Book Notes

Dwight Newman, Book Review Editor *

As in the last few issues, I have prepared notes on a number of recent books. There is much interesting constitutional law scholarship being released that may be of use to readers of the *Review of Constitutional Studies*, far beyond the coverage possible when publishing only longer book reviews. These shorter book notes will hopefully help to identify some of that scholarship and offer some brief commentary on the works identified.

Chris Andersen, *"Métis": Race, Recognition, and the Struggle for Indigenous Peoplehood* (Vancouver: UBC Press, 2014)

In the first few pages of his new book, University of Alberta Indigenous studies scholar Chris Andersen manages to show how the well-meaning, but benighted, writing of John Ralston Saul on Canada as a Métis nation actually perpetuates deeply racialized and imperialistic assumptions about Métis identity. Not to be outdone by his *tour de force* opening, Andersen powerfully spends the remaining pages developing an account of Métis identity that is not based on conceptions of mixed races but on conceptions of nationhood and political identity.

To do so, he re-examines what the Supreme Court of Canada did in its *Powley* decision before turning to the roots and history of the Métis Nation. While acknowledging the complex political dynamics that led Métis and non-status Indian communities to campaign together in various settings, as well as some of the ways his account could be read as exclusionary, Andersen puts forth a powerful argument that the Métis will not be able to claim all of their rights unless their national and political identity is more clearly defined along the lines that he argues. His point, in essence, is that it is difficult for the Métis to pursue Indigenous claims that rest on peoplehood if their identity is

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described in terms of racial mixing or various bureaucratic categories that suit a variety of interests rather than in terms closer aligned with peoplehood.

In his last chapter, Andersen explores the complex issues related to the recognition of Indigenous identity in Labrador, where some communities have alternated between claims to identity as Métis or as Inuit. He effectively notes that the ongoing development of that situation may be an important test case for the clarification of Indigenous identities. His conclusion also usefully highlights a number of suggestions in relation to ongoing research, ranging from more specific questions in contexts like Labrador to a broader set of questions about how to work toward acceptance of a refined concept of Métis identity.

Andersen's book is thorough and deep, insightful and provocative. Some will find it unsettling. But, for anyone interested in questions of Métis identity, or more generally Indigenous rights in Canada, it is an essential read.

Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015)

Ben Berger brings to the realm of law and religion a sophisticated, nuanced approach that has stood him in good stead in a number of important articles over the years. Here, he combines some of those articles, along with new material and new thought, into a significant book-length statement. He argues that constitutional law is a cultural form and that its encounter with religion in the context of religious freedom inherently becomes a cross-cultural encounter. Conventional accounts that suppose law should or can regulate this encounter, Berger argues, are ultimately deceptive and missing the real challenges of the encounter between law and religion.

The book is nuanced and allusive, engaging in its citations with a wide range of scholars, and thus not easily examined in a short book note. Those reading the full book — and, if you are interested in law and religion, or just Canadian constitutionalism, you should be among them — will be drawn into an introduction that shows the engagement between religion and Canadian law from the very beginnings of Supreme Court of Canada jurisprudence. Readers will learn much about law's rendering of religion in a form particularly convenient for legal discourse. They will also learn about perspectives on dealing with cross-cultural encounters.

In the last parts of the book, Berger tries to present an ethics for adjudication in the context of religious difference. He also offers some intriguing thoughts that, without erasing very significant differences of historical context and contemporary circumstance, gesture toward some parallels to the kinds of sensitivity needed in engagement with certain Indigenous claims. In a slim volume, these ideas raise major complexities, and the ethical points Berger arrives at must thus remain somewhat abstract. But, they provide an important foundation that he will continue to build upon in his ongoing work.

Berger's focused discussion on law and religion takes the reader to the heart of deep questions about the cultural dimensions of law itself. There is, however, a potential puzzle here. On the one hand, Berger presents an account of law that is deeply cultural. On the other, though, in parts of his discussion, he seems to presume a highly positivist account of what law is. In particular, his discussion of how law renders religion in individualistic ways rests on what may read as surprisingly positivist accounts of the case law before later parts of the book seem to presume something different about the nature of law.

Berger is engaged with various deeper questions on which he may not yet have reached resolution, and his future scholarly work is to be eagerly awaited. In the meantime, this book is important and one to read and re-read.

