Law & Social Inquiry
Volume 49, Issue 1, 478–508, February 2024

Law& Social Inquiry

How Should Courts Respond to Political Questions? Exploring the Dialogical Turn in the Supreme Court of Canada's Federalism and Indigenous Case Law

Minh Do and Robert Schertzer

In this article, we: (1) advance a theory for how courts should respond to highly political disputes about jurisdictional authority, and (2) assess whether courts can achieve this ideal. Our theory draws from normative realism to argue that courts should push conflict back into the political realm whenever possible—facilitating free and fair dialogue by outlining rules and principles to guide negotiations, while also rejecting zero-sum outcomes when enforcing jurisdictional powers and related rights. We favor this approach because it can generate legitimacy for the legal and political systems by recognizing the judiciary's limited democratic standing in structural disputes. To ground this argument in actual practice, we assess how the Supreme Court of Canada has managed two streams of highly political jurisprudence related to jurisdictional authority—federalism and Aboriginal rights cases. We show that the Court has increasingly relied on this approach of facilitating dialogue in both areas. While we argue that this approach is particularly well suited to federalism cases, our analysis uncovers negative outcomes in Indigenous case law. The Court's approach often fails to strongly enforce the constitutional rights of Indigenous peoples, demonstrating that its facilitator role does not adequality account for the power imbalances between the state and Indigenous peoples.

INTRODUCTION

The critical role that courts play in liberal democracies has shifted over the last few decades. The judicialization of politics—the increasing reliance on courts to solve inherently political controversies—raises significant questions about the ability of courts to serve as independent bodies that uphold the rule of law, check executive power, and adjudicate disputes. This shift away from the traditional judicial role has marked contemporary politics (Tate and Vallinder 1995; Stone Sweet 2000; Shapiro and Stone Sweet 2002; Hirschl 2004). Among its many implications, one of the most serious is that it is

Minh Do is an Assistant Professor in the Department of Political Science at the University of Guelph, Ontario, Canada. Email: mdo03@uoguelph.ca.

Robert Schertzer is an Associate Professor in the Department of Political Science at the University of Toronto, Ontario, Canada. Email: robert.schertzer@utoronto.ca.

We would like to express gratitude to the anonymous reviewers for their insightful and constructive comments. We are also grateful to the participants of the 2021 Canadian Political Science Association, especially Emmett Macfarlane and Troy Riddell, for sharing their thoughtful comments on an earlier draft of this article.

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

jeopardizing the status of courts as fair forums for the resolution of legal issues and limiting the democratic pedigree of political associations (Waldron 1993).

This article focuses on the judicialization of politics by investigating instances where courts are thrust into managing conflicts over the very nature of the political association. Most of the scholarship on the judicialization of politics and the democratic challenge of judicial review focuses on civil rights jurisprudence. Here, we turn our gaze to the less discussed, but equally political, judicial review related to the foundational structure of power in liberal democracies—that is, conflicts over the jurisdiction of constitutive governments and self-governing communities in multilevel political systems (on these conflicts, their political nature and judicial review, see Stone 2008, 2010; Schertzer 2008, 2016). Our objective is to explore how courts can exercise their role in a way that maintains their legitimacy and that of the wider political system. Drawing from an amalgam of legal and normative political realism, we sketch a theory of judicial review that calls on courts to adjudicate foundational disputes over the nature and structure of the political community by facilitating dialogue, rather than retreating to legal positivism. We think it is necessary to pair this theoretical reflection with an analysis of how courts are *actually* responding to situations where they are being asked to adjudicate inherently political conflicts. Given the reality that courts are increasingly playing a role in these types of conflicts—and that this is largely a result of decisions taken by political actors (Hirschl 2004, 2008)—we need to better understand how courts are adapting their own role perceptions. In short, we are investigating how courts should respond when they are asked to manage conflicts over the very nature of the political association, and then turning to assess whether they can actually live up to this ideal in practice.

To assess the practice of the judiciary we turn to Canada, and its apex court, the Supreme Court of Canada (SCC). Canada has a long history of the SCC playing a significant role in major conflicts over its fundamental nature and structure. As a divided polity, there have been long-running and systemic debates over the very nature of the country (Tully 1994; Borrows 1999; McRoberts 2001; Coulthard 2014; Russell 2017). These debates reveal that Canada has multiple "visions" of its constitutional order; although some conflict with one another, all hold some legitimacy. The three primary visions depict Canada as a multinational polity, as a compact among equal orders of government, and as a pan-national state with a common civic identity shared by all citizens (LaSelva 2018; Schertzer 2020). The courts have played a key role throughout Canada's history in mediating these conflicts: from early interjections on the powers of the federal and provincial governments (Cairns 1971); to Quebec's place in Canada as a multinational state (Russell 2004; Brouillet 2005); to the relationship between the Crown and Indigenous peoples (Borrows 2010; Russell 2017); to the enforcement of civil rights in an increasingly multicultural country shaped by immigration (Morton and Knopff 2000; Macfarlane 2013).

The role of the SCC in foundational debates over the nature of Canada provides an exemplary case to understand how courts in liberal democracies are responding to these situations. As we discuss below, there are differences between judicial review in more classical civil rights cases and jurisdictional conflicts over the structure of the constitutional order. Our intention here is to apply an adapted variant of legal and normative political realism to explore the promise and pitfalls of facilitating dialogue

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

to manage politically charged legal disputes about jurisdictional authority and self-governing communities. Our focus is partly motivated by the simple fact that less scholarly attention has been devoted to analyzing judicial strategies for managing these types of political conflicts. At the same time, we recognize that the particularities of these cases and Canada's political and legal context necessarily limit the applicability of our empirical analysis and prescriptions. Nevertheless, our application of a normative realist lens to the judicialization of politics may serve to advance strategies for high courts dealing with political conflicts in diverse and contested constitutional orders.

The remainder of this article is divided into two parts. In the first part we discuss the judicial role in managing political disputes, how courts have traditionally been seen to fulfill this role in a legitimate manner, and how a realist perspective can uncover new pathways to respond to political questions related to the structure of a polity. In the second part we trace the evolving approach of the SCC when it has been asked to manage conflicts between groups over the nature of the political community, assessing its performance against the benchmark of managing conflict via dialogue. Our empirical analysis focuses on two areas of law where we regularly see conflicts over the very nature of the political community and sovereign jurisdiction: federalism and Indigenous-Crown relations. We first examine the SCC's arbitration approach in several highly salient federalism cases over the past four decades—showing a slow but clear shift away from retreating to an independent stance of simply applying constitutional law toward an embrace of a more political role as a facilitator of dialogue between conflicting parties. We then show how the Court has employed a similar approach of facilitating dialogue when it has been asked to help settle conflicts in one of the most contested areas of Indigenous-Crown relations—the roles and responsibilities of settler governments to engage with Indigenous communities when considering and approving actions that could affect Indigenous rights.

We conclude the article by comparing the SCC's federalism and Indigenous case law, reflecting on the promise and pitfalls of the emerging adjudicative approach that focuses on dialogue to manage these highly political disputes. In line with our adoption of a normative realist perspective, we do so with a view toward considering whether this dialogical model can help protect and engender legitimacy for the judiciary and the wider political association. Our argument in this respect is twofold. The turn toward a dialogical model of conflict management by the Court is a defensible response to requests from political actors to wade into inherently political conflicts over jurisdiction. This approach responds to the democratic challenge of asking courts to settle political disputes by pushing the core aspects of inherently political questions back to political representatives. In the SCC's jurisprudence we can see how the Court is doing this in a way that recognizes the autonomy and status of the parties involved to avoid zero-sum outcomes that can breed ambivalence toward the political system.

But, despite the benefits of this approach as a potential pathway to generate legitimacy, we also argue that there are serious challenges around employing dialogue to manage conflict, as seen in how the Court has approached its role in Indigenous case law. The core issue with an adjudicative approach that promotes dialogue is that it can reinforce existing power imbalances when the Court does not equally legitimate all parties' political autonomy. Courts tend to be engaged in political conflicts when one party is seeking protection or recognition through the enforcement of their

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

jurisdictional powers and rights. In these instances, the Court must not use dialogue to abdicate its responsibility to protect groups' powers and rights. Instead, the judiciary should explain or reinforce the legitimacy of each self-governing group to shape the constitutional order while leaving the outcomes to political negotiation. We can see in the SCC's jurisprudence attempts to address this tension—particularly through a focus on the processes of consultation and dialogue in intergovernmental and Indigenous-Crown relations—but the Court's processes and frameworks for dialogue are not always sufficient to protect the rights and interests of less powerful actors in a political dispute.

THE JUDICIAL ROLE IN POLITICAL DISPUTES IN THEORY AND IN CANADA

The judiciary is a fundamental institution in liberal democracies because it is one of the few forums seen as an independent venue to resolve conflicts between different branches of government and among citizens. The social convention of two disputing parties turning to a third party to resolve conflict is so "common sense" that courts are ubiquitous (Shapiro 1981, 1). It is this status as a trusted third party that grants courts their legitimacy: they wield power because disputing parties delegate it to them. But this triadic structure is about more than just settling disputes. In fulfilling their role, courts also enter the political fray by shaping the norms and rules of conduct (Stone Sweet 1999, 156–57; Schertzer 2016, chap. 2). Moreover, in the process of checking and restraining state power, courts have themselves become wielders of political power with few constraints due to their ability to claim neutrality (Manfredi 1993, 37). This "paradox" raises fundamental questions about whether the courts' influence over the political system, which renders them political actors, invalidates their trusted role as independent.

The traditional way that courts and scholars have responded to this challenge is to emphasize the neutrality of courts as legal bodies (Chayes 1976, 1307–08). This neutrality is cultivated through structural and procedural strategies. Structurally, courts in liberal democracies are ideally designed to protect judicial independence. The objective of these designs is to stop political influence seeping into the selection, working conditions, and removal of judges so that they can exercise their duties without fear of sanction. Among the most prominent feature of these designs is how judges are appointed. There are a range of appointment procedures that work to protect de jure and de facto independence (for an overview, see Melton and Ginsburg 2014). Our case here, Canada, seems to lack strong de jure measures since the decision over the appointment of most superior justices, including the members of the apex court, rests with the federal executive and ultimately the prime minister (Crandall 2013). However, in practice, there are some checks and balances to this power that bring Canada more in line with other liberal democracies in protecting judicial independence. The limitations of executive power in appointing judges come from both a set of powerful norms and conventions (Crandall and Schertzer 2019) and an emergent (if sometimes shifting) set of consultation processes and committees. These appointment committees at the provincial and federal levels act as third-party bodies who help to screen candidates and compile lists of nominations for consideration by the attorneys general of the provinces and federal government. These interventions are designed to ensure that

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

candidates are eligible to assume judicial positions and to minimize patronage appointments.[1]

Procedurally, courts can demonstrate neutrality in how they reach their decisions. There are various schools of thought on how decisions can be crafted to show that they are not motivated by self-interest or political calculation. According to legal positivism, law is a human construct that is distinct from morality and politics (Hart 2012 [1961], 185). When judges render decisions and must choose which legal rule to apply, this perspective asks them to conform to rules and impartially consider all alternatives, rather than rely on their sense of morality (141, 205). When choosing the most appropriate legal rule, judges ought to consider those who would be most affected by the rule and which rule can provide a reasoned basis to apply generally over persons engaging in prohibited actions (205). While this is an influential position, the common law legal system casts some doubt on the ability of judges to impartially apply legal rules since it involves case-by-case adjudication (Shapiro 1981, 35). Rather than simply applying rules, judges in a common law system are often seen to discover rules in a retroactive fashion through the process of resolving legal disputes (35–36).

