CURRENT DEBATES ON JUDICIAL REVIEW AND DEMOCRACY: A CONVERSATION BETWEEN PROFESSORS ROBERTO GARGARELLA AND JEREMY WALDRON*

Roberto Gargarella: Thanks to the organizers, and to Professor Waldron for accepting the invitation. It is a great honor to be here having this discussion with you. In a way, I feel like I'm representing my region because your work has been very influential there, and we have been discussing and thinking about your books and articles for many years.

I want to present a theory I'm working on, which I call *The Law as A Conversation Among Equals*. I have been developing this theory through a dialogue with many authors and, of course, the most prominent one is probably Jeremy Waldron. Although I, like many others, agree on most of the things he said on his critique of judicial review, I also have some disagreements.

The theory has three different features: *i.* a majoritarian core, *ii.* a deliberative component, and *iii.* a concern regarding inclusiveness. I have been working on these issues for more than 30 years, and I consider that my ideas have been evolving through dialogue, from the periphery, with what has been produced at the "center", in the Anglo-American discussions. I wanted to make a brief reference to that evolution because I think that it shows how the discussion on judicial review developed. I will present the evolution of this discussion, linked to the evolution of my own position on the matter, in three stages.

In the background of the development that I will describe there is always, beating, a concern about democracy, a suspicion linked to what Roberto Unger called (in a text quoted by Professor Waldron in his book *Law and Disagreement*) "the dirty little secret of contemporary jurisprudence". The "secret" is that the law, from its origins, tended not to get along with democracy, and expressed a discomfort with it. My theory is very much concerned about this discomfort with democracy.

So, I begin with the first stage. My initial approach to this topic was at a time when I was —and I published a book on that in 1991— a very harsh critic of judicial review, based on

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the adoption of a very strong majoritarian view. At that time, I was working with Carlos Nino, and I was very much influenced by the work of some critical legal scholars and also by academics like Bruce Ackerman. I was fascinated by some of the discussions in the early revolutionary period here in the United States. In particular, I was attracted by Pennsylvania's Constitution of 1776, which is —in my opinion— an excellent example of what I assume was a majoritarian understanding of the law. Pennsylvania's experience, among others, proved that —already at that time— it was possible to show concern for rights, concern for the Rule of Law, but at the same time not to give up a majoritarian commitment. In this sense, I sought to make a right-based critique of judicial review, being respectful of the Rule of Law without emptying its democratic content. I tried to defend that majoritarian view and, at the same time, be concerned about rights.

At that time, I was dazzled by these kinds of examples and authors, and a little later, I came to know —unfortunately, I had already written my book on the topic— in 1993 your article *A Right-Based Critique* [*of Constitutional Rights*] and then, of course, your work *Law and Disagreement*. At that time, many of us, in different countries —and I'm sorry to generalize—, shared with you this harsher critique of judicial review. For example, when you [Waldron] published your work *Law and Disagreement*, Mark Tushnet was working on the book *Taking the Constitution Away from the Court*. I mean, approximately at the same period of time and from different places, many people had agreed on a criticism of judicial review that was similar to yours. In any case, you [Waldron] presented such criticism in its best light by a revindication of the principle of equality, showing a firm concern for rights, and defending the right to participation as the right of rights. Also, we agree with you on, and take up from you, your very strong claims about the offensive —or even insulting— character of judicial review. Personally, I tend to agree with you in all these points, as well as in your approach to the dignity of legislation. At that time, many of us —from the periphery— shared that very harsh critique against judicial review. In my case, my critique was based on a very strong majoritarian approach to democracy.

I shall now turn, as I anticipated, to the second period of the debate. In this second period, my studies on judicial review appeared to be more directly impacted by other theoretical issues, in particular, the ones related to democratic theory, and —specifically— with the deliberative conception of democracy. At that time, clearly, I was very much influenced by Carlos Nino, with whom I worked for ten years. From that period, I remember, in particular,

how I was shocked by decisions like "Grootboom"[1] in South Africa. Such a decision showed that it was possible for a Court to intervene in a case involving basic and fundamental rights of disadvantaged people, and to do it in a way that honors the commitment with a strong conception of democracy. Many of us were attracted by this possibility. Just as a footnote, I want to mention that Professor [Cass] Sunstein, who was my supervisor in Chicago, had written (he wrote a lot of things!) in 1993 an article called *Against Positive Rights* —in which he expressed his opposition to the judicialization of social rights—, and then, the year when "Grootboom" was decided, he wrote a new article where he gave up his previous position. In his new work, he argued that from the "Grootboom" case we are learning something new, something important: that the Court can make an active intervention in the enforcement of social rights in ways that are consistent with democracy. And I would add, in ways that are consistent with deliberative democracy.

Of course, before "Grootboom" there were some interesting decisions, oriented in a similar direction, particularly (in the case of Latin America) in the Constitutional Court in Colombia. But let me give you another example which for many of us in Latin America was more interesting, this time in Argentina —the "Mendoza"[2] case— which offers an interesting answer for the problem, in the same style.

I don't want to sound parochial or localistic, but I just want to say something more about the "Mendoza" case, from my country, because I learned a lot from that case. I am not sure if you know it, but "Mendoza" was a case of a polluted river (the "Riachuelo", which bathes the shores of Buenos Aires) that affected with its pollution more than one million people —this is a case of what we call "structural litigation". All national, provincial, and local authorities were involved. Many people were affected and many of these people were in a vulnerable situation. And the Court —I think, as usual, for the bad reasons because they just wanted to gain legitimacy— opened up an extensive process of public hearings, sustained over time. The Court then called the representatives of the political branches, the representatives of the corporations who had been polluting the river, and the representatives of disadvantaged groups. At least in the beginning, this decision was fantastic and there are reasons to say that. The Court held these public hearings in a case in which traditional politics did not want to intervene —basically, because some politicians had agreements or businesses with the corporations. At the time, different levels of the Judiciary had refrained from deciding on the

1. Constitutional Court of South Africa, "Grootboom", 04/11/2000.

2. CSJN, "Mendoza", 08/07/2008.

case by saying: "There are democratic reasons why we cannot interfere. This demands budgetary changes, for which we have neither democratic legitimacy nor technical skills to make".

Those answers were not what many of us were asking for. For a long time, we had been advocating for what we call a more dialogic approach to these cases, believing that many things could be done with that. In Argentina, however, in the legal community people treated Nino (the main exponent of this deliberative approach in the country) as a lunatic. They told him: "You don't understand anything, you are crazy. You are just a philosopher, go back to your place". Suddenly, however, the Court made a decision following that dialogic approach and using Nino as one of the theoretical references. In all aspects, it was a complete success! That decision was totally attractive for political and social movements, political authorities, and people in general. The legal community said: "Oh! This was possible". It was possible to call for a public hearing, to call all the different members of the community and political authorities to start a process that was fully respectful of the democratic dignity of legislatures. The Court stated: "The political branches are the ones that ultimately have to make a decision here, but we are going to ensure that they make it. We are going to monitor how this decision is elaborated, but in the end, they must decide on the substance. Bring here a plan, and then we are going to discuss it and you —political representatives— will ultimately determine what to do according to the budget you have and your possibilities". Such an outcome was, for many of us, spectacular.

For different reasons, the decision did not evolve in the nicest way (the river is now cleaner, health care has improved, but pollution remains), but that was —and still is— an incredibly important example. So, in the same way "Grootboom" made a difference in the international legal community, for many of us in Argentina, decisions like "Mendoza" did as well. These kinds of examples were showing that it was possible to deal with very difficult cases with judicial intervention and without affecting democracy. Not only that, but also helping democracy and helping deliberative democracy as well.

While we were doing this from the periphery, from the center you wrote *The Core of the Case* [*Against Judicial Review*] and other works on the issue, such as *Five to Four: Why Do Bare Majorities Rule on Courts?*, offering important clarifications in relation to what had been your initial approach. In the same way, for example, Mark Tushnet modified at that time —at least partially— his approach to the subject. At least, in relation to the book he had published in 2000, *Taking the Constitution Away from the Court*. In 2008, Tushnet published *Weak Courts, Strong Rights,* proving that even those who were the most radical critics of

judicial review understood that there was room for doing something different, less confrontational, or extreme against judicial review.

