LEGISLATING WITH INTEGRITY

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I am happy to participate in this symposium honoring the work of John Feerick. My title is "Legislating with Integrity," and I want to distinguish it immediately from a title that I had thought about addressing in this panel, "Integrity in Legislation." If I had called the talk "Integrity in Legislation," I might have embarked on a discussion of some of the themes that Ronald Dworkin raised in his book Law's Empire, for although integrity—a central theme in Dworkin's recent jurisprudence—is invoked in that book largely as a value associated with judicial reasoning, Dworkin also applies the idea of integrity to legislation.1 According to the analysis in Law's Empire, the integrity of legislation has to do with the coherence of the terms of the bills that are proposed and voted on in the legislature. Dworkin makes an important argument against "checkerboard legislation," by which he means legislative proposals that are internally incoherent, being the arbitrary upshot of political compromise between rival positions in the legislature.2 He offers, as a hypothetical example, a bill representing a compromise between pro-choice and pro-life factions making abortion criminal for pregnant women who were born in even years but not for those born in odd ones.3 Integrity in legislation also has to do with a duty that Professor Dworkin thinks is incumbent on law makers, to pay attention to the coherence of the body of law as a whole—"to make the total set of laws morally coherent"4—so that they are not like the legislators whom William Blackstone once referred to as the "rash and unexperienced workmen," nailing on ill-considered and ad hoc alterations to the great cathedral of the common law, and ignoring the integrity of the underlying structure.5 That would be a worthy theme, and one aspect of it—the argument about checkerboard laws—I shall return to briefly later.6 But Dworkin's sense of integrity in legislation is a fairly static notion of integrity, and today I want to talk more dynamically about the activity of legislating, that is, about

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2. Id. at 178-79.
3. Id. at 178.
4. Id. at 176.
6. See infra text accompanying notes 33-34.
the active political process by which our laws are made.\textsuperscript{7} My aim is to say something about the importance of integrity in that process. This theme of integrity in the processes and activities of law and government is a recurring motif in the life and work of the man we are honoring here today.\textsuperscript{8} I will begin by focusing specifically on what happens inside the legislature, but I will end by saying something about the way in which we as a political and legal community address the legislature, the demands we place upon it (as compared with the demands we place upon other aspects of our political process), and what we think and say about formal legislation as a mode of making law.

\section{I. THE RULES OF RULEMAKING}

A talk like this has to begin with the Bismarck joke. As you know, the Iron Chancellor of Prussia is reputed to have observed that a person with any affection for statutes, like a person with any affection for sausages, should not inquire too closely into the processes by which they are made.\textsuperscript{9} No doubt it will seem to many that the rather unseemly—indeed, unsavory—scramble that characterizes the processes of legislation is not something we should approach too delicately or moralistically; not something we should approach in too high-minded or fastidious a spirit. Maybe, they will say, we should not approach it with the ethical apparatus of integrity.

The cynics need not be interpreted as saying “anything goes” so far as the activity of law-making is concerned. For all their “realism,” they are bound to acknowledge that legislating is not a free-for-all, but a minutely rules-governed enterprise. There are rules governing the processes by which bills are brought to the floor and given priority and allocated time; there are rules governing debate and cloture; there are rules governing the referring of bills to committees, and rules

\textsuperscript{7} For the distinction between “static” and “dynamic” aspects of law, see Hans Kelsen, Pure Theory of Law 108, 193 (Max Knight trans., 1989).


\textsuperscript{9} This saying was attributed to Otto von Bismarck, by Justice (then Judge) Scalia in Community Nutrition Institute \textit{v.} Block, 749 F.2d 50 (D.C. Cir. 1984). Judge Scalia began his opinion by saying, “This case, involving legal requirements for the content and labeling of meat products such as frankfurters, affords a rare opportunity to explore simultaneously both parts of Bismarck’s aphorism that ‘No man should see how laws or sausages are made.’” \textit{Id.} at 51. An earlier attribution to Bismarck was by Chief Justice Terrell in \textit{In Petition of Edward T. Graham}, 104 So. 2d 16, 18 (Fla. 1958). No one seems to know when or on what occasion Bismarck made this observation, if indeed it was Bismarck. The same quotation was attributed to Benjamin Disraeli by Judge MacFarland in Shields \textit{v.} Shields, 584 P.2d 139, 140 (Kan. 1978) (McFarland, J., dissenting) and to Winston Churchill in Bernard Schwartz, \textit{Curiouser and Curiouser: The Supreme Court’s Separation of Powers Wonderland}, 65 Notre Dame L. Rev. 587, 600 (1990). I have adapted this footnote from Jeremy Waldron, Law and Disagreement 88 n.2 (1999).
governing the membership and powers of committees; in bicameral legislatures, there are rules about everything from constitutional priority to conference committees; and there are rules constituting and regulating the various systems of voting and political decision-making. Overall, there is a dense procedural thicket of rules covering all these matters.\textsuperscript{10} Our cynics might say that the very best we can hope for in the legislative process, so far as integrity is concerned, is that the letter of these rules will be complied with. We cannot expect much more than that. It is of course unlikely that behavior which merely conforms to the rules will look attractive from a moral or a theoretical point of view: it will not look like a showcase for integrity. But we should not be too distressed by the culture of power and money that permeates the legislature, or by the opportunistic motives that actuate compliance and the deals that spring up in the interstices of the rules. That legislators’ behavior conforms for the most part to the letter of the rules which constitute and regulate the process of legislation is no mean achievement, given the passions and power plays that permeate the politics of legislation. Beyond that, say the cynics, we might as well put our fastidious concern for procedural integrity aside and concentrate on the quality of the output—the quality of the sausages that actually emerge from the machine. We should make sure that the bills that are actually enacted are the best they can be, and that appropriate constitutional resources are mobilized to strike down the worst of them.

