

# **‘We the People’ outside of the Constitution. The Dialogic Model of Constitutionalism and the System of Checks and Balances**

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## **Introduction**

In 2004, a group of residents of the shantytown *Villa Inflamable*, in Argentina, filed a claim against the National Government, the Government of the Province of Buenos Aires, the Government of the Autonomous City of Buenos Aires, and 44 corporations. They lived in the basin of the Riachuelo River, and they complained about the highly contaminated banks of the river, which affected the health and well-being of approximately 3.5 million people. In 2006, the (so called) *Mendoza* case reached the Supreme Court who, in a surprising series of decisions, called for open public hearings; ordered the national authorities to submit a clean-up plan for the river basin; and requested reports for the businesses involved detailing the measures they would take in order to reverse pollution in the area.<sup>2</sup>

Also in 2004, the (then) remarkable Colombian Constitutional Court handed down what was described as ‘its most ambitious ruling in its two decades of existence’,<sup>3</sup> namely the T-025 decision, concerning the situation of forced displacement that affected millions of people in Colombia.<sup>4</sup> In addition, the Court defined a series of structural measures, which included orders to the national government to present a coherent emergency plan and also secure the ‘essential core’ of the rights to food, education, health care, land and housing of the people affected. In the same year, in another surprising decision, the Court challenged the so-called *Anti-terrorist statute* (which represented a crucial part of the – then recently re-elected and extremely powerful – President Álvaro Uribe’s political agenda). The Court attacked the law as a consequence of the inadequate process of political deliberation that surrounded its enactment:<sup>5</sup> more than a dozen of the representatives who voted for the polemic statute had changed their views on the topic from one day to the next, without giving any public explanation about this change.<sup>6</sup>

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<sup>1</sup> CONICET (Buenos Aires). I want to thank Dimitrios Kyritsis, Virginia Mantouvalou, Albert Weale and to an anonymous referee for the comments they made to the paper, and also to the colleagues and public that participated at the UCL Current Legal Problems lecture, in March 2014, when I first presented it. I also want to thank the support I received from a Leverhulme grant, which allowed me to complete this research.

<sup>2</sup> ‘Mendoza, Beatriz Silvia y otros c/Estado Nacional y otros s/daños y perjuicios (daños derivados de la contaminación ambiental del Río Matanza-Riachuelo), CSJN 20/6/2006. Leticia Barrera ‘Performing the Court: Public Hearings and the Politics of Judicial Transparency in Argentina,’ (2013) 36 *PoLAR* 2; Paola Bergallo ‘Justice and Experimentalism’ *SELA* 2005 <[http://digitalcommons.law.yale.edu/yls\\_sela/44/](http://digitalcommons.law.yale.edu/yls_sela/44/)> accessed 17 December 2013.

<sup>3</sup> César Rodríguez-Garavito, ‘Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America’ (2011) 89 *Texas LR* 1669-1698.

<sup>4</sup> Corte Constitucional [C.C.] [Constitutional Court], January 22, 2004, *Sentencia T-025/04*.

<sup>5</sup> To state this, however, does not mean to affirm that this was (or should have been) the only (or main) reason employed by the Court in order to defy the statute’s validity.

<sup>6</sup> Similarly, see the Brazilian Supreme Court and its first public hearing, which fostered a national debate on the right to life and the right to personal dignity. Leticia Cesarino & Naara Luna, ‘The embryo research debate in Brazil: From the national congress to the federal supreme court,’ (*Social Studies of Science* 2011) <<http://sss.sagepub.com/content/early/2010/12/30/0306312710386637.full.pdf>> accessed 12 January 2014; Marjorie Corrêa Marona & Marta Mendes da Rocha (2013), ‘Public Hearings of the Brazilian Supreme Court: enhancing its democratic legitimacy?’, (*IPSA* 2013) <<http://paperroom.ipsa.org/papers/view/16063>> accessed

All these events refer to recent, innovative and unexpected decisions by the Supreme or Constitutional Court of different Latin American countries, related to issues of utmost public importance. They represent exciting legal novelties, which seem capable of changing our traditional institutional practices, and which require from us a fresh theoretical approach.

Like some other academics in Latin America, I received these developments with great enthusiasm. These novelties fit well with some of our strongest academic commitments: our objection to traditional forms of judicial review; our defence of social rights; our vindication of deliberative democracy. Let me just add that we did not embrace those views simply following a certain academic fashion. In Argentina, for example, many of us began to adhere to those ideals in the early 1980s, at the end of the last dictatorship, which ruled the country since 1976.<sup>7</sup> Then, if we challenged traditional models of judicial review, this was not because we were in the search for the best available theory of constitutional adjudication, but rather because we were particularly interested in stressing the value of collective self-government. Similarly, we defended social rights because we valued not only individual autonomy but also social justice, which we assumed had also been seriously dishonoured in previous years. Moreover, if we adhered so strongly to the ideal of deliberative democracy, this was so because we wholeheartedly rejected many of its well-known alternatives. In particular, we did not want to reduce democracy to a pure confrontation between different interest-groups neither understand politics merely as a way of aggregating preferences.<sup>8</sup> After a period of terror and brutality, we wanted to insist on the values of democratic persuasion and argumentation. Given this historical background, we received the emergence of dialogic forms of constitutionalism with fervour (even more, I would add, taking into account that during many years, our defence of dialogical solutions had been responded with scepticism or condescension).<sup>9</sup>

Of course, the phenomenon I am referring to is not confined to Latin America. All over the world, constitutional theory began to experience developments of this kind, which so far have been studied under the rubric of *dialogic constitutionalism*, *dialogic justice* or *dialogic judicial review*.<sup>10</sup> Most of these studies began in the early 1980s, after Canada adopted its Charter of Rights, in 1982.<sup>11</sup> As we know, section 33 of the Charter included the so-called ‘notwithstanding’ or ‘override’ clause, which allows the national or provincial legislature to insist on the application of its legislation for an additional five-year period, notwithstanding

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20 December 2013. The debate gathered more than 20 experts and other representatives of the civil society, and was the object of widespread public attention.

<sup>7</sup> I am mainly thinking about people who worked close to legal philosopher Carlos Nino, and tended to embrace his understanding of democracy and constitutionalism. See, for example, C Nino, *The Ethics of Human Rights* (OUP 1991); *Fundamentos de Derecho Constitucional* (Astrea 1992); *The Constitution of Deliberative Democracy* (Yale UP 1996).

<sup>8</sup> J Elster, ‘The Market and the Forum,’ in J Elster & A Hylland (eds.), *Foundations of Social Choice Theory*, (CUP 1986).

<sup>9</sup> See Daniel Bonilla, *Constitutionalism on the Global South. The Activist Tribunals of India, South Africa, and Colombia*, CUP 2013; N Dorsen, M Rosenfeld, A Sajó, S Baer, *Comparative Constitutionalism*, Gale Cengage 2010).

<sup>10</sup> Mark Tushnet ‘Dialogic Judicial Review’ (2009) 61 *Ark. L. Rev.* 205. Dialogic constitutionalism would stand to judicial dialogue as the genus stands to its species.

<sup>11</sup> See Katharine Young, *Constituting Economic and Social Rights* (OUP 2012), 148. Similarly, Luc Tremblay, ‘The Legitimacy of judicial review: The limits of dialogue between courts and legislatures’ (2005) 3 *Int’l J. Const. L.* 617, 1.

the fact that a Court found it inconsistent with some of the rights contained in the Charter. In principle, this innovation appeared to represent only a modest legal development, but in fact it immediately triggered a fabulous academic debate.<sup>12</sup>

In sum, we are facing some interesting novelties in constitutional theory and practice, which seem to have the capacity to challenge traditional ideas and assumptions concerning the system of separation of powers, the organization of checks and balances, and more particularly judicial review.<sup>13</sup> In general, the legal community have received these novelties with great enthusiasm. So, taking this shared enthusiasm as a point of departure, my aim in this article will be to critically assess the recent development of this dialogic practice – a practice that I support and feel attracted to. I will illustrate my comments through examples mainly coming from Latin American, which is the region that I know more. However, I assume that my comments will be in principle applicable to countries beyond that region, as far as they share some of the main elements of its ‘basic institutional structure,’ namely a representative democracy, with separation of powers and a system of checks and balances.

In my opinion, and beside the genuine reasons we have to celebrate the coming of dialogic constitutionalism, we have also reasons for concern, particularly if we are not willing to modify the basic structure of the system of checks and balances in which it is usually based. In my view, the system of checks and balances was proposed in the context of divided and unequal societies, in order to channel the class-conflicts existing within them.

### **Explaining Dialogue. The Coming of Dialogic Constitutionalism**

The Canadian notwithstanding clause, which can be taken as the starting point of dialogic constitutionalism,<sup>14</sup> emerged within a context of legal changes that we may refer to as the ‘new *Commonwealth* model of constitutionalism’.<sup>15</sup> The *Commonwealth* model refers to a diversity of experiences that followed legal reforms introduced not only in Canada (1982), but also in the United Kingdom (1998), New Zealand (1990), or Australia (2004). In South Africa, we also find numerous decisions by the Constitutional Court, which made use of dialogic strategies and devices, from the famous *Grootboom* case, in 2000,<sup>16</sup> to *Olivia Road*, in 2008.<sup>17</sup> According to some, this ‘new model’ represents, in the area of constitutional law,

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<sup>12</sup> Christine Bateup, ‘Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective’ (2007) 21 *Temp. Int’l L. J.* 1; Peter Hogg & Allison Bushell, ‘The Charter Dialogue Between Courts and Legislatures’ (1997), 35 *Osgoode Hall L. J.* 75; Peter Hogg; Allison Bushell & Wade Wright, ‘Charter Dialogue Revisited, -Or much Ado About Metaphors’ (2007), 45 *Osgoode Hall L. J.* 1; Mark Langford, *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2009); Christopher Manfredi & James Kelly, ‘Six Degrees of Dialogue: A Response to Hogg and Bushell (1990), 37 *Osgoode Hall L. J.* 513; Andrew Petter, ‘Twenty Years of Charter Justification: From Liberal Legalism to Dubious Dialogue’ (2003) *UNB Law Journal* 52; Kent Roach, ‘Dialogic Judicial Review and its Critics’ (2004) 23 *Supreme Court Law Review*, 49; Mark Tushnet, *Weak Courts, Strong Rights* (Princeton UP 2008).

<sup>13</sup> In this presentation, I will not be concerned about so-called ‘internal’ deliberation, within the Court. John Ferejohn, & Pasquale Pasquino ‘Constitutional Courts as Deliberative Institutions’, in Wojciech Sadurski (ed.), *Constitutional Justice: East and West* (Kluwer 2012), Virgilio A. Da Silva, ‘Deciding without Deliberating’ (2013) 11 *I.CON.* 3, 557-584.

<sup>14</sup> Mark Tushnet stated: ‘I take dialogic judicial review to have been invented in the Canadian Charter of Rights in 1982’ (Tushnet n 10, 205).

<sup>15</sup> Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* (CUP 2013).

<sup>16</sup> 2001 (1) SA 46 (CC).

<sup>17</sup> 2008 (3) SA 208 (CC).

what the ‘mixed economy’ does, in economic matters. The new model combines traditional elements of the *common law*, with renewed declarations of rights. As Jeffrey Goldsworthy has put it, the newly introduced mechanisms ‘offer the possibility of a compromise that combines the best features of both the traditional models, by conferring on courts constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word’.<sup>18</sup>

In Latin America, the first Court to engage in these kinds of dialogical practices was the Colombian Court,<sup>19</sup> which was shortly after followed by tribunals in many other Latin American countries.<sup>20</sup> Latin American tribunals have demonstrated enormous creativity concerning the design and implementation of dialogic mechanisms. The alternatives that they explored were multiple (I already mentioned some of them in the above examples). We have i) courts that organized *public audiences* with government officers and members of civil society, trying to obtain extended agreements, gain legitimacy for their decisions and/or obtain better information and arguments in the face of complex cases;<sup>21</sup> ii) courts that *ordered* the national government to present a coherent plan (i.e., in the face of an environmental or social catastrophe);<sup>22</sup> iii) courts that *advised* the government what decision to adopt in order to comply with its constitutional duties;<sup>23</sup> iv) courts that *exhorted* governments to correct their policies according to prevalent legal standards;<sup>24</sup> v) courts that launched ambitious *monitoring mechanisms* so as to ensure the enforcement of their rulings over time;<sup>25</sup> vi) courts that *requested reports* to public or private institutions; or –and this is my favourite example– vii) courts that challenged the validity of a certain law, because it was passed without a proper *legislative debate*.<sup>26</sup> I should also add that, even though these innovations are not and should not be seen as limited to cases of social rights and structural litigation, it has been in those cases (this is to say cases that involve massive violation of rights and implicate multiple government agencies), where the practice appeared to be more salient and interesting.<sup>27</sup>

<sup>18</sup> James Goldsworthy, ‘Homogenising Constitutions’ (200) 23 *Oxford Journal of Legal Studies* 484. See also (Tushnet n 8; Gardbaum n 16, 25-27).

<sup>19</sup> Rodríguez-Garavito (n 3).

<sup>20</sup> See Corte Constitucional [C.C.] [Constitutional Court], *Sentencia* C-222, 1997, engaging into an argument related to the importance of having proper legislative debates.

<sup>21</sup> See, for example, a decision by the Brazilian Supreme Court, May 29<sup>th</sup>, 2008, concerning the Biosafety Law.

