Red, White, and KIND OF BLUE?

The Conservatives and the Americanization of Canadian Constitutional Culture

David Schneiderman

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UNIVERSITY OF TORONTO PRESS
Toronto Buffalo London

Toronto Buffalo London
www.utppublishing.com
Printed in the U.S.A.

ISBN 978-1-4426-2947-9 (cloth)
ISBN 978-1-4426-2948-6 (paper)

Printed on acid-free, 100% post-consumer recycled paper with vegetable-based inks.

Library and Archives Canada Cataloguing in Publication

Schneiderman, David, 1958–, author
Red, white, and kind of blue? : the conservatives and the Americanization of Canadian constitutional culture/David Schneiderman.

Includes bibliographical references and index.
ISBN 978-1-4426-2947-9 (cloth). – ISBN 978-1-4426-2948-6 (paper)

1. Constitutional law – Canada – American influences. 2. Constitutional law – United States. I. Title.

KE4226.S36 2015 342.71 C2015-904683-1
KF4482.S36 2015

This book has been published with the help of a grant from the Federation for the Humanities and Social Sciences, through the Awards to Scholarly Publications Program, using funds provided by the Social Sciences and Humanities Research Council of Canada.

University of Toronto Press acknowledges the financial assistance to its publishing program of the Canada Council for the Arts and the Ontario Arts Council, an agency of the Government of Ontario.

Canada Council for the Arts | Conseil des Arts du Canada

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To Kiran and Anika

Acknowledgments

It was shortly after I returned from a three-year sojourn in the United States that the idea for this book was hatched. I had been teaching U.S. constitutional law to U.S. law students during the second term of President George W. Bush. Confidence in the president had reached all-time lows. The advantages of the parliamentary system over the presidential one were increasingly apparent, at least to me. Upon my return to Canada, I could hear arguments during the course of two controversial prorogations reminiscent of those that had issued out of the Bush II White House. Then, there were initiatives like Senate reform and a new procedure for Supreme Court of Canada nominations. All of this appeared to mimic U.S. constitutional rules or practice. *Red, White, and Kind of Blue?* was born out of this intuition.

This book has been a great deal of fun to write. Its initial arguments were developed on the run, as events were running their course. I am grateful to my home institution, the Faculty of Law at the University of Toronto, and to former Dean Mayo Moran and to the current dean, Edward Iacobucci, for their steadfast support. I am also grateful to colleagues at Georgetown University Law School, and to past dean Alex Aleinikoff, for their gracious hospitality and willingness to allow a Canadian to instruct U.S. law students about their own constitution.

I presented an early version of chapter 5 at the "Workshop on Media and Courts," Onati Socio-Legal Studies Institute in June 2013, at the University of Toronto Faculty of Law / University of Montreal "Beetz-Laskin Inaugural Conference" in September 2012, and at the Osgoode Hall Law School "Constitutional Cases Conference" in May 2012. Early versions of other chapters were presented at the "Parliamentary Democracy" panel at the David Asper Centre for Constitutional Rights,

in January 2009, at a Faculty of Law, University of Toronto event on Senate reform in March 2009, and Faculty of Law seminars at the University of Toronto in February and November 2013. A book panel was organized at the University of Toronto Faculty of Law in late September 2014, where Peter Russell, Jean Leclair, and Yasmin Dawood commented upon a draft of the book. In addition to their thoughtful advice, I received helpful comments from Ben Berger, Mark Walters, Rob Walsh, and Nelson Wiseman. I also had the benefit of Martin Friedland's sage advice and encouragement at key moments. Daniel Quinlan of University of Toronto Press provided valuable encouragement and feedback early on. I also had the benefit of excellent research assistance from Matthew Burns, Aria Laskin, Sarah McLeod, Benjamin Miller, Krista Nerland, Zaire Puil, and Chava Schwebel, all former law students at the University of Toronto. Aria Laskin not only helped code newspaper accounts, she generated the data that appear in chapter 5. All throughout, I had the loving support of Pratima, Kiran, and Anika.

A small portion of chapter 2 previously appeared in the *Canadian Parliamentary Review* and an early version of the latter half of chapter 5 appeared online at *Oñati Socio-legal Series*.

As I indicate in the introduction, this is not meant to be a polemic directed at the Harper Conservative government. There are a number of those sorts of books already in circulation. Instead, I take seriously the arguments in support of shifts in practice in an American direction made by the Conservative government. Though I happen to disagree with these shifts, I do not disagree that we are in need of reform in each of the areas under discussion. Each of the topics taken up here, particularly insofar as they concern concentration of power in the executive branch, should preoccupy Canadians into the future.

