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Kirandeep Mahal
Osgoode Hall Law School

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Abstract
The federal system of governance has been posited as a solution to issues of internal conflict and division within states. Over the last century the global prevalence of the federal system has increased. There are currently twenty-six states (accounting for forty per cent of the global population) that have or are in the process of adopting a federal system—including three of the so-called "BRIC" emerging global powers. While the motivating theory of the federal system is one that often seeks to pacify, contain, or eliminate conflict among subnational groups and governments, such an ideal is not as easily achieved in practice. Many federal states are formed amidst conflict and competing visions of national identity. Thus, it is often not only the division of power and resources within the federation that is contested but also the framework of the federation itself. This underlying struggle is borne out in political arenas through self-determination movements and in courts through legal disputes over division of powers. In turn, states rely on federal institutions to proactively and reactively address intra-state conflict. Situated among these institutions are "federal arbiters" who serve the critical role of adjudicating conflicts over power and resources.

Book Review

The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada, by Robert Schertzer[1]

KIRANDEEP MAHAL[2]

THE FEDERAL SYSTEM OF GOVERNANCE has been posited as a solution to issues of internal conflict and division within states.[3] Over the last century the global prevalence of the federal system has increased. There are currently twenty-six states (accounting for forty per cent of the global population) that have or are in the process of adopting a federal system[4]—including three of the so-called "BRIC" emerging global powers. While the motivating theory of the federal system is one that often seeks to pacify, contain, or eliminate conflict among subnational groups and governments, such an ideal is not as easily achieved in practice. Many federal states are formed amidst conflict and competing visions of national identity. Thus, it is often not only the division of power and resources within the federation that is contested but also the framework of the federation itself. This underlying struggle is borne out in political arenas through self-determination movements and in courts through legal disputes over division of powers. In turn, states rely on federal institutions to proactively and reactively address intra-state conflict. Situated among these institutions are "federal arbiters" who serve the critical role of adjudicating conflicts over power and resources.

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1. (Toronto: University of Toronto Press, 2016) 306 pages.
2. JD Candidate (2018), Osgoode Hall Law School.
3. Schertzer, *supra* note 1 at 35-36.
4. *Ibid* at 7, n 11. "BRIC" is an acronym in economics that refers to the countries of Brazil, Russia, India and China.

In *The Judicial Role in a Diverse Federation: Lessons from the Supreme Court of Canada*, Robert Schertzer employs Canada and its Supreme Court as a case study to examine the role of apex courts as federal arbiters managing national diversity and conflict. Working from two foundational premises—the impetus on federal institutions to generate legitimacy for the federation and the inherently contested nature of the federation—Schertzer's book integrates a novel theoretical approach to viewing the role of apex courts as federal arbiters with an in-depth empirical analysis of the Supreme Court of Canada's federalism jurisprudence. Drawing from 131 Supreme Court of Canada (SCC) decisions spanning three decades, Schertzer's analysis suggests that the SCC has managed conflict over national identity and the federation "in both problematic and beneficial ways."[5]

Schertzer's book addresses a "relatively under examined and under theorized" area in federal theory—the role of federal arbiters in "comparative federal and conflict management studies."[6] In this respect, the focus on Canada is advantageous and it follows a trend in comparative federalism of recognizing Canada as a key case.[7] Firstly, Schertzer frames Canada as a plurinational federation in which members of the federation do not subscribe to one single, unifying definition of the nation.[8] Schertzer identifies three dominant federal models that emerge from scholarship on Canadian federalism and can be discerned in SCC jurisprudence: pan-Canadian, provincial equality, and multinational.[9] Secondly, the SCC is often called upon to mediate federalism disputes, which has led to a significant

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5. *Ibid* at 8-9.
6. *Ibid* at 62.
7. See *e.g.* Thomas O Hueglin & Alan Fenna, *Comparative Federalism: A Systematic Inquiry*, 2nd ed (Toronto: University of Toronto Press, 2015); Gerald Baier, *Courts and Federalism: Judicial Doctrine in the United States, Australia, and Canada* (Vancouver: UBC Press, 2006); Michael Burgess, *Comparative Federalism: Theory and Practice* (London: Routledge, 2006); Jan Erk, *Explaining Federalism: State, Society and Congruence in Austria, Belgium, Canada, Germany and Switzerland*, (New York: Routledge, 2008); Jan Erk & Lawrence M Anderson, eds, *The Paradox of Federalism: Does Self-Rule Accommodate or Exacerbate Ethnic Divisions?* (New York: Routledge, 2010).
8. *Ibid* at 7. On plurinationalism, see Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-sovereignty Era* (Oxford: Oxford University Press, 2004). See also Ferran Requejo & Miquel Caminal Badia, eds, *Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases* (New York: Routledge, 2012); Ugo M Amoretti & Nancy Bermeo, eds, *Federalism and Territorial Cleavages* (Baltimore: Johns Hopkins University Press, 2004).
9. Schertzer, *supra* note 1 at 48. Schertzer draws primarily from the work of François Rocher and Miriam Smith. François Rocher & Miriam Smith, "The Four Dimensions of Canadian Federalism," in François Rocher & Miriam Smith, eds, *New Trends in Canadian Federalism*, 2nd ed (Toronto: University of Toronto Press, 2003) 21 at 22, 38-40.

