

Responsive Constitutionalism and Review in the Spanish-speaking world

Constitucionalismo responsivo y revisión en el mundo hispanohablante

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Abstract: This is Rosalind Dixon's response to the symposium on the interaction of her theory of responsive judicial review with relevant discussions in Spanish-speaking countries, addressing the challenges and opportunities presented by the judicial intervention time frame discussed there. Responsive judicial review provides a framework for discussion on important issues such as climate change, inequality, and institutional design. With this response, Professor Dixon opens the door to further discussion.

Keywords: responsive judicial review, Spanish-speaking world, reflexive engagement.

Resumen: Esta es la respuesta de Rosalind Dixon al simposio sobre la interacción de su teoría de control judicial responsivo con las discusiones relevantes de los países hispanohablantes, dando cuenta de los retos y oportunidades que ofrece el tiempo de intervención judicial que allí se plantea. El control judicial responsivo presenta un marco de discusión sobre temas de importancia como el cambio climático, la desigualdad y el diseño institucional. Con esta respuesta la profesora Dixon da pie a mayor discusión.

Palabras clave: control judicial responsivo, mundo hispanohablante, compromiso reflexivo.

I. Introduction

Latin America is home to a long tradition of innovation and important scholarship on democratic constitutionalism (see Hübner Mendes *et al.*, 2022; Huneeus, 2016). Long periods of military rule across the region have prompted deep reflection about the relationship between commitments to democracy and constitutionalism (see Gargarella, 2019). The many transitions from military to democratic rule across the region have likewise given rise to a rich body of scholarship on various forms of “new” democratic constitutionalism, or what Huneeus calls “neoconstitutionalism” (Huneeus, 2016, p. 5; Dixon, 2024d; Couso, 2022).

Against this background, I am especially grateful to have the opportunity to explore my ideas about “responsive constitutionalism” (RC) and “responsive judicial review” (RJR) within a Latin American context (see Dixon, 2024; Dixon, 2023). Responsive constitutionalism is first and foremost a model of democratic constitutionalism. It seeks to orient constitutional design and decision-making to protecting and promoting both “thin” and “thick” conceptions of democracy —through a mix of tiered constitutional design and shared institutional authority (Dixon, 2024, pp. 823-828).

Responsive judicial review, in turn, is an approach to constitutional judicial review by courts oriented by and informed by responsive constitutional ideas. It is further premised on the idea of *functionalist* or purposive construction of the kind promoted by the “new constitutionalism” or neo-constitutionalism within Latin America (Gargarella, 2019). Again, this makes Latin America an especially fruitful terrain for exploring and testing ideas about RC and RJR.

It is also wonderful to have the chance to do so concurrent with the publication of *Responsive Judicial Review: Democracy and Dysfunction* in Spanish (‘the book’) —and I am deeply grateful to Marcial Pons and the translation team, of Roberto Niembro and Alejandra Sánchez Montiel, for their work in making this possible.

The aim of this symposium is to explore the extent to which RC/RJR theory can usefully apply within the Spanish-speaking world (i.e. Spain and Latin America), as well as the extent to which attention to Spanish or Latin American cases can help refine and improve our existing understandings of RC/RJR theory (Freedom House, 2026). This kind of “reflexive” process of theory testing and refinement (Dixon and Perham, 2025) is something I suggest is essential to developing any truly global theory capable of applying across constitutional systems and contexts (Dixon, 2023a; Dixon and Perham, 2025). It is also something that almost always requires the work of many

different scholars, across time: no single scholar has the time and expertise to consider how certain ideas apply across all contexts. Hence, almost all meaningful processes of reflexive theory testing and refinement depend on a collective process of scholarly dialogue (Dixon, 2016; Dixon, 2024a; Dixon, 2023c; Dixon, 2026a).

This symposium is also an instance of just this form of collective scholarly exercise —that aims to draw on the constitutional experiences of Argentina, Colombia, Ecuador, Mexico and Spain, among other countries, as a site for testing and refining RC/RJR theory. This also includes countries that are often the subject of comparative attention (e.g. Colombia), and a range of far less or “understudied” cases (e.g. Ecuador) (Dixon, 2023a, Salazar Marín, 2026; Dixon, 2026a). (Another symposium in Portuguese engages in a similar exercise focused on Brazil, again, to coincide with the publication of RJR in Portuguese. And a third focuses exclusively on Colombia, with a view to fully exploring the lessons of the Colombian constitutional experience —as arguably a “core” instance of RJR (Dixon, 2026a).)

I am especially grateful to colleagues for joining in this collective scholarly enterprise, and the insights they provide in doing so. All the contributors are generous in their engagement and bring new insights to bear based on their distinctive country knowledge and expertise. Their essays usefully highlight the promise, as well as limits, of RC/RJR theory —and its preconditions, and degree to which it depends on a true mix of institutional roles, and weak and strong judicial review.

The authors also offer new and interesting ideas about: the boundary between responsive, abusive and unresponsive judicial review (Salazar Marín), notions of democratic responsiveness and commitments to what might be labelled a “feminist” or “material” minimum core (Salazar Marín and Camarena González), the design and calibration of weak versus strong forms of review (Arballo, García Jaramillo), and the limits of RJR in a polarized polity (Verdugo and López). Similarly, they extend and refine the idea of democratic blockages to draw attention to the idea of blind spots of perspective in relation to the interests of nature and non-human animals (Gaviria-Mira), inter-branch and flow-on inertia (Queralta Jiménez).

Finally, Roberto Gargarella draws on Latin American and broader comparative experience to offer a serious challenge to RC/RJR theory —as insufficient to meet the “dramas” or challenges of the current political moment. (The same could be said for Camarena González, though his focus is on material inequality, whereas Gargarella’s is on democratic and material challenges.) This is a challenge that I can only begin to

answer in these pages, but one that, again, helps refine and improve on existing RC/RJR ideas.

