WHAT'S EVERYBODY'S BUSINESS IS NOBODY'S BUSINESS Bentham on Political Assemblies

Jon Elster

I. Introduction

The main purpose of this paper is to expound and discuss some of Bentham's views about the election to, and organization of, political assemblies. In footnotes, I also suggest some applications of his ideas and offer brief discussions of other writers who have advanced similar or different ideas.

I shall rely on two bodies of his writings. The first consists of *Political Tactics* and other texts written around the time of the French Revolution and formulated in part as advice about how to organize the Estates-General.¹ *Political Tactics* is an especially important text. It "seems to be the first attempt ever made to theorize broadly about parliamentary procedures" (Burns 1966, p. 98). In his introduction to the 1816 edition of that work, the editor Etienne Dumont also affirms that "Le Règlement interne d'une Assemblée politique est une branche de la legislation, et même une branche essentielle. Jusqu'à present, aucun écrivain politique ne s'en est expressément occupé" (PT p. 5).²

¹ Bentham wrote some of these early texts in French; I cite them in French with English translation in footnotes.

² "The internal rules of a political assembly is a branch of legislation, and even an essential branch. Until now, no political writer has discussed them explicitly."

The second body of texts, written from 1820 onwards, proposes and justifies a constitutional code, by which Bentham simply meant a legislative code. (As I discuss below, he was opposed to constitutions that fetter majority rule.) Over these thirty years, Bentham's political views changed radically, and in a radical direction. He discarded, for instance, his earlier proposal of economic qualifications on voters. As my main task is to bring out the intrinsic interest of the causal mechanisms that Bentham proposed at various times, I shall not attempt to trace the evolution of his thought in any detail.³

While Bentham's early writings are relatively accessible, over time they became consistently more forbidding. They are characterized by extensive use of special terminology and neologisms, baroque irony, extreme attention to minute details of procedure, and convoluted nested sentences. These features of his style, together with the sheer mass of his writings, make a formidable obstacle to a full grasp of his ideas. Bentham is not obscure, and almost always has interesting things to say, yet for readers (such as myself) who are not Bentham scholars, the benefits are not always commensurate with the necessity intellectual investment. Hence there may well be nuggets of analytical insights that I have overlooked.

The guiding line in Bentham's writings on politics was to determine the procedures most conducive to the greatest happiness of the greatest number, a phrase that he repeats endlessly. To this end, one should *maximize official aptitude and minimize expense* (OA).⁴ Strictly speaking, this program is incoherent, since it is only by accident that one and the same action will maximize one function and minimize another. Publicity, for instance, is an important but costly means towards

³ A task for which I am in any case unequipped and which has been admirably undertaken by Schofield (2006).

⁴ The verbs « maximize » and « minimize » were invented by Bentham, so his neologisms were not all useless.

ensuring official aptitude. Similarly, considerations of costs might suggest a smaller assembly size than the one that maximizes aptitude.⁵ To my knowledge, Bentham never raises the issue of a trade-off between these two factors. In this paper, I focus only on *aptitude* as it relates to political assemblies.

Bentham distinguishes among three attitudes that are desirable in voters, deputies and officials. In addition to the obvious desiderata of moral and intellectual aptitude, the latter further divided into knowledge and judgment, Bentham emphasizes the less frequently mentioned – but crucial - quality of *active* aptitude. This somewhat elusive idea can be understood as dedication, application, exertion, or industry. Although the conjunction of all three aptitudes is desirable, they are not always so taken in isolation. If moral aptitude is low, high intellectual and active aptitude may be positively harmful (FP pp. 103, 139, 178), and low aptitude in the latter two respects is then to be welcomed.⁶ In symbols, LHH < LLL. In some cases, however, we may find that LHH > HLL:

By the mere care of ministering to his own happiness, a man possessed of a certain degree of intellectual talent or active talent would be led to make better provisions for the happiness of his fellow citizens than could or would be made by a man in whom intellectual aptitude or active talent were to a certain degree deficient, although he were at the same time endowed with the highest conceivable degree of moral aptitude (FP p. 179).

Bentham offers Napoleon⁷ as an example of the first case, and Louis XVI⁸ and Alexander I as being closer to the second.

⁵ True, Bentham does claim that the best way of selecting officials for active aptitude (see text below) is to offer positions to those who make the lowest bid for them (e.g. CC p. 297 ff.) This idea belongs, however, to the more eccentric part of his doctrine.

⁶ The characterization of some dictatorships as "despotism tempered by incompetence" offers an example (Elster 2007 a, pp. 439-40).

⁷ Bentham affirms obliquely (FP p. 180) that Napoleon was aware, through the intermediary of Talleyrand, of Bentham's own "all-comprehensive body of law, having for its end in view the

The interaction between intellectual and moral aptitude is also at the core of Bentham's rebuttal of the claim that the people at large does not possess the wisdom needed for choosing deputies:

[Objection.] Taken in the aggregate, the people neither do any where possess, nor are capable of being made to possess, appropriate knowledge sufficient, nor thence appropriate judgment sufficient, to qualify them, respectively each of them, for contributing by his vote to the location of a Member of the supreme operative body, in which provision shall be made for the promotion of his (the Elector's) share in the universal interest.

Answer. The objection applies not, unless the case be, that in some other quarter indication has been given [of] a person or set of persons in whom there has place appropriate intellectual aptitude to a greater degree, in conjunction with appropriate moral aptitude in an equal degree: or at any rate in so high a degree superior in appropriate intellectual aptitude, and in so low a degree inferior [in] appropriate moral aptitude, as to be superior in the aggregate of appropriate aptitude. Of no such person or set of persons can indication have been or can be ever made (FP p. 142).

Bentham offers a large array of mechanisms that, he thought, might remove obstacles to moral, intellectual and active aptitude. Especially important are *publicity* in assemblies and *secrecy* in the election of their members. He also proposes *sanctions* for inaptitude, whether issued in the "Tribunal of Public Opinion" or by administrative measures. Moreover, the *size* of electorates and of assemblies is an important determinant of active aptitude. He also discusses possible criteria for active and passive *suffrage*, notably property, payment of taxes, literacy, age, race, and gender. He discusses and rejects *indirect elections*,

greatest happiness of the greatest number", but that his "want of appropriate moral attitude made him put it aside".

⁸ Louis XVI was certainly deficient in active aptitude. Two crucial and (at least from his point of view) fatally mistaken decisions concerning the location (Saint-Priest 1929, p. 219-20)) and the possible re-location (Mathiez 1898, p.272) of the Estates-General were due to the fact that he preferred hunting to dealing with matters of state.

bicameralism, supermajorities, entrenchment, judicial review, and *prorogation* as remedies for inaptitude. I shall also mention various other, less important mechanisms.

Some of Bentham's claims, although often ingenious, are implausible, with only antiquarian interest. Others, such as the advocacy of female suffrage, were progressive at the time, but are now accepted as a matter of course. Still others remain fertile and controversial sources of insight and discussion. His relentless majoritarianism and rejection of counter-majoritarian devices corresponds to an important strand in contemporary political thought. The idea that is encapsulated in the title of the present paper suggests an important objection to the muchdiscussed idea of the "wisdom of crowds". His scheme of what I shall call secretpublic voting would, in many committees and assemblies, provide a superior alternative to the standard forms of secret and public voting. From a theoretical point of view, his most important idea is perhaps that the goal of institutional design is essentially *negative*: "the object is to avoid the inconveniences, to prevent the difficulties, which must result from a large assembly of men being called to deliberate in common. The art of the legislator is limited to the prevention of everything that might prevent the development of their liberty and their intelligence" (PT p. 15; my italics).⁹ In other words, the project of positive enhancement of these qualities is chimerical.

