Constitutional forum constitutionnel

The Role of Democratic Majority Understandings of Rights in Rosalind Dixon's Responsive Judicial Review

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I. Introduction

What role should democratic majorities play in determining the constitutional rights of minorities? One response to this question might be to say that the matter was settled in 1982, when Canada entrenched a bill of rights backed by judicial review in its Constitution, and in so doing placed minority rights beyond the reach of majoritarian politics. Indeed, over the past forty years, Canadian courts have delivered powerful decisions affirming the rights of women, persons with disabilities, and the LGBTQ+ community.[1]

However, the real story has always been more complicated. Section 1 of the *Canadian Charter of Rights and Freedoms* clearly permits rights to be limited so long as the demands of proportionality are satisfied.[2] The notwithstanding clause, when invoked, suppresses the effect of rights for a period of five years.[3] And the dominant theories of judicial review have

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1 *Fraser v Canada (Attorney General)*, 2020 SCC 28; *Vriend v Alberta*, [1998] 1 SCR 493 [*Vriend*]; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624. While women are not a numerical minority, they fall under the broader umbrella of equity-seeking groups. It should be noted that there have, of course, been major disappointments before the courts as well.

2 *R v Oakes*, [1986] 1 SCR 103.

3 Grégoire Webber, "Notwithstanding Rights, Review, or Remedy? On the Notwithstanding Clause and the Operation of Legislation" (2021) 71 UTLJ 510.

always evinced a preoccupation with the counter-majoritarian difficulty. The most notable of these, dialogue theory, treats judicial determinations of rights as provisional, and as subject to a legislative response that may or may not align with the court's earlier ruling.[4] This theory has gained sufficient traction that Canadian courts have occasionally spoken of their own role in these terms.[5]

The vulnerability of minorities to majoritarian politics has recently been thrust into the spotlight by new pronoun policies across the country.[6] In fall 2023, the Saskatchewan legislature enacted a law prohibiting children under 16 from using pronouns inconsistent with the sex they were assigned at birth at school unless they first obtain parental consent.[7] The law, titled the "Parent's Bill of Rights," followed a change in government policy to the same effect. The initial policy was challenged in court on constitutional grounds, prompting the government to recall the legislature to enact Bill 137, which invokes the notwithstanding clause to shield the policy from a *Charter* challenge.[8] A similar policy took effect in New Brunswick in summer 2023, though it was repealed in 2024 following a change in government.[9] An Alberta law enacting a school pronoun policy was passed in late 2024.[10]

The Saskatchewan and Alberta policies are now before the courts. In the Saskatchewan case, the legislation is being challenged on a variety of non-*Charter* grounds. The claimant is also arguing that section 33 does not preclude the courts from adjudicating the question of *Charter* compliance — a position with which a majority of the Saskatchewan Court of Appeal

4 Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue between Courts and Legislatures (or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75; Rosalind Dixon, "The Supreme Court of Canada, *Charter* Dialogue and Deference" (2007) 45:1 Osgoode Hall LJ 235.

5 *Vriend*, *supra* note 1.

6 Drew Postey, "Sask. school pronoun policy becomes law", *CTV News* (20 October 2023), online: <https://regina.ctvnews.ca/sask-school-pronoun-policy-becomes-law-1.6609978> [https://perma.cc/WE45-MCUR]; Hadeel Ibrahim, "N.B. digs in on rules for teachers and name, pronoun use of LGBTQ students", *CBC News* (23 August 2023), online: <https://www.cbc.ca/news/canada/new-brunswick/gender-identity-policy-713-pronouns-school-1.6954807> [https://perma.cc/5Y6M-89NP].