For this, and more, I am beyond grateful to colleagues writing in the symposium and those organizing it —especially Professor Micaela Alterio and Mateo Merchan Duque for their amazing collegiality in convening and organizing the symposium.

The remainder of my introduction is divided into three parts. Part 2 reprises the core ideas and concepts in RC/RJR theory. Part 3 explores how, according to various contributors, attention to Latin American cases can help test and refine those ideas. Part 4 explores contributions that seek to adapt and apply RC/RJR theory to a distinctive Latin American and Spanish context—including through a more fine-grained working out of the connection between standards of judicial review and judicial remedies. Part 5 offers a conclusion focused on the challenge—by Gargarella and Queralt Jiménez—to connect RC/RJR theory to a more participatory conception of democracy.

II. Reprising Responsive Constitutionalism and Review

The starting point for responsive constitutional theory (‘RC’) is an understanding that democracy comprises both “thin” and “thick” ideals.

The thinnest versions of democracy (for example, Schumpeterian theories) define democracy solely in terms of elections, or the idea of a competition between political elites, mediated by regular free and fair elections (Schumpeter, 1942; Issacharoff, 2015, p. 244). However, my work with David Landau articulates a somewhat thicker and more substantive, if still relatively thin, conception of the “minimum core” of what democracy entails, namely a commitment to: (i) regular free and fair multiparty elections, second; (ii) political rights and freedoms, and (iii) a set of institutional checks and balances sufficient to uphold the first and second of these commitments.

As Landau and I note, this “democratic minimum core” (‘DMC’) ideal finds support in existing democratic constitutional practice in almost all extant democracies. It also reflects an overlapping consensus among all reasonable democratic theories as to what—at minimum—constitutional democracy requires (Dixon and Landau, 2021). (Of course, as Verdugo and López note, there may be disagreement as to what this entails in practice, or the “outer ranges” of the DMC) (Verdugo and López, 2026).

But Landau and I have suggested this does not undermine the importance of the core consensus. Indeed, Landau and I both suggest —separately and jointly— that this is one reason the DMC idea should anchor a range of debates about democratic constitutional design and interpretation (see Dixon and Landau, 2015).

At the same time, we suggest that understandings of this kind are necessary but not sufficient to realize a fully democratic constitutional ideal. That is, we suggest that democracy entails both thin commitments of this kind and a thicker set of commitments to individual and collective rights, and to collective democratic deliberation or public reason giving.

Recognizing this, RC/RJR theory emphasizes a broader range of rights and institutions as important to promoting democratic contestation, inclusion, and rights protection (Dixon, 2023a, pp. 54-55). In this sense, it is not a purely thin or competitive theory of democracy or constitutionalism —or one that is governed solely by a commitment to political markets (let alone economic markets) (Camarena González, 2026).

But equally, RC/RJR theory emphasizes the scope for reasonable *disagreement* about what thick commitments to constitutional rights and deliberation mean in various concrete settings. Indeed, following Waldron and other political constitutionalists, I emphasize that disagreement about rights is not only pervasive, but often reasonable among citizens who are free to form their own views or judgments on these questions. If we are to uphold a commitment to equality among citizens in a democracy, this means that commitments to rights and deliberation must be connected to —not divorced from— majority constitutional understandings. The same could be said for what commitments to deliberation and public reason require. The only possible exception is where one can identify some overlapping consensus as to the “core” of various civil, social or economic rights.

Because of this, RC/RJR theory proposes a form of two-track or “tiered” approach to constitutional design and decision-making (Landau and Dixon, 2018; Dixon, 2024d). For the democratic minimum core, responsive constitutional theory proposes strong forms of legal entrenchment for constitutional requirements and strong forms of judicial review capable of protecting the DMC against threats of erosion or attack by would-be authoritarian actors (Dixon, 2024d; Dixon 2023a). For thicker commitments to democracy, RC/RJR theory proposes a “weaker” or more “dialogic” approach to judicial review and design that recognizes the important role courts can play in over-

coming democratic “blockages” impeding the realization of minority rights and majoritarian understandings, and the importance of flexibility in amendment processes, or equivalent forms of legislative override to ensuring that judicial review does not create new and distinct forms of democratic blockage (Dixon, 2023a; Tushnet, 2008; Dixon, 2019; Hogg and Bushell, 1997; Dixon, 2007, Sigalet *et al.*, 2019). This, in turn, entails a commitment to shared institutional authority for constitutional interpretation and enforcement—including the sharing of responsibility between courts, the executive, legislature, civil society and other “fourth branch” or “guarantor” institutions (Dixon, 2024d; Dixon, 2026b).

RJR is not the *same* as weak or dialogic review. The idea weakened judicial review emphasizes judicial non-finality in all cases, whereas RJR theory argues for a carefully calibrated approach to judicial finality responsive to the specific legal and political context, and that combines elements of weakened strong review (Dixon, 2023a). This means a distinctive mix of narrow and broad reasoning and/or remedies that are either delayed or time-sensitive, coercive or persuasive, and that draw in broader stakeholders and modes of participation in the interests of effective implementation of court orders (Dixon, 2023a, pp. 202-242; Dixon and Chowdhury, 2019; Dixon, 2024b). The idea of “dialogue”, in contrast, is often (though need not be) associated with the idea of weaker or more conversational forms of review (Sigalet *et al.*, 2019; Dixon, 2007), or else, more formalist understandings of judicial non-finality and legislative override (Manfredi and Kelly, 1999; Dixon, 2019).

In addition, the idea of RJR depends on certain important legal and political preconditions, namely the presence of: (i) formal and de facto judicial independence; (ii) and adequate legal and political support structure for judicial review; and (iii) adequate jurisdiction and remedial power on the part of courts (Dixon, 2023a, pp. 141-178).

