General Counsel memorandum (April 20, 2009). The fall-off between the card-check stage and the formal voting stage may be due to preference falsification, but may also be due to many other causes, such as tacit pressure or open argument by employers. Thanks to Benjamin Sachs for educating me on these matters.

¹⁷ Mill (1862): 208-211.

¹⁸ Brennan and Pettit (1990): 324.

¹⁹ Cf. *Ibid.*

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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 Bentham made this point explicit when arguing that the only correct sequence is for the secret vote to follow the open vote, because it would be pointless to hold an open vote if the secret ballot had already ascertained the true wishes of the assembly (“the real wish once ascertained [i.e. by secret ballot], what good purpose would be served by taking another [open] vote, which would not be the real vote if it differed from the former?”). The logic of the point, however, entails that the open vote is useless whether taken first or taken second. Far from offering an argument for a dual open-secret voting procedure, Bentham inadvertently offered an argument for the secret ballot simpliciter. Given the extended praise for open voting in assemblies elsewhere in Chapter XIV of Political Tactics, this looks like a blunder on Bentham’s part.

Is there a charitable reconciliation of this contradiction? Perhaps Bentham assumed that the ordinary assembly procedure would be open voting, and meant to argue that the dual open-secret voting procedure would only be triggered under conditions in which “circumstances render a hidden influence suspected” (PT 148). But triggered by whom? Third parties like the executive are themselves a frequent source of the corrupting influence that secret voting is intended to guard against; it thus makes little sense to allow an executive officer presiding over the assembly (like the Vice-President in the U.S. Senate) to decide whether the assembly will use secret voting. So perhaps we should imagine a submajority rule²⁰ authorizing some subset of legislators to demand a secret ballot after an open vote has been taken.

This is still not an argument for a dual procedure of successive open-secret voting, however, because the submajority could simply be authorized to demand a secret ballot in place of rather than in addition to the open vote. Where secret ballots are used in

²⁰ See Vermeule (2005).

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assemblies today, this sort of procedure is not uncommon.²¹ The puzzle is still why, under the circumstances Bentham identifies, open voting should be thought to have any value at all. One might insist that the open vote is necessary to inform the submajority that corrupting influences are at work, thereby alerting them to trigger the secret-ballot procedure, but this seems strained.

So far I have assumed, as Bentham seems to, that the results of the two votes are independent of one another (although not of course independent of external influences, which Bentham assumes may contaminate open voting). Yet in fact there is good reason to think that 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 legislators may anticipate that the open vote will have no effect on the final institutional decision. 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. In other words, the availability of what Bentham calls an "appeal" to the "true" wishes of the assembly has moral-hazard effects. For somewhat similar reasons, district judges at the lowest level of the appellate hierarchy often express cursory views on the legal (as opposed to factual) questions that come before them, anticipating that the courts of appeals will decide the legal questions *de novo* in any event.

So Bentham's diagnosis is theoretically sectarian, without adequate justification for his assumptions, and at the stage of prescription Bentham's argument fails to justify his recommendation of hybrid open-secret voting by the assembly. Rather the argument simply implies the secret ballot (contrary to Bentham's view about legislative assemblies). Bentham's open-secret voting procedure must be justified, if at all, on other grounds.

²¹ See European Parliament Committee on Constitutional Affairs (2005): 5. In Spain, "[v]oting shall be secret if so requested by fifty Senators at a Plenary Sitting or by one-third of the members of a committee." In Latvia, "[t]en or more members of the Saeima may propose that voting should be secret." In the latter case, it is unclear whether the proposal for secret voting must be approved by a majority of the assembly.

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III. Open-Secret Voting as a Second-Opinion Mechanism

A. The Rationale

I believe that a better rationale is available:²² Bentham's dual voting procedure can be defended on epistemic grounds, as a second-opinion mechanism that obtains two judgments, produced under different 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" (PT 147). 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. An important limitation of this epistemic rationale is that it pictures voting as a mechanism for aggregating judgments rather than preferences; the plausibility of this assumption varies with the institutional setting and the nature of the issues, as I will discuss below.

²² Although it would be too much of a digression to pursue the issue, I note Pliny the Younger's suggestion that the very act of switching between transparency regimes might temporarily accentuate the benefits of either regime while temporarily minimizing its costs (a kind of "Hawthorne effect"). In 103 or 104 C.E., Pliny wrote that under a previous regime of open voting, the Senate's proceedings

have been marred by uncontrolled shouts of support [for candidates], and recourse has been had to secret voting as a remedy. Meanwhile it has already served as that remedy, because it was a novel and emergency measure, but I fear that as time goes on the remedy itself may give rise to vices, the danger being that silent voting may give rise to shamelessness; for how few evince the same concern for what is honourable in secret as in public? Many show respect for their reputation, but few for their conscience. But it is too early to worry about the future. In the meantime, thanks to these writing-tablets we shall have magistrates who have deserved election . . .

Pliny the Younger (2006): 80. Pliny's worries about the long-run effects of the secret ballot turned out to be justified. In 105 C.E., he observed that

[a]t the recent elections several tablets were found to have many witticisms and disgusting comments inscribed on them The Senate was furious, and with loud cries implored the anger of the emperor against the man who had inscribed them. But the culprit cheated them and escaped detection; perhaps he was even one of the protesters!

