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# JOHN BORROWS' *FREEDOM AND INDIGENOUS CONSTITUTIONALISM:* CRITICAL ENGAGEMENTS

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# I INTRODUCTION AND OVERVIEW

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It is my pleasure to introduce three critical engagements with John Borrows' latest book, *Freedom and Indigenous Constitutionalism*,<sup>2</sup> and provide an overview of the book's argument.

The three reflections emerged out of an Author-Meets-Reader session held at the University of Victoria in February 2017. Each of the readers had engaged extensively with Borrows' previous work. Here they delved into Borrows' latest foray, reflected upon how *Freedom and Indigenous Constitutionalism* added to their understanding of Borrows' central concerns, and considered the book's implications for their own areas of expertise. This collective commentary represents, then, an extension of long-standing conversations. Indeed, Borrows' response, which concludes this set of engagements, continues the exchange, restating a central theme of his book in condensed and arresting terms.

The authors' commentaries are striking in the diversity of standpoints from which they engage Borrows' arguments. Patricia Cochran is a talented legal theorist whose work explores how judges ought to reflect on society and interpret the law in the face of the profoundly different ways in which people experience society and law, differences that are tied to wealth and social position.<sup>3</sup> She explores the methodological implications of Borrows' argument, specifically focusing on Borrows' close attention to the embodiment of our legal relations, including their sheer physicality. The second commentator, Avigail Eisenberg, is a leading political theorist concerned with equality, identity, diversity, inclusion, and democratic citizenship.<sup>4</sup> She focuses on Borrows' discussion of civil disobedience, specifically his emphasis on the ways in which various forms of contestation foster better—or worse—relationships. Our third commentator, the remarkable scholar of Indigenous comparative politics Heidi Kiiwetinepinesiik Stark, in her own work brings Indigenous and non-Indigenous concepts of law and governance into conversation.<sup>5</sup> She is Turtle Mountain Ojibwa and shares with Borrows a deep knowledge of Anishinaabe understandings of the world. Her commentary places Borrows' contributions within that framework of thought.

John Borrows' book consists of six chapters that had previously appeared as articles and policy papers, coupled with an important introduction and conclusion. But it is not merely a collection of previously published papers: First, the papers have been substantially reworked to form a coherent whole. Second, Borrows has long pursued his writing with two things in mind—the immediate purpose to which a particular paper is directed and a vision of how

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<sup>1</sup> Faculty of Law, University of Victoria.

<sup>2</sup> John Borrows, *Freedom and Indigenous Constitutionalism* (Toronto: University of Toronto Press, 2016).

<sup>3</sup> See especially Patricia Cochran, *Common Sense and Legal Judgment: Community Knowledge, Political Power and Rhetorical Practice* (Montreal: McGill-Queen's University Press, 2017).

<sup>4</sup> See, for example, Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims* (Oxford: Oxford University Press, 2009).

<sup>5</sup> Heidi Kiiwetinepinesiik Stark is co-editor (with Jill Doerfler and Niigaanwewidam Sinclair) of *Centering Anishinaabeg Studies: Understanding the World through Stories* (East Lansing, MI: Michigan State University Press, 2013) and author of *Unsettled: Anishinaabe Treaty-Relations and US/Canada State-Formation* (Minneapolis: University of Minnesota Press, under contract).

that project forms part of a larger extended argument. In a short preface entitled “Miigwech” (“Thank you” in Anishinaabemowin),<sup>6</sup> Borrows describes the process by which he reworked the papers into chapters at a cabin in his home community of Neyaashiinigiing on the Cape Croker Reserve in Ontario, inspired by the coming of the spring, with his computer powered by the cabin’s solar panels. It is a poetic start to a beautiful book—a book that adds substantially to the themes Borrows has addressed in previous work.<sup>7</sup> Indeed, the book’s beauty and power have been evident to others: *Freedom and Indigenous Constitutionalism* won the 2017 Donald Smiley Prize for the best book relating to the study of government and politics in Canada—the second time Borrows has won the Donald Smiley Prize.

## A. Structure

The book starts with an introduction that sets out the three linked themes that run through the volume as a whole: freedom, relationality, and tradition. I will return to those themes and their interaction in the second section of this overview. The themes are picked up in the individual chapters, each of which is devoted to a particular challenge of freedom and constitutionalism. The chapters themselves do double-duty: They address the particular topic to which they are devoted, and they provide texture to and elaboration on the themes that flow, like the interlocking channels of a braided river, throughout the book. One has the clear sense that Borrows has been reflecting long and hard on the principles that have underlain his thought across a multitude of questions. The book deals with several of those questions. It does so in a manner that is quite lawyerly at times, demonstrating Borrows’ interest and skill in engaging with legal interpretation and legal mechanisms. But above all, this book expresses, with crystalline clarity, the cross-currents of principle that underlie and animate the whole of his work.

The first substantive chapter is devoted to mobility as an expression of freedom. One of the book’s enchantments is that it anchors its arguments in Borrows’ own life and the lives of his extended family. In this case, mobility is introduced by a story, told with self-deprecation, of Borrows being teased by his students about the frequency with which he has moved among universities.<sup>8</sup> Characteristically, this chapter speaks of mobility in two senses. One is geographical, in which Borrows captures how Indigenous peoples typically travelled widely, all the time retaining a privileged connection to place: to their homelands, which constitute a “pivotal axis around which most Indigenous peoples’ lives revolve.”<sup>9</sup> This is a portrait of an extended world of Indigenous action, one that was forcibly restricted by the establishment of reserves. The second type of mobility, equally if not more important, is mental mobility, in which one exercises the freedom to range across a world of ideas. Borrows sees these two kinds of mobility as being closely related, appropriately so given the grounded vision of freedom that he articulates. Throughout the volume Borrows emphasizes the contextual

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<sup>6</sup> Borrows, *supra* note 1 at ix–x.

<sup>7</sup> Borrows is an immensely productive scholar. Here is a list of just his solely authored books: *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010); *Drawing Out Law: A Spirit’s Guide* (Toronto: University of Toronto Press, 2010).

<sup>8</sup> Borrows, *supra* note 1 at 5–6.

<sup>9</sup> *Ibid* at 21.

conditioning, the sheer physicality, of the conceptual analysis.<sup>10</sup> Indeed, the chapter on mobility is entitled “Physical Philosophy.”