<sup>22</sup> See, for example, a decision by Colombian Constitutional Court in Corte Constitucional, January 22, 2004, *Sentencia* T-025/04.

<sup>23</sup> See, for example, a decision by the Argentinean Supreme Court in Corte Suprema de Justicia de la Nación, 8/8/2006. ‘Badaro, Alfonso Valentín, c/ANSES s/reajustes varios.’

<sup>24</sup> Ibid.

<sup>25</sup> See, for example, a decision by the Colombian Constitutional Court in Judgement T-025 of the Colombian Constitutional Court. On the topic, see also Neal Katyal, ‘Judges as Advicegivers’ (1998), 50 *Stanford Law Review* 6, 1709-1824; Ronald Krotoszinski, ‘Constitutional Flares: On Judges, Legislatures, and Dialogue’ (1989) 83 *Minn. L. Rev.* 1; Abner Mikva ‘Why Judges Should Not Be Advicegivers. A Response to Professor Neal Katyal’ (1998) 50 *Stanford Law Review* 1825.

<sup>26</sup> See, for example, a decision by Colombian Constitutional Court in Corte Constitucional, *Sentencia* C-740/13. Of particular interest, for the purposes of this article, is the right to ‘meaningful engagement,’ in the way it was developed by the South African Constitutional Court. See, for example, Sandra Liebenberg, ‘Deepening democratic transformation in South Africa through participatory constitutional remedies,’ manuscript (2014), University of Stellenbosch Law Faculty.

<sup>27</sup> Christian Courtis, ‘El caso ‘Verbitsky’: Nuevos rumbos en el control judicial de la actividad de los poderes políticos?’ in C.E.L.S. (ed.) *Colapso del sistema carcelarios* (Siglo XXI 2005); Cecile Fabre, *Social Rights under the Constitution. Government and the Decent life* (OUP 2000); Owen Fiss, *The Law as it Could be* (NYU Press 2003); Jeff King, *Judging Social Rights* (CUP 2012); C Gearty & V Mantouvalou, *Debating*

The novelties introduced through *dialogic constitutionalism* were, and still are, particularly exciting for those working with both *constitutional theory* and *democratic theory*. On the one hand, and concerning *constitutional theory*, these innovations are exciting because they allow us to renovate the unending, fatigued discussions on the justification of judicial review and the counter-majoritarian difficulty. In the face of the seemingly insoluble tensions that exist between constitutionalism and democracy –tensions that no new theory of judicial review has been able to solve- dialogic constitutionalism brings reasons for hope. It suggests a stimulating way for accommodating our commitments to both popular sovereignty and the protection of minority rights.

On the other hand, and in what relates to *democratic theory*, dialogic constitutionalism seems attractive for at least two reasons. First, dialogic theories approach constitutionalism with an eye placed on democracy: their purpose is to reconcile both values. Second, they do so in a specific way, namely by choosing the perspective of a deliberative democracy, which many of us consider a particularly fruitful approach to democracy.

There are numerous ways of *explaining* these dialogic developments. However, I want to highlight one possible line of explanation, which is the following. Many legal actors and activists have come to value constitutional dialogue because they understood that, in the situation of *reasonable pluralism* that characterizes most of our societies,<sup>28</sup> and in the face of the profound *reasonable disagreements*<sup>29</sup> we have concerning how to live together, collective dialogue appeared as a reasonable way to address our difficulties. Dialogue, in addition, seems particularly helpful in situations that are often characterized by a profound and also *reasonable uncertainty*, where we are confronted with cases where we simply do not know what to do, how to act. Not surprisingly, in these particular cases –cases involving so-called *structural litigation* (environmental rights; prisoners' rights; forced displacement; massive evictions; massive violations of rights), constitutional dialogue has begun to play a central role.

Of course, many would say that in these situations of grave disagreement or uncertainty, we should simply define whether the affected people had a certain right or not, and then – if they did – ensure its protection. Unfortunately, the fact is that, first (in Latin America, but also beyond the region) the institutional system has actually not ensured protection to rights commonly recognized as fundamental rights (i.e., the Judiciary refused to accept or decide certain cases; legislators seemed unconcerned by certain massive violations of rights). And second, in many cases we honestly and deeply disagree on all the basic questions posed by those proclaimed rights, including questions about i) what the fundamental rights that we have are (i.e., do we have group rights? multicultural rights?); ii) what the content of those rights is (i.e., does freedom of expression include the right to criticize public authorities with actual malice and reckless disregard?); or iii) what the best way to protect and guarantee those rights is (i.e., scope of legal standing).

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*Social Rights* (Hart 2011); Roberto Gargarella, 'Deliberative Democracy, Dialogic Justice and the Promise of Social and Economic Rights' in H. Alviar, L Williams & K Klare (eds.), *Social and Economic Rights in Theory and Practice: A Critical Assessment* (Routledge 2014); Siri Gloppen, 'Analyzing the Role of Courts in Social Transformation', in R. Gargarella *et al.* (eds), *Courts and Social Transformation in New Democracies* (Ashgate 2006); Paul Hunt, *Reclaiming Social Rights* (Darmouth 1996). See also Krotoszynski (n 26), 4.

<sup>28</sup> John Rawls, *Political Liberalism* (Columbia UP 1991).

<sup>29</sup> Jeremy Waldron, *Law and Disagreement* (CUP 1999).

In the face of these reasonable doubts and disagreements, dialogue appeared as a plausible institutional alternative. Dialogue helped to find responses to those fundamental differences, in ways that at the same time took basic questions of democratic authority seriously, and favoured the reach of justified agreements (rather than a mere ‘modus vivendi’).<sup>30</sup>

### **Evaluating Dialogue: Constitutional Dialogue and Deliberative Democracy**

In the previous section, I provided some initial and provisional explanations concerning why dialogue became such an attractive practice, among legal activists and scholars. Herein, I will begin to critically evaluate the development of this novel practice. I want to critically examine this practice precisely because I understand that it can only be defended (and strongly defended) if it develops in certain particular ways.

In order to proceed with my criticisms, let me first clarify what my normative standpoint shall be in my analysis of dialogic constitutionalism. I want to introduce this standpoint even though – I believe – it should also be possible to develop or share most of my criticisms by simply relying on reasons that are internal to the same dialogic practice.

Legal theory has already offered many possible definitions for dialogic constitutionalism. For Katharine Young, for example, ‘dialogue describes a practice in which reason-giving courts are able to adjudicate rights, but elected and accountable legislatures are given the final word on the shape of the obligations that flow from them’.<sup>31</sup> My only significant problem with her attractive definition is that it seems to restrict dialogue to inter-branch dialogue. Another interesting definition is the one provided by Bradley Bakker. For him, ‘constitutional dialogue encompasses the idea that different governmental branches and people interact in ways that shape the dominant views of constitutional interpretation over time’.<sup>32</sup> There are at least three features of this latter definition that I find attractive, namely the fact that it goes beyond inter-branch dialogue; its emphasis on dialogue as an ongoing process; and its focus on constitutional interpretation. I am in principle comfortable with this definition, although I would emphasize a few additional features, which in my opinion should characterize a proper dialogue: first, dialogue should be based on the equal status of the participants; second, it should be limited to issues of inter-subjective morality; and third it should be facilitated by the institutional system.<sup>33</sup> I must emphasize that this definition does not describe but rather tries to refine and build from what I found in actual practice.

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<sup>30</sup>James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (MIT Press 1996); J Bohman & W Rehg (eds), *Deliberative Democracy* (MIT Press 1997); Joshua Cohen, ‘An Epistemic Conception of Democracy’ (1986) 97 *Ethics* 1; David Estlund, ‘Making Truth Safe for Democracy’, in D Copp, J Hampton and J Roemer (eds.) *The Idea of Democracy* (CUP 1993); A Gutmann & D Thompson, *Why Deliberative Democracy?* (Princeton UP 2004); Nino (n 7); Rawls (n 29). See also Jurgen Habermas *Between Facts and Norms*, (Original *Faktizität und Geltung*) (W Rehg tr, first published 1992, MIT Press 1996); Jeremy Waldron, *The Dignity of Legislation* (CUP 1999) and Jon Elster (ed.), *Deliberative Democracy* (CUP 1998).

<sup>31</sup> Young (n 11) 147.

<sup>32</sup> Bradley Bakker, ‘Blogs as Constitutional Dialogue: Rethinking the Dialogic Promise’ (2008) 63 *New York University Annual Survey of American Law* 215, 216. Similarly, see Gal Dor, ‘Constitutional Dialogues in Action: Canadian and Israeli Experiences in Comparative Perspective’ (2000) 11 *Indiana International & Comparative Law Review* 1, 17-18.

<sup>33</sup> See also A Mauwese & M Snel, ‘Constitutional Dialogue: An Overview’ (2013) 9 *Utrecht Law Review* 2, 125-6, <<http://ssrn.com/abstract=2244818>> accessed 10 December 2013.

According to this broader definition, dialogic constitutionalism would be characterized by different important notes, including those of *equality* (which refers to the equal status of the different participants); *deliberation* (which refers to the process of exchange of reasons); and *inclusiveness* (which stresses the idea of deliberation *by the people*,<sup>34</sup> under the assumption that the entire process gains in impartiality if all the potentially affected intervened in that conversation).<sup>35</sup>

Let me also clarify that the idea of equality that I am here taking into account is directed at saying that the institutional system organized by the Constitution should reflect the basic equality that is implicit in the very idea of establishing a Constitution. The Constitution is and should mainly be understood –I submit– as a compact between equals. Of course, this basic egalitarian commitment is compatible with different institutional designs. However, it would be a problem if the institutional system at stake consecrated, promoted, guaranteed or were compatible with profound levels of social exclusion. The requirement of equality emphasizes the importance that this egalitarian commitment has and should have for any proper dialogic conception.

In this article, I will put particular emphasis on the latter point (inclusiveness), and this will not be because I assume that inclusiveness is more important than the other two values, but rather because I think that most reflections on the topic have been merely restricted to ‘interbranch dialogue’ (we shall come back to this point below).<sup>36</sup> In addition, the collective process would refer to an *ongoing conversation* (which would basically mean that courts would not have the authority to pronounce the ‘last institutional word’); that is developed in *public* and is *restricted to issues of public morality* (which means that the collective dialogue would not be concerned with issues related to our private moral life);<sup>37</sup> and that *does not depend on the discretionary will of one of its participants* (in other words, the dialogic process should be promoted, rather than discouraged or simply authorized, by the institutional system, which takes the encouragement of collective dialogue as one of its distinctive features).

Let me clarify what I am mean by “discretion” through an example. In my country, Argentina, the Supreme Court called for six public audiences in 2012, but only two in 2011 and two in 2013.<sup>38</sup> There are no substantive reasons explaining these differences. This is, for me, an example of improper discretion. On the one hand, neither our Constitution nor our institutional system establishes proper institutional procedures and channels for constitutional dialogue: (this kind of) dialogue may happen, or not, and in most cases we do

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<sup>34</sup> See also, for example, James Fishkin, ‘Deliberative Democracy and Constitutions’ (2011) 28 *Social Philosophy and Policy*, 1, 242.

<sup>35</sup> The ‘inclusive’ character of the conversation obviously encompasses the three branches of power (see, for example Young, stating: ‘In conversational review, all three branches assume a shared interpretive role over the right at issue’. Young (n 11) 147. However, it must be noted, the idea of ‘inclusiveness’ is supposed to go beyond the three branches: it aims at including the people at large.

<sup>36</sup> On interbranch dialogue see, for example, the discussions generated around Christopher Edley’s work (Christopher Edley, ‘The Governance Crisis, Legal Theory, and Political Ideology’ 1991 *Duke L. J.* 561), in *Duke L.J.*; or around Dan Coenen’s paper (Dan Coenen, ‘A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue’ (2001) 42 *William and Mary Law Review* 1575).

<sup>37</sup> Justifying this special protection to private morality see John S. Mill, *On Liberty* (first published 1859, Dover Publications 2003); Nino (n 7).

<sup>38</sup> <http://www.cij.gov.ar/audiencias.html>.

not get it, according to recent history. On the other hand, public officers do not offer us any substantive or public reasons explaining, for instance, when they will call for a public audience, and when they will not: dialogue happens or not, as a consequence of some imprecise reasons. I will have these kinds of cases in mind when I made reference to ‘improper discretion.’

Now, my definition of dialogic constitutionalism derives from a particular conception of democracy, namely a deliberative theory of democracy. This assumption is related to a personal, intellectual conviction, but also from the fact that the dialogical practice seems to constantly appeal to (something along the lines of) a deliberative democracy. Of course, there is a long discussion concerning the meaning, scope, implications and virtues of deliberative democracy, but at this point I will not enter into the details of that complex discussion. Here, I will be basically assuming the value of this specific version of deliberative democracy as given.<sup>39</sup> According to this view, public decisions gain justification when they are adopted after an ample process of *collective discussion* with *all those potentially affected*.<sup>40</sup> This view of deliberative democracy, it should be clear, emphasizes two main features as the essential features of a properly functioning democracy, namely *discussion* and *social inclusion*. These features shall play a crucial role in the critical analysis of dialogic constitutionalism that I will develop in the following pages.