Previous symposia and scholarly dialogues on the book have also highlighted the importance of access to courts, and a supportive legal culture—or judicial role conception. In this symposium, Argelia Queralt Jiménez also goes even further in highlighting the importance of a supportive legal and political culture (Queralt Jiménez, 2026). Without this, she suggests, Spanish (and broader) experience suggests that any form of tiered constitutional design or approach to constitutional decision-making may be highly unstable—or veer from responsive to activist and overly strong (or weak) judicial

review (Queralt Jiménez, 2026). This argument echoes arguments Tushnet and I have made, but gives it a more distinctive grounding in *constitutional culture* (Kenny, 2023; Saunders, 2025). This in itself is an extremely valuable contribution, which deserves close attention from readers in and beyond the Spanish-speaking world.

Finally, RJR suggests that it is important to pay attention to the legal, political and sociological legitimacy of constitutional judicial review in a democracy—but that a court’s sociological legitimacy may not be entirely fixed, and instead can often be enhanced by careful, prudential judgments about the strength or weakness of judicial remedies, and the tone, narrative and authorship of court decisions (Dixon, 2023a, pp. 243-268). This is what Yvonne Tew and I label the idea of judicial “statecraft” (Dixon, 2023a, pp. 243-268; Dixon, 2021; Tew, 2020; Mann, 2018).

All these ideas give real and important questions of judicial capacity. Verdugo and López clearly note this, though they suggest that I go a substantial way toward addressing them (Verdugo and López, 2026). Queralt Jiménez, in contrast, suggests those concerns may be more pressing, including based on her own experience as a lawyer before the Constitutional Court and member of the General Council of the Judiciary in Spain. Whether this is true is also a deeply contextual, empirical question that depends on each court and judge, and may itself be influenced by symposia such as this—which make more accessible and understandable the core insights in the book to lawyers and judges in a diverse range of Spanish-speaking countries.

III. Particularizing RJR in the Spanish-speaking world

Several contributors themselves reprise these ideas in extremely useful and illuminating ways. For instance, in his essay, *Dixon and the Possibilities of a Responsive Model of Activist Judicial Review in the Global South*, Leonardo García Jaramillo usefully outlines many of these core ideas, and situates them in the context of a broader range of constitutional theories. Argelia Queralt Jiménez provides a similarly useful summary in her essay, *Democracy, Dysfunctions and Judicial Control: Dixon’s Model from a Spanish Perspective*. In their essay, *Responsive Constitutionalism Uphill, Burdens of Inertia and Consensus*, Sergio Verdugo and Gonzalo López outline many of these same points, and helpfully situate these arguments by reference to more “ideal” forms of constitutional theory, such as Jeremy Waldron and Ronald Dworkin’s (Verdugo and López, 2026, pp. 3-4).

To reprise these essays, and the book, it is worth fleshing out a little more what I mean by the idea of “democratic dysfunction” —both as a rationale for judicial intervention and restraint.

At the heart of responsive constitutionalism is a recognition that democracy can be well- functioning, and yet still subject to a range of blockages or sources of dysfunction —including what I have labelled (drawing on others), democratic “blind spots” and “burdens of inertia” (Dixon, 2023a, pp. 57-92; García Jaramillo, 2026; Queralt Jiménez, 2026).

Legislatures, for instance, may may fail to consider the full range of ways in which laws could apply so as to limit constitutional rights, or values (‘blind spots of application’; to consider possibilities for accommodating minority rights, at little or no cost to the relevant legislative objective (‘blind spots of accommodation’), or even to consider the voices and perspectives on an issue of minorities not directly represented in the legislative process (‘blind spots of perspective’).

Legislative processes may likewise be subject to burdens of inertia, arising from the competing demands on legislative time and capacity that can lead to “priority driven” forms of inertia or else partisan political or coalitional dynamics that can lead political elites to avoid addressing issues even when they are of pressing concern to some notable number of voters (“coalition driven” burdens of inertia). For rights involving positive forms of state action, there is also the possibility of complex burdens of inertia arising from a combination of bureaucratic inertia and a failure of the legislative branch to adequately supervise and overcome inertia of this kind (Dixon, 2023a, pp. 57-92; Metzger, 2015). As Verdugo and López note, these are also blockages noted by scholars such as Eskridge and Calabresi, but which have received insufficient attention in other comparative constitutional scholarship (Verdugo and López, 2026, p. 4; Calabresi, 1982; Eskridge Jr, 2009; Eskridge Jr, 2004).

Each of these blockages creates a strong argument, or a powerful argument for judicial intervention, albeit intervention that combines elements of judicial “strength” and “weakness” in a contextually-sensitive manner designed to encourage greater democratic responsiveness —or is “strong-weak” or “weak-strong” in nature (Dixon, 2023a, pp. 202-242).

The premise behind RJR theory is that judicial review has an enormous capacity to overcome democratic dysfunction, but also to create new forms of dysfunction, if not appropriately tailored or calibrated to be strong-weak or weak-strong in this way.

Courts can get things right, but they can also get things wrong from a democratic constitutional perspective. This means that rather than promoting approaches that are more in line with democratic majority understandings, they can sometimes produce outcomes that are out of line and not readily subject to legislative override (Dixon, 2023a, pp. 179-201). This is what I call the problem of “reverse” democratic inertia.

In *politically* high stakes cases, courts can also engage in judicial review that leads to damaging forms of institutional backlash —backlash that courts may not foresee and yet does real damage to their medium-term capacity to uphold basic commitments to constitutionalism and the rule of law. This is what I call the problem of “democratic backlash” and is distinct from any broader adverse electoral consequences of constitutional decision making.

Finally, Mark Tushnet has highlighted the danger of democratic debilitation, or risk that if courts too consistently and effectively counter democratic dysfunction, they reduce the incentive for legislative and executive actors to improve their own performance in constitutional construction and implementation (Tushnet, 1999; Dixon, 2023a, pp. 179-201). Given the broad range of issues considered by political actors relative to judicial ones, this is also a very real risk; (compare Schauer, 2006; Dixon, 2023a, pp. 179-201) and another reason to prefer weak-strong over purely strong forms of judicial review in the domain of legislative blind spots and burdens of inertia.