There are many reasons to explain this progressive change. One of these reasons has to do with a distinction presented by some authors aligned with what has been called "popular constitutionalism". The distinction I am referring to is the one that separates the "last word" from "judicial supremacy". We were against judicial supremacy, but not necessarily against judicial review —if it is a judicial review that does not intend to keep for itself the "last word". In that sense, articles like *The Core of the Case* [*Against Judicial Review*] and then *Five to Four* reveal your change of perspective, as Tushnet also did in *Taking the Constitution Away from the Courts* and *Weak Courts, Strong Rights.* These examples show that we are before a new paradigm, and they help us to think that there is room to approach these issues in a way that is different from the traditional one.

I mostly agreed with your view [Waldron's] at this point. However, I noticed a significant difference between our approaches in your article *Deliberation, Disagreement, and Voting*, in the book *Deliberative Democracy and Human Rights* (a book in honor of Carlos Nino), in which you emphasized the value of collective decisions through voting, de-emphasizing the centrality of deliberation. In this regard, you said something similar to this: "There are people who have been writing about deliberative democracy as if it was not necessary to make a political decision at one point, and that's completely unacceptable". I completely agree with that. However, I think that this consideration hides a difference that is bigger with the approach of democratic deliberation.

Let me go to the third and last period, which is where I want to focus on a little bit more, because it is where my view differs more from what you have been writing. But first I will summarize what I have said. At the beginning, I had a more majoritarian approach, in line with what you had been writing; in the second period, I was more concerned about deliberative democracy and its implications for judicial review; and in this third period, my main concern was —and still is— social inclusion. It is about emphasizing in a special way a different element, that is part of the democratic theory that I have always defended, that is essentially grounded on inclusion and deliberation. So I consider myself insisting on an approach of democracy that —as Jürgen Habermas maintained— demands a discussion among all those potentially affected. Therefore, in this last period, I find myself with this renewed concern, which I think has to do with the academic and political context of the time. In the last few years, many people have started to write about democratic backsliding, democratic fatigue.

This idea of discomfort with the way democracy works is something that also began to be more present in my work.

To put it briefly, in the last few years I have been very interested in the new developments linked with what we could call "deliberative assemblies", like those found in Australia, British Columbia and Ontario in Canada, Ireland, Iceland, Holland, now France and Argentina. In these cases, through these new "deliberative assemblies" I found something interesting. Just to give an example: in Canada, in British Columbia and Ontario, "deliberative inclusive assemblies" composed of people selected by lot decided, after weeks of discussions, on a complex issue which was the "electoral system". First, there were those who said: "Well, people are not motivated to discuss these very complex issues". But they were actually proven wrong, people can be totally motivated to participate. Second, there were people saying: "Well, this is an extremely technical issue and people are rational or irrational ignorants, so what they say is not important". But reality showed that after a few weeks, those involved in the discussion became experts on those topics and —in the last stated cases— even came up with very interesting and complete projects related to a new electoral system. In the same way, there were those who said that "people cannot change their point of view". But this type of statement, too, ended up being completely false: it became clear that people could perfectly change their opinion.

Another incredibly interesting example is the discussion that took place in Ireland about abortion. I also want to mention the Argentinian case, with which a parallel can be drawn. I think there are many lessons to learn from those experiences. Just one observation about the Argentinian example on abortion. Argentina, for me, is —in institutional terms— a mess [laughs]. I am Argentinian and I am hyper critical, skeptical, and pessimistic about our political-institutional situation. However, last year we had this discussion on abortion, and, for many reasons, I found it exceptional. We had people discussing the subject in the streets, clubs and bars, people writing articles, giving conferences at schools. I went to many schools: fifteen and sixteen-year-old kids knew the law and the international treaties better than I did. I couldn't believe the power of their arguments. Then we had public hearings in Congress, where we listened to the testimonies of women, adolescents, and kids who had been raped and who had not been allowed to have an abortion. It was a quite well-organized procedure that shed light on many issues that hadn't been discussed until that moment. I could keep commenting on those details for a while, because there are so many things to say, but I will focus only on a few issues.

In the first place, both for Argentina and for Ireland, it could be said —again—: "Deliberation? In this country, we don't care about deliberation". But we saw that this wasn't true: people deliberated about the issue because they were interested in it, and they were even willing to change their minds. Second, someone could have said: "Well, let's leave the discussion to those who know about the topic". But this isn't true, and luckily it didn't happen. In fact, we learned a lot from those who weren't experts, allowing us to reach a more impartial decision. Third, even though both Argentina and Ireland are catholic countries where the Church is incredibly powerful, the testimonies of the speakers left a strong message which led many people to change or moderate their positions, despite their religious beliefs. This morning, I was talking to my friend Adam Przeworski —whom I admire greatly— who kept this view for so many years (and now says that I'm starting to convince him): "When your interests or identity are involved, what's the point of deliberation? No one is going to change their mind". This is totally false! Look at Ireland, people changed their views from one day to the other or in a few weeks, after listening to certain testimonies. You can live in a catholic country, with a Catholic Church with a lot of power, and deal with a subject as complex and divisive as abortion, and still change or moderate your opinion, after a period of discussion. So, we must learn a lot from this. From my perspective, these examples open a new paradigm to reflect on. There is something very important in those examples. I may come back to them in a moment but let me, for the time being, move on more directly to discuss some aspects of your work that I disagree with.

In 2016, you published *Political Political Theory*, a book that I find fascinating in many respects. I completely agree with you that political theory should not be studied as a branch of ethics; I agree with the Aristotelian approach to the wisdom of the multitude; I agree with your concern for legislative procedures, deliberation, the structure of debate that should include all the opinions and interests; I also agree with your critic of constitutional interpretation and of the way presidentialism has evolved. But for the first time I found myself disagreeing with some important points of your work, which had to do with what I mentioned before.

There is one important quote in your book that I want to mention. When I read it, in fact, I thought you had written this for me —or against me— [laughs]. I thought: "Okay, he is talking to me". You wrote on page 135 of *Political Political Theory*: "People have assumed from my own work on judicial review, based as it is on principles of democratic legitimacy and political equality, that I, too, must favor the people themselves voting directly as equals on the laws that are to govern them. It is sometimes said that if a democrat accepts anything short of that —any form of indirectness or representation— then they have effectively given the game

away because both representative authority and judicial authority involve the exercise of political power at some remove from the participation of ordinary citizens from participating. All this, in my view, is wrong, at least as far as legislation is concerned". And then one crucial point of the paragraph. You say: "Legislation is a function for which representation, rather than direct participatory choice, is the better democratic alternative". With this I have a very serious problem. I see a view that I admire but I also disagree with. Just like you, James Madison famously wrote in Federalist nº 10: "It may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves". More closely, there is the view of a very good friend, Nadia Urbinati, on representation which you quote. After referring to her, you say: "The abstraction that representation involves is particularly appropriate for lawmaking, which is a domain in which we are striving to produce abstract norms, abstract in the sense of *general*, rather than directives focused on some particular person or situation". I have strong disagreements with this view. Therefore, given that today I have this opportunity, I would like to hear your thoughts about how different our positions are regarding a view which I have been trying to develop in terms of an open, inclusive dialogue. So, let me add some comments on why I have a problem with this approach.

First, I would like to invoke the same critical perspective you use when talking about those who compare the rosy picture of the Judiciary and the craziness of the legislation. In a certain way, and from the references you take, I see that you end up doing the same thing that you criticize, now applied against the more direct approaches to democracy. What I mean to say is that you now compare representation in its best light with the worse version of direct democracy. And I think that the comparison should not be made in this way.

Second, we should not take direct democracy as the only relevant alternative to representation. I am totally against referendums and plebiscites —at least in the ways that these options are usually organized by those in power— when what matters to us is a democratic and inclusive discussion. So, we do not have to say that the only alternative to representation is direct democracy, particularly if we think (as examples of improper popular consultations) in direct consultation processes such as those that usually take place in California, or like those that were carried out recently in England, with Brexit, or in Colombia, with the peace agreement. We can criticize those examples of direct democracy while, at the same time, denounce the kind of representative democracies we have.

Third, I would like to mention something related to the abstraction that is typical of the process of law making. Take for example, the case I just mentioned about British Columbia

and Ontario. Remember what happened there. Until the arrival of citizens' assemblies, legislators had the power to create a new electoral system whenever they wanted and the way they wanted —as expected, never against their own interests. Therefore, and in order to put an end to the possibility of representatives deciding on behalf of all, but for their own benefit, the people decided to take this power away from them and put it elsewhere: "The legislators themselves (who are the ones who can benefit from such measures) should not be the ones to decide on the electoral system".