Ibid., 103. The logic of the mechanism would then suggest the remedy of a switch back to open voting, and so on in an indefinite cycle – unless the voters' knowledge that the switches are temporary would itself prevent the Hawthorne effect from operating.

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In general, second opinions may be obtained either by consulting two different decisionmakers or else by consulting the same decisionmaker twice, under different conditions (including changed procedures or simply the lapse of time).²³ Bentham's open-secret voting procedure falls into the latter category, as the same body is consulted under different transparency rules. On this rationale, in other words, open-secret voting is a mechanism for obtaining in succession two different types of opinions, rendered by the same voting body under different procedural conditions.

The 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, while in the dynamic scenario, the open vote affects the voters' decisions in the subsequent secret ballot. In the static scenario, 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 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 familiar vices of its familiar virtues. Open voting can induce posturing,²⁴ political correctness,²⁵ or, what is equally bad, bending over backwards to signal that the voter is not politically correct;²⁶ 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

²³ For examples and a general analysis of second opinions, see Vermeule (2010).

²⁴ Stasavage (2007).

²⁵ Morris (2001).

²⁶ Fox (2007).

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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, voters 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 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.²⁷ 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,²⁸ 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.”²⁹

Much of the foregoing analysis would also apply to a regime of open deliberation followed by secret ballot – a far more common decision procedure than open-secret voting. Yet I believe the open vote at the first stage adds something, even or especially for sincerely motivated actors who would informatively report their judgments during deliberation. Voting, like the prospect of being hanged, concentrates the mind wonderfully, forcing the voter to consolidate her reactions and to assign weights or priorities to the various factors that bear on the decision. In a Millian vein, even the well-motivated voter may produce a better decision with the additional increment of responsibility that comes with a public vote, as opposed to simply the public expression of tentative views. Finally, a numerical vote provides an informative “summary statistic” for outside third parties who want to assess the state of the voters’ opinions. Compatibly

²⁷ Schwartzberg (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.

²⁸ Estlund (1994): 131.

²⁹ Coady (2006): 72.

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with these points, advisory committees do not merely record their deliberative opinions, but typically vote on the record, even where the voters have common interests and where their votes have no binding effect on the agencies or officials they advise.

So far I have argued for the potential utility of a sequence of open-secret voting. How if at all will the static and dynamic scenarios differ if the sequence of voting is reversed, to 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.³⁰ Here again, a plausible hope is that the secret vote induces maximally autonomous opinions about controversial candidates, while the subsequent open vote induces maximally responsible and focused judgments about the ultimate merits.

One final possibility is a technology that allows voters to cast an open vote and a secret vote simultaneously. Here too, the static scenario is unaffected. Indeed, the simultaneous dual vote just 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. As in all of these cases, there is an obvious question about what to do if the two votes differ, an issue I take up shortly.

B. Limiting Conditions

None of the foregoing arguments implies that open-secret voting is always and everywhere desirable. Most obviously, in any given environment, the institutional

³⁰ Don Herzog, personal communication.

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designer must trade off the benefits of a dual-voting procedure against its clear direct costs and opportunity costs. 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. I believe, although I cannot prove, that these costs will typically be minor. In any event, taking these costs as given, I will pass on to two more fundamental considerations.

First, to justify open-secret voting as a second-opinion mechanism is to assume a picture of voting as judgment aggregation rather than preference aggregation. In some settings a picture of voting as judgment aggregation is plausible, while in other settings it is not. Where the voters have common aims but imperfect information, voting is an exercise in the pooling of diverse factual or causal or instrumental judgments. Administrative agencies, expert advisory bodies, and courts often engage in this sort of epistemic voting.³¹ Legislatures sometimes do so, in areas where the main political parties have common aims, but more often amount to a forum for bargaining among parties with different aims.

A second consideration is the indeterminacy that arises if the open and secret votes reach different results, as in the examples given above. 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.³² 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. In Bentham's words, "[t]he result of these two operations, whether they coincide or whether they differ, would always furnish very instructive indications" (PT 147).

³¹ Although in some cases, expert committees engage in decisionmaking by "apparent consensus." Urfalino (2007).

³² See Vermeule (2009).

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If the vote is binding, then some tiebreaking procedure or default rule must be invoked. As discussed above, if a first open vote is trumped by a second secret vote, in the sense that a motion or proposed action will fail unless it survives both stages, then there is a kind of moral-hazard effect and the voters may take the open vote less seriously than they otherwise would, encouraging posturing and symbolic politics. At a minimum, 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, setting up procedures to cope with indeterminacy when dual voting procedures are used for binding votes amounts to a cost, one that may exceed the benefits of institutionalizing a second-opinion mechanism.

Collating these two considerations 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 have unclear 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,³³ the FDA and other agencies might do well to consider using public and secret ballots in conjunction.

³³ Food and Drug Administration (2008): 4.