body of jurisprudence spanning a range of division of powers issues. In recent decades, questions of critical constitutional importance have been referred to the SCC during deeply divided political and social points in Canadian history.[10]

It would come as no surprise to those familiar with the Supreme Court of Canada that it has significantly influenced the development of the federation of Canada.[11] What is perhaps less understood is how the SCC carries out its role as federal arbiter and the corresponding impact it has on the legitimacy of differing views of the federation and of the federation itself.[12] This is the gap in the literature that Schertzer's work meticulously fills through theoretical and empirical rigour.

Schertzer argues that federal arbiters, in fulfilling their conflict management duties, hold a "special status"[13] in the development of the federation and the maintenance of its legitimacy in diverse states. Schertzer contends that federal arbiters are a part of the "very system being challenged." Thus, when they are faced with adjudicating challenges to the federal system the legitimacy of the federal arbiter itself also hangs in the balance.[14] The ways in which apex courts manage conflict "can either negatively affect the legitimacy of the federal system or generate legitimacy."[15]

Schertzer's focus on legitimacy is of particular note in understanding the arguments advanced in the book. Schertzer defines legitimacy as "the belief in, and acceptance of, the validity of a form of political association"[16] and argues that perceptions of legitimacy act as either a unifying or destabilizing force within a federation. Thus, in order to reap the benefits of a federal system, legitimacy must remain a central focus of institutional actors in managing conflict.

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10. See *e.g. Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, 125 DLR (3d) 1; *Re: Objection by Quebec to a Resolution to amend the Constitution,* [1982] 2 SCR 793, 140 DLR (3d) 385; *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 [*Secession Reference*]; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 SCR 837; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.
11. See *e.g.* Donald R Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (Toronto: University of Toronto Press, 2008) ch 6; John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto: University of Toronto Press, 2002); Katherine E Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990).
12. Schertzer, *supra* note 1 at 276.
13. *Ibid* at 68.
14. *Ibid* at 6.
15. *Ibid* at 62.
16. *Ibid* at 11.

I. RECONCEPTUALISING THE ROLE OF THE FEDERAL ARBITER

While federal theory and Canadian federalism jurisprudence have been the subject of significant scholarly interest, Schertzer's book fills gaps within and across these areas of scholarship. Schertzer bridges the divide between theories of the federal system and judicial review, forming links "between each ideal role for the judiciary and [an ideal] federal approach and model."[17] Part I of *The Judicial Role in a Diverse Federation* draws on general federal theory to discuss how states approach the issue of national diversity.

In chapter two, this theoretical framework is applied to the dominant federal models in Canada: pan-Canadian, provincial equality, and multinational. Schertzer takes these models a step further by articulating the conceptualization of the role of the judiciary that is embedded in each model. The pan-Canadian model places the central government as the locus of a "single, comprehensive civic political identity."[18] Under this framework the judiciary is called upon to act as a neutral, independent umpire "adjudicating…in accordance with pre-established rules."[19] The provincial equality model supports a decentralized view of the state in which provinces "represent the primary political community of belonging"[20] and the judiciary is seen as a branch of government providing checks and balances to power.[21] The multinational model views Canada as comprised of multiple nations for whom power sharing and autonomy are justified.[22] Sub-nations are defined either as ethno-national units (*e.g.*, Quebec, Nunavut, and Aboriginal communities) or as provincial territorial units.[23] The judiciary is viewed as a guardian protecting the constitutional and federal system.[24]

Schertzer argues that these existing dominant approaches fail to account for the "federal structure itself [being] contested," and thereby overlook how imposing a particular federal approach and model affects the legitimacy of the federation.[25] Drawing from these shortcomings, Schertzer advances a new federal