Let me give another brief example on how to understand representation. I really like the example that you give —and its lesson— of Aristotle and the wisdom of the multitude. But I tend to be, in this point, more in line —and I don't think you would disagree— with John Stuart Mill, when he says: "Every single person is the best judge of his/her own interests". I think that here lies the core of our disagreement because, due to common sense, nobody else is going to take myself as seriously as I do and understand what happens to me in connection with these public policies as well as I do. Every single voice is important, and if we miss one voice, we end up missing a relevant aspect of representation. And I think that this is where we find ourselves disagreeing.

Take this example. We are in a seminar outside the law school, in a private space, or in someone's house. We are five hundred people, and we are going to decide whether it is possible or not to smoke inside. Four hundred and ninety-nine of us are desperate for a smoke, but one single person has breathing problems, and if we start smoking, he/she has to abandon the seminar —which is two hours long. We may have a wonderful representative system to make this decision, but when there are voices that are ignored —even when it is one single voice—, we can lose something important, something crucial. In this case, let's imagine that the only voice that we can't hear is that of someone with respiratory problems. Many of us would be ashamed to make a decision (to permit smoking during the seminar) which could seriously harm another person. It's absolutely necessary to listen even —maybe, more so— to this single voice.

The problem with representation increases in multicultural societies like ours, where agreement is more difficult, and where we disagree on many fundamental issues. Representation —in these cases— is always a second best and is —I would add— a very bad one. I would like to see how far your argument goes, because I think there are many reasons to defend a different approach, which is more aligned with what I call *A Conversation Among Equals*.

We are in a stage where we need to be more careful about how we understand democracy. After the Second World War, and after the Vietnam War, we were very concerned about rights, which is very good. However, today I would say that, in the same way, we need to think more about democracy: our main problem today has to do, at least in a special way, with democracy, rather than with rights. In this regard, you insist on the difference between representative and non-representative democracy, to take sides with the former as a "preferred option". I believe that in that point there is an important difference, which later impacts on how we end up thinking about the institutional system in general and on judicial review in particular. Thanks.

Jeremy Waldron: It is an honor for me to be at the same table as Professor Gargarella and to engage with him on these issues. I wanted to thank those who set the whole thing up, but above all, I thank Roberto for the depth and detail of his engagement. He has long been one of the most articulate and interesting voices raised not only in the debate on judicial review, but on the elaboration of the idea of political dialogue. I think what has come from his work has been in many ways much better than what has come from the ground zero of the dialogic theory, which is Canada. I have problems with the dialogue theory that I'll talk about, but while reading his work the engagement was always fruitful and I learned a tremendous amount and that's the important thing about dialogue.

I am going to talk in no particular order about an array of the issues that Roberto raised. First, I'll like to say a few words about the rhetoric of the center and periphery: because if Roberto comes from the "periphery then I come from the "periphery" as well. I come from New Zealand, which is even further away!

Every so often I run into friends who defend judicial review and point me out to the case of New Zealand. I ran into Bruce Ackerman a few months ago, and he said: "Oh yeah, you are still arguing that New Zealand's Constitution should be adopted as a model for the entire world". And I said: "No!". In fact, I am on record, I'm denouncing New Zealand's Constitution in various ways, because they legislate too quickly, they have a single chamber legislature, and they don't take the time and effort required for representative legislation. I will talk about this issue of representation in a few minutes.

I don't disagree with the use of referenda in all matters. I think the Brexit result was troubling, but if Britain wants to be taken out of the European Union, it will have to have been through a referendum. There could not have been another method of making such a fundamental change to the contours of the political system. Similarly, if Scotland were to leave the United Kingdom, it would have to be pursued through a referendum. There is an explicit

provision in the British Constitution, as you know, that if Northern Ireland is to leave the United Kingdom, it should be pursued through a referendum. Those sorts of differences can't be made by any other means. Whether we should use referendums as devices for deciding about abortion and so on, I don't know.

When I was growing up in New Zealand, the country had been through a period of prohibition. Actually, not when I was growing up the period of prohibition was in the 1920-30, and it was a liquor prohibition. Various counties went wet, various counties stayed dry, and some counties had state control of the liquor industry, like the sort you find in Ontario. Every general election, there was a recurring referendum on whether you wanted your county to be dry, wet, or state controlled. Nobody was interested in this anymore, so people would write letters to the newspapers, saying: "Why don't we treat the liquor referendum as a referendum on the legalization of marihuana?" Someone else would say: "Never mind that, why don't we treat it as a referendum on abortion?" And then somebody would propose something different, and they would code the options in the liquor referendum to map them into the options in the abortion debate. And the result was that counties went in and out of the prohibition in a sort of deliriously random manner depending on the patterns of voting that would emerge, so the whole thing can become very crazy after a while.

Let's talk about the fundamental issues with judicial review, and then go into some of these really important detailed questions that Roberto has raised. The fundamental issue is that every society has to make major decisions on what I think of as watershed issues. Abortion is one, affirmative actions is another, basics of criminal justice, immigration, capital punishment, same-sex marriage, religious freedoms, and so on. There is a whole array of 50 or 60 of such issues, and on these issues, there are well defined and well understood options. There are passionate arguments put forward in good faith by the advocates on all sides. These are not just technical issues of legal decision; these are major issues of public policy and principle. If a country has any sort of Bill of Rights at all, stated in the abstract way that Bill of Rights tend to be stated, it won't be hard to map an argument from the Bill of Rights onto these issues. Whether it's about equal protection or about some ordered liberty, or whatever. So, it's not silly to think that the Bill of Rights has a bearing on these issues, but it's also not silly to think that the Bill of Rights doesn't dictate concrete results for these issues. And it seems to me that on these issues we all divide into majorities and minorities. Ordinary people do, legislators do, and judges do. This is one of the things I wanted to stress on that paper in the Carlos Nino volume, which is that judges disagree on these matters as much as anybody else. When

decisions have to be made, whoever has to make them, we have to do something like eventually counting heads.

We can deliberate until the end of time and deliberation may well change some people's minds, may change people's minds in both directions, but usually the end process of deliberation is nevertheless still some sort of division and then some sort of necessity for something like a vote. So, courts deliberate, their members disagree, and they have to vote: five to four on some issue. In parliaments, legislators deliberate, and their membership has to vote on these issues. The people, when these issues are given to the people, deliberate, and they have to vote. And so, the real question seems to me is not whether majorities should rule, but majorities of who or whom. Who should be the constituency of which the majority rules? The constituency of nine justices, the constituency of six or seven hundred elected legislators, or the constituency of the entire people voting in a referendum? I thought, generally speaking, that there is some problem since we are just counting heads and since every constituency is divided on these issues along very similar lines. If it is just a matter of counting heads, why prefer counting heads among the judges to counting heads among the elected legislators? That is the general shape of the worry that I have.

I think the arguments are familiar at every level, everybody understands them. They may not understand the technical details or the precedents, but as Mark Tushnet has argued quite powerfully, it is not altogether clear that we do better on these issues by obsessing about precedents and interpretations, than actually confronting the merits themselves. I often use in my work on these matters the difference between the reasoning in "Roe v. Wade"[3] —which is a great abortion decision in 1973— and the reasoning and deliberation of the British Parliament in 1967, when they enacted the Medical Termination of Pregnancy Act, which liberalized abortion law in the United Kingdom.

In "Roe v. Wade", if you actually look at it and if you are honest about what you see, you will see an awful lot about interpretation methods, you will see an awful lot about precedents, and you will see a paragraph and a half on the fundamental issue. It was not the same situation as the one of the British Parliament. The second reading debate of the British Medical Termination of Pregnancy Bill is about 250 pages of debate on the issues; on nothing else but the issues, on the diverse array of issues related to abortion. Sometimes with representatives giving eloquent testimony of the predicament of the sort of people who, on Roberto's account, could also speak for themselves in a very inclusive process. But one way

3. SCOTUS, "Roe v. Wade", 22/01/1973.

or another, their voices were heard: talking about the merits of the pro-life position, talking about the merits of a pro-choice position, or talking about the merits of an array of positions in between. And that became apparent in the British debate in 1967. I know those were happier times than the sort of savage nonsense that we see in the legislators these days. But there, the pro-life people began to see where the wind was blowing on the debate, and if the house divided, that the majority would vote for liberalization of the law. And one by one, the various spokespeople for the pro-life faction stood up and started to thank their opponents for the respectful ways in which their views had been listened to and responded to in the British debates, and they said it was a privilege to engage in this deliberation and so on.