While summarizing these blockages, various contributors also go on to adapt and apply them within specific Latin American countries and contexts. For example, in his essay *Toward a Model of Judicial Responsiveness: Rethinking Constitutional Review through Differentiated Remedies*, Gustavo Arballo proposes a nuanced taxonomy of judicial remedies (‘interpretive, structural, dialogic and hybrid’ remedies) drawn largely from the Colombian constitutional context. He also goes on to connect those remedial forms to specific democratic blockages of the kind I identify in the book, in a manner that aims to provide even more concrete guidance than RJR theory for Latin American courts. In this way, he also connects ideas of democratic (or external) responsiveness to more internal notions of institutional responsiveness (Arballo, 2026).

In this sense, his work is reminiscent of the contributions of Cora Chan to comparative constitutional debate about the proper approach to judicial deference in human rights cases (Chan, 2024). It also parallels the work of Katie Young on social rights adjudication, where Young connects different theoretical accounts of the judicial role to concrete remedial choices of this kind (Young, 2012).

But it does so with a particular focus on Latin America, and the Global South, which —as García Jaramillo notes— is valuable in its own terms (García Jaramillo, 2026). García Jaramillo himself also shows how these same ideas can be situated within a broader theoretical context —of commitments to responsiveness, but also democratic experimentalism and incrementalism (Arballo, 2026; Dorf and Sabel, 1998; Dixon, 2023a, pp. 179-242).

IV. Refining and extending RC ideas

Other contributors focus more on testing and *refining* RC/RJR theory in a “reflexive mode” —or via the application of RJR theory to new contexts, and with a view both to confirming, extending and critiquing or refining its core ideas and insights (Dixon and Perham, 2025; Dixon, 2026a).

A. Responsive or unresponsive review with “bite”

For instance, in an extremely insightful essay on Ecuador, Daniela Salazar Marín engages in a reflexive process of comparison of just this kind: first, she highlights the uneven trajectory of democratic constitutionalism in Ecuador in recent decades —starting with the adoption of formal constitutional review under the 2008 Constitution, a period of non-independent review, and then renewal of independent review starting in 2019. This transition, she suggests, helps highlight the preconditions for truly responsive judicial review, namely: formal and *de facto* judicial independence. Without independence of this kind, judicial review is likely to become “abusive” rather than responsive in nature —either in a weak or passive sense, of simply rubber-stamping and legitimating anti-democratic forms of constitutional change, or in the stronger sense, of actively advancing those objectives (Landau and Dixon, 2020). Salazar Marín also notes the newfound attacks on courts, and judicial independence, in Ecuador —and the renewed threats to a responsive model of judicial review, compared to more abusive models of review.

Second, Salazar Marín explores the relationship between RC ideas and the issue of access to abortion in Ecuador. The Court in 2021 was asked to consider the constitutionality of legislative limits on access to abortion, in cases where pregnancy is occasioned by sexual assault. The Court, she suggests, adopted a largely responsive approach: it addressed the issue of abortion access in general terms, not just in the context of rape,

and adopted a dialogic or non-prescriptive approach to how abortion law should be reformed to conform with the 2008 Constitution. This also arguably responded to a powerful form of coalition-driven inertia in this area.

But the result was not a fully responsive outcome: while the Congress attempted to adopt new abortion laws, largely in line with the Court's reasoning, the President vetoed those laws, and proposed new far more restrictive regulations (indeed a law imposing approximately 60 procedural and substantive hurdles to legal access to termination). For Salazar Marín, this means that the Court should have been more responsive to this risk, and the relevant context of presidential democracy in Ecuador.

Another possibility, however, is that the Court should have issued the weak-strong, dialogic remedy it did—but been willing to strike down the legislative “sequel” sponsored by the President, as failing to meet the minimum requirements of (a) respect for a narrow version of the Court's ruling and (b) reasonable, reasoned deliberation in the formulation of a response. This is arguably one way of understanding what the Court has recently done in suspending or staying 13 of the limits found in the current abortion law (though whether the Court will be able to maintain these strong-form limits, on the merits remains an open question in light of increasing attacks on judicial independence, and proposals for formal constitutional change in Ecuador). And it is an example of what David Landau has called “aggressive” weak-form review, and Po Jen Yap weak form review “with bite” (Landau, 2013; Yap, 2017; Rodríguez-Garavito, 2011; Dixon and Yap, 2025). In his contribution to the symposium, Gustavo Arballo also labels this a form of “hybrid” judicial remedy, namely: one that is weak-strong (rather than purely weak or strong) in form, including over time—via progressive adjustments in the intensity and strength of judicial orders (Arballo, 2026, p. 20).

Ultimately, Salazar Marín suggests that the abortion case also helps illustrate the limits of responsive—as opposed to more minority-rights oriented, unresponsive approaches to constitutional construction. In fact, Salazar Marín suggests, there may not be democratic majority support for access to legal abortion in Ecuador. But even still, she suggests, to be legitimate a democratic constitutional system must guarantee some level of access—even if it means going against democratic majority understandings.

This form of unresponsive review is something Ely defends in *Democracy and Distrust*, providing it is a means of protecting the rights of “discrete and insular minorities”. But women, of course, are neither discrete nor insular socially or politically. Rather,

they are the subject of historical sources of disadvantage and marginalization economically and politically, and violence and other forms of subordination that impair their economic and political participation (Dixon, 2023a, pp. 57-92). This is one reason in the book I suggest that a concern for equality should be taken seriously, as a formal legal commitment within almost all contemporary democratic constitutions (Law and Versteeg, 2012; UCLA Center X, 2026). It is also a reason I suggest that while a concern for equality should be central to any theory of democratic constitutionalism, it cannot be a concern understood wholly in Elyian terms. Rather, we must find a way of thinking about the relationship between democracy, equality and constitutionalism that does better at recognizing the blurred nature of what it means to be a constitutionally “protected” class for this purpose, and the multiple overlapping values (and understandings) embedded in a commitment to constitutional equality (Dixon, 2023a, pp. 57-92).