In contrast, the natural law tradition suggests that laws reflect principles and values, which ties law with morality (Dworkin 1978, 22). From this view, judges are only legitimate and distinct from representative politicians if they appeal to principles, which are "standards of action that derive their worth from a long view of society's spiritual as well as material needs and that command adherence whether or not the immediate outcome is expedient or agreeable" (Bickel 1962, 58). Nevertheless, this ability to find underpinning principles should be accompanied with restraint, as judges should prudently decide when to intervene with principled decisions to avoid unduly burdening representative actors from reaching necessary political compromises (64). As such, the judiciary is legitimate because of its ability to articulate and reinforce key legal principles and public morality found within constitutional texts (Fiss 2003, 101).

Most scholars take these institutional designs and approaches to judicial review into account when assessing the performance of judges as legitimate arbiters in liberal democracies. Together, they form a yardstick against which people understand judges and courts as neutral; but the issue is that these ideals are fundamentally at odds with the *actual* operations of modern courts (Shapiro 1981, 36).

Legal realists have long pointed out this problematic lack of neutrality in judicial decision making. Legal realism is often associated with the foundational work of Karl Llewellyn, who was highly critical of positivism and the idea that judges apply legal principles and value-free rules to reach impartial decisions (1960). Following Llewellyn, legal realists led a "pragmatic movement" in the twentieth century that applied social science insights to show that "legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purpose to achieve specific ends" (Singer 1988, 474). Earlier theorization has developed with more recent work on how political ideology shapes judging, particularly from attitudinalist scholarship in political science (see Segal and Spaeth 1993; Songer et al. 2012). While a diverse movement, in lifting

1. Hausegger et al. 2010 find that patronage continues to influence appointments in provincial courts, although overall, candidates are of a higher quality.

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

the veil of purported judicial neutrality, legal realists tend to converge on a set of key prescriptions to guide judicial decision making: judges should make decisions cognizant of their social impact and seek outcomes that have "desirable social consequences"; they should avoid broad principles and moral concepts as the basis for their decisions; and, while they should reject formalism, they should make decisions in a way that maintains the legal status quo and methods of legal reasoning to the extent possible (see Singer 1988, 471, 499–501).

This school and its prescriptions—while influential—have also been roundly criticized. The most potent criticism is that legal realists overemphasize that it is a judge's behavior that impacts their rulings, and that the law is simply used as a rationalization for their beliefs (Kalman 1986, 6–7, 164). Crucially, they are criticized for not resolving the very tension they expose. Despite arguing against using broad conceptions as the basis of decisions and the positivist idea that legal rules can be applied to render fair decisions, legal realists in large part assume that judges are able to identify the social consensus on an issue, can determine what is a desirable social outcome, and can render their decisions using legal concepts that do not simply revert to either base politics or legal positivism (Singer 1988, 502). However, as many have pointed out, the influence and insights from legal realism show us that law is not necessarily discovered, but made—and as such this line of thought has informed a great deal of contemporary legal scholarship (see Singer 1988, 503).

This critical focus on the individual-level practice of decision making has been complemented by broader work on the increasing role of the judiciary in politics and the breaches of judicial independence and neutrality that occur in this context. This growth of judicial power is often framed as the "judicialization of politics," or the reliance of political actors to turn to the courts to resolve issues of political, policy, or moral importance (Tate and Vallinder 1995; Goldstein et al. 2001; Ginsburg 2003; Hilbink 2007; Hirschl 2008; Couso, Huneeus, and Sieder 2010; Harding and Nicholson 2010). Many scholars are highly critical of this trend, and thus promote various reforms to address the problems of expanding judicial power. In response to this increasingly political role, much of the work on the judicialization of politics emphasizes the need to protect judicial independence and neutrality. Although some scholars assert that these new demands require a renewed vision of the judicial role and responsibilities (Fiss 2003, 105), suggestions tend to focus on structural reforms. Here there is important work on the ability of courts to strike down legislation to balance the authority and power of government institutions. Indeed, there is an emerging view that one of the answers to the judicialization of politics is to promote "weak-form" judicial review, whereby legislatures have the authority to override judicial decisions (Tushnet 2003). There are also more circumspect measures that aim to diffuse the ability of any single political body to select judges, which usually means increasing the number of actors and institutions with a role in selection and increasing participation from public representatives in order to increase transparency (Ferejohn 2002; Gee 2012; Melton and Ginsburg 2014). While these reforms can help reinforce the perception that the courts are able to be neutral arbiters, they are still caught in the paradox that asks courts to simultaneously be independent from, and part of, the political system.

Here, we are seeking to build on these two complementary schools of thought that highlight the challenges and potential responses to the changing structural role of courts

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

under the judicialization of politics and the inherent problems with striving for neutrality in judicial decision making. Insights from both schools can help craft a response to the question of how judges should manage highly political conflicts over jurisdiction. Our position starts from a recognition of the changing, more overtly politicized role of courts today. In contrast with those who are searching for ways to recapture or reinforce the neutrality of the courts, we follow the view that the judiciary is neither independent nor neutral. The first step here is to see the institution as inherently political, as a body with extensive policy-making powers (Do 2018). This position still traditionally starts with a call for restraint in exercising a political role; yet, it may not be prudent to restrain the judiciary's power too much since the courts have a crucial function to "constrai[n] partisan or incumbent self-entrenchment that inappropriately manipulates the ground rules of democracy" (Pildes 2004, 154). From this perspective, the key issue is considering how courts should use their extensive powers to protect democracy and how the exercise of this power can exhibit more accountability and transparency (Stone Sweet and Grisel 2017). We follow those scholars who tend to view the courts as better suited to managing macro democratic structures, while leaving political competition to sort out rights and equality interests (Ely 1980, 103; Shapiro 2002, 182–83; Pildes 2004, 154). Therefore, the legitimacy of courts is tied in many respects to the perception that they are exercising an *appropriate* role (Fallon 2005; Oldfather 2005, 133), and this perception can change as societal attitudes and needs evolve (Hershkoff 2001, 1912). Building on these insights, we maintain that as the judiciary takes on a new role within the context of judicialization, assessments of their actions may require different normative standards and guidelines than the existing focus on impartiality and independence as the benchmark of legitimate judicial review. Theories of judicial review and adjudication must reflect the actual practice of courts in their new contexts (Molot 2003; Oldfather 2005, 134).

The acceptance of a potential new role and status of courts—and the search for pathways to inform a defensible and legitimate exercise of this role—draws from elements of legal realism. We recognize the powerful critiques of this approach, particularly its tendency to assume that judges can identify a social consensus on an issue and its tendency to revert to a base form of legal positivism or principle-based reasoning to guide decision making. Accordingly, we argue that adapting elements of legal realism to align with aspects of normative political realism may inform a defensible theory of judicial review in political disputes over the nature of the political community and related jurisdiction. Normative political realism does not seek to attain a utopian goal built upon hoping for an ideal outcome (Galston 2010, 386). At its core, this variant of realism rejects the liberal creed that politics and law can be separated (see, in particular, Shklar 1989; Bellamy 1999, 2007), thus making it impossible to achieve judicial independence or neutrality. When thinking about judicial neutrality, normative realism shows us that the cat is already out of the bag: courts have always been political, and they are only gaining more power in this regard. Accordingly, theorizing and assessing models of judicial review should start from this basis to find institutional designs and decision-making processes that minimize the pitfalls of a political judiciary and capitalize on its potential benefits.

It is from this position that normative political realists may have some additional points that can augment and adjust the prescriptions of legal realism to provide some

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

guidance in theorizing how courts can respond to political questions. Like legal realists, political realists have helped highlight how political institutions are not value-neutral venues. Political realists understand institutions as sites of intense contestation. Institutions like courts and bureaucracies do not simply operate outside politics—they are critical sites where political values and norms are constructed and defined and they are themselves objects of intense contestation (Galston 2010, 393). As neo-institutionalists assert, after an institution is created, it also proceeds to develop on its own path, guided by its own internal logics and its relationship to other institutions and actors, over time shaping logics of appropriateness across society (Hall and Taylor 1996, 941; on courts see Macfarlane 2013). As a result of this development, institutions often distribute power unevenly across social groups (Hall and Taylor 1996, 940–41). Importantly, this development is characterized by unintended consequences, inefficiencies, and conflict. Complementing this line of thought—and highlighting one of the issues with the more traditional legal realism—James Tully argues that it is not possible to disaggregate the distribution of power through institutions and the recognition of people's identities and values (2000); conflict does not only happen within the institutions of government—it also happens over their very nature and functions (Schertzer 2016). Since conflict over morals, principles, and values takes place within and over the design of institutional venues, political realists assert that there is no practical utility to evaluating institutions from an assumption that they can garner or implement a complete consensus (Galston 2010, 396). Politics is characterized by conflict, so institutions should not be judged solely on the basis of abstract, ideal principles: they should also be judged prudentially on how effectively they manage and mediate conflict. With regard to the judiciary, a normative realist position asserts that the judiciary's primary objective cannot be to maintain an ideal of neutrality and independence—nor to find and enforce a consensus—since the courts are already embedded in a political system that reflects power asymmetries and often has competing conceptions of its very nature (Schertzer 2008, 2016).

Moreover, judges may not be able to turn to shared morals and values within legal text—or to find some social consensus—to avoid conflict, as those very morals are often contested in a constitutional order. In certain political communities, various social groups compete with one another to gain self-governing powers. These groups demand the powers and authority to influence the constitutional order as an expression of self-governance. By extension, these groups may challenge the legitimacy of existing institutions to attain this self-governance, as those institutions are perceived as denying or repressing the legitimate claims of those various groups (Tully 1994, 5). In these polities with a multiplicity of groups making self-governing or jurisdictional claims, the law does not constrain how groups reason about the law because the basic institutions, laws, and authoritative traditions for interpreting those laws are contested. The judiciary could simply impose its own interpretation of the law or some perceived social consensus onto these groups, but that would likely lead to political instability and a delegitimation of the judiciary itself if groups rejected the validity of those interpretations and the institution delivering it. In this respect, our modified realist position draws attention to how the judiciary's interest in maintaining its legitimacy must change in contexts where the judicialization of politics has granted judges immense power to participate in political decision making in highly contested political societies.

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

Our focus on Canada helps highlight the potential value of this modified realist position on judicial review. There are several different understandings of Canada's constitutional and political order across groups that claim self-governing powers. The various people in Canada have not consented to form a single polity with a common consensus of basic laws and values (Russell 2004). For instance, federalism has been identified as one of Canada's central constitutional pillars, in addition to responsible government and the Charter of Rights and Freedoms (Smiley 1986). And yet, even the impetus for federalism is contested between the national and subnational orders of government. For the subnational governments, Canada was founded as a compromise between the goals of shared rule and self-rule (Simeon 2000). To maintain this balance, the protection of provincial jurisdiction must be guarded against possible incursions, particularly from the federal government and federal institutions like the SCC. Indeed, the use of constitutional mechanisms like the Notwithstanding clause in section 33 of the Charter, it has been argued, is a federalist response that rejects the imposition of judicial norms on areas of provincial responsibility (Hiebert 2019). But Quebec's status as a subnational government is argued by many Quebecers to be unique because of their francophone identity. Therefore, Quebec is not like the other provinces because it is a political nation unto itself. From the Quebec perspective, Canada, and its constitutional order, should be interpreted to respect and uphold the English-French compact (McRoberts 1997; Gagnon 2004). Preceding these compacts between English and French populations or regional and national goals were treaties signed between Europeans and Indigenous nations. Indigenous nations demand that these original treaties inform and shape Canada's constitutional order—powerfully arguing that the current order violates these treaty obligations, rendering Canada's occupation on Indigenous territory unlawful (Robe 1992; Henderson 1994; Ladner 2003). How the Canadian judiciary responds to these types of political conflicts can reveal potential solutions and problems that other high courts in diverse polities may emulate or avoid.