I have never heard any pro-life person say that about the so-called deliberation in the Supreme Court of the United States on the issue of abortion. So, the kind of difference between that respectful gratitude, in relation to a deliberative process happening in a parliament, in a grubby nest of self-interests as we accustomed to regarding parliaments, as opposed for the savage fury with which people regard the decision in the Court is something that is worth bearing in mind.

It's worth bearing in mind also, and I immediately acknowledge this, that Roberto said that we have to be disciplined in our thinking on these matters, and compare like with like, and compare good examples of one with good examples of the other, as well as bad examples of one with bad examples of the other. I accept that. I think it's a powerful point in relation to some of the sneaky tactics I have sometimes employed in this debate.

I do think deliberation is tremendously important and I think you will agree with me that it's important that deliberation should not be treated as a seminar like this. Not that this is a particularly inclusive debate, you guys need to sit quietly and listen for an hour as we talk on and on. But it is important that deliberation on these important issues not be not entirely divorced from consideration of the interests that are at stake. Those interests cannot be relied on to speak for themselves unless they are either properly represented, or one way or another properly present.

As Roberto said, we learned from John Stuart Mill and his arguments about democracy that interests need to be in some sense presented by those who understand them and can advocate for them. It's not enough just to have the main philosophical positions sitting up. We need to have people who bear the brunt of whatever laws are being contemplated or whatever laws are being reformed to state their position. And this notion that there is a contrast between interest-based politics and deliberative politics is a mistake. We need both to be integrated together. Just as I think it's a mistake to contrast deliberative politics with majoritarian politics

because —as I said a moment ago— eventually you are going to have all the deliberation that you like, but in the normal course of human events those who change their minds will probably be matched by others changing their minds on the opposite direction. People will either entrench their positions, or moderate or reverse their positions. However, given the circumstances of human life, given what John Rawls called "the burdens of judgment", it's not to be expected that we are going to reach easy consensus on these issues. These views are not defying consensus simply because people haven't thought hard enough about them.

The harder people think about these issues the more you get some degree of agreement emerging, and the more you get some further degree of disagreement emerging, and yet we have to make decisions in these matters; which means, as I said in the Carlos Nino volume (and I am a great admirer of his), that we have to have a notion of deliberation that dovetails not only with the consideration of interests but also with the preparation for voting. It can't be that we regard it as the antithesis of voting, there has to be a sort of natural leading. Just as when we go to court, we anticipate there will eventually be voting among the justices, and that affects the way in which you make your arguments.

Just one last point on the business of deliberative versus interest-based politics. Deliberative politics addresses principles, but on most political issues the principles that matter are the principles that instruct us to take certain interests into account, or to give certain weights to certain interests. That's what good principles do in something as practically important as politics. Deliberative democracy is, in one way or another, something we need to set up. I know we are straying a lot from judicial review, but the overlap between the discussion of judicial review and this discussion of deliberative democracy is what Roberto has written about dialogue, and about the image of dialogue that might be involved in judicial interventions in politics. It is true that maybe I constructed this straw man of judges coming clumsily into the middle of the political debate, knocking over anything that isn't nailed to the floor, and announcing —on the basis of their tenuous majoritarian reasoning of five to four— what the outcome of the process is supposed to be. And Roberto said that there may be some cases that conform to that paradigm but surely we should respect the experimentation that has been happening in Colombia, in Argentinian politics, in Canada, in various countries around the world where there is a much more complicated and nuanced relation between courts and legislators. I just admire that. I think it is absolutely right to consider this relation and it would be appropriate for us to consider how weak forms of judicial review facilitate such dialogue.

You know the weak form of judicial review is the form in which the courts are not empowered to strike down legislation with the blow of a karate chop, but are empowered to

make a public proclamation of the difficulty in reconciling the statute under consideration with the Bill of Rights. So, the Court announces —in British language— a declaration of incompatibility between the statute and the Bill of Rights. And that announcement is made public just like any other judicial order, but it does not have the effect of striking down the statute. Although it may, in the British scheme, open up or facilitate provisions for a fast-track process if that is what the parliamentarians want to do. In my understanding, when the judges give their reasons for the declaration of incompatibility, they are telling us something like: "Look we are sounding an alarm here, and we want the legislators to listen to this, take it seriously and take a second look at the statute". Then, when they take a second look, it is possible that the legislators will make a change or maybe they won't. Maybe the legislators will give a response to the courts that says: "You misunderstood what we were trying to do, what we think is at stake here". That is interesting because it's a dialogue between branches where the ultimate power of the branches is slightly reversed. In the strong systems of judicial review that Roberto has considered, the ultimate power seems to reside in the courts. Ultimately, it is their majority, and not the majorities in the Legislature, that will prevail.

In weak forms of judicial review, the same dialogue happens, but the legislators have the final say. Obviously, there would be some ideal of equality here for dialogue between parties that treat one another as equals. Actually, I am not really sure about that because equality is a wonderful thing, but not equality among everything. I don't think that we want to say that the Legislature and the Judiciary are co-equal branches. They are branches that have co-equal standing for certain purposes, mostly the issue of their equality or inequality doesn't arise; each has its own job to do, and in that job, they are equally entitled to do their work. If somebody were to say that in Great Britain the two Houses of Parliament —the House of Commons and the House of Lords— should be regarded as equals, I would say: "This is nonsense!". One is an elected Chamber, the other is full of congenital aristocrats, bishops, and a few unelected, superannuated, and unappointed party-heads. The Constitution doesn't recognize their equality, the House of Commons can get its way in any dispute under the Parliament Act, and the Lords themselves recognize their inequality. In the last resort, the opinion of the elected Chamber has to prevail. There is still an interesting dialogue between them. Although dialogue takes place in all bicameral systems, this is a form in which ultimately the House of Commons may have the last word even if the House of Lords speaks very eloquently.

But what I miss most, and I think this is where there is disagreement, is when we talk about dialogue between the branches. I went to a traditional grammar school in New Zealand —Southlands Boys High School is the name of it— and it was organized along very traditional

lines with the headmaster at the top. And the headmaster would set up a school council and we would have meetings and consider some issues facing the school. He would advise us about what he wanted us to decide and occasionally we would come up with slightly more rebellious options and he would carefully explain to us why these were hopeless and why we couldn't do that. So, we would go back and try something else, and he would send the deputy headmaster to explain to us that there was no money for that, and so on. Was this one wonderfully elevated form of dialogue? It wasn't really dialogue, it was a back and forth of some sort. In much of the so-called dialogues that I have seen in this literature, including many of the cases that Roberto has talked about in his wonderful article *'We the People' Outside of the Constitution: The Dialogical Model of Constitutionalism and the System of Checks and Balances*, the dialogue involves the Court saying: "This piece of legislation that you have passed is no good, and here is why". And the people through their representatives saying in a shame face: "Okay we will try something else, is this any better?". And the Court saying: "No, go and try again", and they keep going.

And this is what happened in Canada with the prisoners' voting rights for example. It's not a dialogue in which the Court ever says: "Oh, now we see what you are trying to get here, now we understand that you have a view of the Constitution that is somewhat different from ours, and that we have something to learn from you". Both in this country [United States] and in Canada, by and large as far as I can see, and probably in many of the cases that Roberto was talking about, there was never that willingness on the part of the courts to take as well as give, in the give and take of dialogue. And sometimes it's important for courts to understand that they don't have a monopoly of constitutional wisdom and that they may have something to learn from what the results have been on deliberation and voting among the people. Particularly the people in a Chamber where there is actually some chance that all interests will be listened to. Since I have the air for the moment, I would like to ask you what you thought about requiring the courts sometimes to listen and learn as well, instead of just simply instructing and disciplining the legislators.

I have a case to offer on this, that I can bring just to make it a little bit more concrete. Do you remember "Employment Division v. Smith"?[4] It is about a guy who is fired from his job for using peyote. His job was being a narcotics counselor, so it wasn't an entirely unjustified firing [laughs]. But he was Native American, and it was part of a Native American religion to make use of these substances as a form of sacramental narcosis. He claimed that there was a

4. SCOTUS, "Employment Division, Department of Human Resources of Oregon v. Smith", 17/04/1990.

First Amendment issue about his freedom of religion. The Supreme Court upheld the decision of the relevant authority in Oregon, saying that the First Amendment should not be interpreted in that way. The narcotics laws are not aimed at religion, not intending to disqualify religion; it's true it had an impact on his religion, but merely having an impact wasn't enough to trigger the demand for strict scrutiny. So, Mr. Smith lost his job and his unemployment benefits, for he is voluntarily unemployed. Congress reacted furiously, quickly, decisively, and almost unanimously by enacting the Religious Freedom Restoration Act, clause one of which said that the Supreme Court were wrong about this, and that they should have preferred their earlier decision in "Sherbert v. Verner".[5] So, section one: they were wrong. Section two: if they are so smart why aren't they rich? [laughs]. And section three: we hereby enact that strict scrutiny will be triggered by any type of impact on religion, and not just by an intended impact on religion. The Religious Freedom Restoration Act was passed by an overwhelming majority, and it represents a different view of the First Amendment than the one the Court had adopted.

