
REPRESENTATIVE LAWMAKING

JEREMY WALDRON*

INTRODUCTION	335
I. DEMOCRACY	335
II. TRANSPARENT DEDICATION TO LAWMAKING	336
III. LARGE NUMBERS	340
IV. REPRESENTATION	345
CONCLUSION.....	354

INTRODUCTION

What makes legislation an attractive mode of lawmaking? You may ask: “Attractive, compared to what?” Attractive compared to lawmaking by judges and lawmaking by decree or executive agencies (though in a broader inquiry, we might contrast it also with lawmaking by treaty and also lawmaking by custom).

I. DEMOCRACY

One answer is that, in the modern world, legislation takes place in the context of democracy. Legislatures are, generally speaking, elective and accountable bodies. Their members are elected as legislators and they can be replaced at regular intervals if their constituents dislike what they or their political party are doing in the legislature. This gives their lawmaking a legitimacy that lawmaking by judges lacks. One of the main objections to judicial review is that it allows the decisions of unelected officials to trump the legitimate decisions of elected officials.¹ But this cannot be all there is to it. In many American jurisdictions, state judges *are* elected officials; they too can claim democratic credentials.² And the same might be said of an elected President. If we are faced with a choice between rule by legislation and rule by presidential decree, the choice is not between democratic and non-democratic lawmaking; it is a choice between two different sets of democratic credentials. There is also the point that some legislatures are non-elective, or

* University Professor, New York University School of Law. This Essay was presented as a keynote address at a symposium on “The Most Disparaged Branch: The Role of Congress in the 21st Century” at Boston University School of Law, November 14, 2008.

¹ I have emphasized this aspect of the matter in a lot of my work. See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006).

² See ROBERT F. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* 643 (4th ed. 2006).

have non-elective components. The British House of Lords, for example, and the upper house of the Canadian legislature are appointed rather than elected bodies (and indeed the House of Lords still has a residual hereditary, not to mention an ecclesiastical component).³ So, some legislative bodies do not have democratic credentials and some bodies that do not identify themselves as legislative bodies do have democratic credentials. It follows that democracy cannot be the key to what makes lawmaking by a legislature attractive compared to lawmaking by other bodies.

II. TRANSPARENT DEDICATION TO LAWMAKING

A legislature is a particular kind of lawmaking institution.⁴ What are its distinctive features? The first feature – and a very significant feature – is that a legislature is an institution *publicly dedicated to making and changing law*.

Parliaments and congresses and state assemblies are set up and publicly identified as lawmaking bodies. We tell our citizens: “This is where the laws are made and changed. If you have a lawmaking proposal or if you want to see lawmaking going on, this is where to go.” Now this may not distinguish parliaments and congresses and state assemblies from, say, executive agencies. Some of these are also widely understood to be lawmaking (or at least rulemaking) entities. But it certainly distinguishes parliaments and congresses and state assemblies from courts. For although we (legally-trained insiders) know an awful lot of legal change and adaptation takes place through the activities of courts, we are also uncomfortably aware that courts do not present themselves to the public as lawmaking institutions, nor are courts presented that way in official constitutional discourse. Quite the contrary: any widespread impression that judges were acting as lawmakers, rather than as law-apppliers, would detract from the legitimacy of their decisions in the eyes of the public.⁵ This popular perception is not groundless. Courts are not set up in a way that is calculated to make lawmaking legitimate. They are not publicly provided with the structures, resources, and personnel to assist in their lawmaking role. They do not follow lawmaking procedures: though their procedures are elaborate they are dedicated to quite different tasks. Courts

³ For information about the British House of Lords, see *COMPARATIVE POLITICS TODAY* 171-72 (Gabriel A. Almond et al. eds, 9th ed. 2008); and for information on the Canadian Senate, see GREGORY S. MAHLER, *NEW DIMENSIONS OF CANADIAN FEDERALISM: CANADA IN A COMPARATIVE PERSPECTIVE* 154-57 (1987).

⁴ Notice that I am using “legislature” in a somewhat restricted sense. A legislature is not just any body or institution that makes law. Otherwise the question I began with would be nonsensical. I asked: What makes legislation attractive as a mode of lawmaking, compared to lawmaking by judges or lawmaking by decree or by executive agencies? But if “legislature” is just a term we give to any entity that makes law, then the question would sound like: “What makes legislation attractive as a mode of lawmaking compared to legislation?”

⁵ See ALAN WOLFE, *DOES AMERICAN DEMOCRACY STILL WORK?* 123 (2006).

cobble together resources for lawmaking from the briefs they consider and the arguments they hear in relation to the discharge of the functions they perform that *are* publicly acknowledged – namely, the interpretation and application of existing laws and the settlement of disputes.

The English positivists put this rather well when they distinguished between oblique and direct lawmaking. Judge-made law, according to the nineteenth-century positivist John Austin, is an oblique form of lawmaking.⁶ The judge's "direct or proper purpose is not the establishment of the rule, but the decision of the specific case to which he applies it. He legislates *as properly judging*, and not *as properly legislating*."⁷

Similarly, because the decision-making members of these institutions – the judges – are not officially understood to be lawmakers, they are not evaluated for this role at the time of their appointment. Quite the contrary, both the judicial candidates and those who nominate and support them are at pains to assure the public that nothing is further from their thoughts than making and changing the law.⁸ This is true both of judicial appointments through a process like the one ordained in Article II of the United States Constitution,⁹ and also of elections to judicial office in some American states. Candidates for election to the judiciary do not announce to the voters what laws they would like to make or change when they are in office. They do not campaign the way candidates for the legislature campaign. Quite the contrary: they try to outdo one another in assuring the voters that they will definitely not act as lawmakers.¹⁰

Of course, it cannot be denied: judges are lawmakers. Courts make and change the law all the time. But they do not do so transparently. And transparency is the first virtue of what I am calling legislative institutions. These are institutions publicly dedicated to lawmaking. That means no one is under any misapprehension about what they are doing in this regard. Legislatures exist explicitly for the purpose of lawmaking and they are known to exist for that purpose. Sure, they also have other functions.¹¹ But

⁶ 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE 520-33 (Robert Campbell ed., rev. 5th ed. 1885).

⁷ *Id.* at 621.

⁸ See, for example, President George W. Bush's announcement of his nomination of Judge Samuel A. Alito to the Supreme Court, in which the President said: "He has a deep understanding of the proper role of judges in our society. He understands that judges are to interpret the laws, not to impose their preferences or priorities on the people." Joseph Curl, *Bush Picks Alito for Supreme Court; Right Hails Choice, But Democrats See Threat*, WASH. TIMES, Nov. 1, 2005, at A1.