### **Constitutional dialogue and judicial review**

Among many other interesting consequences, the new dialogical practice helps us revise traditional approaches to judicial review. The first thing to say, in this respect, is that through the introduction of the dialogic approach, judges tend to lose the prerogative they hold today to pronounce the ‘last institutional word’ thereby ‘thwart[ing] the will ... of the actual people of the here and now’.<sup>41</sup> The dialogic model conceives of the institutional system in ways that significantly differ from the traditional one, where judicial review is reduced to the *binary options* of either upholding or invalidating a statute.<sup>42</sup>

What dialogic constitutionalism proposes, concerning judicial review, significantly differs from what many traditional and well-known approaches to judicial review have proposed. Let me illustrate this point with two quite opposite cases, among the many that one could choose from. The dialogic approach diverges, first, from Alexander Bickel’s view, which invites judges to step back and exercise their so-called passive virtues, thus allowing private agents to work out, by themselves, solutions for their legal problems. Contrary to this view, *dialogic constitutionalism* requires judges to be more active, particularly taking into account their unique institutional position. In effect, judges have direct and permanent access to the complaints of all those who consider themselves to have been improperly treated by the majoritarian decision-making process. This is why dialogic constitutionalism expects judges to enrich the collective conversation with the claims of all those unheard or improperly

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<sup>39</sup> My defence of the idea of deliberative democracy is based in the idea of equality, but also in the ‘epistemic’ virtues that I see in it. In this respect see, for example, Cohen; Estlund; Nino (n 31).

<sup>40</sup> Habermas (n 31).

<sup>41</sup> Alexander Bickel *The Least Dangerous Branch* (Yale UP 1962); Larry Kramer ‘Popular Constitutionalism, Circa 2004’ (2004) 92 *California L R* 959.

<sup>42</sup> Trying to reconcile theories favouring the judiciary’s ‘last word’ and dialogic theories, see, for instance, Conrado Hübner Mendes, *Constitutional Courts and Deliberative Democracy* (OUP 2013).



dismissed voices.<sup>43</sup> As Ronald Krotoszynski has put it, it is not difficult to recognize ‘the superiority of dialogue to the passive virtues’.<sup>44</sup> For him, the dialogic model ‘better serves the value of interbranch comity than judicial silence followed by invalidation of legislative work product’.<sup>45</sup>

The dialogic approach to judicial review also differs from Guido Calabresi’s approach, which is quite different from the one that Bickel proposed. Calabresi once maintained that judges should be authorized to repeal obsolete legislation.<sup>46</sup> In his words, courts should be given ‘the power by legislatures to order the sunset of a statute. If the legislature disagreed with a court’s determination, they would of course be empowered to overrule the court and reenact the statute. Whether and when a law should sunset depends on the law itself. Some become obsolete almost immediately, while others remain relevant for a very long time’.<sup>47</sup> This view would require judges to be very active: judges would thus become profoundly and constantly engaged with the legislative process. However, and for different reasons, Calabresi’s views seems also wrong, from a dialogic perspective. Although it is totally fine to have judges deeply engaged in the public decision-making process, it seems erroneous to foster their participation in the way Calabresi does. In fact, Calabresi’s suggestion seems to be still too much attached to the traditional system of judicial review, where judges either uphold or invalidate a statute. The methods and procedures of a collective conversation, however, are and should be fundamentally different from the ones that presently characterize our institutional system. The existing instruments appear to be more capable of favouring a confrontation between unequally situated powers, than of facilitating a conversation between equals (we will come back to this point).

### **Reasons for concern: Terminological, functional, and attitudinal problems**

At the beginning of this article I made reference to some of the many reasons we have for commending the development of dialogic constitutionalism. In what follows, I want to focus my attention on some of the difficulties that dialogic constitutionalism raises. I have in mind five main problems: *terminological*, *functional*, *attitudinal*, and *structural* problems, and also difficulties related to the *uncertainty* that such an approach would create. Herein, I will mainly be focusing my attention on the structural problems, but before doing so, I will briefly explore the other four issues.

i) *Terminological* problems derive from at least two different sources. The first has to do with the natural ambiguities of ordinary language, and our difficulties to deal with them. Clearly, the idea of institutional dialogue, attractive as it is, is not easy to define: What could

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<sup>43</sup> For this reason, judges are assumed to be in an exceptional position to give due weight to the interests of those unjustly excluded from the ordinary democratic political arena. See Sandra Liebenberg, ‘Engaging the paradoxes of the universal and particular in human rights adjudication’ (2012) 12 *African Human Rights Law Journal* 1.

<sup>44</sup> Krotoszynski (n 26) 57.

<sup>45</sup> Ibid., 57.

<sup>46</sup> Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard UP 1985); ‘The Supreme Court 1990 Term. Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)’ (1991) 105 *Harv. L. Rev.* 80; ‘Should the courts be allowed to repeal an obsolete law?’, Interview in *The Atlantic*, 20 March 2012 <<http://www.theatlantic.com/national/archive/2012/03/should-the-courts-be-allowed-to-repeal-obsolete-law/254454/>> accessed 14 January 2014. See also *United States v. Then* (56 F.3d 464, 2d Cir. 1995). Krotoszynski (n 26) 7.

<sup>47</sup> Calabresi 2012 (n 49).

count as a situation of ‘dialogue’ between two branches of power, and what as a situation of ‘domination’ by one of the branches? What could be deemed a proper ‘response’ from the judicial branch to the legislature, and what should be taken instead as a gesture of ‘retaliation’ or ‘imposition’?

One particularly interesting illustration of the problems I am referring to appears in the work of Barry Friedman. In his influential work on judicial review and dialogic constitutionalism, Friedman re-described the judicial decision-making process in an original way.<sup>48</sup> Through this re-description, he tried to demonstrate that we have wrongly been concerned with the so-called counter-majoritarian difficulty. Succinctly speaking, this would be so because – contrary to what most academics believe – courts tend to take their decisions through a conversational process with the people and the other branches. In his view, ‘all the three branches’ interpret the Constitution ‘on a daily basis through an elaborate dialogue.’ The result of this, he claims, is that, over time, the opinions of the court on salient issues tend to come in line with popular preferences.

The problem that I find with his view is that Friedman describes as ‘dialogue’ or ‘conversation’ what most of us would be inclined to describe in other, less amicable terms. In my view, Friedman’s definition of ‘dialogue’ does not comply with almost any of the different requirements I associated with the term: the ‘conversation’ takes place between actors with very unequal power; there are numerous voices that remain inaudible or unheard; the court’s decisions gain a ‘final’ character at least during long years or decades (when the originating conflict had in one way or another dissolved). In addition, the numerous qualifications that characterize Friedman’s description of judicial dialogue suggest that his view of dialogue results, in the best case, a very restricted one.<sup>49</sup> Neil Siegel, for example, has rightly point out that Friedman’s description of dialogue is in fact a very restricted one: it is actually limited to the *most salient* issues, concerning which the Supreme Court and the people’s opinion would *tend* to converge in the very *long run*.<sup>50</sup> As a consequence, we would still have good reasons to consider most judicial decisions as an imposition from above, rather than as a conversational response to our demands. In other words, Friedman’s judicial dialogue would actually take place only in quite exceptional circumstances.

As another illustration of the same problem we can take the academic discussion around the ‘override’ clause in Canada, which is so far the country where the most vibrant discussion on dialogic constitutionalism has taken place. We know, for instance, that the seminal article written by Peter Hogg and Allison Bushell,<sup>51</sup> which triggered an important debate on the topic, was criticized (among other reasons) precisely because of the ambiguous concept of dialogue that it used. According to Christine Bateup, for example, many of the critics ‘have attacked the loose standard Hogg and Bushell employed to test the extent of dialogic interactions, which focused on cases in which there had been ‘some action by the competent

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<sup>48</sup> Jenna Bednar, ‘The Dialogic Theory of Judicial Review: A New Social Science Research Agenda’ (2010) 78 *The George Washington Law Review* 1178; Barry Friedman, ‘Dialogue and Judicial Review’ (1993) 91 *Mich. L. Rev.* 577; ‘Online Alexander Bickel Symposium’ (2008) <http://www.scotusblog.com/2012/08/online-alexander-bickel-symposium-learning-about-the-supreme-court/> accessed 20 January 2014; *The Will of the People* (Farrar, Straus and Giroux 2010).

<sup>49</sup> Roberto Gargarella, ‘Acerca de Barry Friedman y el control judicial de constitucionalidad’ (2005) 30 *Revista jurídica de la Universidad de Palermo* 55.

<sup>50</sup> Neil Siegel, ‘A Coase Theorem for Constitutional Theory,’ (2010) *Mich. St. L. Rev.* 583.

<sup>51</sup> Hogg & Bushell (n 12).

legislative body.’ For her, it is difficult to describe situations of ‘simple compliance’ by the legislature, as evidence of ‘a real interactive dialogue between equals, as these forms of response are more akin to legislative acquiescence to, and compliance with, judicial rulings. Furthermore, such responses also seem to provide evidence of precisely the kind of hierarchical relationship between the judiciary and the legislature in Charter cases that dialogue theory was designed to refute’.<sup>52</sup> Similarly, Andrew Petter stated: ‘dialogue theorists tend to exaggerate the influence of legislatures in responding to judicial decisions. As others have pointed out, not all legislative responses are evidence of genuine dialogue, and many are better characterized as reflections of, rather than responses to, judicial norms’.<sup>53</sup>

In any case, the point of these comments is not to give an exhaustive overview of the existing theoretical discussions around the concept of dialogue, or the override clause. I just wanted to show that even the most interesting and sophisticated approaches to dialogic justice seem to be profoundly affected by terminological problems.

Paradoxically, another source of confusion has been the relative success of the notion of dialogic constitutionalism or judicial dialogue. The fact that, contrary to what was expected, the legal community received dialogic initiatives with certain enthusiasm moved different legal actors to over-use and in the end trivialize the idea of dialogue. Typically, judges began to re-describe what they were doing in dialogical terms, even though their ‘renewed’ decisions did not substantially differ from their previous ones. I will not dedicate time to this source of linguistic misunderstandings, but I did want to mention it, because it is becoming increasingly common and, as a consequence of it, the theoretical discussion on dialogue tends to become less clear.

ii) Let me now turn to the analysis of *functional* problems. Here we find, in my opinion, a minor problem compared to others. The problem derives, at least in part, from our inexperience regarding dialogical devices. Not surprisingly -given the lack of familiarity that we all have with these novelties- judges and public officers in general have been incurring in undesired mistakes and confusions in the implementation of dialogic devices. These functional difficulties have been aggravated because of insufficient theoretical reflection on dialogical mechanisms. To be more specific: the theory of deliberative democracy –which had a fabulous expansion in the last two decades- never went very far in exploring its institutional implications, particularly in what concerns judicial review. How is the practice of judicial review supposed to look like in a deliberative democracy? How much room, if any, should a deliberative democracy leave for that practice?

For Dennis Thomson, deliberative democracy does not exclude judicial review, but tends to resist the way in which it has been traditionally exercised.<sup>54</sup> Other authors, like Cass Sunstein and Carlos Nino, have advanced some interesting speculations concerning how to put deliberative democracy and judicial review together, but their proposals have not gone very far.<sup>55</sup>

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<sup>52</sup> Bateup (n 12) 11.

<sup>53</sup> Petter (n 12) 11.

<sup>54</sup> Daniel Thompson, ‘Democratic Theory and Global Society’ (1999) 7 *The Journal of Political Philosophy* 2, 112.

<sup>55</sup> See, for example the work of Cass Sunstein (i.e., Cass Sunstein, ‘Interest Groups in American Public Law’ (1985) 38 *Stanford L R* 1, 29; ‘Beyond the Republican Revival’ (1988) 97 *Yale L. J.* 1539; *The Partial*

In sum, for different reasons, including the fact that theorists of democracy did not manage to offer a sufficiently seductive alternative to judicial review, judges began to imagine and put in practice different ‘deliberative’ solutions without much theoretical guidance. Their proposals were tentative, untried, provisional. Of course, these searches were motivated, in most cases, by the echoes of academic discussions they were aware of –academic discussions related to the counter-majoritarian difficulty and the value of deliberative democracy. But the point is that –recognizing that the existing theory did not offer them the guidance they needed- judges were forced to develop a process of trial and error – call it judicial experimentalism – trying to provide innovative solutions to the problems they faced.<sup>56</sup>

The obvious consequence of this lack of theoretical guidance is that many of the judicial solutions that were then implemented appear –from our present, more abstract, theoretical perspective- incomplete and at least partially wrong. For instance, some Brazilian academics assessed the first important public hearing implemented by the Brazilian Supreme Court from the perspective of a deliberative democracy, and found many deficits in the way it was developed.<sup>57</sup> In the conclusion of their study they stated:

This assessment revealed that the public hearing fulfilled the requirements of a democratic deliberation only in part. Regarding...inclusivity...not all who applied for participation in the process as *amicus curiae* were incorporated. In addition, almost all nominated exhibitors had an education or a profession in the medical or biological science areas, which indicated the rules to define the participants restrained the concept of organized civil society to a single segment, that is, the scientific community, and more specifically, that group bound to the medical and biological sciences.<sup>58</sup>

Now, it is certainly difficult to disagree with these and other possible criticisms to the way in which the Brazilian Court organized its first public hearing. However, it seems also clear that the Brazilian Court is in a process of learning and that many of the required adjustments can perfectly be incorporated in due time.<sup>59</sup>

In sum, my suggestion would be that the functional problems that courts have experienced so far are not particularly worrisome. Adjustments are obviously necessary, but at this point of time we have accumulated sufficient knowledge, theoretical reflection and comparative experience that may easily help courts to improve their performance in future engagements.