I have dedicated this book to my children, who will be given their own opportunity to contribute to the ongoing experiment of Canadian constitutionalism. I am hoping that they will have learned something from their dad along the way.

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Introduction

"Canadians are conditioned from infancy to think of themselves as citizens of a country of uncertain identity, a confusing past, and a hazardous future," observed Northrop Frye.[1] Canadians might be an impressionable lot – they might be open to influences from elsewhere – but this does not render their past unknowable. Nor does it deliver them up to an indefinite future in which they have no hand in the shape of things to come. Instead, we might insist that Canadians, within limits, have an ability to choose the changes they want, so long as they are adequately informed about them.[2]

Being open to influences from elsewhere renders Canadians particularly vulnerable to the weight of their overbearing neighbour to the south. This susceptibility includes being influenced by aspects of American constitutional governance. When Canada's Conservative government sought to separate out and enhance executive authority during two prorogation crises, initiating Senate reform and revamping the Supreme Court of Canada judicial appointment process, it appeared that the Conservatives were succumbing to the force of America's gravitational pull. If successful, the outcome of these constitutional initiatives would have been to push Canada further into the orbit of U.S. constitutional influence.

This book examines these innovations with a view to evaluating the extent to which they disturb traditions and practices associated with

1 Northrop Frye, "Sharing the Continent," in Northrop Frye, *Divisions on a Ground: Essays on Canadian Culture*, ed. James Polk (Toronto: House of Anansi, 1989), 57.

2 See W.H. New, *Borderlands: How We Talk About Canada* (Vancouver: UBC Press, 1996), 102.

Canada's constitutional culture. It is not that many aspects of constitutional self-governance are not in need of reform. To the contrary, many of the practices and institutions that were the target of the Harper government's reforms are in dire need of rethinking. The concern animating this book is that the prime minister and his government proposed that Canada mimic some of the most problematic aspects of U.S. governance, with its separate executive branch, divided and gridlocked congressional government, and dysfunctional judicial confirmation hearings. It would have been less objectionable if it had been suggested that Canadians take up elements of U.S. constitutional practice that are worthwhile replicating. Change, in other words, should be welcome, but not under conditions that inhibit argument and innovative thinking.

An overriding problem with these initiatives is that they were not intended to engage the Canadian public very much. Many of them were not difficult to initiate, but for Senate reform, they could be initiated simply by executive edicts. From the government's perspective, these innovations needn't have triggered the use of Canada's constitutional amending formulae. They could, for this reason, fly somewhat under the constitutional radar. It is this flexibility – in contrast to the rigidity of Canada's amending formulae – the prime minister hoped to exploit in pursuit of his constitutional plans.

It was not that the prime minister or his Cabinet openly acknowledged that Canada's constitutional order should look more like the U.S. one. We do have, however, statements and legislative enactments – their "performative utterances" – that were intended to have certain effects or "uptake."[3] We also have a context – a "pre-existing conversation"[4] – for understanding the meaning of these utterances, namely, over 225 years of American and almost 150 years of Canadian constitutional experience. The available evidence indicates that the prime minister admires U.S.-style limited government.[5] As some initiatives are

3 J.L. Austin, *How to Do Things with Words*, 2nd ed. (Cambridge, MA: Harvard University Press, 1975), 109, 117.

4 Quentin Skinner, "Interpretation and the Understanding of Speech Acts," in Quentin Skinner, *Visions of Politics*. Vol. 1, *Regarding Method* (Cambridge: Cambridge University Press, 2002), 103–27, 115–16.

5 Stephen J. Harper, "Text of Stephen Harper's Speech to the Council for National Policy, June 1997," Canada Votes 2006, www.cbc.ca/canadavotes2006/leadersparties/harper_speech.html. Harper said to this U.S. conservative think tank, "Your country, and particularly your conservative movement, is a light and an inspiration to people in this country and across the world."

traceable to proposals initiated by the Conservative Party's forerunner, the Reform Party, we also know that U.S. precedent helped to prompt and shape these earlier proposals.[6] They all happen to fit well into a larger pattern of taking from what is familiar and close at hand, a process of constitutional borrowing that Mark Tushnet associates with the idea of constitutional "bricolage."[7]

The object of this book is to examine the implications of these innovative practices for Canadian constitutional culture. It is not intended to be an anti-Harper polemic. The purpose is to take seriously the ideas associated with the proposals advanced by the Harper Conservatives. The hope is that by isolating each of these proposed innovations, Canadians will be in a better position to consciously direct the political momentum in which they have been caught up. They may choose to embrace these innovations, of course. They may have done so, implicitly, by having elected Prime Minister Harper on three prior occasions. They should choose to do so, however, only on the basis of full disclosure of their consequences and in open debate.[8] This book is intended to be a modest contribution to this element of Canada's ongoing project of self-rule.