⁹ U.S. CONST. art. II, § 2, cl. 2.

¹⁰ See, e.g., Shirley S. Abrahamson, Speech, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 978-85 (2001) (discussing the potential problems with having elected judges).

¹¹ As I said in JEREMY WALDRON, LAW AND DISAGREEMENT 28-29 (1999):

Political scientists remind us, correctly, that law-making is just one of the functions performed by the institutions we call legislatures, and, from the point of view of

lawmaking is their official *raison d'être*, and when we evaluate the structures, procedures, and membership of legislatures, we do so with this function in the forefront of our minds.¹² (If you want to have a debate about parliamentarians' lawmaking intentions and to elicit commitments from them in this regard, there is no official ideological obstacle to such a discussion. True, legislators have other tasks to perform and we might quiz them about those tasks also; but the official line in the case of judges is that this is not one of their tasks at all; indeed this is a task they are supposed to be prohibited from performing.)

I do not want to be misunderstood when I say transparency is the first virtue of legislatures. At issue is transparency about what their function is, not necessarily transparency about *how* it is performed. No doubt all sorts of legislative deals are made in back corridors, in what we used to call "smoke-filled rooms." For all I know, the same is true of courts.¹³ But at least in the case of legislatures, the public knows what the back-room deals are about: they are about lawmaking. In courts, there are back-room deals too, but the public is officially assured – quite misleadingly in many cases¹⁴ – that they are deals about the application, not the making or changing, of the law.

Elsewhere I have referred to this transparency-advantage as "the very idea of legislation."¹⁵ The idea of legislation is not the same as the idea of lawmaking. Lawmaking is any activity that has the effect of making or

political power, not necessarily the most important. A political scientist's analysis of law-making behaviour in legislatures is likely to be continuous with his analysis of other functions performed by these bodies – functions such as the mobilization of support for the executive (in the UK the actual selection of the executive), the venting of grievances, the discussion of national policy, the processes of budgetary negotiation, the ratification of appointments, and so on. From an empirical point of view, it may be impossible to predict how a given set of legislators will behave in sessions devoted specifically to law-making without understanding what is going on between them (and between them and their constituents and various interest groups) in other 'legislative' contexts that really have nothing to do with that task. (Legislator A may promise to support B's bill, but only in return, say, for B's support in blocking a judicial appointment.) This is bound to contrast with the jurisprudential point of view, which regards law-making as an activity whose character and significance are *sui generis*.

¹² This may not be true, however, at all times and in all political systems. British voters, for example, vote for legislators of one party rather than another because, in a Westminster-style system, that is the only way they can affect the choice of the executive (i.e., the choice of the Prime Minister and his or her cabinet). See, e.g., ROLF H.W. THEEN & FRANK L. WILSON, *COMPARATIVE POLITICS: AN INTRODUCTION TO SIX COUNTRIES* 58-67 (1986).

¹³ See, e.g., WOLFE, *supra* note 5, at 125-27 (discussing the intense politicization of the judiciary and how certain judges declare laws regulating business unconstitutional in order to promote free-market economic principles).

¹⁴ Cf. JEFFREY ROSEN, *THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA* 177-82 (2007) (criticizing Justice Scalia for refusing to participate in such back-room dealmaking).

¹⁵ Jeremy Waldron, *Principles of Legislation*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 15, 22 (Richard W. Bauman & Tsvi Kahana eds., 2006).

changing the laws. Legislation, however, is the business of making or changing law *explicitly, in an institution and through a process publicly dedicated to that task*. The idea of legislation embodies a commitment to explicit lawmaking – a principled commitment to the idea that on the whole it is good, if law is to be made or changed, that it should be made or changed in a process publicly dedicated to that task.¹⁶

How important is this principle? It is not just a matter of giving notice to those who are to be bound by a given law; that is the function of the Rule-of-Law principle of promulgation and it too is very important.¹⁷ The transparency I am talking about is important for the whole community. The idea of legislation applies the general liberal principle of publicity recognized by John Rawls and others: the legitimacy of our legal and political institutions should not depend upon widespread misapprehensions among the people about how their society is organized.¹⁸

It is particularly important in a democracy that the place where laws are made be publicly known and identified. If we know this is where laws are made, then this will be the place on which to focus our attention so far as democratic principles are concerned.¹⁹ To the extent that laws are made in courts – which are not publicly acknowledged as lawmaking institutions – then attempts to enhance the responsiveness and accountability of judges as lawmakers will be haphazard and confused, with one side seeking to bring policy considerations to bear, another side denying that any improvement is needed, and a third side denying that these values are even relevant in light of the public's ideological commitment to the proposition that the judiciary's role is not to make law, but only find, interpret, and apply it (which are roles whose performance ought to be evaluated in light of a quite different set of concerns).

I have argued elsewhere that the lack of candor and transparency associated with judicial lawmaking contributes to what some commentators have called the rather arid and contentless character of judicial argument, especially in regard to the moral values that ought to be in play when the making of law is at

¹⁶ *Id.*

¹⁷ *Id.* at 19 (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT 324 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)).

¹⁸ JOHN RAWLS, POLITICAL LIBERALISM 66-71 (1993).

¹⁹ I also believe that this affects the way in which citizens discharge their participatory powers: those who advocate changes in the law have a responsibility to orient that advocacy to a forum where their proposal can be explicitly discussed for what it is, rather than to other forums where it will be presented under the guise of a matter of interpretation. A forum such as a constitutional court may be politically more promising for a given group, but that is only because less care has been taken with the legitimacy conditions of lawmaking in that forum (precisely because it has not been thought to be a forum for lawmaking). There is a responsibility not to try and “steal a march” on one's political opponents in this way, but instead to submit one's proposals for honest debate and evaluation in a forum which everyone knows is the place to go to in order to reach collective decisions about whether and how the law should be changed.

stake.²⁰ Because they are at pains to conceal the fact that lawmaking is what they are engaged in, courts are not as open to the sort of reasons and arguments that any reasonable person would regard as indispensable for rational and responsible lawmaking. Instead, courts deploy a *mélange* of reasons, with the relevant moral considerations often heavily compromised or attenuated behind the elements of text, precedent, and interpretive doctrine that are supposed to provide cover for the entire exercise. What goes on in the legislative chamber may be cacophonous and unsophisticated, but better a cacophonous debate of considerations that are actually relevant to the task of lawmaking, than a solemn (but morally distracting) rehearsal of esoteric legalisms.²¹ So, to go back to the starting point: the very idea of legislation provides a specific gloss on the democratic character of parliaments, congresses, and assemblies, relating their democratic legitimacy to important principles of institutional candor and transparency in politics. It explains why *this sort* of democratic lawmaking might be attractive.