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*Constitution* (Harvard UP 1993); *Democracy and the Problem of Free Speech* (The Free Press 1993); and particularly his writings on judicial minimalism (i.e., Cass Sunstein, *One Case at a Time. Judicial Minimalism on the Supreme Court* (Harvard UP 1999); ‘Burkean Minimalism’ (2006) 105 *Mich. L. Rev.* 2, 353. See also Carlos Nino’s writing on the topic (i.e., Nino (n 7).

<sup>56</sup> M Dorf & C Sabel, ‘A Constitution of Democratic Experimentalism’ (1998) 98 *Col. L. Rev.*, 2, 267.

<sup>57</sup> Corrêa Marona & Mendes da Rocha (n 6).

<sup>58</sup> *Ibid.* (n 6) 19.

<sup>59</sup> See also Roberto Gargarella ‘Tres concepciones sobre la libertad de expresión,’ *Diario Clarín*, 3 September 2013, <[http://www.clarin.com/opinion/concepciones-libertad-expresion\\_0\\_986301426.html](http://www.clarin.com/opinion/concepciones-libertad-expresion_0_986301426.html)> accessed 22 January 2014.

iii) The third issue that I want to concisely examine -before turning to what I call structural problems- concerns *attitudinal* (or motivational) problems. The types of problems that I am thinking about have different dimensions but I will only pay attention to two of them. The first has to do with the motivations of public officers to engage in dialogic interactions - typically with members of other branches of power; and the second has to do with their attitudes towards the public or members of the other branches during those interactions.

Of course, judges may engage in dialogic interactions because of very different reasons. In many occasions judges may activate a dialogical process out of conviction: they are persuaded of the value of democratic debate, and recognize that they can play a crucial role in the promotion of collective discussions. However, it may also be true that in other situations they resort to dialogic devices just trying to elude their duty to decide a particular case;<sup>60</sup> or attempting to mask a ruling that would better be explained through other, less attractive, reasons. For example, in October 2013 the Colombian Constitutional Court challenged the constitutionality of a law that provided special penal guarantees for members of the army forces.<sup>61</sup> The Court defied the law alleging the existence of serious failures in the legislative process of deliberation. From the perspective of a deliberative democracy, the public reasons invoked by the Court were impeccable. However, numerous members of the legal community and of civil society in general protested, claiming that the Court's decision was opportunistic, abusive, formalistic, excessive. According to many, the Court had falsely invoked procedural and formal reasons, masked under dialogical concerns, in order to invalidate a law that it in fact wanted to invalidate for other, non-public reasons.<sup>62</sup>

Concerning this kind of attitudinal problem, my suggestion would be simply the following: given that we will never be able to adequately recognize what were the 'real' judicial motivations behind a particular case, I think that we should do better by leaving our speculations behind, and concentrating our attention on the public reasons offered by judicial decisions.

There is, however, another attitudinal problem that I wanted to address, which will finally force us to pay attention to more structural problems. I am referring to the ways in which judges participate in these dialogic processes. In a number of occasions, judges have shown arrogance and other forms of disrespect towards the same people they had invited to discuss about public issues. This situation creates serious difficulties for and in dialogue. By way of illustration, I recently had the opportunity to observe the public audiences organized by Argentina's Supreme Court to discuss the exploitation of lithium in their territories with representatives of indigenous people's organizations. The Court convened these audiences in order to gain direct access to the viewpoints of the affected indigenous group. The audiences were extremely problematic for several reasons. Undoubtedly the most notorious was the attitude the Supreme Court justices took toward the representatives of indigenous groups. The magistrates engaged in those discussions from a position of distance and superiority that was shocking to all who were then present.<sup>63</sup> Again, I do not want to

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<sup>60</sup> I learned about this possibility in a personal conversation with a South African Supreme Court Justice.

<sup>61</sup> See Corte Constitucional, Octubre 2013, *Sentencia C-740*.

<sup>62</sup> Rodrigo Uprimny 'Desafuero de la Corte?' *Diario El Espectador*, 27 October 2013 <[http://www.dejusticia.org/index.php?modo=interna&tema=sistema\\_judicial&publicacion=1616](http://www.dejusticia.org/index.php?modo=interna&tema=sistema_judicial&publicacion=1616)> accessed 14 January 2014.

<sup>63</sup> A chronicle of those audiences can be found in, for example, the webpage of the *Observatorio de Derechos Humanos de Pueblos Indígenas*, <http://odhpi.org/2012/03/corte-suprema-mineria-y-pueblos-indigenas/>.

exaggerate a problem that I cannot adequately demonstrate. However, I do want to suggest that we need to pay attention to the internal dynamic of these dialogic practices. In the end, there are some structural elements that suggest that these kinds of difficulties are not exceptional.<sup>64</sup> And this is why we shall soon begin the analysis of structural problems.

iv) Before turning to the study of the structural problems of dialogic constitutionalism, I want to say a few words about one repeated and significant critique to alternative forms of review, like dialogic review, a critique that I do not share, but that became quite popular among legal academics. I am referring to objections related to the *uncertainty* supposedly created by dialogic-type of mechanisms. This critique, which has most famously been advanced by Larry Alexander, goes like this: all these new alternatives to traditional judicial review are finally unattractive because they introduce improper degrees of uncertainty and instability into situations of conflict. By contrast, the traditional system avoids these problems, and ensures that conflicts are settled through the intervention of authoritative bodies.<sup>65</sup> Keith Whittington, for example, has presented Alexander's settlement-objection as 'the most prominent recent objection to extrajudicial constitutional interpretation'.<sup>66</sup> Now, there are numerous things to say about this view, but at this point I will simply mention why I do not find it particularly attractive. The practice of dialogic constitutionalism has developed for more than 30 years already, both in legally advanced countries and in fragile legal communities. It can be subjected to different criticisms –and we just examined some of them - but critiques such as the ones mentioned by Alexander have not acquired particular relevance in actual practice. Rather than legal chaos and uncertainty, the practice of dialogic constitutionalism has generated great expectations in those places where it took place. Moreover, it has insufflated life to unappealing, old-style, eroded and bad-functioning legal systems. As Whittington has put it, Alexander and others' objection 'overstates the value of constitutional stability, while simultaneously overestimating the ability of the judiciary to impose constitutional settlements and underestimating the capacity of nonjudicial actors to settle constitutional disputes effectively...Moreover, the question of how constitutional meaning can be resolved most effectively is an empirical one'.<sup>67</sup> Similarly, Mark Tushnet claimed that critics of dialogic constitutionalism have still to demonstrate that non-judicial constitutional review introduced 'more instability than they eliminate. The empirical case against non-judicial constitutional review remains to be established'.<sup>68</sup>

### **Structural problems: The system of checks and balances as an exclusive machinery**

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<sup>64</sup> For instance, most judges are recruited from the upper sectors of society, particularly in Latin America. See for example Ana Kunz, *Los Magistrados de la Corte Suprema de la Nación (1930-1983)* (Instituto de Investigaciones Jurídicas y Sociales Ambrosio L. Gioja 1989). This phenomenon is obviously not only limited to Latin America. See for instance James Griffith, *The Politics of the Judiciary* (Fontana Press 1977).

<sup>65</sup> L Alexander & F Schauer, 'On Extrajudicial Constitutional Interpretation' (1997), 110 *Harv. L. Rev.* 1359; 'Defending Judicial Supremacy: A Reply' (2000), *Const. Comment.* 17, 455; L Alexander & L Solum 'Popular? Constitutionalism?' (2005) 118 *Harvard L. Rev.* 1594.

<sup>66</sup> Keith Whittington, 'Extrajudicial Constitutional Interpretation: Three Objections and Responses' (2002) 80 *N.C.L.Rev.* 773, 786.

<sup>67</sup> *Ibid.*, 788-9. See also Michael McCann, 'Reform Litigation on Trial' (1992) 17 *Law & Soc. Inquiry* 715, 733.

<sup>68</sup> Mark Tushnet, 'Non-Judicial Review' (2003) *Harv. J. on Legisl.* 53; 'Popular Constitutionalism as Political Law' (2006) *Chi.-Kent L. Rev.* 81, 991; 'Two Versions of Judicial Supremacy' (1997) *Wm. & Mary L. Rev.* 39, 945.

In the previous pages we explored some difficulties faced by this new dialogic practice of constitutionalism. My impression is that the ‘real’ or more severe difficulties affecting dialogic constitutionalism reside somewhere else, namely in some of its structural limitations. Of course, there are different understandings of what ‘structure’ means, and how to approach ‘structural’ problems. A Marxist approach, for example would recommend that we first focus our attention on the economic or material basis of society; and feminist critiques would suggest that we pay privileged attention to the absence of certain voices or the domination of certain viewpoints in our dialogic experiences.<sup>69</sup> These kinds of criticisms, I believe, are absolutely relevant for those interested in democratic dialogue, and must be taken in serious consideration. Herein, however, I will only pay attention to a small portion of the different structural problems that merit attention. In what follows, in my references to ‘structural’ problems I will only be thinking about our *institutional* structure; and in my references to the institutional structure I will mainly be referring to the existing system of *checks and balances*.

The reasons for my choice should not be difficult to understand. In part, it has simply to do with my area of academic expertise. Above all, however, my choice derives from the fact that the system of checks and balances represents the core of the institutional organization in the Americas, and also one that is gaining growing influence in other parts of the world (even in Europe).<sup>70</sup>

I have two main criticisms related to the system of checks and balances in its relation to dialogic constitutionalism. The first objection says that the system of checks and balances has been designed in order to prevent a civil warfare, rather than *promote a democratic debate*. This fact, I believe, explains why the system is not well prepared and equipped to ensure collective deliberation over time. It can do so, but only as a result of the occasional, informal and discretionary will of certain public officers. The second criticism springs from the fact that the system of checks and balances is based on a distrust of majority ruling and a strong preference for internal or inter-branch controls, rather than external or popular controls. This fact, I believe, explains why the system is not well prepared and equipped to *ensure a properly inclusive deliberation*. It is worth noting that these two main criticisms are directly connected to what I consider to be the two main requirements of a deliberative democracy, namely ‘debate’ and ‘inclusion.’ In addition, I want to remark that my criticisms will expose the existence of a worrisome tension within our constitutional structures, namely *a tension between an old machinery of power and a renewed system of rights*.

The basic point is this: We are trying to obtain from the system of checks and balances something (an inclusive democratic deliberation) that the system is not (was not) well-prepared to provide. It was created for a different purpose, namely to contain social warfare in a situation of social unrest and ‘oppressive legislation’.

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<sup>69</sup> Anne Phillips, *The Politics of Presence* (OUP 1998); Melissa Williams, *Voice, Trust and Memory* (Princeton UP 2000); Iris Young, ‘Activist Challenges to Deliberative Democracy’ (2001) 29 *Political Theory* 670; Iris Young *Inclusion and Democracy* OUP 2002).

<sup>70</sup> I explore the influence of the U.S. constitutional model of checks and balances in the drafting of Latin American constitutions in Roberto Gargarella, *The Legal Foundations of Inequality*; and also in *Constitutionalism in the Americas, 1810-1860* (CUP 2010). Concerning Europe, I am thinking about the growing importance of judicial review, through a concentrated and ‘final’ jurisdiction by a European Court.



In my view, it is this weakness of our institutional system that accounts for the enormous attention that a (rather minor) institutional reform like the *notwithstanding clause* obtained from the legal academy. In fact, the adoption of the Charter in Canada did not represent a significant progress towards the goal of democratic deliberation.<sup>71</sup> If it gained so much attention this was –I submit- because it represented an interesting, unexpected effort aimed at changing the institutional system in the direction of a more deliberative scheme. In other words, I take the academic success of the clause as a first suggestion of the validity of one of my claims, namely that the system of checks and balances has not been even slightly helpful in the promotion of a collective conversation. My assertion, however, is stronger than that. What I am assuming here is that even though the system of checks and balances does not prevent the development of deliberative practices, it neither fosters them, nor fits well with them: the system had a different goal, namely to prevent social confrontation.

In order to support my claims about the tensions between the system of checks and balances and deliberative democracy, in what follows I will pay attention to the *public reasons* offered by the creators of the system in its defence, and also to their *underlying assumptions about democracy*. Later on, I will also suggest that the *actual practice* of the system confirms my critical claims.

### **The system of checks and balances and the promise of an ‘armed truce’**

As anticipated, I will first maintain that the system of checks and balances is not prepared to favour collective debate. It does not prevent it and, occasionally, it can coexist with it, but it was designed to serve a different, and rather opposite purpose. Its main object was to channel social warfare by providing defensive tools to representatives of different sections of society. In other words, its purpose was to prevent social clashes rather than promote any kind of collective conversation. Of course, to state this does not mean to say that a proper deliberative system should not be concerned with the problem of checking abuses or balancing powers. The issue of controlling power is and should always be relevant in any institutional system. Having stated this, however, I would also add, first, that there are different ways of controlling the branches, and not all of them seem to be equally attractive, from a democratic perspective (for instance, I will maintain that the prevalent system is unduly based on internal, rather than external controls). Second, different controlling systems may be more or less compatible with constitutional dialogue (and –I submit- our system is unnecessarily and excessively hostile to democratic deliberation, while –for instance- the one promoted by the Federalists’ critics, including Thomas Jefferson, seemed to be more hospitable to collective participation and debate). It seems clear to me that the system of checks and balances that was created centuries ago was a reasonable response to the kinds of collective, public problems that were present at the time, given the facts and assumptions that were then taken into account (i.e., the power of factions; the irrationality that characterized popular meetings). However, those old institutional responses seem to be much less attractive today, in the face of our widely shared, basic democratic intuitions, demands and commitments. In the end, the idea is that our system offers bad institutional support for the advancement of a deliberative democracy.<sup>72</sup>

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<sup>71</sup> James Goldsworthy, *Parliamentary Sovereignty* (CUP 2010), 205.