In expounding and discussing these ideas, I shall proceed as follows. In Section **II** I consider the aptitudes of voters as a function of their individual qualifications, the voting procedure, and the size of electoral districts. In Section

⁹ Very broadly speaking, this line of argument is in the spirit of Ely (1980). The title of his work – *Democracy and Distrust* - echoes some of Bentham's most striking statements. "Is it objected against the regime of publicity, that it is a system of *distrust*? This is true; and every good political institution is founded upon this base" (PT p. 37). Also, "In the framing of laws, suspicion can not possibly be carried to too high a pitch" (FP p. 15).

III I discuss the aptitudes of deputies as a function of (among others) eligibility criteria, publicity, assembly size, forced attendance, voting procedures, and the ban on plurality of offices. Section **IV** offers some concluding comments.

II. Aptitudes of voters

In Bentham's terminology, the constitutive power is « that by the exercise of which it is determined who the person or persons are by whom the operative power shall be exercised » (FP p. 6). Operative power, in turn, is divided into legislative and executive powers (*ibid*.). Bentham argues that the people at large ought to be the constitutive power, since "[o]n the part of the people appropriate aptitude in the shape of moral aptitude is at all times at a maximum" (FP p. 143). His argument is as follows:

For giving to the supreme constitutive power the best form possible, for placing it in a set of hands better disposed than any other set can be, nothing more is required than the placing of it in the hands of individuals disposed each of them to take that course which in his judgment is most conducive to his own individual interest: so disposed, he will be disposed to take that course which is most conducive to the universal interest, for the universal interest is nothing else but the aggregate of all individual interests (FP p. 133).¹⁰

In an earlier text, Bentham had distinguished two objections to universal suffrage: "Les uns contestent [à l'électeur] la capacité de connaître ce qui lui serait avantageux: les autres celle d'agir d'après cette connaissance, supposé qu'il l'eût"

¹⁰ Tocqueville (2004, p. 265) made a similar argument for the moral aptitude of the people : the majority of citizens "may be mistaken but cannot be in conflict with themselves" (DA p. 265). He had a lower opinion of the intellectual aptitude of the people. Harrington (1977), p. 416 makes similar assessments: "the debate of the few, because there be but few that can debate, is the wisest debate, and the result [decision] of the many (because every man hath an interest what to choose, and that choice which suiteth every man's interest excludeth the distinct or private interest or passion of any man, and so cometh up unto the common and public interest or reason) is the wisest result".

RRR p. 70-71).¹¹ The second objection is based on the possibility of influencing the vote through bribes and threats. Bentham notes that the constant references in the English debates to the danger of "dependence" reveal a strange blindness, since it could easily be eliminated by use of the secret ballot.¹² He takes the first objection more seriously, notably with regard to economic qualifications. He first defines the propertyless as "ceux auxquels il doit paraître que, s'ils pourroient [sic] réussir à faire entre tout le monde la repartition de la masse des propriétés, ils trouveroient leur avantage"¹³; affirms that they would not in fact benefit from an egalitarian redistribution of wealth; but adds that it would be impossible to convince them of that fact.¹⁴

With regard to the specific form of economic qualification for suffrage, Bentham prefers "quota of imposition" to "the value of property". "Un citoyen se trouve-t-il lesé par cette substitution? ce ne peut être qu'autant qu'il se soit fait donner dans l'assiette de l'imposition un avantage indu. Accompagné de cette condition, le droit de voter aura l'effet de servir de contrepoids [...] à l'influence des motifs qui portent le contribuable à diminuer le montant de ses contributions"

¹¹ "Some contest that the voter has the capacity to know what would be to his advantage: others that he possesses the capacity to act on this knowledge, assuming he has it".

¹² At more or less the same time, this argument against manhood suffrage was also made at the Federal Convention and in the French Assemblée Constituante; here, too, no one mentioned the obvious remedy of the secret ballot (Elster 2006).

 $^{^{13}}$ « those to whom it must appear that they would benefit from a redistribution among everyone of the mass of properties ».

¹⁴ Similarly, Tocqueville (2004, p. 40) writes that « It is idle to object that the self-interest properly understood of the people is to spare the fortunes of the rich because they must soon feel the effects of the financial difficulties they create. Is it not also in the interest of kings to make their subjects happy and of nobles to know when to open their ranks? If long-run interests had always trumped the passions and needs of the moment, there would never have been tyrannical sovereigns or exclusive aristocracies ». Later, Bentham changed his opinion on this point, citing the example of Pennsylvania to show that property could be secure in a voting regime with no pecuniary qualification (RRB p. 560).

(RRR p. 81).¹⁵ For Bentham, then, using payment of taxes as a suffrage criterion has the additional benefit of creating a disincentive to tax avoidance or evasion. Alternatively, the criterion might create an incentive to work hard and earn enough to be allowed to vote. Guizot's slogan, "Enrichissez vous", is often but wrongly understood in this sense.¹⁶

The texts I just discussed were written in early 1789, as a response to the 20 questions Necker had put to the Assemblée de Notables which had met in the Fall of 1788. In a project for a constitutional code for France, written in the Fall of 1789 in response to the first laws adopted by the Assemblée Constituante, he proposed that "The Right of election shall be in every French citizen, male or female, being of full age, of sound mind, and able to read" (RRR p. 231).¹⁷ Concerning the last criterion, the following statement shows both his concern for detail and his insistence on creating manipulation-proof procedures: "The fact of being able to read shall be ascertained by reading at the Church in the face of the Congregation a page to be chosen by lot in the collection of laws" (*ibid.*).¹⁸ As he did with the tax-payment criterion, he also defends the literacy criterion by its incentive effects: "So far as the pressure of it is at all felt it will operate as a spur on the desire of instruction and as an instrument of civilization" (RRR p. 249). Moreover, since the criterion is based on achievement and not on ascription, it is

¹⁵ "If a citizens feels injured by this substitution, it can only be because he has obtained an undue advantage in the tax assessment. When joined to this condition, the right to vote will serve as a counterweight [...] to the influence of motives which lead the taxpayer to reduce the amount he owes."

¹⁶ Elster (2006).

¹⁷ Bentham valued literacy highly : « L'on ne peut trop lire ni écouter trop peu » (« You can never read too much or listen too little » (RRR p. 55). Unlike some actual electoral laws, he placed little emphasis on the ability to *write*.

¹⁸ By contrast, the discretionary nature of literacy tests in the American South and elsewhere made it possible to use them as an instrument of oppression.

not discriminatory: "An exclusion which every man has it in his power to free himself from whenever he thinks proper, and not to his detriment in other respects, can scarce be looked upon as the invasion of the rights of any one" (RRR p. 248).¹⁹

Bentham was a staunch defender of the right to vote for women. To the question whether any good can arise from admitting women to the supreme constitutive power, he answers "Yes. The affording encreased probability of adoption to legislative arrangements placing sexual intercourse upon a footing less disadvantageous than the present to the weaker sex" (FP p. 99). Among his other arguments for female suffrage, and refutations of objections to it, the following is worth citing: "The fact [of the inferior intellectual faculties of the female] is dubious, but were it ever so certain, it would be nothing to the purpose, unless in the best endowed of the one sex they were inferior to what they are in the worst endowed of the other" (RRR p. 247). Yet the statistical discrimination that Bentham objects to here to underlies the age-based restrictions that he accepts: surely there are some individuals twenty years of age who are intellectually superior to some twenty-one year olds.