Should we accept this? Are the legal rules that constitute and regulate the legislative process the be-all and end-all of integrity in legislation? In some ways, what I am calling the cynical position is an improvement over what the cynics used to say. There was a time in jurisprudence when philosophers of law played down the idea of legal rules governing law-making. Law-making, said Hobbes and Austin, was a sovereign prerogative, and since the sovereign was the source of all law, he could hardly be governed by law in his exercise of this function.\textsuperscript{11} But nowadays legal positivists maintain that law-making cannot be understood except as a rule-governed process, and that accordingly a legal system must be thought of as consisting of secondary rules—rules for rule-change, for example—as well as the primary rules that are supposed to govern our conduct.\textsuperscript{12} This may be


\textsuperscript{11} See Thomas Hobbes, Leviathan 184 (Richard Tuck ed., 1996); John Austin, The Province of Jurisprudence Determined 212 (Wilfred E. Rumble ed., 1995). Both writers maintained that the sovereign authority was not, and logically could not be, bound by law in the exercise of its law-making power.

the most that modern cynics are willing to concede. Even H.L.A. Hart argued that to understand the operation of secondary rules, all we need to understand is the emergence of a shared sense among the officials that they have an obligation to govern their law-making behavior in a certain way: it does not particularly matter, argued Hart, what the motive for compliance is or where it comes from.\textsuperscript{13}

I believe we can say a little more than this. The legislative process—like any political process—ought to be understood not just in reference to the secondary rules that happen to constitute it and govern it, but also in reference to the relationship between those rules and deeper values and principles that explain why the rule-governed aspects of the process are important to us. Another way of putting this is to say that the secondary tier of a legal system—what Hart called the secondary rules—comprises not only rules but principles as well. Ronald Dworkin argued famously that this is true for the primary tier—that is, he argued that the body of legal norms that govern our conduct includes, for example, non-enacted principles like "No man shall profit from his own wrong-doing"—and it is not hard to extend his insight to apply at the secondary level as well.\textsuperscript{14} So one way of characterizing what I am doing with these remarks is that I am drawing attention to the role that Dworkinian principles play in governing our legislative process. I shall say something about the content of these principles in Part II; at the moment I am talking about their function.

These principles help explain why we have the rules we do; and their "gravitational force" bears on questions of rule-interpretation or hard cases where we appear to be torn between the effect of different legal provisions.\textsuperscript{15} However, I differ from Dworkin in thinking that principles do not just complement the enacted rules. Their role is also to explain why we have the rules of legislative process that we have, and to afford a basis for determining the proper mode of our compliance with them and for distinguishing integrity from lack of integrity in our behavior in this regard.

The idea that a law-governed process may be constituted and regulated by principles as well as rules is not an unfamiliar one. We know it is true, for example, of the judicial process; that is, we know that the enacted rules which constitute and regulate what goes on in the courtroom must be understood by reference to deeper non-enacted norms. What goes on in the courtroom is not a game that we play for its own sake. The rules of evidence and the rules of civil or criminal procedure are supposed to be imbued with a suitable

\textsuperscript{13} Id. at 114-17.

\textsuperscript{14} Ronald Dworkin, Taking Rights Seriously 14, 22-28 (1977). For a suggestion that there are secondary principles as well as primary principles, see Dworkin’s remarks on following precedent. Id. at 37-38.

\textsuperscript{15} For a discussion of "gravitational force," see id. at 111.
awareness of what the parties have at stake in the matter and they serve deeper principles of truth-seeking, fairness, and respect for persons. As we frame the rules of courtroom procedure, we have these underlying values in mind; and it is not unrealistic or naive to say that those values should also determine the spirit in which we conform our behavior, and the spirit in which we demand that others conform their behavior, to the rules. A notion of integrity then can be defined for the process of litigation which is not just about conformity to the black letter rules of procedure. A notion of integrity can be defined which informs our submission to these rules with a sense of why they matter and what they are trying to achieve.

A conception of integrity that is defined in terms of orienting one’s compliance with rules towards the deeper values and principles that rules are supposed to serve faces possible attack from two directions. On the one hand, it might be thought that the purpose of laying down rules for some process—particularly a process where there is a lot at stake for the individual participants—is to define outer limits for their behavior, while leaving them free to do anything within those limits that they conceive necessary to advance their interests. The stakes are very high in the courtroom, which is why we say that a lawyer may do anything to promote the interests of his client, providing he remains within the letter of the procedural rules that apply to him. It is not the lawyer’s job to worry about the values underlying the rules; that is the concern of the rule-maker, but the rule-complier has his own priorities to worry about. Similarly, we might say of the legislature that there too the stakes are high for the participants as rival political factions seek to promote alternative conceptions of the general good, while at the same time trying to obtain as much electoral advantage as they can. That this is their motivation does not mean that there are no deeper values or principles underlying the rules of legislative procedure. But—it may be said—those values and principles are the concern of the people who design the rules, not of the people who are supposed to comply with them. The whole point of setting up rules is to allow the latter group to do what they can to advance their own political interests and ideals within the space that the rules define.

This is a more robust version of our cynics’ original challenge to the idea of integrity in legislation. But it too is misguided. The fact is that different rules stand in different relations to their underlying values and principles. Sometimes it is clear from our understanding of the point of a rule that it is perfectly appropriate to take our behavior as close to the edge that the rule defines as we can get away with; that is, sometimes it is clear that the rule has been set up precisely in order to allow us to do that. Speed limits or rules about maximum tax

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deductions are two examples. In other cases, however, reflection on the point of a rule reveals that this would be inappropriate. For example, a professor who asks how much he can “hit on” a female student before it becomes sexual harassment, much like an official who asks what favors he can accept from lobbyists before it becomes bribery, already shows that he does not understand what following the rules in this area is supposed to be like. So already there is room for a notion of integrity that goes beyond the mere fact of compliance. An individual follows the rules with integrity when he does not just comply mechanically or in a spirit of pure self-interest, but when he reflects upon the rules to an extent that enables him to distinguish between the occasions when a mechanical or an up-to-the-limit mode of compliance is appropriate and the occasions when it is not.  