7 Postey, *supra* note 6.

8 *The Education (Parents' Bill of Rights) Amendment Act*, SS 2023, c 46. The "notwithstanding clause," or section 33, states that:
"(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15.
(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
(5) Subsection (3) applies in respect of a re-enactment made under subsection (4)."
Canadian Charter of Rights and Freedoms, s 33, Part 1 of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

9 Ibrahim, *supra* note 6; Cassidy McMackon, "N.B. government reverses changes to school gender identity policy", *Global News* (19 December 2024), online: <https://globalnews.ca/news/10926212/new-brunswick-liberals-policy-713-revised> [https://perma.cc/Z3FF-K3G8].

10 "Supporting Alberta Students and Families", online: *Government of Alberta* <https://www.alberta.ca/supporting-alberta-students-and-families> [https://perma.cc/4PZJ-VWE8].

recently agreed.[11] The applicants in the Alberta case argue that the legislation violates sections 7, 12, and 15 of the *Charter*.[12]

The role of democratic majorities in the wider rights project is also a prominent theme in Rosalind Dixon's new monograph, entitled *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age*.[13] Dixon is a leading scholar of weak-form judicial review, a form of judicial review that treats decisions on rights questions as subject to contestation and/or revision by legislative majorities.[14] She has also led the way in describing and analyzing the phenomenon of "abusive constitutionalism," a term that refers to the practice of political actors adopting the language and institutional trappings of democracy while simultaneously seeking to subvert it.[15] These two intellectual projects come together in *Responsive Judicial Review*. Building on John Hart Ely's idea of representation reinforcement, Dixon sets out to articulate a theory of judicial review "that both draws on comparative understandings of courts' role in democracy protection and promotion *and* acknowledges the potential limits and contestability of this role."[16]

Dixon conceives of "democracy protection and promotion" in broad terms.[17] She explains that "a responsive approach to judicial review … aims to take seriously both thin *and* thick understandings of democracy."[18] The thin understanding reflects "a commitment to a 'democratic minimum core,' or a system of free and fair elections among multiple political parties, based on the accompanying protection of political rights and freedoms and a system of checks and balances."[19] The thick conception includes "a commitment to a broader set of rights, freedoms, and institutions aimed at promoting good governance and deliberation," but also "recognizes room for reasonable disagreement among citizens about the scope of these rights and commitments … and thus the need for responsiveness to democratic majority understandings in relation to these questions."[20]

At the core of *Responsive Judicial Review* is the claim that courts have a role to play in addressing three types of "blockages" in the democratic process.[21] The first is "antidemocratic monopoly power." This is the risk that concentrated executive power will undermine free and fair elections and the proper functioning of the democratic process. The second, "democratic blind spots," refers to legislative decision-making that produces "unintended or unanticipated

11 *Saskatchewan (Minister of Education) v UR Pride Centre for Sexuality and Gender Diversity*, 2025 SKCA 74.

12 Alberta's UCP to fight legal challenge that aims to scrap school pronoun law (8 September 2025), online: *CTV News* <https://www.ctvnews.ca/edmonton/article/albertas-ucp-to-fight-legal-challenge-that-aims-to-scrap-school-pronoun-law> [https://perma.cc/Q7GY-JZGD]; EGALE, "Egale Canada v. Alberta – Education Amendment Act (Bill 27) – Name and Pronoun Restrictions," online: <https://egale.ca/awareness/egale-v-alberta-pronouns> [https://perma.cc/5KLE-6XGY].

13 Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford: Oxford University Press, 2023) [Dixon, *RJR*].

14 Rosalind Dixon, "The Core Case for Weak-Form Judicial Review" (2016) 38:6 Cardozo L Rev 2193; Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: University Press, 2001).

15 Rosalind Dixon & David E Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford: Oxford University Press, 2021).

16 Dixon, *RJR*, *supra* note 14 at 2 (emphasis in original).

17 Stephen Gardbaum made a similar comment during the workshop on which this special issue is based.

18 Dixon, *RJR*, *supra* note 14 at 61 (emphasis in original).

19 *Ibid*.

20 *Ibid*.

