

## Democratic Processualism

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Stephen Elkin has written a remarkable book, *Reconstructing the Commercial Republic: Constitutional Design After Madison*. The book is noteworthy for its broad scope; for its development of the value of “commercial republicanism” despite Elkin’s serious worry about the political consequences of the poverty that a commercial society will produce; for its sophisticated engagement with the question of partiality in a constitutional order (especially as manifested in faction and party); and for its methodological insistence on a certain way of doing constitutional theory. It is this last element of the work that I wish to engage here.

It is appropriate to read *Reconstructing* as a methodological invitation as much as constitutional theory. The book is clear about its hope, not only to develop our understanding about one good regime, but also to engage methodological questions about what “kind of reasoning should inform efforts” to constitute good regimes more generally (Elkin 2006, 75). Elkin reveals an almost combative relationship with academic philosophy, which he believes has impoverished rather than enriched constitutional theory. He says that much contemporary moral philosophy is focused on setting out the meaning and justification of certain values, as if those can be considered separately from the concrete institutions where those values are made manifest:

Values and institutional form are two separate matters, it is implied, which can be treated through a division of labor. The underlying idea . . . is that political institutions are means for achieving valued ends and that we should first settle precisely what those ends are. (75)

Elkin offers spirited resistance to “what is often termed ‘analytic’ philosophy,” because, he argues, it is analysis about how institutions can and do function that ultimately says “more about the consistency of our values than does an analysis of how we should use words” (76). He says that the underlying methodological problem of most moral theory is the premise “that it is possible and useful to treat as two separate matters what we value and the institutional means of realizing it” (77).

I take Elkin as offering an invitation to political theorists and social scientists to think about abstract questions of democracy, rights, and justice in terms of their particular institutional locations rather than in their abstract forms. Here I would like to take up the methodological invitation by articulating an abstract criterion that I believe could be useful for his enterprise. By so doing, I hope to show that

some of his methodological criticisms are too strong. Constitutional theory needs the perspective that Elkin adds in this book, but it also needs the abstraction and conceptual analysis that he rejects.

The hallmark of the book is its institutional sensitivity. Elkin is emphatic that constitutional theory requires situated and immanent critique, and he wants that critique located in the institutions and practices of constitutional republicanism. His understanding of institutions is richly focused on their capacity to structure deliberation. Fully half of the six “essential features” of the constitutional order he describes detail the ways that institutions structure the practice of giving “concrete meaning to a substantive conception of the public interest” (21). Elkin also writes that “[i]nstitutions create . . . an ‘environment of choice;’ they do not force a particular result but rather encourage those within their ambit to take account of particular kinds of considerations when they act” (124). I find this to be one of the most evocative sentences of the book.

Elkin’s commitment to thinking about how institutions can be structured to give content to the public good requires a conception of democracy that is sensitive to how institutions structure deliberative contexts. In fact, deliberative democratic theory has space, and actually invites, a new criterion of democratic evaluation that can incorporate Elkin’s concern for institutionally situated forms of public reason. The content of this criterion is implicit in some deliberative democratic scholarship, but it has not been explicitly named and theorized. I name it a “processual” criterion. A criterion of democratic processualism allows us to evaluate how well existing democratic institutions and practices evoke the reasons we need to make good judgments.<sup>1</sup> It pertains to the fit between the kinds of reasons for political decisions that are characteristically elicited by a particular institutional context, and the reasons upon which it is actually appropriate to base those decisions. The concern is appropriately captured as an institutional concern about the relationship between procedures and deliberative rationality. The insight is that procedures, and the way procedures are handled in nonideal politics, affect the nature of reasons that are advanced for citizens to rely on. Different procedures differentially affect the actuality of how these processes of justification unfold. Democratic processualism insists that public policies should be decided on the basis of reasons that are sensitive to the critical features of those policies. For an institution to systematically fail to elicit reasons that are sensitive to the critical features of a political choice is for that setting to fail according to the standard of democratic processualism.