Our modified realist position provides the parameters of a model of judicial review that does not propose an exclusive reliance on neutrality and independence to generate legitimacy for the judiciary when it is asked to weigh in on political disputes. At a general level, it provides an alternative to manage political disputes through facilitating dialogue between conflicting parties (Wright 2010; Schertzer 2008, 2017). The starting point here is to accept that courts cannot uphold an impossible standard of neutrality and impartiality and so they should acknowledge both their political role and the limitations of their democratic standing. This basic position of facilitating dialogue can be given more form through two related prongs of ideal judicial behavior when dealing with highly fraught political questions and disputes over sovereign power and jurisdiction.

First, a facilitator role asks courts to reach decisions cognizant of both their political role and their limited democratic standing. This is more than simply calling for restraint in applying the law and being deferential to elected representatives: the guiding principle here is to push explicitly political conflicts back into the political realm to be negotiated through dialogue among representatives of the conflicting parties where possible. Of course, conflicting parties will require a framework to inform any negotiations. A political conflict lands in court in most cases because parties were

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

unable to resolve an issue on their own. In this respect, facilitating dialogue can be achieved by detailing a set of principles to guide how parties will engage and discuss the issue that has led them to seek intervention from a third party. Although seeking judicial intervention about how to proceed in negotiations can ensure that subsequent negotiations are more fruitful, the first risk of using a facilitator approach is relying on the courts to precisely design such processes. It may be more beneficial for courts to emphasize the value of political negotiations and the broad principles that underpin the purpose of negotiations, while leaving the details of the process to political actors themselves to establish. Negotiation processes will be viewed with more legitimacy and buy-in if the participating parties themselves create the terms of negotiations. In the case of federalism in Canada, the national and subnational orders of government have various political forums to negotiate policy, such as First Ministers' Conferences. If negotiations break down, the judiciary's role can be focused on establishing the principles of negotiations that the parties can use within existing forums. If the judiciary takes it upon itself to create a negotiation process, as is the case with the duty to consult Indigenous peoples, there is a risk that courts could favor one party over the other. As we discuss, the judiciary gives a wide latitude to the Crown to structure the duty-to-consult process, particularly in the accommodation phase.

Second, this judicial role must account for the reality that, in many cases, courts need to reach hard decisions: rights must be enforced; government jurisdiction needs to be clarified; wrongful or negligent actions need to be corrected. When a conflict gets to the stage of a court battle, sometimes judges must declare winners and losers. The goal of reinforcing political negotiations is not to eschew the court's responsibility to uphold the constitution and rule of law but to adjudicate the claims brought forward by groups in a manner that still legitimates each party's claim to jurisdiction and self-governance. In other words, a judicial role that is guided by the facilitator ideal can seek to avoid a complete zero-sum outcome to generate legitimacy for itself and for the political system by ensuring that the enforcement of jurisdiction and rights does not suppress a group's legitimate claims to sovereign authority. Rather than impose an outcome from behind a veil of purported neutrality, courts can reach decisions in political disputes in a way that mitigates the impact to the losing party to the greatest extent possible.

Such a goal is defensible when a court is asked to intervene on political questions about the very nature of the political community where definitive and clear outcomes are contested by representatives of different political constituencies. This approach to facilitation means that courts will likely accept the result of political compromises forged through negotiations guided by broad legal principles as legitimate. As we discuss below, this happened in a recent case in Canada on a federal carbon tax where the SCC rejected a provincial government's attempt to renege on previous federal-provincial agreements. Problems may arise when the judiciary in its decision making does not adequately reinforce the legitimacy of a party's self-governing demands. In the case of Indigenous consultation, the SCC does not equally weigh the Indigenous and Crown perspectives within consultation. This puts at risk the entire consultation process, as the judiciary may accept political compromises that do not equally represent the perspectives of all the parties.

On first blush, these may seem like rather broad principles. We recognize this, and so want to ground them in actual practice. We see these principles as the parameters of

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

an alternative approach to answering highly political questions about jurisdiction and as a basis to assess whether courts can achieve these ideals in the real world. Applying these principles as an analytical lens allows us to see how courts are handling political disputes and what their actions tell us about the promise and pitfalls of a realist take on their role as facilitating dialogue. Toward this end, we turn to explore the SCC's jurisprudence.

We are focusing on Canada's apex court because it is widely recognized that the judiciary plays a central role in major political conflicts in the country. This is particularly the case after Canada entrenched the Charter of Rights and Freedoms in 1982, which gave the courts more power to strike down laws through judicial review. Many commentators have traced the growth of the Court's impact following the advent of the Charter (see Snow and Harding 2015; Sigalet, Webber, and Dixon 2019). There is a healthy debate about whether the Charter has rebalanced power between the courts and legislature and whether more activist courts are threatening their own legitimacy and the democratic pedigree of the state (Morton 1999; Manfredi and Kelly 1999; Hogg and Bushell 1997; Roach 2001; Petter 2007; Hogg, Bushell, and Wright 2007; Macfarlane 2013). Part of the increased stature for the courts comes from the Charter's commitment to equal rights for all citizens, which has created an additional, national-based political identity with the Court as its main advocate and supporter (Russell 1983a; Rocher and Smith 2003). And there are those who argue that social groups frame their demands using rights discourse specifically to appeal to the judiciary to advance their policy agenda (Morton and Knopff 2000). In short, by far and away, the Charter is seen as the driver that thrusts the SCC into policymaking and entangles it in political conflicts (Macfarlane 2018).

Indeed, analysis of the SCC's Charter jurisprudence has informed a lively debate that reaches well beyond Canada on the relationship between courts and legislatures. One of the main contributions of this work is "dialogue theory." Dialogue theory emerged from analysis of a trend in Charter cases where the Court would strike down legislation and then the legislature would respond by revoking or reintroducing amended laws (Hogg and Bushell 1997). From this analysis a theory developed about how this "dialogue" could ideally help address the democratic legitimacy challenge of judicial review by showing that elected legislatures ultimately have the final word in dealing with unconstitutional laws (Sigalet, Webber, and Dixon 2019, 3–5). While there is a varied and rich literature on dialogue theory, its core postulates include: that promoting legislative responses to judicial review (a dialogical process between courts and legislatures) helps address the democratic challenge of judicial review (for recent overviews, see Sigalet, Webber, and Dixon 2019; Sigalet et al. 2021); that courts play a critical role in identifying and protecting rights (particularly for groups lacking political power) (Roach 2004); and that, while the democratic challenge to enforcing rights through judicial review in the first instance can be mitigated by legislatures responding, courts should ideally still act in a restrained manner (Dixon 2007).

Dialogue theory is clearly applicable to our enterprise. However, in the Canadian context and broader legal scholarship, dialogue theory has been almost wholly focused on civil rights cases and on the relationship between the courts and legislatures (Sigalet, Webber, and Dixon 2019, 1). We can draw lessons from this work and make linkages—particularly the normative position about the value of dialogue to address democratic challenges of judicial review and the call for a measure of judicial restraint, while not completely abrogating a role in checking political power. But our focus here

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

is different, if complementary: we seek to fill a gap in dialogue theory by analyzing conflicts between political communities over the structure of the political association. The dialogue that we argue courts ought to facilitate is between conflicting parties, not between the court and legislatures.

We are thus focusing on the jurisprudence that pushes the SCC to engage with different political questions than civil rights disputes. As Adrienne Stone has argued (2008, 2010), the democratic concerns with judicial review forcefully apply to cases involving disputes over the structure of a polity. In these types of cases there is significant judicial discretion to shape the very nature and distribution of political power (Stone 2008, 8–11). This potential—and its tendency to manifest itself in a way that means courts fall well short of the ideal of neutrality (Schertzer 2016, chap. 5)—informs our realist position. Indeed, we follow and are seeking to build on Stone's insight that judicial review in structural cases need not (and should not) adopt a strong-form approach of simply settling disputes (Stone 2008, 28–30). In this respect, we are exploring how the SCC has responded—and to what extent it has adopted a role of facilitating dialogue—in highly contested structural disputes. Canada's federalism and Aboriginal rights cases are particularly well suited for this enterprise.

For instance, in its federalism jurisprudence, the SCC has opined and shaped the very nature of the political community. In the *Patriation Reference*, the Court was asked whether the federal government could unilaterally amend the Constitution without consent from the provincial governments. In the *Quebec Secession Reference*, the question was whether the province of Quebec could unilaterally secede from the rest of the country, effectively dissolving the federation. Although the questions of how to amend the Constitution and whether a subnational government can secede have a legal dimension, the SCC also pronounced on the nature of political association within Canada. The SCC spoke about the fabric of the political community and the political values that underpin the federal pact. Indeed, the SCC's role in division-of-powers cases runs the gamut from determining jurisdictional boundaries to resolving disputes about the very nature of the federal system (Schertzer 2016).

Canada's Supreme Court also plays a pivotal role in shaping state-Indigenous relationships to advance restorative justice efforts. The entrenchment of Aboriginal rights under the Constitution in 1982 allowed the Court to structure the state's political relationship with Indigenous peoples—particularly through the promotion of "reconciliation" to redress past state injustices (*Sparrow* 1990, 1109). Furthermore, the development of Aboriginal law has extended to consider the very process and administration of the state's decision making. As we discuss below, the doctrine of the duty to consult demonstrates how the SCC has created legally enforceable standards to structure state decision-making processes when Aboriginal rights may be at stake.

In the analysis that follows we focus on the Court's federalism and Aboriginal jurisprudence as ideal instances where conflict is taking place over the very nature of the political community and sovereign jurisdiction. In general, in these cases, the representatives of governments and Indigenous groups are coming to the Court and asking it to resolve a conflict over their respective jurisdictions, powers, and rights following the breakdown of political negotiations. In many instances, these are highly contested and politically salient issues. Examining how the SCC handles these jurisdictional and Aboriginal rights cases can help assess the promise and pitfalls of its approach.

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

THE SCC'S ROLE IN FEDERALISM JURISPRUDENCE: FROM UMPIRE TO FACILITATOR

In this section of the article, we trace how the SCC has responded when it is asked to settle political disputes related to Canadian federalism. We show that, over time, the Court has shifted its approach away from imposing constitutional rules as an umpire, toward a more flexible approach that recognizes the political nature of its own role by facilitating dialogue among the conflicting governments to manage their dispute.

The traditional understanding of the SCC's role in Canadian federalism is that of an impartial umpire. The scholarship on the Court is shot through with this role perception. It is the dominant understanding of the Court and its key functions (see Swinton 1992; Leclair 2003)—drawing on broader notions about the role of courts in federal countries (Halberstam 2008; Aroney and Kincaid 2017; Popelier 2017). It informs assessments of its shortcomings as a sometimes impartial and biased body (Brouillet 2005; Kelly and Murphy 2005) and more favorable views of it as a balanced arbiter applying the rules (Baier 2006).

