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THE LAW OF DELIBERATIVE DEMOCRACY: DELIBERATING IN A CRISIS¹

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Abstract

Can law improve democracy? Can it, in particular, make democracy more deliberative: more informed, reflective, flexible and equally inclusive of diverse people, views and ideas? Can law help reshape democracy to make it less impulsive, less partisan or less trivial, and better able to reach sound, far-sighted decisions? At the broadest level, these are the questions my co-author Professor Graeme Orr and I ask in our new book, *The Law of Deliberative Democracy*, on which this working paper is based.

I. Introduction

Can law improve democracy? Can it, in particular, make democracy more deliberative: more informed, reflective, flexible and equally inclusive of diverse people, views and ideas? Can law help reshape democracy to make it less impulsive, less partisan or less trivial, and better able to reach sound, far-sighted decisions? At the broadest level, these are the questions my co-author Professor Graeme Orr and I ask in our new book, *The Law of Deliberative Democracy*.

The questions are especially pertinent in light of recent democratic events that have seemed to revive the dark rhetorics of earlier, more troubled times in Western history. Yet, wherever there have been democracies, there have been critics of democracy concerned about the apparent tension between mass rule and deliberation. Aristotle saw value in mass decision-making, but preferred an aristocratic government ‘formed of the best men’. JS Mill lamented the ‘low calibre of the men’ in democratic governments. He hoped for elites instead – or ‘leading minds’ – to assume prominent, educative roles: to demonstrate by example how to ‘reason intelligently about the ends of politics’.

In the current climate, these old questions now frequently manifest as anxieties about rising populism. Can we keep modern democracies from veering too far toward populism, which is often relatively unschooled, and often starkly anti-deliberative? Can we also avoid making the opposite mistake, of overemphasising elite power, and leaving popular rule as just an afterthought – an election or a referendum called every now and then, after the hard decisions have been made by someone else? One problem with elitist governance is that it may have got us, in the first place, into the modern mess of populist reaction: the crises of Trump, Brexit, Duterte and so on.

In response to these tensions between democracy and deliberation, the study of politics has taken a marked ‘deliberative turn’. Scholarship on ‘deliberative democracy’ seeks ways to accommodate democracy to deliberation, often by creative redesign of democratic institutions. This possibility has excited many political scholars (a group not generally prone to undue excitement).

It may seem strange to promote deliberative democracy in the immediate aftermath of the US presidential election. But deliberative democracy scholarship is a response to poor deliberation, not good deliberation. If all democratic deliberation were of a high calibre we would not have needed to write our book. It is when deliberation fails that the study of deliberative democracy becomes all the more urgent.

II. The Best-Laid Deliberative Schemes

What, then, can law do to lift democracy from its current crisis state? Deliberative democracy is not utopian. It does not aim to perfect deliberation, but only to edge democracy ever closer to deliberative ideals. Deliberative democrats are incrementalists, not starry-eyed idealists. Their own empirical studies show that deliberation, like any political value, can be improved upon – but only in stages and by degrees, not all at once.

When we first began to write the book, we relied on our backgrounds in the law of politics to brainstorm about how law influences deliberation in a democracy. Law has now colonised most of the corners of democratic practice, and so it is no surprise that we discovered many examples of laws, real or proposed, that can perhaps lift the quality of deliberation. Among them are the following:

- Laws can control media reporting of opinion polls during the electoral campaign. That may mitigate some of the focus on the horserace of the campaign. In the US election well over 1000 polls were reported. Where did that leave reporting on the substance of policy? Did it help to breed the severe partisan competitiveness that overrode any sincere and open-minded consideration of public policy?
- Laws can regulate the release of prosecutorial information during the late campaign – when allegations may be prejudicial and there is too little time to refute them. Prosecutors and anti-corruption commissions do not publicly declare all the cases before them. And sitting US presidents are already immune from criminal prosecution, precisely due to the fear that prosecutors will use the powers of their office to undermine a duly-elected president. Why not extend these protections to the electoral campaign itself?
- Laws can impose ‘open primaries’ (or, in Australia, open pre-selections) where everyone, regardless of party membership, can vote for party nominees – not just the fired up partisan base that tends to select the most extreme candidate. Laws of this kind once existed in the US.
- Laws can impose requirements of truth in political advertising (as in South Australia).

There are many other examples. However, let us focus here on a key, further example which is nearly always current in Australia and abroad:

- Laws can control the effects of money on the electoral campaign. This is an old ambition, and one usually phrased in terms of the *equality* of political candidates (who need access to a level playing field) or of the *integrity* of politics (because where there is money, there may be corruption). But campaign money regulation also may be seen as pursuing *deliberative* goals: do we prefer a transactional model of democracy, where policy outcomes are bought or at least swayed by the highest bidder, or a democracy premised on sincere, open reasoning about the best policy choices? Caps and bans on donations and public funding of candidates can serve equality, integrity and deliberative aims if they give a diversity of candidates, with a diversity of ideas, sustained access to media to air their views.