III. LARGE NUMBERS

Another distinctive way in which legislatures serve democratic values, when they do, has to do with their *size*.²² Unlike other democratic institutions, the typical legislature comprises – at its highest decision-making level – hundreds (in some cases thousands) of individuals. Compare that to the leadership of the executive. Even though the executive in most countries comprises a huge bureaucratic apparatus, it is assumed to be headed by one person – or, if not a unified executive, a small cabinet of twenty or so members.

The decision-making membership of legislatures is also usually one or two orders of magnitude higher than the decision-making membership of most supreme courts. The Supreme Court of the United States consists of nine Justices, while the federal legislature, comprising the House of Representatives and the Senate, has a total high-decision-making membership of 535. In the United Kingdom, the judicial committee of the House of Lords sits in panels of five.²³ The British legislature, by contrast, had until recently a membership of about 1900, almost three orders of magnitude higher than the number of Law Lords sitting in the highest court.²⁴ Of course, that high figure counted everyone in both houses; since the reforms of the House of Lords that took

²⁰ For more on this argument, see Jeremy Waldron, *Do Judges Reason Morally?*, in *EXPANDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY* 38, 44-46 (Grant Huscroft ed., 2008).

²¹ See *id.* at 60-61; Jeremy Waldron, *Public Reason and “Justification” in the Courtroom*, 1 *J.L. PHIL. & CULTURE* 107, 112 (2007).

²² What follows is adapted from Jeremy Waldron, *Legislation by Assembly*, in *JUDICIAL POWER, DEMOCRACY AND LEGAL POSITIVISM* 251, 252-54 (Tom Campbell & Jeffrey Goldsworthy eds., 2000).

²³ *Id.* at 252.

²⁴ *Id.*

place in 1999, the British Parliament has shrunk to 1354 (specifically, it now includes only twenty-six bishops and archbishops, two dukes, one marquess, twenty-seven earls, one countess, seventeen viscounts, and 621 barons, baronesses, lords, and ladies).²⁵ Even if the aristocratic and ecclesiastical elements are neglected, and focus is placed on the House of Commons, the dominant branch in the British legislature, the total is 646.²⁶

Political scientists often remark that real legislative power is vested in a much smaller number of people than the full membership of Parliament or the full membership of Congress.²⁷ They emphasize the power of the cabinet in Westminster-style systems, under which the parliament very seldom fails to enact any bill proposed by the cabinet and very seldom enacts any bill not proposed by the cabinet.²⁸ Or, in American legislatures, political scientists point to the power of committees and committee chairs as the effective legislative power.²⁹ This might suggest that the disparity of numbers is more a matter of what Walter Bagehot called a “dignified” characteristic of constitutional custom rather than an “efficient” aspect of constitutional reality.³⁰ In some countries no doubt that is true.³¹ Still, in the end, this debunking gambit will not do. For I have no doubt that if the very same political scientists were called upon to advise a new democracy on the reconstruction of its constitution, they would say, among other things, that the country should have a structure of courts with a high court sitting in panels of five or so; that it should have a small decisive executive body of about twenty ministers or secretaries of state; and that it should have a legislative chamber of some hundreds of members to enact and amend its laws. This insistence on a parliament of some hundreds of members would be seen not just as a quaint concession to antiquarianism; it would seem more or less obvious as a feature of a working constitutional structure. We have a sort of *constitutional instinct* that the lawmaking branch, above all the other branches of government, should consist of large numbers of people. We take it for granted that if there is

²⁵ *Id.*; see also HOUSE OF LORDS BRIEFING, MEMBERSHIP: TYPES OF MEMBER, ROUTES TO MEMBERSHIP, PARTIES & GROUPS 2, 6 (2008), available at <http://www.parliament.uk/documents/upload/HofLBpmembership.pdf>.

²⁶ UK Parliament, State of the Parties, <http://www.parliament.uk/directories/hcio/stateparties.cfm> (last visited Feb. 26, 2009).

²⁷ See, e.g., HERBERT A. SIMON, DONALD W. SMITHBURG & VICTOR A. THOMPSON, PUBLIC ADMINISTRATION 530 (Transaction Publishers 1991) (1950) (“Because of the mass and complexity of governmental problems, and because of the size of legislatures, legislation in America is reviewed principally by small committees of the legislature.”).

²⁸ THEEN & WILSON, *supra* note 12, at 59-60.

²⁹ See, e.g., SIMON, SMITHBURG & THOMPSON, *supra* note 27, at 530-31.

³⁰ WALTER BAGEHOT, THE ENGLISH CONSTITUTION 4-5 (Sussex Academic Press 1997) (1867).

³¹ The Chinese legislature, the National People’s Congress, has nearly three thousand members, DU XICHUAN & ZHANG LINGYUAN, CHINA’S LEGAL SYSTEM: A GENERAL SURVEY 42 (1990), but I doubt that real legislative power is distributed equally in that assembly.

explicit lawmaking or law reform to be done in society, it should be done in or under the authority of a large assembly consisting of hundreds of individuals, ranked roughly as equals.

Political theorists historically have taken the large size of legislatures as the cause of its unwieldy and dysfunctional behavior:³² noise, bad-tempered argument, partisan politics, people talking at cross purposes, each legislator pursuing his own electoral agenda on the basis of his unscrupulous ambitions. What gets done in these circumstances seems likely to be “an unprincipled, incoherent, undignified mess.”³³ This critique is unconvincing. I prefer Niccolò Machiavelli’s observation that good laws may arise “from those tumults that many inconsiderately damn,” and that those who condemn them tend to pay too much attention to “the noises and the cries that would arise in such tumults more than the good effects that they engendered.”³⁴

Why exactly do we value the large numbers in our legislatures? Why not reduce the mess and the incoherence, by electing just one person as a lawmaker, or a very small legislative team, perhaps a dozen or so?

