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Citation Information

Snyder, Emily. "Book Review: Tribal Constitutionalism: States, Tribes, and the Governance of Membership, by Kirsty Gover." *Osgoode Hall Law Journal* 50.1 (2012) : 309-316.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss1/12>

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Book Review

TRIBAL CONSTITUTIONALISM: STATES, TRIBES, AND THE GOVERNANCE OF MEMBERSHIP, by Kirsty Gover¹

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CITIZENSHIP IS DEEPLY ENTWINED with state and Indigenous law. The conceptualization and governance of belonging to, and participating within, collectives have far-reaching social, political, legal, and thus also profoundly personal implications. The legal dimensions of Indigenous citizenship are particularly complex, as both Indigenous and state law are at play.³ In her book, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership*, Kirsty Gover raises important questions about the discrepancies between Indigenous and settler-state approaches to articulating and governing Indigenous citizenship.

While I focus on Canada in this review, Gover's research includes Canada, the United States, New Zealand, and Australia. It addresses the question of "what principles should structure the relationship between settler and tribal governments in membership governance?"⁴ Gover looks at various historical and contemporary

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1. (Oxford: Oxford University Press, 2010) 276 pages.
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 3. I use the word "Indigenous" to describe those who self-identify as Indigenous persons. I use "Indigenous law" to describe Indigenous peoples' legal traditions and practices that have historically existed and continue to exist, and are drawn on by Indigenous peoples today. I refer to state law's treatment of Indigenous issues as "state law" only. When the term "tribal law" appears in this review, it is used to describe what the author of *Tribal Constitutionalism* is saying, as this is part of the language that she uses in her work. Further, I understand "citizenship" and "membership" to be related, yet distinct, terms. I use "membership" only when referring specifically to the membership codes and/or Gover's arguments (as she uses the language of membership), and I use "citizenship" to speak to broader participatory engagement with one another. See Tully on "diverse citizenship": James Tully, *Public Philosophy in a New Key: Volume II: Imperialism and Civic Freedom* (Cambridge, UK: Cambridge University Press, 2008) at 267-300.
 4. *Supra* note 1 at 2.

state approaches to governing who ‘counts’ as Indigenous. Her primary objective is to provide an analysis that is attentive to “the role played by Indigenous communities in the construction of indigeneity.”⁵ She does this through a focus on Indigenous peoples’ membership codes and constitutions as articulations of citizenship on their own terms.

By means of an impressive examination of 737 membership codes and tribal constitutions, Gover makes a unique contribution to the literature by providing a study that can speak to the broader trends and patterns in these documents.⁶ She states:

The study offers traction on the following questions: what criteria do tribes use to self-constitute? In what ways do their prospective membership criteria diverge from rules assigned by the State in negotiating a tribe’s base roll? What exogenous influences shape tribal membership rules and which of these result from the actions and policies of settler governments? What use is made of public law concepts of indigeneity in tribal membership governance?⁷

She works to address these and other questions in four main chapters.

In the first chapter Gover situates her discussion in the prevailing debates about Indigenous membership. One of the primary concerns to which she draws attention is the disjuncture between settler-state and tribal approaches to defining Indigenous membership. She highlights the fact that some people who are recognized by the state as Indigenous may not be recognized as such by tribes (or “bands,” to make the language more specific to Canada), and vice versa. This disjuncture can result in a large number of exclusions and in significant tension amongst Indigenous peoples, as well as between them and the state. Gover grounds this discussion in a theoretical deliberation on cultural pluralism, which I discuss further below. Chapter one also includes a summary of the main findings from her research, including a focus on descent, residency requirements, the concept of indigeneity, and issues around enrolment and disenrolment.

Chapter two includes a more detailed comparison of the constitutions and codes themselves. The author begins by discussing her methodological approach and speaking to the challenges concerning the lack of public availability of these documents. Most of these documents are not easily accessible to the public

5. *Ibid* at 10.

6. *Ibid* at 6.

7. *Ibid* at 2-3. Gover further explains, “I suggest that this lack of information has led to a bias in the political theory of indigenous peoples, towards an ascriptive model of tribalism that does not adequately account for the ways tribes self-constitute in the day-to-day exercise of tribal constitutionalism.” See *ibid* at 67.

and Gover considers the possible implications of this, including a concern that theorists as well as policy-makers are coming to conclusions and making ill-informed decisions about membership. She then describes in further detail how descent, multiple membership rules, and loss of membership are dealt with by various codes and constitutions, as well as by the states in question.