The second substantive chapter is on civil disobedience. This chapter is marked by Borrows distinguishing between three possible assessments of individual instances of civil disobedience—(1) productive, (2) questionably productive, and (3) not productive—which then shape his discussion of several cases of Indigenous civil disobedience that are discussed at length in the chapter.<sup>11</sup> The distinction between these three classes depends on the quality of relationship to others that is enacted when one is engaging in civil disobedience. He expressly rejects the “cult of self-sufficiency.”<sup>12</sup> He says that civil disobedience can “pry open new spaces of engagement”; for example: “In some small measure, civil disobedience allows a subjugated group . . . to reflect back to the domineering party the experience of being oppressed.”<sup>13</sup> He has a strong disposition to non-violence, although he declines to condemn all recourse to violence by others.<sup>14</sup> Moreover, in the striving for a better relationship—the quality, Borrows argues, that characterizes productive, democratic, and cooperative civil disobedience—assertions of law, whether of an alternative Indigenous legality or contrasting interpretations of the same non-Indigenous law, play a central role.<sup>15</sup>

The third chapter addresses Indigenous participation in Canada’s various constitutional conversations, especially regarding constitutional reform. Borrows is highly critical of the manner in which Indigenous peoples have been acted upon or ignored by Canadian governments, but he does not reject engagement with the Canadian constitution. On the contrary, he remains faithful to his emphasis on the inescapability of relationship. He does not reject the importance of institutions, including the institutions of the state.<sup>16</sup> This chapter is therefore oriented, simultaneously, toward both resistance and engagement. He emphasizes the capacity, indeed the great value, of Indigenous peoples acting autonomously, “pressing against [the Canadian constitution’s] potentially perpetual Eurocentric form,” but always with the hope (as his use of “potentially” suggests) that Indigenous action will one day open up a greater intercultural dialogue that will transform the Canadian constitution into a genuinely intercultural body of law.<sup>17</sup>

His fourth substantive chapter is on originalism in the Canadian constitution—that is, on Canadian variants of the idea that the meaning of the constitution is set at its date of origin, not subject to continued evolution. His essential argument in this chapter is that, although Canadian constitutional actors have generally rejected originalism when dealing with the non-Indigenous dimensions of the constitution, they have embraced it emphatically and damagingly when dealing with Indigenous peoples. Indigenous peoples have been confined by conceptions of Indianness that are frozen in the past and that serve, when transposed into constitutional

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<sup>10</sup> See, for example, *ibid.* at 8–9, where he discusses his own learning of Anishinaabemowin as a metaphor for contextually conditioned and relational freedom, in which the physical dimension of language acquisition is foregrounded.

<sup>11</sup> *Ibid.* at 53 and 55ff.

<sup>12</sup> *Ibid.* at 54.

<sup>13</sup> *Ibid.* at 51.

<sup>14</sup> *Ibid.* at 100–101.

<sup>15</sup> See, for example, *ibid.* at 53.

<sup>16</sup> See, for example, *ibid.* at 103.

<sup>17</sup> *Ibid.* at 126–127.

interpretation, to hamstring Indigenous peoples and their institutions. Instead, he argues, one should treat the Canadian constitution as a “living tree” in all its dimensions, including those that concern Indigenous peoples. He gives the metaphor of the living tree an extended interpretation founded upon the ability to learn from the natural world.<sup>18</sup> He also opposes originalist approaches within Indigenous discourse.<sup>19</sup> They too are confining and misconceived and should be rejected, although not at the expense of rejecting traditions themselves: “We need to be intellectually mobile and we also need to know when to appropriately ‘dig in.’ . . . We need to be constantly open to alternative approaches that challenge false horizons, even as we embrace life-giving traditions.”<sup>20</sup>

In the fifth substantive chapter, Borrows argues for the value of legislative initiatives to Indigenous legality and Indigenous/non-Indigenous reconciliation. Indigenous peoples’ experience of legislative impositions has not been good. Borrows frames the arguments in this chapter with multiple caveats, emphasizing that Indigenous peoples are fully justified in being skeptical about legislation. But he nevertheless accepts the possibility of legislation as a useful expedient, an expression of the interdependency of peoples,<sup>21</sup> and he draws on the experience of the United States to show ways in which legislation can play a constructive role. For this to work, however, legislation has to embrace Indigenous self-determination, something he suggests has not commonly occurred in Canada.<sup>22</sup>

Borrows’ sixth and final substantive chapter focuses on “Aboriginal and Treaty Rights and Violence against Women.” This chapter brings into conjuncture many of the arguments made throughout the book: the need to engage critically with tradition; the adoption of a living tree approach to constitutional interpretation; the value of relationship; and the past tendency of Canadian courts to interpret Indigenous rights in an ungenerous manner, especially when it comes to questions of governance. Borrows’ arguments proceed along two tracks: (1) They emphasize the need for Indigenous peoples to embrace and promote women’s equality, and especially the crucial role that Indigenous peoples’ own legal principles and institutions can play in doing so; and (2) his arguments stress that the underdevelopment of Indigenous self-government in Canadian constitutional law has impeded the ability of Indigenous governments to fulfil this role, in part because Indigenous governments have internalized these limitations. In short, Borrows seeks to reinvigorate Indigenous peoples’ own mechanisms for addressing the crucial challenge of violence against women by transforming both the internal and external constraints that undermine those mechanisms.

The sixth chapter brings to an end Borrows’ thought-provoking examination of tradition, relationality, and freedom within a wide range of contexts. In his seventh and concluding chapter, the three themes are recapitulated, their interrelationships re-emphasized, and the nature of physical philosophy given greater definition. I now turn to these themes, summarizing each in turn.

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<sup>18.</sup> *Ibid* at 151–152.

<sup>19.</sup> *Ibid* at 153–156.

<sup>20.</sup> *Ibid* at 129.

<sup>21.</sup> *Ibid* at 162.

<sup>22.</sup> *Ibid* at 164–166.