21 *Ibid* at 8–9. I will use these terms throughout.

limitations on constitutional protection."[22] The third, "democratic burdens of inertia," relates to "unjustified delay in addressing democratic demands for constitutional change."[23] These "sources of democratic dysfunction" are ones that "courts are relatively well-placed to counter, at least under certain conditions — that is, where judges enjoy a meaningful degree of independence, political and civil society support, and remedial power."[24]

In addressing these dysfunctions, however, courts must be conscious of context and the limits on their capacities. They should also be alive to the risks of "reverse burdens of inertia," "backlash," and "democratic debilitation."[25] Reverse burdens of inertia are "legal changes that go beyond what democratic majorities are willing to endorse or support, but which legislatures cannot override or modify."[26] Backlash refers to negative public and political responses prompted by judicial decisions.[27] And "democratic debilitation" refers to the phenomenon of court decisions reducing the need or "incentive" for legislatures to make constitutional judgment calls.[28]

Responsive judicial review thus embodies "a commitment to representation-reinforcement that involves protecting and promoting the capacity of a democratic system to respond both to minority rights claims and considered majority understandings under a range of real-world, non-ideal conditions."[29] This is a form of judicial review that can be calibrated up or down depending on the circumstances, and that is defined by two features in rights cases: a willingness to give effect to rights where legislatures have failed to do so due to democratic blockages, and a commitment to deciding cases in ways that align with majoritarian attitudes about rights.

In articulating the reach of her theory, Dixon adds two important caveats. She explains that a court's primary duty on judicial review "is to give effect to *legal* constraints and requirements."[30] Responsive judicial review therefore applies where "formal constitutional 'modalities,' such as the text, history and structure of a constitution run out — and courts are necessarily required to consider broader constitutional or political values as part of a process of constitutional constructional choice."[31] She also explains that "democracy is not the only value a constitutional court can, or should, consider … other values include individual freedom, dignity … formal and substantive equality, and a commitment to the rule of law."[32] In her view, "courts can and should play a role in enforcing these commitments — both as a necessary condition of the legitimacy of democracy, and as a constraint on majoritarian democratic decision-making."[33]

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22 *Ibid* at ch 3.
23 *Ibid* at 2, ch 3.
24 *Ibid* at 3.
25 *Ibid* at 9.
26 *Ibid*.
27 *Ibid*.
28 *Ibid*.
29 *Ibid* at 3–4.
30 *Ibid* at 4 (emphasis in original).
31 *Ibid* at 5.
32 *Ibid*.
33 *Ibid*.

Taken together, these caveats suggest that Dixon's theory will only apply in a small minority of cases, though this is not how things play out in her book.[34] I leave the assessment of the scope and reach of Dixon's theory to others. Instead, in this short article, I examine the role that "democratic majority understandings of rights"[35] play in her account of judicial review, and consider what the recent pronoun cases might tell us about the merits of such an approach.

Dixon claims that a well-functioning constitutional order is one in which legislation keeps pace with "evolving democratic majority understandings of both majority and minority rights."[36] But this goal can be undermined by democratic blockages. Judicial intervention is therefore justified to counter the dysfunction. In doing so, however — and this is the crucial move I explore in this article — Dixon argues that courts should confine themselves to giving effect to "democratic majority understandings of rights."

To be clear, Dixon is in good company in making the case for a democratically responsive approach to judicial review. Scholars of comparative constitutional law have been working for decades to develop theories of rights and judicial review that respond meaningfully to the counter-majoritarian difficulty while also giving effect to rights. Representation-reinforcement, dialogue theory, weak-form judicial review, and the New Commonwealth Model of Constitutionalism are all theories that in one way or another seek to legitimize judicial review by placing an accent on democratic responsiveness.[37] While there may be good reasons for judicial review to be democratically responsive in the broad sense, however, I argue that there are risks to conceiving of judicial review as being disciplined by democratic majority understandings of rights.