Similar arguments have been made, in a Latin American context, in earlier work by Sergio Verdugo. For instance, in exploring the relevance of Ely’s ideas to Latin America, Verdugo suggests that Ely’s ideas must be adapted to account for the prevalence within the region of “hyper-presidential regimes with an unbalanced concentration of power in the executive branch’s hand” *and* the need to protect the “most relevant marginalized groups in Latin America: the poor majority and, in some countries, the indigenous populations” (Verdugo, 2021, p. 517).

In *We Are the 99%: Constitutional Review in Times of Extreme Economic Inequality*, Rodrigo Camarena González takes an important step in this direction —by proposing three broad conceptions of equality, as relevant to the challenge of material inequality facing many constitutional democracies today. This includes “formal inequality, identity subordination, and socioeconomic subordination”, and the complex ways in which they intersect and overlap (Camarena González, 2026, p 7). This also partially corresponds to the idea of equality, I advance in the book, as involving commitments to formal or substantive equality of opportunity (and hence freedom), equal dignity and freedom from group-based domination or subordination (Dixon, 2023a, pp. 39-40, 52-54).

But Camarena González also offers a critically important nudge —or push— for us to pay greater attention to economic or material inequality across all these contexts. He also suggests that without connecting RC/RJR to a concern about material equality, the theory lacks relevance and persuasiveness to many democracies today grappling with high levels of poverty but extreme levels of inequality in wealth and income.

There are two possible responses to this: one is that RC/RJR theory already has the resources to answer this challenge —by (i) insisting on fidelity to formal constitutional commitments to equality (of all relevant forms) in each country; (ii) promoting greater policy responsiveness to the views of marginalized voters, and even the middle class in some cases, and (iii) building into the DMC the idea of substantive protection for political rights and freedoms (Dixon, 2023a, pp. 57-92; Dixon and Landau, 2026). As Rawls notes, this includes provision of the necessary material preconditions for political participation on terms of equality among citizens- or what Rawls called “fair value” of the political liberties (Rawls, 1993).

But the truer response seems to me to recognize the usefulness of the challenge from Camarena González —to do more to connect RC/RJR theory to concerns about material equality. This is a core concern of my more inter-disciplinary work on democratic liberalism and “fair markets”. Indeed, in joint (with Richard Holden) and solo-authored work on fair markets, I have suggested that to be legitimate, democratic constitutional orders must recognize and provide access to a minimum level of “core goods” necessary for a life of full human dignity (in the capabilities sense) (Dixon, 2007; Dixon and Nussbaum, 2012) *and* ensure equality of access to certain “relative goods” (Holden and Dixon, 2022; Dixon, 2023b). These core goods include: (i) food, (ii) clothing, (iii) clean water, (iv) electricity, (v) housing, (vi) healthcare, (vii) education, (viii) rest and leisure, including as a worker and older citizen and (ix) time with family, including as a parent (Holden and Dixon, 2022; Dixon, 2023b). These relative goods, in turn, involve any good with an inherently rivalrous dimension —so decent housing proximate to public and social infrastructure, and education. They also include goods such as health-care, where there is no possibility of avoiding sickness or health, and hence the substantive content of the right is defined by a commitment to dignity in both the Kantian and capabilities sense —i.e., respect for the equal worth and value of each human life, as worthy of the same health-care treatments available to others, and within existing budgetary and technological constraints (Holden and Dixon, 2022; Dixon, 2023b).

Like Camarena, I have also recognized the complex interaction between economic and political inequality —though he provides a nuanced and useful account of this intersection (Camarena González, 2026; Holden and Dixon, 2022, pp. 183-188). But Camarena González process of reflexive engagement with the challenge of material inequality —globally and specifically in Mexico— helps provide critical additional insights about the important connection between RC/RJR theory and these more fair market, materially-oriented ideas.

II. Responsive constitutionalism and a material or feminist minimum core

It suggests, for instance, that even within RC/RJR theory, a commitment to equal dignity should potentially be cashed out not only in the idea of a constraint on courts giving effect to animus, but also the need to uphold universal access to a minimum level of core goods, and relative equality in the domain of decent housing, education and health-care, as well as in the domains necessary for equal participation in electoral politics. This is a deeply interesting and important idea, which I look forward to exploring — along with Camarena González and others — in the coming years.

For now, it is simply worth stressing the method RJR/RC theory suggests for judges or other fourth branch actors identifying the scope of this kind of “material minimum core”. First, a process of this kind would need to recognize the fact of reasonable disagreement about the precise scope and content of rights of access to decent housing, education and healthcare, in different countries and contexts. Second, and relatedly, it would proceed incrementally, by seeking to identify areas of overlap among countries’ actual practices, and different theories of material justice. This is the exact logic I have proposed as helping guide courts’ approach to the enforcement of constitutional social rights guarantees (Dixon, 2007), and that parallels the arguments by Jeff King for incremental social rights enforcement (King, 2012). It likewise has important support in the practice of many transnational human rights bodies, and their reliance on overlapping patterns of state practice as informing the definition of core human rights norms (see Moreno, 2026; Dixon, 2007). Notably, it is also the same method that underpins Landau and my identification of the *democratic* minimum core: it recognizes a practical consensus among constitutional decision-makers and theorists as a means of overcoming reasonable disagreement, albeit in an incremental, case-by-case way (Dixon and Landau, 2021; Dixon, 2023a).

