

## THE LAW AS A CONVERSATION AMONG EQUALS

In a time of disenchantment with democracy, massive social protests, and the “erosion” of the system of checks and balances, this book proposes to reflect upon the main problems of our constitutional democracies from a particular regulative ideal: that of the conversation among equals. It examines the structural character of the current democratic crisis and the way in which, from its origins, constitutions were built around a “discomfort with democracy.” In this sense, the book critically explores the creation of different restraints upon majority rule and collective debate: constitutional rights that are presented as limits to (and not, fundamentally, as a product of) democratic debate; an elitist system of judicial review; a checks and balances scheme that discourages, rather than promotes, dialogue between the different branches of power; etc. Finally, the book proposes a dignified constitutional democracy aimed at enabling fraternal conversation within the framework of a community of equals.

ROBERTO GARGARELLA is Professor of Constitutional Law at the University of Buenos Aires and a senior researcher at the National Scientific and Technical Research Council (CONICET). He has published numerous books and articles, including *The Legal Foundations of Inequality* (2010), *Latin American Constitutionalism* (2013), *The Latin American Casebook: Courts, Constitutions, and Rights* (with J. F. Gonzalez-Bertomeu, 2016), and *Constituent Assemblies* (with J. Elster et al., 2018).

## CAMBRIDGE STUDIES IN CONSTITUTIONAL LAW

The aim of this series is to produce leading monographs in constitutional law. All areas of constitutional law and public law fall within the ambit of the series, including human rights and civil liberties law, administrative law, as well as constitutional theory and the history of constitutional law. A wide variety of scholarly approaches is encouraged, with the governing criterion being simply that the work is of interest to an international audience. Thus, works concerned with only one jurisdiction will be included in the series as appropriate, while, at the same time, the series will include works which are explicitly comparative or theoretical – or both. The series editors likewise welcome proposals that work at the intersection of constitutional and international law, or that seek to bridge the gaps between civil law systems, the US, and the common law jurisdictions of the Commonwealth.

*Series Editors*

David Dyzenhaus

Professor of Law and Philosophy, University of Toronto

Thomas Poole

Professor of Law, London School of Economics and Political Science

*Editorial Advisory Board*

T. R. S. Allan, Cambridge, UK

Damian Chalmers, LSE, UK

Sujit Choudhry, Berkeley, USA

Monica Claes, Maastricht, Netherlands

David Cole, Georgetown, USA

K.D. Ewing, King's College London, UK

David Feldman, Cambridge, UK

Cora Hoexter, Witwatersrand, South Africa

Christoph Moellers, Humboldt, Germany

Adrienne Stone, Melbourne, Australia

Adam Tomkins, Glasgow, UK

Adrian Vermeule, Harvard, USA

*Books in the series**The Law As a Conversation among Equals*

Roberto Gargarella

*Micronations and the Search for Sovereignty*

Harry Hobbs and George Williams

*Fundamental Rights and the Legal Obligations of Business*

David Bilchitz

*Courting Constitutionalism: The Politics of Public Law and Judicial Review in Pakistan*

Moeen Cheema

*Ruling by Cheating: Governance in Illiberal Democracy*

András Sajó

*Local Meanings of Proportionality*

Afroditu Marketou

*Property Rights and Social Justice: Progressive Property in Action*

Rachael Walsh

*Carl Schmitt's Early Legal-Theoretical Writings: Statute and Judgment and the Value of the State and the Significance of the Individual*

Lars Vinx and Samuel Garrett Zeitlin

*Remedies for Human Rights Violations: A Two-Track Approach to Supranational and National Law*

Kent Roach

*Europe's Second Constitution: Crisis, Courts and Community*

Markus W. Gehring

*A. V. Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind*

Mark D. Walters

*Administrative Competence: Reimagining Administrative Law*

Elizabeth Fisher and Sidney A. Shapiro

*Legal Sabotage: Ernst Fraenkel in Hitler's Germany*

Douglas Morris

*Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice*

Edited by Mordechai Kremnitzer, Tayla Steiner and Andrej Lang

*Constitutional Dialogue: Democracy, Rights, Institutions*

Edited by Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon

*The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems*

Anne Twomey

*Vigilance and Restraint in the Common Law of Judicial Review*

Dean Knight

*The Alchemists: Questioning Our Faith in Courts as Democracy-Builders*

Tom Gerald Daly

*Australia's Constitution after Whitlam*

Brendan Lim

*Building the Constitution: The Practice of Constitutional Interpretation in Post-Apartheid South Africa*