II. "Democratic Majority Understandings of Rights"

Before elaborating on the role that democratic majority understandings of rights play in Dixon's theory of judicial review, it is worth recalling that Dixon's ultimate objective is to promote the health of constitutional democracy. This includes ensuring that legislatures respect constitutional rights. Dixon recognizes, rightly in my view, that a range of factors can prevent (even well-meaning) legislators from giving adequate effect to rights.[38] Dixon's emphasis on the importance of rights-respecting legislation is therefore welcome.

More controversial, however, is the idea that courts should approach judicial review as a process of divining and applying democratic majority understandings of rights. In what follows, I raise some methodological questions about how a democratic majority understanding of rights is to be identified. I then consider whether it undermines the judicial role to go in search of such an understanding. Finally, I reflect on the relative importance of democratic responsiveness for the legitimacy of judicial review, and ask whether there are more or less appropriate ways for courts to pursue democratic responsiveness as an objective.

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34 *Supra* note 18.

35 Dixon, *supra* note 14 at 59, 61, 101, 182, 191, 271.

36 *Ibid* at 10–11.

37 Hogg & Bushell, *supra* note 4; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism Theory and Practice* (Cambridge, UK: Cambridge University Press, 2013); Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2009).

38 Dixon, *supra* note 14 at 3–4.

Dixon's defence of the role of democratic majority understandings in her theory is laid out most clearly in the book's third chapter, where she explains that the representation reinforcing elements of her approach require judges to give effect to majoritarian conceptions of rights. She does note that:

> … [i]n some case, commitments to majority rule may appropriately give way to other conflicting constitutional norms and values such as the rule of law, or the redress of historical disadvantage or injustice … And where this is the case, a constitutional system may be committed to norms *other than* norms of democratic responsiveness, or even a form of democratic non-responsiveness.[39]

However, it is unclear when these interests may legitimately be given effect to, and whether they take judges outside the scope of her theory.

Dixon also states that courts will usually be justified in adopting a heightened standard of scrutiny when the rights of vulnerable minorities are at stake.[40] But she also argues that the identification of a group as a vulnerable minority is subject to democratic majority understandings,[41] and that "disadvantage itself must be seen through the lens of evolving democratic understandings of a group's social, economic, and political power."[42] This leads her to conclude that neither women, the LGBTQ+ community, persons with disabilities, nor the elderly "are truly 'discrete and insular' — in the sense of being geographically concentrated and unable to form effective coalitions."[43] On the contrary, she says, "many of these groups have … been quite effective in building successful political coalitions, even though they remain disadvantaged, and subject to demeaning forms of treatment."[44]

The role of democratic majority understandings in Dixon's theory comes through particularly clearly in her case study of the US abortion jurisprudence. There, she concludes that the US Supreme Court has generally decided abortion cases in a manner that is consistent with the level of public support for abortion at that time, with public opinion polls being treated as the relevant metric.[45] She explains that "[t]here are powerful arguments in favor of recognizing a constitutional right to access to abortion. Access to abortion is often necessary to protect women's physical and psychological health, and thus basic human dignity or security of the person."[46] However, she also concludes that shifts in abortion access over time, informed by democratic majority understandings, are "inherently reasonable from a democratic perspective."[47] In short, in the face of deep disagreement about the existence and content of a right to abortion, courts are not only entitled, but justified in giving effect to democratic majority understandings of rights.

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39 *Ibid* at 64.
40 *Ibid* at 135.
41 *Ibid*.
42 Dixon, *supra* note 14 at 135.
43 *Ibid* at 54.
44 *Ibid*.
45 *Ibid* at 188–89.
46 *Ibid* at 191.
47 *Ibid*.

A. Locating Democratic Majority Understandings

Given the importance of democratic majority understandings to her theory, Dixon would have ideally given more detail about how courts are to go about identifying them. One approach might be to say that the best indicator of these understandings is to be found (implicitly or explicitly) in legislation. However, this does not appear to be what Dixon has in mind, and for good reason: if legislation enacted by a democratic majority is the best indicator of democratic majority understandings, then those laws would be impervious to challenge.