## B. Themes

### 1. Tradition

The opening words of Borrows' book are an emphatic rejection of essentialized and fundamentalist conceptions of tradition, especially in the Indigenous context:

In my view, there is no timeless trait, characteristic, custom, or idea that is categorically fundamental to being Indigenous. The categories of Mi'kmaq, Abenaki, Cree, Haudenosaunee, Anishinaabe, Assiniboine, Dakota, Secwepmec, Salish, Nuu-Chah-Nuulth, Gitksan, Tlingit, Haida, Dene, Metis, Inuit, etc., are all context-dependent classifications. They are political, social, legal, linguistic, and/or cultural facts that are fluid and subject to change through time.<sup>23</sup>

Nevertheless, although Borrows adopts a dynamic and even “invented” understanding of traditions, traditions are, for him, the essential starting point for all legal analysis (both Indigenous and non-Indigenous)—indeed for all thought and action:

There is no social or political space which is tradition-free. Traditions explicitly or implicitly colour our every thought and action in our political, social, scientific, religious, cultural, linguistic, and economic lives. . . . They arise as real limits in Indigenous peoples' relationships because they are embedded within everyday practices; within their context, a tradition's limits are treated as necessary to live well within a community in any given moment of time.<sup>24</sup>

In Borrows' view, then, it is necessary to approach traditions respectfully but critically. Everything depends on realizing their dynamic character and working to assess and refine them, drawing upon their strength but reforming their defects:

It all depends on how we envision and apply them.<sup>25</sup>  
 . . . [T]raditions can be a valuable source of inspiration, guidance, and encouragement if they are seen as resources for thought and action. They can make life worth living. However, problems arise when traditions are treated as timeless models of unchanging truths that require unwavering deference and unquestioning obedience.<sup>26</sup>

As with so much else in the book, these arguments are, importantly, not directed solely toward Indigenous legal traditions. Borrows turns them immediately to a critique of Canadian traditions of constitutional thought.<sup>27</sup> Indeed, throughout the book, Borrows holds Canadian constitutionalism to the same standards as Indigenous constitutionalism. He addresses criticisms levelled against Indigenous traditions, he gives those criticisms their due, but he

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<sup>23.</sup> *Ibid* at 3.

<sup>24.</sup> *Ibid* at 11 and 20. See also at 11 and 20n3 where Borrows invokes Eric Hobsbawm's notion of “invented traditions.” See Eric Hobsbawm, “Introduction: Inventing Traditions” in Eric Hobsbawm & Terence Ranger, eds, *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983) at 1.

<sup>25.</sup> Borrows, *supra* note 1 at 5. See also Borrows, *supra* note 1 at 205, although the need for critical engagement is emphasized throughout the book.

<sup>26.</sup> *Ibid* at 4.

<sup>27.</sup> *Ibid* at 4.

then turns them around, showing, with the quality of a trickster, how those criticisms are a compelling critique of Canadian law's own treatment of Indigenous peoples.<sup>28</sup>

The conception of tradition that emerges from this book therefore emphasizes that knowledge and action are contextual, always occurring within a historically and physically located process. Indeed, it is not too much to say that the contextual character of thought and action is what we mean by tradition: Traditions are the body of resources, terminology, stories, and experience that we use to orientate ourselves in thought and action. Tradition indispensably shapes our lives, but we then need to make it our own, criticizing it, deliberating, acting, and thereby adding to our own, our tradition's, and our nation's stock of resources. Tradition is, in Borrows' view, the crucial and indispensable starting point, providing us with sources of "inspiration, guidance, and encouragement" for lifetimes of thought and action, from which we then exercise our intellectual mobility. Traditions are always about thinking and acting, not about stasis.

## 2. Plurality And Relationality

Borrows also emphasizes that we always live among a plurality of traditions. That plurality is manifest at multiple levels. It is present within each individual, with traditions combining differently in each person and group.<sup>29</sup> The legal traditions that affect us are also multiple. When discussing responses to violence against women, he emphasizes that, within Indigenous communities (and indeed outside of them), both Indigenous and non-Indigenous forms of legality have a role to play: "Indigenous governance would be regarded as functioning analogously to the checks and balances of federalism—that is, working in a cooperative, coordinated and competitive way with the other levels of government."<sup>30</sup> He is also clear that this cooperation and competition among legal orders is normatively valuable and not just an empirical fact: The legal orders' combined presence means that violence against women can be dealt with "in ways that draw upon the strengths of all jurisdictions across the land."<sup>31</sup>

Indeed, he sees this pluralism as one of the features that promotes freedom. He emphasizes, again and again, that true freedom resides in the quality of our relationships. We gain a broader sphere of thought and action if we draw, in constructive ways, on our relations with others. Indeed, our very identities are defined in relationship with others.<sup>32</sup> One of his greatest criticisms of Canadian constitutionalism is that it has deprived itself of the benefits that come from constructive dialogue with Indigenous traditions.<sup>33</sup>

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<sup>28</sup> Borrows introduces the Anishinaabe trickster, Nanabozho, *ibid* at 7, but of course the trickster is a key character in Anishinaabe and other Indigenous traditions, whom Borrows has invoked in other writings. See, for example, *Recovering Canada*, *supra* note 6 at chapters 3 and 4.

<sup>29</sup> Borrows, *supra* note 1 at 20.

<sup>30</sup> *Ibid* at 190–191.

<sup>31</sup> *Ibid* at 190–191.

<sup>32</sup> *Ibid* at 6–7 and 10.

<sup>33</sup> *Ibid* at 12.

### 3. Freedom

The vision of freedom in this book is therefore relational, mobile, critical, contextualized, plural, and pragmatic. Borrows is cautious in his abstractions and generalizations, much more comfortable with tentative, nuanced, and context-bound analyses.<sup>34</sup> He sees the capacity for responsiveness and mobility of mind as being itself an important dimension of freedom. Indeed, I suspect that some readers will find his insistence on nuance, multiplicity, qualification, and context-boundedness to be frustrating at times. His openness to legislation as a potential means of instituting Indigenous rights might be one such case.