James Fowkes

*Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law*

Jacob Weinrib

*Reason of State: Law, Prerogative, Empire*

Thomas Poole

*Bills of Rights in the Common Law*

Robert Leckey

*The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*

Translated by Lars Vinx, with an introduction and notes by Lars Vinx

*Parliamentary Bills of Rights: The Experiences of New Zealand and the United Kingdom*

Janet L. Hiebert and James B. Kelly

*Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel*

Yoav Dotan

*Balancing Constitutional Rights: The Origins and Meanings of Postwar Legal Discourse*

Jacco Bomhoff

*Judges on Trial: The Independence and Accountability of the English Judiciary*

Shimon Shetreet and Sophie Turenne

*Proportionality and Constitutional Culture*

Moshe Cohen-Eliya and Iddo Porat

*The Politics of Principle: The First South African Constitutional Court, 1995–2005*

Theunis Roux

*The New Commonwealth Model of Constitutionalism: Theory and Practice*

Stephen Gardbaum

*Searching for the State in British Legal Thought: Competing Conceptions of the Public Sphere*

Janet McLean

*Judging Social Rights*

Jeff King

*Proportionality: Constitutional Rights and their Limitations*

Aharon Barak

*Parliamentary Sovereignty: Contemporary Debates*

Jeffrey Goldsworthy

THE LAW AS  
A CONVERSATION  
AMONG EQUALS

ROBERTO GARGARELLA

*Senior Researcher at the National Research Center (CONICET, Argentina)*



CAMBRIDGE  
UNIVERSITY PRESS

Cambridge University Press & Assessment  
 978-1-009-10206-3 — The Law As a Conversation among Equals  
 Roberto Gargarella  
 Frontmatter  
[More Information](#)



CAMBRIDGE  
 UNIVERSITY PRESS

Shaftesbury Road, Cambridge CB2 8EA, United Kingdom  
 One Liberty Plaza, 20th Floor, New York, NY 10006, USA  
 477 Williamstown Road, Port Melbourne, VIC 3207, Australia  
 314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India  
 103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment,  
 a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of  
 education, learning and research at the highest international levels of excellence.

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9781009102063](http://www.cambridge.org/9781009102063)

DOI: 10.1017/9781009105682

© Roberto Gargarella 2022

This publication is in copyright. Subject to statutory exception and to the provisions  
 of relevant collective licensing agreements, no reproduction of any part may take  
 place without the written permission of Cambridge University Press & Assessment.

First published 2022

First paperback edition 2023

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloging-in-Publication data*

Names: Gargarella, Roberto, 1964– author.

Title: The law as a conversation among equals / Roberto Gargarella, Universidad de Buenos  
 Aires, Argentina.

Description: Cambridge, United Kingdom ; New York, NY : Cambridge University Press,  
 2022. | Series: Cambridge studies in constitutional law | Includes bibliographical  
 references and index.

Identifiers: LCCN 2021047053 (print) | LCCN 2021047054 (ebook) | ISBN 9781009098595  
 (hardback) | ISBN 9781009102063 (paperback) | ISBN 9781009105682 (ebook)

Subjects: LCSH: Constitutional law. | Democracy. | Civil rights. | Equality before the law. |  
 Elite (Social sciences) | Discontent. | Government, Resistance to.

Classification: LCC K3165 .G375 2022 (print) | LCC K3165 (ebook) |  
 DDC 342–dc23/eng/20211223

LC record available at <https://lcn.loc.gov/2021047053>

LC ebook record available at <https://lcn.loc.gov/2021047054>

ISBN 978-1-009-09859-5 Hardback

ISBN 978-1-009-10206-3 Paperback

Cambridge University Press & Assessment has no responsibility for the persistence  
 or accuracy of URLs for external or third-party internet websites referred to in this  
 publication and does not guarantee that any content on such websites is, or will  
 remain, accurate or appropriate.

