

# The Law of Deliberative Democracy, by Ron Levy and Graeme Orr

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## The Law of Deliberative Democracy, by Ron Levy and Graeme Orr

### **Abstract**

The Law of Deliberative Democracy, written by Ron Levy, a senior lecturer at the Australian National University, and Graeme Orr, a professor of law at the University of Queensland, has broken critical new ground in the practical application and expansion of deliberative democratic theory. The core concept for deliberative democrats is that the exercise of political power is only legitimate when it is justified by conversation and consensus with a broad range of citizens. With this book, Levy and Orr examine the degree to which the laws of politics measure up with the ideals of deliberative democracy, as well as how and why they should. In doing so, the authors ask an important question: To what extent does election law--the body of laws regulating parties, candidates, voters, and other actors involved in representative elections--encourage or inhibit deliberation, by the citizenry, about the mechanics of their democracy?

## Book Review

***The Law of Deliberative Democracy*, by  
Ron Levy and Graeme Orr<sup>1</sup>**TANYA KUZMAN<sup>2</sup>

*THE LAW OF DELIBERATIVE DEMOCRACY*, written by Ron Levy, a senior lecturer at the Australian National University, and Graeme Orr, a professor of law at the University of Queensland, has broken critical new ground in the practical application and expansion of deliberative democratic theory. The core concept for deliberative democrats is that the exercise of political power is only legitimate when it is justified by conversation and consensus with a broad range of citizens.<sup>3</sup> With this book, Levy and Orr examine the degree to which the laws of politics measure up with the ideals of deliberative democracy, as well as how and why they should. In doing so, the authors ask an important question: To what extent does election law—the body of laws regulating parties, candidates, voters, and other actors involved in representative elections—encourage or inhibit deliberation, by the citizenry, about the mechanics of their democracy? By analyzing deliberation from this perspective, Levy and Orr have skillfully bridged the disciplines of political science, political theory, and the law, carving

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1. (New York: Routledge, 2016).
  2. Tanya Kuzman holds a JD from Osgoode Hall Law School. She attained her Master's degree in Political Science from the University of Toronto and her undergraduate degree from McMaster University.
  3. See generally Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (Cambridge: Massachusetts Institute of Technology Press, 1996); Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Cambridge, Mass: Belknap Press of Harvard University Press, 1996).

out a previously unexplored field of study that forces the reader to confront the law itself as an institution capable of bringing deliberative democracy to fruition.

In part one, the authors begin by explaining the historical tension between governance seen as either *deliberative*, meaning inclusive, cooperative, reflective, and capable of generating intelligent law and public policy, or *democratic*, signifying the widespread participation of the citizenry in the creation and dispensation of law.<sup>4</sup> Rarely, they explain, has governance been simultaneously seen as both deliberative and democratic. Through invoking the early work of Aristotle and J.S. Mill, the authors demonstrate the degree to which this divide is deeply entrenched in the work of political theorists, academics, and legal scholars.<sup>5</sup> Furthermore, the authors use part one to explore the intersection between law and politics. Levy and Orr shrewdly point out that judicialization and juridification of politics has led to extensive scholarship on how democratic institutions can shape deliberation to yield more trusted governance, but that the existing literature has generally failed to consider the law itself as an institution within the deliberative democratic landscape.<sup>6</sup> This is a critical and novel aspect of the book. Existing deliberativists have focused on examining the legitimacy of laws by investigating the extent to which deliberation was a factor in their creation.<sup>7</sup> What Levy and Orr focus on is the role of the law itself in determining the deliberative quality of democratic decision making.<sup>8</sup> This gap in the discourse, coupled with the critical tension between visions of governance as either democratic or deliberative, forms the backdrop against which the authors' arguments unfold.

As the authors lay out the theory of deliberative democracy, the reader is given a proverbial tool box to be used in tackling the book's remaining chapters.<sup>9</sup> In addition, the authors discuss the various rationales for pursuing deliberative democratic decision making, as well as the criticisms and ambiguities that still haunt the theory.<sup>10</sup> This section is also used to orient the reader by discussing the sites of decision making in which the book's analysis is focused, such as

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4. Levy & Orr, *supra* note 1 at 3-5.

5. *Ibid.*

6. The judicialization of politics refers to an increasing reliance on the courts to address questions about public policy and political controversies. The juridification of politics refers to the proliferation of formal, rational legal systems in western societies. See generally Ran Hirschl, "The Judicialization of Politics" in Keith E Whittington, R Daniel Kelemen & Gregory A Caldeira, eds, *Oxford Handbook of Law and Politics* (Oxford: Oxford University Press, 2008); Levy & Orr, *supra* note 1 at 5-6.

7. Levy & Orr, *supra* note 1 at 7-8.

8. *Ibid.*

9. *Ibid.* at 21-24.

10. *Ibid.* at 25-29.

campaigning, voting, and deliberating in elections.<sup>11</sup> What makes Levy and Orr's book so captivating, however, is not just how skillfully they outline the conceptual theory of deliberative democracy, or the comprehensiveness of their justification for actively pursuing its grand normative goals, but rather, its ability to methodically dispel well-established critiques claiming that the law of politics is not consistent with deliberative democratic theory. For example, while deliberatively democratic decisions should emerge from systems that broadly survey the views of affected participants, judicial deliberation is practiced mainly in isolation, making it difficult to meet the theory's democratic demands.<sup>12</sup> Other critics have argued that entrenched partisan polarization makes achieving the theory's hallmarks of cooperation and informed consent extremely challenging.<sup>13</sup> However, the authors rise to the challenge in responding to these critiques by unpacking what they feel are the true barriers to aligning the law of politics with deliberative democratic ideals.