A similar set of insights arises from engagement with various abortion cases in the Spanish-speaking world — including in a past symposium focused on Colombia, and via engagement with Salazar Marín’s study of Ecuador (see Dixon, 2026d; Benítez and Acosta-López, 2026; Salazar Marín, 2026). Here, scholars such as Benítez have suggested that I go too far in insisting on access to abortion as a necessary or desirable part of a RC/RJR approach, whereas Salazar Marín suggests I might not go far enough. Their process of reflexive engagement with my ideas — and mine with theirs — has also encouraged me to think more about the connection between RC/RJR and my work on feminist theory — including my emerging work on the idea of a “feminist mini-

minimum core”, as reflecting an overlapping consensus among feminist theories as to what is required, at minimum, for a constitutional democracy to respect and uphold a commitment to gender equality. This feminist minimum core also includes a commitment to some (if not unrestricted) access to legal abortion (Dixon, 2025a; Dixon, 2023a; Dixon, 2025c; Brocca, 2025; Milewska, 2025; Lemme 2025; Penteadó, 2025).¹

In another interesting and important essay, *Responsive Constitutional Justice and Ecological Crisis: Beyond Anthropocentric Constitutionalism*, Julian Gaviria-Mira explores the relevance of RC/RJR theory to addressing the current ecological and climate crisis worldwide, but through a special focus on the constitutional experiences of Colombia. Gaviria-Mira begins by noting an important argument of the book, which to date has received only limited attention, namely: the argument that RJR theory supports taking decisive action to overcome political inaction on climate change. A good example, I suggest, involves the approach of the Supreme Court of Pakistan in the *Leghari Case* (see Dixon, 2023a, pp. 120-122; Gaviria-Mira, 2026; Leghari v. Federation of Pakistan, 2015). And it is an example I suggest could and should be replicated, where necessary and with appropriate adaptations elsewhere —even potentially in the United States (Dixon, 2023a, p. 277).

III. RJR and ecological protection

Gaviria-Mira also invites attention to another important case of green constitutionalism: the decision of the Colombian Constitutional Court in Judgment T-622 of 2016 concerning the Arato River. This case, Gaviria-Mira suggests, can be analysed in responsive terms, as effectively aimed at overcoming blind spots of perspective on the part of the government regarding the impact of river contamination on vulnerable indigenous communities, and complex burdens of inertia surrounding measures aimed at its effective protection and decontamination. But it has only led to partial success at the level of implementation —in part because of the territorial conflict, and institutional weaknesses, undermining implementation. Like Salazar Marín, Gaviria-Mira asks whether this should be seen as an indictment of RJR/RC theory.

My own answer, however, is the same as that I give to Salazar Marín: before we can know that, we would need to see a court impose stronger “default” remedies —either initially or in subsequent litigation (Dixon, 2023a; Dixon and Yap, 2025). This kind of remedial default is an essential element of effective RJR in hard cases, and without it, we cannot determine the true reasons for any implementation failure. In cases in-

volving private actors (such as mining corporations responsive for illegal mining and contamination), this might also involve the imposition of default fines and penalties. Indeed, one of the interesting elements of Salazar Marín's essay, in this context, is its exploration of monetary remedies (in the form of reparations) as a potential tool in the RJR toolkit.

But equally, by focusing on Colombia and the issue of ecological justice, Gaviria-Mira also engages in an invaluable additional form of reflexive testing and refinement of RJR ideas: by paying attention to Judgment T-622 of 2016, he suggests, we are able to see the potential relationship between RC/RJR theory and the idea of blind spots of perspective relating to the viewpoint and interests of non-human animals and nature itself, or a non-anthropocentric worldview. This is again an extremely interesting provocation, which sounds in a broader emerging literature on the right to nature and structures of green constitutionalism (Stilt, 2021; Bookman, 2024; Weis, 2025), and one that I look forward to continuing to explore with colleagues in the coming years (an especially interesting case to explore in this context is Climate Emergency and Human Rights, 2025).

IV. Responsive, polarization and (the many forms of) Democratic inertia

In her essay, *Democracy, Dysfunctions and Judicial Control*, Queralt Jiménez explores the usefulness of RC/RJR theory to a range of real-world constitutional settings in Spain. For reasons linked to legal-cultural factors, she is ultimately sceptical of the ability to translate RJR theory into real-world constitutional practice—at least in a stable and consistent way. But by testing RJR theory in various Spanish cases, Queralt Jiménez also ultimately helps extend and refine those ideas—by pointing to distinctive sources of democratic dysfunction, which could in fact extend the scope and relevance of RJR theory in many presidential democracies.

My focus in the book is on parliamentary and presidential democracies, but with a primary focus on the legislative branch as compared to the executive branch (Dixon, 2023a, p. 19; MacDonnell, 2024; Dixon, 2024d). This also means that I give limited attention in the book to the potential inertia that can arise from inter-branch interaction—and especially between legislatures and elected presidents. I certainly note that

“in many presidential systems, partisan polarization together with ‘divided’ forms of government can mean that democratic politics is effectively gridlocked, and it is impossible to pass almost any form of legislation—including legislation that reflects thicker democratic commitments” (Dixon, 2023a, pp. 88-89). Indeed, this is one reason I note a potential tension between the DMC—and a commitment to checks and balances through the spreading of institutional authority—and responsiveness to thick democratic commitments.

I also explore the relevance of this tension to Latin America, including in the context of a discussion of the “unconstitutional state of affairs” doctrine in Latin America (Dixon, 2023a, pp. 122-127). In fact, this doctrine is one I suggest could be adopted elsewhere as a means of addressing inter-branch gridlock and the attendant democratic inertia it can create—in countries such as the US (Dixon, 2023a, pp. 269-279).

But inter-branch blockages are not a prime area of focus or exploration in the book. Hence, Queralt Jiménez’s attention to divided government in Spain helps enrich and refine these ideas—including, by drawing our attention to what I want to label “inter-institutional” forms of inertia.

