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**THE LAW OF DELIBERATIVE DEMOCRACY: SEEDING THE FIELD**

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## I. Introduction: Law, Deliberation and Legitimacy

Two basic expectations of public governance appear to lie in sharp tension. One is that public decision-making should involve *democratic* participation by citizens, through voting or other means. The other is that decision-making should be *deliberative* – for example, informed, cooperative, reflective and capable of issuing sound policy and law. Classically, governance was understood as either democratic or deliberative, but seldom both at once. Observers from Aristotle to Mill noted this deliberative tension.<sup>1</sup> Yet in recent decades it has seemed to grow more acute. Runaway policy complexity – in economics, the environment, international affairs, etc. – coexists uneasily with the global rise of direct lay-citizen input into lawmaking.<sup>2</sup> Moreover, timeworn models of representative government, beset by polarization and other problems, often fail to meet the deliberative demands of contemporary lawmaking.

One extraordinary response to the deliberative tension has been a partial reorientation of political theory over two decades or more. In that time, the burgeoning literature of deliberative democracy has solidified a number of central questions and propositions. A particular concern in the field is whether the tension is to some extent illusory, and whether in fact particular governance models can sometimes robustly encourage democratic participation and deliberation at once.<sup>3</sup>

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<sup>1</sup> Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), 8–9. More recently, Joseph Schumpeter believed a choice lay between political equality for the uninformed and easily swayed masses, or the better option of elite rule: *Capitalism, Socialism, and Democracy*, 3d ed. (New York: Harper Perennial Modern Classics, 1950).

<sup>2</sup> For a review of these developments see Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012).

<sup>3</sup> For example, in *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Cambridge: The MIT Press, William Rehg tr, 1996), Jürgen Habermas embraces citizen participation

Some authors in the field's sizeable *normative* strand of research even stress that *only* governance able to achieve this goal qualifies as legitimate.<sup>4</sup> To be sure, the task of accommodating both deliberation and democracy is profoundly vexed. Yet to many deliberativists, the status quo in governance is more problematic still, and perhaps even untenable. For instance, the deliberative tension is one likely cause of the long crisis of legitimacy afflicting developed democracies since the 1960s, reflected in largely unbroken trends of declining public trust.<sup>5</sup> Unable or unwilling to meet both deliberative and democratic demands, a government's perceived legitimacy may weaken – along with its capacity to respond to pressing challenges facing the polity.

Of course, deliberative democrats are aware of the practical barriers facing their field's grand normative goals. Many studies in the *empirical* strand of deliberative democracy research indicate a difficult environment for deliberation. For example, endemic partisan polarization and low voter information may frustrate deliberative ideals of cooperation and informed democratic consent. Importantly, however, such empirical factors are not merely impediments to deliberative democracy; they are also the challenges to which deliberative democratic theory is geared. To many deliberative democrats, a hard empirical context only makes their work more urgent.

In its *institutionalist* strand, therefore, deliberative democracy scholarship offers practical solutions. These are efforts to navigate the field's freighted normative aspirations and empirical constraints.<sup>6</sup> With recent institutional efforts showing particular promise,<sup>7</sup> the

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within a theory of deliberation. But *cf.* his earlier contributions, e.g., Jürgen Habermas, *The Theory of Communicative Action, Volume 1: Reason and the Rationalization of Society* (Boston: Beacon Press, 1984).

<sup>4</sup> See, e.g., Habermas, *id.* Many Habermasians have though moved on from such a stringent requirement; indeed, even Habermas himself has done so.

<sup>5</sup> Russell J. Dalton, *Citizen Politics: Public Opinion and Political Parties in Advanced Industrial Democracies*, 5th ed (Washington: Congressional Quarterly Press, 2008); Steven Van de Walle, Steven Van Roosbroek and Geert Bouckaert, "Trust in the Public Sector: Is There Any Evidence for a Long-Term Decline?" (2008) 74 *International Review of Administrative Sciences* 45.

<sup>6</sup> As an example, whereas deliberation has previously aimed at reaching consensus, theorists with an empirical bent such as Dryzek and Niemeyer have – given the reality of partisan politics – conceptualized far more realizable goals, e.g. a "normative meta-consensus": John S. Dryzek and Simon J. Niemeyer. "Reconciling Pluralism and Consensus as Political Ideals" (2006) 50 *American Journal of Political Science* 634.

<sup>7</sup> See, e.g., Mark E. Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge: Cambridge University Press, 2008) (on the British Columbia

deliberative turn in political theory – a field hardly known for unchecked optimism – has attracted many new converts at least guardedly intrigued by its possibilities.<sup>8</sup> Yet legal scholars have been slow to join this turn. Only a handful have examined law’s roles in contributing to and constructing – or at times frustrating – more deliberative forms of democracy.<sup>9</sup> The same is true of scholars of election law, where the connection between regulation and democratic politics is of course especially close.<sup>10</sup>

This “Law of Deliberative Democracy” symposium issue of the *Election Law Journal* aims to remedy such omissions. Broadly, the issue’s goal is to describe the contours of an incipient field of legal analysis. Contributors – including some political theorists of deliberative democracy, and a larger number of scholars of election and other public law – initially aired and debated ideas at workshops held in New York and London. In this introduction to the symposium, I briefly provide theoretical context and attempt to map out where the various contributions fit among key emerging debates in the law of deliberative democracy field. In Part II, I lay down groundwork, describing deliberative democracy in brushstrokes and in the abstract. In Parts III and IV, I then turn to questions of law. Here I provide key definitions and flag a number of salient questions about law’s roles in deliberative democracy. Most of all, I ask whether law may directly set some of the conditions for deliberative democracy, or whether it might indirectly inform cultures

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Citizens’ Assemblies) and James Fishkin, *When the People Speak* (New York: Oxford University Press, 2009), 36 (on Deliberative Polling).

<sup>8</sup> Even social choice theorists have come to realize that deliberation can help overcome some of the problems that they themselves confront. For example, they worry that a collective choice will prove indeterminate, if it cycles between three or more options; such as when, for example, A is chosen over B, B is chosen over C, but C is chosen over A. Deliberation has been shown to be capable of breaking such a cycle: e.g., John S. Dryzek and Christian List, “Social Choice Theory and Deliberative Democracy: A Reconciliation” (2003) 33 *British Journal of Political Science* 1; D. Miller, “Deliberative Democracy and Social Choice” (1992) 40 *Political Studies* 54.

<sup>9</sup> Legal scholars who engage with deliberative democratic issues include Cass Sunstein (e.g., *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001)); Bruce Ackerman (e.g., *We the People, Vol. 1: Foundations* (Cambridge: The Belknap Press of Harvard University Press, 1991)); and Ethan Leib (several works).

<sup>10</sup> Forays into the field by election law scholars include Richard Pildes, “Competitive, Deliberative and Rights-Oriented Democracy” (2004) 3 *Election Law Journal* 685; Andrew Geddis, “Three Conceptions of the Electoral Moment” (2003) 28 *Australian Journal of Legal Philosophy* 53; James Gardner, *What are Campaigns For? The Role of Persuasion in Electoral Law and Politics* (Oxford: Oxford University Press, 2009); and Chad Flanders, “Deliberative Dilemmas: A Critique of Deliberation Day from the Perspective of Election Law” (2007) 23 *Journal of Law and Politics* 147.

of deliberation (or anti-deliberation). With a few exceptions, I do not presume to answer such questions, but leave their detailed exploration to the issue's ten other contributors.

It is worth asking why such questions are important: why deliberative democrats should care about election law, and why election lawyers should care about deliberative democracy. One answer is that election law sets much of the context of elective politics, and can influence the quality of democratic deliberation. The question of how law affects deliberation is distinct from an older and more prominent question. Deliberative democrats have long been interested in whether law is legitimate. Lawmaking often takes center stage in their work, because deliberation is thought to be necessary for legitimate law. We may call this the *deliberation-law* relation. Yet the other side of the coin, still much neglected, is of law itself as legitimator. This is the *law-deliberation* relation. Law is an often overlooked, and yet pervasive and perhaps distinctive, element of deliberative democracy's institutional backdrop. Thus we cannot understand the conditions for effective deliberative democracy without asking questions about the roles of law. Election lawyers are perhaps best placed to follow such questions through in detail.

A complication is that the relation between law and deliberation is a dialectical one. We may be unable to understand how deliberation makes law legitimate without also considering how law colors and channels deliberation, and how such effects feed back to each other. If the relation is robustly dialectical, then by omitting either side we fail to understand both. Indeed, nowhere is this dialectic clearer than in election law, where those who write the laws may be those who gain or lose power from them. Election law scholars often recognize this recursive pattern in the possibility that parties will entrench themselves in power against voter wishes.<sup>11</sup> Yet we less often consider the directions for reform that deliberative democracy theory can suggest.

