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Book Review

Canada and the Ethics of Constitutionalism: Identity, Destiny, and Constitutional Faith

Samuel V. LaSelva. Montreal, McGill-Queen's University Press, 2018, 324 p.

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In *Canada and the Ethics of Constitutionalism*, political theorist Samuel V. LaSelva provides a compelling, rich, and synthetic interpretation of Canada's seemingly "elusive and unrealized" (p. 133) constitutional faith. By comparing the constitutions of Canada, the United States and the United Kingdom in a "Montesquieuan" fashion "as historical and cultural phenomena" (pp. xii-xiii), LaSelva's main thesis is that Canadians have developed a new constitutional faith based neither on "the sacred fire of liberty" nor on parliamentary sovereignty, but on the careful consideration of "the rights of others" (p. xii)¹. This theme unfolds in ten chapters exploring issues ranging from federalism to judicial review and rights culture, to conceptions of citizenship. The author weaves together a convincing narrative that proves to be more than an erudite *tour d'horizon*. Ultimately, LaSelva shows that Canada has a resilient and original constitutional faith that responds to and fits its cultural and historical specificity and multinational pluralism.

The first part of the book presents three rival versions of Canada's constitutional faith; the *old* Tory version of George Grant, the *new* liberal version of Pierre Trudeau, and the "Two-Row Wampum" version of First Nations. LaSelva criticizes the Tories' "lament" about the "Americanization" of Canada, epitomized by the Charter, for their distorted understanding of the American constitution and their incapacity—much like the liberals—to ponder the influence of Canada's pluralism on the Charter itself (p. 25). By contrast with the individualistic and atomistic "rights as trumps" narrative stemming from America's

1. The expression comes from Lord Sankey's decision in "The Persons Case", *Edwards v. Canada*, [1930] A.C. 124.

idiosyncratic experience, LaSelva argues that Canada has “a distinctive rights culture” recognizing “a multiplicity of group rights and group identities” (p. 38). Yet, as he himself later recognizes, “[m]any Canadians [...] increasingly analyze the Charter of Rights with the same questions in mind as Americans analyze the US Bill of Rights” (p. 74). While setting the stage for the following chapters, the first part jumps back and forth from the founders’ generation to the present, without distinguishing between elite constitutional culture and popular culture (see MacFarlane, 2008) sometimes at the expense of clarity.

The second part focuses on rights models and judicial review, and their place in the articulation of a constitutional faith. Like many, LaSelva’s interpretation of Canada’s rights regime gives a central place to the Charter’s notwithstanding clause. For him, the clause demonstrates Canadians’ faith in the political process (p. 49). He points out that its history also bears the mark of the embeddedness of constitutional rights in Canada’s multinational federalism that process-based theories like “constitutional dialogue” fail to capture, since they are only meant to assuage the fears of majoritarian democrats. LaSelva argues that Canadian federalism gave a different meaning to judicial review from the very beginning, because it was not pitted against democracy and there was thus no need to construct a “people” (which can hardly be taken for granted in Canada in the first place) to justify the exercise of judicial power on its behalf (p. 67). He illustrates his point with two case studies: hate speech and sexist pornography. Through an original—though sometimes a little self-serving—reading of Canadian case law, he shows that the rights model of each country is rooted in different forms of pluralism. The author traces the influence of these “two radically different brands of pluralism” (p. 116) on conceptions of citizenship in the face of secessionist claims and aboriginal self-government. He uses Georges-Étienne Cartier’s and James Madison’s theories of federalism to contrast the multicultural and multinational Canadian “mosaic” with America’s “melting pot”, and to show that the “war of races” and the War of Independence have given rise to different conceptions of federalism and pluralism: one of respect and recognition, and one of liberty. These differences are mobilized to explain the different conceptions of citizenship intertwined in the secessionist claims of Quebec’s nationalists in the second half of the 20th century and of defenders of state rights in *antebellum* United States. While language and slavery posed challenges respectively to Canadian and American constitutional faith, slavery proved to be an existential issue, because it could not be compromised, whereas language policy could be. LaSelva also uses these pluralisms to contrast Trudeau’s 1969 Indian Policy with Nixon’s 1970 congressional speech. American *Indians* had traditionally been pictured in tension with America’s liberal individualistic creed, a contradiction that Nixon seems to have resolved. LaSelva argues that in Canada, it is the imaginary resources of federalism that need to be drawn upon to give shape to an ethic of multinational constitutionalism based on mutual recognition rather than liberty (pp. 186-187).