This conception of freedom is of a piece with his adherence to a grounded, located, philosophy of acting in the world, which he calls physical philosophy—*akinoomaagewin*. This philosophy consists in “[s]tarting in the middle of the complex state in which we find ourselves, and working towards a better state . . . Anishinaabe physical philosophy is inductive and derives conclusions from experience, observation, and discussion. This approach does not claim to reveal uncontested or absolute truth.”<sup>35</sup> There are clear affinities between Borrows’ approach and James Tully’s “public philosophy,” which similarly conjoins thinking with acting in the world. Indeed, Borrows’ dialogue with Tully is represented in his endnotes.<sup>36</sup> Borrows concludes: “As Indigenous peoples, we cannot just theorize our way to freedom—we must act well in the world. We must more fully and responsibly own, relate to, and control how we interact with others.”<sup>37</sup>

### C. Final Comments

Borrows captures the interconnection of all these themes in the following compelling paragraph:

This book contends that, as we make these decisions and distinguish between helpful and harmful traditions, our freedom is at its strongest when it is publicly interactive and aimed at good living. In a respectful relational context, the quest for freedom to live a good life becomes a self-governing activity, a simultaneously individual and collective practice. It embodies self-determination *and* individual self-examination, critique and deliberation. In this respect, freedom is pursued inter-subjectively, meaning that Indigenous peoples’ identities are non-binary, and are continuously recreated in the context of their struggles against and alliances with one another, occurring under the influence of competing and complementary traditions. There is no relationship-free place for Indigenous or any other peoples, whether positively, negatively, or “mixedly” construed.<sup>38</sup>

<sup>34</sup> See, for example, *ibid* at 55, 58, and 100–102.

<sup>35</sup> *Ibid* at 10–11.

<sup>36</sup> *Ibid* at 219–220. Tully’s principal work on public philosophy is James Tully, *Public Philosophy in a New Key* (Cambridge: Cambridge University Press, 2008), 2 volumes.

<sup>37</sup> Borrows, *supra* note 1 at 17.

<sup>38</sup> *Ibid* at 10.

This book captures, without a doubt, the spirit in which Borrows has conducted his own thought and action. It is an open and generous vision of encounter, co-existence, and relationship, as will become abundantly clear in the assessments that follow.

## II PHYSICAL LEGAL METHODOLOGY

*Patricia Cochran*<sup>39</sup>

*Freedom and Indigenous Constitutionalism* both explains and demonstrates a particular methodology for understanding law. From the perspective of seeking to generate just relationships between Indigenous and non-Indigenous communities, this methodology is at once liberating and deeply challenging, and it is this methodological freedom and difficulty that are the focus of this commentary.

I have chosen to offer my reflections on *methodology* because, in my own work as a scholar of Canadian constitutional law, I am interested in connections between methods for legal scholarship and substantive values about pluralism and relationality. This includes thinking about how Canadian constitutional law can work to generate and sustain more just relationships between Indigenous and settler communities, and between Canadian and Indigenous legal orders. Borrows' methodology, bound as it is to the specific and concrete freedoms of Indigenous peoples, is useful as a way to think about relationships, including from the perspective of a settler Canadian seeking to make good on the transformative potential of state constitutional law.

In this spirit, this commentary offers three short reflections about methodology, in the hopes that this will help others imagine how they might relate to or learn from this work, both in form and substance. The themes I address are (1) the physicality of law and freedom; (2) access to the natural world; and (3) the comparative or relativizing consequences of the methodology.

### A. Physicality

The language that Borrows uses to explain his methodology is *akinoomaagewin*, or “physical philosophy”:

Starting in the middle of the complex state in which we find ourselves, and working towards a better state, is what I term *akinoomaagewin*, or physical philosophy. *Akinoomaagewin* is derived from observation and practice; learning in this way does not stem from identifying first principles and deducing conclusions from abstract propositions . . . Anishnaabe physical philosophy is inductive and derives conclusions from experience, observation, and discussion.<sup>40</sup>

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<sup>39</sup>. Faculty of Law, University of Victoria.

<sup>40</sup>. Borrows, *supra* note 1 at 10.

Physical philosophy has much in common with other inductive or deeply contextualized methods of analysis and discovering. For example, there are resonances with Antonio Gramsci's philosophy of praxis, which also demands a relational approach grounded in lived experiences, and which also has much to offer when thinking about questions of law and justice.<sup>41</sup> However, I think there are ways that Borrows' approach is importantly different and original.

First, the language of *physical philosophy* prompted me to focus on the physical, embodied, and material aspects of the work. Physical philosophy is not just a contextualized (as opposed to abstract) way of thinking about a problem. It is an approach that attends specifically to the physical context of law and freedom. For example, Borrows writes extensively on mobility, not just as a concept or feeling but in terms of *physical freedom to travel over the land* and the way this physical freedom may be a kind of precondition for some kinds of understanding.<sup>42</sup>

Second, the language of the physical in physical philosophy allows Borrows to draw attention to the ways in which practices of freedom are physically constitutive. Our practices are constitutive—with repetition and embeddedness in our lives, they become us. So, in pursuing freedom, we shape our bodies, our lives, and our ideas.<sup>43</sup>

This is a substantive argument about freedom, but it is also about methodology, in the sense that beginning with the complex practices and experiences of real life is what gives us access to meaningful understanding and a basis for reflecting on and evaluating our practices. In Borrows' language: We will encounter both "real" and "false" limits on our freedom.<sup>44</sup> And it is engagement with, rather than abstraction from, our practices and traditions that gives us a critical perspective and the opportunity to maintain or transform constitutive practices accordingly. This methodological approach explains why, in various contexts, Borrows endorses both *resistance to* and *engagement with* oppressive legal structures, variously or simultaneously.<sup>45</sup>

## B. The Natural World

The methodology of physical philosophy is also valuable in the way that it provides intellectual access to knowledge arising from the natural world. For example, Borrows invokes the image of the "living tree" that structures Canadian constitutional interpretation as a way to shed new light on the interpretation of Canada's constitutional documents based on Indigenous diversity and the demands of freedom.<sup>46</sup>

The metaphor of the living tree is a powerful one in Canadian constitutional law. Indeed, it is the governing metaphor in many respects. I have thought about the living tree metaphor a

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<sup>41</sup> Antonio Gramsci, *Selections from the Prison Notebooks*, translated by Quentin Hoare & Geoffrey Nowell Smith (New York: International Publishers, 1971).

<sup>42</sup> Borrows, *supra* note 1 at chapter 1: Physical Philosophy: Mobility and Indigenous Freedom.

<sup>43</sup> See, for example, *ibid* at 8.