Ability to read is an aspect of intellectual aptitude. Whereas Bentham thought the people's moral aptitude was at the maximum, its intellectual aptitude "is at all times naturally on the encrease" (FP p. 143) when the people forms the constitutive power. By contrast, in monarchies and aristocracies "the object towards which on this occasion the endeavours of government have actually been directed has been to diminish on the part of the people the degree of appropriate intellectual aptitude" (FP p. 143-44) and to "implant in their minds the persuasion

¹⁹ Arguably, making the right to vote conditional on a non-manipulable and not excessively demanding test of literacy does not violate basic democratic tenets. By contrast, if Guizot's "Enrichissez-vous" had actually been intended to say that anyone could obtain the right to vote by hard work, it would have been sheer hypocrisy. The tax payment threshold for voting was very high under the July Monarchy.

that, instead of that minimum which really has place, the heart of the ruling one is the seat of maximum moral aptitude" (FP p. 144). Elsewhere (FP p. 180 ff.) Bentham refers to the "interest-begotten prejudice" which multiplies the sinister interests of the few by creating the illusion, in the many, that the few are the best fit to rule.

I conclude this Section by some comments on the active aptitude of voters. To introduce the topic, let me explain the title of the present paper, an English proverb harking back to Aristotle's « that which is common to the greatest number has the least care bestowed upon it » (*Politics* 1261 b). In one of his many discussions of the vices of *boards* – in which several individuals are jointly responsible for a task – Bentham uses this phrase, adding "what is everybody fault is nobody's fault: by each one the fault is shifted off upon the rest" (RRB p. 571).²⁰ In his writings on France, he argued that in the opening sessions of the Estates-General the task of proposing an address of thanks to the King should devolve on the Principal Minister rather than on a deputy. "Pourquoi un Ministre plutôt qu'un autre membre? [...] La besogne de tout le monde n'est la besogne de personne. Il faut donc à toute assemblée quelqu'un à qui appartienne la fonction de

²⁰ Alexander Hamilton (1780) made the same point: « Lately Congress [...] have gone into the measure of appointing boards. But this is in my opinion a bad plan. A single man, in each department of the administration, would be greatly preferable. It would give us a chance of more knowlege, more activity, more responsibility and of course more zeal and attention. Boards partake of a part of the inconveniencies of larger assemblies. Their decisions are slower their energy less their responsibility more diffused. They will not have the same abilities and knowlege as an administration by single men. Men of the first pretensions will not so readily engage in them, because they will be less cospicuous, of less importance, have less opportunity of distinguishing themselves. *The members of boards will take less pains to inform themselves* and arrive to eminence, *because they have fewer motives to do it*" (my italics). Although the argument is in some ways remarkably similar to Bentham's the reference to "men of first pretensions" is foreign to Bentham's spirit (see note 38).

la conduire" (RRR p. 45).²¹ More generally, "the success with which the public is served depends upon the use which each man makes of his own powers, and not upon the reliance he places on those of other men" (PT p. 74).

What these observations suggest is that *the free-rider problem is an obstacle to active aptitude*. In the next Section, we shall see how this problem can arise in assemblies. In elections, it can arise because "the larger the Districts, the more numerous the voters in each district, and the less the value which a voter will be disposed to set upon his vote" (RRR p. 243).²² Other things being equal, this effect provides an argument for small districts.²³ At the same time, as we shall see, *small districts imply large assemblies*, with their attendant free-rider problems.

III. Aptitude of deputies

To continue the immediately preceding discussion, I begin with the question of the active aptitude of deputies. This dimension of aptitude has two components: motivation and attendance. I begin with the motivational free-rider problem.

We know that Bentham was aware of Condorcet's jury theorem by 1808, when he refers to it ironically in a work on "Scotch reform",²⁴ an attack on the Scottish practice of having courts with multiple judges. Bentham first argues that

 $^{^{21}}$ «Why a Minister rather than another member? [...] Everybody's business is nobody's business. Any assembly needs someone whose task it is to lead it. »

 $^{^{22}}$ Although Bentham asserts that "In the case of the people in their quality of Electors, no demand for active aptitude has place" (FP p. 142 n.), I believe this statement is inconsistent with the general argument I am reconstructing. Bentham does not, to my knowledge, suggest fining absentee voters.

²³ In this passage Bentham proposes six arguments for small districts and three for large ones, concluding that "the solution of the question must therefore by arbitrary in any degree" (RRR p. 243); see also Estlund (forthcoming) for a similar conclusion.

²⁴ I am indebted to Philip Schofield for this reference.

this system was deeply pernicious, among other reasons for its tendency to dilute individual responsibility. He then asks:

At its institution, anno 1532, why was the court so crowded as we see it? Because France was the model for everything, and in France, judicature was thus crowded. In France, how came judicature to be thus crowded? From this sinister interest [of the judges] came the custom; from the custom, the prejudice: and that prejudice so strong, that it became a sort of axiom – that if any instance the ends of judicature failed of being fulfilled, it was for want of a sufficiently great multitude of judges. We have a book, my Lord, on this subject, by *Condorcet*: a quarto volume with 460 well-filled pages in it: all algebra, all demonstration, and this axiom (preface, p. 24) a basis of it (SR, p. 19).

This statement is of course a caricature, since Condorcet's jury *theorem* is not an *axiom*, although, as any theorem, it is derived from axioms. As we shall see shortly, Bentham seems to have accepted that other things being equal, the theorem was valid, yet strongly asserted that other things were *not* equal. I say "*seems* to have accepted", as the two texts I shall cite date from 1789. I have no direct evidence that Bentham had read Condorcet's 1785 essay at that time, yet I believe that the words I shall italicize in these texts strongly suggest that he had.

Condorcet argued that the proposed size of the Estates-General, with 1200 deputies, was excessive.

Il est certain qu'avec le nombre s'accroît et la probabilité d'une decision sage plutôt que mauvaise, et la probabilité contre la formation d'une décision quelconque, et la lenteur de cette decision. [...] L'exemple qui approche davantage [d'un corps aussi nombreux] est celui de la Chambre des Communes en Angleterre. Le nombre des membres y est en apparence de 550. Mais jamais ce nombre ne s'est trouvé complet. [...] Bien souvent il n'égale pas meme le nombre de 40, nécessaire pour établir la validité [...] C'est que plus le nombre des votans est grand, moindre est le poids et la valeur de chaque vote: moindre en est le prix aux yeux du votant: moins il se soucie d'en assurer la conformité au vrai but, et meme de le donner du tout. De l'avilissement de ce droit résulte la negligence dans la manière de l'exercer, les grandes fluctuations dans le nombre de ceux qui l'exercent:

fluctuation qui livre à la merci [sic] du hazard le sort des intéressés (RRR p. 35.)²⁵

In the opening sentence, Bentham appears to accept the jury theorem, with the qualifications that a large assembly might not be able to reach any decision at all, or do so very slowly. These qualifications are due, presumably, to the sheer complexity of organizing the vote of 1200 deputies. Towards the end, however, Bentham questions the theorem itself. To prove it, Condorcet had assumed some degree of what Bentham called "intellectual aptitude". More precisely, he assumed that the probability of each voter « getting it right » in a binary decision exceeded 50 %. It is far from clear what meaning one can give to this condition in real assembly decisions, but I shall ignore that issue. If we also assume that voters form their opinions independently of each other and that they vote sincerely, the theorem asserts that as the number of voters increase indefinitely, the probability of a majority vote "getting it right" approaches 100 %.