The examples above suggest that, though doing so is never easy, legislative schemes can potentially improve democratic deliberation. Each of these schemes has pros and cons; we

explore some of these in the book. But our main focus is on an overarching legal problem. Law is not only a set of aspirational schemes. It is also a set of practices; this is particularly where deliberative democratic schemes often run into trouble. The practice of law – especially in the courts, and especially given the courts’ reasoning aids like proportionality testing – often provides a poor fit to political deliberation. The practice of law may not always square with deliberative democracy.

This may seem counterintuitive. Indeed, the first scholars to contend with the roles of law in political deliberation, for example Rawls and Habermas, thought law could make democracy more deliberative. After all, judges, too, deliberate. Rawls and Habermas thought courts can discipline the excesses of democracy and make it more deliberative. We do not discount this; in fact we have encouraged contributors to our next book, *The Cambridge Handbook of Deliberative Constitutionalism*, to explore this notion.

But Rawls and Habermas are not lawyers. And one of the main places in which their deliberative optimism falls short is in the field my co-author and I know best: the law of politics. This is where law directly regulates the political system. Judges must often choose to preserve or strike down a deliberative democratic scheme. How will they make this decision? The judges must make choices about what values should underlie a political system. But does judicial reasoning about politics leave any room for deliberative democracy?

The short answer is, too often, ‘no’. Political deliberation is the dark matter of the constitutional firmament: it is often ignored, overshadowed by prominent political values already settled in the constitutional system. In our study we found that the relative invisibility of political deliberation in the courts is a barrier to deliberative democracy in the real world. In short, the practice of law can be – and often is – a spoiler to the best-laid plans of deliberative democrats.

III. Communicative Liberties and Deliberation

Ultimately in our book, we discuss how these problems may be open to reform – especially by changing the way deliberative democratic schemes are litigated. However, the relatively pessimistic theme of clash between law and deliberative democracy runs through the first part of our book. In this section I give an illustration of this clash using the example of regulating political money.

In a series of cases – from *ACTV* in 1992, to *Unions NSW* and *McCloy* in 2013 and 2015 – we saw a developing story of the Australian High Court struggling over whether it should uphold laws regulating political money and speech.ⁱ This story is one of a pervasive misunderstanding (except by some judges in dissent) of the deliberative factor underlying these cases.

In *ACTV*, a law gave political candidates the great luxury of free broadcast time to make minutes-long appeals to voters, with minimal distraction and focusing on substantive policy. Reflecting on this scheme, we might ask what could have been. If this law had been left to stand, could it have reshaped our political discourse – perhaps even making Australia a model, internationally, for good democratic deliberation? The Court struck down the scheme partly on liberty grounds, as the law banned alternative forms of TV and radio advertising. The Court also relied on a kind of equality reasoning: that the law privileged established

parties, which got the lion's share of free airtime – 90%. *ACTV* did not close the door on the regulation of political money and speech. But the question that lingered for a long time was, What kind of regulation would be allowed? Would any? After the *Unions NSW* case in 2013 struck down part of a NSW law limiting political donations, there was even more doubt and anxiety about this. Finally, in the *McCloy* case we learned that the Court would uphold some regulations. This was a relief to many.

But that apparent victory rests on what we think are uncertain and even incoherent foundations. The Court still is not thinking about the role of deliberation clearly. And this may be a problem in the future. Throughout the book, we show how the political value of deliberation is understood by courts as rival to three other values: liberty, equality and integrity. The trouble with these three rivalries is that deliberation nearly always loses out to the other values. The assumption that the values are in tension with deliberation is based on what we call *deliberatively thin* understandings of liberty, equality and integrity. *Thick* understandings of each of these values would recognise how deliberation is compatible with them. Indeed, deliberation is even a component of these values. Consider equality: recall that deliberation is defined in part as the inclusion, on equal terms, of a diversity of people, information and views. Equality is already part of deliberation, and vice-versa. Deliberation as a value should inform how we view equality in the political domain.

However, judges who review deliberative schemes seldom sign on to this integrated, deliberatively thick view of equality. Legal concepts, in general, do not do justice to integrated political values. Courts in the law of politics struggle to make sense of and to give coherent decisions in a profoundly complex normative universe: the universe of democratic politics. Here there is competition over which policies and which people are best for the polity. But, even prior to this, there is also debate over what 'best' means in the first place. This is a radically contested normative universe. In response, legal practice relies on simplification. It does this in part through proportionality testing – a workhorse of the common law at least since Magna Carta. Proportionality structures and simplifies judgment. The problem raised, however, is that the complexity set aside is sometimes crucial to understanding our normative world. Simplicity is not always a virtue.