<sup>72</sup> On the need to connect discussions about interbranch dialogue and normative democratic theory see, for example, Mark Tushnet, ‘Subconstitutional Constitutional Law: Supplement, Sham, or Substitute?’ (2001) 42 *William and Mary Law Review* 1871.



In order to support my claims about the ‘purpose’ and ‘logic’ of the system of checks and balances, I will first resort to legal history and pay attention to the public reasons offered by the ideologues of the system. Those legal arguments, I assume, will make apparent that the system of checks and balances was aimed at responding to a particular type of legal and political conflict, rather than favour any kind of collective deliberation. In this way, the Framers of the system were doing proper constitutional law: they were trying to use the coming Constitution to confront the *main political and social drama* of their time, which related –in their view- to the actions of factious majorities in state legislatures. Legislatures were creating two main problems, which they did not want to see reproduced at national level, namely i) the encroachment on the other branches (i.e., Rhode Island, 1785); and ii) the passing of ‘unjust’ legislation.<sup>73</sup> This is what explained their (double) reaction that consisted in i) providing defensive tools to members of the different branches, and ii) limiting the pressures of passionate majorities upon their representatives. At the same time (and this is my claim) these solutions created two main problems: the first solution ended up undermining the deliberative character of the system; and the second solution ended up undermining its inclusive character.

After completing this review of legal history, I will also claim that my argument can also be supported by examining the actual practice of the system. In other words, no matter what the Framers of the system thought or desired concerning the system of checks and balances, I will claim that we have good reasons to assert that the system, in actual practice, does not favour or directly hinder collective deliberation. Let me begin this exploration by focusing on the first, historical analysis.

*i) Containing social warfare (or undermining deliberation).* Not surprisingly, I will begin this historical investigation with a reference to the *Federalist Papers* (this is to say the texts where some of the “Founding Fathers” justified the U.S. Constitution) and particularly to the most cited, significant and influential text ever written on the topic, this is to say *Federalist Paper No. 51*. The analysis of this line of argument seems particularly important given the decisive influence that it had for the creation and development of the system of checks and balances, first in the United States, and then in other regions of the world, beginning from Latin America.

In *Federalist paper No. 51*, James Madison explained and justified the creation of this system of mutual balances. The core of the paper appears in this crucial paragraph, where Madison stated:

the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature,

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<sup>73</sup> In his crucial paper *Vices of the Political System of the United States*, Madison made reference to these problems, alluding to the ‘multiplicity,’ ‘mutability’ and ‘injustice’ of the laws, which he attributed mainly to the way in which ‘representative bodies’ were then organized. See James Madison, *Vices of the Political System of the United States*, 1787, <<http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html>> accessed 10 January 2014.

that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.

The passage is extraordinarily rich, and a proper understanding of it would take an entire seminar, so I will limit myself to highlight a few notes about it. First of all, I will claim that, concerning the basic organization of the system of checks and balances, Madison's views were apparent. Madison did not envision a dialogic relationship between the different branches, but rather a scenario of 'perpetual war'. He assumed that 'those who administer[ed] each department' would systematically attempt to violate the limits of their own powers and invade the areas controlled by the other branches. In other words, the ideas of cooperation or mutual collaboration were basically absent from his understanding of the dynamic between the branches. This explains why members of each branch were mainly prepared to 'resist encroachments of the others.'

The main strategy in order to avoid these mutual encroachments was –and this is probably the main line of *Federalist paper No. 51*– to give 'to those who administer each department the necessary constitutional means and personal motives' required for that purpose. For Madison, the representatives' 'personal motives' were taken as given: he was mainly thinking about self-interest (and passions). As he put it: 'ambition must be made to counteract ambition'. In this respect, Madison was basically following David Hume's understanding of human motivations. In passing, it is interesting to note that this view of human motivations implied the dismissal of other alternative approaches to the topic, and particularly a dismissal of those (then enormously relevant) *republican* views that assumed that *civic virtue* played or could play a central role in politics. Madison ridiculed those views, claiming that '[i]f men were angels, no government would be necessary.'<sup>74</sup>

Madison assumed that the main motivation of 'those who administer each department' was (and was going to be) their uninhibited ambition. So what can be done in the face of this disgraceful fact? His response was to give members of each department 'the necessary constitutional means...to resist encroachments of the others.' Clearly, these 'necessary means' were not dialogical instruments. They were mechanisms that, like arms or guns, were supposed to facilitate the achievement of an 'armed truce' between the branches. In other words, it was then assumed that, with these arms at their disposals, members of each department would be able to 'resist the encroachment of the others.' In other terms –and this was the hope, and at the same time the promise of the system– fearing retaliation, members of the different branches would not be tempted to interfere with the affairs of the other branches. This promise was also a sad recognition of the limitations of the system, which in no way was perceived as favourable to collective dialogue. Recall, for example, the

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<sup>74</sup> Morton White, *Philosophy, The Federalist and the Constitution* (OUP 1987). On virtue, see Quentin Skinner, 'Machiavelli on the Maintenance of Liberty' (1983) 18 *Politics* 3; 'The idea of Negative Liberty: Philosophical and Historical Perspectives', in R Rorty, J.B. Schneewind & Q Skinner (comps.), *Philosophy in History* (CUP 1984); Quentin Skinner, 'The Republican Ideal of Political Liberty', in G Bock, Q Skinner, M Viroli (eds.), *Machiavelli and Republicanism* (CUP 1984); Quentin Skinner, *Liberty Before Liberalism*, (CUP 1998).

conclusion reached by Nathaniel Chipman -by that time Senator from Vermont, and then Chief Justice of the Vermont Supreme Court. For him, the proposed system of checks and balances created the context for a ‘perpetual war of each [interest] against the other, or at best, an armed truce, attended with constant negotiations, and shifting combinations, as if to prevent mutual destruction: each party in its turn uniting with its enemy against a more powerful enemy’.<sup>75</sup>

In sum, the Framers promoted an institutional system that was aimed to ‘economize in virtue’ (that, seemingly, their rivals did not want to ‘economize’), and consequently tried to use the representatives’ self-interest (‘ambition’) in the benefit of all.<sup>76</sup> Their idea was that the mechanisms of checks and balances could ensure an ‘armed truce’ between the then existing social, economic and political interests. The veto powers in the hands of the Executive; the impeachment capacities of Congress; the possibility of judicial invalidation of laws; or the legislators’ powers of insistence were some of the most important ‘guns’ or ‘defensive tools’ provided to those in power.

ii) *Thwarting the ideal of ‘government by the people’ (or undermining inclusion)*. In the precedent section I tried to demonstrate that the system of checks and balances responded to the need to contain social warfare, rather than promote collective deliberation. Now, let me say something concerning its deficit in terms of inclusion and popular participation, by making three points related to the Framers’ ideas about *factions*; the *representative system*; and the establishment of a system of *internal rather than external controls*.

The concept of *factions*, which is unquestionably the most important political concept in *Federalist Papers*, represents a good start in order to specify my views on the subject.<sup>77</sup> It seems clear that the entire new structure of government was directed to contain the risks that factions posed to any government. We can put this even more strongly: the entire Constitution was primarily justified as a way to contain the evils of factions. Now, a first interesting thing to note is that, in *Federalist Paper No. 10* Madison defined factions with great care as a ‘number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.’ However, a few lines below he made it clear that ‘if a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote.’ As a consequence, the only factions that *really* mattered were majority factions, which allows us to say that the entire Constitution was, in the end, dedicated to restrain the actions of majority groups, given their oppressive tendencies. The risk of minority oppression was not taken seriously at the time (even in the face of slavery).<sup>78</sup>

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<sup>75</sup> Nathaniel Chipman, *Principles of Government. A Treatise on Free Institutions* (Burlington 1833), 171. See also Maurice Vile, *Constitutionalism and the Separation of Powers* (Clarendon Press 1967), 133.

<sup>76</sup> Bruce Ackerman, *We the People: Foundations* (Harvard UP 1991) 198.

<sup>77</sup> Madison defined the concept of factions in *Federalist paper 10*. ‘By a faction’ –he claimed- ‘I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.’ See A Hamilton, J Madison, J Jay, *The Federalist Papers* (first published 1787, Bantam Books 1982).

<sup>78</sup> This point also in Robert Dahl, *A Preface to Democratic Theory* (The University of Chicago Press 1956).

In the same paper, Madison made reference to the ‘violence of faction’ and the ‘instability, injustice, and confusion’ that factions ‘introduced into the public councils,’ which represented ‘the mortal diseases under which popular governments have everywhere perished.’ What Madison had in mind was the so-called ‘paper money crisis’ that affected the country during this post-independence (and pre-constitutional) period. This ‘crisis’ had become more threatening and dangerous as a consequence of its legal manifestations than as a result of the armed confrontations that it provoked. In the end, the armed confrontations (symbolized by the famous ‘Shays rebellion’) were generally perceived as illegal actions, and consequently repressed by the troops of the Confederation.<sup>79</sup> The real problem, however, emerged when the same demands that a few had advanced through the use of armed violence (and that were then combated, as illegal actions), began to gain terrain through the use of the law. This is to say, the main threat to a stable and well-ordered government seemed to come from ‘outside’. The suggested federalist solution to the problem was then twofold: restrictions to external pressures, and a system of internal controls.

In other words, a socially explosive situation, which included armed rebellions, unchecked legislatures and the ‘paper money crisis’, explains why most of the Framers came to favor a system of endogenous, rather than exogenous or popular controls. It was that explosive social situation that moved Madison, in *Federalist No. 10*, to resist direct popular participation in politics, and favour, instead, a representative system where representatives of the people would ‘refine and enlarge the public views by passing them through the medium of a chosen body of citizens’.<sup>80</sup> So, for Madison, as for most of the ‘Founding Fathers’, the representative system was not seen as a ‘second best’ or a ‘necessary evil’ (as many of their anti-federalist opponents envisioned it). Representation was, for them, a first and desired option. And this was so because they assumed that the people themselves were still not well-prepared to engage in politics directly. For Madison, the representatives’ decisions tended to ‘better serve justice and the public good than would the views of the people themselves if convened for that purpose’. James Fishkin has characterized this Madisonian approach (which he directly relates to the one developed by John Stuart Mill a century later in his *Considerations on Representative Government*), as one of *elite deliberation*.<sup>81</sup> As we also try to do here, Fishkin distinguishes that elitist system of democracy from deliberative democracy.<sup>82</sup>

The Framers’ elitist view derived from some of the assumptions explored in preceding sections, and particularly from the Framers’ fear of majoritarian democracy. It was also as a result of those assumptions that they limited popular political participation mainly to periodic suffrage.

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<sup>79</sup> Robert Brown, *Revolutionary Politics in Massachusetts* (Harvard UP1970); ‘Shays’s Rebellion and its Aftermath: A View from Springfield, Massachusetts, 1787’ (1983) 40 *William and Mary Quarterly*. 4; Robert Feer, *Shays’s Rebellion* (Garland 1988); David Szatmary, ‘Shays’ Rebellion in Springfield,’ in Martin Kaufman (ed.), *Shays’ Rebellion: Selected Essays* (Westfield State College 1987); Gordon Wood, *The Creation of the American Republic* (W.W.Norton & Company 1969).

<sup>80</sup> It has also been noted how Madison played with the ambiguous notion of ‘chosen’: ‘chosen’ could refer both to those who had been selected by the people, and/or something more in the line of the ‘selected few’. See Bernard Manin, *The Principles of Representative Government* (CUP 1997).

<sup>81</sup> Fishkin (n 37) 243, 246.

<sup>82</sup> By which he means ‘a theory that attempts to combine deliberation by the people themselves with an equal consideration of the views that result’, *ibid.*, 247.

It is true that periodic elections represent an external control that plays a crucial role in our system of government. However, it is also true that periodic elections constitute only one among the many numerous mechanisms of popular character that could have been then adopted. The fact is that the Framers rejected or chose not to consider numerous other mechanisms of external control, which were very common at their time. These mechanisms included mandatory instructions; the right to recall; mandatory rotation; annual elections; frequent town meetings; etc. Devices of the kind had been advanced by British radicals in Great Britain during the mid-1700s – from Richard Price, Joseph Priestly and the group of ‘Radical Dissenters,’ to James Burgh and John Cartwright – and also in the United States, by the political opposition (the so-called anti-federalists), in the years that preceded the enactment of the national Constitution.<sup>83</sup>

Now, the fact that none of these mechanisms found a place in the U.S. Constitution implies at least two things. On the one hand – and we have discussed this already – the system of endogenous controls became the central feature of the new structure of government. On the other hand, popular suffrage suddenly became the only relevant institutional bridge between the representatives and the represented. In other words, periodic suffrage assumed an extraordinary responsibility: elections became in charge of periodically ‘revealing’ the will of the people, without much additional institutional help.