At first impression, seeking better democratic deliberation in or through law is a quixotic aspiration. This is especially so when we focus, as this symposium does, on deliberation

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<sup>11</sup> Michael Klarman, "Majoritarian Judicial Review: The Entrenchment Problem" (1997) 85 *Georgetown Law Review* 491 at 498.

during or before elections and referenda – both traditionally viewed as poor environments for deliberation. Indeed, as I discuss in Part III, there are at least three reasons to suppose that law cannot appreciably effect deliberative democracy in practice. Nonetheless, I will also suggest that skepticism in this regard may be too simple. A harder and more interesting question is how law might actually help. This is the key question in Part IV, as it is in a parallel book project surveying election law through a deliberative lens.<sup>12</sup> That project has already identified several causes for optimism about election law’s deliberative potential. Yet as the work is ongoing, any such optimism should be tempered by a strong note of caution.

I will be less cautious or equivocal, however, in contending that deliberation still enjoys too little normative weight in studies of election law, in comparison with libertarian, egalitarian and other sources of legal reasoning. This essay’s main argument is therefore that election law scholarship should recognize a deliberative telos at least as robustly as it embraces more established values. Better political deliberation is already an express or unspoken aim of much legislation and jurisprudence in election law. Even if laws do not always succeed at fulfilling them, scholarship in the area should more consistently expose and evaluate law’s deliberative aims. With similar objectives in mind, the contributors to this issue present a range of perspectives on whether, when and how the pursuit of deliberative ideals is a worthwhile or plausible project of election law.

## II. Deliberative Democracy in Overview

The “deliberative” in deliberative democracy is a term of art particular to the field. It does not refer simply to public acts of “thinking” and “communicating.” (If it did, then almost all democracies would be deliberative.) Instead, deliberation denotes certain forms of robust and rational decision-making by citizens or their representatives. In Habermas’ terms, “no force except that of the better argument is exercised.”<sup>13</sup> Persuasion for other

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<sup>12</sup> Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (London: Routledge, under contract). See also Graeme Orr, this symposium.

<sup>13</sup> Jürgen Habermas, “Reconciliation Through the Public use of Reason: Remarks on John Rawls’s Political Liberalism” (1995) 92 *Journal of Philosophy* 109 at 124.

reasons – class, majority opinion, reputation, divine revelation – is devalued in comparison.<sup>14</sup>

Deliberativists flesh out such well-known general propositions with a range of further particulars. While there is no standard source setting out the ideals of deliberation, a number of hallmarks recur in the literature:

(1) *Inclusive*. Deliberation should be widely inclusive: of citizens, on equal terms;<sup>15</sup> of broad sources of information (e.g., about ideas, scientific facts and affected social interests);<sup>16</sup> and of intergenerational perspectives.<sup>17</sup>

(2) *Cooperative*. Deliberation usually involves multiple deliberators working collectively rather than individually, drawing on multiple perspectives to respond in suitably complex ways to inherently complex problems.<sup>18</sup> However, cooperative reasoning should avoid the tendency toward “groupthink”.<sup>19</sup>

(3) *Open-minded*. Deliberation is mostly civil and open-minded.<sup>20</sup> This contrasts with more adversarial and reactive “agonistic” decision-making.<sup>21</sup> Political and other forms of partisanship or inter-group polarization pose particular risks to the open-mindedness ideal.

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<sup>14</sup> See, e.g., Gutmann and Thompson, *Why Deliberative Democracy?* *supra* note 1 at 52. Habermas once thought that religious arguments should be translated to secular political claims, but changed his mind after admitting this excludes religious people from arguing, see Steiner, *The Foundations of Deliberative Democracy: Empirical Research and Normative Implications* (Cambridge University Press, 2012), 104.

<sup>15</sup> James Bohman, “Deliberative Democracy and the Epistemic Benefits of Diversity” (2006) 3 *Episteme* 175; Joshua Cohen, “Deliberation and Democratic Legitimacy” in James Bohman and William Rehg (eds.) *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997), 72.

<sup>16</sup> Gutmann and Thompson, *supra* note 1 at 43.

<sup>17</sup> *Id.* at 210.

<sup>18</sup> *Id.* at 358–9; David Estlund, *Democratic Authority: A Philosophical Framework* (Princeton: Princeton University Press, 2008), 177.

<sup>19</sup> To be sure, deliberativists may have given this problem too little attention: André Bächtiger, Simon Niemeyer, Michael Neblo, Marco R. Steenbergen, Jürg Steiner, “Disentangling Diversity in Deliberative Democracy” (2010) 18 *Journal of Political Philosophy* 39 (“Social psychologists versed in such phenomena as ‘groupthink’ claim that deliberative democrats fail to consider, let alone actively exclude the possibility of such outcomes”).

<sup>20</sup> Gutmann and Thompson, *supra* note 1 at 57-59, 110-19; Mark Warren and Hilary Pearse, “Introduction,” in Warren and Pearse, *supra* note 7 at 6.

<sup>21</sup> Chantal Mouffe, “Deliberative Democracy or Agonistic Pluralism?” (1999) 66 *Social Research* 745.

(4) *Reflective*. Deliberative procedures aim to be relatively exhaustive, allowing deliberators sufficient opportunity to reflect.<sup>22</sup>

(5) *Holistic*. Deliberation is holistic, accommodating or trading off diverse values, costs and benefits, rather than viewing policy or legal options in isolation.<sup>23</sup>

(6) *Reason-giving*. Deliberative decision-makers justify their decisions by publicly providing reasons, which everyone else “may reasonably be expected to endorse,” and that are intelligible and acceptable to all.<sup>24</sup>

(7) *Other-regarding*. Deliberative decision-makers are concerned both with their own interests and with those of others differently situated from themselves. Deliberative democrats reject theories such as those of rational choice and social choice as explaining politics through the too-narrow lens of self-interest.<sup>25</sup>

(8) *Uncoerced*. Finally, for a decision to be deliberative, no law or other force should unduly compel decision-makers to reach a particular decision.<sup>26</sup> This condition follows from the criteria above; predetermining a decision is a procedural shortcut avoiding a more elaborate and deliberative course of decision-making.

How might these ideals of deliberation work, if indeed they do, in practice? Some deliberative democrats see a role for governmental elites as key in deliberation. These comparatively *elite-mediated* varieties of deliberative democracy expect elites to filter or translate raw social values, often initially pitched broadly and vaguely, and render them into more workable policy and law.<sup>27</sup> For instance, on Habermas’ “two-track” ideal, elites and ordinary citizens play complementary roles, which constitute a loose division of labor rather than a traditional hierarchy of power.<sup>28</sup> Ordinary citizens express and perhaps deliberate over general values, before elites then follow this general course through and concretize it in law. Deliberativists such as Parkinson defend such arrangements because “those who decide represent [and] express ... ‘mutuality, identification and co-

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<sup>22</sup> Zsuzsanna Chappell, *Deliberative Democracy: A Critical Introduction* (Basingstoke: Palgrave Macmillan, 2012), 8.

<sup>23</sup> James Fishkin, this symposium: “The root of deliberation is *weighing*.” [emphasis in original]

<sup>24</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 137.

<sup>25</sup> Chappell, *supra* note 22 at 4.

<sup>26</sup> Habermas, *Theory of Communicative Action*, *supra* note 3 at 25.

<sup>27</sup> Habermas, *Between Facts and Norms*, *supra* note 3.

<sup>28</sup> *Id.* at 304.



performance' with those who are led," with the result that "'knowers' (philosophers, technical experts or bureaucrats) are ... subordinate to 'the people affected.'"<sup>29</sup>

Alternatively, more *populist* variants of deliberative democracy aim to encourage better deliberation by citizens themselves, relatively free from elite control. For example, in "deliberative referendums" (see Stephen Tierney, this symposium), Deliberation Day (see James Fishkin, this symposium)<sup>30</sup> and "deliberative voting,"<sup>31</sup> discussion or balloting on legal reform occurs via procedures designed to aid voters' sustained consideration of relevant arguments and information.

Beyond the main elements of deliberative democratic theory, contributors to this issue also sometimes engage with certain emergent or contentious ideas in the field. For instance, Jacob Rowbottom considers the "systemic approach," which conceives of democratic systems as fulfilling deliberative democracy's requirements by employing parallel institutions, each with particular and complementary strengths.<sup>32</sup>

### **Rationales for Deliberative Democracy**

There are many ways to argue for deliberative democratic decision-making. Consider three principal rationales. First, a democracy featuring robust deliberation ideally rationalizes decisions in an *epistemic* sense. Such a democracy better addresses problems to which we otherwise pay too little attention. These problems affect the health and success of the polity. For example, anti-deliberative, and perhaps polarized, legislators might fail to find solutions to pressing problems – environmental, geopolitical, economic, epidemic, etc. – which can then persist or worsen. By contrast, deliberation may support a

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<sup>29</sup> John Parkinson, "Legitimacy Problems in Deliberative Democracy" (2003) 51 *Political Studies* 180 at 183 quoting John Schaar, "Legitimacy in the Modern State" in William Connolly (ed) *Legitimacy and the State* (Oxford: Blackwell, 1984), 104-33.