Queralt Jiménez further usefully highlights the flow-on effects of inertia of this kind in Spain, and specifically the ways in which inter-institutional inertia has led to delay in re-authorizing the work of the General Council of the Judiciary—a central institution in promoting independence and professionalism in judicial appointments. The Council is responsible for appointing, promoting, and transferring judges and magistrates throughout their careers.² This includes appointing high-level positions like the justices of the Supreme Court and the presidents of high courts. It is also the head of the disciplinary system for judges. Hence, this kind of flow on effect could be seen as a species of hybrid blockage (or threat to both democratic responsiveness and the DMC), which is again a distinct and important dynamic for RC/RJR theory to pay closer attention to.³

Verdugo and López engage with the idea of burdens of inertia, through reflexive testing and refinement in the Chilean context—but reach somewhat different conclusions as to what this suggests for the scope or reach of RC/RJR theory. Like Queralt Jiménez, Verdugo and López note the rise of political polarization in Chile (as elsewhere) as a major threat to a well-functioning democratic constitutional system. But rather than treat this as an argument for judicial review, aimed at overcoming inter-branch inertia, they suggest it poses a more fundamental challenge to the theory, and its com-

mitment to majoritarian-inflected constitutional construction. In fact, they suggest, rising polarization often means that there is “no there there”, or no actual majority agreement or consensus as to what is required to address fundamental challenges in a society.

A good example, they suggest, is attitudes within Chile to health-care reform: there is a broad consensus within Chile as to the need for reform, but no clear majority view as to what this reform should consist in. As I note in the book, this poses a real challenge to RJR. But Verdugo and López suggest that the problem is in fact increasing in scope and significance in a polarized world. In doing so, they also usefully highlight the different layers at which democratic agreement or disagreement may exist, including consensus on: (i) the existence of the problem; (ii) a negative consensus on current policy, and (iii) the future policy to be adopted in an area (Verdugo and López, 2026, p. 10).

What does this mean for the conduct of judicial review? Verdugo and López suggest that it may mean a preference for much weaker, more restrained forms of review. And to some extent, I agree: as I note in the book, in the absence of majority agreement in favour of legal change to expand (or contract) thick democratic constitutional commitments, courts have two choices: either they can treat it as an instance that “requires ongoing democratic deliberation”, and hence a high degree of judicial restraint or commitment to weakened review, or a case in which there may be an “emerging if still nascent democratic majority position”, which helps can help elicit through appropriately calibrated weak-strong forms of review (Dixon, 2023a, pp. 150-152).

But it is also important to note when it would be appropriate to prefer weak over weak-strong review of this kind: one would be preferable where there was no democratic majority consensus or agreement capable of being judicially enforced (weak-weak view), whereas the other would be appropriate in instances of shallow consensus —say, around the existence of a problem and a negative consensus on current solutions. Here, the aim of judicial review should be to promote better —more focused and structured— deliberation aimed at reaching agreement on preferred solutions. Courts can also promote this via the adoption of narrow reasoning twinned with the appropriate forms of engagement-style, or structural remedies, aimed at creating structured opportunities for ongoing debate and deliberation (Dixon, 2023a; on engagement remedies, see Ray, 2016). Or they can do so via a mix of broad persuasive, and narrow forms of binding, reasoning, combined with a mix of delayed and coercive remedies (i.e. a form of strong-weak/weak-strong judicial review).⁴

To do so, they must simply avoid adopting an overly strong —i.e., broad or deep— approach to judicial reasoning, which limits the parameters of deliberation of this kind. That is, they should almost always prefer weak-strong over strong-weak forms of judicial review. Or at the very least, limits of this kind should be imposed with great care, mindful of the fact of reasonable disagreement and risk of reverse democratic inertia, and with a view to concerns about legal and political legitimacy.⁵

Verdugo and López make this point with great force and subtly in their essay (Verdugo and López, 2026, pp. 13-14). I am simply somewhat more sanguine that courts can —if not always will— promote approaches to deliberation that are consensus-building rather than undermining. They may not be able to prompt the kind of root and branch reform needed to address political polarization (for instance, through electoral reforms such as compulsory and ranked choice voting).⁶ But one should not be too quick to assume this, given for example, the idea of an “unconstitutional state of affairs” doctrine (on this doctrine and its relationship to RJR, see Alejandro Ramírez, 2026). Indeed, in the book I suggest that conceptually —if not in any real-world sense— such a doctrine could provide the basis for the US Supreme Court forcing change on voting rights —or one could argue, like electoral reforms in the domain of campaign finance regulation, ranked choice voting and independent electoral districting (Dixon, 2023a, p. 277).

V. Beyond RJR: A Critique?

Another critique, by Queralt Jiménez, relates to the stability of RC/RJR as a model —and tendency for weak-strong RJR to become overly strong, and displace legislative deliberation. For the most part, Queralt Jiménez offers an accurate and generous portrait of RC/RJR theory. But in one respect, she slightly mischaracterizes it, in ways that then make it more likely that she will find that the theory is not applied consistently in practice.

RJR theory, I have suggested, is a theory that seeks to protect a system’s latent responsiveness, by protecting the DMC, *and* to increase its responsiveness on a more case-by-case basis —both directly and indirectly, by directly countering legislative and compound blind spots and burdens of inertia, and encouraging legislatures to do so in a specific case, and in an ongoing way. This kind of judicial function is designed to be supplementary to the role of the political branches, and not to displace or replace them. But at the same time, it is not purely “democracy-forcing” in the manner advocated

by Cass Sunstein —that is, dependent on courts remanding all issues to the political branches for further consideration or deliberation (Dixon, 2023a, p. 6). This, I argue in the book, unnecessarily increases system-level inertia and capacity constraints, and overstates the degree to which the legislature as compared to the court is a “direct” representative of the voice of the people. Instead, I suggest, it has certain epistemic and sociological advantages which must be considered by courts, as they seek to strike the balance between direct and indirect approaches to overcoming inertia.

The same question could be raised about the relationship between RC/RJR theory and commitments to direct versus indirect democracy. In theory, RC/RJR theory is capable of embracing commitments to direct and representative democracy. But my focus to date has been on indirect or representative forms, and on blockages within a constitutional system —rather than root failings or sources of dissatisfaction with democracy itself. This is one of the major criticisms of the book, and my work to date, by Roberto Gargarella.