Consequently, the virtual absence of alternative devices make it extremely difficult for the people to control their representatives and make their voice audible, thus undermining the republican character of government.<sup>84</sup> Most early critics of the representative system recognized this risk.<sup>85</sup>

The point is, in the end, that contrary to some widespread assumptions (we shall come back to this below), the system of checks and balances presents serious flaws in term of the incentives it provides to public officers and the types of controls that it establishes. The risks that I mention had been clearly anticipated by the republican and radical critics of the system, who for such reason proposed an alternative institutional system (based on the promotion of civic virtue plus an emphasis on popular controls).<sup>86</sup> In particular, from the perspective of deliberative democracy, this understanding of politics becomes particularly unattractive. And this is so because the appeal of the new *dialogic system of constitutionalism* entirely depends – or so I shall argue – on its capacity to overcome the democratic deficit that has been affecting our representative system in all these years. Only a wide and inclusive dialogue may become a meaningful dialogue.

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<sup>83</sup> Carl Cone, *The English Jacobins. Reformers in Late 18<sup>th</sup> Century England* (Scribner 1968); Cecelia Kenyon, *The Antifederalists* (Northeastern University Press, 1985); Thomas Paine, in Bernard Kucklick (ed.), *Thomas Paine. Political Writings* (CUP 1989); Herbert Storing, *What the anti-Federalists were for* (The University of Chicago Press 1981); Gordon Wood, *The Radicalism of the American Revolution* (Alfred Knopf 1992); *The American Revolution. A History* (The Modern Library 2002). See also David Lutz, *The Origins of American Constitutionalism* (Louisiana University Press 1988)104-5.

<sup>84</sup> As Philipp Pettit stated: ‘No matter how powerful a system of popular influence, it will not support republican democracy unless it serves to impose a popular direction on government.’ Philip Pettit, *On the People’s Terms. A Republican Theory and Model of Democracy* (CUP 2012), 306.

<sup>85</sup> But see, for instance, Mark Tushnet, ‘Weak-Form Judicial Review: Its Implications for Legislatures’ (2004) 23 *Supreme Court Law Review* 213.

<sup>86</sup> See Gargarella (n 74). See also Thomas Jefferson’s letter to John Taylor, 1816, in Thomas Jefferson, *Political Writings* (CUP 1999), 209.

iii) *Democracy*. Having reached this point, I think that it is very important to pay attention to the peculiar view of democracy presupposed in the system of checks and balances. The conception of democracy that prevailed among the Framers has already been the object of profound academic analysis.<sup>87</sup> We have already some indications about what that conception of democracy looked like: we know about the Framers' distrust of the legislatures or their fear of unchecked majorities. For the Federalists it was clear that 'in all very numerous assemblies, of whatever character composed, passion never fails to wrest the scepter of reason' (*Federalist paper* 55).

This fearful approach to politics favoured the development of a *negative* understanding of democracy – let us call it *pluralist* – where the main purpose of democracy is not to foster deliberation or promote collective agreements, but rather *avoid mutual oppressions* (Dahl 1956). This goal, together with the assumption that factions had a natural tendency to oppress each other, explains the Framers' overriding concern with the creation of a system of controls and mutual balances. The proposal to balance 'ambition with ambition' so as to 'control the abuses of government' expresses well the Federalists' assumptions, their fears and their hope. Alexander Hamilton made this point very clear. He stated: 'Give all the power to the many, they will oppress the few. Give all the power to the few, they will oppress the many. Both therefore ought to have power, that each may defend itself agst. the other'.<sup>88</sup> James Madison made an identical point. For him, '[t]he landholders ought to have a share in the government, to support the...invaluable interests (of property) and to balance and check the other (group)'.<sup>89</sup>

Now, the object of this view of democracy – avoiding mutual oppression – was certainly worth of praise, particularly at a time when social divisions implied dire confrontations and even armed clashes between opposing interests. In that context, a negative conception of democracy may appear as a reasonable choice: few things seem more important than preventing extreme social conflict, avoiding the repression of unpopular minorities, etc. However, it seems also clear that this conception of democracy was based on controversial normative grounds – grounds that substantially differ from those that characterize the deliberative approach, and also from our presently shared understandings of democracy.<sup>90</sup> For the moment, it should be enough to say that the institutional system tried to ensure that 'the many' and 'the few' enjoyed an equivalent institutional power, which seems an odd solution in democratic terms. This sole proposal suggests an idea of democracy that has very little connection with our present approaches to the democratic ideal. Of course, it seems perfectly reasonable to ensure protection to unpopular minorities, but not – I would add – at the cost of so severely undermining the basic majoritarian component of democracy.<sup>91</sup>

iv) *Latin America*. Given that I take most of my dialogic examples from Latin America, let me add a few lines exploring the existing continuities between Anglo-American legal history and what happened in Latin America during its Founding years.<sup>92</sup> I will limit myself to make two quick points: first, I will claim that there is a clear continuation between the

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<sup>87</sup> Dahl (n 84).

<sup>88</sup> Max Farrand (ed.) *The Records of the Federal Convention of 1787* (Yale UP 1937) vol. 1, 288.

<sup>89</sup> Farrand (n 97) vol. 1, 431.

<sup>90</sup> See Nino 1996 (n 7) 81.

<sup>91</sup> Presently, it is difficult to think about democracy without making reference, first, to 'the rule of the many'. Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Westview Press 1996).

<sup>92</sup> I have explored this comparison in more detail in Gargarella (n 74).

U.S. constitutional history and Latin America's constitutional history; and second, I will show that Latin Americans tended to carry the U.S. institutional model to its extreme, particularly as a result of the influence of conservative/religious groups. These two developments, I should add, make inter-branch and popular dialogue still more difficult to achieve.

Concerning the continuities between the U.S. and Latin America, I would add that, given the importance that liberalism acquired during the Framing Period in Latin America, most countries in the region modelled their Constitutions under the influence of the U.S. Constitution. They organized a system of checks and balances that followed the U.S. model and, accordingly, established a presidentialist system. In addition, they also included a Bill of Rights in their Constitutions, according to the U.S. example. However, I should add that this particular aspect was substantively modified during the 20<sup>th</sup> Century (and after the 1917 Mexican Revolution), when most countries began to include social, economic and cultural rights within their Constitutions.

The second point that I want to make is that, given the significant and growing influence of conservative and religious forces in Latin America (particularly during the first half of the 19<sup>th</sup> Century), most Constitutions began to at least partially depart from the U.S. example. In particular, the changes that were then incorporated into the new Constitutions implied two things. First, the separation of Church and State that some Latin countries recognized in their Bill of Rights resulted in one way or another undermined. In cases like the one of Argentina, the Constitution included, at the same time, both a commitment to religious tolerance and a provision ensuring a special status to the Catholic religion. The other change that was introduced in most Constitutions concerned the organization of the system of checks and balances. A majority of Latin American countries modified the U.S. presidentialist system and carried it to its extreme. Consequently, they created hyper-presidentialist systems of government, within the context of already highly centralized countries. This initiative, I should add, put the entire system of equilibriums (which requires the different branches to be relatively equal in power) at risk.<sup>93</sup> Moreover, and more significantly for our purposes, hyper-presidentialist systems tend to be particularly harmful as far as public discussions are concerned. As Carlos Nino has suggested, powerful presidents have very little incentives for engaging in dialogue with the other branches of power (why do it, when they can simply impose their decisions upon the rest?); and tend to use the strong powers at their disposal so as to foster public acclamation, rather than public debate about their proposals.<sup>94</sup>

v) *Summing up*. What are the inferences we can derive from all these initial reflections concerning the system of checks and balances? And what is the connection between them and our topic of dialogic constitutionalism? The partial conclusion is the following: The system of checks and balances does not represent an appropriate institutional basis for the promotion of deliberative democracy.<sup>95</sup> It was a remedial, institutional response to a situation of extreme social, political and economic conflict. In that conflictive context, its immediate and fundamental purpose was to contain and channel the existing social crisis,

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<sup>93</sup> See Juan B. Alberdi, *Bases y puntos de partida para la organización política de la República Argentina* (first edition 1852 Plus Ultra 1981), chapter 25).

<sup>94</sup> Nino 1996 (n 7).

<sup>95</sup> Jeffrey Tulis, 'Deliberation Between Institutions,' in P Laslett & J Fishkin (eds.), *Debating Deliberative Democracy* (Blackwell Publishing 2003), 200.

which had begun to manifest itself through the institutional system (i.e., through paper money legislation enacted by seemingly unchecked legislatures). The connection of this partial conclusion with our present topic seems then apparent: taking into account the present characteristics of our institutional system, dialogic constitutionalism faces and (most probably) will continue to face grave problems for becoming a stable and non-discretionary institutional solution.<sup>96</sup> And this is so because the basic structure of our institutional system is not well prepared to favour inter-branch dialogue, and even less to maintain institutional dialogue over time. It can accept it occasionally, but it is clearly not hospitable to it.

The problem we are dealing with (the fact that our institutional system is not hospitable to collective dialogue) seems to be present even in the context of Canada, where the Charter introduced formal mechanisms favouring at least some form of constitutional dialogue. Reviewing the history of dialogic mechanisms in Canada, Kent Roach (who is one of the main academic authorities on the override clause) recognizes these worries. He states: ‘concerns have been raised that on some issues the Court has had or shaped the last word. Fears have been expressed that whatever its potential, dialogic judicial review can degenerate into judicial monologue and supremacy’.<sup>97</sup> Clearly, I do not want to, and I am not able to, evaluate the actual working of the Canadian model. At this point, I just want to say that one can perfectly understand existing concerns about the real scope and implications of the Charter reform and judicial review.

The difficulties I mention in relation to the Canadian context are obviously more significant in those countries that have decided to keep their old structure of checks and balances untouched. In Latin America, serious problems emerge as a consequence of the privileged position that judges still enjoy; or as a result of the hyper-centralized and hyper-presidentialist character of the dominant institutional organization. For instance, a recent study by Rodríguez-Garavito compares the most important dialogic decisions of the noted Colombian Constitutional Court, in cases of structural litigation.<sup>98</sup> These decisions include the famous *Sentencia T-025*, about the rights of displaced people; *Sentencia T-760*, about the right to health;<sup>99</sup> and *Sentencia T-153*, about the rights of prisoners.<sup>100</sup> In one of these cases, namely *Sentencia T-025*, the Court designed a spectacular monitoring process. In Rodríguez-Garavito’s words: ‘Over the course of seven years, it has engendered twenty-one follow-up public hearings involving a wide array of governmental and nongovernmental actors, as well as nearly 100 follow-up decisions whereby the CCC has fine-tuned its orders in light of progress reports’.<sup>101</sup> The situation, however, has been dramatically different in the other two cases, and particularly in *Sentencia T-153*, which did not include any court-sponsored monitoring-mechanisms. In the face of these facts, I just want to insist on one point, related to the informal, discretionary character of our dialogical practices. In the end,

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<sup>96</sup> Exploring the connections that exist between judicial intervention and institutional settings (with a particular focus on the cases of Mexico and Brazil), see J Rios-Figueroa & M Taylor, ‘Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico’ (2002) *J. Lat. Amer. Stud.* 38, 739.

<sup>97</sup> Roach (n 12) 75-6; Jamie Cameron, ‘Dialogue and Hierarchy in Charter Interpretation: A Comment on R. v. Mills’ (2001) 38 *Alta. L. Rev.* 1051.

<sup>98</sup> Rodríguez-Garavito (n 3).

<sup>99</sup> C.C., July 31th, 2008, *Sentencia T-760/08* (slip op. at 200-03), available at <http://www.corteconstitucional.gov.co/relatoria/2008/T-760-08.htm>.

<sup>100</sup> C.C., April 28th, 1998, *Sentencia T-153/98* (slip op.), available at <http://www.corteconstitucional.gov.co/relatoria/1998/T-153-98.htm>.

<sup>101</sup> Rodríguez-Garavito (n 3)1694.



and to repeat, the point is that the traditional system of checks and balances (everywhere, and particularly in countries with highly concentrated systems of governments) is not hospitable to dialogic mechanisms: it may accept them occasionally, but only when public authorities want to appeal to them, and insofar as they are willing to accept their implications.<sup>102</sup>

## Two objections: The history and actual practice of contemporary democracies

In the previous pages, I maintained that the system of checks and balances has not been conceived for the purpose of promoting public deliberation –rather the contrary – and is not hospitable to it, even though it may occasionally be compatible with it. This is why those interested in dialogic constitutionalism should also be interested in changing the basic structure of the institutional system, so as to make it more supportive to collective conversations.

I understand, however, that my views about the structural problems affecting the system of checks and balances are open to numerous criticisms. So, in this part of my article I will try to at least very briefly address two of these possible objections. The first one would mainly challenge my first criticism to the system of checks and balance, which was directed against its *deliberative-deficit*. The second one would mainly challenge my second criticism to the system of checks and balances, which was directed against its *deficit* in terms of *social inclusion*. In different ways, both criticisms may serve to demonstrate both that my *historical reconstruction* of the Framing period was wrong, and that (no matter what the arguments of the Framers were) the *actual practice* of the system of checks and balances is much more democratic than suggested.

i) The first objection to my argument may be directed against what I said concerning the *deliberative* character of the system. Academics such as Cass Sunstein or Stephen Holmes have been reading the historical origins of U.S. constitutionalism in ways that significantly differ from the one I proposed here.<sup>103</sup> According to Cass Sunstein, for example, the ‘Founding Fathers’ of American constitutionalism created an ambitious system of ‘government by discussion,’ in which the results would be reached after extensive process of public deliberation. This system, Sunstein claims, does not reward authority or privilege, but rather the arguments presented and solved through a general discussion.<sup>104</sup> Stephen Holmes has advanced similar considerations in other well-known writings.<sup>105</sup>

The point they make, however, is not simply historical. Mainly, what they defend is a normative view according to which the system of checks and balances (i.e., through the introduction of bicameralism; the existence of multiple instances for revising a statute; etc.) *works* -and *should work* - in the promotion of public deliberation. Seen in its best light, the system of checks and balances would be favourable to the transformation (or ‘laundering’)

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<sup>102</sup> Similar problems explain also why the interesting public audiences that the Brazilian Supreme Court convened, related to the right to health; or the significant public audiences summoned by the Argentinean Court, concerning the right to freedom of expression, ended up in classic instances of judicial imposition.