It is also the ideal principal that is often promoted by scholars to guide judicial behavior. The umpire role is anchored by a view that the Court ought to be an apolitical body (Lederman 1975, 53; Greschner 2000, 57). Accordingly, the view is bound up with an emphasis on how judicial independence is paramount to the legitimate execution of its role in mediating disputes (Shapiro and Stone Sweet 2002, 167; Halberstam 2008, 151). It thus holds that the Court ought to simply apply the constitutional law in a neutral fashion, regardless of the political implications. And, in applying the rules, the Court is supposed to act in a restrained manner to avoid usurping democratically elected governments (Russell 1969, 123; Lederman 1975, 615; Greschner 2000, 56–57).

The Court has endorsed this role for itself in federalism disputes on many occasions. For example, in *Northern Telecom v. Communications Workers* (1983) it said that "it is inherent in a federal system ... that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments ... to ensure their operations remain within their statutory boundaries." This formalistic view of the Court's role as simply applying the rules of the federation—without consideration for their political impact—shaped its approach throughout much of the 1980s and 1990s (see Schertzer 2016, chap. 5). For example, in *Scowby v. Glendening* (1986) the Court said that the Constitution grants the federal government a criminal law power that must be interpreted in "the widest sense," even if its actions have a "destructive force" on valid provincial laws. In *Canada Assistance Plan* (1991), the Court explicitly said that it has "no jurisdiction to supervise the [valid] exercise of legislative power" assigned by the Constitution, even if federal action clearly runs counter to the very principles of federalism (on this, see also Baier 2006, 149).

This perceived role for the Court as the umpire of the federal division of power presumes that the Canadian federation has a clear delineation of responsibilities and rules that the Court can simply enforce. This is often referred to as a "classical" understanding of federalism in Canada, where the federal and provincial governments have defined autonomous areas of responsibility outlined in the Constitution. Among the clearest expressions of this view is that Canadian federalism is composed of "watertight compartments," as Lord Atkin put it in the landmark case *Canada (AG) v. Ontario (AG)*

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

(1937). Over time, however, this view has become divorced from the dynamics of Canadian federalism. The pattern of intergovernmental relations in Canada has moved from one where the two orders of government operated more independently from one another to a system where they are in constant contact and where the realities of modern policymaking and governance mean they are highly interconnected (Cameron and Simeon 2002). This interconnection has led to a new breed of federalism—a collaborative federalism—defined by a set of norms of shared federal-provincial ownership over an expanding number of policy areas paired with regular and institutionalized forms of cooperation (Schertzer, McDougall, and Skogstad 2018).

Over the last thirty years, the SCC has shifted its role as federal arbiter in response to these changes. The more traditional approach of simply enforcing the constitutional rules in a rigid fashion, come what may on the political front, has given way to a focus on facilitating negotiation between the orders of government (see Schertzer 2008, 2016; Wright 2010). This shift has largely come through the Court strongly endorsing a more collaborative approach to federalism (see Schertzer 2018). The Court has even labeled this preference for a flexible view of the division of powers that supports intergovernmental negotiation as the "dominant tide" of constitutional interpretation (*Canadian Western Bank v. Alberta* 2007, paras. 35–42). But this shift is about more than just a flexible view of the division of powers. Underpinning it is: (1) a turn away from seeing the Constitution solely as a strict set of legal rules, instead recognizing its contested nature as a normative political order; and (2) a related recognition that the Court plays a highly political role in this contested order, and so it needs to be mindful of how it exercises power to protect its legitimacy and the legitimacy of the constitutional system.

The early foundations for this turn lie in the *Patriation Reference* of 1981. This well-known case was about the ability of the federal government to unilaterally alter the Constitution after failed negotiations with the provinces on establishing an amending formula and bill of rights (for overviews, see Banting and Simeon 1983; Russell 2004). Following provincial objections, the Court was asked to intervene on this politically charged issue. It responded by saying that the federal government could, according to the letter of the law, unilaterally seek an amendment; but it also said that there was a constitutional convention requiring provincial consent for such changes. The Court thus responded to this political question by balancing the formalistic law with political convention. Significantly, the Court gave weight to the conventional need for negotiation by saying that it was part of the "global system of rules and principles which govern the exercise of constitutional authority" (*Patriation Reference* 1981, 874). This more flexible view of the constitutional order allowed the Court to push the conflicting federal and provincial governments back to the negotiating table, but with an impetus to reach an agreement given the threat of legal, unilateral federal action.[2] In this respect, the Court responded to this political question with "bold statecraft" that embraced a more political role (Russell 1983b). Elements of this approach—recognizing the contested and normative foundations of the Constitution, while pushing conflicting

2. Though the reliance on constitutional conventions and having constitutional authority has received considerable criticism (see for example Russell 1983b and especially Dodek 2011). For a discussion—and defense of the use of constitutional conventions in this and related cases—see Schertzer (2016, 285).

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

governments back to the negotiating table to manage their dispute—popped up in a few subsequent decisions in the 1980s and 1990s (see, for example, *Multiple Access Ltd v. McCutcheon* 1982; *Newfoundland Continental Self* 1984; *R. v. S (S)* 1990).

A similarly high-stakes political case, the *Secession Reference* in 1998, signified a monumental shift in how the Court approached federal-provincial conflict. The *Secession Reference* is certainly among the most important, and most discussed, SCC cases ever (for an overview, see Schertzer 2016, chap. 4). It engaged existential issues about the very survival of the state, asking whether Quebec had a right to unilaterally declare independence and secede. It was a highly political case, following a razor-thin referendum result where the remain side won by just over fifty thousand votes. Indeed, the first thirty paragraphs of the decision were responding to the claim that the case was too political for the Court to even hear. But, mirroring the logic and approach of the *Patriation Reference*, the Court provided an opinion that rejected a zero-sum outcome. It held that, technically, under domestic and international law Quebec does not have a right to unilaterally declare independence, but it also found that the unwritten principles of the constitutional order create a duty for all parties to negotiate in good faith if a clear majority of Quebecers vote for secession in a referendum with a clear question. The rationale behind this ruling was a view that Canada's federal system requires "a continuous process of discussion" to manage conflicts through "compromise, negotiation and deliberation" (para. 68). From this view, the Court's opinion responded to the political question by pushing the most contentious elements back to the democratically elected governments to negotiate if a positive vote for secession ever came to fruition, but in doing so, the Court created a framework to guide these negotiations and gave both sides a leg to stand on in the difficult discussions.

Following the *Secession Reference*, this approach to managing intergovernmental conflict increasingly became the Court's favored way to respond to these types of political questions over jurisdictional authority. As the Court said in *Canadian Western Bank* (2007), the "dominant tide" when interpreting the Constitution has been to recognize that the constitutional division of powers provides overlapping and interconnected roles for both orders of government in most areas, which the Court has reinforced by emphasizing "the importance of cooperation among governmental actors to ensure that federalism operates flexibly" (paras. 35–42). This emphasis on the need for collaboration and negotiation between the orders of government has been the driving logic of most major federalism decisions over the last twenty years (see for example, *Fédération des producteurs de volailles du Québec* 2005; *Bank of Montreal v. Marcotte* 2014; *Marcotte v. Fédération des caisses Desjardins du Québec* 2014). The *Securities Reference* (2011) exemplifies this trend: here the Court explicitly said that the governments should explore "a cooperative approach" and discharge their responsibilities in a "coordinated fashion," instead of taking unilateral action (para. 9).

At the same time, there are signs that this tide may be receding. In more recent, high-profile cases the Court has qualified the extent to which its stated preference for collaboration and its approach to managing conflict by facilitating intergovernmental negotiation overrides the legal division of powers in the Constitution. As the Court said in *Quebec v. Canada* (2015), a provincial government cannot block federal action simply because they failed to negotiate a compromise position: "the principles of collaborative federalism … cannot be seen as imposing limits on the otherwise valid exercise

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

of legislative competence" (para. 19). Similarly, in the *Greenhouse Gas Pollution Pricing Act Reference* (2021) the Court found that the federal government's carbon pricing scheme was a valid exercise of its power as a matter of national concern, despite provincial objections that it encroached into their area of responsibility. The majority said that "the Court has always maintained that flexibility and cooperation, while important to federalism, cannot override or modify the constitutional division of powers" para. 50). As the Court remarked in 2011 *Securities Reference*, "[t]he 'dominant tide' of flexible federalism, however strong its pull may be, cannot sweep designated powers out to sea, nor erode the constitutional balance inherent in the Canadian federal state."

Over the last few decades, we have thus seen the rise of a new approach in how the SCC handles highly political questions about the nature of federalism. It has shifted away from simply applying the legal rules by looking to the text of the Constitution. Instead, it has increasingly recognized that Canadian federalism is a highly contested system, where negotiation and collaboration are necessary. From this view, it has repeatedly sought to facilitate dialogue between the orders of government by rejecting zero-sum outcomes in disputes. While more recent cases are showing that the Court may be receding from this approach, we need to be mindful of what the Court is saying in rationalizing its decisions. The majority in the *Greenhouse Gas Pollution Pricing Act Reference* certainly clarified that "collaborative federalism" cannot override the division of powers. However, it also went to lengths to say that, while its role is to be an "impartial arbiter" in federalism disputes, the Court has long rejected a rigid application of the division of powers in favor of "a flexible view of federalism—what is best described as a modern form of cooperative federalism—that accommodates and encourages intergovernmental cooperation" (para. 50). Perhaps more tellingly, the majority went into considerable detail to show how the existing federal carbon pricing scheme was the result of intense federal-provincial negotiation and stemmed from an agreement made before elections led to changes in governments with new positions in some provinces (paras. 14–15, 18). Among the rationales for upholding the scheme was that it is a backstop to provincial noncooperation in a pan-state regulatory scheme—but it does not preclude negotiation and cooperation (paras. 65, 82). In this respect, the *Greenhouse Gas Pollution Pricing Act Reference* actually follows the principle of the approach to managing federalism disputes over the last thirty years: it is about facilitating negotiation by providing a framework and incentives for governments to cooperate. As we show in the next section, a similar pattern of moving toward facilitating dialogue, but with some increasing qualifications and limits, marks the Court's approach in arbitrating Crown-Indigenous conflicts.

THE COURT'S PROMOTION OF DIALOGUE IN THE DUTY TO CONSULT INDIGENOUS PEOPLES

The federalism jurisprudence reveals that the SCC underwent a transformation to adopt a facilitator role when addressing jurisdictional disputes. In contrast, within Aboriginal law, the SCC has been transparent from the outset in the early 2000s about its preference for political processes and negotiations to advance reconciliation between Indigenous and non-Indigenous claims. However, political negotiations aimed at

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

reaching comprehensive agreements over the scope and nature of Indigenous self-government have, so far, largely failed.

Indigenous groups successfully mobilized to affirm their rights in the Constitution Act, 1982. This constitutional recognition of Aboriginal rights alongside key legal victories that affirmed Aboriginal rights survived the assertion of Crown sovereignty (*Calder* 1973) marked a turning point in the development of Aboriginal self-government. Aboriginal rights under section 35 meant that Indigenous peoples' prior occupancy on the land entailed rights over traditional territory. Coupled with the rejection of failed assimilatory policies that only widened socioeconomic gaps between Indigenous peoples and non-Indigenous populations, Indigenous nations began demanding self-government to control their own political destinies. However, the First Ministers' conferences after the patriation of the Constitution Act, 1982 and the failure to ratify self-government in subsequent constitutional packages showed that Canadian leaders were divided over the scope of Indigenous self-government and rejected a blanket transfer of jurisdictional authority to regional or local Indigenous organizations.