Go forward a year or two and there is a new controversy that flared up, this time in Texas. A Roman Catholic church was being modernized and redesigned under the auspices of the Bishop of San Antonio. The city of Boerne —which is where the church was— blocked this because it would interfere with the historic preservation scheme for the downtown area which was important for the tourist trade. The church complained: "This is a violation of our religious freedom". Then the city says: "No, the Historic Preservation Act was not aimed at your religion, it just has an impact on your religion". And the Bishop says: "Haven't you read the Religious Freedom Restoration Act?". Then the case goes to the Supreme Court. So, there is already what seems to be the beginnings of dialogue back and forth, but the Court says: "We are not going to listen to what the Legislature has said on this matter, if we listen to anybody it will be to our own precedents, not to what the legislators had said". There were other issues in "City of Boerne v. Flores"[6] —Flores was the name of the Archbishop of San Antonio—, but the remarkable thing was that the Court insisted that its views have to be paramount on these issues. I talked about this in that dialogue article that Roberto mentioned.

So that is my big worry about dialogue. My first worry is that there isn't take as well as give. And my second worry is actually if there was to be inequality or asymmetry between the branches, it should be the other way around, because the Legislature has an inherent dignity, and ought to have an inherent dignity in the Constitution that goes beyond that of the courts.

5. SCOTUS, "Sherbert v. Verner", 17/06/1990.

6. SCOTUS, "City of Boerne v. Flores", 25/06/1997.

I want to talk about representation, and I want to talk about citizens' assemblies as well. But before I do, there is a theme which I think is important on some of these matters, which is particularly important in the countries in the South that Roberto has been talking about: Argentina, Colombia, and Brazil. These are political systems that are characterized by a certain amount of dysfunction —in the Executive certainly. In the highest ranks of the Executive there are continuous waves of impeachment, arrests, corruption, malfunction, and so on. People coming in and out of office with bewildering rapidity. A certain amount of dysfunction in the Legislature, which seems to be a nest of corruption. In these systems, the courts are treated as being, in some sense, the last institution with some integrity left standing. It's natural and understandable that we would try to assign to the courts a greater role in the Constitution just because the other entities, properly entitled to do this work, might have proved themselves unworthy of the task. And there again I would defer to Roberto's greater knowledge, but one thing to worry about, in relation to that, is the more such tasks are loaded onto the courts, the more the courts are likely to be targeted both by political forces and corrupting forces. It's just a matter of the long run what they are going to be like.

Those of you who have the misfortune of being in the democratic theory class —you know who you are— [laughs] will know that I also suggested that we take a long run approach to thinking about citizens' assemblies. Not looking at them in the flash of their youth, when James Fishkin and his very band of graduate students are organizing them, but imagine citizens' assemblies in a hundred years' time and think how they will have been ossified and corrupted, and how they would have —al last— come to resemble parliaments. I think we already have citizens' assemblies, we call them parliaments. We appoint people by election rather than by random choice. We don't have a bunch of graduate students to organize their discussions, they organize their discussions themselves. But it's important to look at these methods, whether we are talking about the institutional processes of courts now and in a hundred years' time, the institutional processes of citizens' assemblies now and in a hundred years' time, and just ask whether we are being seduced by refreshment and novelty in these cases.

Finally, let me say something about representation because I much appreciated the comments that Roberto made. I stand by the view that it's important for legislation to have a certain abstract character. In legislation, we don't just solve individual cases, we solve social problems with general rules. We solve problems with abstractions. We want our laws not to say that "Elmo should do this", but that "anybody who is sharing a meeting should do this". And if we are going to have exceptions, the exceptions should be stated in general terms. Now Roberto is absolutely right, in the process of doing that abstract lawmaking we do want to be

sensitive to the particularity of real human predicaments. If we are passing a law about smoking in close spaces, we want to have some process which is sensitive to the person with emphysema or the person with lung problems. I don't know whether that is ever going to work in a process with complete inclusiveness, as though the entire quarter of a billion highly opinionated and quarrelsome people in the United States could participate one by one, and their oneness and their particularity would be able to turn the ship of legislation around. What actually happens in a well-designed representative system is that, in the midst of the discussion of the abstract provisions of a bill, representative after representative will stand up and tell a story about some of its constituencies. "You don't seem to understand in passing the 'Smoking Prohibition in Railroads Carriages Act' that constituents of mine, like Mister X or Miss Y, have these lung conditions and we need to bear that in mind and make provisions for people with these conditions". Not making provisions for Mister X and Miss Y, but making provisions for people with these conditions. So, we still want some little bit of abstraction.

If we try to do it on a person-by-person basis then —as Judge Posner once said— in a country this size with three hundred million people, massively opinionated, all quarrelsome, all highly suspicious and muttering at each other, anything that can go wrong will go wrong. We have to organize legislation on a different basis than that. It doesn't follow that the representation system is perfect. It doesn't follow that the diversity of considerations that we want represented is best adjusted by or best organized under some geographical principle, like the geographical districting or representation by state. Many electoral systems around the world use other provisions. So, representative systems can be adjusted depending on what we think is likely to be important for legislation. But the task of representation is not to substitute for inclusiveness, it is to provide a practical method for it. So, just for that reason I continue to hold this view that Roberto criticizes that representation is actually a better system for day-to-day legislation, including legislation on major issues of principle, than direct democracy through referendum, which in my view should be reserved for something like major adjustments to the shape of the body of politics. But thanks, above all to Roberto.

Roberto Gargarella: I have five or six points to mention and a story. The story has to do with the democratic objection, which I think is related to your view on representation. But the story is just to say something funny. Do you know this writer from Honduras, whose name is Augusto Monterosso? He is famous because he wrote the shortest story in the history of literature. It is one line, which says: "When he awoke, the dinosaur was still there". For me, the democratic objection is like the dinosaur, it is still there. Now we discuss with sophisticated arguments, then we go to sleep, and the dinosaur is still there.

I will say something about that. Very quickly: some points are very minor and others more substantive. A minor point is about referendums. In my view, in the kind of system that we live in, where there is concentrated authority and a very strong Executive, referendums are a fantastic opportunity for manipulation. That is why all the authoritarian dictators, from Pinochet to Fujimori, were so enthusiastic about the possibility of calling for referendums: they knew they were in optimal conditions to favor their own position. So, for me, referendums are only acceptable after a very long, well organized process of discussion. If not, I would reject them for democratic reasons. But this might be a minor point, or maybe not a major point.

A more substantive point is your view regarding how we are all divided into majorities and minorities. I think, again, that that is the reason why the debate about abortion was so fascinating. I learned a lot in that discussion, and as a result of it I changed partly my point of view. It is not that I was in the majority and then I went to the minority, but there were some aspects in which I changed, and that's crucial. It is not that "either you are here or you are there". If we only see the issue from a binary perspective, then of course nobody is going to change their views. What tends to happen is something else: we sharpen or moderate our opinions, and that is why deliberation is so important. It's not just something else. It is not just that deliberation is something good because we are all good friends. No, deliberation is fundamental because we are going to qualify what we think, we are going to modify it a little bit. And that is very important.

With that said, I would like to clarify something else. I have been and I will always be a critic of judicial review. I'm not fascinated with these Colombian and Argentine experiences. I believe that these cases show something important that, in my case, has helped me to change my old vision, in which I recognized myself —like you— as a staunch critic of judicial review.

So, to conclude. It's not that —after recognizing the value of these new ways of judicial intervention— I have begun to believe in an open system of judicial review of constitutionality with deliberation. And I think like that because, among other reasons, I don't believe judges have the correct institutional incentives to promote dialogue. In fact, they don't have these incentives at all, and so they use their privileges to do whatever they want. When they make a correct decision, like it happened when they organized the public hearing in the "Mendoza" case, it's okay, we applaud it, and we celebrate it. But it is not because we trust that the judges will do the same in the next case; but because we know they will not do so unless it gives them —for example— popularity or legitimacy. Actually, that public hearing took place after a period in which people would go all over to judges' houses to throw rocks at them. There was such a legitimacy crisis that affected the Judiciary that —as I get it— the members of the

Supreme Court tried to do something to improve their situation. Many times, good things come for bad reasons. In any case, what happened made us realize something important. After the public hearing, we learned that the mechanism was interesting, that it was within the framework of action of the courts (when, at some point, we had been told that they were not prepared to go on with that kind of procedure), and that the social reaction was very good (not negative, as some had wrongly anticipated).