Gérard Bouchard, Interculturalism: *A View from Quebec*, trans. Howard Scott (Toronto: University of Toronto Press, 2015)

For those who did not, or could not, read Gérard Bouchard's original French-language book on interculturalism several years ago, Howard Scott has now released a translated version. The book, by one of the authors of the Bouchard-Taylor Report on reasonable accommodation, offers a further development of the concept of interculturalism that the report had already drawn to the attention of a wider audience.

In that respect, the original book was already a major contribution to the international literature and debates around multiculturalism. The translation makes its ideas accessible to yet broader audiences, including Anglophone Canadians who wish to better understand some of the distinctive concerns within Quebec about the Canadian idea of "multiculturalism" and the distinctive ideal of "interculturalism."

The ideal of interculturalism puts a different focus on maintaining the values of a host culture, even while developing a shared public culture that integrates immigrants. It is a pluralism, not an assimilationism or a communitarianism; it is certainly an approach distinct from multiculturalism. This book explains the subtleties of interculturalism and is thus highly recommended.

Jamie Dickson, *The Honour and Dishonour of the Crown: Making Sense of Aboriginal Law in Canada* (Saskatoon: Purich, 2015)

This work, based on an LL.M. thesis that the author completed at the University of Saskatchewan, is a significant contribution to Canada's Aboriginal law literature. Many casual observers — and, frankly, many in the field as well — continue to talk about the role of fiduciary duty in Aboriginal law as if that foundation had continued untouched through recent jurisprudence. From a doctrinal standpoint, Dickson carefully shows how the concept of the honour of the Crown has largely displaced the concept of fiduciary duty.

What Dickson does from a theoretical standpoint is perhaps even more intriguing: he shows that reading the honour of the Crown precept as an organizing principle of Canadian Aboriginal law doctrine opens up new possibilities for the ongoing development of Aboriginal law. The duty to consult has emerged already as a major doctrinal manifestation of the honour of the Crown, and there have been hints of other kinds of legal obligations also flowing from the honour of the Crown. Dickson subtly argues that more are to come. Anyone trying to interpret the ongoing development of Canadian Aboriginal law should read and reflect upon this thesis.

Lois Harder & Steve Patten, eds., *Patriation and Its Consequences: Constitution Making in Canada* (Vancouver: UBC Press, 2015)

This edited collection, which emerged from a major conference held in 2011 by the Center for Constitutional Studies under the leadership of Patricia Paradis, re-engages with Canada's 1982 constitutional patriation negotiations from a standpoint now some three decades removed from those negotiations. Some

essays in the volume focus on the historical and intellectual roots of patriation and its components, some focus specifically on negotiation history, and some reflect on the broad consequences of patriation. One or two pieces are not particularly closely connected to patriation at all, reflecting the constant challenge of editing an academic collection — a task that has been aptly described as "herding cats."

The book is, as implied in the last comment, an academic collection. Although the 2011 conference drew together many speakers who actually participated in the patriation negotiations, Barry Strayer is the only one from the inside of those negotiations who has participated in the collection — although some of the activist contributors would also no doubt describe themselves as patriation participants. And, as is unsurprising with legal and political academics, their focus tends toward their particular interests. So, for example, something like the new section on natural resource jurisdiction receives no attention, even though its inclusion in the constitutional framework was an essential part of the deal if some Western provinces were to come on board.

To say these things, though, is not to criticize the book. For what it is, it is an interesting and engaging collection of academic papers, with some real intellectual gems amongst them. Janine Brodie offers a rich theoretical framework around the patriation process. Eric Adams offers a superb, historically rooted discussion of Anglophone constitutional nationalism. Peter Russell offers a very thoughtful piece on the unintended ways some of the broader structures of patriation have played out. And the riches just go on, with these being just a few examples from many others one could cite.

As with most edited collections, it would be somewhat impertinent to try to impose too much of a theme to the diverse papers that this work includes, although the introduction by Lois Harder and Steve Patten is able to skilfully weave the papers together to some extent. The diversity of the papers, though, is one of the collection's strengths. Readers will encounter a rich set of different ideas on patriation and its complexities. Decades later, there are new things to be said about patriation, and these authors have offered a lot of new thoughts. Perhaps, like one of its key progenitors, patriation will haunt us still.

Adam J. MacLeod, *Property and Practical Reason* (Cambridge: Cambridge University Press, 2015)

Adam MacLeod's new book offers a moral argument for private property rights and institutions like those found in the common law tradition, speaking implicitly to the appropriateness of constitutional recognition of property rights in the process. Property rights, MacLeod argues, allow individuals to develop plans in their lives and thus have fundamental moral justifications. But, describing his argument that way drastically oversimplifies it, for it is engaged at a highly sophisticated level not only with a range of moral thinkers but also with some of the details of common law property systems — right down to certain limitations on the common law rule against perpetuities. Throughout, MacLeod marries theory and doctrinal structures effectively and, in doing so, makes a significant scholarly contribution.