<sup>44</sup> *Ibid.* at 20.

<sup>45</sup> *Ibid* at 14 and chapter 2: Civil (Dis)Obedience, Freedom, and Democracy.

<sup>46</sup> Specifically, Borrows contrasts the way Canadian courts have interpreted s 35 of the *Constitution Act, 1982*, which protects Aboriginal rights, with the way they have interpreted the provisions of the *Constitution Act, 1867*, which identifies that only qualified "persons" can be appointed to the Senate. *Ibid.* at chapter 3: (Ab)Originalism and Canada's Constitution.

lot, but I have to admit that until I gained the perspective offered by this book, I have always thought about it as just that: *a metaphor*.

The metaphor of the living tree generates debates about how best to approach the sources of constitutional meaning, including the historical context of a document's negotiation and enactment and the shifting context of its use and implementation. In contrast, physical philosophy asks us to attend to the physical reality of a tree. This method asks that we go beyond the metaphor to consider what an actual living tree requires to survive and thrive. The living tree becomes not only a metaphor to guide interpretation, but a concrete source of law and legal analysis. What constitutional analogues exist for rain or a forest ecosystem, and what insights might these physical legal sources provide when we struggle to think about what is required to sustain freedom, equality, or democracy?

Borrows points out that many Indigenous communities also use constitutional concepts that are metaphors to living things. For example, he describes how some coastal communities in British Columbia carve poles to describe constitutional relationships:

Unlike living trees, which metaphorically grow forever, totem poles are designed to eventually fall down and decay as they return to the earth. This reinforces the idea that constitutional laws, though carved from deep histories, are to be reinscribed every few generations to ensure they remain relevant through time.<sup>47</sup>

### C. Indigenous Freedom And The Constructive Relativization Of Canadian Constitutional Law

The methodology of physical philosophy—*akinoomaagewin*—is tied to the concrete, lived experiences of Indigenous peoples. In the context of Canadian constitutional law, this necessitates accounting for the ways in which Indigenous peoples and Indigenous approaches to constitutionalism have been harmed and undermined by colonial domination. In critiquing the capture of constitutional law by “false” Canadian traditions, Borrows provides this account, thus opening the space for more practices of freedom for Indigenous peoples.

At the same time, by analyzing freedom through *akinoomaagewin*, Borrows reveals the ways in which *Canadian* constitutional law is also harmed by the unjust relations that exist between settler and Indigenous peoples and legal orders. Canadian law is cut off from Indigenous insights, and Canadian people lose the opportunity to discover agency-enhancing practices.<sup>48</sup>

Thus, the methodology of physical philosophy offers another valuable intervention, almost as an incidental effect: It relativizes Canadian law. Importantly, this relativization is not achieved by abstracting parallel concepts or placing different traditions on an undifferentiated plane. Because it is so deeply rooted in the experiences and ideas of Indigenous communities, especially the specific Anishnaabe ideas that Borrows recounts in personal and community narratives, the methodology of *akinoomaagewin* prevents constitutional arguments from being

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<sup>47.</sup> *Ibid* at 152.

<sup>48.</sup> See, for example, *ibid* at 17.

abstracted away from the substantive justice concerns of Indigenous freedom and the quality of the relationships at hand.

### III LESSONS FROM INDIGENOUS (DIS)OBEDIENCE

*Avigail Eisenberg*<sup>49</sup>

In the first chapter of *Freedom and Indigenous Constitutionalism*, John Borrows explains the pragmatic aim of his project: “This entire book is devoted to deconstructing grand theories . . .”<sup>50</sup> His approach to freedom—what he calls physical philosophy—is designed to recognize the fluid, hybridized, contingent, contested, cross-cutting, and ever-changing nature of Indigenous traditions, and to map these more accurately onto real life. Physical philosophy is “a pragmatically engaged approach that rejects idealized views of Indigenous life”<sup>51</sup> and recognizes that freedom is not attained when people must follow a defined path. Physical philosophy pulls away from discourses about what is authentic to Indigenous tradition and instead focuses on what is happening and, specifically, on the question of how action and experience create space and require space for Indigenous peoples to enjoy freedom and have agency in their quest for a good life.

In this commentary, I focus on the second chapter of Borrows’ book, entitled “Civil (Dis)Obedience, Freedom, and Democracy,” in part because it provides a good illustration of the unique and insightful perspective found throughout the book. As the chapter title indicates, disobedience to one law could well be obedience to another. The title is a reminder that Indigenous peoples live under regimes in which their efforts to reoccupy their lands, re-establish their communities, and exercise rights that have been denied to them are interpreted by the settler majority and state as disobedience and dissent. The chapter draws this state-centred interpretation into question but then moves away from the abstract questions of legitimacy entailed by it. Borrows argues that conflicts among Indigenous communities and between Indigenous and settler communities are not best resolved by appealing to arguments about which side is right or whose principles or truths are higher, more absolute, universal, and valid. Questions like who is “right” and who is “wrong” do not interest Borrows here, although it’s clear he has opinions.

Instead, Borrows’ approach is to discuss nine recent cases of (dis)obedience by Indigenous communities in Canada in terms of their success or lack thereof. He finds four cases display “best practices,” two have mixed results, and three are unsuccessful. His assessments focus on the mutual dependences of people and communities at stake in each case. The potential for political change to result from (dis)obedience depends on social actors recognizing that they are bound to each other through systems of intricate cooperation. Borrows begins the chapter by referring to Gene Sharp’s observation that “[w]hen people persist in their disobedience and defiance, they are denying their opponent the basic human assistance and cooperation

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<sup>49</sup>. Department of Political Science, University of Victoria.

<sup>50</sup>. Borrows, *supra* note 1 at 47.

<sup>51</sup>. *Ibid* at 49.

which any government or hierarchical system requires.”<sup>52</sup> Through disobedience, those who are powerless underscore that those who dominate them, despite their powerful position, are reliant on those they dominate to cooperate. And cooperation, even from people who are oppressed, can be revoked and refused.