Another possibility is that democratic majority understandings of rights are to be ascertained by reading newspapers and consulting public opinion polls. Indeed, these appear to be the types of sources Dixon has in mind for locating democratic majority understandings. Again, however, this approach poses challenges. Are litigants to supply the court with public opinion polls? Should courts engage in independent judicial research?

There is also a disconnect between the idea that the meaning of rights is deeply contested and the existence of an identifiable democratic majority understanding. If views about what the constitution requires are divided, then it is difficult to see how democratic legitimacy can be advanced by adopting interpretations of rights favoured by 53 per cent of the population but opposed by 47 per cent.[48] Indeed, in circumstances in which there is a wide range of opinion about what the constitution requires, there may be no majority understanding at all. What are the courts to do then?

Even when there is a clear democratic consensus on an issue, there are likely to be lingering questions about the nature of that consensus. Dixon, understandably, appears to have fairly high-level democratic majority understandings in mind — "the constitution should include a right to abortion," or "the constitution should not include a right to abortion." However, these high-level views may be of limited utility in complex cases. They also beg the question of whether public opinion polls actually represent constitutional interpretations at all, as opposed to opinions about what interests a constitution should or should not protect.

B. Legitimacy Concerns

Beyond the logistical questions, this approach also raises other concerns. Although it is defended as a way of securing courts' legitimacy, there are obvious legitimacy trade-offs associated with framing the judicial role in this manner. If the function of courts is to work out what public opinion requires in any given case, then judges begin to look more like politicians. As a consequence, judges may find their legitimacy diminished rather than enhanced.

In retrospect, the scholarship of the last few decades has been propelled by a legitimate if overweening preoccupation with the democratic credentials of judicial review. It would be a mistake, though, to think that the judicial role has ever drawn its legitimacy in significant part from its democratic credentials. Rather, judicial legitimacy derives primarily from the courts'

48 Robert Post & Reva Siegel, "*Roe* Rage: Democratic Constitutionalism and Backlash" (2007) 42 Harv CR-CL L Rev 373. For the argument that there can also be heterogeneity in democratic majority understandings of rights that track sub-state (provincial) political lines, see Jean-Christophe Bédard-Rubin's contribution to this special issue.

unique responsibility for upholding the rule of law — always the fellow traveller of parliamentary sovereignty in Westminster accounts of constitutional law — and from the discipline supplied by the common law method.[49] The latter's demands have produced a form of judicial practice defined by the incremental development of the law, attention to the facts of individual cases, and a commitment to *stare decisis*.[50]

The foregoing suggests that judges should decide constitutional cases, not by trying to determine what level of rights protection the majority would accept, but rather as a judge would, using the tools of a judge: by hearing evidence, finding facts, and interpreting law; by taking an incremental approach, sometimes holding back, but sometimes acting boldly when other branches of state fail in chronic ways to address matters falling within their constitutional remit.[51] In the same way that legislators should not "govern like judges," courts should not "judge like politicians."[52] Such an approach would not only take the courts outside of their context and capacities; it would risk eroding their authority.

The strongest argument for the democratic legitimacy of judicial review may in fact lie in the courts' ability to safeguard the rights of the vulnerable and the unpopular against encroachment by the majority. Indeed, this was the Supreme Court of Canada's message in the *Oakes* case, where the Court was called upon to explain the types of limits on rights that should be permitted in a "free and democratic society." As Chief Justice Dickson explained:

> Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[53]

By giving effect to the *Charter* using the tools of the judge, courts uphold both the rule of law and democracy, and in a way that is well-tailored to Canada's rights-based democracy.

C. Final Thoughts on Democratic Responsiveness

Now, to say that courts should not view their role as giving effect to democratic majority understandings of rights is not to suggest that courts should forego attempts at democratic

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49 Albert V Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: Macmillan, 1965); Mark D Walters, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2009) 245. On the legitimacy of the judicial function, see Aileen Kavanagh, *The Collaborative Constitution* (Cambridge, UK: Cambridge University Press, 2023); Joseph Heath, *The Machinery of Government: Public Administration and the Liberal State* (New York, NY: Oxford University Press, 2020) at 82.