<sup>30</sup> See also Bruce Ackerman and James Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004).

<sup>31</sup> Ron Levy, "'Deliberative Voting': Realising Constitutional Referendum Democracy" (2013) *Public Law* 555.

<sup>32</sup> Jacob Rowbottom, this symposium, citing J. Mansbridge, J. Bohman, S. Chambers, T. Christiano, A. Fung, J. Parkinson, D. Thompson and M. Warren, "A Systemic Approach to Deliberative Democracy" in J. Parkinson and J. Mansbridge (eds) *Deliberative Systems* (Cambridge: Cambridge University Press, 2012).

political system's greater sensitivity and responsiveness to relatively objective, exogenous problems.

This epistemic justification for deliberation is insufficient on its own, however, because policy choices also impact on citizen values. For example, even when a community achieves political consensus that climate change is an objective problem, they must still choose among policy responses impacting unevenly on different people and values.

Secondly, then, deliberative democracy is also concerned with decision-making in the face of disagreement. Put another way, deliberative democracy seeks to *rationalize values*. Deliberativists argue that deliberation can transform and harmonize values in conflict. Habermas famously draws a distinction between strategic individuals – who compete against each other to maximize their assumed self-interests – and communicatively rational people.<sup>33</sup> Only the latter are open to reconsidering what is in their own interests. They may even find themselves better off as a result of their flexibility.

Communicatively rational decision-makers therefore seek what lawyers sometimes call “accommodation” among different values. (This will be important again, below, in the discussion of law.) The literature of deliberative democracy sometimes describes accommodation in terms of the pursuit of “overlapping consensus”<sup>34</sup> or “normative meta-consensus”<sup>35</sup> – that is, areas where values are shared, despite worldview or other differences. Many of the hallmarks of deliberation noted above can contribute toward this process of deliberation over values. For example, reciprocal reason-giving sees people try to explain why their views should be persuasive, using terms generally acceptable to others, whether or not the others agree with the particular reasons given. As was also noted, deliberative democracy is ideally other-regarding.

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<sup>33</sup> Habermas, *The Theory of Communicative Action*, *supra* note 3 at 285-6.

<sup>34</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

<sup>35</sup> Dryzek and Niemeyer, *supra* note 6.

A third key justification for deliberative democracy responds to the occasional charge that deliberation distorts or detracts from democracy. (James Gardner presents such a charge in this symposium.) Deliberativists do not yield the point that deliberative democracy departs from a purer, unfettered form of democracy. Instead they marshal arguments for deliberative democracy's *greater democratic bona fides*, including the following:

(1) *Democratic inclusion*. With its stress on the force of the better argument, a deliberative democracy can place all participants on roughly the same footing, regardless of social station. On this ideal, any person's argument is influential if it is cogent.

(2) *Informed consent*. Consent in a democracy may be a fiction to the extent citizens do not know what they are voting on or consenting to. We should therefore understand public consent in a democracy in terms of robustly "informed consent."<sup>36</sup>

(3) *Reflecting democratic preferences accurately*. An ideal deliberative democracy does not channel or attempt to fit citizen values and preferences into the narrowly polarized categories of partisan debate. It therefore may provide a truer representation of often multipolar and complex communities.

(4) *Majority tyranny*. To the extent we persuade rather than coerce smaller or weaker groups in a democracy, we genuinely involve more people in it. This presents the normatively and practically best answer to the classic problem of the "tyranny" of democratic majorities. The prevailing solution sees a judicial fiat (e.g., under a bill of rights) overrule majority interests post hoc, after preferences settle in public discourses and legislation. A deliberative democracy instead seeks to accommodate majority and minority interests in the course of deciding a matter, before positions harden.

### **Critiques of Deliberative Democracy**

Understandably, many critiques still cast doubt on whether politics might ever fulfill deliberative democratic ideals. One skeptical argument leveled against deliberative democracy is that citizens are unlikely to be adequately informed about policy particulars. Another assumes that ideals of reasoned, other-regarding and reflective

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<sup>36</sup> Levy, "Deliberative Voting," *supra* note 31 at 563-564.

decision-making naïvely ignore the ineradicably closed, selfish and reactive patterns of human reasoning. (In the extreme case, the skeptical view discounts – as skewed, unreliable or misreported – any apparent evidence of trusted, trustworthy and deliberative political conduct.<sup>37</sup> Given this unfalsifiable assumption, arguments for deliberative democracy of course can never win.)

It is worth stressing that no deliberative democrat thinks deliberation is easy. Yet certain institutional innovations, such as the Citizens' Assemblies first trialed in Canada, were by nearly all accounts successful in generating civil, cooperative, inclusive and reflective decision-making.<sup>38</sup> More generally, the best summary of the empirical evidence is that the potential for deliberation in the real world depends on its context. Empirical studies have outlined a host of specific categories in which deliberation is either relatively weak or relatively strong.<sup>39</sup> For instance, deliberation is often weaker in the broader public sphere than it is within the controlled conditions of a deliberative assembly.<sup>40</sup>

Normative critiques are also common. In particular, deliberation over values attracts many of deliberative democracy's most insistent detractors, many of whom suspect that ideal deliberation cannot adequately accommodate social difference. For instance, some feminist and other critics argue that the reason-giving of females, workers, immigrants, etc., is never held in the same esteem – it is often prejudged and written off – by others in the deliberating group. Hence the notion of citizens participating in public deliberation on equal footing may be only a fiction, and an unconvincing one besides.<sup>41</sup> In addition, some theorists think the strategic-communicative distinction doubtful, since individuals often

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<sup>37</sup> See, e.g., Australian Senate, debate on the *Citizen Initiated Referendum Bill 2013*, Finance and Public Administration Legislation Committee, Hansard April 29, 2013 (Senator Scott Ryan) (discounting favorable findings in an empirical study of deliberative democratic bodies).

<sup>38</sup> See, e.g., contributions to Warren and Pearse, *supra* note 7.

<sup>39</sup> For discussions of empirical studies yielding mixed and contingent results see, e.g., Dennis Thompson, "Deliberative Democratic Theory and Empirical Political Science" (2008) 11 *Annual Review of Political Science* 497; Kevin Mattson "Do Americans Really Want Deliberative Democracy?" (2002) 5 *Rhetoric & Public Affairs* 327.

<sup>40</sup> See, e.g., Robert Goodin, "Democratic Deliberation Within" (2000) 29 *Philosophy and Public Affairs* 81.

<sup>41</sup> See, e.g., Iris M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); Seyla Benhabib, "Deliberative Rationality and Models of Democratic Legitimacy" (1994) 1 *Constellations* 26 at 39.

have a multitude of motivations for speech and actions, some strategic and others communicative.<sup>42</sup>

Also commonly, some authors sympathetic to deliberative democratic ideals seek to loosen restrictions about what counts as “deliberative.” Young, for one, would wish to include in this category certain popular narrative styles such as storytelling, which are typical of ordinary public discourse.<sup>43</sup> The difficult question this raises is whether relaxing deliberative ideals robs them of their distinctive force (see, e.g., the contributions to this symposium of Rowbottom and Yasmin Dawood). Other avowed deliberativists also wonder whether politics should still preserve zones of non-deliberative or pre-rational discourse to allow for political party, class or other “indoctrination,” since perhaps only such non-deliberative processes can generate citizen values in the first place.<sup>44</sup>

### III. Three Problems in the Law of Deliberative Democracy

Next I connect the outline of deliberative democracy above to the key question of whether law can set some of the conditions for deliberative democracy. I outline worst-case scenarios first, suggesting three reasons why law may be unable appreciably to assist in deliberative democratic design. Research in the law of deliberative democracy should remain sensitive to such difficulties. Yet later, in Part IV, I will return to a measure of guarded optimism and contend that skepticism about law’s utility in this area may be too easy. To close, in Part IV I will also highlight how some tools already common in the

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<sup>42</sup> See, e.g., Jürg Steiner, André Bächtiger, Markus Spöndli and Marco R. Steenbergen, *Deliberative Politics in Action* (Cambridge: Cambridge University Press, 2004).

<sup>43</sup> Lynn M. Sanders, “Against Deliberation” (1997) 25 *Political Theory* 347; Iris Marion Young, “Justice, Inclusion and Deliberative Democracy” in *Deliberative Politics: Essays on Democracy and Disagreement*, ed. Stephen Macedo (New York: Oxford University Press, 1999), 151. Strictly speaking, Young regards her conception of democracy as “communicative”, rather than “deliberative”; however, regardless of what Young calls it, her democratic conception includes storytelling (and rhetoric, and greeting), rather than only reason-giving.