For one possible explanation, legal theorists and political scientists continue to toy with Condorcet’s Jury Theorem, which provides an arithmetical account of the value of larger rather than smaller numbers of people voting on a proposal.³⁵ The basic idea is that when all the members of a group are reasonably competent, then the chances that a majority will reach the right answer by voting increases towards certainty as group size increases.³⁶ But this cannot be the real explanation. Condorcet certainly did not think it was. He believed that average individual competence tended independently to decline as group size increased (and then of course the arithmetic of majority decision worked in the other direction): “A very numerous assembly cannot be composed of very enlightened men. It is even probable that those comprising such an assembly will on many matters combine great ignorance with many prejudices.”³⁷ So the Condorcet effect, for all its mathematical interest, may be

³² JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 34-35 (1999).

³³ This was the title of one of the panels in this symposium. For arguments for and against whether legislation is an unprincipled, incoherent, undignified mess, see generally *Editors’ Note on “Legisprudence,”* 89 B.U. L. REV. 423 (2009); Alan L. Feld, *The Shrunken Power of the Purse*, 89 B.U. L. REV. 487 (2009); Vlad Perju, *A Comment on “Legisprudence,”* 89 B.U. L. REV. 427 (2009); Ann Seidman & Robert B. Seidman, *ILTAM: Drafting Evidence-Based Legislation for Democratic Social Change*, 89 B.U. L. REV. 435 (2009).

³⁴ NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* 16 (Harvey C. Mansfield & Nathan Tarcov trans., 1996) (1531).

³⁵ CONDORCET, *Essay on the Application of Mathematics to the Theory of Decision-Making*, in CONDORCET *SELECTED WRITINGS* 33, 48-56 (Keith Michael Baker ed., 1976). For recent use of Condorcet’s result in legal theory, see generally Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV. 131 (2006).

³⁶ CONDORCET, *supra* note 35, at 38.

³⁷ *Id.* at 49.

a non-starter in an account of why there is a constitutional instinct for large assemblies rather than small bodies to undertake the task of lawmaking.

To capture the value of large legislatures in a model from the canon of political theory, it is to Aristotle rather than to Condorcet that we should turn. Aristotle insisted in Book III of *Politics* that a large multitude of people, when they meet together, may be politically competent if regarded not individually but collectively:

For the many, each of whom is not a serious man, nevertheless could, when they have come together, be better than those few best – not, indeed, individually but as a whole, just as meals furnished collectively are better than meals furnished at one person’s expense. For each of them, though many, could have a part of virtue and prudence, and just as they could, when joined together in a multitude, become one human being with many feet, hands, and senses, so also could they become one in character and thought. That is why the many are better judges of the works of music and the poets, for one of them judges one part and another another and all of them the whole.³⁸

The key here is diversity. Different people bring different perspectives to bear on the issues under discussion and the more people there are the greater the richness and diversity of viewpoints are going to be. When the diverse perspectives are brought together in a collective decision-making process, that process will be informed by much greater informational resources than those that attend the decision-making of any single individual.

What sort of diversity? Diversity of opinion? Certainly. But it is not just diversity of opinion; it is also diversity of knowledge and experience, and indeed it is also diversity of interests. Now, the first two seem appropriate, but the third may be a problem for some theorists of democracy.³⁹ Certainly, in lay discussion, if not in political and legal theory, it is often thought that it would be an improvement if legislators were to concentrate on what are said to be “the issues,” rather than what is in it for them or what is in any particular legislative proposal to affect the interests of them or their constituents.⁴⁰

A moment of reflection, however, indicates that this cannot be right. Legislation affects people’s interests, and the effect it has on their interests is surely important; in many – perhaps most – cases that effect is of the essence. The aim of the legislature is to promote the interests of the members of society as a whole, or the interests of one particular sector in some particular regard as part of an overall strategy of promoting everyone’s interests in various ways.

³⁸ ARISTOTLE, *POLITICS* 95-96 (Peter L. Phillips Simpson trans., 1997).

³⁹ See, e.g., WOLFE, *supra* note 5, at 106-07 (explaining the need for some institutions of democracy to remain disinterested).

⁴⁰ See, e.g., Peter Applebome, *Connecticut Hopefuls Flock to Public Financing*, N.Y. TIMES, Oct. 23, 2008, at A29 (recounting a successful Connecticut experiment in which candidates for the state’s General Assembly elected to receive public campaign financing, which allowed the candidates to “focus on the issues” instead of special interests).

Also, if a legislative proposal seems likely to have a negative impact on certain interests, then surely that ought to be a matter of concern, a matter to notice and then take the time to consider whether the adverse impact should be compensated for or otherwise mitigated.

Those who think that lawmaking should be conducted only on “issues” forget that the impact on interests is often the main issue.⁴¹ Those who think that legislative discussion should be conducted at the level of high principle forget that it is the point of many principles to insist that certain interests be taken seriously; that certain interests should not be neglected. Even when it is thought a decision should not be taken on the basis of pure consequentialist reasoning, even when the relevant principles are not utilitarian or wealth-maximizing, still it is a rare moral or political principle that makes no reference to interest at all or is impervious to the impact on people’s interests when it is being applied.

In any case, legislation even on morally significant matters – matters of individual rights, for example – is never just the embodiment of principle. Principles may be in the background, but each piece of legislation must be framed so that technical provisions, with their attendant definitions, procedures, exceptions, and administrative clauses will actually have the effect of promoting the principles the public thinks are morally important. The task of converting principles to statutory provisions is not easy. Its difficulty lies in a number of dimensions, some of which are no doubt quite technical. But sometimes we want to compare various possible provisions to consider the different ways in which they will impact people; and there information about interests is needed, in particular information from those who are familiar with the conditions under which interests are served or disserved in particular situations – in a specific kind of transaction, for example, or in a particular kind of profession or business. In our high-flown enthusiasm for principled deliberation, we are sometimes in danger of forgetting that information about interests, and the likely impact of legislation upon interests, does not reach the legislature automatically or by magic. It is not something that can be taken for granted so that members can concentrate all their deliberative energy and attention on the more abstract issues of principle.

For these reasons, one might value the presence of an array of persons in the legislature acquainted with all walks of life, all types of interests, and different experiences in the community. If the community is geographically diverse, for example, with different conditions in the North compared with those in the South, then one would value the presence of legislators from both ends of the country; if there is diversity of interests as between town and country, again one would value the presence of people from rural and urban sectors. If there are differences and conflicts between the interests of the workers and the

⁴¹ See, e.g., DAVID R. OBEY, *RAISING HELL FOR JUSTICE: THE WASHINGTON BATTLES OF A HEARTLAND PROGRESSIVE* 3-5 (2007) (discussing the personal and group interests of those who lobby for legislative changes in Congress).

interest of their employers, then one would want labor unionists as well as oligopolists in the legislature and so on. Where measures impact men and women differently, one would hope there were women in the legislature to bear witness to those differences. And finally, if there are ethnic differences in the community, one might want the legislature to include members of different ethnicities so that various – and, from the point of view of the dominant group, unanticipated – impacts can be assessed.