Rather than recognize Indigenous nations' right to self-government at the constitutional level, self-government has been negotiated on a piecemeal basis across various Indigenous nations. The scope of these agreements is highly variable. The Nunavut land claim agreement that established the new territory of Nunavut was unique because of the territorial concentration of Inuit in the region. The Inuit opted to modify a parliamentary-style government by imbuing it with Inuit values and customs, creating a unique consensus-style government within their legislative assembly. In contrast, many other self-government agreements give local Indigenous organizations authority and power to manage traditional territory, determine membership rules, and design and deliver social services to members.

The negotiation process for self-government can be lengthy and litigious due to the highly politically contentious process of addressing competing interests over jurisdictional authority. As a result, Indigenous groups continue to use the courts to determine the nature and scope of Aboriginal rights protected under section 35 of the Constitution. Establishing these rights through the courts can help protect the exercise of rights from unjust state infringements and establish a basis for a stronger negotiating position in self-government processes. The SCC has thus intervened and devised tests to substantiate Aboriginal rights and title and the conditions under which those rights can be infringed by the Crown. These tests have been thoroughly critiqued for not treating Aboriginal rights as rights to exercise jurisdictional authority and sovereignty (Borrows 1999; Ladner 2005; Asch 2014; McCrossan and Ladner 2016).

Because the process to establish Aboriginal rights and title through the courts or self-government negotiations is lengthy, many Indigenous nations have rights claims that are pending recognition by the Canadian state. In the interim, when rights are not proven but claimed, Indigenous groups are entitled to constitutional protections in the form of the duty to consult and accommodate. The duty is triggered when a proposed Crown action, including a strategic, higher-level decision, may negatively impact an Aboriginal rights claim (*Rio Tinto Alcan* 2010, para. 44). Depending on the severity of the projected impact and the strength of the Aboriginal rights claim, Indigenous parties may be entitled to participate in various consultation processes,

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

including the negotiation of accommodation measures to mitigate a negative impact (*Haida Nation* 2004). Importantly, the process of consultation and negotiation is not merely to allow Indigenous groups to "blow off steam" while the Crown decision maker proceeds with their intended plans (*Mikisew Cree* 2005, para. 54); the Crown must have the intention of substantially addressing the concerns raised by Indigenous parties (*Haida Nation* 2004, para. 42). As a result, the process of consultation is thoroughly scrutinized to evaluate the Crown's good faith intentions, while the parties are under no obligation to reach an agreement (para. 10).

The duty to consult is designed to facilitate political negotiations, as "negotiation is a preferable way of reconciling state and Aboriginal interests" (*Haida Nation* 2004, para. 14). The *Haida Nation* trilogy that first established the duty-to-consult doctrine, which includes *Haida Nation* (2004), *Taku River* (2004), and *Mikisew Cree* (2005), stands as an early confirmation of the Court's preference for a facilitator role in these types of disputes: this trilogy of cases outlined the duty's objectives as enabling meaningful negotiations between Indigenous peoples and the Crown. We can see how the Court institutes this facilitator role in the *procedural* and *substantive* elements it has built into the duty, which aim to encourage political resolutions to deeply contested stances between Indigenous and non-Indigenous interests over land.

When the SCC first articulated the duty to consult in the 2004 *Haida* case, the Court directed how the Crown may structure consultation processes. These rules have largely remained unchanged since this decision. The Crown's obligation to consult Indigenous groups depends on the severity of the proposed Crown action and the strength of the Aboriginal rights or rights claim (*Haida Nation* 2004, paras. 43–44). The aim is to create flexibility in consultative processes to address claims on a case-by-case basis (para. 41). On the lower end of the spectrum, where the proposed Crown action may have an insignificant impact on Aboriginal rights, or when the Aboriginal rights claim is weak, consultation may only entail a duty to give notice. In contrast, at the higher end of the spectrum, where Crown action may have a significant impact on Aboriginal rights or they have strong rights claims, consultation must be more expansive. The SCC explained that examples of "deep" consultation may entail formally including Indigenous participants throughout decision points and providing written reasons to show how Aboriginal rights have been considered (*Haida Nation* 2004, para. 44; *Clyde River* 2017, para. 41; *Chippewas* 2017, para. 47), and the inclusion of Indigenous parties in accommodation negotiations.

Apart from the spectrum criteria, the SCC also prescribed how the various parties should behave throughout consultation and negotiation. Actors must engage with one another with good faith, and, in the case of the Crown, with the intention of incorporating Indigenous perspectives (*Haida Nation* 2004, para. 41). Sharp dealing from either party is not appropriate (para. 42). However, the Court acknowledges that hard bargaining may be a part of consultation and accommodation negotiations (para. 42). When the Crown acts in good faith, the Crown demonstrates that it is acting honorably toward Indigenous peoples and is ensuring that Indigenous participation is meaningful. The SCC also supports dialogue by emphasizing the importance of providing written reasons when the Crown delivers its decision. Written reasons "show that Aboriginal concerns were considered and … reveal the impact they had on the decision" (*Haida Nation* 2004, para. 44). Later, the Court elaborates further by stating

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

that written reasons "foster reconciliation" (*Clyde River* 2017, para. 41; *Chippewas* 2017, para. 62) because it "denotes respect and encourages proper decision making" (*Chippewas* 2017, para. 62). These prescriptions demonstrate that the SCC appears to embrace its facilitator role by creating rules surrounding how political actors should engage with one another in addition to structuring the process of consultation.

The SCC's decision to legally obligate the Crown to include Indigenous peoples in decision making on land use and possible infringements of their rights is a significant development toward the reconciliation of Indigenous and Crown sovereignty. This mandate both recognizes the standing of Indigenous peoples, protected under section 35 of the Canadian Constitution, and seeks to offset power imbalances that may limit free and fair negotiations. Under the duty, Indigenous parties are designated a unique position in decision making to respect their status as constitutional rights holders. This unique position could open the door to "a consensual process where the rights of Aboriginal people converge with constitutional power and the rights of Canadian society" (Henderson 2010, 37). By upholding the honor of the Crown, the integration of Aboriginal rights through the duty could entail developing "consensual strategies to effectively recognize, determine, and implement [Aboriginal] rights in a generous way in Canadian society" (Henderson 2010, 37). One of the main pathways to develop such a consensual process is through political negotiations, guided by constitutional rights and values as interpreted by the SCC. Thus, in its duty-to-consult jurisprudence the Court is facilitating dialogue to create new patterns of governance.

Once Indigenous representatives participate in the decision-making process and communicate their Aboriginal rights at stake, the SCC has established that the Crown must move to negotiate accommodation measures that address the potential negative impacts to Aboriginal rights (*Haida Nation* 2004, para. 49). Like consultation, substantive accommodation "is an essential corollary to the honourable process of reconciliation that s. 35 demands" (38). While the Court has established that accommodation is an important component of the Crown's honorable dealing toward Indigenous peoples, it has not devised a framework to evaluate the adequacy of the Crown's accommodation measures. The Court has reiterated that there is no duty to reach an agreement and that Indigenous parties do not have a veto over the outcomes of consultation (para. 48). The SCC's facilitator role appears to stop at the point of dictating the outcomes of negotiations and evaluating any accommodations: it assumes that a fair consultative process will lead to fair outcomes. Although there is no explicit framework, the SCC's understanding of the purpose of the Crown's accommodation measures can be analyzed to an extent by considering how the SCC approaches its conception of reconciliation.

The SCC has clarified in the duty-to-consult jurisprudence that reconciliation entails the need to balance and find compromises between Indigenous and non-Indigenous interests. Where accommodation is required, "the Crown must balance Aboriginal concerns reasonably with the potential impact of the decision on the asserted right or title and with other societal interests" (para. 50). The Court affirmed that compromises may have to be struck between Aboriginal rights and non-Indigenous interests. This conception of reconciliation continues from ideas contained in the 1996 *Gladstone* decision. In this decision, the SCC stated that placing limits on Aboriginal rights "where objectives furthered by those limits are of sufficient importance to the

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

broader community as a whole, [is] *equally* a necessary part of that reconciliation" (*Gladstone* 1996, para. 73). Therefore, in the Court's view, reconciliation is not just between Crown sovereignty and Aboriginal rights but between the "interests of Indigenous societies and of the broader society that also includes Indigenous communities" (para. 73). Indigenous interests and rights are treated as just one of many public interests that can be weighed equally with other non-Indigenous interests.

Given that the result of consultation should reflect a balancing of competing interests, the Court also established that a standard of reasonableness should be employed to evaluate whether the Crown adequately discharged the duty. This standard is deemed appropriate because each situation that triggers the duty is highly dependent on the specific nature of the Aboriginal rights and potential negative impacts. Some deference to statutory decision makers is thus necessary, as these actors have the discretion to balance competing interests based on the facts and information before them. Reasonableness requires the Crown to "make reasonable efforts to inform and consult" (*Haida Nation* 2004, para. 62). The SCC further elaborated in the 2017 *Ktunaxa* decision that a "[r]easonableness review … entails 'a respectful attention to the reasons offered or which could be offered in support of a decision'" (*Ktunaxa* 2017, para. 140). The reviewing court does not substitute its own reasons but analyzes whether a statutory decision maker's findings on an issue were within a range of reasonable outcomes (para. 82).

Over the last twenty years, the SCC has established that there is a clear duty to consult Indigenous groups when their rights or title interests may be impacted by Crown actions. The Court has outlined both procedural and substantive elements to carry out the political negotiations and dialogue, but to date it has largely focused on elaborating the procedural components of the duty. Yet the accommodation phase of consultation is precisely the point in decision making where the Crown seriously considers whether and to what extent the protection of Aboriginal rights should alter the Crown's proposed action. In other words, the Court's relative lack of guidance on the scope and nature of the required Crown accommodation leaves a blind spot in its promotion of free and fair dialogue: it is the nature of the accommodation that reveals how the Crown has balanced non-Indigenous interests and Aboriginal rights.

ASSESSING THE SCC'S APPROACH TO FACILITATING DIALOGUE: PROMISE AND PITFALLS

When examining these two streams of jurisprudence over the past few decades, we can see how the SCC has moved toward an approach of facilitating dialogue when it is asked to weigh in on highly political disputes. In both its federalism and Aboriginal rights cases involving the duty to consult, the Court has approached conflicts cognizant of its democratic standing, pushing the issue back to the political realm to manage the dispute through subsequent dialogue. It has sought to structure this dialogue in many instances by providing guidelines to inform the process. At the same time, the Court has not entirely shied away from making hard decisions and enforcing jurisdictional autonomy and rights. In these two areas of jurisprudence, we can thus see how elements of a more realist facilitator approach plays out in practice. It is in this practice that we

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

see both the promise and pitfalls of turning away from a more traditional umpire model of settling political disputes.