Some might be reassured by the knowledge that the prime minister has not had substantial success in driving Canadian constitutional culture in an American direction. The Supreme Court constitutionally forbade the pursuit of Senate reform via unilateral federal legislation. The prime minister abandoned holding judicial nomination hearings for his last two Supreme Court nominees.[9] As the prime minister mostly relied upon executive edict, few of these innovations would have been secure enough to outlast him in any event. Whenever change is sought solely by executive action, much will depend on the behaviour of

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6 Roger Gibbins, "The Impact of the American Constitution on Contemporary Canadian Constitutional Politics," in *The Canadian and American Constitutions in Comparative Perspective*, ed. Marian C. McKenna, 131–45 (Calgary: University of Calgary Press, 1993).

7 Mark Tushnet, "Comparative Constitutional Law," *Yale Law Journal* 108 (1999): 1304.

8 Rounds of failed constitutional reform in the 1990s indicate that Canadians likely will no longer tolerate not being consulted about major constitutional change. See Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd ed. (Toronto: University of Toronto Press, 1993), 234.

9 His last two appointments, Justices Clément Gascon and Suzanne Côté, unlike his previous ones, were made without their appearing first before a special House of Commons Committee. See Sean Fine, "Harper Appoints New Judge, Passes Over Public Hearing," *Globe and Mail*, 28 November 2014.

successive political leaders and their party platforms. Such is the risk of proceeding by unilateral executive order and legislation rather than by constitutional reform. What has been done can endure, but can also be undone, with time. We should worry, however, that such initiatives might be more lasting, even where the government changes hands. Claims that the prime minister is directly elected continues to inhibit the prospect of future coalition governments; the executive continues to treat the House of Commons disdainfully as a separate branch; many still yearn for an elected Senate; and judicial confirmation processes are likely develop further along the lines already laid down. In other words, future governments may choose to guide constitutional practice in similar directions. We can reasonably anticipate, then, that arguments made here will have salience in the future.

The Necessary Comparative Dimension

This book also is an exercise in comparative constitutional law. Undertaking this task calls for the examination of not just one but three distinct constitutional traditions – of the United Kingdom, United States, and Canada over time. There is, of course, more than a family resemblance between them. Understanding Canadian constitutional culture requires that it be traced back to its origins in English constitutional thought and imperial policy. This tradition heavily influences developments in British North America and in what would become the United States. The American (or U.S. – I use them interchangeably) experience shapes both the fortunes and constitutional predicament of the British rump in North America – the counterfactual to the revolutionary polity to the south – in what would become Canada. If the English constitutional experience has been formative, Canadians have always been under an American influence, continually being drawn into its orbit. Canada, in this sense, has been the product of these two empires. Taking the long view, we can say that the sorts of pressures examined in this book are not new, that Canadian constitutional developments always have been intertwined with the United States, and that Canadians continually have been tempted to deepen that relationship. Canadians, in short, always have been at the front lines of the movement towards greater integration and harmonization with its populous and powerful neighbour to the south.

Taking up comparative constitutional law methods has the advantage of isolating both similarities and differences. Claims to constitutional

distinctiveness, Sujit Choudhry has argued, are "inherently relative,"[10] in which case we might find movement towards convergence, based on regional or universal standards, or divergence, even resistance, away from prevailing patterns. The approach adopted here resembles a "dialogical"[11] or "engagement" model'[12] of comparison that facilitates, through self-reflection, the identification of similarity and of difference. It also "facilitates constitutional choice" insofar as it clarifies the implications of adopting constitutional change in one direction or another.[13]

The Perennial Identity Question

Inevitably, the book engages with enduring Canadian identity questions, such as, "Who are we" and "What distinguishes us from the United States?" Asking such questions remains a healthy Canadian preoccupation. Otherwise, why insist on policing Canada's borders? Why not just fold up Canadian tents and join in the political project to the south. Canadian philosopher George Grant appeared to be of the view that Canadians and Americans were practically joined together at the hip. Canada's demise was inevitable – a "necessity" – because of the "impossibility of conservatism" in an age when all that matters is the "capacity to consume." There was "nothing," Grant declared, "essential [that] distinguishes Canadians from Americans – no 'deep division of principle.'"[14] For his purposes, Canada has ceased to exist as a nation. "The disadvantages of being a branch-plant satellite rather than in having a full membership in the Republic will become obvious," Grant predicted.[15] Why not, then, have a more direct say in who rules over Canada?