It is often assumed the diversity needed in our deliberative institutions is something like philosophical diversity – diversity of theory and moral viewpoint, so that organizing a legislature is like organizing a panel at the Annual Meeting of the Association of American Law Schools⁴² or at a philosophy conference. But it is important also to see the point of other modes of representation, including geographical representation, as a crude but good-faith attempt to represent the diversity of various communities of interest in the society.

IV. REPRESENTATION

The fourth and last distinctive and attractive feature of legislatures that I want to consider is representation. Legislatures are not just democratic institutions, not just transparent institutions, not just large assemblies, but large *representative* assemblies. What I have to say about this will involve some rather abstract political theory – in fact much of it is about the value of abstraction. But this abstraction is extremely important in our theory of legislation and the distinctive significance of representative legislative assemblies in a modern society.

It is often thought by those who dabble in political philosophy that lawmaking by a representative assembly must be regarded – at least from a democratic point of view – as “second-best.”⁴³ Surely the democratic ideal should be some sort of plenary legislature of the people.⁴⁴ People assume that Rousseau’s conception of direct popular sovereignty in lawmaking is the ideal from a democratic point of view and that, even if we are not as scathing about representation as Rousseau was, we should nevertheless deplore representative lawmaking as a very distant second best.⁴⁵ It is thought that if only we could

⁴² The Annual Meeting of the Association of American Law Schools is a gathering of the Association’s diverse membership. Any law school is invited to apply for membership after it has offered five years of instruction and has graduated its third class. The Association of American Law Schools, AALS Membership, http://www.aals.org/about_membership.php (last visited Feb. 24, 2009).

⁴³ See, e.g., HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 84 (1967).

⁴⁴ *Id.* at 84-85.

⁴⁵ JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND THE DISCOURSES* 263 (G.D.H. Cole trans., Alfred A. Knopf, Inc. 1973) (1913). According to Rousseau:

Sovereignty . . . cannot be represented; it lies essentially in the general will, and will does not admit of representation: it is either the same, or other; there is no intermediate

have a direct democracy that was fully inclusive (in a way that Athenian democracy, for all its direct and participatory virtues was not),⁴⁶ then that would be the democratic ideal. Or consider the possibility of a California-style system of plebiscitary legislation, shorn of all the corruption and manipulation that the Californian system presently involves.⁴⁷ It may be said that system would be preferable ideally from a democratic point of view, preferable to lawmaking by an elected Congress or Parliament or by assemblies of elected state representatives. If one assumes a need for information about interests, then surely the ideal has to be the literal presence in the lawmaking process of all interested parties. And if one wants deliberation among opinions, theories, and ideologies, then surely the ideal is the literal presence in the lawmaking process of each adherent of an ideology or theory, each partisan of a view or principle or hypothesis, so that every shade of opinion in the community can really-and-truly speak for itself. People assume, based on my work on judicial review, that I too must favor the people themselves voting directly as equals on the laws that are to govern them.⁴⁸ It is sometimes said that if a democrat accepts anything short of that – any form of indirectness or representation – then they have effectively given the game away, for both representative authority and judicial authority involve the exercise of political power at some remove from the participation of ordinary citizens.⁴⁹ All this, in my view, is wrong, at least so far as legislation is concerned. Legislation is a function for which representation, rather than direct participatory choice, is the better democratic alternative.

This is a counterintuitive view, so I had better explain it. In doing so, I will draw on some of the recent work of Nadia Urbinati, a distinguished theorist of politics and a former colleague of mine at Columbia University. Professor Urbinati's article, *Representation as Advocacy*, published in *Political Theory*,⁵⁰

possibility. The deputies of the people, therefore, are not and cannot be its representatives: they are merely its stewards, and can carry through no definitive acts. Every law the people has not ratified in person is null and void – is, in fact, not a law. The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of members of parliament. As soon as they are elected, slavery overtakes it, and it is nothing. The use it makes of the short moments of liberty it enjoys shows indeed that it deserves to lose them.

Id.

⁴⁶ Nadia Urbinati, *Representation as Advocacy: A Study of Democratic Deliberation*, 28 POL. THEORY 758, 762 (2000).

⁴⁷ See JOHN HASKELL, DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT 151 (2001).

⁴⁸ My work on judicial review is based on the principles of democratic legitimacy and political equality. See generally *supra* note 1 and accompanying text.

⁴⁹ See, e.g., Mattias Kumm, Democracy is Not Enough: Socratic Contestation, the Rationalist Human Rights Paradigm and the Point of Judicial Review (Sept. 8, 2008) (unpublished manuscript presented to NYU Faculty Workshop, on file with author).

⁵⁰ Urbinati, *supra* note 46.

and her recent book, *Representative Democracy: Principles and Genealogy*,⁵¹ represent major contributions to democratic political philosophy. Professor Urbinati is interested in a body of thought that emerged in France not long after Rousseau had put his frenzied pen to paper; this body of thought suggested representative democracy might be the first-best option for political institutions and anything like direct democracy might be a very distant second.⁵² I think Urbinati's work is very important, as are the writings of Sieyès and Condorcet, two French *philosophes* upon which she draws.⁵³ This work needs to be better known among lawyers as well as political theorists. Unfortunately there is not space for a detailed exposition and review of Urbinati, Condorcet and Sieyès on representation, but a lot of what follows builds on their work.

The part of their work that interests me is a connection they draw between two sorts of abstraction: (1) the abstraction exhibited by enacted laws insofar as they satisfy Rule-of-Law requirements of generality⁵⁴ (what I call *content-abstraction*); and (2) the abstraction involved in the task of representation whereby a single political actor may represent a certain kind of constituent, constituents from a given locality, for example, or constituents who hold a party allegiance of a certain sort⁵⁵ (what I call *agent-abstraction*). The connection that interests me relates these two kinds of abstraction to one another in a democratic Rule-of-Law society. Whatever its relevance in other functions of government, the abstraction that representation involves is particularly appropriate for lawmaking, where what we are striving to produce are abstract norms – abstract in the sense of *general* – rather than directives focused on some particular person or situation (e.g., the way a bill of attainder or a judicial decision is focused, at least in the first instance).