The concept of democratic processualism illuminates a core accomplishment of Elkin’s work. It provides a conceptual vocabulary for the form of analysis that Elkin is urging on theorists of constitutional design and helps to sharpen the differentiation between constitutional theorizing that is institutionally focused, and constitutional theorizing that is not. Democratic processualism, like deliberative democratic theory, focuses on the relationship between practices of reasoning and the exercise of legitimate authority. Yet the criterion of democratic processualism also departs from standards of evaluation that deliberative democracy already offers.

The two most basic evaluative standards that deliberative democratic theory insists on are about procedure and substance. Proceduralism emphasizes the significance of fair majoritarian decision processes when citizens disagree. Hence proceduralists emphasize the significance of fairness, of equal opportunity to affect the democratic process, and of turnout (Bellamy 2007; Dahl 1989; Spitz 1984; Waldron 1999). Substantive conceptions of democratic authority also claim that the content of decisions is fair ground for democratic criticism. Some use a substantive account of democracy to justify the institution of judicial review, which renders decisions through processes that are non-accountable to the electorate (Dworkin 1999). Others develop the substantive core of democracy to defend rights such as a right to privacy on democratic grounds (Brettschneider 2007). Of course, a marker of deliberative democratic theory is its emphasis on overcoming the conceptual divide between these two evaluative standards.

Deliberative democrats have powerfully demonstrated that the core values of democracy contain both procedural and substantive content, and have argued for democratic scrutiny both of procedures and of the content of political proposals (Beitz 1989; Brettschneider 2007; Cohen 1996; Gutmann and Thompson 1996). Deliberative democrats achieve such scrutiny through tremendous emphasis on the kind of reasons that are available for the justification of public policy and political process. A core ideal of deliberative democracy is that public decisions and processes be justifiable according to reasons that take each citizen as a full, equal, and free member of the political community. For example, in *Democracy and Disagreement*, Gutmann and Thompson consider the case of Diana Brown, a terminally ill citizen in need of a publicly financed organ transplant. While proceduralists may believe a majority vote to be a fair way to resolve Brown's predicament, Gutmann and Thompson argue that "a majority vote alone cannot legitimate an outcome when the basic liberties or opportunities of an individual are at stake" (30). It is this basic insight that is a hallmark of deliberative democratic theory.

Achieving legitimate policy according to this conception of democracy requires that certain reasons be excluded as sources of justification for public decisions. This domain of excluded reasons is one of the most controversial aspects of deliberative democratic theory. As Joshua Cohen puts it, "[t]he deliberative conception of democracy is organized around an ideal of political justification . . . justification of the exercise of collective political power is to proceed on the basis of a free public reasoning among equals" (Cohen 1996, 99). Reasons such as "Catholics are less capable of making good decisions" or "poor people are unworthy of receiving organ transplants" are unacceptable for public policy because they degrade the free and equal status of Catholic or poor citizens. Reasons excluded, then, are those reasons that are incompatible with each citizen's basic freedom and equality.

It is a limitation of deliberative democratic theory that the dividing line posed between legitimate and illegitimate reasons is uniquely tethered to the capacity of

citizens to regard themselves as free and equal. Yet beyond that (richly theorized) constraint lie a great number of reasons that may not violate anyone's equal citizenship, but which are nonetheless democratically inappropriate. For example, there are arguments that are not premised on anyone's subordination yet which are still inappropriate because they fail to tether themselves to a relevant dimension of public debate. Imagine a voter deciding to vote for a candidate named "John Kennedy" on the basis of her opinion about JFK, in a context where the candidate bears no relationship to the Kennedy family dynasty. (Voting failures linked to name recognition is a more common problem than we might like to believe.) In that exercise of power (voting), no basic right or opportunity is at stake. Nor is the freedom or equality of any of the town's citizens at stake. John Kennedy the mayoral candidate may have perfectly decent policies. But if he were chosen as mayor because his town's voters admire the Kennedy family's political dynasty, the mismatch between the reasons available for his choice and the actual content of the choice is vulnerable to criticism on democratic grounds. The voters have failed to use their vote to advance their actual preferences (either for policies or for honoring the Kennedy family). Such a problem could occur in other deliberative contexts as well. If a democratic public were to make a decision about war without considering the question of national security, it would be appropriate to criticize that public. If these failures were related to systematic features of the electoral environment, as it might be if the ballot never indicated that John Kennedy was a Republican, then failure would not be only a "mistake" of the individual voter but would rather be systemic. I propose we call this a failure of democratic processualism. Democratic processualism differs from proceduralism because it is concerned with more than the fairness of the voting procedure. It differs from substantive criteria because it is not primarily about justifying public policy on the basis of reasons acceptable to free and equal citizens or any other substantive criterion of justice. Finally, it differs from normal publicity requirements in democratic theory because it pertains to the nature of reasons elicited by a particular institutional setting, not to the fact of transparency or secrecy as such. Democratic processualism pertains to the capacity of institutions to elicit forms of reason-giving that are appropriate for the political questions at hand.