On the other hand, by relating the integrity of a political procedure to the deeper values underlying the secondary rules that constitute it, I do not mean to undermine the status of those rules qua rules or to suggest that compliance with them should be wholly oriented to the contribution that compliance makes to the promotion of those values. I do not mean to suggest, for example, that compliance should not be regarded as necessary when the rules seem over-inclusive with regard to the underlying purpose. A rule may be followed categorically and still be followed in a way that is sensitive to the values that underlie it: such values may determine how important the rule is, for example, and how severely we should regard or punish a breach. Certainly, attention to the purpose or the underlying principle will affect the way we make decisions about the application of the rule in hard or marginal cases, and that is not at all the same as refusing to follow the rule when it seems over-inclusive. A rule can seem over-inclusive in a core or non-marginal case; or it can seem vague or indeterminate in a case that turns out to be central to the purpose or principle underlying the rule. Using the purpose then to help us in the vague or indeterminate case does not commit us to following the purpose rather than the rule in cases where the meaning of the latter is clear.

17. As an analogy here, consider the difference between “indirect utilitarianism” in moral theory and what Bernard Williams has called “Government House utilitarianism.” See Bernard Williams, Ethics and the Limits of Philosophy 108-10 (1985). In Government House utilitarianism, there is supposed to be a division of labor between those who simply obey the rules (the natives) and those who are allowed to reflect upon their purpose (the colonial administrators). In the indirect utilitarianism of someone like R.M. Hare, however, both tasks are assigned to each individual: in a more reflective moment, each of us must try to ascertain the spirit in which each rule should be followed. See R.M. Hare, Moral Thinking: Its Levels, Method and Point 44-64 (1981). I am saying that this, at the very least, is what integrity requires.

II. THE VALUES BEHIND THE RULES

Let us turn now to the content of these deeper values and principles, which I believe underlie the rules that define the legislative process. We might begin with some reflection on the very idea of legislation. Legislation is a practice whereby laws are made (or changed or repealed) deliberately by formal processes dedicated explicitly to that task. Now, legislation is not the only way law changes; it is changed also by the decisions of common law judges. Some reputable jurists have even gone so far as to suggest that the courts have the primary responsibility for legal change.19 However, when courts change the laws, they do so under partial cover of a pretense that the law is not changing at all. As John Austin put it, the judge makes law obliquely, on the side, as it were. The judge’s “direct and proper purpose is not the establishment of the [new] rule, but the decision of the specific case. He legislates as properly judging, and not as properly legislating.”20 Judicial decision-making does not present itself in public as a process for changing the law. Quite the contrary: any widespread impression that judges were acting as law-makers, rather than law-appliers, would detract from the legitimacy of their decisions in the eyes of the public. And this popular perception is not groundless. Courts are not set up in a way that is calculated to make law-making legitimate. Legislatures, on the other hand, exist explicitly for the purpose of law-making. Sure, they also have other functions, like approving appointments, consenting to taxation, and debating government policy. But law-making is their official raison d’être, and when we evaluate the structure and processes of legislatures and the basis on which their membership is determined, we do so with that function in mind.

One value, then, which might be thought to underlie the legislative process is the idea that on the whole it is good that, when the law is changed, it should be changed openly and explicitly in a transparent process dedicated to that task. In this way, everyone is put on notice.

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19. Hart and Sacks put the point this way in the late 1950s in their famous Legal Process materials:

A legislature has a primary, first-line responsibility to establish the institutions necessary or appropriate in the everyday operation of government. For example, it must create courts. . . . But in relation to the body of general directive arrangements which govern private activity in the society its responsibility is more accurately described as secondary in the sense of second-line. The legislature characteristically functions in this relation as an intermittently intervening, trouble-shooting, back-stopping agency. . . . The private lawmakers, the courts, and administrative agencies are . . . the regularly available continuously functioning agencies of growth in the legal system.


that a change in the law is in the offing, so that members of the community can face up to the issues that the prospect of such a change gives rise to. It is much easier to do this when there is a flourishing practice of legislation in an institution designed for that task than when legal change is assigned to a body, like a court, whose activity inevitably blurs the distinction between debates about legal change and debates about the interpretation of existing law. Partly what is at stake here is the liberal principle of publicity—the idea that the legitimacy of our institutions should not depend upon any widespread public misapprehension about the way they operate. People’s acceptance of and their willingness to comply with newly-made law should not depend on a false belief that the law in question is not newly-made at all but simply newly-interpreted. But legitimacy is not the only issue. Changing law through a public and transparent process of legislation presents legal change as an appropriate focus for political action on the part of the public. It conveys the idea that law in some sense belongs to the members of the public, and for that reason they are entitled to participate, directly or through their representatives, in the debates and decisions that determine whether or not it will be changed. It is their law, not something to be imposed on them by a ruling clique, who are better able than the people are to determine how the law should change, and better able to do this when they are undistracted by public opinion or popular participation. Again this idea—that the people own the law, that it is their law, and that therefore they should participate in the process of legal change—is much harder to reconcile with the assignment of primary responsibility for legal change to the courts. This brings me to a second important principle—that law-making should be not only an


22. This distinction is inspired in part by Justice Scalia’s comments in his dissent in Planned Parenthood of Pennsylvania v. Casey, 505 U.S. 833, 1000-01 (1992), about the relation between interpretive disputes and the growing practice of public demonstrations at the Supreme Court:

What makes all this relevant to the bothersome application of “political pressure” against the Court are the twin facts that the American people love democracy and the American people are not fools. As long as... the people thought... that we Justices were doing essentially lawyers’ work up here—reading text and discerning our society’s traditional understanding of that text—the public pretty much left us alone. Texts and traditions are facts to study, not convictions to demonstrate about. But if in reality our process of constitutional adjudication consists primarily of making value judgments;... if, as I say, our pronouncement of constitutional law rests primarily on value judgments, then a free and intelligent people’s attitude towards us can be expected to be (ought to be) quite different. The people know that their value judgments are quite as good as those taught in any law school—maybe better. If, indeed, the “liberties” protected by the Constitution are, as the Court says, undefined and unbounded, then the people should demonstrate, to protest that we do not implement their values instead of ours.