The idea of such a connection was mooted famously by Rousseau, though it is the burden of the work on which I am drawing to prove that Rousseau got the connection wrong. According to Rousseau, it is important that laws be general in character, applicable equally to everyone in the society.⁵⁶ That law

⁵¹ NADIA URBINATI, *REPRESENTATIVE DEMOCRACY: PRINCIPLES AND GENEALOGY* (2006).

⁵² *Id.* at 10-12.

⁵³ See *id.* at 138-61 for a discussion of Sieyès's model of representative government and *id.* at 176-222 for a discussion of Condorcet's ideas on indirect democracy.

⁵⁴ Urbinati, *supra* note 46, at 765-70.

⁵⁵ *Id.* at 770-72.

⁵⁶ ROUSSEAU, *supra* note 45, at 210. Rousseau elucidated:

When I say that the object of laws is always general, I mean that law considers subjects *en masse* and actions in the abstract, and never a particular person or action. Thus the law may indeed decree that there shall be privileges, but cannot confer them on anybody by name. It may set up several classes of citizens, and even lay down the qualifications for membership of these classes, but it cannot nominate such and such persons as belonging to them. . . . In a word, no function which has a particular object belongs to the legislative power.

Id.

should be general in its formulations is not just Rousseau's insight; it is, as I said,⁵⁷ commonly cited as one of the foremost principles of the Rule of Law.⁵⁸ Rousseau thought it was important to match this Rule-of-Law generality with generality of source or provenance. For this reason, he insisted lawmaking was properly the work of all the members of the relevant society acting together as not just subjects (affected by the general character of its provisions) but as active elements of the sovereign (who contribute to the generality of its source). The plenary provenance of law is the proper match to its general form.

[W]hen the whole people decrees for the whole people, it is considering only itself; and if a relation is then formed, it is between two aspects of the entire object, without there being any division of the whole. In that case the matter about which the decree is made is, like the decreeing will, general. This act is what I call a law.⁵⁹

He went on, "law unites universality of will with universality of object."⁶⁰ And this is why Rousseau disparages representation.

But notoriously, that all subjects are also implicated in the sovereign act of lawmaking is no guarantee they will be motivated by the appropriate spirit. The will of all is not the same as the general will. Rousseau tried to wrestle with this difficulty in his political theory, with very mixed results.⁶¹

I would argue, as many of the thinkers Urbinati studies believed,⁶² it makes more sense to associate content-abstraction with the abstraction involved in representation. A representative stands *for* something: in a democratic system, she stands for a whole array of constituents who have voted for (or against) her or participated in the voting process by which she was chosen. But she also stands for her constituents under *certain auspices*: she stands for them geographically, in constituency-based systems; she stands for them jurisdictionally, in federal systems; and she stands for them ideologically, in systems of party representation, particularly party-proportional representation. And because she stands for them under those auspices, her standing for them involves abstraction from their personal decision-making. She stands for the interest of the northeast district, or she stands as the junior senator from New York, or she stands as a representative of the Liberal Democratic Party.

Rousseau asked indignantly how a representative could possibly stand for the personal will of his constituents, considered severally, when it is only their willing that can possibly make a law legitimate. "[W]ill does not admit of

⁵⁷ See *supra* notes 16-18 and accompanying text.

⁵⁸ Compare the discussion of generality in LON L. FULLER, *THE MORALITY OF LAW* 46-49 (rev. ed. 1969) (characterizing "generality," or the requirement that "there must be rules," as an important primary component of a legal system).

⁵⁹ ROUSSEAU, *supra* note 45, at 210.

⁶⁰ *Id.* at 211.

⁶¹ See *id.* at 203-07, 271-76.

⁶² See *supra* notes 50-55 and accompanying text.

representation . . .”⁶³ But the sense in which will does not admit of representation is the sense in which will is unique and personal to each individual. It is like the will involved in the consent that one gives to sex, for example, or the consent that one gives to a medical procedure. It is a further question whether *this* sense of will or consent is what is required for the legitimacy of making *laws*, where it is part of understanding of the very idea of *law* that we are trying to move away from a direct focus on the unique identity of each person, trying to consider them instead in the light of what they have in common.⁶⁴

We know that a bill of attainder, directly imposing a penalty or disqualification on a known individual by legislative fiat, is an abuse of lawmaking power.⁶⁵ But the difference between that and the generality of a law – a norm formulated in general terms, according to the requirements of the Rule of Law – is not just a difference of numbers, as though it would be proper to govern a society of a hundred million people with a hundred million bills of attainder. Our laws should consider people universalizably under certain aspects, and as when embarking on lawmaking, our representatives should present people’s interests, concerns and ideals, universalizably, under certain aspects.

Let me illustrate with a crude example. Suppose a society is planning to introduce universal conscription, i.e., national military service. It is going to be a general law, though of course there may be all sorts of conditions and exceptions built into it, each stated in general terms. For example, there may be a question about whether certain exemptions, not for identifiable individuals but for classes of people (for instance in certain areas of employment such as labor-intensive farming) should be made. It may be important that the people subject to this law should be considered not just as potential conscripts, but as potential conscripts from the cities, or potential conscripts from the northern rural areas (where farming is difficult), or potential conscripts from the ranches out west (where farming is not so labor-intensive). Geographic representation seems to make this possible; for now the law has to be scrutinized in an assembly that represents the very classes of interest, understood in general terms, that may be relevant to the complexity – though still the generality – of its content. There will be representatives from the North and from the West and from the cities and the farms; and their presence, their influence and their interaction as representatives will determine the final configuration of general requirements and exemptions that the law finally embodies. The presence of these various interests is what is necessary for appropriate legislative debate. By this, I do not mean their presence directly in the personal will and wishes of those whose interests they are, but the presence of the interests as such. No

⁶³ ROUSSEAU, *supra* note 45, at 263.

⁶⁴ See also the discussion of different uses of consent in political theory in Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 135-39 (1987).