The concept of democratic processualism helps to overcome a second limitation of deliberative democratic theory, and that is the abstraction of the preconditions that deliberative democrats offer. The preconditions for deliberative legitimacy are usually imagined as a set of background conditions of freedom and equality. This abstracted background makes sense given a highly idealized legitimating theory such as that of Habermas, but also makes it unclear what the implications of deliberative democratic theory are for practical politics, where we know that we cannot count on anything like background conditions of full equality (see Fraser 1992 and Young 1990 on the risks of translating abstract preconditions into actual standards). Moreover, there is too little scholarship that examines how existing institutional settings, as opposed to the social identities of deliberating parties, can be expected to shape the kinds of reasons offered on behalf of political

choices (for exceptions that will be taken up shortly, see Bessette 1994; Elster 1998; Tulis 2003; Rosenblum 2008). Elkin criticizes deliberative democrats for just this reason: “deliberation is exceedingly difficult if those involved are understood as living nowhere in particular. What will they talk about?” (129). The concept of democratic processualism responds to this criticism because its application requires that the scholar render the nature of the institutional and social context with precision. Evaluating how an institution can systematically elicit or suppress particular kinds of reasons requires a careful sensitivity to how institutions operate in their broader contexts.

These elements of abstraction that Elkin targets have in fact made it difficult for the theory of deliberative democracy to make contact with the practice of actual politics. Some have tried to empirically “prove” that deliberation provides better processes and outcomes (Fishkin 1991), but empirical evidence on deliberation largely does not touch the theoretical debate about deliberation simply because almost no actual deliberation, not to mention actual deliberative politics, comes anywhere near meeting the theoretical preconditions that deliberative democratic theorists impose. In fact, while some empirical work has sought to show that deliberative democracy does not always “work,” unfavorable empirical claims can always be brushed aside by theorists insofar as actual deliberative settings almost never meet the preconditions for democratic legitimacy (Mendelberg and Oleske 2000). Furthermore, translating the theoretical preconditions of deliberative legitimacy into actual preconditions for actual politics is tricky business. Mendelberg and Oleske assert as an empirical requirement of deliberative theory that “citizens are fully informed” and that “all alternatives are considered” (170). Yet I know of no deliberative democratic theorist who has specified that “all alternatives being considered” is a legitimating condition of deliberation in the real world. In fact, deliberative democratic theorists have said very little about how abstract deliberative preconditions translate into actual deliberative contexts. Although Mendelberg and Oleske seem to take it as given that the deliberative preconditions of an abstracted situation (i.e., all alternatives considered) would simply translate into principles for actual settings, in fact it could well be that applying deliberative principles to the real world could require disruptive, impatient, and manipulative behavior, as opposed to open, discursive, and transparent behavior (Estlund 2007, chap. 10). Hence, while deliberative democrats have powerful responses available to defend themselves against empirically based criticisms of deliberative democratic theory, those responses only underscore the extent to which theoretical and empirical theories of democratic reason-giving are failing to make intellectual contact. The failure of contact between these two rich fields is a loss for the field of constitutional theory as a whole.

It is natural that empirical social scientists would turn to existing deliberative contexts to evaluate the claims of deliberative democrats, and it would be highly appropriate for theorists to make use of such empirical energy by specifying the kinds of questions that would benefit from social scientific investigation. In fact,

the gap between deliberative democratic theory and the reality of politics expresses itself theoretically in the failure of deliberative democratic theory to advance a set of praxis concepts, concepts that designate the points of intersection between deliberative democratic theory and the real world. Democratic processualism is one example of a praxis concept. It provides a way of describing what makes processes of democratic decision making legitimate while also opening itself to empirical investigation about the extent to which institutions can and do foster the processualist ideal. It is a concept that supports interrogation about how particular institutional settings could be designed so as to maximize the likelihood that public decisions will be made with reference to the reasons that are the most critically relevant for those decisions.