50 See generally Jula Hughes, Vanessa MacDonnell & Karen Pearlston, "Equality & Incrementalism? The Role of Common Law Reasoning in Constitutional Rights Cases" (2014) 44:3 Ottawa L Rev 467.

51 Kavanagh, *supra* note 50 at ch 7.

52 Janet Hiebert, "Governing Like Judges?" in Tom Campbell, KD Ewing & Adam Tomkins, eds, *The Legal Protection of Human Rights: Sceptical Essays* (Oxford: Oxford University Press, 2011) 40.

53 *R v Oakes*, *supra* note 2.

responsiveness. Indeed, one of the lessons of Dixon's book is that rights protection is a whole-of-state project. By the time a law is challenged in court, its constitutional *bona fides* have been tested, first within the executive and then during the legislative process. These determinations of constitutionality and the evidence that support them provide the foundation for the adjudicative exercise that follows.[54] Courts should grapple meaningfully with the choices the legislature has made, based on the information it had before it, and not lightly discard them. This is what the collaborative project of rights protection requires.[55] The degree of care with which the constitutional issues and trade-offs have been considered and debated, for example, may well have an impact on the court's subsequent approach to adjudication.[56]

The reasons for considering what occurred at earlier stages extend beyond this, however. Each branch of state approaches rights questions from a somewhat different perspective, owing to their unique functions. They also bring different tools to the task of giving effect to constitutional rights.[57] One of the strengths of an inter-institutional approach to rights protection is that in the coming together of these different approaches, solutions to rights questions emerge that reflect the considered views (one hopes) of three different branches of state. This heterogeneity strengthens, rather than weakens, rights analysis. For this reason, too, courts should not attempt to give effect to democratic majority understandings of rights. Such an approach would be at odds with the judiciary's expertise, and would detract from, rather than add to, the robust system of inter-institutional engagement that currently defines Canada's constitutional order.[58]

Attention to inter-institutional dynamics also demonstrates the importance of some of Dixon's other prescriptions regarding judicial review. Dixon's theory shows that remedial flexibility can be used to craft remedies that are tailored to context and mitigate the possibility of backlash. The task of tailoring remedy to context is well-suited to the judge, and does not implicate them in overtly political decision-making. Rather, it involves courts in conscious reflection of the context in which their ruling will be received. This, Peter Oliver has forcefully argued, is simply a hallmark of good judicial decision-making.[59]

Another major contribution is the idea that the "intensity" of judicial review can be "calibrated" up and down depending on context.[60] As I explain in the next section, there is real value to the idea that courts may vary the intensity of judicial review and the remedies they grant to respond to the specific concerns raised by a case. This approach allows courts to give effect to rights in a way that fits with their expertise *and* respects the separation of powers.[61] In short, there is a range of ways that courts can be democratically responsive, only one of which involves treating democratic majority understanding of rights as decisive.

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54 Janet L Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montréal: McGill-Queen's University Press, 2002); Kavanagh, *supra* note 50.

55 Kavanagh, *supra* note 50. See also Vanessa A MacDonnell, "The Constitution as Framework for Governance" (2013) 63:4 UTLJ 624 [MacDonnell, "Constitution as Framework"].

56 Vanessa MacDonnell, "The New Parliamentary Sovereignty" (2016) 21:1 Rev Const Stud 13 [MacDonnell, "New Parliamentary Sovereignty"].

57 Kavanagh, *supra* note 50.

58 See generally *ibid*.

59 Peter C Oliver, ""A Constitution Similar in Principle to that of the United Kingdom": The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019) 65:2 McGill LJ 207.