<sup>44</sup> Michael Walzer, “Deliberation, and What Else?” in Stephen Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford: Oxford University Press, 1999), 58; James Bohman, Simone Chambers, David Estlund, Andreas Follesdal, Archon Fung, Cristina Lafont, Bernard Manin, and Jose Luis Marti, “The Place of Self-Interest and the Role of Power in Deliberative Democracy” (2010) 18 *Journal of Political Philosophy* 64 at 84.

kitbag of legal design might help. In spite of its genuine limitations, law may yet directly or indirectly aid deliberative democratic design projects.

There are at least three obstacles to the development of an effective law of deliberative democracy:

(1) *The Accommodation Problem*. One of the great innovations of deliberative democracy – but also its Achilles’ heel – is the surprising way in which it is meant to work. We can describe this using the lawyer’s term “accommodation”: not balancing, bargaining, weighing aggregates or meeting halfway, but rather fitting multiple preferences and values together simultaneously in the making of policy or law. For instance, recall that the search for “overlapping consensus” or “normative meta-consensus” is central in some conceptions of deliberative democracy. That is, we expect not zero-sum, but win-win substantive outcomes from deliberative democratic decision-making.<sup>45</sup> Deliberative democracy also employs accommodation at the level of institutional design. Above I noted several theoretical positions pointing to the stronger democratic bona fides of deliberative democracy, in comparison with standard democratic forms. Each position suggested deliberation may not always compete with democracy, but may instead help to legitimate it. Indeed, there is even some overlap in the basic criteria for both deliberation and democracy (e.g., equality). Deliberative democratic theory therefore disputes that a tension unavoidably lies between deliberation and democratic participation, or even that each is wholly distinct from the other.

Arguments from accommodation are key to understanding deliberative democracy. Nevertheless, they defy easy description and are often poorly served by media and other elite representations of democratic governance. More common is the assumption that democracy is, of necessity, crudely majoritarian – satisfied simply by the act of voting for representatives.<sup>46</sup> Deliberative democrats often have a difficult time publicly conveying the insight that theirs is not just a theory presenting a laundry list of requirements for

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<sup>45</sup> Bohman et al, *id.* at 71.

<sup>46</sup> See, e.g., Australian Senate (Senator Ryan), *supra* note 46.

better deliberation. Nor is it merely a movement for popular participation. It is both of these, but it is neither on its own. Most importantly, deliberative democracy is more than the sum of its parts; it is an account of what those parts are and of how the parts fit together to the benefit of both democracy and deliberation.

By and large, law does not encourage accommodation. Cases on election speech under bills and doctrines of rights provide useful examples, illustrating how law often inclines toward balancing rather than accommodation. In *Bryan*<sup>47</sup> and *Thompson Newspapers*,<sup>48</sup> the Supreme Court of Canada scrutinized legislation banning the publication, respectively, of election results and opinion polls just before the vote. The laws' aims were unmistakably deliberative: to diminish the bandwagon or horserace character of elections.<sup>49</sup> However, in the freedom of expression doctrine under Section 2(b) of the *Charter of Rights and Freedoms*, courts nearly always find the freedom infringed.<sup>50</sup> The bulk of legal inquiry falls to *Charter* Section 1, the "balancing clause," where courts determine whether a legitimate legislative purpose justifies the breach. Similarly, at the Australian High Court the doctrine of implied constitutional rights, though somewhat vaguer, fixates on the proportionality of legal means and ends. In *Australian Capital Television*, the Court considered a law regulating election campaign speech. The law guaranteed publicly-funded television airtime, but restricted the advertising to a prescribed format and allowed regulators to apportion airtime among the parties.<sup>51</sup> Before striking down the legislation, the Court briefly discussed the deliberative ends of the law, which included encouraging a less trivial national political discourse, and curbing the role and influence of campaign money.<sup>52</sup>

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<sup>47</sup> *R. v. Bryan*, 2007 SCC 12, [2007] 1 SCR 527 [*Bryan*].

<sup>48</sup> *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 SCR 877, 159 DLR (4th) 385.

<sup>49</sup> *Id.* at paras. 29-38; *supra* note 52 at paras. 12-14, 33-37. Note that, despite the poor fit of its balancing analysis, the *Bryan* Court ultimately ruled in favor of the law: *Bryan supra* note 47.

<sup>50</sup> *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11, s. 2(b); *Irwin Toy Ltd. v. Quebec (Attorney general)*, [1989] 1 SCR 927, 58 DLR (4th) 577 (defining s. 2(b) broadly: "if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee."). See also Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2011) at 43-10.

<sup>51</sup> *Australian Capital Television Pty. Limited and Others v. The Commonwealth* (1992) 177 CLR 106 ('*ACTV*').

<sup>52</sup> *Id.* at para. 50. Note that Australia's implied rights are still sparingly applied and poorly developed.

Cases such as these raise numerous deliberative implications.<sup>53</sup> Yet, for present purposes, the most important lesson is the difficulty deliberative democracy encounters after the superimposition of law. Law is occasionally a poor conceptual fit and may be too blunt or inflexible to embrace accommodation as a political value. As noted, deliberative democrats hold that, with careful institutional design, deliberation reinforces democracy and democracy in turn reinforces deliberation. The reductive inquiry of a balancing or proportionality test, by contrast, disassembles democratic deliberation into component parts – with popular expression on one side, and rigor, reflection, cooperation, policy holism, etc., on the other. Indeed, balancing presupposes that such parts cannot be reconciled. Judicial enthusiasm for balancing therefore leads to a miscategorization of deliberative democratic projects. Understood more thickly, as democratic deliberation, democratic speech is a coherent compound of elements.

(2) *The Elite Problem*. Another question confronting the law of deliberative democracy is how well litigation marries with deliberative democracy. For example, some of the decisional procedures, structures and values endogenous to law,<sup>54</sup> maintained by a substantially autonomous legal class, risk rupturing the Habermasian “two-track” cooperative relation between elites and ordinary citizens. In this deliberative ideal, as we saw, elites serve citizens by translating widely-sourced public values into concrete law. On the one hand, legal process often parallels this ideal. Citizens or their values inform judicial decision-making, for instance as parties to litigation, by the interventions of amicus curiae, via the influence of legislatures, and even through judges’ informal and impressionistic notice of public sentiment.<sup>55</sup> The law’s rationalizing procedures (e.g., analogic reasoning, evidentiary rigor, ostensibly blind justice and judicial reason-giving) may then assist the translation from values to law. On the other hand, decision-making in

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<sup>53</sup> But the court may not have appreciated these. Even judges who implicitly recognized the goal of deliberation here never used the term, much less the theory, but instead grasped at deliberative ideas with phrases like “political discussion”: *id.* para. 39.

<sup>54</sup> All governance is to some extent elite-mediated; but legal elites, perhaps more than most, keep at least one eye fixed on norms endogenous to their own roles and process. George Fletcher and Jens Ohlin similarly note that the “institutional perspective of lawyers leads to an entire apparatus of rules that are alien to” other disciplines: *Defending Humanity* (Oxford: Oxford University Press, 2008), 22.

<sup>55</sup> Frank Michelman, “Brennan and Democracy: The 1996-97 Brennan Center Symposium Lecture” (1998) 86 *California Law Review* 399 at 423.



the courtroom frequently involves not just elite translation, but elite direction. The old formalist vision of the law as a closed normative system, though often discredited, still persists: for example in law society and bar association self-regulation, in the doctrines of separation of powers and judicial independence, and in the continuing construction of lawyers and judges as learned, deliberative and apolitical actors in the formation of law.<sup>56</sup> Law's practitioners might not often resemble Habermas' model-elites who pay heed to citizens' diverse preferences, ideas and values.

The autonomy of legal process should be a special concern in "judicializing" jurisdictions. Hirschl describes judicialization as a "globally widespread" phenomenon that "includes the wholesale transfer to the courts of some of the most pertinent and polemical political controversies a democratic polity can contemplate."<sup>57</sup> From the perspective of deliberative democratic theory, the clear worry is that by entrusting a greater number of pivotal decisions to a semi-autonomous legal class, we risk unduly constraining the deliberative public sphere. This should inspire some general skepticism about law's role in deliberative democracy.

More particularly, however, an outsized role for legal elites may also diminish deliberative democracy's prospects in our focus area, election law. As noted, election law's position in governance is powerful and recursive. Here the question is not just how law's distinctive institutional features affect democratic deliberation, but how they affect choices about government itself. Put another way, election law concerns choices not merely *in* a democracy, but *about* democratic systems. (Dennis Thompson draws a similar distinction in his contribution to this symposium.) In election law disputes, judges can face choices such as whether to institutionalize deliberative or alternative models of

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<sup>56</sup> Actual practice likely lies between these extremes: curial processes sometimes embrace public preferences and values, even if they do so in far from ideal terms, given the high bar to entry and the vagaries of the process.