<sup>103</sup> Stephen Holmes, ‘Precommitment and the Paradox of Democracy,’ in J. Elster & R. Slagstad (eds.), *Constitutionalism and Democracy* (CUP 1988), Sunstein 1985, 1988 (n 58).

<sup>104</sup> This is, for instance, what Sunstein maintained in his book on *The Partial Constitution* (n 58) xvi.

<sup>105</sup> Stephen Holmes, *The Anatomy of Antiliberalism* (Harvard UP 1993).

of the people's preferences:<sup>106</sup> rather than taking the preferences of people as given and unchangeable, the system of checks and balances would take those preferences as an endogenous outcome of a process that involved, often, prejudice, resignations and injustice, and would consequently favour their transformation.

My disagreement with their views is threefold. My first difference is, obviously, historical. I have tried to defend the accuracy of my readings of U.S. constitutional history (vis a vis Sunstein's views) elsewhere,<sup>107</sup> so I will not attempt to settle this disagreement here. I will merely repeat that, in my view, the American Framers were not trying to establish a system of public deliberation, but rather attempting to limit the pernicious effects of factions (as Madison put it in *Federalist No. 10*). My second disagreement is more relevant, and concerns the role of the people in public deliberation. As I said, I defend a particular approach to deliberative democracy, which has social inclusion as one of its main components. Deprived from active and direct popular engagement, deliberative democracy becomes, as Fishkin put it, a system of elite deliberation. Both Sunstein and Holmes are more concerned with elite deliberation than with deliberative democracy so understood. So, even if their historical reconstruction were right (which I deny), they would still be defending what I would describe as an exclusive, limited, elitist institutional system. My third criticism is that (irrespective of the history behind the adoption of this or that institutional tool) the existing institutional tools are still not adequate for the promotion of deliberation. Think, for instance, about the judiciary's capacity to strike down a law. The 'dichotomous' powers of judges (uphold-strike down a law) still represent a very poor solution to usually complex, difficult, delicate, serious, multifaceted problems. Thus organized, our institutional system does not favour the exploration of nuanced solutions, favouring a reasoned conversation between different civil and official actors, who sit together and begin a discussion, trying to refine their ideas and improve their original (and challenged) proposals. Instead of that, the system offers judges (and not many other actors) very limited and unattractive tools for intervening in the conflict in a rather dramatic (all or nothing) way. Worse than that: given both the character of the institutional mechanisms at their disposal, and the practice that has consequently been developed, judicial decisions tend to be extremely difficult to overcome. So, the relationship between the different powers becomes unnecessarily tense, taking the form of an 'institutional battle' between different branches. This is why we (members of the legal academia at least) tend to usually ask ourselves questions like the following: Would the will of the judges or the will of the Executive prevail in this case? Would the judiciary finally prevent the President from enforcing (say) his proposal for a 'universal health system'? This, I submit, is an unfortunate outcome of our institutional practice, which may be useful for some other purposes (say, prevent hasty decisions) but one that has very little to do with any reasonable understanding of democratic dialogue.

My final criticism, which is related to the former one, is the following: in my view it is not at all clear that a device such as the system of checks and balances helps to refine the voice of the people (or transform the people's preferences in an interesting way). To begin with: the system of checks and balances requires the intervention of too many actors, before the eventual enforcement of any law. Unfortunately, those who intervene in this process have

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<sup>106</sup> Robert Goodin, 'Laundering Preferences,' in J. Elster & A. Hylland (eds.), *Foundations of Social Choice Theory* (CUP 1986).

<sup>107</sup> Roberto Gargarella, *Public Discussion and Political Radicalism in the Origins of Constitutionalism* (Kluwer 2001).

very different democratic credentials, different legitimacy and different interests. For example, some of them are democratically elected, while some of them are not. Some of them may have been selected after a recent election and for a short time, while others may have been occupying their position for a long time and/or have life tenure. Some of them may have been put in place to defend local interests, while others may be in office to defend national interests. As a result of this, it is difficult to argue that the laws emerging at the end of this complex process actually express (something like) the democratic ‘will of society’ and not a mere *patchwork of views* and opposing interests. As Carlos Nino put it:

there is no guarantee whatsoever that the result of this awkward mix of different decisions, which can ultimately respond to a combination of findings from different debates, carried out by different groups of people at different times, have some resemblance to the majority consensus that obtained after an open and free debate.<sup>108</sup>

Let me illustrate Nino’s point through an example. Imagine that we are in a class, within a small school in a marginal district in Texas. Also imagine that we usually discuss collectively about all our most relevant affairs (and this through debates where all the students in the class and also the professor take part). For instance, we discuss collectively about when and how to take the final exams, because we want all the students to have the best chances to be well prepared (we do not want, for example, that the exam took place in a date where most students have many other exams, as seemed to be the rule in our school). Now, compare this situation with an alternative one, where the professor decides by herself all relevant issues, but students can file a claim, and complain about specific decisions by the professor (or much worse: those who can complain are only those students who have the material resources to do it, say hire a legal assistant). One possible outcome of this latter institutional organization would be this: a student complains about the professor’s choice; then the director of the school steps in and decides something; then the rector of the school supervises the director’s decision; then Texas’ Board of Education revises the whole case. It seems undeniable to me, first, that this latter decision-making process is very different from the former one. Both of these processes may include checks to power; both of them may leave room for complaints. However, both processes greatly differ in term of the legitimacy and democratic character of the decisions that they create. And the fact that (in the latter case) more and more authorities, here and there, intervene (perhaps also authorities at the national level; perhaps even the Ministry of Education herself) does not clearly improve the impartiality or the democratic character of the final decision. I would not be surprised to know, for instance, that after the participation of all these authorities, the final date of the exam did not match the needs, demands and possibilities of most students.

ii) The second objection to my argument may be directed against what I have said concerning the *inclusive* character of the system. This kind of critique can be formulated by academics related to so-called *popular constitutionalism*. Although there is no agreement on how to precisely define popular constitutionalism,<sup>109</sup> for the purposes of this article we can assume that it is a theory that recognizes that the people play – have played/should play – a central role in constitutional interpretation, defying the most traditional approach to judicial

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<sup>108</sup> Nino 1992 (n 7) 578.

<sup>109</sup> Tom Donnelly, for example, assumes that ‘leading theorists [of popular constitutionalism] fail to offer a common reading of constitutional history, a common methodology, or even a common set of remedies’ Tom Donnelly, *Making Popular Constitutionalism Work*, Harvard Public Law Working Paper (2011) No. 11-29, 1.

review, which is jurocentric and places the ‘last word’ in the hands of judges. For Larry Kramer, under popular constitutionalism, ‘the role of the people is not confined to acts of constitution making, but includes active and ongoing control over the interpretation and enforcement of constitutional law’.<sup>110</sup> Challenging traditional jurocentric conception of constitutional interpretation, popular constitutionalism sees this interpretative process as a multiparty, contested one.<sup>111</sup> According to this approach, the Court would take its decisions through a continuous dialogue that would not only include the different branches of government but also, and most significantly, social movements and state and local political actors.

The status of the theory is, however, somehow unclear. Sometimes, popular constitutionalism seems to be making a *historical* point, by showing that during the Framing period the people used to play, and was supposed to play, a more crucial role in constitutional interpretation. (In other words, for this view, it is not true that the Framers proposed the Supreme Court as the exclusive or final interpreter of the Constitution). Other authors within popular constitutionalism seem to be less concerned with history. Their main claim is, instead, that the *current practice* of judicial review significantly differs from what traditional jurocentric approaches claim about that same practice. In both cases, however, a normative project seems to be present: it is either necessary to recover those old (more popular-sensitive) practices, or to strengthen their actual current manifestations.

Although I am personally interested in popular constitutionalism, and sympathize in part with its project, I want to differentiate it from what I have been claiming in this piece. My main disagreements with members of popular constitutionalism are not related to their historical readings.<sup>112</sup> I do have problems, however, with their approach to deliberation and, more generally, with their institutional view. The main point is that, in the context of economic, social and political inequalities (a context that, I assume, is characteristic of many of our institutional systems), the possibilities of meaningful popular participation are significantly limited. I am not claiming that, within the context of unequal societies, people tend to participate less – possibly the contrary is true. What I am trying to say is that in conditions of profound inequalities, the people’s chances to influence politics through their participation are substantially reduced. And this would be so for numerous reasons.

First, the costs of collective action are usually so high (particularly in divided and unequal countries) that opportunities for popular participation tend to become limited to rather extreme or very heated cases (i.e., situations of dire injustice, abortion). Second, participants in legal conversations come usually from different social sections of society, which tends to create serious difficulties in the instances of dialogue: deliberation becomes thus one between powerful minority actors (normally coming from the upper classes), and large but weak groups of disadvantaged. Third, in contexts of injustice as those that were described above, the popular sectors have an unjustifiably unequal chance to make their views prevail

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<sup>110</sup> Kramer (n 44) 959. Also Larry Kramer, *The People Themselves. Popular Constitutionalism and Judicial Review*, (OUP 2005).

<sup>111</sup> Jack Balkin, *Living Originalism* (Harvard UP 2011); R Post & R Siegel, ‘Roe Rage: Democratic Constitutionalism and Backlash’ (2007) *Harvard Civil Rights-Civil Liberties Law Review*, 42, 373; Reeva Siegel, ‘Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown’ (2004) *Harvard Law Review*, 117, 1470.

<sup>112</sup> Then, I do not tend to share, for example, Alexander & Solum harsh criticisms on this issue. Alexander & Solum (n 69).

(i.e., protesters tend to be legally prosecuted, and their demands are only rarely taken into account).<sup>113</sup> Even more so, within the framework of an institutional system that reserved the legitimate use of violence to the State. In sum, popular constitutionalism is relying on an informal practice, which – not surprisingly – tends to be more detrimental than beneficial to the interests of the people at large.<sup>114</sup> This is – I submit – why one needs to urge the adoption of egalitarian institutional reforms, among other things, capable of changing the basic structure of our institutional system: we have no good reasons for relying on a social practice that has normally been hostile to popular mobilization.<sup>115</sup>

### **Legal alienation/ ‘We the people’ outside of the Constitution**

I mentioned two problems about the system of checks and balances: one related to its deliberation-deficit, the other related to its deficit in terms of social inclusion. In what follows I will dedicate some additional time to the discussion of the second problem, which I find particularly relevant and also usually neglected by legal theory. More specifically, I want to explore some of the difficulties derived from having institutions that make it so difficult for the people at large to control their representatives and gain a say in the decision-making process. I will call this a situation of *legal alienation*.<sup>116</sup> At this point I am not able to say much about this problem in general, but I do want to explore some of its implications for dialogic constitutionalism.<sup>117</sup>

One consequence that follows from situations of legal alienation and ‘fear of majority action’ is that instances of inter-branch dialogue, which in principle result appealing and worth-promoting, become for this reason much less interesting. In other words, democratic dialogue loses much of its appeal when it is reduced to a dialogue between elites that are ‘too far removed’ from the people (Madison, *Federalist No. 55*). We would then trivialize deliberative democracy if we were to celebrate the emergence of new instances of inter-branch dialogue as a triumph of democratic dialogue.

This problem, I believe, seems particularly relevant for contemporary constitutional theory. Think for example about the work of Mark Tushnet and Jeremy Waldron, this is to say the work of two legal scholars who have been leading the academic discussion against traditional forms of judicial review.<sup>118</sup> As we know, both of them have been harsh critics of

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<sup>113</sup> Helen Fenwick, ‘The Right to Protest, the Human Rights Act and the Margin of Appreciation’ (1999) 62 *The Modern Law Review* 4, 491; Roberto Gargarella, ‘Law and Social Protests’ (2012) 6 *Criminal Law and Philosophy* 15.

<sup>114</sup> I admit that this is a fundamentally intuitive claim: the point needs an empirical support that I am not able to provide at this stage of my argument.

<sup>115</sup> Examining the tensions between judicial review and political participation see Jeremy Waldron, ‘A Right-Based Critique of Constitutional Rights’ (1993), 13 *Oxford Journal of Legal Studies* 1, 51.

<sup>116</sup> For the concept of alienation, see Karl Marx, *Economic and Philosophic Manuscripts of 1844* (first published 1844, Wilder Publications 2011: 86-7).

<sup>117</sup> The problem of popular exclusion (and consequently *legal alienation*) that I am thinking about is similar to the one that Roberto Mangabeira Unger once denounced in his often quoted reference to the ‘dirty little secret of contemporary jurisprudence’, Roberto M. Unger, *What Should Legal Analysis Become?* (Verso 1996) 73.

