FORGING ALBERTA'S CONSTITUTIONAL FRAMEWORK, RICHARD CONNORS AND JOHN M. LAW, EDS. (EDMONTON: UNIVERSITY OF ALBERTA PRESS, 2005) AND *THE ALBERTA SUPREME COURT AT 100: HISTORY AND AUTHORITY*, JONATHAN SWAINGER, ED. (EDMONTON: UNIVERSITY OF ALBERTA PRESS, 2007)

In a recent issue I raised the question of whether Canada has developed a distinctive law of its own.[1] With two recent publications it is possible to focus that question more narrowly and ask if there is such a thing as a distinctive Albertan law that has developed over the twentieth century. In the introduction to their book *Forging Alberta's Constitutional Framework* (*Forging*), Richard Connors and John Law declare that "Alberta has, in part, forged its own Constitution and its place within Canada's Constitution."[2] This statement perfectly balances the issue: on the one hand, Alberta has its own Constitution that it has made itself; on the other hand, it exists as an entity within the wider Canadian constitutional framework. In his introduction to *The Alberta Supreme Court at 100: History and Authority*, Jonathan Swainger strikes a similar balance:

> [I]n those areas where the Court did act, the weight of evidence suggests that while some aspects of Alberta's jurisprudential path have been creative and forward looking, in others they were less inclined to strike out in new directions.... And if the Court's jurisprudence in a given area might appear tentative or tightly prescribed, in others we find indications of a distinctive "made in Alberta" flavour that did not necessarily tread expected paths.[3]

Reading these books introduces us to many interesting parts of Alberta's legal past, but in the end these sometimes unique events do not lead us to conclude that there is much distinct about the law in Alberta, whether in its constitutional framework or in its courts.

The two books are somewhat different in focus: Alberta's Constitution (broadly understood) in the one and the Supreme Court of Alberta (now the Alberta Court of Queen's Bench and the Alberta Court of Appeal) in the other. The sweep in time is much greater in *Forging*, which begins with an essay by Connors on the legal ideas behind the creation of Rupert's Land in the late 1600s.[4] Alberta's Constitution for Connors and Law includes the various constitutional statutes from 1867 on, but is broader, including "law, legal institutions, legal processes and ideology."[5] In effect, this means that most of the essays in the volume focus on one or more of the three core elements of constitutional law in Canada: federal-provincial powers and relations, group and individual rights, and legal institutions. The essays cover legal, political, and intellectual topics both historically and in the contemporary.

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1 James W. Muir, "Judges and Canadian Legal Thought," Book Review of *The Court of Queen's Bench of Manitoba 1870-1950: A Biographical History* by Dale Brawn and *A History of Canadian Legal Thought: Collected Essays* by R.C.B. Risk, (2007) 45 Alta. L. Rev. 287 at 287.

2 Richard Connors & John M. Law, "A Legal and Constitutional History of Alberta" in Richard Connors & John M. Law, eds., *Forging Alberta's Constitutional Framework* (Edmonton: University of Alberta Press, 2005) xix at xxii [Connors & Law, *Forging*].

3 Jonathan Swainger, "*History and Authority*: The Past and Present in the Supreme Court of Alberta" in Jonathan Swainger, ed., *The Alberta Supreme Court at 100: History and Authority* (Edmonton: University of Alberta Press, 2007) 1 at 10 [Swainger, *Supreme Court*].

4 Richard Connors, "In the Mind's Eye: *Law and British Colonial Expansion in Rupert's Land in the Age of Empire*" in Connors & Law, *Forging*, *supra* note 2, 1.

5 "Preface" in Connors & Law, *Forging*, *ibid.*, xvii.

The focus of Swainger's *The Alberta Supreme Court at 100* is at first glance narrower: the men and women who sat on the Court and its successors, and several areas of law brought to the Court from its founding in 1907. The book's first section reviews the Court's membership and jurisprudence, primarily in its first 20 years, but throughout its first 100 years from 1907-2007. The second, longer part includes essays on several specific areas of law, including energy and water, native hunting rights, and family law. All of the essays are historical in focus. There is some cross-over in topics between the books, although even where they do share topics, there is little that is strictly repetitive.

