# (Almost) Everything You Always Wanted to Know on Legal Theory, Democratic Theory, and their Connection

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**Date :** August 3, 2022

Paolo Sandro, **The Making of Constitutional Democracy: From Creation to Application of Law** (2022).

In this book, *The Making of Constitutional Democracy: From Creation to Application of Law*, Paolo Sandro has done what few in recent common law scholarship have attempted: presented a persuasive case for the interconnection between some issues in high legal theory and democratic legitimacy. His excursion into legal theory is needed to argue against, among others, Kelsen, legal realists, critical legal scholars, and interpretivists that there is a meaningful distinction between law-applying and law-creation and that the former is not always the latter. But these points are also pivotal to democratic theory. His case, briefly put, is this: if there is only constant creation of meaning in legal processes, then there is no such thing as applying the (*ex ante*) law, and law could not fulfil its function of conduct guidance in complex societies. Also, there would be no way that people rule themselves, even through their representatives, for whatever is legislated or democratically created does not (*ex ante*) determine the results of individual cases. So there could be no real collective autonomy, undercutting democratic legitimacy.

Sandro is discussing law-application not only by officials, but by private law subjects as well. The book is a real learning experience. If you have accepted some of mainstream legal or political thinking, get ready to have several of your received ideas challenged on a sophisticated level.

The degree of precision in this discussion may be surprising to those who are familiar with the usual English-language literature on the separation of powers, the rule of law, constitutions, and norms, to name just a few subjects. The book discusses theories and draws insights from both Anglo-American jurisprudential scholarship and the Continental tradition. It does this so much that at points, it has a survey-the-literature quality. You will learn much more than you expect about the positions of thinkers on a variety of topics in theoretical jurisprudence and political theory. That includes taxonomies and classifications that do not always seem essential to Sandro’s main argument stream, but may be valuable as clarifying frameworks in some debates.

All sorts of topics receive Sandro’s treatment: the nature of constitutions and constitutionalism, the linguistic meaning of legal texts, the nature of discretion (and why Dworkin’s taxonomy isn’t helpful or accurate), the connection between normative defeasibility and radical rule scepticism, the doctrine of the separation of powers and the difference between it and the division of powers, even (briefly) methodology in general jurisprudence. The book also offers a criticism of Hobbes, based on archaelogical discoveries, on the passage from pre-political to political society; a view of the common law as a different kind of law, having a different kind of connection, to the exercise of political power than code law; a critique of Leiter’s moderate legal realism (borrowed from Schauer); and an account of a tension between two ideals, the rule of law and what Sandro calls “legality.” We learn, e.g., a constitution can be only political in nature, and that there are four types of rule application with different amounts of discretion associated with them. In these respects, the book is a *tour de force*.

The book has limitations. One of the most important for common law thinkers is that Sandro’s account of law-application only pertains to norms that can count as what is communicated by a legal text

(created by an authority with the power to do so), according to his theory of the meaning of legal texts in Chapter Five. He has no clear account of law-application for common law decisions by courts, even those following precedent, or of law-application for those courts applying principles of a political constitution, as in the U.K.

What interests me most in the book is Chapter Five, where Sandro rejects the Gricean and neo-Gricean accounts of meaning and favors the idea of text-acts to replace the idea of speech-acts for legislation. I think he's done an excellent job in this, with compelling and carefully crafted critical arguments, grounded in sound empirical observations. He is intent on correcting the direction of much legal theorizing by "putting lay people back at the centre of law's interpretive field…." (P. 5.) Establishing, correctly, to my way of thinking, who controls meaning and how are large steps in this direction. This enables him to give an account of easy cases (when legal texts are all that is at issue) that do not require adjudication, a realm of determinacy in law.

I do not agree with all of Sandro's philosophical claims, even in Chapter Five; but I think the reader will find that in spite of a few flaws, the book is a worthwhile addition to the literature on a number of key topics in legal theory and democratic theory.

Cite as: Barbara Levenbook, *(Almost) Everything You Always Wanted to Know on Legal Theory, Democratic Theory, and their Connection*, JOTWELL (August 3, 2022) (reviewing Paolo Sandro, **The Making of Constitutional Democracy: From Creation to Application of Law** (2022)), https://juris.jotwell.com/almost-everything-you-always-wanted-to-know-on-legal-theory-democratic-theory-and-their-connection/.