INTEGRITY AND REFLECTION

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Professor Waldron and Professor Michelman have presented us with two interesting, but very different, views on what procedural components might contribute to the integrity of lawmaking. I will focus on a different aspect of legislative integrity: legislation reflection. "Reflection" has two meanings, and in this context they are direct opposites. A legislature can be reflective as a mirror is reflective: It can be a reflection of its constituents and therefore a relatively direct agent of popular sovereignty. But reflective can also mean thoughtful and deliberative; a legislature that is reflective in this sense "reflects" or deliberates to reach its *own* views of appropriate legislation (although constituent views, of course, can be one factor in the deliberations).

The bivalent meanings of reflection lurk beneath the surface of the papers by Professors Waldron and Michelman. Professor Waldron, for example, describes a truly deliberative legislature, and suggests that it can provide a model for the United States Congress. Professor Michelman is less certain that deliberation can ever produce consensus, or that legislative integrity can ensure legitimacy. Although neither directly discusses the question, it seems that both scholars would agree with me that only a deliberative legislature, and not a mirror-like one, affords sufficient protection of rights within an otherwise purely majoritarian regime. Where they differ, perhaps, is in their assessment of the capability of legislatures—or at least the Congress—to behave in a deliberative fashion.

Almost certainly, a deliberative legislature is what the founders of our constitutional regime envisioned. Many aspects of both the original Constitution and eighteenth century American society served to re-enforce the likelihood that legislators would consider both individual liberty and majority desires, and not be led astray by what James Madison called the "transient impressions"[1] of the populace, or

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1. James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 167 (Gaillard Hunt & James Brown Scott eds., The Lawbook Exchange, Ltd. 1999) (1920) (reporting for June 26, 1787).

what Elbridge Gerry called "the excess of democracy."[2] The founders did not want Congress to emulate what Gouverneur Morris called the "precipitation, changeableness, and excesses"[3] of state legislatures. Instead, the Constitution they wrote tried to ensure that Congress would deliberate in a thoughtful and civic-minded way about the good of the nation.

Factors that limited direct democracy, and therefore encouraged reflection, included the various "filtering" provisions of the Constitution, such as the electoral college and the selection of Senators by state legislators. There were also state laws limiting the franchise in various ways, and, perhaps most important, barely lingering societal norms of natural aristocracy, civic virtue, and political deference.

As Gordon Wood has demonstrated, however, these social limits were collapsing even as the Constitution was ratified.[4] Societal trends toward democratization proceeded apace, and were quickly followed by both statutory and constitutional changes that broadened the franchise and diminished the effect of the Constitution's mediating provisions. The trend accelerated in the twentieth century, and by the second half of the twentieth century virtually all of the constraints on direct popular sovereignty were gone. Senators are now directly elected, and the electoral college no longer exercises any independence. The franchise has been broadened, not only by eliminating status-based qualifications such as race and gender, but also by removing qualifications that had previously served to ensure a somewhat deliberative voting population: The abandonment of all educational and property requirements, as well as poll taxes, means that any 18-year-old citizen can now vote. Other changes include a decrease in voter responsibility and a drop in the percentage of eligible voters who actually vote, further reducing the incentive for true deliberation. The expanded role of money and the media cemented these trends, and many politicians now end up appealing to the most *reflexive* rather than *reflective* instincts. Of course, many, if not most, of these changes are for the better. Even taken altogether, the changes are not necessarily a bad thing. But they do change the nature of the legislature, making it more likely to be a mirror rather than a deliberative body.

The evidence suggests just such a decline in legislative deliberation. In the last quarter or so of the twentieth century, we have had a federal legislature that either thinks of itself as purely reflective of popular will (with a mandate from the American people) or is simply incompetent at true deliberation. Much of the significant legislation

2. *Id.* at 32 (reporting for May 31, 1787).
3. *Id.* at 202 (reporting for July 2, 1787).
4. *See generally* Gordon S. Wood, The Radicalism of the American Revolution (Vintage Books 1993) (1991).

that Congress has enacted recently has been duplicative of existing state or federal legislation (or unnecessary for other reasons), constitutionally suspect, or both. Even if useful in the abstract, it has been so hastily and sloppily drafted as to cause problems in application and unanticipated consequences. But all of this legislation has been highly popular either with the general public or with powerful constituents, and much of it has been passed by overwhelming margins in election years or in times of perceived crisis. Some of this legislation might have been a good idea, but it was written and enacted with little real consideration. Had there been more serious deliberation, some of the legislation might not have been enacted at all, and some might have been enacted in different form.

I draw my examples from a broad variety of subject areas, but they have much in common. All were passed by large majorities, quite quickly, and often in an election year. A few have already been invalidated by the Supreme Court. Examples of unnecessary statutes include the Violence Against Women Act,[5] the Gun-Free School Zones Act,[6] and the Electronic Signatures in Global and National Commerce Act ("E-SIGN"),[7] all of which duplicated laws already on the books or in process in most states. The first two statutes, of course, were invalidated by the Court for other reasons.[8] The Anticybersquatting Consumer Protection Act ("ACPA")[9] duplicated the still-new Federal Trademark Dilution Act,[10] and courts were successfully using the latter to remedy and prevent cybersquatting[11] when Congress decided to jump in and pass the ACPA. The Defense of Marriage Act[12] was unnecessary because courts had already interpreted the Full Faith and Credit Clause of the Constitution to permit states to refuse to recognize out-of-state marriages that violated their own public policies; no further legislation was necessary to ensure that states would not have to recognize gay marriage.[13]

Congress also ignored the Constitution in enacting popular statutes.