The last point I would like to refer to is the matter of representation and the people outside its scope. I think that we have an insoluble problem with legislation that persists even if there is a better relationship between the Legislative and the Judiciary: we have a more structural problem in front of us. It happens that the representative system in the United States, in England, in Argentina, or even in Colombia has extreme difficulties understanding the multicultural character of society. I mean, the idea of pluralism that Rawls mentions. I think that there is a structural difficulty there. When Madison thought of the institutional system, he thought there would always be majorities against minorities, property holders against non-property holders, debtors against creditors, etc. For him, society was basically divided into two or three groups, and the institutional system gave us the chance to include them all. Furthermore, he assumed, like many others, that the small groups in which society was divided were internally homogeneous, so with a few "owners" and a few "debtors", basically all members of those groups were represented. In multicultural societies like ours, such assumptions no longer hold. It is not that one native person is going to represent all native people. Or that a woman in Parliament can represent the interests of all women. No, native people and women are massive groups in which an infinite amount of people with different views coexist. So, today we come upon a structural difficulty or inability in representation. In that sense —and this is the last point—, I believe that we just need to give up for once our hopes in the capacity of the traditional representative system: I think that it is impossible to recover what we had already lost. It is the sad truth. We need to be open to these new experiences because there are structural difficulties to represent the amount of diversity in our multicultural societies. My final and main concern is about, once again, the people who are not represented. Anybody when defining their identity can say they are middle class and, at the same time, gay, and vegan, and religious, and republican: each one of us is a lot of things; as every person is, at the same time, a lot of things. Our multiple identities, in the framework of multicultural societies, tell us that the representative system faces a problem without solution.

Participant: I would like to come back to one of the parts of both of your presentations. I think you might have some disagreement on this issue, which is basically the *weaponization*

of rights in both courts and public discourse. One issue I think you both raised is the following: there is something that is lost when the political discussion is brought to the courts, because you must translate it into the language of rights, and that misses a lot of things. In Professor Waldron's work, some pride can be seen in the arguments that people were making in the British Parliament, but those were also right-based arguments. So, my question for both of you is: is there anything lost when you translate the dispute in terms of rights, even in the political discussion? And what happens when the discussion goes to Court, in that regard?

Jeremy Waldron: I think in some cases there is some loss, but not in all cases. Sometimes if you have an issue that involves collective or communal dimensions, the discussion can be impoverished if you represent them in terms of rights, as you said, whether that happens in courtrooms or in parliaments. Conversely, if some issue is properly understood in terms of rights or in terms of the application of principles, I believe that in many cases those principles can be better apprehended in the parliamentary contexts than in the court's contexts. I agree that this is something that we all emphasized in the 70's. You [Gargarella] remember this, you are about the same age as I am.

Roberto Gargarella: I'm fifty-five.

Jeremy Waldron: You are not as old as I am [laughs]. But there was a time when we were all maintaining that putting everything into the language of rights was a way of impoverishing issues. I think now, in our mature reflection, that that's true in some cases, and not true in most cases. If that is true, it would be true whether that happens in Parliament or whether it happens in courts.

Roberto Gargarella: Coming from the left and paying attention to the political discussions in my region, I was able to find out that during the funding period in Latin America the radicals of the left were strongly against the concentration of power (the concentration of power was always recommended by conservatives) and, also, against the way liberals used the language of rights. In the twentieth century, I think that the radicals changed both positions and they started to support (against what they had supported in the nineteenth century) both the concentration of power as well as the litigation carried out in the name of social rights. I think that in that process something was lost. I do agree with you [Waldron] that there are a lot of things to learn and to gain from the language of rights, but you might also lose something. All republicans in Latin America, and I would also say in France, were discussing what Hannah Arendt called the "social question", and they were not meddling much with the concept of rights, because they knew about its limitations. So, there is something that we should think about here.

Jeremy Waldron: Mark Tushnet, who Roberto mentioned, when he was a member of the Critical Legal Studies movement used to write articles called *A Critique of Rights* and *Essay Against Rights*, or *Why Rights Suck* [laughs], and so on. It was never entirely clear whether he was concerned about the issues that Roberto and I'd just been talking about, of how you can distort an understanding of any of the merits of such an issue by trying to cram it into the framework of rights, or whether he was talking about the tendency to consign these decisions to courts. I think he was playing those off against each other.

Roberto Gargarella: I also think there was a kind of Marxist tradition (as Marx wrote) that considered that the language of rights was garbage, a verbal nonsense.

Jeremy Waldron: Yes, that is right.

Participant: Well, as Professor Waldron already knows, I'm from Quebec, Canada. We've been having very interesting discussions recently about the notwithstanding clause, especially because of the new legislation regarding religious symbols that has just been adopted in my country. At the end of the day, we might have to face the possibility that there would be no consensus attained or that in the discussion there would be no unanimous answer. If that happens, what should be the mechanism to make a decision? Should it be just one way or the other? I mean, either the Court decides, or the Parliament decides. Or should it be a more complex mechanism of decision making? And in relation to this question, when it comes to judicial review, courts have been used, wrongly or for the right reason —depending on the position of people— by a lot of minorities groups to achieve the recognition of rights, if we speak about women, ethnic minorities, if we speak about linguistics minorities in Canada, for example. If we take the dialogic approach, how long should these people wait for these discussions to take place? How long should it take and how long should we wait to give rights as an answer? Because if we speak, for example, of linguistic minorities, outside Quebec, and inside Quebec too, it's pretty different; because I don't know, you can correct me, but one person out of three in Quebec comes from the French minorities. I think that if there was no court intervention, I'm not sure if this minority, for example, would have sustained their right to education. So, the more they waited, the less they had the possibility to have these rights that they were allowed to have. Because to acquire the rights a certain number is needed, for example.

Roberto Gargarella: The issue of the waiting time was introduced in a critique made by Larry Alexander and Frederick Schauer against all these dialogic developments. They said something similar: the people need decisions, instead of dialogue; the law needs to assert its authority, not a never-ending conversation that comes and goes. I'm very annoyed by those

critiques because in many of the experiences that I know, with all the characteristics I had described, the kind of debate that took place allowed the Judiciary to start deciding on issues that were not even mentioned or solved at all for decades. It's often said: "Well, we need more decisions and less debate", but the truth is that (going back to the example of the "Mendoza" case) for three decades the polluted river was not a matter of decision by anyone. Neither the legislators, who were afraid of the capitalists and the corporations, nor the Judiciary wanted to mess with these extremely difficult problems. These kinds of mechanisms (the public hearings of the example) allowed us, for the first time, to start doing something on an issue which was not discussed for decades. I think it was Tushnet who said that the arguments against the dialogic processes, as the ones presented by Alexander and Schauer, need further development and empirical background, since —in practice— the results have not been those anticipated by them.

Regarding whom decides in these cases, we need to go back to the people, and the ideal principle that I tried to uphold is the idea of an ongoing and open conversation. I want to bring an example to illustrate what I think, my favorite example, an example that I find fascinating. I could spend days with this example because it is very valuable. If you don't know it, read it because it's amazing for this discussion. It's a decision made by the Inter-American Court of Human Rights against Uruguay. In Uruguay, they passed an amnesty law after the crimes of the dictatorship, and many discussions were held in the country. Well, in Uruguay —which is an incredible democracy— Congress took a decision, which a lot of people didn't like because it implied an amnesty. As a consequence, people started to discuss and defy the decision made by Congress. Everyone was angry, somehow. Then they had a national discussion, which ended up with a plebiscite supporting the amnesty. But then people continued to discuss, and another plebiscite was organized through which a majority supported the amnesty again. So, in ten to fifteen years there were massive discussions in the streets and public forums, two plebiscites, and strong decisions taken by Congress and courts. One could say: "Well, who should decide in terms of representation?" In my opinion, that's the spectacle, the beauty of democracy: we disagree, society is divided, and so we need to discuss this. So, we make a decision at one point, after a while maybe we consider that we were wrong and then we discuss and decide all over again. That's for me the essence and the beauty of democracy.