Although I have not heard the term labeled explicitly before, its presence lurks within deliberative democratic scholarship. William Nelson has called for scholarship that would reveal, on deliberative democratic grounds, “which actual institutions are justified, whether *their* outcomes are legitimate, and whether we should comply with them?” (Nelson 2000, 188). Joseph Bessette has studied deliberation in Congress and the relationship between Congress’s structures and its capacity to deliberate democratically (1994). Jon Elster has written to clarify the relationship between the structures of constitutional conventions and the extent to which they can be called “deliberative” (1998). Jeffrey Tulis wrote a defining article for the concept of democratic processualism because his concept of “institutionally induced deliberation” allows us to engage the question of the relationship between an institutional form and the elicitation of certain reasons, that is, whether “the structure designed to induce deliberation privileges some arguments over others” (Tulis 2003, 201). Recent work by Nancy Rosenblum (2008) continues in this vein by emphasizing the contribution of political parties to structuring deliberative contexts. At stake is the relationship of institutions to the reasons offered in a political context in areas that may have little or nothing to do with basic rights and opportunities.

It is worth emphasizing that there is nothing necessarily democratic about processualism as I define it here. While democratic proceduralism advances a democratic set of procedures, and substantive conceptions of democracy advance substantive content that is required by democratic norms, the concept of processualism could be used to describe how institutions encourage the advancement of the right or wrong kinds of reasons in general, whether those institutions are democratic or not. But the value of what I am calling processualism acquires a heightened significance in a democracy for two reasons. First is that a commitment to democracy creates a special reason for caring about citizen’s knowledge, simply because knowledge is required if citizens are to be able to advance their own interests, desires, and judgments. In other words, a failure of processualism is a democratic failure when it occurs in a system that is legitimated through democratic processes. A second reason processualism is of special democratic significance is because democracy itself is sometimes defended on epistemic grounds (Cohen 1986; Condorcet 1976; Estlund 2007). Given such defenses, the

capacity of democratic institutions to condition the advancement of appropriate reasons takes on a special importance.

Democratic processualism should also be emphasized to be a value that is midway between theory and practice. There cannot be an abstract defense or criticism of an institution apart from how it functions, because processualism explicitly focuses on how institutions either do or do not elicit certain forms of reason-giving. Institutions operate only within context and so any defense or attack on processualist grounds will engage the content of the situation. Yet it is more abstracted than a simple charge that a single agent is offering bad reasons; it pertains to the structure of an institution and how likely it is that that institution will enduringly evoke certain forms of justification.

Elkin's invitation to think about the process of giving content to the public interest in a way that is institutionally specific is well cognizable within a larger set of conceptual categories that he seems wedded to resisting. Deliberative democratic theory has provided a service to the discipline by connecting questions of knowledge, truth, and judgment to questions about democratic authority itself. This kind of theory, in turn, can be enriched by the emphases that scholars who are mindful of institutions bring to their own work. We do not need to reject theory that is not concerned with institutions. Institutionally minded scholars can harness the achievements of such theory by developing concepts that link larger theory to particular practices. Such concepts, meant to cover a variety of cases, will necessarily be abstract. But why should we reject the significant insights of a discipline simply because they are abstract?

### Note

<sup>1</sup>One scholar has used the term "processual institutionalism" to describe a method of thinking about change within new institutionalism and organizational studies. See Jostein Askim, "Attending to a Blind Spot of New Institutionalism: Introducing Processual Institutionalism," unpublished manuscript presented at *Theory and Methods for Studying Organisational Processes: Institutional, Narrative, and Related Approaches*, London School of Economics, February 2005. This term has been picked up by Michael Barzelay and Raquel Gallego, "From 'New Institutionalism' to 'Institutional Processualism': Advancing Knowledge about Public Management Policy Change," *Governance* 19, no. 4 (2006): 531–57. These authors assign a different meaning to "institutional processualism" from that advanced here.

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