Book Notes

Dwight Newman, Book Review Editor

Emmett Macfarlane, ed., *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 2016).

Constitutional amendment has become effectively impossible in Canada, or has it? This edited collection engages with a range of legal and political facets of Part V of the *Constitution Act, 1982*. A variety of scholars examine the actors who could be involved in constitutional amendment, the legal procedures and formulae for amendment, and applications to some issues related to the Supreme Court of Canada, Senate, Crown, and secession.

Although in the form of an edited collection — rather than a monograph like Benoît Pelletier's wonderful but increasingly dated French-language book on amendment — Macfarlane's book is now the single most useful English-language book on constitutional amendment in Canada. In a variety of chapters, it offers an effectively comprehensive treatment of a topic that normally gets too many quick comments and not enough deeper reflections. It is a book that belongs on every constitutionalist's bookshelf.

Patrick Macklem, *The Sovereignty of Human Rights* (Oxford: Oxford University Press, 2015)

Patrick Macklem's latest book effectively critiques standard views concerning the intersection of international law and domestic rights instruments such as constitutional bills of rights. Macklem effectively roots international human rights in the need to respond to certain flaws in the international legal order, with many original consequences for the implicit primacy of different rights. For example, because Macklem's account is essentially oriented around the consequences of the legal organization of the international order in terms of sovereign states, rights like minority rights in international law, international Indigenous rights, and international labour rights take on a new primacy as vital responses to the consequences of state sovereignty.

Make no mistake. While having acknowledged parallels to aspects of thinking by some scholars like Allen Buchanan, this book is transformative.

Avoiding common conceptions of international human rights as growing out of basic moral claims or as stemming from global politics, he situates them as remedial parts of international law itself and as effectively responding to potential dangers in the way that international law ascribes legal sovereignty. This idea is original and provocative, and the book thus makes a significant contribution.

Because Macklem's account assigns a certain primacy to minority rights, Indigenous rights, and international labour rights, it more effectively explains their earlier historical origins as compared to international protections of paradigmatic civil and political rights. He also offers an explanation for why there is deep-seated ambivalence in many international rights bodies about these rights, showing how some of this ambivalence may stem from their thinking of international human rights in terms of a different (more orthodox) model.

In the course of that particular point, Macklem has an intriguing two-line reference to language rights. Particularly in the context of his writing from a Canadian standpoint that would allow interesting engagement with language rights, it would be genuinely interesting to see him do more on what the potential implications for language rights might be, as I would suggest that his approach might actually call for something more transformative in that arena than may be already apparent.

More generally, it would be fascinating to see more fully how Macklem sees the intersection of this account and domestic rights instruments that have deep-seated human rights protections that do seem to assume a priority to civil and political rights. A further-going account of the implicitly differentiated origins of human rights at the international and domestic levels would be a tremendously valuable extension of his project that would bear directly on constitutional law. Such an extension would aid meaningfully in how to integrate the international law requirements on states stemming from rights rooted in his account with existing constitutional law protections of rights, with an often different focus in those domestic constitutional contexts.

That such an extension is not present in this book speaks, of course, to no deficiency, but rather to the impossibility of doing everything in one book. Macklem's book is already an enormously significant contribution, and it is simply one that could ground many future research agendas. Any constitutionalists thinking about international law and its domestic implications quite frankly need to consider and take account of Macklem's claims.

Patrick Taillon, Eugénie Brouillet & Amélie Binette, eds., *Un regard québécois sur le droit constitutionnel: Mélanges en l'honneur d'Henri Brun et de Guy Tremblay* (Montréal: Éditions Yvon Blais, 2016)

The two solitudes of Canadian history find an unfortunate continuing life in constitutional scholarship. Quite simply, English-language constitutionalists fail to read enough of the French-language scholarship emanating principally from Québec. This book, itself functioning internally within Québec as a *festschrift* for two enormously influential Laval constitutionalists, could function for English-language readers as a very helpful introduction to some significant bodies of French-language constitutional scholarship.

The variety of authors within both reflect upon some of the scholarly legacy of Henri Brun and Guy Tremblay and engage in a series of original contributions across a range of topics bearing on federalism, rights instruments, and other matters of constitutional law. The very balance of topics is different than would ever be seen in an equivalent English-language collection. So has been that within the writings of Brun and Tremblay themselves. Québec constitutionalists have focused on constitutional topics in qualitatively and quantitatively different ways than English-language constitutionalists. In addition to its scholarly merits in general, and its role as a *festschrift*, this book is to be further recommended across Canada as a very valuable introduction to a range of Québécois constitutional scholarship.