Jeremy Waldron: I want to add that the general sense on any of these issues, but particularly issues on minorities rights, is that there are going to be two sides to every question. Minorities don't necessarily have the rights they think they have. Minorities are not necessarily binding authorities on their own rights. They may exaggerate their rights, or they may

underestimate them. And the majority is not really the expert either. But eventually, whatever is done with minority rights —the accommodations that are made for them, the provisions for their entitlement— the whole society has to be able to live with that and accept that decision. So, we need a mechanism that will confer legitimacy on the decision, notwithstanding the fact there will be continuing disagreement.

This is something that I also talked about in Argentina and, also, I think, in Colombia. We must compare the political processes that eventually, after whatever length of time it takes, make the decision, by asking: "Those who favoured the decision will have no trouble living with it, but why those who opposed the decision should be inclined nevertheless to accept it?" Is it about the way the decision was made or the institution that made it what gives it legitimacy? Because the question about legitimacy in my mind is always the following: "How do you reconcile those who opposed the decision to the decision once it has been made?" Democratic arguments give us a sort of basis for doing that. We had to decide somehow: we had a full, free, and fair discussion, everybody was empowered to vote, and eventually there was a majority. That's one way of tiptoeing towards legitimation. We must try to figure out whether anything in some sense similar to this can be said on behalf of a decision by the Court.

Roberto Gargarella: Well, one more thing just because it makes me curious. You insist that on these controversial issues there are two sides. In my opinion, the important thing is — as I said— the nuances. I think we lose something very important if we don't focus on nuances, that people can change what they think, even a little bit, even in relation to certain nuances. For example, in the case of abortion: should it be allowed until the third month or even until the fourth month? In this discussion, which seems secondary, there are a lot of important aspects involved. Being able to moderate our own positions in this sense is crucial. The point is: it is not that we are all for or against, but many of us have differences in terms of when it should be done, in which cases, and under what circumstances. If not, if we insist on focusing on the existence of two antagonist sides, then things get more problematic.

Jeremy Waldron: We agree on that.

Participant: I have two questions. Could you comment on the kinds of arguments that you think are appropriate to rights adjudication? I think one of the premises of the argument for dealing with rights in a deliberate body is that every reason is appropriate to deliberate on. I just wanted to surface that as an element of the argument, and maybe defend the idea that it is not the case that, as a matter of public reason or for some other justification, there is a subset of arguments that are legitimate to an amount and that we should deal with them, and that the courts are better at scoping the argument.

I also have another question, which is a conceptual idea that I creep across in Hobbes and Locke and in the Bible and is just the idea that you can't be a judge in your own cause. Could you comment about that, just a general idea, and how it may apply to this argument? Because the rights holders may complain: "Well, the legislators already made a decision about this, and if I want to raise a claim, why should I go to the same body that has already decided?". I need somebody separate from them to adjudicate between me and the legislator that made the decision. I don't know if this is the right form of the argument or not, but it's just an idea that keeps coming across in the great texts about the limitations or the needs for judicial review.

Jeremy Waldron: You are right, it is an important principle *nemo iudex in causa sua* —in Latin it sounds even better— [laughs]. It's got to be understood in a way that is reconciled with the need for an eventual decision. Whoever has the final say is effectively judge in some sense in their own cause, because they are not just reaching a decision, but they are sealing the finality of the decision.

The other thing is that you can look at the legislators' decision as though they were parties in the dispute, or you can look at the legislators' decisions as though they were adjudicators of the dispute. And if you think of them as parties in the dispute, in some sense that's right. If we think that it is very important that legislators should bear the burdens and enjoy the benefits of whatever laws they passed, then they are interested parties. Actually, that is true of judges as well... we don't bring in judges from other countries. I mean, sometimes we do. New Zealand judges get up and decide issues of nations of the South Pacific. But generally speaking, I think that it is important that judges be citizens in the countries they live in. So, they too will enjoy the benefits and burdens. So, we got to be a little bit careful about the logic of that in relation to these features. I don't have much to say on the first point, Roberto will have more to say, I think.

As I think you know [referring to the participant], I've never really been a fan of the *Rawlsian* approach to public reasons, according to which "religious reasons are inappropriate". People need to just call it as they see it and bring up the reasons that they think are important. And we don't want to be suppressing that. I think that we have already talked a lot about the importance of interest-based reasons, even on matters of principle. Why? Because most matters of principle are about the importance of certain interests, so it's not just reading Immanuel Kant.

Roberto Gargarella: I just want to add something very short. About the first question, I would say the same as Professor Waldron, the same critique to Rawls' approach to public reasons: we don't want to have guardians of the arguments. Judges standing in the door saying:

"If you have a good argument, you enter and if not, you leave". We don't want that because of the distortions that may come up, but also because we live in a democracy, and we want people to say what they think frankly. That is crucial. Again, the example of abortion taught me a lot: people crying and showing their emotions. There we also have the basis of an argument: in the expression of those emotions. You can learn a lot from that. You can make it more abstract if you want, but it is what this person is saying about her problems and how she is affected by the law. That's why I don't want to defend the idea of "the guardians of the arguments".

Regarding the second question, I also agree with Professor Waldron. I adhere to what has been said, that —in a way— has something of the oldest of the several arguments offered by Dworkin in favor of judicial review. According to Dworkin's original idea, you cannot send the legislator to decide, ultimately, about what they have already decided when passing the law. But on that argument, there's much that can be said. One alternative —once suggested by Tushnet— is to appeal to the legislators, but warning them that, if they want to insist on the disputed statute, they should do it under a super-majority rule. That could be one possibility. Thomas Paine —an early radical-majoritarian— was criticized in 1776 for similar reasons and he said: "Well, you can do many things if you don't like what I propose". So, he had some ideas about what alternatives could be explored (for example, he proposed randomly dividing the same representative body, in order to force more meditated debates). We don't need to give up the majority rule or majoritarian discussions because of Dworkin's critique.

And finally, I'm more concerned about the people left out than about the legislators. So, my questions would be: if this issue is really dividing us and is so important for us, what should we do in order to make the decision more legitimate? What can we do to get more information? What can we do to learn more from other viewpoints? How can we do it in a public debate? The great hope in these times of darkness is that we see that it is possible to have a public, open, and inclusive debate. So, I wouldn't take into account Posner's concern, because the experience shows us that it is possible to do something different and that is precisely the crucial point about the value of procedures. We can have, and we know that we can have, procedures that could help us improve our decision-making mechanisms in order to make them more inclusive. So now we know it is possible. We must decide, now that we know that those mechanisms can work: do we want to use those inclusive procedures or not? I think that —and this is also something that you said [Waldron]— for everyday legislation we need a division of labor (we can't do everything, every time, with everyone gathered on a public square). But accepting, for these reasons, the division of labor goes hand in hand with recognizing that representation is a second best. It is clear: we can't all get together in the same

public square all day, we want to do other things, watch television, watch The Simpsons, or take a nap. But then, when we discuss about abortion everyone wants to intervene, and then when we discuss about the electoral system many of us would like to participate. That is why I disagree with Posner. I think that the beauty in this time, within this darkness, is that we see that there is some light. We see the possibility of a more open and inclusive discussion.

Participant: I have one question, a very short question for Professor Waldron. I'm extremely curious about your position in relation to citizen's assemblies and other deliberative groups. This is something we already discussed in the Democratic Theory course, but I want to ask you a question in relation to this. You say that these mechanisms will end up being something very similar to our legislatures. But I would like to know if you share or accept that these types of spaces might represent a way of taking seriously the right to participate like a jury in a judicial process... having the possibility of being there. It seems that we are winning something. My only doubt is: do you accept that there is something there that we need to recognize?

Jeremy Waldron: These are characteristically bodies of a few hundred people, and they make some claim to be representative even when they are not elected. They are chosen randomly by some concern for diversity, age, and geographic representation. So, we are not talking about a mechanism that allows everybody to participate, just as with a regular electoral representation. This is an empowerment of a tiny, tiny fraction of the population to participate in the discussion. It may be admirable, it may serve as a good role model for the rest of the society to watch, listen, and learn. One of the things I wanted to say in relation to the previous question was that it is really important for any system of deliberation that if it takes place in an institution —whether it is a citizens' assembly, a parliament, or even a court— we want it to be a permeable membering, so that it has some sort of a back-and-forth relation with informal deliberation with the community as a whole. That seems to me to be exactly true of the process that Roberto described about abortion debate in Argentina.