⁶⁵ See U.S. CONST. art. I, § 9, cl. 3.

doubt, any proposed exemptions will be politically controversial, but it may be easier to deliberate in the midst of that controversy when the rivalry of interests is seen not just as a zero-sum game among the personal bearers of the respective interests, but as an interaction between types of interest considered abstractly under the auspices of a matrix of representation that covers the society as a whole.⁶⁶

As Urbinati points out, representation “helps to depersonalize claims and opinions” in a way that makes deliberation easier.⁶⁷ It represents what various classes of people have in common and thus operates “as a *simplifier* of interests and an *assimilator* of subjects.”⁶⁸ Of course, my example is artificial: a single case, contrived and highly simplified, in which the array of relevant kinds of interest the law in question needs to accommodate happens to match a plausible basis of representation for real-world societies. Usually, there will not be anything like this straightforward match. For one thing, the representative matrix for the legislature will not be able to reproduce the diversity of relevant interests for just one enactment, let alone those germane to all the bills considered in a given legislative session. But it is important to see that if there is a falling-short of an ideal here, it is a falling-short of a *representative* ideal. A utopian legislature would represent interests with great specificity, so that not only farmers would be represented, or farmers from the North and from the West, but women farmers, poor farmers who have been in the business for a long time, poor farmers in the business for a long time with children available to work the farm, and so on. But the limit of this idealization is a very fine-grained representation; it is not the literal presence of each person in a plenary legislature. Specificity is not the same as particularity;⁶⁹ and it is the particular, not the specific, that we seek to abstract from in our insistence that laws must be general, and that laws should be considered in the light of types of interest, not in light of personal presence.

⁶⁶ For a similar view, see THE FEDERALIST NO. 53, at 333 (James Madison) (Clinton Rossiter ed., 1961). Madison examined:

How can foreign trade be properly regulated by uniform laws, without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States? How can the trade between the different States be duly regulated, without some knowledge of their relative situations in these and other points? How can taxes be judiciously imposed and effectually collected if they be not accommodated to the different laws and local circumstances relating to these objects in the different States? How can uniform regulations for the militia be duly provided without a similar knowledge of some internal circumstances by which the States are distinguished from each other? These are the principal objects of federal legislation and suggest most forcibly the extensive information which the representatives ought to acquire.

Id.

⁶⁷ Urbinati, *supra* note 46, at 760.

⁶⁸ *Id.* at 769.

⁶⁹ See the discussion in R.M. HARE, FREEDOM AND REASON 38-40 (1963), for the contrast between universal and particular on the one hand, and between general and specific on the other (Hare uses “universal” in the sense that I am using “general”).

In real-world legislatures, we have compromised on this ideal specificity by making arrangements for all-purpose representation, using rather crude indices of geography leavened by party affiliations. In addition, we hope the presence of large numbers of members in the legislature will mean various dimensions of informal representation will emerge informally on the back of geographical representation, and so, there will be a balance of black and white, men and women, and so on in the legislature.⁷⁰

We also compromise on the specificity of our laws. Even though a highly specific law would not necessarily violate the requirement of generality, legislators legislate with reasonably coarse-grained distinctions, albeit not nearly as coarse-grained as our matrix of representation. The more elaborate and specific the terms of a law, the harder it is to promulgate and administer. Once again, though, it is important to understand the contrast here. The contrast is not with an ideal piece of legislation that would make provisions for the particularity of each individual; it is with an ideal piece of legislation that would refer to each and every relevant *type* of individual circumstance or consideration, no matter how specific. The ideal is not approached; indeed it is left to the realm of particularized equitable decision-making to determine specific cases for which general legislation really cannot take account.⁷¹

Let me return now to the matrix of representation. Many political systems also set out to represent opinions and not just interests, where the relevant opinions are bodies of doctrine or ideology about the way in which interests in society are properly dealt with and balanced against one another. Systems of pure-proportional party representation do this directly, like that of Israel.⁷² Mixed systems, with both a party-proportional and a constituency basis of representation (like New Zealand) do it alongside geographic representation (and in addition, New Zealand also has a dimension of direct ethnic representation in the provision for Māori seats).⁷³ Most legislative systems,

⁷⁰ Sometimes the legislature actively adjusts geographical representation to ensure this as a more or less formalized objective. For an example of how we adjust geographical representation to attempt a balance of race, see generally the discussion in Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589 (1993).

⁷¹ For a useful exchange on the relationship between equitable decision-making and the generality required by the Rule of Law, see generally Lawrence B. Solum, *Equity and the Rule of Law*, in THE RULE OF LAW: NOMOS XXXVI, at 120 (Ian Shapiro ed., 1994); Stephen J. Burton, *Particularism, Discretion and the Rule of Law*, in THE RULE OF LAW: NOMOS XXXVI, *supra*, at 190.

⁷² See The Knesset in the Government System, The Electoral System in Israel, http://www.knesset.gov.il/deSCRIPTION/eng/eng_mimshal_beh.htm (last visited Feb. 24, 2009).

⁷³ For a description, see the official New Zealand government account at Elections New Zealand, Māori Electoral Option – FAQ, <http://www.elections.org.nz/maori/enrolment/maori-option-faq.html> (last visited Feb. 24, 2009).

even the American system or the United Kingdom parliament which do not admit to any formal proportionality element, still use parties to organize representation in the legislature so that there is a useful matrix of party-political categories cutting across the geographical ones.

Once again, there are limits on specificity. Not every shade of opinion is represented, partly because not all have significant support in the country and the number of members allocated to the legislature is not large enough to provide a more fine-grained sample. But also – and significantly – it is the function of political parties to organize opinion into a relatively small number of comprehensive and well-thought-through party programs. In this way there is a more or less well-organized abstraction process from the particular opinions held from time to time by any individual to a type of opinion – or rather several types of opinion – about legislation and policy generally, that can then address and deal with the various types of interest that are also represented. And so we get a combination of a broad array of types of interest along with an array of well-organized party-political ideologies to address these interests. Of course, the whole system is organized on the basis of individual voting and thus it is permeated with fundamental principles of political equality; but the reality and processes of representation that are built upon this foundation add up to a viable and responsible politic.

What I have said about representation has been quite sketchy and abstract; mostly I am trying to show why lawmaking as such might have a special affinity with representation, more than other structures and functions of government. I want to show why a large *representative* assembly, of the sort that we are all familiar with in the legislative context, is a better environment for lawmaking than other institutions or agents that might conceivably perform that task.

The points Nadia Urbinati and others have made about representation are slightly more familiar when they address the question of promoting genuine deliberation in politics.⁷⁴ They are familiar from a tradition of political moderation that is apprehensive about the pressure and the immediacy of direct plenary political decision-making.

Legislation requires time and careful deliberation; yet a large gathering of the populace can barely contrive for itself the space, let alone the time, for genuine engagement. The masses will melt away unless a decision is made simply and quickly. Yet simplicity and haste are the obverse of responsible legislative decision-making, precluding, as they do, the extensive thinking, speaking and listening – and, within the realm of speaking and listening, the successive rounds of proposal, reply, amendment and reconsideration – that genuine engagement with legislative issues requires.⁷⁵ That is simply not possible in a gathering of tens or hundreds of millions of citizens, and any attempt to make it possible would involve a radical attenuation and “dumbing-

⁷⁴ See *supra* notes 50-55 and accompanying text.