Let me assume with Bentham (FP p. 77) that the probability depends on the *knowledge* as well as on the *judgment* of the voters. These can also be expressed as (1) *possession of information* and (2) *information-processing ability*. The first breaks further down into (1a) information that the deputies possess before they start deliberating and (1b) information that they acquire in the process of deliberation

 $^{^{25}}$ « It is certain that with a more numerous assembly there will be an increased probability of a wise decision rather than a bad one, an increased probability against any decision being made at all, and an increased slowness in coming to a decision, assuming that one is made. [...] The example that approaches most closely [to a body that numerous] is the House of Commons in England. In appearance, the number of members is 550. But this never has never been reached [...]. Often it does not even equal the 40 members needed for a quorum [...]. The reason is that the larger the number of voters, the smaller is the weight and value of each vote and the smaller its price in the eyes of the voter, and the less does he care about its conformity to the true end, and even about casting it at all. From the devaluation of the right results negligence in using it and great fluctuations in the number of those who use it: fluctuations which make the outcome for the interested parties a matter of chance."

itself. Whereas (1a) and (2) are exogenous to the deliberations²⁶, (1b) is endogenous. As Bentham argues, the incentive for deputies to inform themselves about the matter they are to decide is diluted in large assemblies. Hence, as he observes, increasing the number of deputies has two opposite effects:

Avec le nombre des membres s'accroît la chance de sagesse. Autant de membres, autant de sources de lumière. Réponse. La diminution que cette même cause amène dans la force des motifs necessaires pour faire sortir ces lumières [...] compense cet avantage (RRR p. 122).²⁷

Assume now that as the number of deputies increases indefinitely, the likelihood of each of them "getting it right", while remaining above 50 %, decreases steadily. Aanund Hylland has shown (personal communication) that if p_N is the probability that each of N deputies will "get it right", the probability of a majority vote "getting it right" converges to 100 % only if (p_N -1/2) goes to 0 more slowly than the square root of N goes to infinity. If that is not the case, the dilution of active aptitude may offset the increase in "lumières".²⁸

²⁶ They may be endogenous to the political process as a whole, if voters choose deputies on the basis of the intellectual aptitude of the candidates. To my knowledge, Bentham does not make this claim.

 $^{^{27}}$ « With the number of members increases the chance of wisdom. So many members, so many sources of light. Answer : the reduction which that same cause operates in the strength of the motive to bring out this light [...] offsets this advantage. »

²⁸ Vermeule (2007, p. 228-31) argues that the assembly can overcome this collective action problem by setting up a separate informational-gathering structure staffed by officials who are paid to determine the facts. As an example, he cites the Unfunded Mandates Reform Act of 1995, which obligates Congress to determine the obligations that a federal law would impose on states, municipalities and tribes, and indicate which of them would not be funded by the federal government. The decision by the Belgian parliament in 1875 that no proposition of law could be signed *by more* than six members (Pierre 1893, p. 724) can be interpreted in the same spirit.

I believe this argument anticipates recent debates about *informational free riding* in committees and assemblies. ²⁹ I also believe that Bentham, towards the end of the first passage I cited, anticipates the *absence of a unique equilibrium in pure strategies* in strategic decisions whether to vote or not.³⁰ If others vote, my vote is worth little, so I might as well abstain. But if others think along the same lines and abstain, my vote increases in value to make voting worth my while. Roughly speaking, under simplifying assumptions this game has a very large number of equilibria in pure strategies, in each of which exactly M out of N citizens decide to vote, and a mixed-strategy equilibrium in which each votes with probability M/N. Rational voters will never be able to converge of any of these. Instead, they will follow their "animal spirits", second-guessing each more or less successfully, with turnout fluctuating randomly.

Bentham goes on (RRR p. 122-23) to make three further claims that I shall summarize briefly without discussion. First, he affirms that "light" increases with the numbers of "proposans et plaidants" (proposers and pleaders) – including contributors such as Bentham himself - rather than with the number of judges. Second, he claims that the Condorcet jury theorem might have some force in secret assemblies. Third, in "times of ignorance" with few written and no printed documents, an Athenian or Roman assembly of 2000 members might have more lights than one of 1000 members.

Although Bentham does not draw attention to the fact, his arguments about district size and assembly size generate a dilemma. Large electoral districts exacerbate the free-rider problem for voters, whereas small districts produce large

²⁹ Karotkin and Paroush (2003), Mukhopadhaya (2003). Grossman and Stiglitz (1980) show that *markets*, as well as *assemblies*, can induce suboptimal investment in information. In all cases, the problem is caused by free riding.

³⁰ I assume here that people vote if and only if their vote can be expected to *make a difference*, not out of civic duty and other non-consequentialist considerations.

assemblies that exacerbate the free-rider problem for deputies.³¹ He might have proposed to resolve the first problem with an appeal to the Tribunal of Public opinion, for instance by publishing the names of non-voters. As we shall see shortly, this was one of the solutions he proposed to the problem of deputy abstentions. Yet to my knowledge he did not propose to have the people judge itself.

Thus deputies may not show up in the assembly for debates and votes, or they may show up and pay little attention. Both behaviors exemplify free riding. Bentham makes several proposals about how to address the first problem. As he believes that fining absentee deputies would create needless complications, he proposes instead the following scheme: "requiring of each member a deposit, at the commencement of each quarter, of a certain sum for each day of sitting in the quarter; this deposit to be returned to him at the end of the term, deduction being made of the amount deposited for each day he was absent" (PT p. 58). Since wealthy deputies will not be affected by this scheme, he proposes to supplement it by coercive measures: "one day of arrest for each contravention" (PT p. 59). Finally, he argued for a register of non-attendance, to be published at the end of each session (PT p. 60).³² As he observes with characteristic astuteness, these measures should be mechanical and automatic. The English practice of requiring in

³¹ The following clarification may be needed. From a rational-choice-cum-self-interest perspective, the electorate or the assembly has to be quite small to make it *objectively* worth while voting or making an effort. From their subjective point of view, however, individuals seem to be sensitive to differences that, objectively, should be irrelevant. Election turnout is higher when stakes are high or when elections are expected to be close, regardless of the fact that the probability of being the pivotal voter remains too small to justify the cost of voting. Similarly, citizens or deputies may be more motivated to participate in smaller groups than in larger groups even when rational self-interest would tell them to abstain in both cases. *That* people seem to be somewhat but not fully consequentialist seems clear; *why* that is the case remains a mystery.

³² In France, publication of the names of absent deputies has been often debated and sometimes practiced (Pierre 1893, pp. 480-81, 968-69, 1034, 1036).

each case a vote of the House to punish an absentee member is unlikely to be efficient, "when all the judges are interested in the contravention of the laws" (PT p. 61).

Just as the active aptitude of any elected or appointed official is diluted if he shares his task with others, it suffers when he divides himself among different tasks.³³ To justify his proposal that "No one invested with [legislative] office shall during his continuance there in execute any other" (RRR p. 231), he argues that "All the time and exertion a man can possibly muster can never be too much to dedicate to such a service. If to this most important of all functions a man adds any other, the consequence is infallible: the duty of one or the other must be neglected" (PT p. 251).³⁴ Hence "One person, one task" (Bentham does not himself synthesize his two claims).

Bentham also points to another source of "motivational fatigue" in assemblies. When deputies speak in a pre-established order, as was sometimes the case in the French ancien régime (PT, p. 95-96), a "man who finds himself low upon the list, may, in ordinary cases, naturally expect to find his arguments forestalled; and the lower he is, the less will it appear to be worth his while to be at pains of studying the subject, for so small a chance distinguishing himself, or being of use" (PT p. 101). He notes that the problem is magnified when, as was usually the case in the ancien régime, members of the privileged orders spoke before the

 $^{^{33}}$ In contemporary France, the « cumul des mandats » - deputies serving as mayors or in other local functions – is a very serious impediment to active aptitude, and one that the deputies are unlikely to abolish.