LETTER TO THE BOOK REVIEW EDITOR

By David Schneiderman

I am writing about the 'book notes' review of my book *Red, White and Kind of Blue? The Conservatives and the Americanization of Canadian Legal Culture* by Professor Dwight Newman in Volume 20:1 of the *Review*. I appreciate that Prof. Newman found the book stimulating and to contain worthwhile material on constitutional cultures, which were two of my main goals. However, he also cited a number of purported shortcomings of the book, including subject matters he says were not addressed. With respect, I think this reveals a less than careful reading, and cite the following responses to Prof. Newman's criticisms to make this point:

#1: That I fail to engage with 'serious recent scholarly work on the monarchy by the likes of Phillip Lagassé.' In fact, I engage with Lagassé's work at p. 172. We might disagree about the amount of attention that work deserves — I chose to take Lagassé up when talking about Crown prerogatives. But to say that there is no 'engagement' is incorrect.

#2: That I do 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.' This is odd because this is a comparative study — I talk at length about executive power in the US in Chapter 2 (pp. 83-88). I also write about this in the context of Great Britain and, in passing, in 'western democracies' more broadly (at p. 89- 90). References to the body of literature dealing with concentration of executive authority appear throughout the footnotes.

#3: That I do not "really engage with the possibility that a modified nomination process [for the Supreme Court of Canada] flows inexorably" from the adoption of the Charter. I acknowledge this argument at pp. 238- 39. Much of chapter 5 is dedicated to addressing this very question.

#4: That I am too attached to '"great man" theories of politics.' I do not understand this point. I do not subscribe to a 'great man' theory of politics, nor do I refer to any such 'theory.' Perhaps Prof. Newman has confused that theory with observations, uncontroversial I should think, that power was concentrated, perhaps at unprecedented levels, in the office of the Prime Minister.

#5: Prof. Newman states that "the changes the Conservatives have pursued surely flow from broader political dynamics than Schneiderman acknowledges or even realizes." He does not, however, go on to identify any of these 'broader dynamics.' I appreciate that the book note is a short form, not given to providing a lot of evidence. However, it is unfair to make such an accusation, with its hint of condescension, without backing it up. This criticism is particularly dismaying because, in each of the four chapters in which I take up Conservative party innovations, I provide original empirical evidence in support of the argument, something not mentioned in the note.

Despite these disagreements, I thank Prof. Newman for having written a note on the book, and am glad he found it "well worth reading."

REPLY TO DAVID SCHNEIDERMAN

By Dwight Newman

I thank Prof. Schneiderman for taking the time to reply to my short book note. In my original book note, I was complimentary about his book in many respects but did express briefly some challenges. He has chosen to reply to some of these, and readers can examine my original note for others that have stood without issue. With respect, as for those replies he has put, I do not agree that they effectively challenge points in my review.

On #1, my point in my note was that claims in the book that the Conservatives sought to Americanize constitutional culture on a number of fronts did not sit neatly with very significant moves they also made to enhance the role of the monarchy, something discussed at length in a number of Philippe Lagassé's recent works. That Prof. Schneiderman can point to having included a footnote to Lagassé in the particular context of prerogatives does not answer that point.

On #2, that Prof. Schneiderman indicates he discussed a point "at length" over a particular six pages could almost come across as inadvertently humorous. I suggested he should have engaged in a fuller comparison on the point in light of how the presidentialization phenomenon related to needs of the contemporary state, and I stand by that.

On #3, I acknowledge that Prof. Schneiderman does mention the argument, but I stand by my original claim that he "does not really engage with it" — there are a lot of things going on in Chapter 5, and it is not focused closely on the point I raised.

On #4 and #5, I of course do not wish to ascribe to Prof. Schneiderman a view he does not hold. However, I used the well-known term, "great man theory", to refer to his underlying suggestion that the changes that he discussed flowed from particular political leadership. There are significant bodies of scholarship on what underlying forces led to such leadership being in place, which admittedly could not readily be cited in a short book note. With respect, I do not find it constructive for Prof. Schneiderman to speculate on alleged motives of "unfairness" and "condescension" on my part.

I thank Prof. Schneiderman for his reply and encourage readers to judge his arguments for themselves. I considered and continue to consider his book well worth the attention of readers.