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Conversation or Competition Among Equals*

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In his important new book, *The Law as a Conversation Among Equals*[1], Roberto Gargarella offers a new vision for both democratic politics and democratic constitutionalism. Politics, Gargarella argues, should be more both egalitarian and participatory, and premised on a form of grassroots "conversation among equals" rather than elite Schumpeterian-style[2] competition or bargaining. Constitutionalism, in turn, should do more to enable and encourage this kind of participatory politics – through citizen assemblies as key part of a process of constitutional design and amendment, and "dialogic" models of judicial review that encourage and empower democratic participation.

Why? The current disillusion with democracy, Gargarella argues, is driven by a fundamental desire for – and indeed expectation of – voice and participation on the part of citizens, when current democratic and constitutional models remain largely non-participatory in nature. This mismatch has grown over time and is now in urgent need of redress if we are to restore faith in the democratic constitutional project.

Gargarella makes these arguments in his usual powerful and poetic way, drawing on constitutional history and theory from across the Americas (i.e., Argentina, Chile and the United States). First, he suggests that his ideas draw on understandings of constitutionalism that focus on structure over rights. Here, Gargarella's previous important work on this topic features prominently. In doing so, Gargarella aligns himself with other 19th century thinkers such as Madison, who proposed that the "only effectual safeguard to the rights of the minority, must be laid in such a basis and structure of the Government itself".[3] Second, he suggests that his ideas are a radicalization – or continuation – of Bruce Ackerman's idea of "constitutional moments".[4]

Gargarella also addresses potential critics head-on: Constitutional assemblies, he suggests, have now been adopted in a sufficient range of contexts to show their plausibility as a model for large-scale democratic deliberation. Further, they are not equivalent to constitutional plebiscites. Indeed, one is structured to promote deep and deliberative conversation among participants, where the other involves a relatively shallow form of participation, based on a single vote for a bundle of ideas, many of which citizens may disagree with.

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[1] R. Gargarella, *The Law As a Conversation among Equals*, Cambridge, 2022.

[2] J.A. Schumpeter, *Capitalism, Socialism and Democracy*, London, 1976.

[3] J. Madison, *Speech in the Virginia Constitutional Convention* (Dec. 2, 1829), in G. Hunt (ed), *The Writings of James Madison 1819–1836*, New York, 1910, p. 361.

[4] B. Ackerman, *We the People, Volume 1: Foundations*, Cambridge, Mass., 1991.

Finally, a turn to democratic deliberation does not require an abandonment of commitment to rights: Indeed, the foundation for a conversation among equals is a deep commitment to equality and self-government, and in the virtues of deliberation in promoting rights-respecting outcomes. In this sense, Gargarella takes a similar position to Jeremy Waldron[5] about the virtues of political over legal constitutional models of rights protection. But he also goes beyond political constitutional ideas and draws on public choice theory to highlight the degree to which rights may end up advancing powerful (rather than vulnerable) minorities, or even powerful government actors. Indeed, he notes my own previous argument that rights may be used to advance the interests of would-be authoritarian actors seeking to "bribe" civil society into lending support for anti-democratic or "abusive" constitutional change.[6]

These answers are persuasive. And the case Gargarella makes for dialogic constitutionalism on the part of courts is especially compelling. He also avoids the danger that one might fear arises from the title of the book – namely, the danger of treating judicial review, not just democracy, as a conversational practice. Gargarella envisages a weak, collaborative or responsive model of judicial review,[7] but also one that acknowledges the decisive and coercive nature of legal decision-making by courts.[8]

What I was less persuaded by is whether the models Gargarella presents – of elite and participatory democracy – are really the only game in town. There may in fact be true hybrid forms of elite and participatory democracy that offer a viable, and attractive, third way worthy of consideration along with Gargarella's own preferred participatory model.

For instance, Chile's recent participatory constitutional model produced a constitutional draft that was ultimately rejected by a majority of voters. The same was true for the republican constitutional proposal coming out of the 1988 Australian Constitutional Convention. But that Australian proposal came much closer to being adopted, and the Convention comprised a true mix of elite (appointed) and popularly elected representation. This mix also contributed to the success of the body in creating the kind of "synthetic" agreement Gargarella touts as a solution to intractable democratic disagreement.

More important, the Australian political model is one that combines representative democratic processes with a widespread mandate for democratic

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[5] J. Waldron, *Law and Disagreement*, Oxford, 1999.

[6] R. Dixon, *Constitutional Rights as Bribes*, in *Conn. L. Rev.*, 2018; R. Dixon – D. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy*, Oxford, 2021; D. Landau, *Abusive Constitutionalism*, in *U.C. Davis L. Rev.*, 2013.

[7] M. Tushnet, *Weak Courts, Strong Rights*, Princeton, 2008; A. Kavanagh, *The Collaborative Constitution*, Cambridge, 2023; R. Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age*, Oxford, 2023.

[8] *Cf.* R. Dixon, *Dialogue and Deference*, in G. Sigalet – G. Webber – R. Dixon (eds.), *Constitutional Dialogue: Rights, Democracy, Institutions*, New York, 2019); R. M. Cover, *Violence and the Word*, in *Yale L.J.*, 1986.

participation: It has a system of compulsory voting backed by a mix of sticks and carrots. The sticks are a legal requirement to vote in all national, state, and local elections, or face a modest fine. The carrots are a work-friendly model of Saturday and postal voting, backed by social norms that support making voting enjoyable and accessible. The system also achieves more than 90% turnout at national elections. And it promotes equal access to the franchise for Australians from different racial and economic backgrounds. Instead of parties courting the party base, they seek to persuade the median voter. And instead of low-income voters being deterred from voting, they are encouraged to vote by the ease and accessibility of voting.

In addition, Australia adopts a system of ranked choice voting that minimizes extremist outcomes, and the chances that certain voters will have their vote thrown out, or "not counted". These twin features of the Australian democratic model have also helped underpin democratic non-retrogression, and a relative degree of ongoing trust for democracy in Australia.[9] Where that trust has broken down, it has also helped facilitate the election of largely non-populist independent candidates and third-party candidates whose aim is to retore democratic integrity and faith in government.

The Australian model, however, is far from the deliberative conversation among equals which Gargarella champions. Gargarella is careful to note that vigorous competition and contestation can go hand in hand in with the model of participation he envisages. But his ideal is deliberation not competition. And the Australian model is closer to an ideal of competition rather than conversation among equals.

Ultimately, Gargarella succeeds in making the case for a newly democratic, egalitarian politics, and an attempt to protect democracy against retrogression by reinvigorating it rather than wrapping it in constitutional cotton wool. In this sense he echoes recent arguments by Tushnet and Bugarič in favor of the virtues of pro-constitutional populism.[10]

My only question is whether that politics should be as participatory as Gargarella suggests, or rather a true hybrid of elite and citizen participation. A conversation among equals is an attractive idea, but perhaps a competition among equals has even greater promise.

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[9] R. Dixon – A. Gauja, *Australia's Non-Populist Democracy? The Role of Structure and Policy*, in M.A. Graber – S. Levinson – M. Tushnet (eds.), *Constitutional Democracy in Crisis?*, Oxford, 2018.

[10] M.V. Tushnet – B. Bugarič, *Power to the People: Constitutionalism in the Age of Populism*, New York, 2021.

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ABSTRACT: This article offers a critical analysis of *The Law as a Conversation Among Equals* by Roberto Gargarella. This book offers a new vision for both democratic politics and democratic constitutionalism.

KEYWORDS: Democracy – Deliberation – Participation – Competition – Australia

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