Both books include lengthy essays by Dale Gibson. In *Forging*, he presents a fascinating study of Premier William "Bible Bill" Aberhart's Social Credit legislation of the 1930s and 1940s and its fate before the courts and the federal government.[6] This is a good example of legal history story-telling. Gibson begins by providing background about the rise of Social Credit in Alberta. He then describes Aberhart's legislation in 1937 and the *Alberta Bill of Rights Act*[7] proffered by the Ernest Manning government in 1946, both attempts to legislate a new political economy for the province. These Acts were the most sustained attempt to put Albertan law on a different track than that of the rest of Canada. In each case, some combination of the Supreme Court of Canada, the Judicial Committee of the Privy Council, the executive branch, and the Social Credit government itself invalidated, disallowed, refused assent, or rewrote the legislation under threat. Gibson finds three significant consequences for Canadian constitutional law concerning "erosion of provincial autonomy, protection of civil liberties, and the unwritten Constitution."[8] By invalidating the Acts, the Supreme Court of Canada enunciated the principles of an unwritten bill of rights that could be relied upon to limit provincial government power and allowed for judicial oversight of legislation not simply on written constitutional grounds. Thus, Alberta's attempt at creating a distinct economy were rebuffed and new law for all of Canada was created.

In his essay in Swainger's volume, "The Supreme Court of Alberta Meets the Supreme Law of Canada," Gibson also addresses the question of Alberta's legal independence over the Court's 100 years.[9] This wide-ranging essay begins with a discussion of court challenges to order-in-council changes of the federal *Military Service Act*[10] during the First World War (the same events are discussed briefly by Louis A. Knafla[11] and in much greater detail by Wayne N. Renke[12] in the same volume) and the divorce case *Board v. Board*[13] that allowed for court-ordered divorce in Alberta and the other Western provinces (this case is also discussed by Marie L. Gordon[14] in the same volume). He then moves on to the Social Credit legislation, natural resources cases from the 1930s through to the 1980s (discussed in greater

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6 Dale Gibson, "Bible Bill and the Money Barons: *The Social Credit Court References and their Constitutional Consequences*" in Connors & Law, *Forging*, *ibid.*, 191 [Gibson, "Bible Bill"].

7 S.A. 1946, c. 11.

8 Gibson, "Bible Bill," *supra* note 6 at 218.

9 Dale Gibson, "The Supreme Court of Alberta Meets the Supreme Law of Canada" in Swainger, *Supreme Court*, *supra* note 3, 99 [Gibson, "Alberta Meets Canada"].

10 S.C. 1917, c. 19.

11 "The Supreme Court of Alberta: The Formative Years, 1905-1921" in Swainger, *Supreme Court*, *supra* note 3, 27 at 37-38.

12 "The Power of Law: Judicial Independence and the Supreme Court of Alberta, 1918" in Swainger, *Supreme Court*, *ibid.*, 69.

13 (1918), 41 D.L.R. 286 (Alta. S.C. (A.D.)), aff'd in [1919] A.C. 956.

14 "The Marriage of Law and History: Family Law Cases in the Alberta Supreme Court, 1907-2006" in Swainger, *Supreme Court*, *supra* note 3, 261 at 264-65.

detail in an essay by Alastair R. Lucas[15]), and *Canadian Charter of Rights and Freedoms*[16] cases. In this last section, he contrasts the Alberta court's different responses toward extending rights with corporate plaintiffs in cases like *R. v. Big M Drug Mart Ltd.*[17] and *Hunter v. Southam Inc.*,[18] and individual plaintiffs as in *Mahe v. Alberta*[19] (regarding language education) and *Vriend v. Alberta*[20] (regarding sexual orientation). He concludes that at the appellate level, the Court generally showed "less enthusiasm than the Supreme Court of Canada for the Canadian Charter of Rights and Freedoms; and that when it did uphold Charter rights, it tended to prefer those of a democratic or majoritarian character over those designed to protect or advance the well-being of minorities."[21] Throughout the piece he notes places where "the Supreme Court of Alberta did itself proud,"[22] but except for the rights decisions, finds that the Supreme Court of Alberta, "generally appeared to share the constitutional understandings of the courts of last resort."[23] These two pieces in several ways set the groundwork for much of the rest of both books.