MacLeod is engaged in serious thought that considers counterarguments, particularly those from scholars like Jeremy Waldron, who have challenged arguments for private property based on concerns over their universalizability. At the same time, his argument will not likely convince everyone. In so far as it is grounded in considerations of enabling individuals to develop plans and thereby to have opportunities to exercise practical reasonableness, it depends on assumptions that opportunities for practical reasonableness are a leading normative consideration. Some will deny that, unreasonable though that might be, or simply not feel the force of the concept of practical reasonableness. In broader circles of legal academia, that concept does not necessarily receive the discussion it ought to receive. One wonders whether MacLeod could have developed the argument without expressing it so much in this terminology, so as to draw in more prospective adherents — or, if he might do so in future work that could then reach a yet broader audience. In addition, one might also note that MacLeod's book does not explain what relationships its argument might or might not have with law and economics arguments concerning property rights, and further discussion of this issue would also be welcome in future work that considers how economic and moral considerations fit together. In a Canadian context, it is also worth mentioning that the latter parts of the book that consider the institutions of private property have some implications for constitutional protections for private property that were possibly not fleshed out as much as in most Western states already having that protection.

In saying these things, of course, I am not actually critiquing MacLeod's argument, which has much force to it. There is no doubting that MacLeod's book is an important scholarly contribution within a particular strand of natu-

ral law scholarship, and one that bears significantly on important legal and normative questions.

Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015)

Samuel Moyn's important work on the history of the twentieth-century human rights movement has already led to several thought-provoking contributions in his past books. His latest carries on that legacy, provocatively exploring the Christian origins of the Universal Declaration of Human Rights. At this particular entrenchment, Moyn argues, human rights were effectively an instantiation and entrenchment of what he calls a "Christian moment" in world politics. At the same time, he suggests that human rights later detached from these origins, which raises all kinds of interesting questions as the human rights movement advances from here.

In making this argument, Moyn discusses, of course, the influence of such figures as Jacques Maritain and Gerhard Ritter but also a range of other actors and a broader-based Catholic influence on not just the Universal Declaration but also on the European Convention of Human Rights, ultimately engaging with the complex implications this has had in the context of the adoption of religious freedom guarantees. This book, interestingly, is situated very much in the middle of the twentieth century and does not, for instance, consider deeper links to the American Bill of Rights or other deeper historical origins. But, it makes its points effectively and provocatively. Those interested in the history of human rights, and the implications of that history, should consider this book essential reading.

Victor Muñiz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (Oxford: Oxford University Press, 2014)

McGill law professor and political theorist Victor Muñiz-Fraticelli's new book is an important scholarly contribution to theories of pluralism. There is more in it than can be quickly summarized, but it traces long traditions of thought on pluralism (notably, the work of the British pluralists) while also offering its own distinctive modern contribution. In part of his new contribution,

Muñiz-Fraticelli argues for the authority of intermediate associations over their members in some instances based on modern theories of the authority of law, notably the account offered by Joseph Raz. Thereafter, he goes on to explore in general terms some of the rights of associations, including those related to property. The book is a work of political theory, and not an engagement with specific legal disputes, but it is an important contribution.

I am sympathetic with many of the claims of the book, and many practical conclusions have an alignment with conclusions that would flow from my own 2011 book on collective rights. However, Muñiz-Fraticelli and I have significantly different argumentation in arriving at some of those conclusions, and there is fruitful room for further engagement on methodology and argumentation.

Those who have not worked directly on these topics previously will find Muñiz-Fraticelli's book a complex but worthwhile read. In situating pluralism both historically and theoretically, it offers the reader a range of valuable perspectives. In the context of ongoing challenges around different questions that relate to pluralism, Muñiz-Fraticelli's work makes a very worthwhile contribution.

Michael Plaxton, *Implied Consent and Sexual Assault: Sexual Autonomy, Intimate Relationships, and Voice* (Montreal: McGill-Queen's University Press, 2015)

Michael Plaxton's new book does not comment directly on constitutional law. However, in an era with important discussions of rape culture, American college campuses riled in debates over affirmative consent requirements, and Canada transfixed by the Jian Ghomeshi trial and its media-saturating exposure of the realities of a sexual assault trial, Plaxton's book warrants significant attention — including from constitutionalists who may need to think about these issues more directly if legislators begin contemplating further statutory reforms, and more generally as courts keep engaging with the systems that exist in the context of Canadian constitutional values.