The promise of this approach is evident in many of the Court's federalism decisions over the past two decades. The central trend in this jurisprudence is a turn away from a rigid, positivist understanding of the Constitution: the Court has consistently recognized the highly contested nature of Canada's political community and how it divides power and responsibilities. Some have argued that this view of the Constitution—which looks beyond its text to also recognize its underlying principles and conventions—is "questionable jurisprudence" (Russell 1983b; see also Dodek 2011). The potential pitfall here is that a retreat from legal positivism and the text of the Constitution as a strict guide to decision making can empower judges to impose their own interpretations, exacerbating the antidemocratic nature of judicial review. However, in practice, this is not what we have seen in Canada's federalism jurisprudence. From its evolving understanding of the Constitution, the Court has adapted its own role away from simply imposing aspects of the contested legal order when it is drawn into highly political conflicts. In these instances, as we show above, the judges have largely responded by asking the political actors to manage their conflict through subsequent negotiation, putting the ball back in their court. This leads to another potential pitfall—that the Court is eschewing its role as an arbiter; however, in our view, the SCC has shown how it can facilitate successful dialogue by providing a framework to guide negotiations (e.g., the *Patriation Reference* and *Secession Reference*). Similarly, the Court has reinforced its preference for a more collaborative, dialogical approach to governance (*Canadian Western Bank*, *Securities Reference*). But it has not demurred from settling disputes after a negotiation impasse: the Court has enforced the division of powers, while still saying it considers the preceding negotiations and agreements to inform how it interprets the Constitution (*Greenhouse Gas Reference*). In other words, rather than ushering in judicial activism, the Court's approach in its federalism jurisprudence and its own role as a facilitator of dialogue has taken steps to address its lack of democratic standing in political conflicts.

In a similar vein, the Court has sought to reinforce the value of dialogue in managing conflicts between the Crown and Indigenous groups. As we outline above, starting with the *Haida Nation* trilogy, the SCC established a set of principles to inform the process of consultation and dialogue when Crown action could impact Aboriginal rights or title. The driving principle informing the Court is an endorsement of the need to reconcile Aboriginal rights and asserted Crown sovereignty. In this respect, the Court's approach of facilitating dialogue to manage conflict is underpinned by a move to empower Indigenous groups and to create political space for them to further their claims: the dialogical process of the duty to consult is a pathway to recognize the autonomy of Indigenous groups. The promise here is both in the recognition of Aboriginal rights and title, and in the creation of an alternative pathway to generate legitimacy for a highly contested political order that has a long colonial legacy (Beaton 2018). Rather than imposing elements of the colonial legal order in whole, the SCC's duty-to-consult jurisprudence has the potential to create venues to further Indigenous political autonomy and to advance a nation-to-nation relationship with the Crown.

Like with its federalism jurisprudence, there is also promise in how the SCC has responded to its fragile standing as a legitimate, democratic institution.

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

In its duty-to-consult jurisprudence, a facilitator role similarly reflects the Court's standing as part of the contested, colonial political order. Rather than simply imposing elements of that colonial legal order, it has opted to also create political space for Indigenous-Crown negotiations. Of course, as we have indicated, how the Court establishes the process of negotiation, and how it enforces substantive decisions on the outcomes of these negotiations, matters a great deal in assessing this approach to judicial review. And, here, there are some significant pitfalls, which are most evident and best exemplified in its duty-to-consult jurisprudence.

As the Court's conception of the duty to consult has developed over time, several issues have emerged in both its understanding of the process of dialogue and in how it says it will enforce the duty in terms of the substantive outcomes of negotiation. On the process, the SCC's approach falls short of empowering Indigenous groups to have their views weighed equally throughout consultations. Recent decisions, such as *Clyde River* (2017), *Chippewas* (2017), and *Ktunaxa* (2017), illustrate how the Court has not necessarily devised a consultation process that counteracts the power asymmetries between the Crown and Indigenous participants. As the SCC has said, effective participation is a central component of dialogue to ensure that parties can attain a "mutual understanding on the core issues" (*Clyde River* 2017, 49). To support this objective, the SCC could have further elaborated that attaining the mutual understanding of section 35 rights at stake requires equal emphasis on both common law and Indigenous perspectives, as was emphasized in the *Van der Peet* decision in 1996 (para. 50). If the Court acknowledged the importance of dialoguing with Indigenous groups on their own terms throughout consultation, this would significantly legitimate the Indigenous legal traditions that underpin Indigenous parties' perspectives as they communicate their rights and interests in political processes. Given that the SCC has shown less willingness to distinguish section 35 rights as jurisdictional in nature, affirming the importance of Indigenous perspectives on their section 35 rights would legitimate and protect Indigenous parties' constitutional vision in subsequent political negotiations. Also crucially, signaling the equal value of Crown and Indigenous perspectives in the consultation process could then contribute to the establishment of more robust measures of accountability to evaluate the adequacy of the Crown's consultation and accommodation efforts.

The Court's current silence on how to evaluate the substantive outcomes from consultations reveal significant pitfalls in the facilitator approach at a more fundamental level. In its duty-to-consult jurisprudence, the SCC has not asserted a strong preference or set of guidelines regarding the kinds of accommodation measures that Indigenous and Crown actors should negotiate. This is indicative of a minimalist facilitator role: at its core the approach seeks to create space for political negotiation. But in the duty-to-consult context, this means the Court has not established clear measures to hold the Crown accountable when executive governments conduct consultations and negotiations. The only guideline that the Court has established to assess the adequacy of the Crown's performance in consultations and any resulting accommodation measures to account for Indigenous interests is a standard of reasonableness. This is a relatively low bar that arguably does not reflect the Crown's established duty to act honorably toward Indigenous peoples. Acting reasonably and honorably within the context of the unique Indigenous-Crown relationship could, for example, include a requirement that decisions following consultations account for the unique vulnerabilities

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

experienced by affected Indigenous parties (Sossin 2003, 180; Potes 2006). In practice, this may resemble project cost-benefit analyses that are sensitive to the cultural context in which it is employed; for instance, environmental assessments can include assessments of mental and psychological harm to capture the loss of culturally and spiritually significant sites (Graben 2014). Furthermore, if the Court adopted the stance taken in *Van der Peet*, that the Indigenous and common law perspectives are equally important when assessing section 35 rights, the Court could evaluate the quality of the Crown's accommodation measures based on whether Indigenous perspectives on their rights were given equal consideration in the Crown's final decision. This standard would be more robust than reasonableness and reflect the unique constitutional status of Indigenous rights holders.

In short, the Court could take a more active role to facilitate meaningful, free, and fair negotiations between the Crown and Indigenous groups by providing clearer assessment criteria for negotiations. As we said above, sometimes to facilitate dialogue, rights must be enforced. A statement that legitimates the unique status of Aboriginal rights could provide some additional direction in this respect, pushing the Crown to meaningfully consider Indigenous perspectives and recognizing the contested nature of Canada's constitutional order.

Here we see one of the most significant pitfalls that can come from a more restrained facilitator role: the absence of a clear framework to guide the Crown's accommodation measures can lead to outcomes for Indigenous parties that may be "unsatisfactory, indeed tragic" (*Ktunaxa* 2017, para. 86), even when those outcomes are considered reasonable. In the 2017 *Ktunaxa* case, the Ktunaxa Nation's claim that any development on their traditional territory would drive out the Great Bear Spirit was considered by the Court as a claim for a particular policy outcome that the Crown was not obliged to follow (*Ktunaxa* 2017, para. 94). Therefore, the Crown's attempts to adjust a ski resort development were considered reasonable, even though the substantive claim of the Ktunaxa Nation was that any development would make their "prayers, ceremonies, and rituals in recognition of Grizzly Bear Spirit . . . become nothing more than empty words and hollow gestures" (*Ktunaxa* 2017, para. 133). The Court was satisfied that the extensive consultation meetings and project modifications were reasonable accommodation measures while even acknowledging that such an accommodation would irrevocably render the Ktunaxa's spiritual practices meaningless. This case starkly demonstrates how the Court is willing to accept a minimal compromise from the Crown as a reasonable accommodation measure, even when the Crown is not engaging with the substantive claims made by the Indigenous parties. This situation captures the main danger of the Court's facilitative model. Focusing singularly on the goal of compromise may interfere with the Court's interpretative process that gives meaning to the rights and obligations in the Constitution (Fiss 2003, 104). As the duty-to-consult jurisprudence shows, facilitating dialogue without legitimating all parties' constitutional visions can have detrimental costs to less powerful actors in those negotiations.

As demonstrated by the *Ktunaxa* case, if the Court took more seriously their commitment to include Indigenous perspectives on their rights throughout consultation, this standard could be used as a more meaningful benchmark to evaluate the Crown's accommodation measures. Apart from establishing more accountability to

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

ensure that dialogue equally considers relevant perspectives, the Court's approach to consider both Indigenous and Crown perspectives on section 35 rights would also mitigate the Court's own lack of legitimacy to evaluate policy compromises.

The judiciary's facilitation of dialogue should also not introduce additional avenues for judicial incursion in political processes. In the 2018 *Mikisew Cree First Nation v. Canada (Attorney General)* case, the SCC assessed whether the duty to consult applied to the legislative process. Although the Court agreed the case should be dismissed on a technicality, the justices were split over the substantive question about the appropriate scope of the duty. The four different positions presented by various justices reveal fundamentally different positions on the place of section 35 rights in Canada's Constitution (Nichols and Hamilton 2020). Of interest in this article is the appropriate role of the judiciary to facilitate dialogue in political processes.

The majority of the Court ruled that the duty to consult should not apply to the lawmaking process because it would inappropriately fetter legislatures' ability to control their own processes by imposing upon them judicial interference (*Mikisew Cree First Nation* 2018, para. 38). The Court's facilitative approach to political disputes should be conducted in a manner that would not encourage further judicial interference in political processes. Applying the duty to consult over legislative processes would mean that courts would directly interfere with the making of legislation (39). Thus, maintaining the duty as an obligation that constrains executive action prevents unnecessary judicial involvement in policymaking.

Moreover, the executive-driven nature of Indigenous consultation may better advance a nation-to-nation approach to dialogue as Indigenous parties negotiate directly with the Crown to express their perspectives on their section 35 rights. Indeed, a nation-to-nation approach to consultation would be further bolstered if the Court explicitly asserted that section 35 must reflect intersocietal law whereby both Indigenous and Crown perspectives are required to delineate section 35's scope and content. In order to provide this crucial perspective, Indigenous parties would require privileged, bilateral access to the Crown in decision making. Within the legislative process, it is unclear how meaningful Indigenous-Crown negotiations could occur. For the justices who supported imbuing the duty to consult in legislative lawmaking, their solution amounted to ensuring that legislative processes reflect the "special relationship between the Crown and Indigenous peoples" (*Mikisew Cree First Nation* 2018, para. 93), which is likely to lead to Indigenous peoples having a limited role in shaping legislation (Nichols and Hamilton 2020, 356).

CONCLUSION

In this article we have explored how high courts should respond to political questions about the very nature and structure of a polity—something they are increasingly being asked to do with the rising judicialization of politics. Our response to this question drew from elements of normative realism to sketch a theory of judicial review. The starting point for our position was that the increasing judicialization of politics in liberal democracies only accentuates the inherently political role of courts—and consistent with a realist approach, there is limited value in pining for an elusive ideal

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

of courts simply applying the law in a neutral, impartial fashion. Instead, we argued that an amalgam of legal and political realism can highlight a pathway for courts to manage political conflicts over the structure of power in a constitutional order in a way that generates legitimacy for the institution and the political association.