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10 Sujit Choudhry, "The *Lochner* Era and Comparative Constitutionalism," *International Journal of Constitutional Law* 2 (2004): 52.

11 Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation," *Indiana Law Journal* 74 (1999): 856–7.

12 Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (New York: Oxford University Press, 2010), 72.

13 Choudhry, "*Lochner* Era," 52.

14 George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Toronto: McClelland & Stewart, 1965), 90, 54, 76. This was considered a positive development for an earlier generation of historians. See discussion in Carl C. Berger, "Internationalism, Continentalism, and the Writing of History: Comments on the Carnegie Series on the Relations of Canada and the United States," in *The Influence of the United States on Canadian Development: Eleven Case Studies*, ed. Richard A. Preston, 32–54 (Durham, NC: Duke University Press, 1972).

15 Grant, *Lament for a Nation*, 86, 90.

Rather than giving up on the Canadian project of democratic self-rule, this book holds out the hope that it is worthwhile to sustain that project. In thinking about the content of Canadian constitutional culture, one should be able to do more than develop understandings that are "pragmatic, ad hoc, and a response to the needs of the moment."[16] Though democratic patterns and practices in Canada look increasingly like American ones,[17] I argue in chapter 1 that Canadian constitutional culture at least continues to hold out the prospect of channelling collective political wills better than does American practice. So rather than folding up tents, Canadians might instead want to celebrate this distinctive feature of their constitutional culture.

Yet there is no need to condemn ongoing American influences.[18] This book is not intended to be an anti-American polemic. It is not premised upon "ritualistic expressions of deeply held assumptions" about the United States[19] or a species of "hatred, bias, and deliberately contrived fear mongering."[20] Instead, the book's arguments rely upon a U.S. historical record as well as interpretations of that experience by leading academics in the field. Increasing numbers of scholars are expressing dismay at the state of constitutional democracy in the U.S.[21] As two co-authors put it in the title of their recent book, "It's Even Worse Than It Looks."[22] So there is no need for a Canadian scholar to evaluate

16 Allan Smith, *Canada: An American Nation? Essays on Continentalism, Identity, and the Canadian Frame of Mind* (Montreal and Kingston: McGill-Queen's University Press, 1994), 10.

17 S.F. Wise, "The Annexation Movement and Its Effect on Canadian Opinion, 1837–67," in S.F. Wise and Robert Craig Brown, *Canada Views the United States: Nineteenth-Century Political Attitudes* (Toronto: Macmillan Canada, 1967), 95.

18 Frank H. Underhill, *The Image of Canada* (Fredericton: University of New Brunswick Press, 1962), 14.

19 Wise, "Annexation Movement and Its Effect," 95.

20 J.L. Granatstein, *Yankee Go Home? Canadians and Anti-Americanism* (Toronto: HarperCollins, 1996), 286.

21 For example, Bruce Ackerman, *The Decline and Fall of the American Republic* (Cambridge, MA: Harvard University Press, 2010); Robert A. Dahl, *How Democratic Is the American Constitution?* (New Haven, CT: Yale University Press, 2001); Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress – and a Plan to Stop It* (New York: Twelve, 2011); Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (New York: Oxford University Press, 2006).

22 Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks: How the American Constitutional System Collided with the New Politics of Extremism* (New York: Basic Books, 2012).

that experience in light of the voluminous record. Nor do I purport to introduce a novel account of the English constitutional experience or of British imperial policy in North America. Rather, I hope to contribute to an understanding of Canadian constitutional practice and culture, foregrounding contemporary debates in light of that inheritance. The book is not about being buried by or resurrecting that tradition. Instead, I hope to lay the groundwork for "new departures" in the direction of sensible, democratically legitimate change.[23]

A Distinctive Culture?