One kind of proportionality is the test developed over time in the freedom of political communication context (recently revised as 'structured proportionality'). The test imagines a zero-sum competition between values on either side of a balance scale. In cases like *ACTV*, we see courts place values such as liberty and deliberation on the balance scale. In the book we call this 'conceptual balancing', because it is a conceptual analysis in which it is a foregone conclusion that we are dealing with separate, and not integrated, values. Here, then, liberty is a thin value.

However, in the book we identify not one but several variations on proportionality. Turning to my focus in this short piece – equality – courts in Australia and Canada, and especially in the US, rely on a lesser-known form of proportionality, which we call 'strategic balancing'. 'Strategic' is a term we borrow from deliberative democracy scholarship to describe not deliberation, but rather a contest of tribal units – fixed groups, with fixed ideas and interests, who struggle for dominance over each other. This is in many ways the opposite of deliberative democracy, which is meant to be cooperative and open-minded about ideas and interests.

We think it notable that practice in the law of politics conceives of equality in strategic terms. The result is a thin notion of equality. The proportionality test for political equality is conceived most often as equality between political parties. This amounts to strategic balancing: a weighing of political rivals to ensure their chances for gaining election are roughly equal; or at least that legislation does nothing to spoil the electoral prospects of either main party. The focus is therefore on equality of opportunity for political parties. A court focused on equality of the parties in this way can neglect deliberately thicker equality aims. This is what we saw in *ACTV*, where again the Court fretted about 90% of free airtime going to established parties.

Arguably, however, the scheme only tried to promote more substantive discussion of policy, from within the existing democratic system dominated by parties. This is the system we have, and it is not likely to be replaced in the near future. Perhaps, then, laws should attempt to improve deliberation from within the system. Indeed, we think the scheme should have been left to run, at least for an experimental period to see whether it would succeed.

Note, briefly, how later cases approximately match the *ACTV* equality framework. In *Unions NSW*, the impugned law was struck down. Here there was an implicit party-equality issue, as the law kept labour unions from donating freely to the Labor Party. By contrast, in *McCloy*, a ban on donations from property developers affected the parties essentially equally. The Court left this law standing. There is, of course, more to each of these cases. But these details are notable as they lend more evidence of the Court's party-focused equalitarian reasoning in the law of politics.

The reliance on equality reasoning has been on the rise in cases since the 1990s in Australia, and since the 1960s in the US (with the advent of 'one person, one vote'). It is understandable why: judgments of equality under law are easier to make than more unbounded, absolute judgments of what justice requires in politics. Judges face the wicked problem of needing to take a multifaceted world and render it simple. Even though the world of politics cannot be simplified, it must be simplified. Judges, by getting involved in reviewing politics, have left themselves no choice but to rule finally and clearly on profoundly indeterminate value questions. They cannot throw up their hands to say 'we're sorry, this is just too hard'. From this we get thin political values and the simplified proportionality methodologies that enforce them.

On the surface, we appear to be in the uncomfortable position of arguing against equality. However, this is not the case. Our ultimate claim is that an apparent conflict between deliberation and equality is illusory. Thick equality incorporates lessons from deliberative theory to generate a more complete picture of what political equality entails. It means an equality of inclusion of ideas, arguments, interests, values, preferences, social perspectives, discourses and intellectual frameworks. Strategic balancing, premised simply on political party parity, is a far thinner notion of equality, which almost wholly fails to capture these wider meanings.

Thin equality is a judicial crutch. It reduces complex, cross-cutting, and vague arguments about justice to simple comparisons. Political parties present points where – unusually – the two normative systems of law and electoral democracy best recognise each other. Here they use a partly common language and share features in common. Political parties are formalised and stable. Parties thus play similar roles in politics and in law: aggregating people and points

of view, and forming them into more or less coherent unities. This helps explain the law's enthusiasm for regulating political parties.

The difficulty is that the affinity between politics and law at these points of mutual recognition can drag politics toward a model of practice inconsistent with deliberative democracy. Legal decision-making sometimes forces these points of contact and undermines a deliberative vision of equality premised on inclusion beyond political parties.

IV. Conclusion

Our book is among the first full-scale examinations of law's effects on political deliberation. The argument I have presented here is one of several appearing in the book. The book's focus is on the law of politics, where a court's tasks include making fundamental choices about democracy and elections. A court may be forced to consider, at least implicitly, whether electoral democracy should aim to be deliberative. Other political values compete for the court's attention: especially liberty, equality, and integrity. Faced with such choices, judges try to make their jobs simpler and adopt thin conceptions of political values. This, in many areas, across many examples, is how courts and legal practice play spoilers to deliberative democratic schemes. That they do so is a testament to how little deliberative democracy has penetrated the consciousness of lawyers. It is also a problem in deliberative democracy scholarship and practice, which often do too little to engage with questions of law. It is incumbent on both sides to bridge their solitudes.

ⁱ *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Unions NSW v New South Wales* [2013] HCA 58; *McCloy v New South Wales* [2015] HCA 34.