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5. Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994).
6. Pub. L. No. 101-647, 104 Stat. 4844 (1990).
7. Pub. L. No. 106-229, 114 Stat. 464 (2000).
8. *United States v. Lopez* held that the Gun-Free School Zones Act overstepped Congress' authority under the Commerce Clause. 514 U.S. 549, 551 (1995). In *United States v. Morrison*, the Court held that Congress, in passing the Violence Against Women Act, exceeded its powers under both the Commerce Clause and Section 5 of the Fourteenth Amendment. 529 U.S. 598, 627 (2000).
9. Pub. L. No. 106-113, § 3002, 113 Stat. 1501A-545 (1999).
10. Pub. L. No. 104-98, 109 Stat. 985 (1996).
11. *See* Suzanna Sherry, *Haste Makes Waste: Congress and the Common Law in Cyberspace*, 55 Vand. L. Rev. 309, 320-32 (2002).
12. Pub. L. No. 104-199, 110 Stat. 2419 (1996).
13. *See* Restatement (Second) of Conflict of Laws § 283(2) (1971) (stating that a valid marriage "will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage").

The Communications Decency Act[14] blatantly ignored existing First Amendment doctrine in sweeping legislation that was quickly—and unsurprisingly—invalidated by the Supreme Court.[15] The Flag Protection Act[16] was similarly obviously unconstitutional, and was also invalidated.[17] The Sonny Bono Copyright Term Extension Act,[18] which was recently upheld by the Court[19] (wrongly, in my opinion), was enacted deliberately to get around constitutional limitations: Legislators expressed the hope that successive extensions of existing copyrights could effectively extend copyrights "forever" despite the "limited times" language in the Intellectual Property Clause of the Constitution.[20]

Other statutes, while probably constitutional and arguably necessary, were drafted so hastily that the unanticipated consequences may well outweigh the benefits. The Supplemental Jurisdiction Act,[21] a five-paragraph statute meant simply to return the law of pendent and ancillary jurisdiction to what it was before a particular Supreme Court case, is so poorly drafted that it has created at least three different circuit splits.[22] The Sarbanes-Oxley Act,[23] in addition to its primary purpose of ensuring corporate responsibility, imposes radically new obligations on lawyers, changing their relationships with their clients and treading into territory previously regulated only by the states. The problems are so numerous that the SEC was forced to delay issuing regulations for that section of the statute. There is also the Economic Growth and Tax Relief Reconciliation Act of 2001,[24] which changes the rules for estate taxes. It phases out federal estates taxes gradually, so that there will be none at all in 2010. But—little known except to tax lawyers—it also *reinstates* federal estate taxes the very next year, 2011, back at 2001 rates! It is now impossible to engage in rational estate planning unless you know whether you will die before or after January 1, 2011. Some people are apparently adopting living wills that give different instructions about whether heroic measures should be taken depending on the date on which the decision needs to be made.

In all of these instances, Congress took the easy way out. Many of the statutes involved circumstances not readily susceptible to interest

14. Pub. L. No. 104-104, § 501, 110 Stat. 133 (1996).
15. Reno v. ACLU, 521 U.S. 844 (1997).
16. Pub. L. No. 101-131, 103 Stat. 777 (1989).
17. United States v. Eichman, 496 U.S. 310 (1990).
18. Pub. L. No. 105-298, § 102, 112 Stat. 2827 (1998).
19. Eldred v. Ashcroft, 537 U.S. 186 (2003).
20. *See, e.g.*, 144 Cong. Rec. H9951-52 (daily ed. Oct. 7, 1998) (statement of Rep. Mary Bono).
21. Pub. L. No. 101-650, § 310, 104 Stat. 5089 (1990).
22. *See* Sherry, *supra* note 11, at 319 n.30.
23. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).
24. Pub. L. No. 107-16, § 501, 115 Stat. 38 (2001).

group politics. Nobody is *for* violence against women, or guns in schools, or even flag-burning. The strongest arguments against the statutes are abstract and theoretical: the need to avoid duplication, or the values of federalism and free speech. A deliberative Congress would consider those abstract interests, despite the fact that few members of the public were urging them to do so. *This* Congress did not, or at least did not take the interests seriously.

My bottom line, then, is this: Only a legislature that is reflective in the sense of being deliberative can act with integrity. A great deal of evidence suggests that the contemporary American Congress is incapable of being reflective, and I therefore conclude that it is not likely to act with integrity. If we are looking for the branch of government most likely to act with integrity and to uphold our enduring values and aspirations, we should—unpopular as the suggestion is today—heed Alexander Bickel's advice and turn to the judiciary.