<sup>57</sup> Ran Hirschl, "The Judicialization of Politics" in Keith Whittington, R. Daniel Kelemen and Gregory A. Caldeira (eds.) *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008), 120. See also, e.g., Jürgen Habermas, "Law as Medium and Law as Institution" in G. Teubner (ed.), *Dilemmas of Law in the Welfare State* (Walter de Gruyter, 1988); Richard Pildes, "The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics" (2004) 118 *Harvard Law Review* 29; John Ferejohn, "Judicializing Politics, Politicizing Law" (2002) 61 *Law and Contemporary Problems* 41.

governance, as we saw in the cases on election speech regulation. Importantly, the role of elites helps to explain why election law might favor balancing over the accommodation necessary for deliberative democracy. A suggestion made above was that accommodation is unintuitive, and balancing the simpler alternative. Yet empirical data add an important wrinkle: it is primarily *elite* citizens who regard deliberative democracy as unintuitive, or who resist this model for other reasons.<sup>58</sup>

A key barrier to the use of law in effecting deliberative democratic projects is elite antipathy toward such projects. This “elite problem” appears to be based firstly on *institutional* misrecognition. Elites such as media opinion leaders sometimes confidently express skeptical views of deliberative democracy without appearing to be apprised of its specific aims and methods. In a stark example in 2010, an Australian proposal for a Citizens’ Assembly to address climate change prompted almost uniformly negative media responses, which frequently mischaracterized deliberative democracy as merely populist and participatory.<sup>59</sup> It is true that in a Citizens’ Assembly, ordinary citizens take the lead. Yet first they become deliberative “citizen-experts,” informed over several months about a discrete decision-making task, with proceedings structured to maximize learning, cooperation and other aspects of deliberation.

Such cases underscore the dangers of investing, in a few people, the power to gauge and filter public sentiment about institutional choices. In the Australian case, media accounts generated a picture of mass opposition, even as polling before and during the presumptive backlash told a subtler story of approximately 40-per-cent popular support for the Assembly idea – nearly twice as high as support for leadership on the issue by Parliament.<sup>60</sup> Surveys have indicated that several kinds of “elite” groups view Citizens’

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<sup>58</sup> Ron Levy, “Deliberative Constitutional Change in a Polarised Federation” in Paul Kildea, Andrew Lynch and George Williams (eds.), *Tomorrow’s Federation* (Annandale: Federation Press, 2011) 362-369.

<sup>59</sup> Among many examples see Paul Kelly, “Labor Can’t be Serious about Citizens’ Plan,” *Weekend Australian*, July 24, 2010 at p 1; Peter Hartcher, “Great Procrastinator Takes Reins of Inaction on Climate Change,” *Sydney Morning Herald*, July 24, 2010; Tim Blair, “The Horror of a Year in Climate La La Land,” *The Daily Telegraph*, July 26, 2010 at p 22.

<sup>60</sup> Ron Levy, “Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change” (2010) 34 *Melbourne University Law Review* 805 at 836-837 (on Citizens’ Assemblies for constitutional reform); Phillip Coorey, “Support for ETS Dwarfs Backing for Assembly” *Sydney Morning Herald*, July 31, 2010 at p 7 (on Citizens’ Assemblies for climate change policymaking).

Assemblies and deliberative democracy relatively unfavorably. These include elites who live close to the national capital, vote for mainline rather than “third” parties, work in any branch of government, are located in the largest cities or have the highest levels of formal education.<sup>61</sup> (Relevantly, lawyers fall within at least the latter two classifications overwhelmingly.) By contrast, non-elite citizens have little trouble embracing an accommodative body such as a Citizens’ Assembly, and in key contexts even favor such Assemblies two-to-one over traditional lawmaking by legislatures.<sup>62</sup>

Resistance to deliberative democracy is especially pronounced among university-educated elites, who trust the model least among all groups.<sup>63</sup> Their skepticism appears to stem partly from doubt that fellow citizens are adequately informed on weighty lawmaking matters; the university-educated group uniquely values well-informed procedures over ones dedicated first to majority rule.<sup>64</sup> This raises a second set of problematic elite assumptions, based on *empirical* misrecognition of ordinary citizens’ fitness to deliberate. Elites, relying on broad presupposition or personal anecdotal experience, may not be best-placed to gauge the deliberative capacities of non-elites. While elites may be relatively knowledgeable, it does not follow that elite perspectives provide a clear view of how much non-elites know or do not know, nor of how relevant such knowledge may be to decisions at hand.<sup>65</sup>

Moreover, it is important to nuance these issues in ways previously noted. Focusing on whether non-elite citizens already have the ability deliberatively to decide complex public matters inevitably yields a negative answer, but not necessarily a relevant one. More useful is the question of whether such citizens have the capacity to gain that ability in particular institutional settings. As we saw, deliberative democrats focus on the latter

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<sup>61</sup> Levy, “Deliberative Constitutional Change in a Polarised Federation,” *supra* note 58 at 362-369. See also Michael Pal, “The Promise and Limits of Citizens’ Assemblies: Deliberation, Institutions and the Law of Democracy,” (2012) 38(1) *Queen’s Law Journal* 259 at 270.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 368. But note that all groups favor Citizens’ Assemblies over the status quo legislative approach.

<sup>64</sup> *Id.* at 364-365.

<sup>65</sup> As noted, knowledge is necessary but not sufficient for deliberation: *supra* note 33 and accompanying text.

question and have shown that ordinary citizens deliberate well in a number of contexts.<sup>66</sup> For instance, the deliberative successes of ordinary members of the Canadian Citizens' Assemblies are among the most highly-confirmed results in recent institutional studies.<sup>67</sup>

In sum, deliberative democratic projects potentially clash with views based on elite (indeed, elitist) institutional and empirical preconceptions. Elites are best placed to publicize or act on their skeptical views of deliberative democracy, though such elites may overestimate their own relevant expertise and good judgment. This points to a similar problem for election law, which gives a partly autonomous voice to elites not only to read and translate citizen values, but to draw upon their own assumptions when selecting among democratic models. If it follows standard elite cues, election law might consistently err in interpreting deliberative democracy's aims, methods and empirical prospects, and resist avidly embracing deliberative democratic projects.

(3) *The Performative Problem.* Finally, skepticism about deliberative democracy, whether justified or not, poses a special problem due to the performativity of institutions and law. Election law may diminish deliberation by presupposing that balancing, partisan adversarialism and mutual distrust are the dominant and inexorable methods or motives of political actors. As the trust theorist John Braithwaite observes, “[t]here are grave dangers in following the advice of Thomas Hobbes and David Hume and designing institutions that are fit for knaves, based on distrust. The trouble with institutions that assume that people ... will not be virtuous is that they destroy virtue.”<sup>68</sup> Indeed, when skeptical assumptions about trust, deliberation or other political virtues inform institutional or legal design, the assumptions can be self-fulfilling. This performative problem is a familiar feature of election law generally.<sup>69</sup>

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<sup>66</sup> *Supra* note 39.

<sup>67</sup> See, e.g., contributions to Warren and Pearse, *supra* note 7; Michael Pal, *supra* note 61 at 266 (reviewing empirical evidence showing that the Ontarian and British Columbian Citizens' Assemblies “appear to have embodied the deliberative ideal in most ways”).

<sup>68</sup> John Braithwaite, “Institutionalizing Distrust, Enculturating Trust,” in Valerie Braithwaite & Margaret Levi, eds., *Trust and Governance* (New York: Russell Sage Foundation, 1998) 343 at 351 [endnotes omitted].

<sup>69</sup> See, e.g., Samuel Issacharoff, “Is Section 5 of the Voting Rights Act a Victim of Its Own Success?” (2004) 104 *Columbia Law Review* 1710 at 1729.

The performative problem is, however, acute for deliberation. Like trust, deliberation is relational and cooperative. Skepticism about deliberation therefore undermines deliberation, because when we expect we cannot persuade others, we may remain closed to persuasion by others. This is akin to a prisoner's dilemma: if I am first to deliberate I open myself to defeat by others still acting strategically. It may take only one element in a political culture to foreclose deliberation; that element may be law. Yet, as we saw, the empirical record for deliberative democracy is not wholly negative, but is mixed and context-specific. For instance, even in a context such as electoral boundary drawing, where there is a high potential for partisanship, studies in Canada, Australia and the United Kingdom – and even to some extent in the United States – commonly show certain independent redistricting bodies decide matters essentially deliberatively.<sup>70</sup> Designed well, such bodies can effectively attend to non-partisan principles, such as keeping voter “communities of interest” united. (See, similarly, Joo-Cheong Tham's work in this symposium.) The practical effect of unqualified skepticism by elites or others about the possibility of deliberation may be the design of electoral laws and institutions fit for partisans, and destroying deliberation.