17. *Ibid* at 80.
18. *Ibid* at 50.
19. *Ibid* at 77.
20. *Ibid* at 50-51.
21. *Ibid* at 78.
22. *Ibid* at 51-52.
23. *Ibid* at 52.
24. *Ibid* at 79.
25. *Ibid* at 80.

model "that sees federal systems as the *process and outcome of negotiation*" in which the federal arbiter's role is that of a broad facilitator of negotiation.[26]

This "ideal model" rejects the prioritization of one view of the federation above others; instead it moves towards recognizing a dynamic federation in which courts aim to facilitate "negotiation and political compromise."[27] Schertzer suggests that the federal arbiter can facilitate this model by either (1) pushing the conflicting parties back into political negotiations or (2) rejecting a zero-sum approach to conflict resolution by reaching an outcome that validates and accounts for competing perspectives.[28]

While this ideal model encourages compromise and dialogue within the federation, the reality is that often negotiation may not be a viable option for disputes that reach the level of the apex court. Further, the impetus to reject a zero-sum outcome must be balanced with the expectation on courts to deliver decisions with clear directives for the parties on the question(s) before them. The strength of Schertzer's approach lies in its recognition that the influence of the federal arbiter does not rest solely with the disposition of the conflict. Rather it is embedded in the way the decision is rendered. The manner in which the apex court depicts the federation, reinforces this depiction through legal argument, and recognizes that "continued disagreement is reasonable" influences the legitimacy of its decision to parties beyond the clear "winner."[29] In this way, it is open to the apex court to validate the contested nature of the federation and render decisions in which the plurality of views of the federation may find fruit for future conflict management.

Part II of the book leads off this point and demonstrates how this ideal model has been achieved in practice through an examination of SCC federalism jurisprudence.

II. EXAMINING THIRTY YEARS OF SUPREME COURT OF CANADA FEDERALISM JURISPRUDENCE

Canadian legal scholarship has benefited from a robust body of study concerning the role the SCC has had in the development of the Canadian federation; however, much of this scholarship focuses on the impacts of specific decisions, doctrines,

26. *Ibid* at 83 [emphasis added].
27. *Ibid* at 93.
28. *Ibid* at 93-94.
29. *Ibid* at 97.

eras, or personalities of the Court.[30] This is understandably so, given the sheer breadth of cases touching on issues of federalism. In *The Judicial Role in a Diverse Federation*, Schertzer views the Court as an *institution* and rises to the challenge of taking a deep dive into Canadian federalism jurisprudence.[31] Schertzer achieves this by undertaking an empirical analysis spanning 131 decisions rendered by the Supreme Court of Canada from 1980–2010.[32] Beyond the analysis specific to this book, Schertzer's work provides a set of tabulated data that not only advances an understanding of how the Court has managed federalism conflicts, but that may also serve as a rich foundation for future research on Canadian federalism.

In Part II of the book, the theoretical foundation set out in Part I is applied to develop an empirical framework through which trends in the Supreme Court of Canada's management of conflict are identified. Schertzer's framework takes a case-by-case, granular, and detail-oriented approach. Schertzer analyzes how the federation is depicted in order to determine which federal model(s) have found favour with the Court and identifies the constitutional modalities[33] employed in the legal argumentation. The framework also assesses the judgments' outcomes and the role assumed by the Court in each case.

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30. See *e.g.* Wade K Wright, "Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada" (2010) 51 SCLR (2d) 625; Nathalie Des Rosiers, "From Québec Veto to Québec Secession: The Evolution of the Supreme Court of Canada on Québec-Canada Disputes" (2000) 13:2 Can JL & Jur 171; Gordon DiGiacomo, "The Supreme Court of Canada's Federalism as Expressed in the Securities Reference" (2012) Queen's University Institute for Intergovernmental Relations Working Paper No 2012/01; Jean-François Gaudreault-DesBiens, "The 'Principle' of Federalism and the Legacy of Patriation and Quebec Veto References" (2011) 54 SCLR 77.
31. Schertzer recognizes that while the views of individual judges may help to explain "*why* the Court shifts its conception of the federation over time" the Court's power ultimately is derived from "the normative force it wields as the apex court of the [Canadian] judicial system." *Ibid* at 110. Recent scholarship suggests that a view of the Court as an "institution" may be apt and appropriate for the SCC. See Emmett Macfarlane, "Consensus and Unanimity at the Supreme Court of Canada" (2010) 52 SCLR (2d) 379 (on unanimous judgments in the Supreme Court of Canada); Peter McCormick "'By the Court': The Untold Story of a Canadian Judicial Innovation" (2016) 53:3 Osgoode Hall LJ 1048 (on the rise of judgments by "THE COURT").
32. Schertzer, *supra* note 1 at 113-14.
33. Constitutional modalities are "method(s) through which legal propositions about the constitution are given a meaning" (*e.g.*, historical, doctrinal, textual, and progressive approaches). See *ibid* at 125-26. Schertzer builds on the taxonomy employed by Philip Bobbitt (*ibid* at 125). See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford: Oxford University Press, 1982); Philip Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell, 1991).