## CONTENTS

<i>Preface</i>	<i>page</i> xv
<i>Acknowledgments</i>	xviii
1	Constitutionalism and Democracy 1
	An Institutional Problem of Structural Nature
1.1	The Democratic Objection is Still There 5
1.2	Of History and Ideas 8
1.3	Three Clarifications 12
2	The Law As Conversation among Equals 16
2.1	Immigrants in the “Promised Land” 16
2.2	Six Basic Elements of a Conversation among Equals 21
2.3	“Constitutional Moments” As Collective Conversation 25
2.4	Autonomy, Self-Government, Rights, and Democracy in the Conversation of Equals 29
2.5	Autonomy and Self-Government 29
2.6	Rights and Democracy 30
3	“Democratic Dissonance” 32
	Elitism Translated into Institutions
3.1	Three Great Jurists from the Age of Revolutions: Madison, Alberdi, and Bello 32
3.2	Madison 33
3.3	Alberdi 35

- 3.4 Bello 36
- 3.5 Elitist Discourse in an Exclusive Framework:  
 Constitutions Conceived for Another  
 Time 38
- 3.6 Political Sociology 39
- 3.7 Elitism Translated into Principles and  
 Institutions 40
- 3.8 Assumptions, Principles, Institutions 41
- 3.9 What Has Stayed the Same and What Changed in  
 Constitutional Terms: The “Fact of  
 Democracy” 45
- 3.10 “Democratic Dissonance” and the Tight-Fitting Suit  
 of Constitutionalism 48
- 4 A Constitution Marked by a “Discomfort with  
 Democracy” 51
  - 4.1 Madison and “Factions” 51
  - 4.2 Direct Democracy 53
  - 4.3 Motivations 54
  - 4.4 Violations of Rights 54
  - 4.5 Majorities and Minorities: The Construction of a  
 Counter-Majoritarian Constitution 55
  - 4.6 A Constitution Made to Protect  
 Minorities 57
  - 4.7 Exactly Which of the Minorities Warrant  
 Protection? 59
  - 4.8 So What to Do About Majority Factions? (Another)  
 Counter-Majoritarian Response 61
- 5 Motivations and Institutions 66  
 “If Men Were Angels”
  - 5.1 How Far Off Were the Radical  
 Republicans? 69



## CONTENTS

ix

- 5.2 Egoism As “Fuel” for and the “Endogenous Product”  
of the Institutional System 71
- 5.3 No System Is “Neutral” 75
- 5.4 The Economic Preconditions of Political  
Self-Government 77
- 6 The Structural Difficulties of Representation 82
  - 6.1 The Bristol Debates 82
  - 6.2 Do We Need to “Filter” the Citizen Voice? 87
  - 6.3 The Problems of the Predominant Model: Isolation,  
“Capture,” Ignorance 90
  - 6.4 From “Virtual” Representation to Representation As  
“Mirror”: Representation and “Presence” 91
  - 6.5 The Structural Difficulty of  
Representation 94
- 7 The Rise and Fall of Popular Control 98
  - 7.1 Citizens and Representatives 98
  - 7.2 On Institutions Sensitive to Popular Will in Radical  
English Thought 100
  - 7.3 Instructions, Rotation in Positions, Annual Elections:  
Different Forms of “Popular” Control 102
  - 7.4 The Gradual Elimination of “Popular”  
Controls 104
- 8 The Periodic Vote, or “Electoral Extortion” 108
  - 8.1 Regular Voting As the Only Bridge Standing between  
Citizens and Representatives 108
  - 8.2 “Electoral Extortion” 109
  - 8.3 Elections from the Representative’s Point of View:  
Voting and Interpreting the Vote 115
  - 8.4 From the Agora to the Dark Booth: The Absence of  
Dialogue 118
  - 8.5 “Paper Stones” 119

- 8.6 Irrational Voters or Dysfunctional System? 120
- 9 Checks and Balances 124  
 Combining “Institutional Means and Personal Motives”
  - 9.1 The Key to Modern Constitutionalism: “Checks and Balances” 124
  - 9.2 Institutionally Channeling “Civil War” 127
  - 9.3 Erroneous Antidemocratic Logic 129
- 10 Presidentialism 136  
 Busting the Checks and Balances
  - 10.1 Creating the Leviathan 139
  - 10.2 A Poorly Designed Institutional System 140
  - 10.3 The Problem with the Pact 141
  - 10.4 An “Unbalanced” System of “Checks and Balances”: The “Alberdian Error” 143
  - 10.5 The Political Left and Presidentialism 146
- 11 Rights 149  
 Citizenship As Repository of Rights
  - 11.1 Natural and Self-Evident Rights: Rights As “Planets” 151
  - 11.2 Bentham and the Idea of “Natural Rights” As “Nonsense upon Stilts” 155
  - 11.3 Rights versus Democracy 158
  - 11.4 Rights As “Trump Cards” against Majorities 160
  - 11.5 Rights and the “Sphere of the Undecidable” 162
- 12 Social Rights and the “Engine Room” 166
  - 12.1 The “Exorbitant” Mexican Constitution of 1917 166