³⁴ In a passage inserted by Dumont, but which is fully in Bentham's spirit, it is argued that the President of an assembly should not have the right to vote or to participate in the debate (PT 68-69).

members of the third estate, and approves the adoption of the reverse order by the Assemblée des Notables of 1788 as "the least bad of all fixed orders" (PT p. 106).³⁵

Active attitude in deputies has to be fostered by creating the right incentives in the assembly, not by including this quality among the criteria for eligibility. It is hard, in fact, to imagine observable indices for active aptitude. By contrast, there have been many proposals and attempts to promote moral and/or intellectual aptitude by appropriate criteria of eligibility. Generally speaking, Bentham is skeptical towards this idea. Here, too, he prefers to rely on incentives.

In an early discussion of eligibility criteria, it is not clear whether Bentham relates them to (what he was later to call) moral or to intellectual aptitude. Whichever he has in mind, he rejects such criteria in toto: "From the capacity of being elected no human creature whatsoever shall be excluded" (RRR, p. 231).³⁶ To

³⁵ To my knowledge, Bentham does not propose a procedure for allocating speech time in assemblies. (On this issue, see Jouvenel 1961.) I conjecture that he might have found active aptitude maximized by having the order of speakers determined by lot, not by a one-shot lottery at the beginning of the debates but with a new draw from the urn (without replacements) after each speaker to select the next. Alternatively, he could have left it up to the deputies to ask for the floor. The same three options – by free choice, by preset arrangement, and by lottery – also arise with regard to the *seating* of deputies. Citing and disapproving the Dutch practice of predetermined places, Bentham argues for the first option: "Every one ought to take his place as he arrives" (PT p. 52). In the French Convention, seats were allocated by lottery once a month, to prevent "the dangers of fraction" (Pierre 1893, p. 829). By contrast, Bentham advocated free choice to *facilitate* the coordination of members belonging to the same fraction or party.

³⁶ Since Bentham excluded the illiterate and those not of sound mind from the electorate, his scheme is more restrictive for active than for passive suffrage. Before universal suffrage and universal eligibility, heavier restrictions on passive than on active suffrage were probably the norm, but some electoral systems have been in the spirit of Bentham. In the 1776 constitution of Virginia, voters had to be freeholders with at least 50 acres of land or satisfy other property conditions, whereas representatives only had to be freeholders. Eugène Pierre (1893, pp. 126-28, 163-64) lists the following three examples from the late nineteenth century. Great Britain had economic qualifications for active suffrage, but not for passive. In the Danish elections to the lower chamber, voters had to be at least 30 years of age, but anyone above 26 could be elected. In Spain, voters had to be at least 25 years old, but only 21 to be eligible. More recently, in Holland and Spain women became eligible before they could vote.

the question "Would you admit for example an ideot, a child in arms, a woman, a negro, or a convicted murderer" (RRR p. 250), he replies

If they did, what would be the consequence? The ideot would remain in the hospital, the child in arms would remain in arms, the convicted murderer would be dealt with like other convicted murderers. As to the Negro and the Woman, were they by some strange accident to overcome the body of prejudice which combats their admission with so much force, there could not be a stronger proof of a degree of merit superior to any that as found among whites and among men (*ibid*.).

The last argument might also apply to the prospect of electing a fifteen-year old person to the assembly. It would be proof of superior merit if the majority of the citizens were to elect someone of that age. Bentham does not make that argument, however. In a discussion thirty years later, he makes two different and rather curious objections to the use of age as a criterion for intellectual aptitude. The context is a discussion of bicameralism, which is supposedly justified by greater degree of *active aptitude in the lower chamber* and of higher *intellectual aptitude in the upper house*, by virtue of the higher age qualifications for the latter (FP p. 103). Bentham first seems to argue that any inferior intellectual aptitude of the young might be offset by their greater moral aptitude:

[Y]outh has much better pretension to being regarded as the seat of appropriate moral aptitude – of *virtue* if that is to be the word – than a more advanced age has. In a ratio which is the inverse of the degree of altitude in the scale of age, the mind is susceptible of that degree of excitation, in the French phrase *exultation*, of which self-sacrifice, sacrifice of immediate to self-regarding to social interest, is the result (FP p. 104).³⁷

³⁷ In an uncharacteristically functionalist passage, Bentham argues that exultation may also be an effect of *circumstances*: «plus d'une fois la difficulté même d'un projet a été la cause de son accomplissement. Le tems des grandes crises est la saison des grandes vertus: *la vertu est une denrée qui comme les autres se multiple à raison de la demande*» («more than one time the very difficulty of a project has been the cause of its realization. The time of great crises is also the time of great virtues: *virtue is a good that like any other is multiplied by demand*») (RRR p. 31; my italics). Tocquevillle (2004, p. 228) is more convincing: « It has been observed that a man facing

The reasoning is, as I said, curious, given what Bentham elsewhere has to say about the social benefits of people acting out of self-interest, and the possibly ruinous effects of altruistic motivations (FP p. 233-34).

Next, he offers a dubious argument to show that even if some voters are intellectually deficient because of their age, they cannot do any harm:

Take any age for the age short [of] which deficiency in the article of wisdom is to be regarded as preponderantly probable: say for example 21 years of age. *By no such deficiency can any sensible evil be produced otherwise than in the case in which the individuals labouring under it compose a majority.* But that in any number approaching to a majority, these supposed unripe minds should have a place in any body constituted as that in question is here proposed to be, is altogether improbable (FP p. 104).

The statement I have italicized seems wrong. Even if intellectually inept members should only form a minority in the assembly, they could do harm by joining forces with some individuals deficient in moral aptitude. Although, as we shall see shortly, it may be possible to enhance the moral aptitude of deputies by institutional means, it begs belief to assume that it could be brought to perfection.

The moral aptitude of a deputy, as of any official, is a negative quality: "it is constituted by the absence [...] of the propensity to sacrifice all other interests to that which at each moment appears to him as his own preponderant interest" (FP p. 13). It is not a question of deputies being motivated by the public good, but of structuring their situation so that self-interest has *no purchase* on their decision: "By moral aptitude is therefore here meant but practical innocuousness; [...] such

danger rarely remains as he was: he will either rise well above his habitual level or sink well below it. The same thing happens to peoples» - and, we may add, to assemblies. During the French Revolution, the abolition of feudalism on the night of August 4th 1789 and the Terror of 1793-94 illustrate the two reactions.

innocuousness not having any other cause than impotence [to do wrong] in the station of each functionary" (FP p. 15).

Whereas appointed officials can be kept in line by minimizing their powers (FP p. 30 ff.) and the funds at their disposal (FP pp. 40 ff.), as well as by holding them responsible before legal tribunals (FP p. 53 ff) and before the Tribunal of Public Opinion (FP p. 56 ff.), elected officials are subject only to the last check. The importance of publicity and transparency in all political matters except in the election of deputies is a constant theme in Bentham's writings. Anticipating Judge Brandeis's dictum "Sunlight is the best disinfectant", he refers to "the grand antiseptic effect of publicity" (PT p. 149) and asserts that calumny "is destroyed by the light of day" (PT p. 30). He acutely notes two mechanisms by which publicity can produce its desirable effects on deputies: by the "dread of shame" and, more important, by "the fear of being removed in an assembly liable to change" (*ibid*.).³⁸

The last mechanism is somewhat fragile, however. One of Bentham's own examples of the tyranny of the present over the future, the Long Parliament (RRR p. 279), points to an inconsistency in his position. Being – as it should be - omnipotent (RRR p. 265 ff.), Parliament can prolong its own life indefinitely without calling new elections. The Septennial Act was perfectly legal.³⁹ Moreover, in this case the Tribunal of Public Opinion is not very strong. The deputies need not fear non-reelection if they can extend their power indefinitely. The weaker

³⁸ At one point, Bentham suggests *two* components of "respect for public opinion- dread of its judgment – desire of glory" (PT p. 37). Usually, however, he only cites the first. Referring to the moral psychologists of the 17th and 18th centuries, Lovejoy (1961, p. 135-36) notes that "those who were keenly aware of the potency of the 'love of praise' were rarely equally sensible to the potency of the fear of blame, and vice versa". Bentham was more sensible to the latter, Alexander Hamilton (note 20) to the former. For a sustained study of the desire for glory, see Adair (1998).