Id. (Scalia, J., dissenting).
open and transparent process, but it should also be a process which may plausibly be attributed to the people and describable as a process of self-government. This principle has a lot of work to do. We have extremely complicated rules about the membership of our legislative bodies, ranging (at the national level, for example) from the constitutional provisions governing the allocation of seats in House and Senate,\textsuperscript{23} through the morass of rules and practices associated with redistricting, to the electoral laws themselves, governing who may vote and how votes are counted.\textsuperscript{24} It is obvious that this array of rules does not exist as an end in itself but is oriented to deeper ideas about fair representation, democratic enfranchisement, and basic political equality.\textsuperscript{25} Once again, our proverbial cynics may intervene to remind us how imperfect our electoral system is by the standards of democratic theory, and how byzantine and unprincipled are the rules governing the allocation of seats and the boundaries of constituencies. All this is true; and it is true too that there is intense ideological controversy about all these matters. My emphasis on the deeper ideals that underlie the legal rules governing these matters is not meant to suggest that our arrangements are perfect (or even adequate) by democratic standards. Instead, what I mean to emphasize is that we do have \textit{something} in our law, besides the rules themselves—some legal principles, in the Dworkinian sense discussed earlier\textsuperscript{26}—to which we can refer when we express our dissatisfaction with these arrangements or when we debate with one another about how to make things better. Without those deeper ideas in mind, we cannot think sensibly about apportionment, we cannot think sensibly about redistricting, and we cannot think sensibly about the electoral system. And—I want to suggest—without these deeper ideas in mind, we are not in a position to distinguish between participating in a redistricting or reapportionment process with integrity and participating in a way that lacks integrity, or between fighting one’s corner in an electoral dispute with integrity and fighting without integrity.\textsuperscript{27} Once again, in this area of life, integrity is not just a matter of staying within the rules; it is, at the very least, a matter of orienting

\textsuperscript{23} U.S. Const., art. I, §§ 2-3.

\textsuperscript{24} For a good general account, see Samuel Issacharoff et. al., \textit{The Law of Democracy: Legal Structure of the Political Process} (2d ed. 2002).

\textsuperscript{25} I do not want to suggest that democratic principles are the only legal principles in play here. There are also principles about the equal representation of the constituent states of the Union in at least one house of the legislature and there are principles, too, about the importance of stability and efficiency in electoral and legislative politics. It is, of course, part of the Dworkinian model of the presence of principles in the law that diverse and even potentially contradictory principles can interact with one another. \textit{See} Dworkin, \textit{supra} note 14, at 25.

\textsuperscript{26} \textit{See supra} text accompanying notes 14-15.

\textsuperscript{27} Without naming names, it is obvious that almost everyone wanted to draw distinctions like these in the disputed Presidential election of 2000, and in the litigation that surrounded it culminating in \textit{Bush v. Gore}, 531 U.S. 98 (2000).
one's conduct to the rules the way that is required by the principles underlying the rules.

Notice that the gravitational force of these democratic principles affects not only the rules that determine the membership of the legislature, but also the rules that govern the allocation of power within the legislature and, in particular, the voting rules that members use in making their democratic decisions. Legislatures are majoritarian institutions: that is, they make their decisions by voting among their members. So far this does not distinguish them from courts. The Supreme Court of the United States, for example, has made many of its most important decisions by margins of five-to-four or six-to-three among the justices. The difference is that in the case of the Court, majority-voting is simply a decision procedure and there is not much more to be said in its favor than that it produces determinate decisions among an odd number of justices.\(^{28}\) Certainly it would be hard to defend majority-decision in this context on grounds of fairness, because the justices do not represent interests to whom society has an obligation to be fair, nor does society have an obligation to be fair to each of the justices in his or her own right.\(^{29}\) In the case of the legislature, however, the decision-procedures used are fraught with issues of fairness towards the members of the community at large. What makes the decision procedures of legislatures fair from a democratic point of view is that a vote in the legislative chamber is related to a notional vote in the country, by virtue of the elective credentials of each voting member. To be sure, the relation is very rough: a majority among the legislators may represent much less than a majority of the people, if some constituencies were won by large margins and other constituencies, whose representatives vote with the majority, were won by small margins. Too much of this, and there will be reason to adjust the electoral system or the system of representation to tighten up the correlation. It would make little

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The suggestion that majority-decision is simply the ur-form of political decision-making is found in Hannah Arendt, On Revolution 163 (1963), "[T]he principle of majority is inherent in the very process of decision-making" and it is "likely to be adopted almost automatically in all types of deliberative councils and assemblies." Notice also Arendt's contrast between majority-decision and majority-rule: "Only where the majority, after the decision has been taken, proceeds to liquidate politically, and in extreme cases, physically, the opposing minority, does the technical device of majority decision degenerate into majority rule." \textit{Id.}

sense to pursue similar adjustments in the case of institutions, like the U.S. Supreme Court, that also use majoritarian procedures, for their use of these procedures is, as I said, unrelated to norms of democratic fairness. I suspect something similar can be said about the rules determining membership of committees, seniority and so on—that these, too, are related to important underlying principles that are concerned ultimately with respect for the legislators' constituents and not just respect for the legislators themselves. We say that Congress is master of its own procedures, and presumably we say that state legislatures are masters of their own procedures as well. But, for the reasons I have given, I do not think integrity can be restricted to the principle of keeping faith with whatever procedural rules happen to have set up in the course of legislative history. It is more important than that: one has to keep faith with those procedures as expressions of these deeper principles of fairness and democracy.

Legislatures do not just assemble and vote, they deliberate. They are places where we air our disagreements about the most important issues that face us as a community, and many of the most Byzantine rules of legislative procedure concern the process of debate—who may speak when, who is entitled to demand a reply from whom, how long debates are to last before there is a vote, how debates are brought to an end, and so on. What are the deeper values and principles underlying this array of rules?