The last part returns to George Grant and Alan Cairns to understand the twofold “meaning of the Canadian constitutional crisis” of the 1960s onward. LaSelva thinks that Cairns better captured the multifaceted nature of Canadian pluralism and its internal contradictions than did Grant’s pessimistic prediction for the future of Canada, engulfed in the homogenizing capitalist American mould. Yet, they both failed to notice that the tensions they highlighted were already embedded in Canada’s founding, but were captured neither by the image of the “peaceable kingdom” nor the land of “peace, order and good government” (p. 205). In conclusion, LaSelva asks: What kind of faith will emerge as a constitution (like Canada’s) undergoes crises and existential threats? What will make it the object of fidelity? Why has Canada not learned to embrace its own living constitution to make sense of the crises it has weathered? He suggests that we return to George-Étienne Cartier’s vision, which offers a different understanding of Canadian constitutionalism based on the idea of a “new political nationality”. Despite MacDonald’s centripetal “peace, order and good government” and Trudeau’s “People’s Charter”, Canada’s founding documents bear the stamp of Cartier’s pluralistic vision whose teaching is still highly relevant for today’s “fractured political world”: “the essential thing is the ability to compromise and the willingness to consider the rights of others” (p. 227).

LaSelva’s book skillfully shows the connections between debates that do not always overlap. For example, the discussion of Grant’s *Lament for a Nation* and Canadian federalism dovetails well with the discussion of judicial review and rights culture. It shows deep continuities around the Canadian experience and its complicated relationship with the United States. The same is not always true for his reading of Supreme Court cases, which LaSelva uses to illustrate his argument at various points in the book. His interpretations range from genuinely creative to eyebrow-raising to one-sided. In this respect, his engagement with constitutional scholars proves to be more fruitful than with case law. That being said, it is surprising not to see any reference to David Schneiderman’s *Red, White and Kind of Blue* (Schneiderman, 2015) which covers much of the same comparative ground and similarly claims the heritage of Montesquieu to understand Canadian constitutional culture.

The breadth of the enterprise and its comparative dimension also clarify the originality of Canada’s constitutional development and brings explicitness to themes that can remain otherwise somewhat inarticulate. It complements the comparative scholarship on other multinational federations (Belgium, Spain, Switzerland, etc.) that often pays too little attention to constitutional traditions. The comparison with the United Kingdom, while fruitful when providing historical background to Canadian and American constitutionalism, feels sometimes forced, however. This is especially the case for the discussion of citizenship, secession, and aboriginal self-government, where the comparison with the United States is more straightforward.

The elephant into the room, though, is the absence of serious engagement with Francophone scholarship. But for passing references to a very small group of scholars whose work has been translated into or published in English, the bulk of Francophone scholarship of the last decades on the topics covered by the book is completely absent. For example, it would have been interesting to bring to bear the debates about French Canada's *Américanité* (e.g. Thériault, 2002) or Quebec's Republican tradition (e.g. Kelly, 1997; Harvey, 2005; Chevrier, 2012; Chevrier, Harvey, Kelly & Trudeau, 2013) on the discussion of the Americanization thesis and the chapter on secession and identity. Unfortunately, LaSelva's book confirms "the absence of recognition of [Francophones'] contribution to the advancement of knowledge, especially when it deals with Canadian politics" (Rocher, 2007: 850). For a book that seeks to praise Canada's constitutional faith as cemented by "political fraternity" rather than "cultural solitudes" (p. xii), this is bitter irony.

LaSelva wrote in 2002 that "Canadians seem[ed] increasingly unable even to live under a common constitution, let alone recognize a constitutional faith" (2002: 205). Not unlike Peter Russell's 2017 *Canada's Odyssey* (Russell, 2017), his pessimistic assessment has visibly given way to a sober appraisal of the resilience of the Canadian constitutional experiment. In the face of the apparent unraveling of American and British constitutional faith in the era of Trumpism and Brexit, LaSelva's book is a convincing plea for the recognition of Canada's late-coming constitutional faith, as well as an important step towards its full articulation.

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