In chapter three, the author focuses on state-Indigenous relations in the United States by discussing the use of blood as a quantifiable marker of Indianness. Gover explores how and why tribes in the United States increasingly use blood quantum in their membership criteria, while government use of this marker is decreasing.⁸ She also examines the growing tribal preference for “tribal blood” (an attempt to limit membership to specific tribes) as opposed to “Indian blood” (a pan-Indian conceptualization).⁹

The discussion in chapter four is similarly focused, but the author shifts her attention to how land-claim settlement processes shape the development of Indigenous constitutions in Australia and New Zealand. Here, Gover also considers the complexities that the categories of “membership” versus “beneficiaries” create for Indigenous articulations of citizenship.¹⁰

The author works hard to confront common assumptions about Indigenous membership practices. She challenges readers to recognize that not all Indigenous communities conceive of membership in the same way and that there are a multitude of internal and external considerations to account for with regard to membership codes and constitutions. Gover attempts to show that these variations are time and place specific and that membership practices can change over time. Further, she calls into question the assumption that formally written rules and their institutionalization are incompatible with indigenous laws.¹¹ Although I have an appreciation of Gover’s work, I also have some concerns, which are primarily methodological and analytical.

Gover’s book is a survey. She explicitly notes that “[s]cholarship on tribal membership has tended to focus on particular disputes or types of dispute (usually disenrolments), rather than surveys,” and therefore there is a need for survey work on membership.¹² Her book undoubtedly has useful factual information in it and succeeds in describing broader patterns and trends concerning Indigenous membership. Yet, I struggled as a reader to fully understand the significance

8. *Ibid* at 112.

9. *Ibid* at 131-32.

10. *Ibid* at 157.

11. *Ibid* at 161-67.

12. *Ibid* at 67.

of all of her findings because the information was often too broad and, at times, under analyzed. Further, her broad approach creates some confusion with regard to language. Due to her attempt to be consistent throughout the piece, Gover frequently uses language that does not fit well in particular discussions. While at times using terminology specific to the context, there were many instances where she spoke of, for example, First Nations people in Canada as “tribes.” This was distracting, even with the caveat that she provides about her language use.¹³

Pursuing a comparative approach across four large states that are themselves different and home to a multitude of indigenous peoples with varying social, cultural, political, and legal practices means that the researcher is going to be contending with a substantial volume of information and tasked with *much* contextualizing. Further, Gover’s analysis of 737 tribal constitutions and membership codes representing 586 indigenous groups would have inundated her with data.¹⁴ As a reader, I found that there was simply too much information to try to make sense of, especially in the first two chapters. While the last two chapters are more focused and easier to read, it was disappointing that the author did not include a dedicated chapter on Canada, as she did with the other states. Survey work of this scale is difficult to read, and this was compounded by analytic gaps in Gover’s work. That is to say, the author needed to better guide her readers through all of the information.

There were many times when further explanation and deeper analysis were required. For example, when writing about state definitions of indigeneity, Gover notes that prior to 1985 in Canada, Indian women lost their Indian status if they married a non-status man, but non-Indian women gained Indian status if they married a status Indian man via the *Indian Act*.¹⁵ She reflects:

Following a series of challenges to the Act by Indian women who had lost their status on out-marriage, the Act was amended in 1985 by Bill C-31, to remove the gender-discriminatory elements of provisions conferring Indian status, abolish enfranchisement, restore persons who had lost Indian status as a result of those provisions, and to permit Bands to take over the governance of membership.¹⁶

After stating this, the author immediately moves on to a discussion of how the state of New Zealand defines indigeneity. Yet, more attention to her statement about the Canadian context is needed. It can be argued that the 1985 amendments did

13. *Ibid* at 7.

14. *Ibid* at 6. The number of documents is higher than the number of tribes because for some tribes she had gathered multiple documents as they were revised over time.