We may begin by stating the obvious: the issues discussed in legislatures are issues on which we expect to experience disagreement. They are issues where we expect proposal to be matched by counter-proposal, and on which every proposal that someone finds persuasive is liable to be opposed in a variety of ways by others. The idea that it is appropriate, indeed necessary, to air these disagreements in open debate is evidently a deep principle underlying the rules that govern legislative procedure. It can be justified in two complementary ways. First, deliberation may actually improve our legislative decision-making. Because of what is at stake in legislation, we have a duty to make the best decisions we can, and to neglect nothing that may improve our decision-making. Second, whether or not it makes our decision-making better, dissenting voices have a right to be heard and listened to, because no proposal—however popular it is at the outset, however much it seems to accord with common sense—is entitled to stand in the name of the community until it has been tested in the face of dissent. Associated with this latter point is the principle of loyal opposition—the principle which holds that dissenting from and actively opposing a popular proposal (or any proposal) is not a form of treason or disloyalty to the society, and that a person is not to be regarded as a subversive or a saboteur merely on account of his opposition to proposal after proposal put forward by those who are popular or those who hold power.
That these concessions to dissent are not mere tokens is borne out by a couple of facts about the way we structure our legislatures. One of the most striking features of modern legislatures is their size.\textsuperscript{30} We seem to go out of our way to ensure not only that a plurality of voices may be heard, but that many voices, a large variety of different dissenting voices, may be heard in the deliberations that take place in the legislative chamber. Unless we anticipated a multitude of different dissents, it would make little sense to populate our legislatures with hundreds of members, as opposed to the handful of homogeneously acculturated individuals whom we install on the benches of our highest courts. Another way in which the concession to dissent is not a mere token is that legislative sessions are not just treated as places where dissenters are permitted to have their say as a matter of free expression. They are places where we permit dissenters to test the popular appeal of their ideas and to measure how much support they can command among the fairly allocated membership of the legislature. If they command majority support, they win; and what they win is not a debating prize, but the right to have their proposal regarded as the law of the land. In other words, we organize the legislative chamber as a place where dissenters can attempt to gain power, to overthrow or replace the powerful and popular politicians who currently command political support. The rightness of permitting this—indeed the moral requirement that dissenters must be permitted to act in this way—is one of the deepest and most important principles underlying our legislative procedures, and it is a principle that needs to be taken seriously in the way we interpret and manipulate those procedures. I have stated these various principles quite bluntly, as though their content were obvious, or as though I were an authority (or could cite an authority) on the principles underlying the legal rules of legislative procedure. But of course Dworkinian principles are not like that. They do not have canonical formulations and they cannot be recognized by source-based criteria in the way that rules and precedents are recognized.\textsuperscript{31} They are more like moral reasons or strands of moral reasoning embedded in the law. Certainly, there are competing conceptions of what the various principles I have mentioned require, and there would probably be competing lists of the principles themselves if anyone else bothered to undertake a similar exercise. I have concentrated particularly on principles associated with democracy, representation, fairness, and dissent; others might also stress principles relating to efficiency, stability, and the duty of care that legislators owe to those who will be affected by their decisions.\textsuperscript{32} My point is not to minimize the possibility of this

\textsuperscript{30} See the discussion in Jeremy Waldron, Legislation by Assembly, 46 Loy. L. Rev. 507 (2000). \textit{See also} Waldron, supra note 9, at 49-68.

\textsuperscript{31} See Dworkin, supra note 14, at 40-41.

\textsuperscript{32} See, e.g., Adrian Vermeule, The Constitutional Law of Congressional
sort of controversy. Quite the contrary: I want to highlight it and say that it is impossible to understand the integrity of our legislative procedures without engaging in deep controversies about things like democracy, representation, fairness, and dissent. In other words, I believe a legislator acts with integrity not when he necessarily agrees with me about the deeper principles underlying legislative procedure, but when he at least reflects on what those principles might be, is willing to engage in conversation about them, and attempts in good faith to orient his rule-compliance to the upshot of that reflection and conversation.

III. THE VALUE OF INTEGRITY

Legislative integrity is not just a principle for legislators, nor is it just a principle for those who set the legislatures up or make decisions about their structures. Legislating with integrity is also a duty incumbent upon society as a whole: it is an aspect of the morality with which citizens deal with one another, under the auspices of their most serious society-wide relations, namely, law and law-making.

The civic aspect of this duty is most prominent when questions about the electoral system and the system of voting are raised, whether these are particular problems—like those that plagued the resolution of the Presidential election dispute in Florida in 2000—or wholesale issues about the overall shape of the electoral system—choices about proportional representation, for example, that many societies have faced, and in which we in the United States are looking increasing like outliers. There are intermediate problems, too, like the integrity of the redistricting and apportionment processes, which citizens must pay attention to and take responsibility for, however much we have in the past surrendered those issues to the law-makers themselves to determine.

The integrity of the legislative process can also be a concern for other actors in the legal system. I have in mind particularly the role of judges and the way in which the measures that emerge from the legislature are interpreted. Judges have a duty to keep faith with the integrity of the legislative process too, and I want to offer a couple of examples to illustrate this point.

The first example concerns the standing judicial temptation to try and "clean up" the statutes they are presented with. It is sometimes said that courts have a responsibility to interpret statutes in a way that is not blatantly over- or under-inclusive relative to their purpose. To take a very crude example, a judge might be tempted to read an ordinance prohibiting dogs in restaurants for health reasons in a way

that admits clean dogs (so as to avoid over-inclusiveness), while excluding filthy cats (so as to avoid under-inclusiveness).\textsuperscript{33} However, quite apart from the difficulty of discerning the purpose of the legislation in question, there are also issues about the respect that the judge should pay to the compromises that were necessary in the legislature in order to get this particular measure enacted. Part of what I emphasized in Part II is that legislatures are political institutions: they are places where law is politicized. The politics are not just in the deliberation, and the voting; they are also in the search for votes and in the compromises and adjustments that the formation of a majority often requires. This will certainly affect the way that the final version of a bill is drafted. It may have been the case that the restaurant hygiene measure in our example would not have passed without the support of the cat lobby, i.e., unless it was (from a health point of view) under-inclusive in this regard. In other words, provisions that seem arbitrary in the statute when it is read on its own may seem non-arbitrary when the politics surrounding its enactment are taken into account. Certainly there are good reasons to avoid incoherent legislation. Even when such incoherence is the price of political support in the legislature, law-makers should strive to enact measures which have integrity and which do not disturb the integrity of the legal system as a whole.\textsuperscript{34} But if a court takes it upon itself to clean up the statute, it is slighting the political process by virtue of which alone the statute has its legitimacy, as well as begging the important question—which of course any exercise in repairing inconsistency inevitably gives rise to—as to which cleaned-up version of the bill would have been enacted had the legislature been paying proper attention to its duty in this regard.