³⁹ Dicey (1915), p. 9.

mechanism of naming, blaming and shaming may not be sufficient to keep them in line.

The Tribunal is also "not infrequently divided against itself" (FP p. 259). To illustrate this case, Bentham offers the example of a placeman: "Continuing to give speech or vote in favour of the King from whom he has received his place, he remains exposed to and suffering under the imputation of corruption and want of patriotism. But in so doing he preserves himself from the joint imputation of perfidy and ingratitude" (*ibid*.). Bentham goes on to argue that the placeman will in general be more strongly blamed for ingratitude than for corruption. In the eyes of the Tribunal, breaking a promise he should not have given is worse than having given it.

Among the four objections to publicity that Bentham discusses and tries to refute, the last is perhaps the most interesting: "In a monarchy, the publicity of the proceedings of political assemblies, by exposing the members to the resentment of the head of the State, may obstruct the freedom of their decision" (PT p. 37). Bentham dismisses the objection as specious: "the proceedings of the assembly would always be known to the sovereign" (*ibid*). While this may well be true with regard to assembly *debates*, the secret ballot can prevent the sovereign from acquiring knowledge about the *votes*.⁴⁰

⁴⁰ Under the Restoration and the July Monarchy (until 1843), the French National Assembly voted by secret ballot (Pierre 1893, p. 1018-19). Tocqueville (1985) claimed that "Si une assemblée politique préférait le régime secret en alléguant la nécessité de se soustraire à l'inspection du chef de l'Etat, il ne faut pas s'y tromper : ce ne serait qu'un prétexte. Le vrai motif de cette conduite serait plutôt le désir de se soumettre à son influence sans trop s'exposer au blâme public » (« One should not be fooled if a political assembly preferred the secret régime by citing the need to avoid the surveillance by the head of the State : it would only be a pretext. The real motive for this behavior would rather be the desire to submit oneself to his influence without exposing oneself too much to public blame".) As a parliamentarian himself from 1839 onwards, Tocqueville knew the system and detested it.

Before I comment on Bentham's views about the objects and means of publicity, let me note that he is not at all opposed to a deputy promoting the interest of his electoral district: "the interests of the inhabitants of all the other Districts being adverse, this endeavour of his will be to no effect: the arrangements which are favorable to the interests of all the Districts, or at least to the majority of them, [will] on each occasion be adopted and carried into effect" (FP p. 135). Deputies should not try to second-guess the general interest, but rely on its realization by the aggregation of group interest through majority voting.⁴¹

In *Political Tactics* Bentham lists the "Objects to which Publicity ought to extend"

- 1. The tenor of every motion
- 2. The tenor of the speeches or the arguments for and against each motion
- 3. The issue of each motion
- 4. The number of the votes on each side
- 5. The names of the voters
- 6. The reports &c. which have served as the foundation of the decision (PT p. 38)

Obviously (5) implies (4). For Bentham, (5) was essential for the ability of the public to sanction deputies for their votes, either through "blame and shame" or by non-reelection. He nevertheless discusses (4) separately, and cites the Continental Congress during the War of Independence as "accustomed, if I am not deceived, to represent all its resolutions as unanimous" (PT 39). Although the enemies of the Confederation "saw in this precaution the necessity of hiding an

⁴¹ To my knowledge, Bentham never discusses aggregation of group interests by *logrolling*, a mechanism that can arguably work against the general interest (Riker and Brahms 1973). Nor does he address the problem of *preference intensity*, which can break the link between the) interest of the majority and the greatest happiness of the greatest number.

habitual discord", the assembly "chose rather to expose itself to this suspicion, than to allow the degrees of dissent to the measures it took, to be known" He justifies this procedure by assuming that "Congress, secure of the confidence of its constituents, employed this stratagem with their approbation, for the purpose of disconcerting its enemies" (*ibid.*). On this point, Bentham *was* actually deceived, at least in part⁴². Yet other assemblies have on occasion decided to suppress information about the number of votes on the different sides.⁴³

The *means* of publicity should include not only transcripts of the debates and records of the votes, but also the admission of the public to the sittings of the assembly, to "inspire confidence in the reports" (PT p. 40). Bentham also claims, surprisingly, that "the presence of strangers [will be] a salutary restraint upon the different passions to which the debates may give rise" (PT 40-31) and that "the publicity of debates has ruined more demagogues than it has made" (PT p. 36).⁴⁴ He makes, however, one striking exception:

⁴² The assembly did publish its Journal, with votes recorded, except in military matters where secrecy was needed. Hence the many close votes on political issues were in the public domain. The secrecy of *individual* votes might follow from the fact that the states voted as delegations, except in the frequent cases where a delegation was composed of the minimal number of two delegates. If a two-person delegation was recorded as casting a vote for a proposal, one could infer that both delegates had voted for it. It is worth while noting, though, that in October 1774, the Continental Congress decided to expunge any reference to the British-friendly Galloway plan, rejected by a mere six states to five, from the Journal.

⁴³ As an example of secrecy induced by the desire of a majority to prevent the minority from making disagreements public one can cite the decision by the Federal Convention to keep its votes secret not only during its sitting but afterwards (Anderson 1993, p. 8-12). The French Assemblée Constituante voted to keep the size of majorities secret so as not to undermine the expression of the general will (Castaldo 1989, p. 272-3).

⁴⁴ The conventional wisdom is the very opposite. Bentham's argument would require either that deputies would be ashamed if a public could observe their passions and demagoguery, or that knowledge of these propensities might deter their constituents from reelecting them. Since these are matters of demeanors rather than of words, only the first mechanism seems possible, although not very plausible.

Ought females to be admitted? No. I have hesitated. I have weighed the reasons for and against. I would repudiate a separation, which appears an act of injustice and contempt. But to fear is not to despise them. Removing them from an assembly where tranquil and cool reason ought alone to reign, is avowing their influence, and it ought not to wound their pride. [In the House of Commons] it has been found that their presence gave a particular turn to the deliberations – that self-love played too conspicuous a part – that personalities were more lively – and that too much was sacrificed to vanity and wit (PT. p. 64)⁴⁵

Bentham makes a number of observations about the institutional features that can heighten the sensitivity of deputies to the Tribunal of Public Opinion. First, he claimed that in *large assemblies* the members will be more concerned with their reputation among their fellow deputies than with that Tribunal:

[Une assemblée nombreuse] est moins soumise à l'influence de l'opinion publique. Elle forme en elle-même une espèce de petit public réuni dont l'opinion peut intéresser chacun des membres plus que ce public de dehors si éloigné, si bigarré, si disperse, si foible. [...] Pourquoi les dettes appelées d'honneur sont-elles si bien payees, tandis que celles contractées envers les marchands le sont si mal? C'est que dans le premier cas le débiteur voit constamment ses créanciers en face: dans l'autre il ne les voit guère" (RRR p. 121).⁴⁶

Second, *indirect elections* break the link between voters and their representatives. An intermediate assembly "withdraws the Members of the National Assembly entirely out of the reach and influence of the body of the people [...].