15. RSC 1985 c 1-5 s 14.

16. *Ibid* at 56.

not properly address the gender discrimination in the *Indian Act*; furthermore, there is evidence of resistance from some bands regarding the implementation of these membership changes.¹⁷ Bill C-3, which was an attempt to remove the gender discriminatory aspects of the Act itself, was recently passed. However, the changes from this Bill are still argued to be insufficient.¹⁸

Gover later brings up Bill C-31 when explaining that First Nations could decide to opt out of *Indian Act* regulations on membership and develop their own codes. If First Nations opted out by 28 June 1987, then they would not have to 'let in' all of the new members resulting from the legal changes in Bill C-31 (which expanded the definitions of "status").¹⁹ She remarks, "This suggests that many codes were prepared in some haste and with the primary aim of avoiding the full extent of the new obligations imposed by the Indian Act amendments."²⁰ This point is significant, yet Gover does not speak further on it, nor does she direct readers to more specific analyses elsewhere. There is something much deeper going on with regard to the regulation of membership: Both the state and some Indigenous groups rely on systemic gender discrimination and heteronormativity in the management of membership. How are norms and values with respect to gender and sexuality built into state and Indigenous conceptualizations of Indigenous membership and citizenship? This question is not addressed by Gover. While I recognize that she could not specifically analyze all of the laws and facts that she included, and that a gender analysis could have taken her work in a direction that she did not intend to go, the author could have explicitly acknowledged these power dynamics as they play out in relation to citizenship. There are many instances in the book where

17. See *Sawridge Band v Canada* 1996 1 FC 3; *Sawbridge Band v Canada* 1997 3 FC 580; *Sawridge Band v Canada* 2008 FC 322. For a discussion of *Sawridge*, see Val Napoleon "Aboriginal Discourse: Gender, Identity, and Community" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland: Hart Publishing, 2009) 233 at 244.

18. See e.g. Sharon McIvor, "Indigenous Women Organizing for Change" (Panel discussion at The Symposium on Colonialism, Marginalization, and Gendered Violence: Dialogues for Change, delivered at Green College, University of British Columbia, 5 March 2011), [unpublished]; Sarah E Hamill, "*McIvor v. Canada* and the 2010 Amendments to the *Indian Act*: A Half-Hearted Remedy to Historical Injustice" (2011) 19 Const Forum Const 75. While I recognize that Bill C-3 was passed after the publication of Gover's book, other materials on the failings of the changes from Bill C-31 to address gender discrimination were available to the author. See Sharon McIvor, "Aboriginal Women's Rights as 'Existing Rights'" (1995) 15 Can Woman Stud 34.

19. If a First Nation wanted to opt out of the *Indian Act* regulations on membership after this date, then they would most likely see an increase in membership. *Supra* note 1 at 91.

20. *Ibid.*

Gover neglects to raise questions about power and processes of exclusion that arise under tribal law.²¹

When analyses are not as deep as one would wish, it can lead to an impression that the work is inadequately contextualized, despite the author's attempts to work against this. To provide another example, when discussing blood quantum in Canada, Gover provides the statistic that 13 per cent of "Section 10 First Nations" in her study use blood quantum as part of their membership codes.²² She argues that:

References to Indian blood *quantum* have never been used by the Canadian Federal Government, although references to Indian *blood* appeared in the first attempt to define Indians in the 1850 predecessor to the Indian Act and were not removed from the Act until 1951. The Canadian First Nation use of blood quantum, then, is a tribal innovation.²³

A statement such as this requires further discussion and consideration. The frequent lack of deep analyses throughout the book leads me to conclude that the scope of her study is perhaps too broad.

Because Gover's research is based on analyzing documents, we do not know how these rules are actually being followed in practice, a point the author herself acknowledges.²⁴ Yet it is still fair to discuss the implications of this omission. Of the 243 Section 10 First Nation membership codes that she looked at from Canada, an overwhelming number are from 1987.²⁵ The reason for this older data could be that Gover was not able to access more recent copies of codes for