60 Dixon, *supra* note 14 at 127. See also Kavanagh, *supra* note 50.

61 Kavanagh, *supra* note 50.

III. Recalibrating Judicial Review Where Minorities are Concerned

This brings us back to the rules restricting trans and non-binary children's pronoun use at school. Dixon might argue that values other than democracy should be vindicated in this situation. After all, those most impacted by the measures are too young to vote.[62] But apart from the age factor, there is nothing that marks these laws as fundamentally different from the ones she discusses in her book. Indeed, one of her case studies is the global experience with LGBTQ+ rights.

The fact that the Saskatchewan legislation includes a notwithstanding clause is a significant impediment to the success of any *Charter*-based claim. In Alberta, however, the *Charter* arguments are still on the table. In my view, the shortcomings of an approach to judicial review that enforces democratic majoritarian understandings of rights emerges rather clearly in this context. Provincial leaders have claimed that there is strong public support for these types of initiatives, though there is evidence that these claims are exaggerated.[63] Public opinion polling is not particularly helpful either. According to EGALE Canada and spark*insights, a poll conducted in fall 2023 demonstrates that "Canadians are divided on school pronoun mandates,"[64] with 51 per cent being opposed to mandatory disclosure, and 49 per cent being in favour. An Angus Reid poll published in December 2023 found that 55 per cent of Saskatchewan residents polled were in favour of the pronoun policy, while 40 per cent were against.[65] 55 per cent believed that teachers should retain the power to determine whether to advise parents that their child is using a different name or pronouns at school.[66] And 63 per cent of persons polled concluded that the new policies were likely to be harmful to children.

Once can see both the conceptual and practical difficulties associated with determining what the democratic majority understanding is here. In addition to the fact that the politicians say one thing and the public opinion polls say another, the polls themselves do not clearly identify a democratic majority position (and in fact raise additional questions about who the relevant political community is).[67] Moreover, it is unclear that the public opinion polls communicate constitutional interpretations at all, as opposed to policy views.

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62 Nathalie Des Rosiers & Caitlin Salvino, "Saskatchewan's Use of the Notwithstanding Clause Reveals a Fundamental Flaw", *Policy Options* (29 September 2023), online: <https://policyoptions.irpp.org/magazines/september-2023/saskatchewan-notwithstanding/> [https://perma.cc/D2HT-YUPC].

63 Jeremy Simes, "Sask. pronoun law: province received 18 official complaints before policy introduced", *CTV News* (18 December 2023), online: <https://regina.ctvnews.ca/i-want-god-taught-in-school-sask-received-18-letters-before-implementing-pronoun-policy-1.6691870> [https://perma.cc/YT5D-8HNY].

64 Spark Insights, "Canadians are divided on school pronoun mandates", online: <https://sparkadvocacy.ca/insights/2023/10/canadians-are-divided-on-school-pronoun-mandates> [https://perma.cc/59B9-UCBY]. See also Egale Canada, "New polling data shows that majority of Saskatchewanians believe children are likely to be harmed if school pronoun policy legislation is enacted", online: <https://egale.ca/egale-in-action/sask-polling-data> [https://perma.cc/SAS3-6FXK].

65 Angus Reid, "Saskatchewan: Majority support government's gender & pronoun policy but half also say exceptions needed", online: <https://angusreid.org/saskatchewan-gender-pronoun-policy-moe> [https://perma.cc/6SR5-VDPP].

66 Spark Insights, *supra* note 65.

67 I am grateful to Jean-Christophe Bédard-Rubin for pointing this out.

In this context, the tension between the search for democratic majority understandings and the purposes of constitutional rights protection also emerge quite starkly. The failed project of rights being dependent on the goodwill of others is partly what led to the *Charter*'s entrenchment; it would be odd if this approach were to re-enter through the back door in the guise of constitutional interpretation. This is not to say that deference to political judgment should necessarily be attenuated, or that there is a single set of relevant interests in this context. Rather, the point is that it is important to think carefully about where and how democratic majority understandings of rights are salient, and when counter-majoritarian interpretations of rights will in fact be necessary for realizing the *Charter*'s purposes.