Our argument was that when high courts are asked highly political questions about the nature of the polity and related jurisdictional powers and rights, they should respond following a two-step model of judicial review that is anchored by the goal of facilitating dialogue among the conflicting parties. In the first step, we called for courts to push the resolution of the conflict back into the political realm to be negotiated by the conflicting parties to the greatest extent possible. To facilitate productive dialogue courts should outline a set of principles to guide how parties will engage and negotiate the issue that has led them to seek intervention from a third party. Of course, courts become involved in these types of cases because parties have reached an impasse in negotiations or have seemingly irreconcilable positions. In recognition of this, as a second step, when a hard decision is required on jurisdiction or rights for a self-governing community, we called on courts to render decisions in a manner that avoids a zero-sum outcome for the parties involved to the greatest extent possible. Rejecting a zero-sum outcome is primarily anchored by rejecting a formalistic and positivist approach to applying constitutional rules, instead crafting decisions to recognize the contested nature of the political association, validating elements of each party's positions to the extent possible and leaving open the possibility of continued contestation, negotiation, and dialogue. As we argued, this model of judicial review and two-step process can address several challenges of courts taking on increasingly political roles in jurisdictional disputes. Most importantly, it starts from a place cognizant of the (lack of) democratic standing of courts, while deciding cases in a way that can generate legitimacy for the association that does not simply revert to the false neutrality of legal positivism.

To help ground this theoretical model and explore how courts are actually responding to these types of questions, we turned to Canada and the federalism and Indigenous case law of its Supreme Court. As seen in the Canadian context where the constitutional order is highly contested by groups conflicting over their jurisdictional powers and also claiming self-government, the facilitator model is well suited to generate legitimacy for the Court and the political system, rather than asserting and enforcing highly contested constitutional rules. At the same time, while this approach seems to translate well into the SCC's federalism jurisprudence where the legal status and autonomy of parties is relatively secure, the Court does not adequately facilitate dialogue in duty-to-consult cases. Power asymmetries, colonial legacies, and complications of representation are accentuated in these cases—challenges that make a more minimal approach of pushing conflicts back into the political realm without strong frameworks to legitimate demands for self-government risky for vulnerable groups. The irony here is that one of the principal reasons to pursue a facilitator role—its ability to generate legitimacy for the political process by recognizing its contested nature—could imperil the legitimacy of the judiciary. In duty-to-consult cases, Indigenous groups are generally seeking protection for their interests—looking to the Court to enforce their rights. In these situations, if courts redirect issues back to political negotiations without strong guidance, both the court and the consultation

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

process may be seen as unfair and disingenuous. This is arguably emerging in Canada: skepticism among Indigenous groups that consultations will lead to meaningful political negotiations has the potential to delegitimize the entire duty-to-consult process and the judiciary as an enforcer of this right (Hamilton and Nichols 2019, 743).

Our investigation of these two streams of jurisprudence in Canada shows some of the promise and peril of a facilitator model. Among the most important points here is that it seems that the first aspect of the facilitator role is more appropriately applied in the SCC's federalism jurisprudence, but that a stronger enforcement of rights in its duty-to-consult cases may be needed to produce meaningful dialogue and negotiations between Indigenous groups and the Crown. In short, our comparison of these two streams of jurisprudence shows that the power differentials between conflicting parties is an important consideration in the applicability of a facilitator model. In federalism cases this works relatively well, given the political security of the parties. In Indigenous cases, the material and power disparities require a more robust enforcement of rights and explicit legitimation of claims to political autonomy to ensure free and fair negotiations.

This difference in the applicability of the model is not only relevant to Canada's federalism and Indigenous case law—it also points to some considerations when thinking about the wider applicability of our argument. As we noted, our focus here was to look beyond civil rights cases. While we maintain that analyzing how courts respond to political questions in jurisdictional conflicts—and the approach of facilitating dialogue—can inform how courts respond in civil rights cases, our findings on the suitability of the model in federalism and Indigenous cases points to the likely need for more robust enforcement of rights when there are serious power differentials between parties. This may limit the ability to apply the facilitator model broadly in civil rights conflicts. Similarly, the wider applicability of facilitating dialogue to manage conflict may be limited by the fact it is largely reliant on parties accepting the guidance of courts and carrying out subsequent negotiations in good faith (rather than abiding by strict judicial enforcement). In this respect, the applicability of the facilitator model beyond Canada—even in cases involving jurisdictional conflicts—is likely limited to stable, liberal multilevel democracies with a strong adherence to the rule of law.

REFERENCES

Aroney, Nicholas, and John Kincaid. "Comparative Observations and Conclusions." In *Courts in Federal Countries: Federalists or Unitarists?*, edited by Nicholas Aroney and John Kincaid, 482–540. Toronto: University of Toronto Press, 2017.

Asch, Michael. *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*. Toronto: University of Toronto Press, 2014.

Baier, Gerald. *Courts and Federalism: Judicial Doctrine in the United States, Canada, and Australia*. Vancouver: UBC Press, 2006.

Banting, Keith, and Richard Simeon. *An No One Cheered: Federalism, Democracy and the Constitution Act*. Toronto: Methuen Publications, 1983.

Beaton, Ryan. "*De facto* and *de Jure* Crown Sovereignty: Reconciliation and Legitimation at the Supreme Court of Canada." *Constitutional Forum* 27, no. 1 (2018): 25–33.

Bellamy, Richard. *Liberalism and Pluralism: Towards a Politics of Compromise*. London: Routledge, 1999.

——. *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*. New York: Cambridge University Press, 2007.

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press

Bickel, Alexander. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. Indianapolis, IN and New York: Bobbs-Merrill Company, 1962.

Borrows, John. "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*." *Osgoode Hall Law Journal* 37, no. 3 (1999): 537–96.

——. *Canada's Indigenous Constitution*. Toronto: University of Toronto Press, 2010.

Brouillet, Eugénie. *La Négation de La Nation: L'identitié Culturelle Québécoise et Le Fédéralisme Canadien*. Quebec: Éditions du Septentrion, 2005.

Cairns, Alan. "The Judicial Committee and Its Critics." *Canadian Journal of Political Science* 4, no. 3 (1971): 301–45.

Cameron, David, and Richard Simeon. "Intergovernmental Relations in Canada: The Emergence of Collaborative Federalism." *Publius* 32, no. 2 (2002): 49–72.

Chayes, Abram. "The Role of the Judge in Public Law Litigation." *Harvard Law Review* 89, no. 7 (1976): 1281–1316.

Coulthard, Glen. *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*. Minneapolis, MN: University of Minnesota Press, 2014.

Couso, Javier, Alexandra Huneeus, and Rachel Sieder, eds. *Cultures of Legality, Judicialization and Political Activism in Latin America*. New York: Cambridge University Press, 2010.

Crandall, Erin. "Understanding Judicial Appointments Reform." PhD diss., McGill University, 2013.

Crandall, Erin, and Robert Schertzer. "Competing Diversities: Representing 'Canada' on the Supreme Court." In *Canada at 150: Federalism and Democratic Renewal*, edited by Elizabeth Goodyear-Grant and Kyle Hanniman, 111–31. Montreal and Kingston: McGill-Queen's University Press, 2019.

Dixon, Rosalind. "Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited." *International Journal of Constitutional Law* 5, no. 3 (2007): 391–418.

Do, Minh. "Lessons from Public Policy Theories: Ask about Policy Change First, Courts Second." In *Policy Change, Courts, and the Canadian Constitution*, edited by Emmett Macfarlane, 21–39. Toronto: University of Toronto Press, 2018.

Dodek, Adam. "Courting Constitutional Danger: Constitutional Conventions and the Legacy of the Patriation Reference." *Supreme Court Review* 54, no. 2 (2011): 117–42.

Dworkin, Ronald. *Taking Rights Seriously*. Cambridge, MA: Harvard University Press, 1978.

Ely, John Hart. *Democracy and Distrust*. Cambridge, MA: Harvard University Press, 1980.

Fallon Jr., R. "Legitimacy and the Constitution." *Harvard Law Review* 118, no. 6 (2005): 1787–1853.

Ferejohn, John. "Judicializing Politics, Politicizing Law." *Law and Contemporary Problems* 65, no. 3 (2002): 41–68.

Fiss, Owen. *The Law as It Could Be*. New York and London: New York University Press, 2003.

Gagnon, Alain-G. *Quebec: State and Society*. 3rd ed. Peterborough, ON: Broadview Press, 2004.

Galston, William. "Realism in Political Theory." *European Journal of Political Thought* 9, no. 4 (2010): 385–411.

Gee, Graham. "The Persistent Politics of Judicial Selection: A Comparative Analysis." In *Judicial Independence in Transition*, edited by Anja Seibert-Fohr, 121–45. Heidelberg: Springer, 2012.

Ginsburg, Thomas. *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*. New York: Cambridge University Press, 2003.

Goldstein, Judith, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, eds. *Legalization and World Politics*. Cambridge, MA: MIT Press, 2001.

Graben, Sari. "Resourceful Impacts: Harm and Valuation of the Sacred." *University of Toronto Law Journal* 64, no. 1 (2014): 61–105.

Greschner, Donna. "The Supreme Court, Federalism and Metaphors of Moderation." *Canadian Bar Review* 79, no. 2 (2000): 47–76.

Halberstam, Daniel. "Comparative Federalism and the Role of the Judiciary." In *The Oxford Handbook of Law and Politics*, edited by Keith Whittington, Daniel Keleman, and Gregory Calderia, 142–64. Oxford: Oxford University Press, 2008.

Hall, Peter, and Rosemary C.R. Taylor. "Political Science and the Three New Institutionalisms." *Political Studies* 44, no. 5 (1996): 936–57.

Hamilton, Richard, and Joshua Nichols. "The Tin Ear of the Court: Ktunaxa Nation and the Foundation of the Duty to Consult." *Alberta Law Review* 56, no. 3 (2019): 729–60.

Harding, Andrew, and Penelope Nicholson, eds. *New Courts in Asia*. Oxfordshire: Routledge, 2010.
Hart, H.L.A. *The Concept of Law*. 3rd ed. Oxford: Oxford University Press, 2012.
Hausegger, Lori, Troy Riddell, Matthew Hennigar, and Emmanuelle Richez. "Exploring the Links Between Party and Appointment: Canadian Federal Judicial Appointments from 1989 to 2003." *Canadian Journal of Political Science* 43, no. 3 (2010): 633–59.
Henderson, James Youngblood. "Empowering Treaty Federalism." *Saskatchewan Law Review* 58, no. 2 (1994): 243–329.
——. "Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada." *Alberta Law Review* 14, no. 2 (2010): 24–48.
Hershkoff, Helen. "State Courts and the 'Passive Virtues': Rethinking the Judicial Function." *Harvard Law Review* 114, no. 7 (2001): 1833–1941.
Hiebert, Janet. "Notwithstanding the Charter: Does Section 33 Accommodate Federalism?" In *Canada at 150: Federalism and Democratic Renewal*, edited by Elizabeth Goodyear Grant and Kyle Hanniman, 59–84. Montreal: McGill-Queen's University Press, 2019.
Hilbink, Lisa. *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile*. Cambridge, UK: University of Cambridge Press, 2007.
Hirschl, R. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press, 2004.
—— "The Judicialization of Politics." In *The Oxford Handbook of Political Science*, edited by Robert Goodwin, 253–74. Oxford: Oxford University Press, 2008.
Hogg, Peter, and Allison Bushell. "The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)." *Osgoode Hall Law Journal* 35, no. 1 (1997): 75–124.
Hogg, Peter, Allison Bushell, and Wade Wright. "A Reply on 'Charter Dialogue Revisited'." *Osgoode Hall Law Journal* 45, no. 1 (2007): 193–202.
Kalman, Laura. *Legal Realism at Yale, 1927-1960*. Chapel Hill, NC and London: University of North Carolina Press, 1986.
Kelly, James, and Michael Murphy. "Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor." *Publius* 35, no. 2 (2005): 217–43.
Ladner, Kiera. "Treaty Federalism: An Indigenous Vision of Canadian Federalisms." In *New Trends in Canadian Federalism*, edited by François Rocher and Miriam Smith, 167–94. Peterborough, ON: Broadview Press, 2003.
——. "Up the Creek: Fishing for a New Constitutional Order." *Canadian Journal of Political Science* 38, no. 4 (2005): 923–53.
LaSelva, Samuel. *Canada and the Ethics of Constitutionalism: Identity, Destiny, and Constitutional Faith*. Montreal-Kingston: McGill-Queen's University Press, 2018.
Leclair, Jean. "The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity." *Queen's Law Journal* 28, no. 2 (2003): 411–53.
Lederman, W. "Unity and Diversity in Canadian Federalism: Ideas and Methods of Moderation." *Canadian Bar Review* 53 (1975): 595–619.
Llewellyn, Karl. *The Common Law Tradition: Deciding Appeals*. Boston and Toronto: Little, Brown and Company, 1960.
Macfarlane, Emmett. *Governing from the Bench: The Supreme Court of Canada and the Judicial Role*. Vancouver: UBC Press, 2013.
——, ed. *Policy Change, Courts, and the Canadian Constitution*. Toronto: University of Toronto Press, 2018.
Manfredi, Christopher. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. Norman, OK: University of Oklahoma Press, 1993.
Manfredi, Christopher, and James Kelly. "Six Degrees of Dialogue: A Response to Hogg and Bushell." *Osgood Hall Law Journal* 37, no. 3 (1999): 513–28.
McCrossan, Michael, and Kiera Ladner. "Eliminating Indigenous Jurisdictions: Federalism, the Supreme Court of Canada, and Territorial Rationalities of Power." *Canadian Journal of Political Science* 49, no. 3 (2016): 411–31.

