

# Law and Democracy in Deliberative Theory and Practice

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**The Law of Deliberative Democracy** by Ron Levy and Graeme Orr. Abingdon: Routledge, 2016. 239 pp., £110 hardcover 9780415705004, £36.99 paperback 9781138481886

**Deliberative Democracy between Theory and Practice** by Michael A. Neblo. Cambridge: Cambridge University Press, 2015. 215 pp., £64.99 hardcover 9781107027671, £18.99 paperback 9781316649169

Ron Levy and Graeme Orr's *The Law of Deliberative Democracy* and Michael Neblo's *Deliberative Democracy between Theory and Practice* are important contributions to democratic theory and, in particular, to deliberative democracy. Both books engage with state of the art discussions on pressing issues in political theory in profound, well-articulated fashions.

In this review essay I proceed by first describing the main theses of these books, their structure, and their conclusions, and finish with critical remarks. Let me begin with *The Law of Deliberative Democracy*.

Levy and Orr have managed to bring together two separate fields, namely deliberative democratic theory and what they refer to as *the law of politics*, in a complex and innovative manner. The book is insightfully written so as to use each discipline to cover some of the scholarly gaps exhibited in the other. Their premise is that “[l]egal scholars have been slow to join the deliberative turn ... [and] [d]eliberative democrats have not always recognized law’s wider perfusion through democratic politics” (pp. 4-5). They thus seek to extend the scholarly view of the law of politics beyond traditional concerns over the values of liberty, equality and integrity “to critique, and ultimately to update, certain routine assumptions about law in deliberative democratic theory” (p. 8). In short, they criticise the deliberative democrats’ neglect to consider how legal norms enable and limit democratic processes of deliberation and legal scholars’ resistance to enter the field of deliberative democracy.

These problems are dealt with in four parts. Part I (the book’s introduction and Chapter 1) poses the question of what the role of deliberation in a world of increasing juridification is. Part II (Chapters 2 and 3) reconstructs and discusses the foundations of deliberative democracy, with a focus on the law of politics. Part III (Chapters 4 to 6) critically surveys problems in the law of deliberative democracy by tracing “how the essential propositions [of deliberative democratic theory developed in part II] apply to the law of politics’ doctrines of political liberty, equality, and integrity”. The last part (Chapter 7) offers concluding remarks.

The book advances two major arguments. The first, developed in Parts I and II, examines different ways in which law shapes and/or conditions what they coin “second-order deliberation”, i.e., “questions concerning *deliberation about the process of democratic decision-making itself*” (p. 9. Emphasis in the original). The book contrasts this category with that of “first-order deliberation”, which “concerns the collective process for writing substantive policies that have direct effects on the lives of citizens” (p. 9). The authors give second order deliberation primacy over first order. As a result,

second order deliberation is the perspective from which the analyses of the theoretical arguments and case studies in the book are undertaken.

The second major argument, mostly developed in Part III, is that judicial reasoning and, most prominently, the method of proportionality often used by judges to reduce complexity when balancing competing principles of liberty, equality, and integrity, is at odds or in tension with deliberative values and/or other aspects of democracy (e.g. free speech). This is, Levy and Orr argue, to the extent that the values balanced are seen in a *thin* way. By contrast, *thick* readings of liberty, equality, and integrity open paths for reconciling these values with deliberative democracy.

In a nutshell, their point in this book is that their understanding of deliberative democracy (1) allows for a “accommodative approach and jurisprudence, which understands liberties of expression not as one-dimensional rights, but as part of a deliberative system of discourse” (p. 108); and (2) offers a solution to the conflict in the law of politics between equality and deliberation. In Levy and Orr’s wording “an apparent conflict between deliberation and ... equality in the law of politics is illusory ... [T]he law of politics should favour [a] thick conception, which gives equality in law a novel aspect largely distinct from other, well-worn legal equality categories” (p. 121). Furthermore, their view of deliberative democracy (3) represents a valuable tool for overcoming problems of integrity in the law of politics (partisanship and coercion). For them “carefully tailored laws and institutions may engender integrity, even in the face of extreme partisanship” (p. 151).

Several critical remarks are in order, but given space limitations, I will focus on two. First, the book does not adequately justify the authors’ selection of Australia, the UK, Canada and the US as the countries for their case studies other than that this geographic “breadth is in keeping with the authors’ diversity of experience” (p. 12). Although they do aver that this choice “also reflects the law of deliberative democracy’s potentially broad relevance across the liberal democracies of the common law world” (p. 12), no further reflections are offered as to how their findings and arguments may be generalisable to other countries or legal traditions.

Second, in my view, the book does not strike a complete balance between the theoretical contributions that the law of politics makes to deliberative democratic theory and the ones that deliberative democracy could make to the law of politics. Although adequately presented, the section on the foundations of deliberative democracy does not innovate as much as the overall topic of the book allows. The authors even invite readers versed in deliberative democratic theory to skip Chapter 3, where they define the theory’s main elements (p. 21). By contrast, the book is extremely well documented on election law and the law of politics more generally. In fairness, however, this is also a minor point, for the overall project is very consistent.

In turn, the second book under review, Michael Neblo’s *Deliberative Democracy between Theory and Practice*, is an attempt to close gaps between deliberative democratic theory and practice. It is an impressive account of how to cope with important challenges from social choice theory and other theoretical constructs critical of deliberative democracy. Against these “realist” accounts, Neblo is adamant that “governance can be both genuinely democratic and robustly deliberative” (p. 3). He adopts a systemic perspective whose main goal is to “secure authentic deliberative buy-in for good political decisions”. That is, that “citizens can look at the policies, laws and rationales produced by the political process and recognize them as reasonable and better

yet, embrace them as their own” (p. 8). Neblo’s aim is to “develop the outline of [a] transformed relationship between deliberative theory and empirical social science, and to show how doing so opens the door to a vastly more constructive interaction between the two” (p. 10).