#### IV. Prospecting the Field

Beyond identifying problems, a canvass of the law of deliberative democracy should also consider whether laws might help to establish more deliberative forms of democracy. In this final main part, I catalogue a number of open questions about the deliberative potential of election law. I remain largely agnostic about their answers. Yet the choice of

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<sup>70</sup> While few empirical studies of redistricting focus on deliberation per se, a number of sources reference impartiality and partisanship, effectiveness, representativeness and other features relevant to deliberation: e.g., John C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (McGill-Queen's University Press, 2001), 8, cf. 144-49; Jean-Pierre Kingsley, “The Administration of Canada's Independent, Non-Partisan Approach” (2004) 3 *Election Law Journal* 406 at 406-07; Michael P. McDonald, “A Comparative Analysis of Redistricting Institutions in the United States, 2001–02” (2004) 4 *State Politics and Policy Quarterly* 371; Bruce Cain, “Redistricting Commissions: A Better Political Buffer?” (2012) 121 *Yale Law Journal* 1810; Thomas E. Mann, “Redistricting Reform: What Is Desirable? Possible?” in Thomas E. Mann, Bruce E. Cain (eds.) *Party Lines: Competition, Partisanship, and Congressional Redistricting* (Brookings Institution Press, 2005) 99, 101; Lisa Handley “A Comparative Survey of Structures and Criteria for Boundary Delimitation” in Lisa Handley, Bernard Grofman (eds.) *Redistricting in Comparative Perspective* (Oxford University Press, 2008), 268.

questions is itself significant: perhaps because antiempirical skeptical certainties about deliberation still dominate, legal scholarship has largely neglected to mine these lines of inquiry. The following is a partial list of open questions in the field.

(1) *Substantive legal inquiries: how do the consequences of specific laws impact democratic deliberation?* Any laws regulating political process might also influence democratic deliberation, either directly or incidentally. Deliberative analyses can therefore examine the substance of given election laws to evaluate their effects on political deliberation, and in turn their fit with deliberative democratic ideals. Several of this symposium's contributions enter the field on this front. Yet much work is still to be done. Laws directly affecting public deliberation are those most clearly relevant (e.g., media and campaign speech regulation, as analyzed in this symposium by Rowbottom and Graeme Orr). But a host of further laws also have deliberative implications (e.g., redistricting and party regulation; see Dawood, Tham, Thompson and Orr in this symposium).

As with most research into democratic design, deliberative analyses of law can yield complex answers. Election laws often raise deliberative dilemmas rather than transparent best options. For instance, is it preferable for voting at elections to be compulsory (as in Australia – see Lisa Hill's contribution to this symposium), or voluntary? Compulsion broadens the range of citizen input into public decision-making, but perhaps also encourages under-informed participation. However, in another set of cases some deliberative options do stand out as best. For example, apart from modest economic costs, pre-referendum public education initiatives (see, e.g., Paul Kildea, this symposium) present no obvious downsides.

(2) *Procedural inquiries: how do the procedures of law impact democratic deliberation?* Given their special familiarity with the myriad details of electoral regulation, scholars of election law are well-placed to conduct the substantive legal analyses described above. However, our most distinctive contribution to deliberative democracy theory may be to address how election law practice influences democratic deliberation. These inquiries

cover not only new ground, but new kinds of ground. The forms and institutions of law may assist or frustrate deliberative democratic goals. Yet this second branch of inquiry in the field is underexplored. Open questions about process include those discussed next.

(3) *Addressing the accommodation problem: to what extent are common modes of legal reasoning consistent with accommodation?* As we saw, balancing is common in law but can be inimical to deliberative democracy. On the one hand, the *Bryan* and *Thompson* cases (considering publication bans on vote results and opinion polls) illustrated this difficulty: a Court habituated to balancing analyzed the merits of essentially accommodative deliberative democratic initiatives. On the other hand, the language of accommodation is already well-established in law. For instance, like deliberative democracy, anti-discrimination cases often aim for accommodative solutions to conflicts between groups. The important *Meiorin* decision in Canada expressly confirmed that cases under anti-discrimination statutes should first seek accommodation between the interests of contending parties.<sup>71</sup> This entails finessing discriminatory norms to ensure they still accomplish legitimate aims, but exclude fewer people. In *Meiorin* itself, height requirements for firefighters had disqualified female applicants in disproportionate numbers. The Court favored a newer hiring standard for firefighters that gauged actual physical ability (e.g., ability to carry out certain firefighting tasks), rather than relying on stature or other rough markers of ability.

Accommodation in such cases requires the judicial creativity to recognize as valid, and even occasionally to create, norms that are mutually agreeable to parties whose interests otherwise conflict. Rather than view effective firefighting and non-discrimination values as necessarily in tension, in *Meiorin* the Court sought ways to preserve both. Whether such cases can serve as precedents for a similar express jurisprudence of accommodation in election law remains an open question.

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<sup>71</sup> *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government Service Employees' Union* 1999 SCC 48, [1999] 3 SCR 3 ["*Meiorin*"].

(4) *Addressing the elite and performative problems: alternatives to litigation and legalistic constraint?* Above we saw two additional problems in the law of deliberative democracy. First, an insular class of legal elites might draw principally on its own values in driving the law's formation. Second, such values can presuppose the impossibility of deliberation.

Such problems firstly present rhetorical challenges. Addressing them requires alerting lawmakers and jurists to simplifications in the dominant, skeptical view of deliberation. The deliberative democrat's claim is seldom that institutions can achieve ideal deliberation. As is common with other normative benchmarks (e.g., equality, liberty), deliberative analyses should examine just a selection of laws at one time and should determine if those laws marginally improve or impair deliberation, without presuming to perfect it. There is no determinate threshold above which a process counts as "deliberative." As we saw, empirical work suggests a complex picture of deliberation – of many shadings, arising from a variety of institutional models and their associated trade-offs. (See similarly Dawood's "continuum" of deliberation in this symposium.) For deliberation, the more complex description is usually the more accurate one. Shading the empirical picture of deliberation in this way brings needed nuance to debates sometimes colored in primary hues.

More than simply recognizing faulty premises, however, answering the elite and performative problems may also turn on favorable institutions and laws. It can be tempting to return, as so often in the past, to strategies that construct politics as anti-deliberative. In particular, the default regulatory models in election law are negative in form. Rather than focus on defining good decision-making, these models emphasize what good decision-making is not: it is not partisan, or is at least not dominated by just one partisan faction.<sup>72</sup> One subset of negative regulation aims directly to constrain the discretion of power-holders who are presumed to incline toward strategic self-dealing.

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<sup>72</sup> For a discussion of "negative" and "positive" (as well as "perfectionist") forms of electoral regulation see Ron Levy, "Drawing Boundaries: Election Law Fairness and its Democratic Consequences," in Joo-Cheong Tham, Brian Costar and Graeme Orr (eds.), *Electoral Regulation and Prospects for Australian Democracy* (Melbourne: Melbourne University Press, 2011).



For instance, prohibitory norms attempt to define and interdict partisan gerrymandering (often with limited success).<sup>73</sup> Laws and institutions also seek to negate partisanship indirectly, by balancing partisans against each other on bodies (e.g., commissions and committees) constituted with partisans of different stripes, or in adversarial litigation. Yet, as election lawyers well know, many election laws often only shift the site of political contestation to the courts, where law can aggravate and concentrate competitions for power around narrow doctrinal disputes (e.g., defining what counts as a gerrymandered district), reinforcing a political system's own tendencies toward agonism.

Commentary on election law still often favors negative regulation, however, on the assumption that law cannot positively articulate clear decision-making criteria or that partisans will manipulate their interpretation.<sup>74</sup> Indeed it may be easier to identify partisans than good decisions. This is a valid concern: a regulatory regime should not be impractically complex in design or application. Yet judicial review under a model of negative regulation potentially substitutes an attenuated set of decisional criteria – based largely on considerations of partisanship – for broader positive and deliberative ones – based on varied substantive sources, participants, interests, reasoning, etc.

Such legal regulation may be incompatible with deliberation not least because the regulation compels an outcome. As noted above, coercion is antithetical to deliberation. By reviewing decision-making outcomes under law, we risk shortcutting deliberation. This effect may not be temporary. The encounter between election law and political process may see the former lastingly displace any political-cultural norms that may already drive relatively deliberative decision-making.

Attempts to use law to engender or preserve deliberation therefore raise a difficult set of questions. Can some legal-institutional models:

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<sup>73</sup> Such cases are common in in the United States; for reviews and commentary see Samuel Issacharoff, "Gerrymandering and Political Cartels" (2002) 116 *Harvard Law Review* 593 (highlighting the occasional futility of "constricting language"); Cain *supra* note 70.