⁷⁵ URBINATI, *supra* note 51, at 183.

down” of legislative debate. Representation, on the other hand, “creates distance between the moments of speech and decision and, in this sense, enables a critical scrutiny while shielding the citizens from the harassment of words and passions that politics engenders.”⁷⁶

There is an ancient contrast in political philosophy between a politics based on will and a politics based on judgment;⁷⁷ there is a contrast between respecting people simply in a voluntaristic way, as the bearers of a will, and respecting them as capable of political judgment. It is the latter respect, not the former – respect for judgment, not respect for will – that is most affronted when we assign lawmaking to a non-democratic institution. The people’s capacity for judgment is at stake when we look for a democratic mode of lawmaking, and if we are to respect that capacity, we must respect the forms, structures and processes that can house and frame it. Like Professor Urbinati, I believe structures of representation provide processes for judgment-formation and for the deliberative engagement of judgments both among the people and among their representatives. In Urbinati’s own words, representation involves a comprehensive filtering, refining, and mediating process of political will formation and expression, shaping “the object, style, and procedures of political competition.”⁷⁸

It is a position which, as Hannah Arendt noticed, was held also by the American framers who suggested we need representation in politics in order to pass opinions “through the sieve of an intelligence which will separate the arbitrary and the merely idiosyncratic, and thus purify them into public views.”⁷⁹ Arendt pursues this further in *The Origins of Totalitarianism*, where she contrasts the discipline of representative politics with the fragmentation of political parties, their supersession by mass movements, and the growth of public irresponsibility, procedural impatience, and general contempt for parliamentary institutions in the interwar period.⁸⁰ In these circumstances, there was a “chaos of unrepresented and unpurified opinions,” which could

⁷⁶ Urbinati, *supra* note 46, at 768.

⁷⁷ URBINATI, *supra* note 51, at 72-73.

⁷⁸ Urbinati, *supra* note 46, at 760.

⁷⁹ HANNAH ARENDT, ON REVOLUTION 230 (1963) [hereinafter ARENDT, ON REVOLUTION]. There she also observes that “limitation to a small and chosen body of citizens was to serve as the great purifier of both interest and opinion, to guard ‘against the confusion of a multitude.’” *Id.* at 229. It is not clear whether this is Arendt’s own view or that of the American framers she is discussing. Arendt is no doubt drawing upon the view expressed in *The Federalist No. 10* about the importance of “refin[ing] and enlarg[ing] the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.” THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961). This paragraph is adapted from Jeremy Waldron, *Arendt’s Constitutional Politics*, in THE CAMBRIDGE COMPANION TO HANNAH ARENDT 201, 201-15 (Dana Villa ed., 2000).

⁸⁰ See HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 115, 250-66 (1973).

produce nothing in politics except an array of dangerous impulses waiting for a strong man to mold them into the slogans and ideologies of a mass movement, which in Arendt's view would spell death to all genuine opinion and genuine judgment in politics.⁸¹ To diminish these dangers she looked to two-party systems (like that of Great Britain) where effective participation in politics required both cooperation with others in "broad-church" arrangements and a degree of shared responsibility for the public world, born of the constant possibility that one might have to take office at the next election.⁸²

The idea of representative party politics as a process of "opinion formation, reflection, revision, and amendment,"⁸³ as a way of transforming impulse and sentiment into judgment, by and for the sake of the interplay of representative with constituent, constituent with party, representative with representative, representative with party, party with party, and citizen with citizens generally – all that conveys a model of politics generally that I find enormously attractive.⁸⁴ And in the grip of that picture, it is impossible to see direct democracy as an ideal of which we have tragically fallen short. Instead, it is a wrong turn, which only representative structures can redeem. No doubt a case can be made along these lines in favor of framing and filtering political decisions of every kind through representative processes and representative institutions. But it seems to me that the case has a particular importance in regard to legislation.

CONCLUSION

I have been in the business of defending the dignity of legislation long enough to expect that there will be complaints about the highly idealized picture of legislatures that I have painted. There is something to this criticism. But we cannot undertake intelligent disparagement or criticism of our legislative institutions if we do not have a well-thought-through ideal which we can use to hold up to them for comparison. I do not mean a utopian ideal, one which cannot possibly be realized in practice. I mean a realistic normative account that shows us the moderate standards to which we ought to be holding our lawmaking. Otherwise – if there is no well-thought-through normative ideal – our criticisms will consist of intuitive gut-reactions, rather than intelligent assessments based on some articulate sense of what a good set of legislative institutions ought to be.

⁸¹ ARENDT, ON REVOLUTION, *supra* note 79, at 231.

⁸² See MARGARET CANOVAN, HANNAH ARENDT: A REINTERPRETATION OF HER POLITICAL THOUGHT 35 (1992).

⁸³ See URBINATI, *supra* note 51, at 184.

⁸⁴ *Id.* at 149 ("Through the arithmetical unit of the vote, the electors who vote for a candidate enter simultaneously into a pluriverse relation of reflection – to their representatives, to the members of their constituency, to all the electors in the nation, and to the legislative body.").

I have been concerned that, to the extent that people ever think about this ideal, they carelessly fall into a couple of misapprehensions. Because our normative theory of lawmaking is broadly democratic, people assume that our ideal must say, “[t]he more democracy the better,” and they assume this pushes us in the direction of direct democracy (i.e., in the direction of treating everything else as a shabby compromise). I have tried to answer that with my account of the relation between the representative character of our institutions and the generality that is required of our statutes under the Rule of Law. There is also a tendency to assume that although legislative politics is about preferences and interests in the real world, with special interest groups lobbying and jockeying for pressure and advantage, an ideal legislature would brush off such sordid distractions and concentrate on matters of principle, deliberating about them in the manner of a philosophy colloquium. This too I have argued is a mistake. A politics of principle is no doubt desirable but the important thing about principles is that they are addressed to interests, they guide us in the equitable treatment of interests, and they indicate for us which interests it is morally important to take into account and when, and which kinds of impact upon interests are or ought to be matters of moral concern. Our legislatures cannot do this work unless they serve as clearinghouses for information about interest and for the pressing of the claims of interests on the conscience of the nation. This is the ideal of politics, and it is in relation to that ideal – not an impossibly philosophical ideal – we ought to develop our assessment of actual legislative institutions.