Far more promising, in my view, is an approach to judicial review that can be ratcheted up and down depending on context. Where the executive and the legislature engage meaningfully and in good faith with rights, including minority rights, then there will be good reason for courts to defer to legislative judgment.[68] Where they fail to do so, however, the intensity of judicial review may need to be ratcheted up to preserve the core function of rights. Of course, courts must be cognizant of the context in which their rulings will be received. As Dixon suggests, remedial discretion and "weakened norms of *stare decisis*" may sometimes need to be relied upon to mitigate the risk of backlash, particularly in an era of high polarization and creeping populism.[69] The use of these judicial tools permits courts to give full effect to rights while also respecting institutional relationships.[70]

If this argument appears to echo claims that were made nearly a century ago when courts were considering the rights of vulnerable minorities, it is no coincidence. The "discrete and insular minority" problem has always been the Achilles heel of theories of democratic constitutionalism and weak-form judicial review.[71] The recent pronoun policies are a reminder of the potentially pernicious consequences of allowing political majorities to define the rights of vulnerable minorities, and the crucial role courts play in safeguarding their interests.

Now, these arguments do not address the wider problem of political actors invoking the notwithstanding clause to suspend the operation of minorities' constitutional rights. I for one am sceptical about the possibilities for addressing this concerning practice through judicial review. However, the use of the clause in this context warrants political condemnation, in my view. There is also good reason to develop political norms against the use of the notwithstanding clause in circumstances that imply animus toward a minority group or otherwise irreparably impact their interests.[72]

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68 MacDonnell, "Constitution as Framework", *supra* note 56; MacDonnell, "The New Parliamentary", *supra* note 57; Liora Lazarus & Natasha Simonsen, "Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference" in Murray Hunt, Hayley Hooper & Paul Yowell, eds, *Parliament and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2014) 385.

69 Dixon, *supra* note 14 at 228; Oliver, *supra* note 60.

70 Aileen Kavanagh, "Recasting the Political Constitution: From Rivals to Relationships" (2019) 30:1 King's LJ 43.

71 *United States v Carolene Products Co*, 304 US 144 (1938), fn 4.

72 On political norms, see generally Aileen Kavanagh, "The Ubiquity of Unwritten Constitutionalism" (2024) 21:4 International Journal of Constitutional Law 968.

IV. Conclusion

I conclude by noting that this article should not be interpreted as an assault on the character of democratic majorities. After all, democratic majorities set the modern rights project into motion, and legislation that implements constitutional rights has played a crucial role in rights realization.[73] It would therefore be misleading to suggest that democratic majorities are always a threat to minority rights. But the increasing use of the notwithstanding clause to suppress minority rights demonstrates that the political process cannot always be relied upon to respect, much less protect and promote, minority rights. This has placed pressure on courts to play a more active role in adjudicating cases involving the notwithstanding clause, and more generally, serves as a reminder of the important role of courts in the rights project.[74]

Democratic responsiveness must therefore be put in its place. When courts adjudicate cases, they should use judicial tools rather than focus their analysis on the vision of constitutional rights that democratic majorities are prepared to condone. At the same time, they ought to review legislation with an appropriate degree of deference, taking into account the "engagement" with rights that occurred at earlier stages of the process.[75] It is appropriate for the intensity of review to be calibrated up or down depending on a range of factors, including the nature of the rights that are at stake, the degree of engagement with rights at the legislative stage, and whether the legislation appears to be motivated by animus toward a particular minority group. This approach recognizes the distinctive contributions that each branch of state makes to the interpretative enterprise, while also ensuring that minority rights receive robust protection.[76]

73 MacDonnell, "Constitution as Framework", *supra* note 56.

74 Mark S Harding, *Judicializing Everything? The Clash of Constitutionalisms in Canada, New Zealand and the United Kingdom* (Toronto: University of Toronto Press, 2022).

75 Janet L Hiebert, "Parliamentary Engagement with the Charter: Rethinking the Idea of Legislative Rights Review" (2012) 58 SCLR (2d) 87.

76 Kavanagh, *supra* note 50.