It is not that there will be only a single idea that shapes Canadian constitutional culture. Instead, we are likely to find an ensemble of practices and understandings that are continually evolving. For instance, I have argued that Canadian constitutional culture presently channels middle-class values in its understanding of equality rights, is hostile towards the idea that income assistance rises to the level of constitutional right, but contemplates a robust role for the state to facilitate market exchange and the redistribution of wealth.[24] It might well be, as Grant maintains, that even in these respects Canadian political and legal institutions only are marginally different from those in the United States. On the pressing questions facing industrial civilization, Grant argued, there are no differences between the two systems "sufficiently important to provide the basis for an alternative culture on the northern half of this continent."[25] There might be nothing that is "unique or exclusive," Northrop Frye agreed, only a difference in "matter[s] of

23 Margaret Atwood, *Survival: A Thematic Guide to Canadian Literature* (Toronto: House of Anansi, 2012), 278.

24 See David Schneiderman, "Universality vs Particularity: Litigating Middle-Class Values under Section 15," *Supreme Court Law Review* (2nd) 33 (2006): 367–87; Schneiderman, "Property Rights, Investor Rights, and Regulatory Innovation: Comparing Constitutional Cultures in Transition," *International Journal of Constitutional Law* 4 (2006): 371–91; Schneiderman, "Social Rights and Common Sense: *Gosselin* through a Media Lens," in *Social and Economic Insecurity: Rights, Social Citizenship and Governance*, ed. Margot Young, Susan B. Boyd, Gwen Brodsky, and Shelagh Day, 57–73 (Vancouver: UBC Press, 2007); Schneiderman, "Human Needs above Property Rights? Rethinking the Woodsworth Legacy in an Era of Economic Globalization," in *Human Welfare, Rights and Social Activism: Rethinking the Legacy of J.S. Woodsworth*, ed. Jane Pilkington, 161–79 (Toronto: University of Toronto Press, 2009).

25 Grant, *Lament for a Nation*, 74.

emphasis and of degree."[26] It is these differences – small ones, some say[27] – that many Canadians stubbornly cling to. If America has historically been the crucible of our distinctiveness,[28] are there differences worth preserving? Perhaps so, if we improve upon them under conditions of informed and public deliberation.

Nor do I intend to draw any sharp distinction between English-Canadian, Quebec, and Aboriginal constitutional cultures. It is true that there are competing narratives about the Constitution issuing out of these differing "national" communities – they each draw upon different (and sometimes similar) histories and legal traditions.[29] In other work,[30] I have tried to have due regard for this phenomenon. There seems less reason to be attentive to such differences here, largely because the conception of constitutional culture relied upon insists on a mythical unity. It rests on the belief that there is a single community upon which this culture operates,[31] an abstraction common to much "modern" constitutionalism.[32] It is a conception that imposes a common vision and common principles upon fragmented polities.[33] It is, from this angle, a "unitary discourse."[34] It also is a productive one,[35] a project of social

26 Frye, "Sharing the Continent," 59.

27 Generally, see David Card and Richard B. Freeman, *Small Differences That Matter: Labor Markets and Income Maintenance in Canada and the United States* (Chicago: University of Chicago Press, 1993).

28 Ian Angus, *A Border Within: National Identity, Cultural Plurality and Wilderness* (Montreal and Kingston: McGill-Queen's University Press, 1997), 116.

29 See Jean-François Gaudreault-DesBiens, "The Quebec Secession Reference and the Judicial Arbitration of Conflicting Narratives about Law, Democracy, and Identity," *Vermont Law Review* 23 (1999): 797–8; and John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press), who calls this intermingling a "mistake" (15).

30 For example, David Schneiderman, "Dual(ling) Charters: The Harmonics of Rights in Canada and Quebec," *Ottawa Law Review* 24 (1992): 235–63.

31 Paul Kahn, *The Cultural Study of Law* (Chicago: Chicago University Press, 1993), 113; Carl Schmitt, *The Concept of the Political*, trans. George Schwab (Chicago: University of Chicago Press, 1996).

32 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995), 58; see Jacob T. Levy, "Montesquieu's Constitutional Legacies," in *Montesquieu and His Legacy*, ed. Rebecca Kingston, 115–37 (Albany, NY: State University Press of New York, 2009).

33 Pierre Bourdieu, "Rethinking the State: Genesis and Structure of the Bureaucratic Field," in Pierre Bourdieu, *Practical Reason* (Stanford, CA: Stanford University Press, 1998), 46.

34 Michel Foucault, "Two Lectures," in Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–77*, ed. Colin Gordon (New York: Pantheon, 1980), 82.

35 Ibid., 93.