## CONTENTS

xi

- 12.2 The Mexican Constitution of 1917: A “Conservative Moment” in the Revolutionary Movement 167
- 12.3 The Animal Stirs: From the Fourteenth Amendment to “Social Authoritarianism” in Latin America 172
- 12.4 The “New Latin American Constitutionalism”: Constitutionalism That Was Already Old at Birth 176
- 12.5 Rights versus “Engine Room” 177
- 12.6 Rights As Bribes? Another Take on Rights versus Democracy 179
- 13 Judicial Review 183  
 “It Seems Something of an Insult”
- 13.1 The “Democratic Objection” and Hamilton’s Defense of the Judiciary 183
- 13.2 The Most Famous Court Case in History: *Marbury v. Madison* 187
- 13.3 Judicial Review and Democracy: Failed Arguments 190
- 13.4 The “Interpretative Gap” Argument 193
- 13.5 Law Goes Global: International Courts 197
- 14 Constitutional Interpretation 202  
 When the “Interpretative Gap” Widens
- 14.1 What Interpretation Is Not 204
- 14.2 The Multiplicity of Interpretative Theories 205
- 14.3 Look to the Past or Think in the Present? 210
- 14.4 Looking to Past or Present for Often Opposite Results 213

- 14.5 Radicalizing the Critique of Constitutional Interpretation 216
- 14.6 Constitutional Interpretation in a Community of Equals (or “from How to Who?”) 223
- 15 Constitution Making 232
  - Speaking with One Voice in Multicultural Societies
  - 15.1 Ulysses and the Constitution 232
  - 15.2 Constitutions That Speak with One Voice in Multicultural Societies 234
  - 15.3 A Plebiscite for Everything Aggravates the Problem: The “Hourglass” 240
  - 15.4 Inclusive Constituent Assemblies 242
- 16 The Birth of Dialogical Constitutionalism 246
  - 16.1 The *Grootboom* Case in South Africa 247
  - 16.2 The “Notwithstanding Clause” in Canada 250
  - 16.3 The Spaces for Dialogue Expand: “Public Hearings,” “Prior Consultation,” and “Meaningful Engagement” 252
  - 16.4 The Potential of the Incipient Dialogical Constitutionalism 255
- 17 Why We Care About Dialogue 258
  - 17.1 The Debate Over Abortion in Argentina 258
  - 17.2 Why We Are Interested in Dialogue 260
  - 17.3 What Kind of Dialogue Are We Talking About, When We Talk About Dialogue? 263
  - 17.4 “Real-Life” Constitutional Dialogue 266
- 18 “Democratic Erosion” 270
  - 18.1 An Autobiographical Note 270

## CONTENTS

xiii

18.2	“Democratic Erosion”: A Previously Unidentified Species?	273
18.3	Too Slow a Death: From the Crisis of Rights to the Crisis of Democracy	275
18.4	Repairing a Ship at Sea: Restoring Democratic Controls	278
18.5	“The Final Stop”: Congress As the Best Democracy Can Do?	283
18.6	Between Mill’s “Best Judge” and Aristotle’s “Wise Crowd”	286
19	The New Deliberative Assemblies	290
19.1	The “Pots and Pans Revolution”	290
19.2	The Era of Assemblies: A Short Initial Balance Sheet	297
19.3	The Problem of “Capture”: When the Past Holds Back the Present, and the Old Will Not Let in the New	305
20	Conclusion	308
	For a Conversation among Equals	
20.1	The Different Pieces of “Institutional Decoupling”	311
20.2	What to Do?	315
20.3	Three Themes and Three Cases	318
20.4	Final Objections	321
20.5	So Then . . .	325
	<i>Bibliography</i>	327
	<i>Index</i>	338

## PREFACE

The idea for this book came to me over the course of a few exciting yet strange hours one sleepless night in April 2019. By the end of the night, I felt sure of the path the book would follow and the content it would cover from start to finish. All that was left, so I thought, was the writing. In other words, I needed to start writing a book that was already finished. Curiously, this had never happened to me before. During this unique moment of unexpected lucidity, I also realized that I needed to change my surroundings in order to find some isolation, which meant leaving Argentina for at least a month, to devote myself entirely to the task of, at the very least, laying the foundations of the book, which I could complete on my return.