<sup>74</sup> See, e.g., Cain, *supra* note 70, 1837-1839; Z. Landau, O. Reid and I. Yershov, "A Fair Division Solution to the Problem of Redistricting" (2009) 32 *Social Choice and Welfare* 479.

- *minimize coercion*, in the sense of reducing law’s potential to shortcut deliberation and dictate decision-making outcomes?
- preserve or create a *complex discursive space* – that is, a decision-making context in which participants can engage in characteristically wide-ranging, inclusive and multifaceted deliberative reasoning?
- but, despite this complexity, be *simply articulable* in law and thus practically workable?

Perhaps we should begin by pledging to first do no harm with institutional and legal design. Indeed, courts in Canada generally avoid closely scrutinizing redistricting commissions<sup>75</sup> – many of which feature long-established impartial, reflective and inclusive cultures of decision-making.<sup>76</sup> Thus the Canadian courts seldom substitute their own preferred outcomes for those of the commissions. But are such judicial laissez-faire strategies sufficient? And are there alternative, positive legal models more compatible with, or even generative of, deliberation’s distinctive patterns? Addressing these questions calls for creativity. Examples such as the federal Canadian model of redistricting – itself consistently and abjectly partisan before the 1960s, when the *Electoral Boundaries Readjustment Act* created the federal Commissions and the legal setting in which they work<sup>77</sup> – suggest alternatives. Especially outside the courts, the toolbox of legal design includes far more than merely negative models of regulation.

One option is the law’s “*guidance*” function, which Raz and others identify.<sup>78</sup> Some laws mandate more than they restrict or constrain, and may thereby indicate which norms

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<sup>75</sup> *Reference Re Prov. Electoral Boundaries (Saskatchewan)*, [1991] 2 S.C.R. 158 [“*Carter*”]. The case concerned provincial electoral boundaries, but applied and developed the federal law of the right to vote under s. 3 of the *Canadian Charter of Rights and Freedoms*.

<sup>76</sup> Courtney, *supra* note 70, 8.

<sup>77</sup> The Act is now the *Electoral Boundaries Readjustment Act*, R.S.C. 1985, c. E-2 [“*EBRA*”]. On previous partisanship in the area see W.E. Lyons, “Legislative Redistricting by Independent Commissions: Operationalizing the One Man-One Vote Doctrine in Canada” (1969) 1 *Polity* 428. The full story of redistricting by commission in Canada actually begins earlier, with provincial bodies in Manitoba and Quebec: Courtney, *supra* note 70, 36-52

<sup>78</sup> Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (Oxford University Press, 2009) 99; Joseph Raz, *The Authority of Law: Essays on law and morality* (Clarendon Press, 1979) 167-8; T.R.S. Allan, “The Rule of Law as the Rule of Reason: Consent and Constitutionalism” (1999) 115 *Law Quarterly Review* 221, 225-227.

ought to govern, rather than those that should not. This model has intriguing applications to the law of deliberative democracy. Guidance is a restrained legal model; here law creates some of the conditions for decision-making – potentially including deliberative conditions – but thereafter retreats to a more limited role and does not directly determine a final outcome. Guidance may therefore be a relatively non-coercive option. We can also describe it as “additive”: it mainly augments the norms driving decision-making, rather than displacing them wholesale.

*Guidance of Process.* It is easiest to see how a guidance strategy might work in terms of process. Deliberative democrats consistently show that careful institutional design can place people in circumstances where they are more likely to deliberate. A process’ stages, decision-maker roles and interactions, durations, citizen consultations, etc. can be orchestrated to encourage participants’ mutual respect and learning, deeper reflection, and other hallmarks of deliberation. Well-examined instances include Deliberative Polls and Citizens’ Assemblies, both of which involve randomly-selected (but demographically representative) citizen-members, whom the institutions direct through several stages of learning and collective deliberation.<sup>79</sup> In addition, a relatively unsung example from election law is the Federal Electoral Boundaries Commission system in Canada. I have previously written about the “obstacle course of diverse and redundant stages” in these bodies:

There is a mixture of advisory and direct influences: parliamentarians and members of the public make recommendations, and commissioners finally decide. There is a combination of partisan and generally impartial contributions. There are open and in camera sessions. The stages of the Canadian process are numerous and their total duration extensive.<sup>80</sup>

The Commissioners also draw from elite and non-elite ranks; in addition to judges, academics and lawyers, they have included, for example, a police officer and a social

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<sup>79</sup> Fishkin, *supra* note 7; Warren and Pearse, *supra* note 7.

<sup>80</sup> Ron Levy, “Regulating Impartiality: Electoral Boundary Politics in the Administrative Arena” (2007) 53 *McGill Law Journal* 1 at 36-37 (“Regulating Impartiality”).

worker.<sup>81</sup> In the previous work noted, I asserted that these and other factors have contributed to the effectiveness of the Commissions, which are widely viewed as impartial, reflective, inclusive and attentive to appropriate substantive principles – in short, as deliberative.<sup>82</sup> Thus laws can perhaps set procedures to destabilize political-cultural norms of partisan decision-making, which previously had undercut deliberation in a given setting.<sup>83</sup>

Notably, positive guidance of procedure may therefore have the potential to yield the complex forms of decision-making characteristic of deliberation while still relying on simple laws. Indeed, by targeting structure and starting conditions, legal guidance regulates the least ephemeral element of a deliberative system. It may be easier for laws to create good institutions and procedures than to recognize and review good outcomes. Also note that procedural guidance still entails some legal coercion, but not unusually so; any process, deliberative or otherwise, must use rules to create a reasonably stable and structured course of decision-making. But in this respect negative alternatives, being relatively interventionist, entail more coercion than does procedural guidance.<sup>84</sup>

*Substantive Guidance.* On the other hand, can, and should, law similarly exercise a guidance function over the substance of decisions? The federal Canadian redistricting Commissions point to substantive guidance as another alternative to negative regulation.<sup>85</sup> Guidance in this case may again be less coercive and generally more consonant with deliberation. While federal redistricting law in Canada positively

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<sup>81</sup> *Id.* at 37.

<sup>82</sup> Courtney, *supra* note 70 at 8; Kingsley, *supra* note 70 at 406-407; Christopher S. Elmendorf, “Representation Reinforcement Through Advisory Commissions: The Case of Election Law” (2005) 80 *New York University Law Review* 1366 at 1386-1405; Richard L. Hasen, “Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown” (2005) 62 *Washington & Lee Law Review* 937 at 983-990.

<sup>83</sup> Gerrymandering had been something of a tradition in Canada until the 1950s: Lyons *supra* note 70. Even Canada’s founding Prime Minister, Sir John A. Macdonald, directed a brazen and still infamous gerrymander; Macdonald told the Opposition: “We meant to make you howl.”: House of Commons (Canada), *Debates* (1882) at 1392.

<sup>84</sup> Admittedly, participatory democrats and feminists would object to the idea that elite-authored laws should mandate certain norms over others. Such critics would want to see bottom-up participation that is uninfluenced by elite-defined norms. I recognise this objection. Yet we should seek both participation and deliberation, and the latter may well require elite-authored laws in order to ensure that the interpersonal decision-making meets deliberation’s required standards.

<sup>85</sup> Levy, “Regulating Impartiality,” *supra* note 80.

stipulates a set of starting conditions,<sup>86</sup> thereafter the law steps back to let decision-makers follow a largely autonomous course.

There is little question that law must at least sketch out broad substantive criteria to outline what counts as a decision appropriate to purpose – to the reasons why a decision is called in the first place. For example, redistricting criteria stem from a district-based democratic model; voters must be able to pool their preferences, interests and identities to allow representatives for the district to serve constituents conveniently and coherently. Such notions inform criteria like communities of interest, contiguity, compactness, and rough district alignment with existing transportation corridors, urban limits and physical barriers.<sup>87</sup> Most redistricting systems have positive and negative elements in varying proportions. Despite the Supreme Court of Canada’s hands-off approach, that Court may countenance what we might call a “backstop” function; it is still prepared to overrule commissions in cases of egregious error or partisanship.<sup>88</sup> Conversely, even in US states where redistricting focuses overwhelmingly on negative regulation strategies, laws are not wholly rudderless in substantive terms, but also stipulate positive criteria.<sup>89</sup>

But should electoral regulation orient more toward positive or negative regulation? Substantive guidance potentially raises more intractable problems of coercion than does procedural guidance. It may be harder merely to stipulate substantive starting conditions without going on to regulate outcomes. Substance is markedly vaguer; it defies clear characterization in law. Thus it may be difficult to describe or verify when decision-makers fulfill substantive criteria, and therefore to draw a distinction between starting

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<sup>86</sup> *Id.* at 36-37.

<sup>87</sup> See, e.g., *Commonwealth Electoral Act 1902*, s. 66(3)(b) in Australia; and *EBRA*, *supra* note 77, s. 15 in Canada.