⁴⁵ Following a decision in 1778, women were in fact excluded from the House of Commons, but not for the reason offered by Bentham. In the French Convention, women were barred from admission because they were reputed to be trouble-makers (Pierre 1893, p. 826).

⁴⁶ « [A numerous assembly] is less subject to the influence of public opinion. It constitutes itself a small united public whose opinion can have greater interest for its members than this remote, colorful, dispersed and weak public out of doors. Why are so-called debts of honor regularly paid, whereas debts to merchants are not? It is because in one case the debtor is constantly meeting his creditors face to face: in the other, he hardly sees them." It is not obvious that this sociological claim is correct. The small American Senate has a club-like nature, governed by strong social norms (Matthews 1973 Ch. V).

Conceive a breach of trust ever so enormous: the traitor is perfectly out of the reach of any thing they can do: the only person they can punish is an innocent man whom the traitor has deceived" (RRR p. 245).⁴⁷

Third, Bentham argued that what one might call *secret-public voting* allows one to combine the autonomy (lack of pressure-induced conformism) of the deputies vis-à-vis each other with their accountability to their constituents. While votes ought to be *public*, they should also be cast *simultaneously*, "to lessen the efficacy of undue influence" (PT p. 106). At the moment of casting his vote, no deputy would know how others were going to vote; having cast it, his fellow deputies as well as his constituents would know it.⁴⁸ If deputies do not put their vote where their mouth is, they can be exposed to the blame of their fellow deputies as well as that of their constituents. In my view, this is one of Bentham's most valuable institutional proposals, which deserves to be widely adopted.

Fourth, *bicameralism* will reduce transparency and hence accountability. Deputies themselves easily get lost in the "secret and successful operation of

⁴⁷ The following argument is also in Bentham's spirit : One "reason why indirect election does not allow adequate democratic control is related to non-unanimity. Say we have a political system where voters in ten districts each vote for a representative and these ten elected representatives then vote for a single person, A or B, to hold some office. If the voters within each district were unanimous in their desires, and the ten representatives all faithfully reflected the views of their constituents, then the officeholder they would choose would indeed be the choice of the people as a whole. But the situation is different when views within districts are not unanimous. Suppose that in each of seven of the districts the vote was 60% in favor of the representative wanting to choose candidate A and 40% in favor of the representative wanting to choose candidate B. In the other two districts, 20% of the voters favored the representative wanting to choose candidate A and 80% the representative wanting candidate B. When the ten representatives meet, they will vote 7-3 in favor of candidate A. But in terms of the wishes of their constituents, a majority, 52% (.7 x 40% + .3 x 80%) preferred candidate B» (<u>http://www.zcommunications.org/parpolity-andindirect-elections-by-stephen1-shalom</u>).

⁴⁸ Although Bentham thought the system imperfect, since "neither the process of crying *Aye* or *No*, nor that of holding up hands, can be rendered [...] perfectly simultaneous" (PT p. 107), this problem could be overcome by using secret ballots signed by the deputies, with subsequent publication of their names. The secret-public effect is achieved by the system of electronic voting used in some parliaments.

sinister interest" (FP p. 102) encouraged by that system. Moreover, "if the texture of the business is thus more or less rendered obscure and indiscernible by [to?] those to whom by office it obtains, much more effectively it is concealed from the eye of the people at large in their character of members of the Public Opinion Tribunal" (*ibid*.).

To conclude this Section, let me digress briefly to discuss some other arguments that Bentham adduces against bicameralism. In the earlier editions of *Political Tactics*, Dumont inserted a long passage (PT pp.25-29) in favor of this system. Some of his arguments are quite powerful, notably the observation that a unicameral assembly is unable to precommit itself to orderly procedures: "a single assembly may have the best rules, and disregard them when it pleases" (PT p. 26).⁴⁹ Bentham, however, argued vehemently and consistently against bicameralism. He did so partly on grounds of the expenses of the system, an argument I shall ignore. Instead I shall briefly consider one argument he offers against bicameralism and one objection he makes to an argument for it.

Bentham believed that a chamber whose only function was to veto would use its power excessively, to justify its existence: "in reference to personal interest – the only motive in which we can constantly reckon – that body which is reduced to a single negative, will be opposed to everything. It can only show its power by rejecting: it appears as nothing when it accepts" (PT p. 25). Elsewhere (RRR p. 43) he imputes this obstructionist behavior to "vanity, jealousy, laziness". The idea that

⁴⁹ Dumont's observation may have been inspired by the events of the night of August 4 1789, when the Assemblée Constituante abolished feudalism at one fell swoop, ignoring its own procedural rules that required three sittings (Elster 2007 b).

upper houses tend to embody *der Geist der stets verneint* is not an implausible proposition of political psychology, but it remains to be verified. ⁵⁰

In the long section Dumont introduced in *Political Tactics*, he tried to justify bicameralism by what came to be called "the law of anticipated reactions":

If it were asked what good has resulted in England from the House of Lords, it would not be easy to cite examples of bad laws which it has prevented by its negative; it is possible, on the contrary, by citing many good ones which it had rejected, to conclude that it was more hurtful than useful. But this conclusion would not be just; for in examining the effects of an institution, we ought to take account of what it does, without being perceived, by the simple faculty of hindering. An individual is not tempted to ask for what he is certain beforehand will be refused (PT p. 28).

Bentham also engages in counterfactual speculation, to refute a possible justification of an upper house that would rest on the "bad laws which it has prevented by its negative". Instead of saying, as does Dumont, that many bad laws would have been proposed had it not been for the upper house, Bentham asserts that bad laws that *were* proposed might not have been put forward had there been no upper house:

As to the *good* [that a second chamber could do], the only case that affords an inlet to it is that in which a pernicious measure, which would have passed had there been but one chamber for it to pass, is prevented from being thrown out by the Second Chamber. To be on sufficient grounds assured that in this case preponderant good has been the result of the operation [...], two distinguishable points must be established: viz. 1 that the law or measure, if carried into effect, would have been pernicious: 2. that had there been no Second Chamber, it would not have been thrown out in the First. For as to this latter point, a state of things not incapable of being realized is – that, on being assured that the measure will not pass the Second Chamber, many of

⁵⁰ Along similar lines, Ferreres (2004, p. 1730 ff.) argues that "pure" constitutional courts tend to be less deferential to the legislature than mixed courts (such as the US Supreme Court), because their only function and raison d'être is to strike down unconstitutional laws.

those who would otherwise have opposed it in the First Chamber, are by one consideration or another kept back from meddling with it (FP p. 106).

The counterfactual, although speculative, is not intrinsically implausible. If members of the first chamber are opposed to a bill favored by their constituents, they may propose it in the certain knowledge that it will be vetoed by the second chamber (or struck down by judicial review). Yet had there been no second chamber (or judicial review), their opposition to the bill might have overridden their desire to please their constituents.⁵¹

IV. Conclusion

To an unusual degree, at least for his time, Bentham thought that the public interest could be promoted by institutional design that would give ordinary people an incentive to act in socially desirable ways. The people at large, in its double capacity as possessors of the supreme constitutive power and as judges in the Tribunal of Public Opinion (FP p. 249), could be trusted to realize its own interests. Instead of *selecting* voters or deputies for preexisting moral, intellectual or active aptitudes, one should *foster* these virtues in all citizens. As I have explained, the virtues are essentially negative, and consist in the absence of an opportunity to promote one's self-interest when doing so would be socially undesirable. At least this holds for active and moral aptitude; for intellectual aptitude, Bentham recognizes the importance of education, but adds that "even without any such endeavours it has been found sufficient" (FP p. 143).