As this chapter shows, mutual dependence is a two-way street. Dominant groups depend on the cooperation of those they dominate and, as Borrows shows, dissenters are also bound to others in relations of mutual dependence. Successful resistance and dissent requires dissenters to recognize that success depends on their capacity to expand and escalate defiance by appealing to those outside their immediate circle. Similar observations have been made in the context of other historically important protest movements, including the US civil rights movement and the anti-Vietnam protests. The case studies Borrows explores show that instances of resistance tend to succeed when Indigenous movements attract and build a coalition of people, some of whom have interests that overlap but are not identical to each other. This is true, for instance of the coalition of Indigenous and environmentalist groups that succeeded in stopping logging in Clayquot Sound. It is also true of the James Bay Cree, who succeeded in stopping the Great Whale River Project in northern Quebec by developing strategic alliances among Indigenous and environmental groups and, crucially, convincing New York State to cancel a hydroelectric contract with Quebec.

By highlighting the centrality of mutual dependence in acts of (dis)obedience, Borrows points to some difficult and not altogether hopeful lessons. First, disobedience is a risky strategy that usually does not succeed. In part, this is because people fail to recognize their mutual dependence, which failure leads to reprisals and to the fragmentation of dissenting communities. The standoff at Oka is a good example of this failure. The failure by all sides—the Mohawk community, the province of Quebec, and the city of Montreal—to recognize their mutual dependence, which was nonetheless so clearly underscored by the blockade of Mercier Bridge, led to an armed standoff and ultimately a violent clash after which the province called in the army.

Second, violence is sometimes difficult to avoid in acts of (dis)obedience. At the same time, it almost always damages the conditions for success. Numerous scholars of dissent, including Gene Sharp, Mahatma Gandhi, and Henry David Thoreau, also argued that violent dissent undermines the possibility of securing just ends. This is because enacting violence rests on a mistaken belief that one party can control the other. Violent dissent buys into a view of the modern subject as independent, competitive, and fearful. A subject with these traits will perpetuate violence even as it seeks peace through political means. For this reason, violence is never agency enhancing.

Third, successful dissent relies on building coalitions. This is difficult work. It is often unpredictable where coalition partners will be found and whether or how they can work together. Potential partners and allies can be separated by colonialism or white supremacist ideologies, which makes coalitions both difficult to rely on and especially fragile.

The success or failure of direct action campaigns is notoriously difficult to gauge in part because the kinds of problems that dissenters typically aim to address are complex along numerous dimensions and tend to change over time. Borrows argues that direct action is

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<sup>52</sup> *Ibid* at 51, quoting Gene Sharp, “Nonviolent Action: An Active Technique of Struggle,” in Robert L Holmes & Barry L Gan, eds, *Nonviolence in Theory and Practice*, 2nd ed (Long Grove, IL: Waveland Press, 2005) at 253.

successful if it opens up democratic space and enhances democratic communication. But why must dissenters, who are colonized, marginalized, and often poor, be committed to these democratic ideals as a means to solve their problems? According to Borrows' analysis, those cases in which (dis)obedience has opened up democratic space and communication tend to be more successful. But successful at what? The answer in this book returns the reader to ideas at the heart of physical philosophy, namely that people's freedom and capacity to live good lives have improved in communities where direct action has followed best practices.

This might seem to be an optimistic conclusion, but Borrows' account of Indigenous (dis)obedience is neither pessimistic nor optimistic. Borrows assesses these cases in context and in light of whether they strengthen conditions consistent with good relations among peoples, such as the creation of democratic spaces, clear communication, and recognition of mutual dependence, rather than in terms of the rightness or goodness of one side or another. The method employed here echoes the pragmatist idea that the success of any project is neither inevitable nor impossible but a "possibility" that becomes more of a probability the more numerous the actual conditions for success are in place.<sup>53</sup> In this way, Borrows leads us to think about what has to be done, but offers no guarantees or promises of success, which is yet more evidence of his deeply pragmatic perspective.

## IV MOBILIZING INDIGENOUS FREEDOM

*Heidi Kiiwetinepinesiik Stark*<sup>54</sup>

John Borrows' body of scholarship has been transformative, opening new intellectual pathways for thinking about Indigenous legal traditions, Canadian law, and the power and potential of stories and dreams—all while continually resisting and refusing prescribed modes for transmitting knowledge. You will often find the trickster Nenabozho traversing the page or engaging Supreme Court judges in the hope of kindling the fires that have kept the Anishinaabe warm. Borrows' work illustrates the fluidity and complexity of life, reminding us that just as Nenabozho has the potential to rekindle fires, he also risks being burned. Drawing on Anishinaabe pedagogies, Borrows challenges his readers to draw out their own conclusions and insights instead of producing prescriptions for how to be in the world. His newest work, *Freedom and Indigenous Constitutionalism*, is no different.

Much like Nenabozho, Borrows steadfastly resists and refuses categorization. He asserts as much, stating "I believe categorizations are often inaccurate and do not capture the fluidity, ambiguity, and contradictory aspects of human nature."<sup>55</sup> Indeed, the limits of categories drive *Freedom and Indigenous Constitutionalism*, which begs the reader to question and challenge conceptions of tradition "rooted in fundamentalist views about the immutable nature of Indigenous peoples and their societies."<sup>56</sup> Borrows is concerned by the treatment of traditions

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<sup>53</sup> See Alexander Livingston, *Damn Great Empires! William James and the Politics of Pragmatism* (Oxford: Oxford University Press, 2016) at 153–165.

<sup>54</sup> Department of Political Science, University of Victoria.

<sup>55</sup> Borrows, *supra* note 1 at 279.

<sup>56</sup> *Ibid* at 3.

“as timeless models of unchanging truths that require unwavering deference and unquestioning obedience.”<sup>57</sup> He shows the reader in each chapter how this framing of tradition can be oppressive and exclusionary, reminding us that traditions must be understood as contextualized practices, not as *a priori*. Each chapter details the physical and ideological barriers erected through the treatment of tradition as temporally and geographically fixed.

Borrows offers a compelling vision of the transformations that can occur if we see the limits of Western conceptions of freedom and begin to understand ourselves as inhabiting relations of interdependence with one another and with the world we live in. His proposal represents a shift away from views of Indigenous peoples frozen in time and toward a relational way of being that is inspired by the principles of interconnectedness inherent in many Indigenous legal and political orders. Borrows outlines the need to attend to the underlying relationships that configure and delimit Indigenous peoples’ contemporary political movements. These include relations between humans, with Creation, and between Indigenous governments and state institutions. In fact, he succinctly outlines the aim of the work in his conclusion when he asserts that “we must seek out those traditions that enhance our relationships and increase our abilities to live in accordance with our own dreams, while simultaneously rejecting any tradition which thwarts the realization of these goals.”<sup>58</sup> In the process, Borrows encourages us to be ever attentive to the physicality of our circumstances, even as we reach toward more emancipatory alternatives.