Plaxton's book rather courageously puts forward what might initially seem like a shocking thesis, which is a claim that a defence of implied consent in the sexual assault context may actually be necessary in some contexts to fully recognize women's autonomy. But, his book is not about shock value. It is a

nuanced and deeply feminist argument concerned with the terms of intimate relationships.

Given the complex and sometimes competing strands of feminism, not all feminists will agree with Plaxton's approach, let alone his conclusions. But, hopefully all can respect it as an intellectually serious and morally nuanced treatment that is oriented around feminist concerns. Indeed, to some extent, the book underplays its own significance, focusing through the title, and even in some of the argument, on a defence that the author himself suggests should be available only in circumstances where prosecutors are unlikely to be pressing charges anyway. It is how Plaxton gets there, and the broader significance of those arguments, that is ultimately more significant.

Let there be no doubt: the book's broader argument, and how Plaxton goes about developing it, is a tremendous contribution. Plaxton brings the resources of criminal law theory to Canadian criminal law in innovative ways, and he integrates criminal law theory with feminist argumentation in a manner that opens new ways of thinking. In so far as consent is under examination internationally, Plaxton's book also powerfully contributes to a broad scholarship. Hopefully, he will follow up this book with future books that might offer similarly sophisticated theoretical treatment of affirmative consent issues and various issues on consent. This book is a profound scholarly contribution that warrants significant attention from those in various scholarly fields, including constitutionalism.

Greg Poelzer & Ken S. Coates, *From Treaty Peoples to Treaty Nation: A Road Map for All Canadians* (Vancouver: UBC Press, 2015)

Greg Poelzer and Ken Coates have both been important commentators on Aboriginal policy questions over the last number of years. Here, they offer what has been billed as a book-length discussion of how to move forward on Aboriginal policy in Canada today. Their discussion has many merits, depending on the audience, but it will leave many readers wanting more.

The first several chapters of the book consist of a set of very fair-minded summaries of the main arguments of a number of different scholarly and political commentators on Aboriginal issues in Canada, including both Indigenous and non-Indigenous individuals. For those who have not read the particular

authors they have summarized, this is an excellent overview of an interesting range of thought. However, to others, it will just seem like summaries of a potentially quirky list of thinkers. There is no particular explanation for why these thinkers were chosen and, although many are interesting and influential, these descriptors probably cannot be applied to all of them. Furthermore, the authors' list also excludes many other voices that might have been worth hearing.

The next several chapters describe a number of success stories from Aboriginal communities. Their uplifting tone is welcome, and this sort of optimism is a valuable corrective to a sometimes unrelentingly gloomy picture in discussions of Aboriginal policy. Their discussion engages incidentally with some of the challenges Aboriginal communities face, although typically in an optimistic context of success stories in some communities.

The last chapters turn to a number of recommendations, some of them quite creative. The authors may have had in mind how exactly all the recommendations flow from the bodies of thought referenced in the early chapters and/or the success stories from the middle part of the book, but they do not explain those connections with particular clarity. Some of the recommendations will also read as not being -well explained in terms of their relationship with existing legal rights and the consequences of those rights for these policies. Optimism is welcome, but the authors could have done more to explain how exactly their recommendations respond to the issues and can be implemented. They show real awareness of certain kinds, but seem to optimistically gloss over other challenges.

This book will be valuable to some audiences, particularly readers who want a balanced introduction to a range of thinkers on Aboriginal policy or who would benefit from reading some of the success stories Poelzer and Coates are so good at telling. However, those readers might also be reminded of some of the complexities of these policy contexts, and the authors might usefully have engaged more with some of those complexities. Poelzer and Coates have been influential commentators on Aboriginal policy issues, and this book may be a contribution to some public discussions, but one would like to see them be more ambitious by engaging more with the tough questions since they are amongst those most well-placed to face them.

David Schneiderman, *Red, White, and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture* (Toronto: University of Toronto Press, 2015)

Although the book was published just before the 2015 Canadian federal election, David Schneiderman's latest book has effectively become one of the first post-Harper books to comment on the constitutional legacy of the recent Conservative government. The book pursues the interesting thesis that, across a number of different areas, the Conservative government tended to Americanize Canadian constitutional culture. To make that argument, Schneiderman first offers a very helpful discussion on the concept of constitutional culture, which is useful to any reader. The argument, as developed, then relates especially to the consolidation of greater executive authority, to moves to try to implement Senate reform toward an elected Senate, and to allegedly increased political thought about the appointment of Supreme Court of Canada nominees.