McRoberts, Kenneth. *Misconceiving Canada: The Struggle for National Unity*. Toronto: Oxford University Press, 1997.
——. "Canada and the Multinational State." *Canadian Journal of Political Science* 34, no. 4 (2001): 683–713.
Melton, James, and Tom Ginsburg. "Does De Jure Judicial Independence Really Matter?" *Journal of Law and Courts* 2, no. 2 (2014): 187–217.
Molot, Jonathan T. "An Old Judicial Role for a New Litigation Era." *Yale Law Journal* 113, no. 1 (2003): 27–118.
Morton, F.L. "Dialogue or Monologue?" *Policy Options* 20 (1999): 23–26.
Morton, F.L., and Rainer Knopff. *The Charter Revolution and the Court Party*. Toronto: Broadview Press, 2000.
Nichols, Joshua, and Robert Hamilton. "In Search of Honourable Crowns and Legitimate Constitutions: *Mikisew Cree First Nation v Canada* and the Colonial Constitution." *University of Toronto Law Journal* 70, no. 3 (2020): 341–75.
Oldfather, Chad M. "Defining Judicial Inactivism: Models of Adjudication and the Duty to Decide." *Georgetown Law Journal* 94, no. 1 (2005): 121–82.
Petter, Andrew. "Take Dialogue Theory Much Too Seriously (or Perhaps Charter Dialogue Isn't Such a Good Thing after All)." *Osgoode Hall Law Journal* 45, no. 1 (2007): 147–67.
Pildes, Richard H. "The Supreme Court., 2003 Term—Foreword: The Constitutionalization of Democratic Politics." *Harvard Law Review* 118, no. 1 (2004): 25–154.
Popelier, Patricia. "Federalism Disputes and the Behavior of Courts: Explaining Variation in Federal Courts' Support for Centralization." *Publius* 47, no. 1 (2017): 27–48.
Potes, Veronica. "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" *Journal of Environmental Law and Practice* 17, no. 1 (2006): 27–45.
Roach, Kent. *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*. Toronto: Irwin Law, 2001.
——. "Dialogical Judicial Review and Its Critics." *Supreme Court Law Review* 23, no. 2 (2004): 49–104.
Robe, Andrew Bear. "Treaty Federalism." *Constitutional Forum* 4, no. 1-4 (1992): 6–11.
Rocher, François, and Miriam Smith. *New Trends in Canadian Federalism*. 2nd ed. Toronto: University of Toronto Press, 2003.
Russell, Peter. *The Supreme Court of Canada as a Bilingual and Bicultural Institution*. Ottawa: Queen's Printer, 1969.
——. "Bold Statecraft, Questionable Jurisprudence." In *And No One Cheered: Federalism, Democracy and the Constitution Act*, edited by Keith Banting and Richard Simeon, 211–38. Toronto: Methuen, 1983b.
——. "The Political Purposes of the Canadian Charter of Rights and Freedoms." *Canadian Bar Review* 61 (1983a): 30–54.
——. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* Toronto: University of Toronto Press, 2004.
——. *Canada's Odyssey: A Country Based on Incomplete Conquests*. Toronto: University of Toronto Press, 2017.
Schertzer, Robert. "Recognition or Imposition? Federalism, National Minorities and Supreme Court of Canada." *Nations and Nationalism* 14, no. 1 (2008): 105–26.
——. *The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada*. Toronto: University of Toronto Press, 2016.
——. "Federal Arbiters as Facilitators: Towards an Integrated Federal and Judicial Theory for Diverse States." *International Journal of Constitutional Law* 15, no. 1 (2017): 110–36.
——. "Collaborative Federalism and the Role of the Supreme Court of Canada." In *Policy Change, Courts, and the Canadian Constitution*, edited by Emmett Macfarlane, 103–24. Toronto: University of Toronto Press, 2018.
——. "Intergovernmental Relations in a Complex Federation." In *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, edited by Herman Bakvis and Grace Skogstad, 165–19. Toronto: University of Toronto Press, 2020.

Schertzer, Robert, Andrew McDougall, and Grace Skogstad. "Multilateral Collaboration in Canadian Intergovernmental Relations: The Role of Procedural and Reciprocal Norms." *Publius* 48, no. 4 (2018): 636–63.

Segal, Jeffrey, and Harold Spaeth. *The Supreme Court and the Attitudinal Model*. New York: Cambridge University Press, 1993.

Shapiro, Martin. *Courts: A Comparative and Political Analysis*. Chicago: University of Chicago Press, 1981.

——. "The Success of Judicial Review and Democracy." In On Law, Politics, and Judicialization, by Martin Shapiro and Alec Sweet Stone, pp. 149–183. New York: Oxford University Press, 2002.

Shapiro, Martin, and Alec Stone Sweet. *On Law, Politics, and Judicialization*. New York: Oxford University Press, 2002.

Shklar, Judith. "The Liberalism of Fear." In *Liberalism and the Moral Life*, edited by Nancy Rosenblum, 21–38. Cambridge, MA: Harvard University Press, 1989.

Sigalet, Geoffrey, Grégoire Webber, and Rosalind Dixon, eds. *Constitutional Dialogue: Rights, Democracy, Institutions*. Cambridge, UK: Cambridge University Press, 2019.

——. "Dialogue and Distrust: John Hart Ely and the Canadian Charter." *International Journal of Constitutional Law* 19, no. 2 (2021): 569–85.

Simeon, Richard. *Political Science and Federalism: Seven Decades of Scholarly Engagement*. Kingston: Institute of Intergovernmental Relations School of Policy Studies, 2000.

Singer, Joseph. "Legal Realism Now." *California Law Review* 76, no. 2 (1988): 465–544.

Smiley, Donald. "The Three Pillars of the Canadian Constitutional Order." *Canadian Public Policy* 12 (1986): 113–21.

Snow, Dave, and Mark Harding. "From Normative Debates to Comparative Methodology: The Three Waves of Post-Charter Supreme Court Scholarship in Canada." *American Review of Canadian Studies* 45, no. 4 (2015): 451–66.

Songer, Donald, Susan Johnson, C.L. Ostberg, and Matthew Wetstein. *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada*. Montreal and Kingston: McGill-Queen's University Press, 2012.

Sossin, Lorne. "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law." *Saskatchewan Law Review* 66 (2003): 129–82.

Stone, Adrienne. "Judicial Review without Rights." *Oxford Journal of Legal Studies* 28, no. 1 (2008): 1–32.

——. "Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law." *University of Toronto Law Journal* 60 (2010): 110–35.

Stone Sweet, Alec. "Judicialization and the Construction of Governance." *Comparative Political Studies* 32, no. 2 (1999): 147–84.

——. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000.

Stone Sweet, Alec, and Florian Grisel. *The Evolution of International Arbitration: Judicialization, Governance, Legitimacy*. Oxford: Oxford University Press, 2017.

Swinton, Katherine. "Federalism under Fire: The Role of the Supreme Court of Canada." *Law and Contemporary Problems* 55, no. 1 (1992): 121–45.

Tate, C. Neal, and Torbjorn Vallinder, eds. *The Global Expansion of Judicial Power*. New York: New York University Press, 1995.

Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity*. Cambridge, UK: Cambridge University Press, 1994.

——. "Struggles over Recognition and Distribution." *Constellations* 7, no. 4 (2000): 469–82.

Tushnet, Mark. "Alternate Forms of Judicial Review." *Michigan Law Review* 101, no. 8 (2003): 2781–2802.

Waldron, Jeremy. "A Right-Based Critique of Constitutional Rights." *Oxford Journal of Legal Studies* 13, no. 1 (1993): 18–51.

Wright, Wade. "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada." *Supreme Court Law Review* 51 (2010): 625–93.

CASES CITED

Canada (AG) v Ontario (AG), [1937] UKPC 6.
Calder et al. v. Attorney-General of British Columbia, [1973] SCR 313.
Re: Resolution to Amend the Constitution [Patriation Reference], [1981] 1 SCR 753.
Multiple Access Ltd. v. McCutcheon, [1982] 2 SCR 161.
Northern Telecom v. Communication Workers, [1983] 1 SCR 733.
Reference re Newfoundland Continental Shelf, [1984] 1 SCR 86.
Scowby v. Glendinning, [1986] 2 SCR 226.
R. v. Sparrow,[1990] 1 SCR 1075.
R. v. S. (S.),[1990] 2 SCR 254.
Reference re Canada Assistance Plan (B.C.), [1991] 2 SCR 525.
R. v. Van der Peet,[1996] 2 SCR 507.
R. v. Gladstone,[1996] 2 SCR 723.
Reference re Secession of Quebec, [1998] 2 SCR 217.
Haida Nation v. British Columbia (Ministry of Forests), [2004] SCC 73.
Taku River Tlingit First Nation v. British Columbia (Project Assessment Director), [2004] SCC 74.
Fédération des producteurs de volailles du Québec v. Pelland, [2005] 1 SCR 292.
Canadian Western Bank v. Alberta, [2007] 2 SCR 3.
Mikisew Cree v. Canada (Minister of Canadian Heritage), [2005] SCC 69.
Rio Tinto Alcan Inc. v. Carrier Sekani, [2010] SCC 43.
Reference re Securities Act, [2011] 3 SCR 837.
Bank of Montreal v. Marcotte, [2014] 2 SCR 725.
Marcotte v. Fédération des caisses Desjardins du Québec, [2014] 2 SCR 805.
Quebec v. Canada, [2015] SCC 14.
Clyde River (Hamlet) v. Petroleum Geo-Services Inc., [2017] SCC 40.
Chippewas of the Thames First Nation v. Enbridge Pipelines Inc., [2017] SCC 41.
Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), [2017] SCC 54.
Mikisew Cree First Nation v. Canada (Attorney General), [2018] 2 SCR 765.
Greenhouse Gas Pollution Pricing Act Reference, [2021] SCC 11.

https://doi.org/10.1017/lsi.2022.89 Published online by Cambridge University Press