Focusing on Borrows’ first chapter, which takes up physical philosophy and mobility, his work encourages us to be attentive to colonial efforts to restrict Indigenous mobility by tethering Indigeneity to land. He highlights that state framings of Indigenous mobility produce a lose-lose situation where Indigenous peoples find ourselves damned if we move and damned if we don’t. We are framed as either too nomadic or too static. He notes that “despite the reality of our near-constant motion, most legal systems manipulate conceptions of mobility to deny or diminish Indigenous freedom. Laws are devised to limit our movements and to foster confinement within ever-diminishing spaces.”<sup>59</sup> He also cautions us to consider the philosophical confinements these discourses produce by discouraging our freedom to integrate others into our communities or our authority to regulate others across our lands. In doing so, Borrows calls for the mutual harmonization of Indigenous and non-Indigenous laws.

Borrows’ work on mobility and the reminder of our need to resist the entrapments that keep us fixed temporally and geographically enabled me to think through Indigenous resurgence efforts in new ways. By centring mobility, we are reminded that it is through the activation of our relationships with the living entities that constitute this expansive space known as Creation—the land, animals, spirits, and humans—that knowledge is produced and transmitted. The generative quality of our movement across Creation is too often eclipsed by narratives that tether Indigeneity in space and time, positing our knowledge and relationships to Creation as innate and natural. Borrows’ work begs the question of what alternative pathways we have foreclosed by centring our attention on articulations of land that reify statist notions of bounded space.

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<sup>57.</sup> *Ibid* at 4.

<sup>58.</sup> *Ibid* at 206.

<sup>59.</sup> *Ibid* at 27.

As Vince Diaz reminds us, we need to be “cognizant of how we as Native peoples sometimes unwittingly perpetuate colonial definitions of land (and self) through ways that we invoke primordial connectedness to landedness, particularly in political programs of reclaiming stolen land bases.”<sup>60</sup> This romanticizing of pre-contact Indigenous life covers up the hard work that is carried out when we engage with our territories in the respectful, responsible, and reciprocal ways that produced the very traditions and practices that are too often essentialized. To understand how settler colonialism has (re)ordered our relationships to place requires us to take greater care in understanding our engagement with place as a series of meaning-making practices. We must bring forward our own rich stories about how we relate to Creation, which means we must expand our focus to include both the other living beings that have shaped and regulated our relationships to land as well as how our relationships with and across land are generated through our movements across these territories.

The containment of Indigenous lands to reserves, or even the more expansive Aboriginal territory, can risk us assuming that our movements through our own territories are not also always regulated and conditioned by relationships and responsibilities. In fact, it is our engagement with place and with others in these places that gives rise to our political practices, exchanges, and the development of new relationships. A greater understanding of how our mobility is generative can also enable us to see how discourses that fix us spatially (as well as temporally) are reductive. The greatest tool available to Indigenous peoples is not just in the revitalization of our traditional practices, but in the processes that gave rise to these ever-growing and flourishing traditions.

It is our mobility, our movement across the lands and waters, that activates our relationships and responsibilities. Attention to how we relate to one another can combat colonial containments of Indigenous political authority. For the Anishinaabe, we speak of ourselves as the last of Creation. This is not just some inversion of the hierarchy of Creation, with ourselves as the lowest and thus the least valuable. Instead, Anishinaabe attention to our order of placement on the earth reminds us of our obligations to those who came before us, who already governed the territories we came to inhabit. As our stories and the practices they give rise to denote, the animals stood up for us and brought us into an already regulated and governed territory. Our clan governance is the extension of these relationships, reminding us that whether we are moving through our lands or visiting the lands of others, we must account for the web of relationships that order these spaces. We offer tobacco to the water beings before we enter our canoes; we petition the plants and animals in recognition of their agency and our relationships with these beings; we engage in political exchange and the expansion of kin relationships when moving into the territories of others. We are always in relationship and are also always aiming at nurturing and expanding these relationships. We contend that attention to Indigenous mobility enables us to unearth the generative nature of our relationships with Creation and with others in our movements across Creation. Borrows’ attention to mobility is just one of the many chapters in this book that asks us to give serious consideration to how ideological and physical containments have constrained us in achieving freedom and the good life.

Borrows concludes his book with the story of Opichi, relaying his commitment in the telling of this story to his daughter time and again so that she realizes she is always free to

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<sup>60</sup> Vince Diaz, “No Island Is an Island” in Stephanie N Teves, Andrea Smith, & Michelle H Raheja, eds, *Native Studies Keywords* (Tucson: University of Arizona Press, 2015) at 91.

follow her own path in life. He notes that the Anishinaabe word for father is *noo-se*, meaning “one that creates paths which make it easier for his family to follow.”<sup>61</sup> Much like *noo-se*, Borrows clears the path in *Freedom and Indigenous Constitutionalism*. He leaves it to the reader to interpret and take up his concerns and cautions as they each see fitting. Borrows uncovers the multiplicity of pathways possible for achieving freedom and the good life. While some readers unfamiliar with the landscape may miss out on understanding the wider terrain, as a result of a lack of knowledge of the well-trodden roads, the new pathways Borrows’ work illuminates provide openings for additional approaches and possibilities for the achievement of freedom and the good life. Indeed, many of Borrows’ concerns centre on the ways in which well-trodden roads have been later traversed without consideration to alternative pathways. These roads risk being overdirective if we don’t look up and consider other approaches in determining the best pathways forward. This tension for Borrows is driven by his commitment to Anishinaabe pedagogies that resist directing individuals toward a particular or singular option. Instead, he highlights how Anishinaabe thought posits that each individual has his or her own unique purpose and gifts. If we overly direct others or let ourselves be overly directed, we risk interfering with the fulfilment of these gifts. Borrows notes, in the words of Thomas Peacock, “Ojibwe teachings say that we exist to live out and give expression to our vision, and that in so doing we find meaning and purpose in life. And because each of us has a different vision, it must be lived as we alone can understand it.”<sup>62</sup> Borrows therefore recognizes that each of us may consider travelling down the pathways he has opened up, or we may reject them for the well-trodden pathways we already know, or alternatively may carve out others yet to be imagined. The freedom to travel our own paths is his aim.