I felt it would be necessary to write a book on a subject that has long tormented me – the deterioration of constitutional democracy in our time. Moreover, the project I envisioned would look back on everything I have learned in thirty years of studying the primary elements of constitutionalism, such as political representation, checks and balances, judicial review, and protections for individual rights and minorities. I had in mind a concrete ideal to orient the project the same way compasses point north (or south): the law as conversation among equals. For the rest, I hoped to develop my ideas in critical dialogue with a recent theoretical current on the same subject that enjoys considerable prestige. In my opinion, this current confuses elements of constitutional theory with problems that have more to do with democracy. It proposes constitutional fixes (repairing faulty judicial review, for example, or restoring effective checks and balances) as if those were capable of compensating for the democratic deficit that ails us. Unfortunately, such fixes that adjust the constitutional structure without addressing the severe inadequacy of our democratic systems do not and cannot succeed. Our main problem these days actually has to do with democracy.

The silver lining of the generally dark and worrying panorama that drove me to write this book involves a number of recent phenomena that allowed me to recognize and assert the feasibility of my ideal of law as conversation among equals. These manifestations negate the traditional retort that such an ideal for social structure is no more than a utopian abstraction or illusion that can only work in the scenario of meetings held behind closed doors. We have now seen (and will later examine) examples of deliberative assemblies that have taken place in many Western countries. These include (which is even more relevant for my argument) inclusive, thorough public debates over controversial topics (such as abortion in Catholic countries like Ireland and Argentina). These examples reveal, for starters, the value, meaning, and importance of democratic dialogue – even in societies divided by political convictions or beliefs – around questions related to basic rights (a possibility that predominant political and legal theory, with its insistence on separating questions related to rights from democratic debates, has rejected). However, the significance of these examples goes further, for they also demonstrate that such experiments can produce real results. They show that public discussion is not only possible but can even prove effective in heterogenous, institutionally deficient societies.

In early October 2019, having wrapped up my classes and most of my other professional obligations for the year, I left for the United States. There I encountered supportive scholars with whom I could converse whenever necessary plus a network of excellent libraries where I could work for hours on end. Three in particular, the libraries at the University of Columbia (when I was uptown), at New York University (when I was downtown), and the New York Public Library (near Grand Central), made my stay one of austere yet intense happiness.

To my surprise, after a few weeks of working long hours that flew by, I finished the first draft of the book. Unexpectedly, long before planned, and as if the book had written itself, or as if someone had dictated it to me. I had not had to struggle with my ideas to disentangle my thoughts and make the arguments clear. (During those days in the US, Jon Elster confessed to me that it also happened to him sometimes: writing “downhill” - that is, sliding quietly. And he suggested me to stop writing when the exercise turned “uphill” - when writing became difficult or unpleasant). It was as if someone was reading the book to me and I was trying so hard to keep up that I entered into a sort of trance.

One last clarification about the book. This is a book aimed at discussing ideas, in which I present thoughts and arguments that I have been

## P R E F A C E

xvii

maturing – with more or less fortune – for decades. To facilitate my writing and your reading, I decided not to burden it with scholarly quotes, references, and footnotes. This choice greatly facilitated my writing, making it – I believe – more fluid and lighter. I hope it also helps your reading and engagement with the discussions I present.



## ACKNOWLEDGMENTS

At this point, and only at this point, I would like to express my gratitude to several of the people who helped me. I thank Carlos Díaz and Caty Galdeano for the friendly support that made the book possible. I thank Martin Abregú and Mirna Goransky for putting me up without asking anything in return. My thanks to Vicky Murillo and family, for always being there for me. I would like to thank the friends who kept me company during my stay: Christian Courtis, Jorge Contesse, César Rodríguez Garavito, Sergio Chejfec, Roberto de Michele, Patricio Navia, David Sekiguchi. I would like to thank Sebastian Guidi, Fernando Braccacini, Patricio Kenny, and Emiliano Catán for their help. I would like to thank the scholars who met with me: Adam Przeworski, Jon Elster, Owen Fiss, Robert Post, Helene Landemore, Lewis Kornhauser, Joseph Raz, and Jeremy Waldron. Very special thanks to David Dyzenhaus, for his immense generosity and for the great opportunity of teaching a seminar on the book with him for the University of Toronto. I would also like to thank Leonardo Filippini for encouraging me to pursue this idea and to my friend Siri Gloppen, for her support and encouragement. Thanks so much Brad Hayes for a wonderful, “active,” and “participatory” translation! And thanks to Vanina Domizzi for the corrections. I would like to thank my friends in Argentina who give everything meaning to me. Thanks Paula for her curiosity. Thanks to my parents, my brothers and sisters, my extended family, and my nephew Juan. Thank you all.

This book is dedicated to the memory of my father, Nicola, an Italian immigrant