Throughout the remainder of the book, Levy and Orr call the reader's attention to the law of politics' real deliberative problem, which is that of the design or practice of law, whereby courts favour methods that too often generate less deliberative reasoning. This is perhaps most apparent in the way judges use the principle of proportionality in legal reasoning. The fulcrum upon which the rest of the book pivots is Levy and Orr's claim that proportionality often creates a false dichotomy between deliberation and the more dominant values of liberty, equality, and integrity in the law of politics (these three values, respectively, encompass the three remaining chapters of the book, exclusive of the conclusion).<sup>14</sup> The authors substantiate these claims by looking at a range of case studies from regulating polling data to truth in political campaigns, public broadcasting of campaign pledges, and gerrymandering.<sup>15</sup> Ultimately, Levy and Orr conclude that when judges adopt "thicker" readings of the values of liberty, equality, and integrity, they allow for a reconciliation with deliberation such that these values become mutually supportive rather than eclipsing one another.<sup>16</sup>

They then examine the relationship between equality and the proposed value of deliberation. The authors explain that, when judges try to make decisions to either maintain or bring about political equality, they typically see the principle as

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11. *Ibid* at 25-36.

12. *Ibid* at 45-46. See generally John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford: Oxford University Press, 2006) at 1-21.

13. Levy & Orr, *supra* note 1 at 45-46.

14. *Ibid* at 60-61.

15. *Ibid* at 86-108, 128-35, 149-81.

16. *Ibid* at 60-61.

operating between competing political parties, political candidates, or individual voters themselves. However, Levy and Orr argue that this represents a “thin” conception of equality, one that unnecessarily casts deliberation as a value against which equality must be balanced. The case study focusing on the legal regulation of campaign speech proves insightful. *Australian Capital Television Pty Ltd v Commonwealth*, the Australian High Court’s free expression case, concerned a law mandating publicly-funded broadcast airtime for political parties.<sup>17</sup> The law granted free television airtime to candidates to deliver speeches about policy, untainted by visual distraction. The law also banned alternative forms of paid political broadcast advertising during campaigns. The court struck down the law, in part, because 90 per cent of the broadcast time was allocated for the parties already represented in parliament, with the remainder of time being allocated for parties without any incumbent members.<sup>18</sup> Levy and Orr argue that, in doing so, the court mistakenly characterized the most pressing equality issue as being unequal division of time between established and developing parties.<sup>19</sup> If left in place, the legislative scheme had the potential to realize significant deliberative goals, including an exchange of the typically short and shallow stump speeches for more substantive policy explanations. Therefore, Levy and Orr suggest, had the court been mindful of deliberation *and* equality, it would have upheld the law, possibly recommending modifications to rectify concerns about time allocation between the parties.<sup>20</sup> With this case study, Levy and Orr demonstrate how the court’s “thin” view of equality underestimated the law’s broader deliberative potential by conceptualizing equality as a balance between political parties, rather than a gateway to more robust discussion of policy choices.<sup>21</sup>

Finally, the authors deal with partisanship and the unethical use of power for political gain. Levy and Orr propose a “guidance” model for decision making, which they claim is capable of meeting deliberative goals, while avoiding at least some of the chronic coercion in democratic politics.<sup>22</sup> The authors posit that the model helps to account for how, beginning in the early 1960s, the Federal Electoral Boundary Commissions rapidly eradicated a history of partisan gerrymandering in Canada.<sup>23</sup> Levy and Orr use the concept of “thick” integrity to connote the

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17. *Australian Capital Television Pty Ltd v Commonwealth*, [1992] HCA 45, 177 CLR 106; Levy & Orr, *supra* note 1 at 128-35.

18. *Ibid* at 128.

19. *Ibid* at 128-29.

20. *Ibid* at 130.

21. *Ibid* at 129.

22. *Ibid* at 164.

23. *Ibid* at 164-70.

kind of decision making recommended by the model—that being well-sourced and reflective of relevant arguments rooted in rational methodologies.<sup>24</sup> Ultimately, the authors rightly point out that, while the law cannot compel behavior in keeping with “thick” integrity, embracing the guidance model can lead to decisions that have the capacity to entrench deliberation into the law, thereby ensuring more decisions are made with integrity.<sup>25</sup>

*The Law of Deliberative Democracy* is an extremely well-written work which presents the reader with a novel lens through which to understand the role of the law as an institution capable of making deliberative democracy a reality. Levy and Orr’s prescriptions for adjustments to judicial reasoning chart a previously unmarked path to reconciliation between the values of liberty, equality, integrity, and deliberation. Their success is due, in large part, to the space and time they devote to explaining and re-explaining their arguments in engaging ways. For anyone intrigued by the discourse concerning the intersection between law, politics, and democracy, this book equips the reader with the conceptual tools to optimistically imagine and perhaps even work towards a truly deliberative democracy.

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24. *Ibid* at 60-61.

25. *Ibid* at 180-81.