Generally, there is always vast deliberation, inclusiveness, and empowerment in the age of social media in the society. And whatever highly orchestrated deliberation we have, it takes place in relation to that. The only thing that worries me about the citizens' assembly model is that if it doesn't tend towards eventually becoming just another representative body —disciplined by norms of fairness, norms of accountability, and so on— it will take a rather sophomoric approach to political issues, because it assumes that these issues can be dealt with one by one, rather than bundled together in the context of budgetary responsibilities and political priorities. So, it looks nice because we isolate one issue to talk about electoral reform,

and we say: "Can you just concentrate on this particular issue? And don't worry about the budgetary implications, the rate of inflation, or unemployment, or China, or foreign policy, or anything like that". It is interesting when they are allowed to concentrate on just one issue. But the life of politics is not just one issue. The life of politics involves a million things coming at you at once, all of them having to be solved simultaneously because they are working in a single matrix of time and priority.

Roberto Gargarella: First, I think that the citizen's assemblies are just one of the possibilities we have at hand. Again, what we have been seeing in real practice is that these assemblies work and they do interesting things. But, in my opinion —I insist, the Uruguayan case could be one example, the abortion case could be another one—, the discussion is really open for debate. It is a possibility. We may want to adopt them and promote them or not, but at least today we know that these kinds of alternatives are possible —it is not an utopia, like it seemed to be in the past.

Of course, not all the issues have the same importance or relevance. But I think we should first go for that option. I'm very convinced, I don't know if you agree with this, about the structural difficulties of our current institutions to represent diversity. I think that there is something there that we cannot get back.

Secondly, we know about the bureaucratization and the capture of the decision-making mechanisms. All these things seemed clear even during our founding moments in the United States or in Latin America, when there was a discussion about what institutional system to choose and alternative institutional arrangements were taken into consideration. We choose one of those possibilities —the representative republic—, which is the one that Madison defended, or which you would defend: a representation system thought as a "filter" for the people. They opted for representation as a preferred option and not as a "necessary evil". But when they opted for that alternative, it was already clear which were the risks of the chosen option.

Of course, the alternatives also have a lot of problems —I mean the more democratic alternatives, the ones closer to direct democracy. That is true. But the fact is that we chose the "representation as a filter" alternative, and we have all the problems that we could have imagined at that moment —problems that had been anticipated at the time by the Anti-Federalists. So, the dinosaur is still there. The problem is there, and we have to assume that: the democratic objection is not going to disappear. Today parliaments have all the problems that we know they have in terms of bureaucracy, in terms of capture, in terms of a political class that works for its own interests. We need to face that, plus the fact that we live in

extremely multicultural societies, so there is a specific difficulty to represent diversity. There is a different political sociology, the society changed, we need to acknowledge that, but we also know about the functional problems that we imagined that they would come, and they came.

Participant: I have a question for Professor Gargarella regarding the referendum. If I understood correctly, you said that you were suspicious about deciding certain issues via referendum, like the examples of Brexit and Colombia, right? I would like for you to elaborate a little bit on that. I wonder if your preoccupation or your suspicion is related to the outcomes of these referendums. You mention that the Executive could manipulate the referendum, but in the case of Colombia, for instance, the president actually lost. As a counterexample, you mentioned the case of abortion in Ireland; as far as I know, I could be mistaken on this, the criminalization of abortion was implemented via a constitutional amendment that was passed thanks to a previous referendum. So, how can we distinguish when referendums can be used for certain kinds of issues and not for others?

And Professor Waldron, regarding this very same point about referendums, you said that in the Brexit example they had to do it via a referendum, to decide whether to remain or not in the Union, because it was a matter of necessity, perhaps. "There was no other way to do that", you said. So, I would like to know your opinion about the criterion to determine when a referendum is a good idea as a decision-making procedure. Is it a matter of necessity or there are more criteria?

Jeremy Waldron: I will answer my question very quickly. It wasn't that they had to do it. If there was to be a decision, then it had to be done by referendum. I think that it was a terrible mistake to decide to have a referendum on this issue. But the prospect of Britain being taken out of the EU by simple parliamentary legislation or, worse still, being taken out of the EU pursuing into the decision of the citizens' assemblies, I think that would be ludicrous. But, just to be clear, my position was not that the referendum was necessary. All I say is that if there is any question of Britain being taken out, then it has to be a question of referendum.

Roberto Gargarella: Very quickly. First, my opinion about referendums has nothing to do with their outcomes. For example, in the Uruguayan case I was against the two possible options that were available for the people when participating in the plebiscite, but I'm fascinated with the example, and I think that what they did was fantastic in terms of public discussion. A referendum that I would support is one that would look like the one in Ireland, a referendum that came after a very long process of public discussion. And of course, I insist on the issue of the concentration of authority and I think that this happened in England as well as

in Colombia. Why did Pinochet or Fujimori organize plebiscites with so much anxiety? They didn't do it because they had the guarantee that it would work (Pinochet lost the plebiscite, for example). But they organized referendums because they knew —as an expression of their concentrated power— that in this way they would be in an advantageous position, in a very privileged position to organize things in their favor. We do not want that. The referendums are usually used in that way if we don't ensure that they are preceded by a long period of deliberation. If we don't have that, if they don't guarantee us that, I would reject them.

In Colombia, I was very much against a plebiscite for peace, but not in the same way as certain influential jurists in Latin America that told us: "We are talking about peace and human rights, so we cannot discuss this democratically". I believe the opposite. No, we can discuss it, we can make a referendum, but we need a different kind of thing: we need a previous process of clear, calm, long discussions because our lives are at stake. We need to make this decision very carefully. After that, we can have a plebiscite, but don't rush like Cameron in England or like Colombia.

Participant: I don't know much about these topics, admittedly. I have more basic questions within the deliberative model. I wonder if you could talk about the role of more public trial's players. Specifically, for example the Eichmann trial where there is an aspect of spectacle to the trial itself which can play out. I mean, the Eichmann trial is criminal but in a similar sense you could imagine a "Roe v. Wade" type of thing, playing out in a more deliberative way or playing the rule with a more deliberative process within a court system. I am wondering if that captures any kind of deliberative element but within the Court rather than in Parliament or somewhere else.

Roberto Gargarella: I have very close examples. I know the details of the trials against massive human rights violations in Argentina where Carlos Nino was deeply involved. In those cases, the important thing was to open a collective process, which eventually can include a trial with a judge. But, first, we need to make sure that we had discussed that collectively: How we, as a society, are going to go through this trauma? For example, in South Africa they did the opposite to what we did in Argentina, where the solution was "trials and punishment". The idea is not just to do what the law says, or what international law says, or to condemn those responsible to twenty years or one hundred years of prison. I don't think that is an interesting solution. I wouldn't say either that the right solution was the one adopted by South Africa (which consisted of exchanging pardons for information, assuming that the trials gave the wrong incentives because they force you to remain in silence, so if we want to give you a different incentive so that you tell us the truth, we have to pardon you). I do believe that the

"truth for pardon" option can be perfectly acceptable as an alternative (it is neither immoral nor unlawful) and, in a way, it is what Uruguay did. So, I think that what society needs is to take those traumas and discuss them profoundly. The trial is something interesting. Who is going to be against the Eichmann trial? But, in any case, I think that we lose something there.

I'm very proud of what we did in Argentina. I think that it's the only good thing that we did really well in all our history: those trials. I'm very proud of those trials. But, at the same time, I think that we missed something there, when we think that we are going to solve such a trauma by sentencing someone to a hundred years in prison. I think that we need to process that in a different way, which may include a trial, but we need to do something more. So, we need a process, an open and inclusive process.

Jeremy Waldron: I think that is really a fascinating idea. I don't think that it's possible for us to estimate the massive impact of that trial on contemporary and subsequent discussion of Holocaust and Holocaust responsibilities. But we could take your point much more broadly, not just thinking about criminal trials, thinking about litigation, the constitutional litigation. I spent the best years of my life arguing about all this stuff with Ronald Dworkin. He made a very powerful argument on exactly the same minds as you made, which is that a constitutional discussion in a courtroom, structured and highly proceduralized, can have a tremendous impact on public discussion as a result. People start to think about affirmative actions in much more complicated ways as a result of reading about them in *The Times*, or in *The New York Review of Books*, or whatever it is. Part of that is Ronald Dworkin patting himself on the back for having been an acknowledged entrepreneur explaining to us what was at stake in these trials, but another acknowledged entrepreneur is Gargarella, you know, also explaining these decisions to us. I think that we shouldn't underestimate that. It's very, very important indeed, just taking it out of the particular context of a capital trial as the Eichmann was, to a situation where we are deciding issues about abortion or issues about affirmative action in the courtroom. Thank you.