There are issues, too, about the use of legislative history in interpretation. One common mode of statutory interpretation is to attempt to recover the intention of the legislature in passing a particular bill (whose text now seems for some reason obscure or difficult to apply). We ask ourselves whether the legislature intended the text to apply in a particular way to a case like the one in front of us, or we speculate about what the legislators would have intended if cases like the one in front of us had been brought to their attention. The quest for legislative intent is big business in the United States, where lawyers spend hundreds of billable hours combing the congressional record for any scrap of material, any speech or memo, that may bear on the interpretive issue.\textsuperscript{35} But it is a controversial practice: the quest for legislative intent was described by one jurist as

\textsuperscript{33} See, e.g., Schauer, supra note 18, at 207-28.

\textsuperscript{34} See Dworkin, supra note 1, at 167, 176-86, 217-24; see also supra text accompanying note 6.

\textsuperscript{35} Since the decision in Pepper v. Hart, [1993] A.C.. 593, it has become common also in England and in Commonwealth jurisdictions.
something like searching for a friendly face in a crowd, and it is strongly opposed in America by devotees of what is called "the new textualism."

On its face, the idea of an appeal to legislative intent makes sense. In the case of an individual speaker, when his words are unclear, we can ask him what he meant or we can consult what we know of the thoughts that were associated with his original utterance. And if the legislature were a single individual we might do exactly the same thing: confronted with an ambiguous enactment, we would take the sovereign aside and ask him what he meant, or if he was unavailable we would pore over what else we knew about the state of mind he was in at the time that he did his legislating. None of this makes sense, however, in the case of a legislature that comprises hundreds of members with radically diverse opinions and states of mind. As I said earlier, this is diversity we are supposed to value, not gloss over. Such a body may be said to have intentions only in the performance of its formally specified acts—i.e., only by virtue of the constitutive rules (about voting, etc.) that stipulate what is to count as an Act of Congress or an Act of Parliament. Beyond that, there is no question of our being able to attribute to the legislature as such any intentions, or thoughts, or beliefs, or purposes. Of course, individual legislators may have had their own individual views and hopes about the legislation expectations. And various devotees of legislative intent have suggested laborious schemes for determining whose intentions count. But none of this has any authority. There is no authorized mechanism for bringing these particular mental states into relation with one another in a way that would enable us to specify the views and hopes of the legislature as such. In the absence of such an authorized mechanism, the textualists have suggested that there is some danger in giving legislative history much weight to interpretation because often the relevant piece of history has been inserted deliberately into the record in order to be available for subsequent interpretation. If Justice Scalia is to be believed, it is one of the standard tasks of a Washington lobbyist to persuade somebody on the staff of a legislator to insert language into the debate that can then subsequently be used as a resource for thinking about the interpretation of the bill once it has been enacted. And patently there is merit in the position of the new textualists, who say that if we rely too much on what has been said by an individual legislator during

39. Scalia, supra note 37, at 34.
the debate, we are slighting the integrity of the debate and enactment process as a whole. The only material that has authority as a result of the legislative process is the bill as eventually enacted (by both houses, if it is a bicameral legislature) and presented to the President or head of state for his signature. If we haphazardly pull out other stuff from the legislative process, and attempt to give it weight and authority in interpretation, then we are endangering the integrity of the legislative process. I am not suggesting that we abandon the use of parliamentary history altogether—or I am not suggesting that today. 40. But if we do use parliamentary history, we have a responsibility to use it in a way that takes legislative integrity seriously and takes seriously the point that the mere fact that something has been said by a committee chair or by an individual member on the floor of a house does not by itself give it authority. Authority is conferred on a proposition by the whole process of enactment, not by simply its occurrence within the physical boundaries of the legislative chamber. Even when we are inclined to associate a legislative measure with some particular politician who has sponsored it, or some particular committee chairman who has shepherded it through the legislative process, we should remember that the bill stands in the name of the whole legislature, and it is a fact of first importance about the integrity of legislating that we take seriously and keep faith with that proposition. 41.

IV. INTEGRITY IN ACTION

In the final part of my remarks, I want to distract you with an historical example about the relation between bills and their sponsors. In January 2003, the British statesman and author Roy Jenkins died at the age of eighty-two. Among his many accomplishments, Jenkins was a founding member of the breakaway Social Democrat party in

40. For an argument to this effect, see Waldron, supra note 9, at 119-46. See also Jeremy Waldron, Legislators’ Intentions and Unintentional Legislation, in Law and Interpretation: Essays in Legal Philosophy 329, 352-56 (Andrei Marmor ed., 1995).

41. I find the following an instructive analogy. Sometimes litigation may go so well for one of the parties that a brief filed by their counsel is adopted more or less verbatim as the opinion of the court. This is very flattering: the court is so persuaded by counsel’s argument that it adopts her submission as its opinion. Still, even when that happens, it doesn’t mean that the court has substituted successful counsel’s judgment for its own judgment. And if there is an ambiguity in the text of the court’s opinion, it would not be appropriate for subsequent jurists to ask the successful counsel what the opinion meant and accord any authority to her answers. What she did was make a spectacularly successful submission to the court. But the court’s judgment belongs to the court and has the authority of the court. I think a committee chair or a powerful legislator (or in a Westminster system, a Minister) who successfully guides a bill through Parliament is like a counsel whose brief is eventually adopted by the court. It is certainly an individual triumph but it doesn’t mean that that chairman’s or that legislator’s or that Minister’s opinions about the meaning of the Bill have any particular authority.
the United Kingdom, President of the European Commission, Chancellor of Oxford University, and author of acclaimed biographies of Churchill and Gladstone. Most prominently, Jenkins was also a Cabinet Minister in the third and fourth Labour governments: he was Home Secretary for several periods and he was Chancellor of the Exchequer for several periods. Many people thought he should have been Prime Minister, but he never was. It is in his capacity as Home Secretary in the term 1965 to 1967 that I want to say something about his accomplishments today.