<sup>118</sup> The comment could also be directed at the British Benthamite school advocating for a reinvigoration of parliamentary politics. See for example, the work of Jeffrey Goldsworthy, Conor Gearty, etc. (Goldsworthy n 75). Exploring (in different ways) these views, see David Dyzenhaus, ‘The Left and the Question of Law’ (2004) XVII *Canadian Journal of Law and Jurisprudence* 1; David Dyzenhaus, ‘The End of the Road to Serfdom?’ (2013), 63 *University of Toronto Press*, 310; Martin Loughlin, *Sword & Scales. An Examination of*

judicial review and both of them have favoured alternative options that in a certain way ‘recover’ the ‘last word’ for legislative majorities.<sup>119</sup> Now, even though I substantially agree with the purposes and motives of their academic undertaking, I want to call attention to a risk that may affect it. I am thinking about the risk of assuming a fundamental identity between legislatures and the people at large, when everything suggests the existence of a profound gap between the elected and their electors.

Let me explore this claim by using Jeremy Waldron’s work as an example – particularly, his views as developed in his book *The Dignity of Legislation*.<sup>120</sup> Waldron’s book represents a significant (and necessary) effort to defend the role of legislative bodies, within an academic context that has traditionally been contemptuous and disdainful towards Congress and everything related to it.<sup>121</sup> Part of the merit of the book – and of Waldron’s project, in general – is that it helps to balance a view that became dominant, particularly in the legal academia. In his words, academics have developed ‘an idealized picture of judging and...a disreputable picture of legislating’.<sup>122</sup> This is why he tries to ‘recover and highlight ways of thinking about legislation that present it as a dignified mode of governance and a respectable source of law’.<sup>123</sup> In the end, he wants to develop ‘a *rosy* picture of legislatures that matched, in its normativity, perhaps in its naivete, certainly in its aspirational quality, the picture of courts – ‘the forum of principle’ etc.- that we present in the more elevated moments of our constitutional jurisprudence’.<sup>124</sup>

In my view, the difficulty with this Waldronian approach is that, even assuming a rosy picture of how legislatures work, the representative system remains profoundly unattractive from a democratic perspective.<sup>125</sup> The problems affecting our legislatures do not merely depend on the bad faith, corruption or greediness of legislators. They derive from a plurality of sources (we have explored some of them), including the virtual absence of popular controls, which tends to alienate the people from ordinary politics. For these and other related reasons – the system has been designed for much simpler societies, composed of few, internally homogeneous groups – I would suggest that our present legislatures are structurally incapable of representing the multiplicity of views and voices existing in contemporary societies.<sup>126</sup> As a consequence, we – meaning those who are convinced about the merits of having an inclusive, deliberative democracy – have few reasons to celebrate

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*the Relationship Between Law & Politics* (Hart 2000); Tom Poole, ‘Legitimacy, Rights and Judicial Review’ (2005) 25 *Oxford Journal of Legal Studies* 4, 697.

<sup>119</sup> Tushnet 2004 (n 93) 2008 (n 12) 2009 (n 138); Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004), 23 *Supreme Court Law Review* 7; The Core of the Case Against Judicial Review’ (2009) 115 *Yale Law Journal* 1348. Also Waldron 1999 (n 30) 1999 (n 31)

<sup>120</sup> Waldron (n 30).

<sup>121</sup> This has been particularly so since *public choice theory* began to gain attraction within Law Schools. For public choice theory, see for example G Brennan & L Lomasky, *Democracy & Decision* (CUP 1997); James Buchanan, *The Limits of Liberty* (first published 1975, Liberty Fund 2000).

<sup>122</sup> Waldron (n 30) 2.

<sup>123</sup> Ibid.

<sup>124</sup> Ibid. For Mark Tushnet through ‘dialogic judicial review,’ we ‘advance the *value of democratic self-governance by leaving the final decision to the legislature*’. Tushnet (n 10) 212, emphasis added.

<sup>125</sup> To state this does not mean to say that Waldron or Tushnet refer to legislatures and to the people indistinctly (see, for example, Waldron 2012). But I do think that in part of their work this distinction is not sufficiently stressed, which may create confusions regarding the actual attractiveness of the alternatives they propose.

<sup>126</sup> I have explored other structural problems in Roberto Gargarella, ‘Full representation, deliberation, and impartiality’, in J. Elster (ed.), *Deliberative Democracy* (CUP 1998).

the changes that are seemingly taking place in contemporary constitutionalism. To be more precise: there is nothing particularly exciting in the fact of having contemporary constitutionalism slowly moving away from its traditional picture of pure judicial dominance and towards a different one, where legislatures prevail.

The problem I am referring to should be particularly clear for all those who have been criticizing judicial review because of its elitism; their homogeneous attitudes; their conservatism; their defence of 'private property and dislike of trade unions, [their] strong adherence to the maintenance of order, distaste for minority opinions, demonstrations and protests...'; etc.<sup>127</sup> In other words, for those who have been objecting to the 'politics of the judiciary' as a consequence of its profound elitism, the response should in no case be legislative elitism. And, of course – it should go without saying – our distrust of Congress or the Judiciary in no way speaks in favour of even less democratic alternatives, such as those based on Schmittian proposals for taking the Executive as the guardian of the political Constitution.<sup>128</sup>

Of course, there are democratic reasons that still, and in spite of all the existing institutional difficulties, may make us prefer legislative dominance to judicial dominance. However, the main point remains intact: for those of us who favour deliberative democracy, a system of legislative supremacy may be an improvement, but not a solution. As Karl Marx would have put it, self-government needs more than legislatures: it requires a different type of constitutional organization.<sup>129</sup>

This discouraging situation is what in the end explains why, even in the most promising cases, what we find are processes of elite discussion, mostly promoted by political or economic minorities, for their own benefit. This conclusion seems also applicable to the case of the Canadian Charter, which 'has commonly been seen as a revolution in the relationship between the Supreme Court and the legislatures',<sup>130</sup> and its notwithstanding clause – a clause that has been described as 'the Charter's homage to Parliamentary Democracy'.<sup>131</sup> David Beatty, for example, stated: '[for most people] rather than the democratic and progressive institution the theory described,' the new established process of judicial review appears 'as the very regressive and anti-democratic institution which the sceptics have always claimed it to be...In addition to its very anti-democratic underpinnings, it will appear to those starting a challenge that judicial review is very expensive and regressive as well... It is impossible not to notice how those who already do very well and enjoy considerable influence in our country's affairs...were quick to take advantage of the Charter'.<sup>132</sup> Even in this promising case, I would add, the people's voices appear either inaudible or subordinated to the desires of political or economic elites.<sup>133</sup>

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<sup>127</sup> John Griffith, 'The Political Constitution' (1979) 42 *The Modern Law Review* 1; Loughlin (n 132) 102.

<sup>128</sup> Dyzenhaus (n 132); Gargarella (n 74).

<sup>129</sup> For him, 'In democracy, the constitution, the law, the state itself, insofar as it is a political constitution, is only the self-determination of the people, and a particular content of the people. Karl Marx 'Contribution to the Critique of Hegel's *Philosophy of Right*,' in R. Tucker (ed.), *The Marx-Engels Reader* (first published 1843, Norton & Company 1978) 21.

<sup>130</sup> Kent Roach, 'Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures' (2001) 80 *La Revue du Barreau Canadien* 482.

<sup>131</sup> Peter Russell, 'The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy' (2007) *Policy Options*, February, 65.

<sup>132</sup> David Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Carswell 1990) 252-3. Also see his 'A Conservative's Court: The Politicization of the Law' (1991) 41

To take another example, think about the problems that followed the judicial decision in the famous *Mendoza* case, in Argentina.<sup>134</sup> *Mendoza*, as we know, represents one of the most remarkable cases of structural litigation and judicial dialogue in Latin America, even though many other examples deserve similar attention.<sup>135</sup>

Initiated in 2004, the case concerned damage stemming from the contamination of the Matanza-Riachuelo River, which passes through Buenos Aires. Several million people live alongside or near the river. The pollution resulted in massive violations of health and environmental rights. Numerous actors with different levels of authority shared responsibility for the problem, including the National Government, the Province of Buenos Aires, the City of Buenos Aires, and 44 private companies that had dumped hazardous waste into the river. In this context, and facing a situation of perennial political paralysis, the Court undertook to intervene, and it did so in an unexpected and original way. The Court convened a series of public audiences, to which all parties involved were invited.

The beginning of the case could not have been more spectacular. The Court recognized the structural nature of the case, refused to limit itself to the binary options of traditional judicial review (to either uphold or invalidate a statute), called open public audiences, and engaged in a frank conversation with executive authorities. In considering and revising the proposed clean-up plan, the Court enlisted the help of the public, NGOs, and university experts (rather than abstaining on grounds of lack of technical capacity). It helped to make previously unheard voices audible. However, the entire process has also been subjected to different and serious criticisms. For example, some legal experts described the clean-up process as ‘clearly top-down, exceedingly centralized’, which made the victims feel that ‘the judicial process’ was ‘closed to them, as it prevented their access to the basin authorities’.<sup>136</sup> In addition, the dialogic process was also undermined by some significant allegations of corruption.

There are many things to say about this process, but here I just want to mention a couple of them, related to what I called situations of legal alienation. My impression is that the process gained attraction because of its attempts to re-connect some of the most disadvantaged groups of society with the decision-making process. However, in the end the entire process turned to be much less attractive than expected, because it began to develop in the contrary direction. More specifically, the people began to realize that the process continued to be managed ‘from above,’ and that they had actually few chances to gain

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*University of Toronto Law Journal* 147. See also Allan Hutchinson, ‘Waiting for CORAF. Or the Beatification of the Charter’ (1991) 41 *University of Toronto Law Journal* 358. See also A Hutchinson & A Petter, ‘Private Rights/Public Wrongs. The Liberal Lie of the Charter’ (1988) 38 *University of Toronto Law Journal* 278.

<sup>133</sup> Andrew Petter made a similar point, concerning the way in which so-called democratic dialogue tends to become an elite dialogue, Petter (n 12) 13.

<sup>134</sup> A well-supported and very pessimistic approach to the Brazilian case, in Octavio Ferraz, ‘Harming the Poor Through Social Rights Litigation: Lessons from Brazil’ (2011) 89 *Texas Law Review* 1643.

<sup>135</sup> These include *Verbtsky*, *Horacio s/ habeas corpus*, decided by Argentina’s Supreme Court (2005)(concerning prisoners’ rights); and many decisions of the Constitutional Court of Colombia including *Sentencia* T-847 (2000)( prisoners’ rights); *Sentencia* T-590 (1998)(concerning state-protection of human rights advocates under threat); and *Sentencia* T-025 (2004) (concerning the situation of internally displaced persons). See Courtis (n 28).

<sup>136</sup> Mariela Puga, ‘Litigio y cambio social en Argentina y Colombia,’ (CLACSO, Serie Digital 2012) 93. A more optimistic approach in Bergallo (n 2).



control over it. I am not claiming that the process was a failure (it was not), or that the Court coordinated it in bad faith (which is not true). What I am saying, instead, is that, given that the institutional system has not been improved, problems related to its elitist features (i.e., ‘top-down’ directives, difficulties to ensure popular controls; hyper-centralization of power) should not come as a surprise.

## Conclusions

At the beginning of this article, I justified the excitement with which many scholars, like me, received the development of dialogic constitutionalism, through two main and related reasons. On the one hand, we presupposed that this development would bring about interesting and democratic improvements, concerning the traditional system of judicial review. Mainly, we assumed, these dialogic changes would help us (“We, the people”) to regain a central role in the process of constitutional interpretation. On the other hand, we also assumed that these dialogic devices would foster democratic deliberation, thus reducing the influence of interest-groups politics. In other words, we assumed that these new instruments would help deliberative democracy gain force and presence *vis a vis* other less attractive conceptions of democracy, such as democratic pluralism.

Now, in the conclusion of this analysis, I must say that the picture looks gloomier than imagined. In most countries – and most notably in Latin American countries – we have significantly renovated and reinvigorated our commitment to rights, while keeping the core of our institutional system, this is to say the mechanism of checks and balances, fundamentally unchanged. As a consequence, many of the old vices and elitist features of the system are still in place, while many of the promises of dialogic constitutionalism (particularly in what concerns the enforcement of social rights) appear to be still too dependent on the good will and discretion of those in charge of promoting it.

These unfortunate circumstances mostly affect countries that have not introduced any formal changes to their constitutional organization, so as to facilitate dialogue – Latin American countries in particular, given that most of them still retain a hyper-centralized institutional system. However, I should say that things do not look substantially different if we focus our attention on the *New Commonwealth Model of Constitutionalism*, where attractive and formal institutional changes were actually adopted. And this is so because – everywhere – the representative system seems to have become in control of a political elite and also increasingly subject to the demands and pressures of interest groups. ‘We the people’ still remain outside of the Constitution, fundamentally incapable of managing and controlling our own public affairs.

Now, my worries about the perceived limits of dialogic constitutionalism should not be taken as a defence of the institutional status quo. This prevalent system causes the institutional problems that dialogic constitutionalism has been trying to overcome without much success. We need to replace a system of checks and balances that obstructs rather than promotes public collective dialogue; and we need to transform this institutional system that has become prey of political and economic elites. In the face of these challenges, the modest improvements offered by the new dialogic model of constitutionalism can be celebrated as small steps in the right direction. They are, however, small steps that require some revision and some substantial improvements.

The required changes are neither utopian in nature, nor impossible to imagine. Democratic theory is there to come in our help, and so it is the accumulated comparative experience, with its failures and its achievements. The main goal to be achieved is still clear: we need to make our constitutional systems more hospitable to our democratic priorities. In other words, we need to finally bring 'We the people' back into the Constitution.