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Conclusion

My suggestion is just that there exists a nontrivial range of conditions under which the benefits of dual voting procedures will outweigh their costs. Yet this suggestion only goes through if we identify the benefits and costs correctly, and Bentham failed to do so. By justifying open-secret voting as an appeal to the assembly's "real" wish, Bentham inadvertently argued for the secret ballot alone. Open-secret voting, and for that matter secret-open voting, might better be justified as a mechanism for institutionalizing second opinions – in this case two opinions from the same body, delivered under different procedural conditions. The hope is that the open vote will represent an aggregation of maximally responsible judgments, the secret vote an aggregation of maximally autonomous ones, and that both will be informative, both for voters and other actors. This justification is most persuasive in cases where the voting body provides a collective judgment that is advisory rather than binding.

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References

- Andrews, Edmund L. and Robert Pear. 2007. With New Rules, Congress Boasts of Pet Projects. *New York Times* A1, Aug. 5.
- Ashman, Allan, and James J. Alfini. 1974. *The Key to Judicial Merit Selection: The Nominating Process*. Chicago: American Judicature Society.
- Bentham, Jeremy. 1999. *The Collected Works of Jeremy Bentham: Political Tactics*. Eds. Michael James, Cyprian Blamires, and Catherine Pease-Watkin. Oxford: Oxford University Press.
- Brennan, Geoffrey and Philip Pettit. 1990. Unveiling the Vote. *British Journal of Political Science* 20: 311-33.
- Coady, David. 2006. When Experts Disagree. *Episteme* 3:68-79.
- Demosthenes. 1990. *Against Meidias*. Ed. & trans. Douglas M. Macdowell. Oxford: Clarendon Press.
- Elster, Jon. 1998. Deliberation and Constitution-making, in *Deliberative Democracy*. Ed. Jon Elster. Cambridge: Cambridge University Press. 97-122.
- Estlund, David. 1994. Opinion Leaders, Independence, and Condorcet's Jury Theorem. *Theory & Decision* 36: 131-162.
- European Parliament Committee on Constitutional Affairs. 2005. Working Document on Voting by Secret Ballot in the Member State Parliaments. http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/562/562487/562487en.pdf.
- Food and Drug Administration, U.S. Department of Health and Human Services. 2008. Guidance for FDA Advisory Committee Members and FDA Staff: Voting Procedures for Advisory Committee Meetings. <http://www.fda.gov/downloads/RegulatoryInformation/Guidances/UCM125641.pdf>.
- Fox, Justin. 2007. Government Transparency and Policymaking. *Public Choice* 131: 23-44.
- Hine, David. 1993. *Governing Italy: The Politics of Bargained Pluralism*. Oxford: Oxford University Press.
- Mill, John Stuart. 1862. *Considerations on Representative Government*. New York: Harper & Brothers.
- Morris, Stephen. 2001. Political Correctness. *Journal of Political Economy* 109: 231-65.

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- Ober, Josiah. 1996. *The Athenian Revolution: Essays on Ancient Greek Democracy*. Princeton: Princeton University Press.
- Office of the General Counsel, National Labor Relations Board. 2009. *Memorandum GC 09-06: Report on the Midwinter Meeting of the ABA Practice and Procedure Committee of the Labor and Employment Law Section*. April 20.
- Pliny the Younger. 2006. *Complete Letters*. Trans. P. G. Walsh. Oxford: Oxford University Press.
- Respectfully Quoted*. 1992. Ed. Suzy Platt. Washington: Congressional Quarterly, Inc.
- Robbins, Ira P. 2007. The Importance of the Secret Ballot in Law Faculty Personnel Decisions: Promoting Candor and Collegiality in the Academy. *Journal of Legal Education* 57: 266-292.
- Schermers, H. G. 1965. Some Constitutional Notes on the Fifteenth Congress of the Universal Postal Union. *The International and Comparative Law Quarterly* 14: 632-37.
- Schwartzberg, Melissa. 2010. Shouts, Murmurs and Votes: Acclamation and Aggregation in Ancient Greece. *Journal of Political Philosophy*, forthcoming.
- Stasavage, David. 2007. Polarization and Publicity: Rethinking the Benefits of Deliberative Democracy. *Journal of Politics* 69: 59-72.
- Urfalino, Philippe. 2007. La Decision par Consensus Apparent: Nature et Propriétés. *Revue Européenne des Sciences Sociales* XLV-136: 34-59.
- Vermeule, Adrian. 2005. Submajority Rules: Forcing Accountability upon Majorities. *Journal of Political Philosophy* 13: 74-98.
- Vermeule, Adrian. 2007. *Mechanisms of Democracy: Institutional Design Writ Small*. Oxford: Oxford University Press.
- Vermeule, Adrian. 2009. The Parliament of the Experts. *Duke Law Journal* 58: 2231-75.
- Vermeule, Adrian. 2010. Second Opinions. Harvard Law School Working Paper (available on SSRN).
- Zitzewitz, Eric. 2010. Does Transparency Really Increase Corruption? Evidence from the 'Reform' of Figure Skating Judging. Unpublished manuscript. <http://www.dartmouth.edu/~ericz/transparency.pdf>.