## V CONSTITUTIONAL SUFFERING: A RESPONSE

*John Borrows*<sup>63</sup>

Professors Cochran, Eisenberg, and Stark discuss how legal doctrines, civic (in)activities, and Indigenous pedagogies can either capture or liberate Indigenous peoples, depending on how they are used. Each commentator highlights the importance of resisting categorizations drawn from abstract characterizations when considering Indigenous peoples’ relationships with the world around them. This is one of the central themes in *Freedom and Indigenous Constitutionalism*. Both fixed and fluid classifications can negatively impact Indigenous peoples’ relationships when they are based on inalterable first principles. Freedom is the ability to own your responsibilities within your relationships (*dibenindizowin*) and “bob and weave” between what appear to be inconsistent alternatives that do not necessarily represent essentialized “truths.”<sup>64</sup> As each commentary in this volume demonstrates, we must constantly attend to context in the constitutional realm. The book itself argues that freedom is not just an idea, it is a practice. As Hannah Arendt observed, “the raison d’être of politics is freedom, and

<sup>61</sup> Borrows, *supra* note 1 at 207, quoting Dr Basil Johnston.

<sup>62</sup> *Ibid* at 6, quoting Thomas Peacock, *The Four Hills of Life: Ojibwe Wisdom* (Afton, MN: Afton Historical Press, 2006) at 105.

<sup>63</sup> Faculty of Law, University of Victoria.

<sup>64</sup> Borrows, *supra* note 1 at 18.

its field of experience is action.”<sup>65</sup> Canada’s constitution facilitates freedom when it practically helps to improve lives in physically tangible ways.

For these reasons, as the book posits, we must continuously evaluate Canada’s constitution in the light of our physical circumstances, which includes our physical health, safety, and well-being. When this occurs, it is impossible to ignore the fact that Indigenous peoples’ lives are drastically shorter than other Canadians. They are marked by greater suffering, as measured by considerably higher rates of poverty, injury, and incarceration, and significantly lower levels of education, income, and health.

By these measures Indigenous suffering is a contemporary part of our country’s constitution. Suffering is a constitutional, constituted, and constituting experience for Indigenous peoples—it is not just a conceptual hypothesis. Indigenous peoples in Canada are living through a period of profound, extended, multigenerational trauma. Of course, some are doing well, either living in relative peace in their homelands or increasingly joining the country’s shrinking middle class. Indigenous peoples have long taken daily and longer-term steps of resistance and adaptation to protect their lands, languages, and resources. This occurs, even while others within our midst “silently” succumb to the despair spawned by the overwhelming challenges presented by Canada’s constitutional law.

Unfortunately, our constitution has not effectively addressed Indigenous suffering when measured against these material realities; legislation, litigation, education, and economic development have not turned the tide. Sixty-four per cent of the children under provincial care in British Columbia are Indigenous, and these numbers are even higher on the prairies. There are more Indigenous children under provincial care than was the case during the height of the residential school era. Furthermore, 28 per cent of the prison population is composed of Indigenous people, which is almost six times higher than their representation in the adult population (5 per cent). No set of cases nor policies have been able to effectively address these challenges. This is a constitutional problem of grave significance.

Despite signals running in other directions, the philosophy that most strongly characterizes Canada’s constitution still bends toward liquidating Indian reserves, dismantling distinctive Indigenous-run governments, and educating “Indians” to participate in the broader society. This is as true today as it was in the first decades after Confederation. In 1876, the *Indian Act* was passed to assimilate Indigenous peoples. This legislative framework still permeates most First Nations communities today. Métis and Inuit people encounter similar pressures in their dealings with the courts, legislatures, and Parliament. While assimilation has failed miserably, it has not been clearly rejected as a constitutional principle in day-to-day legal experience. Indigenous land, governance, and resource use continues to be subject to federal and provincial authority and priorities. In practical terms this means that Indigenous peoples do not have the ability to effectively manage their relationships with their natural environments or one another.

As Professors Cochran, Eisenberg, and Stark discuss (mirroring themes in the book), the practical elements of Indigenous peoples’ lives have not been adequately accounted for in Canada’s constitution. Indigenous peoples suffer because they have been constrained by conceptions that falsify or misrepresent the level of consensus needed to improve relationships, as the book discusses. We should reinvigorate the diversities within Canadian and Indigenous law by recognizing that the relativization of Canadian law “is not achieved by abstracting

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<sup>65</sup> Hannah Arendt, *Between Past and Future* (Toronto: Penguin Books, 2006) at 145, cited in *ibid* at 6.

parallel concepts or placing different traditions on an undifferentiated plane,” as Professor Cochran argues. In line with Professor Eisenberg’s insights, we should treat the country’s constitution as a site of possibilities for enhancing freedom, “which becomes more of a probability the more numerous the actual conditions for success are in place.” This means, as Professor Stark suggests, that we must resist approaches that encourage singular solutions in forging freedom.

Canada’s ability to incorporate diversity through democratic means in broader political, legal, and social processes is one of its pillars of strength. Recognition of this fact could extend these same privileges to Indigenous peoples. As *Freedom and Indigenous Constitutionalism* suggests, constitutional traditions can be hollow, frozen, and empty if they are solely based on *a priori* and universal forms. Alternatively, tradition can help stir us to action in contemporary, dynamic ways if it “reminds us that we do not have to accept the world as we find it; we can challenge and change how and where we live, think and speak, at least to a degree.”<sup>66</sup> As Hannah Arendt observed, “to be free and to act are the same.”<sup>67</sup> Constitutional traditions must engage living complex relationships to facilitate action in the real world. They must address suffering. This is a broad theme in the book, among others, and I am pleased to see how Professors Cochran, Eisenberg, and Stark have highlighted these ideas in their commentaries.

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<sup>66</sup> Borrows, *supra* note 1 at 9.

<sup>67</sup> Arendt, *supra* note 65 at 150.