Although the main object of the legislator is to prevent the influence of *sinister interest*, a secondary object is to reduce the impact of *passions* on voters

⁵¹ In unicameral systems, too, even if minorities propose bills they do not want and do not expect to pass (or oppose bills they want and expect to pass) in order to please their constituents, they might have behaved differently as a majority.

and representatives. I have already cited Bentham's claim that publicity of debates might counteract the passions of the debaters, except in the presence of women. Although Bentham is opposed to the mandatory delays in legislation that would be created by bicameralism or by slow amendment procedures, he accepts the possibility of self-imposed delays when the assembly finds itself in a state of ignorance or passion:

What may happen to an individual may happen to an assembly. The individual may feel that, in the actual conjuncture he is not sufficiently master of his passion, as to form a prudent determination, but he may be sufficiently so, not to form any. "I would beat you", said the philosopher to the slave, "if I were not angry". This faculty, of doubting and suspending our operations, is one of the noblest attributes of man (PT p. 142).⁵²

By and large, however, Bentham did not think that institutions or constitutions could successfully harness the passions. One object of the French constitution of 1791, he says, was to protect it "against the assaults of passion. Such is the object in view: what is the natural tendency and effect: against passion, against the assault of passion, it is impotent [...] : opposed to the tide of popular passion it is a sheet of paper" (RRR p. 273).⁵³

Even worse, some institutional measures may *trigger* destructive and dangerous passions. In Bentham's virulent attack on rights as "Nonsense upon stilts", he asserts that "In France the great [end of government] is to inflame and excite [the passions]: it does so when it talks of declaring rights" (RRR p. 386).

⁵² This argument ignores the « hot-cold empathy gap » (Loewenstein 1999) that makes it difficult for individuals in an emotional state to imagine that it will eventually subside. In the debates on the night of August 4th 1789 (note 47 above), those who wanted immediate action said that "an élan of patriotism does not need three days" and "since one cannot vary in such sentiments, the three days would be a pointless waste of time" (see references in Elster 2007 b).

⁵³ The often-cited cooling-down effect of bicameral legislatures has not, to my knowledge, been empirically demonstrated. For some skeptical comments, see Mueller (1996), p. 192-93 (citing the Gulf of Tonkin episode).

Referring more specifically to the right of resistance to oppression stated in Art. 2 of the French Declaration of the Rights of Man and the Citizen, he describes its incendiary effects as follows:

Whenever you are about to be oppressed, you have a right to resist the oppression: therefore, whenever you conceive yourself to be oppressed, conceive yourself to have a right to make resistance, and act accordingly. In proportion as a law of any kind, any act of power supreme or subordinate, legislative, administrative or judicial, is disagreeable to a man, especially if, in consideration of such its unpleasantness, his opinion is that such act of power ought not to have been exercised, he of course looks upon it as oppressive. As often as any thing of this sort happens to a man, as often as any thing happens to a man to inflame his passions, this article, for fear his passions should not be sufficiently inflamed, sets itself to work to fan the flame, and urges him to resistance. Submitt not to any decree or other act of power of the justice of which you are not yourself perfectly convinced. If a Constable calls upon you to serve in the militia, shoot the Constable, and not the enemy (RRR p. 37).⁵⁴

⁵⁴ In the Assemblée Constituante, Lally-Tolendal (AP 8, p.222) and Malouet (AP 8, p.322) also argued that a bill of rights might give the people exaggerated, confused and dangerous ideas about their liberties.

REFERENCES

Works by Bentham:

CC = *Constitutional Code*, Vol. I, Oxford University Press 1983.

FP = *First Principles Preparatory to Constitutional Code*, Oxford University Press 1989

OA = Official Aptitude Maximized, Expense Minimized, Oxford University Press 1993.

PT = *Political Tactics*, Oxford University Press 1999

RRB = "Radical reform bill", in J. Bowring (ed.), *The Works of Jeremy Bentham*, vol. III (1843).

RRR = Rights, Representation, and Reform, Oxford University Press 2001

SR = "Scotch reform", in J. Bowring (ed.), *The Works of Jeremy Bentham*, vol. V (1843).

Others

Adair, D. (1998), *Fame and the Founding Fathers*, Indianapolis IN: Liberty Fund Press

Anderson, T. (1993), *Creating the Constitution*, University Park, PA: Pennsylvania State Press

AP = <u>Archives Parlementaires</u>, Serie I: 1787-1799, Paris 1875-1888

Burns, J. H. (1966), "Bentham and the French Revolution", *Transactions of the Royal Historical Society* 16, 95-14.

Castaldo, A. (1989), *Les méthodes de travail de la constituante*, Paris: Presses Universitaires de France.

Dicey, A. V. (1915), *The Law of the Constitution* 8th edition, Reprint Indianapolis IN: Liberty Fund Classics 2001.

Elster, J. (2006), "Drawing a veil over equality", in C. Sypnowich (ed.), *The Egalitarian Conscience: Essays in Honour of G. A. Cohen*, Oxford University Press.

Elster, J. (2007 a), Explaining Social Behavior, Cambridge University Press

Elster, J. (2007 b), "The night of August 4 1789: A study of social interaction in collective decision-making", *Revue Européenne des Sciences Sociales*_45, 71-94.

Ely, J. H. (180), *Democracy and Distrust*, Cambridge, MA : Harvard University Press.

Estlund, D. (forthcoming), « Democracy counts », In H. Landemore and J. Elster (eds.), *Collective Wisdom*, Cambridge University Press.

Ferreres, V. (2004), "The consequences of centralizing constitutional reviw in a special court", Texas Law Review 82, 1705-36,

Grossman, S. and Stiglitz, J. (1980), "On the impossibility of informationally efficient markets", *American Economic Review* 70, 393-408

Hamilton, A. (1780), Letter to James Duane of September 3 1780, in P. Kurland and R. Lerner (eds.), *The Founders' Constitution*, vol. 1, University of Chicago Press 1987.

Harrington, J. (1977), Oceana, in J. A. Pocock (ed.), The Political Works of James Harrington, Cambridge University Press

Jouvenel, B. de (1961), "The chairman's problem", American Political Science Review 55, 368-72.

Karotkin, D. and Paroush, J. (2003), "Optimum committee size: Quality-versusquantity dilemma", *Social Choice and Welfare* 20 429-41.

Loewenstein, G. (1999), « A visceral account of addiction », in J. Elster and O. J. Skog (eds.), *Getting Hooked*, Cambridge University Press.

Lovejoy, A. O. (1961), *Reflections on Human Nature*, Baltimore : Johns Hopkins Press.

Mathiez, A. 1898) "Etude critique sur les journées des 5 & 6 octobre 1789", *Revue Historique* 67, 241-84.

Matthews, D. (1973), U. S. Senators and Their World, New York : Random House

Mueller D. (1996), Constitutional Democracy, Oxford University Press

Mukhopadhaya, K. (2003), "Jury size and the free rider problem", *Journal of Law*, *Economics*, & *Organization* 19, 24-44

Pierre, E. (1893), *Traité de droit politique, électoral et parlementaire*, Paris : Librairies-Imprimeries Réunies

Riker, W. and Brahms, S. (1973), "The paradox of vote trading", American Political Science Review 62, 1235-47.

Saint-Priest, Comte de (1929), Mémoires, vol. 1, Paris: Calman-Lévy

Tocqueville, A. de (1985), « Notes pour un discours politique », in A. de Tocqueville, *Œuvres Complètes* III.2, Paris : Gallimard

Tocqueville, A. de (2004), Democracy in America, New York : Library of America.

Vermeule, A. (2007), Mechanisms of Democracy, Oxford University Press