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21. Gover does speak of processes of exclusion within tribal legal practices in her work, but does so primarily by cautioning readers against the logic of liberal principles, which maintain that Indigenous peoples take up discriminatory practices in their membership governance. For example, the liberal logic would hold that, because race is referred to in some codes, Indigenous people are being racist and need to find a "race blind" approach. *Ibid* at 63. While it is useful to consider that liberal principles can lead to unproductive conclusions about membership, this does not mean that urgent questions about power and systemic processes of exclusion within Indigenous communities should not be raised.
 22. *Ibid* at 83. Gover uses the term "Section 10 First Nation" to refer to First Nations that opted out of the *Indian Act* regulations on membership and instead developed their own membership codes.
 23. *Ibid* [emphasis in the original]. Whatever the origin of blood quantum is, Gover risks stating things in overly simplistic terms. Just because something is tribally constituted does not mean that it should be treated as unproblematic. In her work on membership codes, Val Napoleon highlights how deeply destructive and problematic many of the First Nations' membership codes can be. See "Extinction by Number: Colonialism Made Easy" (2001) 16 CJLS 113 at 122.
 24. *Supra* note 1 at 70.
 25. *Ibid* at 225-230. Gover also looked at a small number of constitutions that were developed by indigenous communities in Canada, who were entering into self-governance agreements with the federal government as per the 1995 Inherent Right of Self-Government Policy.

practical reasons (it would be a significant undertaking) or because she was denied access.²⁶ All of this is to say that when Gover writes about membership codes as an expression of tribal law, she is referring to codes from almost twenty-five years ago. She does not consider what sorts of changes may or may not have occurred since then, nor does she look at the actual practice of membership laws and politics on the ground. I still find her analysis of the documents to be interesting and important, but it is relevant to note that the rules in these codes should not be conflated with practice. Further, readers should not conflate rules with law.²⁷ In the Canadian context, those who govern their own membership codes only represent thirty-eight per cent of state-defined First Nations.²⁸ As such, it is important that readers do not misinterpret Gover's findings as speaking to citizenship trends for all Indigenous peoples in Canada.²⁹

Important conceptual questions about tribal law came up while I was reading Gover's book. For instance, what is the relationship between "tribal law" and "indigenous law?" Gover uses a variety of terms in her book to refer to law. This raises the question of how, for example, "custom," "tribal customary law," and "indigenous customary legal systems" differ from one another conceptually. The language of "custom" predominates in much of the literature on Indigenous law. While custom is certainly a part of Indigenous laws and local practices, as John Borrows notes, customary law is just one type or source of law in indigenous legal practices.³⁰ Customary law can be found in all legal systems but is often wrongfully used only to describe Indigenous peoples' legal practices.³¹ Another question about Gover's use of terms is: What are the differences between "tribal

26. Section 10 First Nations only had to make first renditions of codes available to the government in 1987. *Ibid* at 74.

27. Law is something much broader than rules. As John Borrows, a leading scholar on Indigenous law, writes, "Law includes both formal and informal elements. It pivots around deeply complex explicit and implicit ideas and practices related to respect, order, and authority. Laws arise whenever interpersonal interactions create expectations and obligations about proper conduct." *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 7.

28. *Supra* note 1 at 74.

29. Therefore, the majority of the state-recognized First Nations in Canada follow the *Indian Act* concerning membership. Further, there are Indigenous peoples and communities that fall outside of the *Indian Act* and who are not part of Gover's research.

30. The other sources include sacred law, natural law, deliberative law, and positivistic law. Borrows, *supra* note 27 at ch 2.

31. *Ibid* at 51. For a further discussion on customary law, see Jeremy Webber "The Grammar of Customary Law" (2009) 54 McGill LJ 579.

law,” “self-governance,” and “self-constitution?” There will be many answers to these questions, and these are important discussions that need to be ongoing.

On a further conceptual note, the language of “membership” itself remains uninterrogated in Gover’s book. Does a distinction need to be made between “membership” and “citizenship?” I noted earlier that Gover situates her work in the beginning of the book in a theoretical discussion about cultural pluralism. Out of this discussion, Gover seeks an approach to Indigenous membership that views membership rules, which she understands as “cultural products,” as being fluid over time and as something that develops out of complex processes of engagement.³² She notes that in Australia, the state’s apparatus for identifying indigenous people includes community recognition in addition to ancestry and self-identification.³³ The author argues that community recognition allows Indigenous-centered membership approaches to prevail, and that under such an approach the state concept of public indigeneity can be understood as being “created by the positive choices of indigenous individuals and groups.”³⁴ While I do not have the space to discuss this proposal in detail here, I wonder about future dialogues that could take place on community recognition in relation to notions of citizenship that are based on participatory engagement rather than rule-based frameworks for belonging. Gover’s book encourages many questions and, importantly, encourages ongoing conversation about the entanglement of state law, Indigenous laws, and citizenship.

32. *Supra* note 1 at 11.

33. *Ibid* at 54.

34. *Ibid* at 11.