Federal-provincial wrangling, like that between Premiers Aberhart and Manning and Prime Minister William Lyon Mackenzie King, was repeated in the 1970s and 1980s between Premier Peter Lougheed and Prime Minister Pierre Elliott Trudeau. This later battle is discussed by Gibson and by Lucas in the Swainger volume, where both focus on the National Energy Policy (NEP) and Lougheed's reference on the taxation proposal.[24] Considering the nature of *The Alberta Supreme Court at 100*, such a limit on the discussion is understandable. Even so, Gibson includes a mock dialogue of swagger between Lougheed and Trudeau that is the low-point of his essay in the book.[25] Similarly disappointing is the discussion of the NEP in *Forging*, where it is addressed anecdotally by Preston Manning[26] and as an example of a "spectacular failure [of] process" by Douglas Owram.[27] Manning's account is essentially a restatement of the received wisdom in Alberta about the NEP, while Owram's discussion offers promise as a way of rethinking the event, but is in the end too brief and under-resourced to be very interesting.

The best discussion of the Lougheed-Trudeau years in the two books is in Michael D. Behiels' chapter "Premier Peter Lougheed, Alberta and the Transformation of Constitutionalism in Canada, 1971-1985" in *Forging*.[28] Behiels recaps the negotiations and fights between the provinces and the Liberal government over "repatriation" and the *Charter*

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15 "Energy Law: The Court and the Prosperity Bonus" in Swainger, *Supreme Court*, *ibid.*, 227.

16 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

17 [1985] 1 S.C.R. 295.

18 [1984] 2 S.C.R. 145.

19 [1990] 1 S.C.R. 342.

20 [1998] 1 S.C.R. 493 [*Vriend*].

21 Gibson, "Alberta Meets Canada," *supra* note 9 at 125-26.

22 *Ibid.* at 103, 111, 126. This describes the Court's decision in *Re Gray*, [1918] S.C.R. 57, in contrast to the Supreme Court of Canada's decision which may have been "a classic example of the hard case that makes bad law" (at 103).

23 *Ibid.* at 125.

24 *Ibid.* at 115-16; Lucas, *supra* note 15 at 241-45.

25 Gibson, "Alberta Meets Canada," *supra* note 9 at 116-17.

26 See Preston Manning, "Federal-Provincial Tensions and the Evolution of a Province" in Connors & Law, *Forging*, *supra* note 2, 315 at 329-30.

27 Douglas Owram, "The Perfect Storm: *The National Energy Program and the Failure of Federal-Provincial Relations*" in Connors & Law, *Forging*, *ibid.*, 391 at 392.

28 Michael D. Behiels, "Premier Peter Lougheed, Alberta and the Transformation of Constitutionalism in Canada, 1971-1985" in Connors & Law, *Forging*, *ibid.*, 411.

in the 1970s and early 1980s. The article makes for a nice bit of narrative and highlights the important role of the Alberta government and Lougheed in constructing the *Constitution Act, 1982*[29] (especially regarding the amending formula and aboriginal rights). In an interesting bit of analysis, Behiels asserts that the outcome of 1982 represented a combined constitutional legacy of Liberal Trudeau and Progressive Conservative Lougheed that was adopted and defended by Canadians generally and threatened by the Progressive Conservative Brian Mulroney and Liberal Robert Bourassa twice in the decade that followed.[30] Once again, we get not a distinct law for Alberta, but Alberta helping to set the law for Canada.

Federalism is an unlikely place to find distinction: over time every province has had its fights with the federal government in Ottawa, and at times every province has come to agreement with Ottawa, if not with each other. There may be moments of sharp, bilateral conflict, but no patterns in the treatment of the law of federalism discussed here seem to be unique. The focus on federalism disputes in *Forging* and its discussion in *The Alberta Supreme Court at 100* is exceptional in these sorts of volumes. Recent collections on British Columbia and the Yukon, the prairie west, Nova Scotia, Newfoundland, and Prince Edward Island contain almost no discussion of federalism.[31] The repeated concern with federalism has a lot to do with one stream in the self-identity of Albertans. Focused on Alberta's exceptionalism, this identity sees Alberta's independence rooted in its provincially controlled natural resource wealth and its laissez-faire political culture. The flash-points of Alberta's legal history thus are often related to conflicts over the resources with the federal government or to the political effects of oil wealth and oil bust, and budget surplus and budget deficit.

Thomas Flanagan and Mark Milke's contribution to Connors and Law is a good example of this thinking, if not of effective argument: the two political scientists assert the *Agreement for the Transfer of Natural Resources of Alberta*[32] is "Alberta's Real Constitution."[33] The essay itself is not particularly convincing in presenting the *NRTA* as constitutional even as metaphor, but the authors assert resources (and particularly oil and gas) were and are foundational to making Alberta distinct in confederation. Local control of natural resources ensured Alberta the economic clout to chart its own course politically and to more effectively challenge the dominant positions held by federal politicians. Without the *NRTA*, Flanagan

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29 Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

30 *Supra* note 26 at 450.