Gargarella has long called on constitutional scholars to develop theories capable of addressing the “dramas” of our time —including the current crisis in representation, and sense of alienation and disillusionment that has caused, in many democracies worldwide. He also criticises my work, and that of others, for the attention we give to the threat of democratic erosion of “abusive constitutionalism”, (Landau, 2013; Dixon and Landau, 2021) as opposed to this crisis in democratic representation (Gargarella, 2025).

Some of Gargarella’s criticisms are fair and generative: most importantly, he invites me to pay closer attention to the connection between commitments to RC and direct democracy, or the role of participatory deliberative fora in generating the kind of positive consensus about democratic change that Verdugo and López suggest is so often currently lacking in our democratic politics. This challenge has been raised by others, (Gargarella, 2025) but Gargarella is uniquely positioned to make the case for this participatory turn in RC/RJR theory. It is also a challenge I am currently addressing in other work —by connecting RC/RJR even more directly to participatory conceptions of democratic deliberation (Dixon, 2026d). As Verdugo and López note, there is nothing in RJR theory that precludes the expansion or adaptation of RC ideas in this way (Verdugo and López, 2026). (My focus to date has been on a more Rawlsian as opposed to Habermasian conception of deliberation as imposing public reason-style constraints, rather than direct participatory requirements (compare Rawls, 1993; Habermas, 1996; Gargarella, 2025, p. 661). It is also fair for Gargarella to label this a quite “thin” conception of “thick” democracy.)

At the same time, in his response to me, Gargarella raises two criticisms that I am less ready to accept: first, he suggests that there is no clear line between thin and thick conceptions of democracy in my account, and that I provide little conceptual guidance to courts in seeking to delineate between cases involving the DMC and blind spots or burdens of inertia. The example he gives is “the case of a severely polluted river —such as the Riachuelo River in Argentina— which endangers the rights of thousands of people, amid the passivity or inadequate response of the legislature” (Gargarella, 2025, pp. 662-663). This, in RJR theory, is a classic instance of a compound burden of inertia, which invites courts to engage in a form of weak-strong review aimed at prompting a more effective state response. Indeed, this is exactly the kind of remedial approach adopted by the Supreme Court of Argentina in this case. And contrary to Gargarella’s claim that “judicial experience” is the only guide I provide to the Court in this context, I provide extensive guidance for a court (a) in determining whether or how the DMC or other, less pressing blockages are implicated in a case, and (b) on the appropriate mix of strong and weak review and remedies that courts should apply in cases of this kind (Dixon, 2023a, pp. 57-140, 202-238).

This guidance is also another reason I think Gargarella is too quick to suggest that modern constitutionalism necessarily imposes undue constraints on democratic polities responding to the current crisis in representation. They certainly can do: the age of *Lochner*-style negative constitutionalism is not over (see Choudhry, 2004). But an increasing number of constitutions and constitutional courts have embraced more positive, transformative models of constitutionalism, and a form of de facto constitutional “tiering” that creates much greater flexibility for democratic reform than Gargarella suggests is the modern constitutional norm (see Landau and Dixon, 2004; on positive constitutionalism, see Barber, 2018; and on TC, see various sources in Dixon, 2025b).

Second, Gargarella suggests that my near exclusive focus is on the current crisis in constitutionalism, or the challenge of democratic erosion, rather than democratic representation. But this could not be further from the truth. While my joint work with David Landau has this focus and character, my own work has always been concerned with the twin crises of constitutionalism and democracy—including the very real problems for democracy of legislatures failing actively to engage with the constitutional claims of democratic minorities *and* majorities (Dixon, 2007). I have also suggested that RJR provides a potential response to some of the most profound contemporary failures of representation worldwide—including on issues such as gun violence and climate change, in the US for example (Dixon, 2023a, pp. 277-278). Indeed, I go so far as

to suggest that the unconstitutional state of affairs doctrine might provide one useful response to this form of profound democratic inaction, and dysfunction.

Further, I am attentive to the ways in which crises in democracy and constitutionalism interact. I put the point this way in the book: “Democratic systems that consistently fail to respond to the needs, concerns, and perspectives of democratic majorities will often lose public support and trust. The erosion of trust of this kind can also be a strong predictor or precursor of the rise of illiberal or anti-constitutional populist parties and movements, which then seek to erode democracy via a range of abusive constitutional tactics” (Dixon, 2023a, pp. 89-90) Indeed, like Gargarella, I am deeply concerned by the ways in which failures of active and responsive democratic representation continue to forms of democratic disillusionment that fuels the fire of what Wojciech Sadurski calls “illiberal, anti-constitutional populism” (Sadurski, 2022). My focus on democratic blind spots and especially burdens of inertia is motivated in part by this concern —as well as an intrinsic concern about the political legitimacy deficit that can arise from failures of democratic representation.

The real question is whether courts, or other guarantor institutions, can go far enough in responding to blockages of this kind —with or without more direct modes of democratic participation as a catalyst. This is also a question that this symposium only begins to answer. It is a question I look forward to revisiting, along with colleagues in and beyond these pages, in the years to come.

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Notes

- 1 The feminist minimum core involves “(1) a commitment to equal freedom and dignity for all women, and (2) interrogation of the degree to which current legal, political, economic, and social structures advance, or impede, access to freedom and dignity of this kind”: Dixon, 2025a, pp. 482-483.
- 2 I am indebted to Mateo Merchan Duque for clarifying this point and its significance.
- 3 Note that Queralt Jiménez suggests there are no immediate threats to the DMC in Spain, but erosion of norms of independent judicial appointment could be seen as preliminary source of threat of this kind. Compare, eg, Khaitan, 2020.
- 4 I am again indebted to Mateo Merchan Duque for this helpful suggestion.

- 5 In some cases, a domain restriction may help promote agreement among citizens, but equally, it may limit deliberation in ways that reduce rather than increase the possibility of genuine consensus on solutions.
- 6 Verdugo and López, 2026, p.16. For my own arguments in favour of these as valuable and possibly even necessary to democratic responsiveness, see Dixon, 2024d; Holden and Dixon, 2022; Dixon and Gauja, 2018.

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