The rigour of Schertzer's analysis is exemplified in chapter four of the book in which a discussion of the *Reference Re Secession of Quebec* (*Secession Reference*)[34] provides a window into the application of the new empirical framework. Using the *Secession Reference* as the benchmark embodying the "ideal model," Schertzer identifies two streams of jurisprudence—one in which the SCC *imposes* a particular view of the federation and one in which the SCC *reinforces* the legitimacy of multiple views.

The Court rendered the *Secession Reference* in a time of 'crisis'[35] in which there was a "direct challenge to the legitimacy of the constitutional and federal system"[36] in Canada. While commentators have characterized the Court's reasoning in the *Secession Reference* as resorting to "abstract normativity…[and]…extra-ordinary adjudication"[37] and reflecting "strategic decision making" rooted in an effort to reinforce the legitimacy of the Court as a federal institution,[38] Schertzer's analysis suggests that the impact of this decision was much broader. Schertzer argues that the *Secession Reference* is an "exemplar" of recognizing the federation as the process and outcome of negotiations and of the way in which the federal arbiter can legitimize competing perspectives of the federation. A bird's eye view of the empirical analysis finds that the *Secession Reference* marked a shift in SCC federalism jurisprudence from *imposing* a particular federal model towards "recogniz[ing] the legitimacy of multiple federal models and the federation as the process and outcome of negotiation between the subscribers of these models."[39]

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34. In this advisory judgment the SCC considered three specific questions relating to the legality of unilateral secession by the province of Quebec under Canadian and international law. *Secession Reference*, *supra* note 11 at para 2 (for full text of the questions referred to the Court).
35. Schertzer, *supra* note 1 at 140.
36. *Ibid* at 164.
37. See Sujit Choudhry & Robert Howse, "Constitutional Theory and The *Quebec Secession Reference*" (2000) 13:2 Can JL & Jur 143 at 168. Choudhry and Howse highlight three unconventional aspects of the decision. First, they point out the decision's "reliance on abstract, unwritten constitutional principles" beyond the written text of the constitution to create a new framework for governing secession. *Ibid* at 149, see also 154. Second, they reference the decision's interpretative responsibility, namely the Court's decision to vest "primary responsibility for contextualizing the constitutional rules governing secession" with political actors rather than the courts. *Ibid* at 149, see also 157). Third, they highlight the decision's interpretative style, specifically the Court's articulation of "a normative vision for the Canadian constitutional order." *Ibid* at 164.
38. See *e.g.* Vuk Radmilovic, "Strategic Legitimacy Cultivation at the Supreme Court of Canada: Quebec *Secession Reference* and Beyond" (2010) 43:4 Can J Pol Sci 843.
39. Schertzer, *supra* note 1 at 220. Under Schertzer's framework of analysis, seventy-eight per cent of post-*Secession Reference* federalism jurisprudence reflected a recognizing approach, as opposed to merely forty-three per cent of federalism jurisprudence pre-*Secession Reference*.

Schertzer substantiates this argument by devoting chapters five and six to analyzing decisions in the *imposing* and *recognizing* streams of SCC jurisprudence. In these chapters, Schertzer summarizes the key characteristics of an imposing as opposed to a recognizing case, the trends that emerge within these two streams of jurisprudence, and the corresponding implications for the legitimacy of the federation.

The analysis presented in Part II raises two interconnected issues. First, as Schertzer notes at the onset of his book, the apex court does not exist in a vacuum. Rather, it is a part of the very system that is being contested. Accordingly, as commentators have suggested in relation to the *Secession Reference*, the Court is attuned to the social and political implications of the decisions it must render. This begs the question of the degree to which the circumstances surrounding a particular case may influence the impetus to advance an "imposing" versus an "accommodating" stance by the Court. The temporal and substantive ranges in the cases Schertzer analyzes demonstrate that the trends identified transcend particular points of conflict or issues. However, the analysis is confined primarily to an investigation of the decisions rendered, with a secondary focus on the political and social climate surrounding the decision and their actual impacts on perceptions of legitimacy within the federation. These may serve as fruitful areas for future research, building on the rich data set generated by Schertzer's empirical study.