The book has an introduction, six chapters and a final part with conclusions. Chapter 1, introduces an inclusive, non-elitist version of deliberative democracy that seeks to answer the realists’ objection that the theory hardly meets its goals in practice. In addition to some instrumental, outcome-derived benefits, Neblo sees deliberative democratic theory as normatively valuable because of its insistence on argumentation and accountability according to reasons, which promotes values of freedom and autonomy.

Chapter 2 develops two ideas central for the book: the notion of a “deliberative system” and what Neblo terms “the inferentialist account of political justification” (pp. 10-11). Like most contemporary deliberative scholars, Neblo’s understanding of the deliberative system is that no single institution can embody every deliberative ideal by itself. Instead, such ideals should be evaluated and measured holistically, at the system level. This puts him in a good position to argue that citizens’ apathy, lack of political commitment and engagement is to a great extent explained by their lack of institutional opportunities to discuss, argue, voice their opinions, listen to others, and have informed policy preferences. I will come back to Neblo’s version of the deliberative system in my critical remarks.

Regarding the idea of an “inferentialist account”, Neblo follows Robert Brandom’s inferentialist semantics, according to which “the meaning of some term or expression is determined by its inferentialist relationship to other terms and expressions” (p. 30). In a deliberative system, this entails that individuals form their preferences internally in a critical manner, examining “some problematic regions of their webs of belief in an effort to resolve [problems]” (p. 30). Consequently, when those problems bear on contested collective matters, individuals can try to solve them via a deliberative process of mutual search and clarification that Neblo calls “inferentialist articulation”, the attractiveness of which lies in that it “opens up the possibility that we can make better and worse arguments in the game of giving and asking for reasons ... in a way that goes beyond any given instance of deliberation” (p. 31).

Chapters 3 to 6 tackle four critiques of deliberative democratic theory. Chapter 3 addresses the framing critique, that is, that deliberative democracy is bound to fail because it relies on the possibility that individuals provide reasonable inputs to the deliberative process. Yet, the critique goes, in reality individuals have neither stable preferences nor stable judgements. Neblo, however, does not deny that this is the case. Instead, he argues that it is not only citizens who are the ones affected by this problem, but elites as well. The difference is not one of kind, but a matter of degree (p. 62), and inferentialism can be a useful tool in closing the gap between both groups.

Chapter 4 discusses the social choice critique of popular democracy with a focus on William Riker’s thesis that social choice theory “renders populist notions of democracy meaningless” (83) as well as on Gerry Mackie’s response to this challenge. The chapter argues that this debate left important questions unsolved, for which inferentialism provides useful answers. In this vein, Neblo defends a partially epistemic thesis: that inferentialism allows for a rapprochement between formal and deliberative

theories. Far from reproducing traditional problems of social choice, deliberative democracy generates conditions for ruling out a good amount of bad policies as well as for selecting sets of reasonable alternatives.

In Chapter 5, Neblo draws on empirical work with other co-authors to tackle the belief that citizens' motivation is limited to prevent corrupt politicians from taking office. To the extent that politicians behaved correctly, the critique has it, citizens would lose their motivation to participate in deliberative encounters. Neblo and his colleagues refute this thesis, concluding that people's willingness to deliberate is much more widespread than usually expected, and that it is precisely people who are less likely to participate in traditional partisan politics who are the ones most interested in deliberative participation (p. 120).

Chapter 6 deals with the objection that deliberation is bound to fail because citizens are incompetent. Neblo engages in a discussion about deliberative polling and how these democratic innovations can be the object of partisan manipulation to the extent that they are not publicly scrutinised, to conclude that "citizens are not only more willing to deliberate than commonly thought, but that they [are] more competent as well" (p. 197).

This book raises many questions, but I will limit myself to one criticism. It is puzzling that Neblo describes the deliberative system in a rather formal way. As it happens, the main division in his version of the deliberative system reproduces the binary idea of "strong" and "weak" public spheres (p. 22). In Neblo's own wording, "[t]he main division ... is organized around the familiar distinction between the state and civil society" (p. 22). But this fails to consider that deliberative democrats think of deliberative systems differently, emphasising sequencing, creativity, and other non-formal aspects and sites. Neblo seems to be limiting his systemic approach to something akin to what Boswell et al. (following Gutmann and Thompson) call "middle democracy". That is, one "whereby actors through the system can pursue matters of common interest through existing democratic spaces or conventional links between public and empowered space (e.g. public hearings, legislative inquiries)". But other versions emphasise "coupling of inclusive participatory forums to empower institutions", as well as "discourses, understood as broad ensembles of ideas, categories and metaphors",<sup>i</sup> and Neblo's portrayal of the system does not seem to provide enough room for them.

Despite these and other possible criticisms, both books are interesting, and extremely well documented, and their authors are conversant with a vast array of literature, which they grapple with, advancing innovative arguments. They will certainly be of value to constitutional lawyers, political theorists and political scientists who are interested in deliberation.

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<sup>i</sup> Boswell, John, Carolyn M. Hendriks, and Selen A Ercan. "Message received? Examining transmission in Deliberative Systems." *Critical Policy Studies* 10, 3 (2016), p. 265.

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