In pursuing his argument that the Conservatives came along and Americanized Canadian constitutional culture, Schneiderman seeks to write descriptively and with some degree of neutrality, hoping to analyze what he argues is a significant shift in constitutional culture that occurred under Canada's most recent government. Unfortunately, the impression of neutrality is undermined through verb choice when more (upper- or lower-case) conservative commentators are described on various occasions through the book as having "grumbled" or "complained" rather than having "said" or "argued," as more liberal commentators apparently do. No doubt seeking to enliven the book, these verb choices were an unfortunate stylistic decision, although Scheiderman does generally try to be fair even to "grumbled" positions.

What is more unfortunate is that Schneiderman so quickly glosses over the countervailing tendencies in the Conservative government related to the place of the monarchy and various traditional Canadian elements. Schneiderman tends to treat these changes as merely symbolic. An engagement with some of the serious recent scholarly work on the monarchy by the likes of Philippe Lagassé might have given pause for second thought on the point, or at the very least enriched the sophistication of Schneiderman's argument on this potentially countervailing tendency.

A further puzzling feature of the book is that it seeks to impute the informal changes at issue to the Harper government, without much exploration of potential competing theses. Although Schneiderman is attentive to (and some-

what dismissive of) the idea that Canada's Prime Minister has been subject to a longer-term process of "presidentialization," he does not compare the consolidation of Canadian executive power in recent years to the parallel phenomenon taking place in other countries, such as the United States, in light of some of the demands of the contemporary era. On the appointment of Supreme Court of Canada justices, he does not really engage with the possibility that a modified nomination process flows inexorably from the previous Americanization of constitutional rights guarantees in Canada that took place through their adoption into a written, constitutionalized *Charter of Rights and Freedoms* — something that occurred under the Liberals rather than under the Conservatives.

Schneiderman's book is intellectually stimulating and contains much worthwhile material on constitutional cultures. Regretfully, I find the argument somewhat unconvincing on its face and arguably too attached to "great man" theories of politics; the changes the Conservatives have pursued surely flow from broader political dynamics than Schneiderman acknowledges or even realizes. But the book is well worth reading and, in pursuing an interesting albeit contestable thesis in a sophisticated manner, it will no doubt form part of the canon of thought on Canadian constitutionalism in the years ahead.

Cass R. Sunstein, *Constitutional Personae* (Oxford: Oxford University Press, 2015)

In a surprisingly slim volume, Cass Sunstein seeks to categorize four main judicial approaches to constitutional adjudication, to argue for his preferred approach, and to show how recognizing these approaches can help to explain the presence of unanimity and disagreement on different constitutional questions. He suggests that these approaches are followed by four different personae of judges: heroes, who boldly interpret the constitution; soldiers, who seek to implement legislative orders; minimalists, who seek to build incrementally on the past; and mutes, who seek to avoid constitutional questions whenever possible. The early chapters flesh out these personae somewhat, before Sunstein turns to the defence of his preferred constitutional persona, the Burkean minimalist.

Edmund Burke has exerted more influence on recent American constitutional scholarship than most Canadians realize and has often been cited by conservative constitutional or political theorists. Interestingly, Sunstein has also sought to develop a Burkean-inspired account of constitutional adjudication in a number of pieces of writing over recent years. The middle chapter of

this book offers readers a brief introduction to Sunstein's account of Burkean minimalism and his arguments for it, although not, for instance, any defence of it against serious challenges to its foundations put by scholars like Adrian Vermeule. Nonetheless, it is a helpful, lively introduction to Sunstein's thought on adjudication.

The last chapter of the book turns to consider how the presence of the different constitutional personae Sunstein has described might be able to help explain the dramatic change in American constitutional adjudication that took place in 1941, which marked a critical turning point in terms of the breakdown of unanimous opinions from the United States Supreme Court. The breakdown in a norm of consensus that took place at that time, Sunstein admits, actually poses some challenges for minimalist judging; the clarity of a rule that emerges from a case may not be enhanced by some proportion of judges taking a minimalist approach, at least in some circumstances.

Across the range of topics with which he engages in such a short book, Sunstein is thoughtful and provocative, and his book is well worth reading for some different ways of thinking about judges' multifarious approaches to constitutional adjudication and their respective advantages and disadvantages.