<sup>88</sup> *Carter*, *supra* note 78 at 189 (McLachlin J.) (“the courts ought not to interfere with the legislature’s electoral map under s. 3 of the Charter unless it appears that reasonable persons applying the appropriate principles ... could not have set the electoral boundaries as they exist”).

<sup>89</sup> Justin Levitt, “Communities of Interest” (November 26, 2010) *The Brennan Center for Justice at NYU School of Law* (“Twenty-four states address these communities of interest directly, asking redistricting bodies to consider various types of communities in drawing district lines”). To be sure, such substantive criteria may be overshadowed where negative regulation predominates.

conditions and end results.<sup>90</sup> As well, in a system leaving Commissioners free to determine how substantive criteria are to be applied, what is to keep Commissioners from deciding boundaries for partisan reasons? Significant partisanship seldom materializes in Canadian federal redistricting, as we saw; yet in extreme cases of partisanship or error, judicial reversal would still be still a possibility. This raises the potential for difficult line-drawing questions: what counts as egregious? Judges might too often substitute their own substantive judgments for those of Commissions. Even after *Carter*, the Canadian courts continue to probe and challenge the boundaries of acceptable levels of judicial regulation.<sup>91</sup>

On the other hand, in the previous work noted, I asserted that the federal Canadian Commissions seem to be deliberative in part *because* substantive criteria yield few normatively “correct” answers. Institutional choices are often inherently indeterminate.<sup>92</sup> Hence election law rule-making (e.g., redistricting) can be, in a literal sense, chaotic: although there is a causal link between starting factors and end result, this result is unpredictable. There can be multiple, equally legitimate outcomes. This indeterminacy appears to provide some conceptual insulation between initial conditions and final outcomes – allowing decision-makers to follow substantive criteria without also having to consider downstream political effects (e.g., the fortunes of political parties affected by a new electoral map). To the extent it therefore does not exacerbate decision-makers’ bent for strategic decision-making, this approach may resonate with deliberative ideals.<sup>93</sup>

The hardest challenge of all, however, may again be rhetorical: in this case convincing election law practitioners, commentators, judges and drafters to overcome anxieties about non-deterministic criteria. Guidance in law embraces complexity and indeterminacy. But

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<sup>90</sup> See, e.g., Courtney, *supra* note 70 at 259; Royal Commission on Electoral Reform and Party Financing (“Lortie Commission”), *Reforming Electoral Democracy: Final Report* (Ottawa: Minister of Supply and Services Canada, 1991), I, at 150, 157-158; cf. Hasen, *supra* note 82 at 983.

<sup>91</sup> *Charlottetown (City) v. Prince Edward Island* (1998), 168 D.L.R. (4<sup>th</sup>) 79 (P.E.I.C.A.); *East York (Borough) v. Ontario* (1997), 36 O.R. (3d) 733 (Ont.C.A.); *Friends of Democracy*, [1999] N.W.T.J. No. 28 (N.W.T.Sup.Ct.); and *Reference re Electoral Boundaries Commission Act [Alberta]*, [1992] 1 W.W.R. 481 (Alta.C.A.); *Raïche v. Canada (Attorney General)*, 2004 FC 679, [2005] 1 FCR 93.

<sup>92</sup> Kenneth Arrow, “A Difficulty in the Concept of Social Welfare” (1950) 58 *Journal of Political Economy* 328 at 328-331

<sup>93</sup> For a more complete discussion see Levy, “Regulating Impartiality,” *supra* note 80 at 33-47.

we may be tempted to retreat to simpler, negative forms of regulation, with more readily articulable and cognizable categories. Arguably, then, election law must become as comfortable with indeterminacy as deliberative democracy already is.<sup>94</sup>

*(5) How Distinct are Institutional and Public Deliberation?* Positive election regulation raises a number of further questions. For example, is the guidance function sustainable beyond the limited set of cases above? And can we adapt it, or other legal models, to promote deliberation outside of relatively confined institutional settings?

In his contribution to the symposium, Dennis Thompson, for one, discounts the latter possibility, noting that institutional deliberation over democratic ground rules is more realistic than deliberation across wider political cultures. Doubtless this is true. But the distinction is a porous one. Deliberative electoral rule-making is not intrinsically valuable. Its value instead depends on its capacity to promote certain democratic virtues – especially deliberation itself – in the public sphere. For instance, if a deliberative redistricting body suppresses gerrymandering, it does so to avoid a host of more general anti-democratic and anti-deliberative vices: for example, under-representative and hence under-inclusive districts; predetermined elections and thus inflexible decision-making in election periods; or more polarized and therefore less open-minded and wide-ranging political debate.

We may also challenge the distinction between deliberation “in” and “about” elections in light of the blurred roles of political culture at these two levels. Decision-making cultures inside and outside of electoral institutions interpenetrate to a great extent. For instance, as Pildes notes, the perception that districting is a selfish partisan game can set the terms of public debate about electoral politics.<sup>95</sup> Thus when partisan self-interest seems to govern rule-making, we may also see a broader decline in wider public discourses characterized by reason, trust and cooperation. Conversely, some studies show that deliberative bodies

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<sup>94</sup> For example, for deliberative democrats, the Ontario and British Columbia Citizens’ Assemblies’ very different electoral reform recommendations are unproblematic, and only reflect the bodies’ different starting conditions, the different needs of different jurisdictions, and – most of all – the futility of seeking correctness in electoral law and design.

<sup>95</sup> Pildes, “Foreword” *supra* note 57 at 219.

can set deliberative cues for citizens to follow.<sup>96</sup> This is an instance of the “*expressive*” function of institutions and law, which Sunstein, Anderson and Pildes, and Ghosh, among others, have identified.<sup>97</sup> Expressivism is essentially the guidance function writ large. Law and institutions might not merely constrain or coerce, but perhaps may telescope the desirability, in the public arena, of certain norms. Thus, like the debate-clarifying function of political parties,<sup>98</sup> carefully regulated deliberative bodies can perhaps help to structure and focus public discourses, but in deliberative ways. For instance, by a number of accounts, public debate during and soon after British Columbia’s Citizens’ Assembly experiment in 2004 was relatively reflective, informed and non-partisan.<sup>99</sup>

## V. Conclusion

Election law and deliberative democracy grew up rapidly over the past two decades, but for the most part did so separately. Cross-pollination between the two fields was rare. The contributions to this symposium issue therefore aim to uncover the deliberative in election law and practice, in order to begin outlining the borders of an incipient “law of deliberative democracy” field. I have sketched out, at broadest possible scale, a range of open questions in the field. These included questions about the viability of attempts to use law to effect deliberative goals. I have generally avoided suggesting firm answers to such questions. But in a few cases I have also ventured tentative – and sometimes tentatively hopeful – responses. For instance, the law’s guidance function might replace constraint and adversarial balance in regulation, and may perhaps serve as a relatively simple way to advance deliberative democratic aims.

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<sup>96</sup> Fred Cutler, Richard Johnston, R. Kenneth Carty, André Blais and Patrick Fournier, “Deliberation, Information, and Trust: The British Columbia Citizens’ Assembly as Agenda Setter” in *Designing Deliberative Democracy: The British Columbia Citizens’ Assembly* (Cambridge: Cambridge University Press, Mark E. Warren and Hilary Pearse eds., 2008), 168-170

<sup>97</sup> See, e.g., Cass R. Sunstein, “On the Expressive Function of Law” (1996) 144 *University of Pennsylvania Law Review* 2021; Elizabeth S. Anderson and Richard H. Pildes, “Expressive Theories of Law: A General Restatement” (2000) 148 *University of Pennsylvania Law Review* 1503; Eric Ghosh, “The Australian Constitution and Expressive Reform” (2012) 24 *Journal of Constitutional History* 95.

<sup>98</sup> Thompson, this collection; Nancy L. Rosenblum, *On the Side of the Angels: An Appreciation of Parties and Partisanship* (Princeton: Princeton University Press, 2010).

<sup>99</sup> Cutler, *supra* note 96; Michael K. Mackenzie and Mark E. Warren, “Two Trust-Based Uses of Minipublics in Democratic Systems” in John Parkinson and Jane Mansbridge (eds.) *Deliberative Systems* (Cambridge: Cambridge University Press, 2012), 111-112. *Cf.* Orr, in this collection, who raises the reasonable point that elections are less susceptible to deliberative conditioning than referendums.



Of course, such provisional answers raise a host of new questions. There are also more questions in the field than those canvassed here; other symposium contributors will touch on many more. Some of their contributions seek to expose and examine a deliberative telos in existing election law. Others interrogate whether election law reform might promote more deliberative politics. In either case, unless we begin to ask such questions, we run the risk that law will only continue to import its own, predominantly anti-deliberative patterns and preoccupations into democratic processes, and to sideline deliberative democratic aspirations.