

The Possible Dream

By Jennifer Nou

Review of **SOCIAL CHOICE AND LEGITIMACY: The Possibilities of Impossibility** by John W. Patty and Elizabeth Maggie Penn

Cambridge University Press, 2014

How should societies resolve conflicting and, often, incommensurable goals? This question has long motivated a sub-field of political science concerned with the problem of *social choice*. Social choice theorists ask how individual preferences should be aggregated to reach some collectively coercive decision. Some of their central insights have been decidedly pessimistic — at least as far as democratic governance is concerned. So-called impossibility theorems, for example, demonstrate that no voting system with at least two members and three options can satisfy a set of minimal criteria thought necessary to any theory of democracy, such as non-dictatorship and preference transitivity. As a result, some scholars have concluded that there is no “popular will” that exists independently of the particular mechanism used to ascertain it: identical distributions of preferences could yield different social choices for different decision rules. Democratic procedures produce arbitrary outcomes subject to endless cycling.

Defenders of democracy have since rallied to rescue the concept. Some have critiqued the assumptions underlying impossibility theorems, or else have argued that deliberation could help to structure preferences towards collective consensus. As part of this restorative project, John Patty and Elizabeth Penn’s *Social Choice and Legitimacy* presents a theory that squarely aims to provide a basis for democracy on grounds other than the popular will. Instead of refuting the prospects of cycling and other irrationalities, they take them as the motivation to search for alternative democratic theories grounded in the giving of reasons or justifications. In their words, impossibility theorems “do not tell us that legitimate democratic governance is impossible; they simply tell us that pure aggregation alone may not be enough to identify a uniquely legitimate policy choice” (p. 190).

As a result, Patty and Penn set out to ground democratic legitimacy in the dynamics beyond elections that actually result in policy implementation, whether through legislative, executive, judicial, or administrative means. Their interest, in other words, is not with elections as aggregation mechanisms, but rather with what happens when the real choices and tradeoffs occur on the ground. In this sense, they are not concerned with the aggregation of individual preferences, but rather with the question of how to democratically resolve irreducible conflicts between values. As such, they share many of liberalism’s preoccupations (indeed, it is not a coincidence that they open and close their book with quotes from Isaiah Berlin). What is refreshing about their approach is that it seeks to explain actual institutional arrangements — by contrast to the tendency of many social choice theorists to conceive of democracy as an arid series of continual votes and referenda.

To make sense of their account, one must first accept their assumption that democratic legitimacy obtains even when the means through which any two policy options are ranked can be

taken as a given, that is, can be exogenously determined (pp. 84, 87). In other words, their theory presumes that there are principles according to which choices can be ordered, even while remaining agnostic about what those principles are or should be — whether, for example, grounded in wealth maximization, Pareto optimality, or supermajority preference. Given this principle, then, Patty and Penn argue that a legitimate decision is one that is “accompanied by a justification for its choice in terms of the other alternatives that could have been chosen and the principle that guided the choice” (p. 194). Stated differently, they argue that legitimacy requires that each step of a decision procedure must be consistent with some underlying principle, and that later steps in the justification must follow from the previous ones. The given rationale must also explain why some alternatives were not included in the decision-making process. Decisions that satisfy these criteria can be understood as democratically legitimate.

The essence of Patty and Penn’s claim, then, is that legitimate governance requires explanations for the tradeoffs that governments must make between conflicting goals — particularly given that such decisions are often the products of indirect delegations from more accountable elected officials (p. 190). Here, legal scholars may recognize parallels to Rick Pildes and Elizabeth Anderson’s [work](#), which similarly argues that incommensurable values demand robust democratic institutions to help construct a collective will. By contrast to Pildes and Anderson, however, Patty and Penn embrace the insights of impossibility theorems to justify democratic institutions as the means through which controversial decisions are justified. Instead of rejecting the premises of social choice, Patty and Penn seek to rehabilitate them, for “it is *precisely* the impossibility theorems” that require that democratic governance “involve[s] not just choices but the reasons behind those choices” (p. 32). In addition, they are also more agnostic about the role that institutions should play in shaping preferences, instead preferring to take such preferences as given. In this sense, an important goal of their project is to demonstrate the continuing relevance of social choice theory.

Many of these abstract propositions — often accompanied in the book by formalized axioms and theorems — are rendered more concrete when Patty and Penn discuss their application to the real world. Specifically, they consider how their theory might operate with respect to courts, Congress, and administrative agencies. With respect to judicial review, for example, they note that strict scrutiny, or the demand for a tight fit between government means and ends, is more consistent with their theory of legitimacy than rational basis review, which requires only a hypothetical rationale for statutes. The reason is that rational basis review does not require a government’s decision to be publicly explained, let alone justified with respect to why other policies were not chosen. Both of these criteria are central to legitimate decision-making. Regardless, Patty and Penn argue that both rational basis review and strict scrutiny suggest that judicial review may be a requirement for statutes to be legitimate, since such review serves as a check on legislative reason-giving (p. 146).

Similarly, in their view, legitimacy also requires that certain alternatives must be omitted during legislative decision-making processes. Thus, Patty and Penn favorably discuss legislative requirements that help to structure internal discussions, such as germaneness requirements for amendments introduced in the House of Representatives as well as single-subject rules in many state legislatures. Both of these institutional restrictions enhance legitimacy because they “bolster both the transparency of the link between legislative action and the principle that justifies it and

reinforce the internal consistency of legislative deliberations when considering, crafting, and enacting statutes” (p. 147). More broadly, such requirements also create incentives for legislators to agree upon a single principle for a given statute, thus helping to resolve potential internal conflicts in a manner consistent with the book’s theory of legitimacy.

Finally, Patty and Penn are most persuasive when they apply their insights to the administrative state. Indeed, the evolution of various doctrines governing agency action resonates with their account. Agencies, even more so than courts and legislatures, depend on constitutional, statutory and common law procedures to legitimate their actions. The *Chenery* principle, for instance, requires agencies to give and rely upon rationales originally provided at the time of agency action. The non-delegation doctrine requires statutes to have an “intelligible principle,” while *Chevron* grants agencies the authority to interpret otherwise ambiguous statutes reasonably. One conspicuous gap in Patty and Penn’s account, however, is their failure to discuss the development of hard look review, which perhaps best instantiates their theory. Under this standard, agencies are required to “articulate a satisfactory explanation for [their] actions” and demonstrate a “rational connection between the facts found and the choices made” in the preambles of their final rules. Not only are these explanations provided by the agency at the time the regulation is promulgated, but they must also justify why particular options were not adopted by the agency.

Social Choice and Legitimacy is a worthwhile read for legal scholars and political scientists otherwise skeptical of the intellectual advances offered by social choice theorists. Instead of treating the sub-field’s contributions as cause for despair, Patty and Penn take its lessons as reason to present a thicker conception of democracy that will resonate as an explanation for the evolution of familiar democratic institutions. Moreover, while some of their writing is dense, they admirably attempt to make their formal insights accessible to a broad audience. The book can be understood not only as a descriptive account of American democratic legitimacy, but also as a model of the kind of public reasoning that they convincingly argue lies at the concept’s very core.

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