In an obituary published in the New York Times at the time of his death, the writer said this of Roy Jenkins: “He showed himself a notable social reformer by legalizing abortion and homosexuality, easing divorce, and ending theater censorship.” Now, strictly speaking, these formulations are quite inaccurate. The Home Secretary has no authority to legalize abortion or homosexuality; he has no authority to enact anything of the sort. Perhaps he has power to make some regulations under statutory authority, but certainly the Home Secretary cannot on his own initiative change the laws about whether abortion or sodomy are felonies. That is a task of the British Parliament as a whole.

Now, I take it what the New York Times meant was that Jenkins was the minister responsible for drafting and sponsoring the bills that legalized abortion and homosexuality, and for shepherding these bills through the House of Commons in 1965 and 1966. As everyone knows, under the British Constitution, Parliament seldom fails to enact measures that are proposed by the government and seldom enacts any measures that are not proposed by the government, because the government exists as, in effect, a committee of the House of Commons. So even though in strict constitutional theory we should say legislation is enacted by Parliament, maybe we can say—in mitigation of the New York Times’s error—that it was a convenient abbreviation: Parliament may have passed the bills, but in a real sense they were the work of Roy Jenkins and the Labour government of which he was a member.

But actually that is not true either. Abortion was legalized in 1965-1966 on the basis of a Private Member’s Bill in Parliament, and in the same period, homosexual sodomy among consenting adults ceased to be a criminal offense on the basis of a Private Member’s Bill in Parliament. This was not government legislation, and Jenkins was not the Minister responsible for enacting it. If he made a contribution, it was more indirect than that. Roy Jenkins’s contribution was, first, to make Parliamentary time available for debating these measures (for

time is not always, or even often, available for Private Members’ Bills), and secondly, to announce that Labour Party MPs could have what is known as a “free vote” on these measures, unconstrained by the party whip. This concession was matched by similar announcements by Conservative Party leaders and the leaders of other parties in the House of Commons.

Is what I have said just pedantic nitpicking about aspects of British legislative practice that no one has any reason to know anything about? Well I don’t know about *New York Times* obituary writers, but it seems to me that those who are interested in legislative integrity do have good reason to take this distinction very seriously indeed—I mean the distinction between an individual statesman doing something on his own initiative and a Private Member’s Bill being enacted after full and open debate in Parliament. Let me explain why.

One reason it is important is that the *New York Times*’s formulation encourages us to overlook the significance of the legislative sessions and the legislative debates that accompanied these momentous legal changes. I will focus my remarks on abortion and compare the British legislative process with the American judicial decision in *Roe v. Wade*, though exactly similar remarks might be made also about the British legislation on homosexual law reform and the recent Supreme Court decision in *Lawrence v. Texas*. I recently read through the House of Commons debates on the Medical Termination of Pregnancy Bill from 1966. In the British legislature, the Second Reading debate is where deliberation takes place on the main principles of the bill. I think the Second Reading debate on the Medical Termination of Pregnancy Bill is as fine an example of legislating with integrity as you could hope to find. It is a sustained debate—about 100 pages in *Hansard*—and it involved pro-life Labour people and pro-choice Labour people, pro-life Conservatives and pro-choice Conservatives, talking through and focusing on all of the issues that need to be addressed when abortion is being debated. They debated the question passionately but also thoroughly and honorably, with attention to all of the issues of rights on both sides and all the issues of principle on both sides, not to mention all the pragmatic issues on both sides. It was a debate that in the end the supporters of the bill won, and the pro-choice faction prevailed. The Second Reading debate was only the beginning, of course. There was a long committee of the whole stage and then a Third Reading debate, and then of course similar debates in the House of Lords. But eventually, by margins of about 300-to-100 or 300-to-150 in the Commons, this legislation was enacted. One remarkable thing was that everyone who participated in the debate, even the pro-life MPs when they saw which way the vote was

46. *Id.* at 1164.
going to go, paid tribute to the respectfulness with which their positions had been listened to and heard in that discussion.\footnote{See, e.g., id. at 1152. Norman St. John-Stevas, an MP who voted against the bill, nevertheless began his argument by noting, “We all agree that this has been a vitally important debate, conducted on a level which is worthy of the highest traditions of the House.” MP St. John-Stevas then moved on to congratulate the MP “on the manner in which he introduced the Bill, which he did with extraordinary moderation and skill.” Id. at 1152.}

Think about that. How many times have we ever heard anybody on the pro-life side pay tribute to the attention and respectfulness with which their positions were discussed, say, by the Supreme Court in \textit{Roe v. Wade}? In the United States, liberals believe that courts are better for resolving these issues than legislatures. No doubt this is sometimes on the unprincipled ground that we think we are more likely to get the result that we want from courts. But we profess to believe it, too, on the grounds that the courts provide a more suitable forum for discussing the moral issues. And that is what I now want to contest, in the name of legislative integrity. For integrity is not just about what happens in the legislature, it is also about what doesn’t happen in the legislature but ought to happen there rather than somewhere else. At the beginning of Part II, I spoke about the importance of the very idea of legislation. I suggested that a society facing a momentous change in its law should face up to that in an explicit process, rather than blur it under the heading of some issue of interpretation. The British example from 1966 provides us with a fine instance of a legislative process that lives up to that principle. It was a process involving hundreds of elected representatives, expressing a diversity of passionately different views, in which the various positions on this most difficult of issues were able actually to confront one another in serious debate. I doubt whether very many of those who celebrate \textit{Roe v. Wade} have ever read what a genuine legislative debate on an issue of principle like abortion actually involves, and I commend the Second Reading debate in \textit{Hansard} to you for that reason, as well as the similar debates that the British Parliament of Roy Jenkins’s generation had on questions like homosexuality, capital punishment, censorship, prostitution, and so on. All of these issues that we in America are used to having dealt with in courts—as though they were issues of interpretation—are dealt with there in open legislative debate. All of these debates had what we would call liberal outcomes; but in each of them the opposing positions were heard and discussed and given a fair opportunity to test the measure of their support among the representatives of the people.