31 The recent volumes of provincial legal history surveyed that have no serious federalism discussion include Christopher English, ed., *Essays in the History of Canadian Law: Two Islands: Newfoundland and Prince Edward Island*, vol. 9 (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2005); Hamar Foster & John McLaren, *Essays in the History of Canadian Law: British Columbia and the Yukon*, vol. 6 (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1995); Philip Girard & Jim Phillips, eds., *Essays in the History of Canadian Law: Nova Scotia*, vol. 3 (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 1990); Louis A. Knafla & Jonathan Swainger, eds., *Laws and Societies in the Canadian Prairie West, 1670-1940* (Vancouver: University of British Columbia Press, 2005). The only essay I found was in a precursor book to Swainger's on the Nova Scotia Supreme Court: William Lahey, "Confederation, Adjudicative Culture, and the Law of the Constitution: The Late Nineteenth-Century Persistence of Local Autonomy in the Nova Scotia Supreme Court" in Philip Girard, Jim Phillips & Barry Cahill, eds., *The Supreme Court of Nova Scotia, 1754-2004: From Imperial Bastion to Provincial Oracle* (Toronto: University of Toronto Press for the Osgoode Society for Canadian Legal History, 2004) 392.

32 14 December 1929, PAA, Acc. No. 69.289, Reel No. 60, File/Item No. 620 [*NRTA*].

33 Thomas Flanagan & Mark Milke, "Alberta's Real Constitution: *The Natural Resources Transfer Agreement*" in Connors & Law, *Forging*, *supra* note 2, 165.

and Milke contend that Alberta, "might well have been closer to Saskatchewan and Manitoba's status, both in terms of its economic status and in terms of its political clout vis-à-vis the federal government."[34] Of all the essays in the two volumes, this piece offers the clearest assertion of Alberta's distinctiveness, but this also sets Flanagan and Milke apart from most of the contributors to the two books.

Allan Tupper's article in *Forging* offers something of a corrective to the second half of the resources and political culture equation.[35] In a review of several recent moments of potential conflict within the province's political and legal culture, Tupper shows much less distinction for Albertans from the Canadian norm than might be assumed. Tupper notes how in the aftermath of the Supreme Court of Canada's *Vriend* decision, "[n]ational media paid extraordinary attention to the views of religious minorities and to homophobic sentiment in Alberta."[36] This was paralleled by Premier Ralph Klein's public musings about using the s. 33 of the *Charter* to evade the effects of the decision. Tupper continues, however, by recalling that Klein withdrew the idea of using the notwithstanding clause and that the media outside of Alberta, at least, paid "[m]uch less attention ... to widely-expressed support for ... the Vriend decision."[37] He concludes that, "Alberta embraced the Canadian norm in this regard but only its differences were highlighted."[38] Likewise, he cites the now famous "firewall" open letter from Stephen Harper and others to Klein. Tupper recounts how it was "skilfully crafted to appeal to Albertans' pride," yet "received little public support in Alberta ... [with] [n]o major group publicly endors[ing] either its premises or specific recommendations."[39] Despite stereotypes to the contrary, neither Albertans as a whole nor the law in Alberta appear to be that distinct from other Canadians or Canadian law.

Distinction, in the end, comes not in the actual content of the law nor in jurisprudence. Rather, it comes in what both those inside and outside of Alberta choose to focus on when thinking about Alberta and its law. Provincial identity is found in how the law is understood, not in what it is. For Albertans at this time, that means concerns about resources, rights, and federalism. The events of Alberta's legal history are unique, but the outcomes are not. The joy in reading either collection comes from discovering these unique events and reflecting on how they place Alberta more firmly within Canada's shared past nevertheless.

As with all essay collections, some of the articles in both *Forging* and *The Alberta Supreme Court at 100* are better than others, and it is the readers' privilege to read those parts that are most enjoyable. Overall, both books offer excellent introductions to much of Alberta's legal history. Readers will be surprised, even inspired or angered by some of the stories told, and challenged by some of the arguments made by the authors.

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34 *Ibid.* at 185.
35 Allan Tupper, "Uncertain Future: *Alberta in the Canadian Community*" in Connors & Law, *Forging*, *supra* note 2, 479.
36 *Ibid.* at 489.
37 *Ibid.*
38 *Ibid.* [footnotes omitted].
39 *Ibid.* at 492.