Second, one may grapple with whether the SCC is, in fact, imposing or recognizing certain models in its decision, or whether it is instead more accurate to suggest that decisions are driven by doctrine and the factual circumstances of a case. To this point, Schertzer contends that "underlying theories of federalism structure judicial decision making,"[40] and that, as discussed above, it is not solely the disposition of a decision that holds force but rather the reasoning and depiction of the federation that rationalize the outcome. Schertzer illustrates this by recasting the SCC's analysis in *Reference Re Canada Assistance Plan* in order to demonstrate that legitimizing competing views of the federation may not be mutually exclusive with the necessity of adjudicating an outcome.[41]

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40. *Ibid* at 282.
41. *Ibid* at 283-85; *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525, 83 DLR (4th) 297.

III. CONTRIBUTION TO GLOBAL AND NATIONAL FEDERAL THEORY

While the book centres on Canada as a case study, Schertzer contextualizes his analysis within broader federal theory. *The Judicial Role in a Diverse Federation* provides a rich theoretical and empirical foundation for comparative study that may be used to inform conflict management in other plurinational federal states and states where "conflict over the nature of nationality"[42] is prevalent. Furthermore, the application of Schertzer's ideal model to the SCC highlights the importance of the federal arbiter and serves as a window of comparison for other federal states into how decision making by apex courts may affect legitimacy.

In recent years, studies of traditional topics of federalism in Canada have arguably given way to rights-oriented scholarship focusing on the *Canadian Charter of Rights and Freedoms*.[43] The ideas advanced in this book and the granularity of the empirical analysis provide a basis for future scholarship on federalism theory and jurisprudence in Canada. In particular, as Canadian legal and political spheres respond to the call to action of the Truth and Reconciliation Commission report[44] and begin to act on a commitment to reconciliation with Aboriginal peoples in Canada, governments and courts will be called upon to negotiate a comprehensive vision of the federation in which Aboriginal self-government holds a fundamental and operative role.[45] In this respect,

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42. *Ibid* at 301.
43. See Patrick Fafard & François Rocher, "The Evolution of Federalism Studies in Canada: From Centre to Periphery" (2009) 52:2 Can Pub Adm 291.
44. Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Library and Archives Canada, 2015).
45. As of 2015, Canada had signed twenty-two self-government agreements and there were approximately ninety self-government negotiation tables across the country. See Indigenous and Northern Affairs Canada, "Fact Sheet: Aboriginal Self-Government" (2 April 2015), online: <www.aadnc-aandc.gc.ca/eng/1100100016293/1100100016294>. Active scholarship exists on the role of federal theory and federalism to recognize, affirm, and implement Section 35 Aboriginal rights including the right to self-government. This scholarship suggests that theories of federalism in Canada can and should evolve to effectively operationalize Aboriginal rights. Of particular note is the potential for the courts and the Supreme Court of Canada to contribute by adapting legal doctrines of federalism when adjudicating disputes and defining the parameters that will govern the division of power and resources in this new era of the federation. See *e.g.* Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) ch 6; Martin Papillon, "Towards Postcolonial Federalism? The Challenges of Aboriginal Self-Determination in the Canadian Context" in Alain-G Gagnon, ed, *Contemporary Canadian Federalism:*

Schertzer's focus on Canada as a plurinational state is apt and timely. While the SCC's post-*Secession Reference* shift may not reflect a calculated effort by the Court to follow a new federal model to the exclusion of others, Schertzer's work gives pause for reflection on what may be achieved in a federation when conflicts that reach the highest legal arena are approached from a place of negotiation rather than imposition.

Foundations, Traditions, Institutions (Toronto: University of Toronto Press, 2009) 405; Martin Papillon & André Juneau, eds, *Canada: The State of the Federation 2013: Aboriginal Multilevel Governance* (Kingston: McGill-Queen's University Press, 2015); Mark Mancini, "Wandering Without a Torch: Federalism as a Guiding Light" (2016) 67 UNBLJ 369; Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31:2 Queen's LJ 521; Dwight G Newman, "Aboriginal 'Rights' as Powers: Section 35 and Federalism Theory" in Graeme Mitchell et al, eds, *A Living Tree: The Legacy of 1982 in Canada's Political Evolution* (Markham, Ont: LexisNexis, 2007) 527.