Elsewhere I have written at length opposing the American practice of judicial review of legislation,\footnote{See Waldron, supra note 9, at 10-127, 211-312; see also Jeremy Waldron, \textit{Judicial Power and Popular Sovereignty}, in Marbury Versus Madison: Documents and Commentary 181 (Mark A. Graber & Michael Perhac eds., 2002); Jeremy} and I do not want to repeat those
arguments here. But I brought the issue up in the context of the obituary of Roy Jenkins because I think it is revealing about the discomfort we feel in America about attributing responsibility for these reforms to a large body of people rather than to one person or a few individuals. In the United States, we congratulate ourselves on consigning issues of individual rights to the courts for constitutional adjudication, on the ground that courts may be regarded as forums of principle, to use Ronald Dworkin's famous phrase.\textsuperscript{49} Indeed we sometimes say that the British are backward, for not doing things that way.\textsuperscript{50} We see legislatures as corrupt and unruly and we are more comfortable with the thought that questions about rights are worked through in a principled way by a cluster of high-minded individuals, undistracted by vote-counting or issues of electoral advantage. They are questions that require serious moral thought and we find it difficult to associate that seriousness with the clamor of a legislative assembly, as opposed to the solemnity of deliberation by a small and serious group of black-robed notables. A decision by a judge or a handful of judges better matches our image of serious moral thought by a Kantian individual, than a process of noisy debate among the representatives of the people.

I have little patience with this fetishism of closeted moral thought by respectable individuals as a model for a political process that is supposed to rule tens or hundreds of millions of free people. Moreover, I think we do a serious injustice to the possibilities of legislation on these issues, when we attempt to reduce the liberal decisions of the British Parliament to the high-minded judgment of just one Roy Jenkins. In other words, I am not convinced that the passage I quoted from the \textit{New York Times} obituary was a harmless error. Maybe the \textit{New York Times} cannot bear to imagine that abortion law reform or homosexual law reform could have been handled by legislators in a 600-member assembly, confronting one another on equal terms. So the \textit{Times} concocts this fantasy that the British process was not after all so different from our own: it was the work of a philosopher-king even if he did not wear judicial robes.

A further point that is sometimes made in favor of assigning law-making on these issues to courts rather than to legislatures is that

\begin{quote}
\textsuperscript{49} Cf. Ronald Dworkin, \textit{A Matter of Principle} 33, 69-71 (1985) (using the term "the forum of principle" to describe the United States Supreme Court).
\end{quote}
courts give reasons of principle for their decisions. In the American constitutional system, it is said, we are never just faced with a bare decision, coercively imposed; the majority on the Supreme Court state their reasons (and the minority dissenters will state the reasons for their position as well). I have my doubts about this too. It is worth bearing in mind, as you read what passes for "reasoning" in Supreme Court decisions, that much of it is oriented not to the specific merits of the moral issues that need to be confronted on the issue itself, but to issues about interpretive technique, or issues about precedent or jurisdiction or other legalisms. This is the price of what I referred to earlier, quoting John Austin, as the "obliqueness" of this form of law-making:

we have to pretend that we are not deciding on the merits but simply interpreting some eighteenth century calligraphy. On the other hand, when we read the British debates I have mentioned, we become aware that legislative decisions on these matters are not just coercive impositions, with the weight of majorities behind them. They too are reasoned decisions, emerging from processes of deliberation: there is a hundred pages of reasoning accompanying the Second Reading vote on the Medical Termination of Pregnancy Act. The key difference between the British legislative debate and the American judicial reasoning is that whereas the latter is mostly concerned with interpretation and doctrine, the former is able to focus steadfastly on the issue of abortion itself and what it entails—on the status of the fetus, on the predicament of pregnant women and the importance of their choices, their freedom, and their privacy, on the moral conflicts and difficulties that all this involves, and on the pragmatic issues about the role that law should play in regard to private moral questions. Those are the issues that surely need to be debated when society is deciding about abortion rights, and those are the issues that are given most time in the legislative debates and least time in the judicial deliberations.

I do not want to be read as saying anything here about the constitutional merits of the decision in Roe v. Wade or to suggest that it is time to put it behind us. What I do want to suggest, though, is that we liberals should open our minds to the possibility that issues like these can be dealt with in the framework of an open legislative debate. I know people will say that I have painted a very unrealistic picture of legislation. But the example I have given is not a philosopher’s concoction. Nor is it the fake debating of those theorists who profess to believe in deliberative democracy, but who want to control through their writings exactly how the debate should unfold. I have cited a real legislative process that took place in the

51. See supra note 20 and accompanying text.
52. See supra note 45 and accompanying text.
United Kingdom in the 1960s and, far from being an anomaly, it is, as I said, matched by similar debates in the British Parliament on almost all of the great issues of principle that American liberals are certain should be assigned to the courts: capital punishment, homosexual law reform, and so on. These are examples of real legislators proceeding on the basis of those deep principles I mentioned about open debate, respectful disagreement, equal enfranchisement, fair decision-procedures, and dissenting voices being given an opportunity to measure their support. In short, they are examples of legislative integrity—not just the integrity of the legislators who participated so honorably in these proceedings, but also the legislative integrity of the citizens of the United Kingdom, who did not flinch from assigning these issues to a representative forum and whose commitment to democracy did not evaporate the instant they looked like losing a democratic debate.

Integrity in law-making, in other words, is not just a principle for legislators. Nor is it just a principle for legislators and judges. It is a principle for anyone who has a say or anyone can bring pressure to bear on the issue of where our laws should be made and the issue of what processes should be used when a society is seeking resolution on a legislative issue on which its members disagree. As a citizen, one can act with integrity on these issues—bringing troubled legislative decisions to a forum where dissenting voices can be heard and where they will have an opportunity to test their support fairly among the representatives of the community. Or one can devote all one's energies to denigrating these processes, and seek to bypass representative forums whenever there is a greater chance that one might win somewhere else. Whatever one's views on the outcomes of these decisions—and I support the pro-choice decision that was reached both in *Roe v. Wade* and in the British debates on the Medical Termination of Pregnancy Bill—one should surely not rest easy with the fact that so many good-hearted men and women, so many good-hearted lawyers and law professors, in the United States are so quick to turn their backs on this conception of legislative integrity.