

Barry L. Strayer. *Canada's Constitutional Revolution*. Edmonton: University of Alberta Press, 2013. xvii + 335 pp. \$34.95, paper, ISBN 978-0-88864-649-1.



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Commissioned by Christopher R. Waldrep (San Francisco State University)

Barry L. Strayer's book about the formation of Canada's present constitutional order, and his own role in it, joins a short and distinctive shelf of similarly erudite yet also entertaining legal memoirs. A non-exhaustive list of comparable books (well, these are a few on my shelf anyway) might include, for example, Lord Denning's *The Discipline of Law* (1979), H. R. Khanna's *Neither Roses Nor Thorns* (1987), and Albie Sachs's *The Soft Vengeance of a Freedom Fighter* (1990, 2d ed. 2000). These names, including Strayer's, will be unknown to most Americans, including most American lawyers and even, I daresay, most American professors of constitutional law—a loss hopefully remedied for those who may stumble across this review. Denning served as Master of the Rolls (one of the highest judicial posts in the United Kingdom); Khanna served as one of the most revered justices on India's Supreme Court (he penned a famous lone dissent challenging Prime Minister Indira Gandhi's emergency rule during 1975-77); and Sachs was appointed by President Nelson Mandela as a founding justice of

South Africa's post-apartheid Constitutional Court (after many years as a white Jewish participant in the African National Congress's freedom struggle, and victim of a 1988 assassination attempt by the apartheid government).

Strayer did not achieve the stature of these luminaries on the bench, though he did serve as a Canadian federal judge after a distinguished career as a law professor and government attorney. He was apparently far more influential in the latter role, part of the inner circle that brought about (as his title accurately claims) a genuine constitutional revolution in one of the world's most respected and important democracies. (This review is inevitably written from my own perspective as an American law professor, though an unabashed "Canadaphile" with more of an international perspective than most Americans. My husband was born and raised in India and we have numerous family members there. A long-time teacher and writer on U.S. constitutional law, I have enjoyed the privilege of teaching and learning more about comparative constitutional law,

including that of Canada, India, South Africa, and other nations, since 2011.)

The “revolution” of Strayer’s title refers to the “patriation” (bringing home) of Canada’s constitution in 1982 (from the United Kingdom, the colonial mother country). Patriation was accompanied by important constitutional amendments, most notably, the historic enactment of the Canadian Charter of Rights and Freedoms, equivalent in significance to the proposal and ratification of the U.S. Bill of Rights in 1789-91. Strayer, as assistant deputy minister of justice, was a key brain in the top-level legal team of Pierre Elliott Trudeau, Canada’s charismatic prime minister in 1968-79 and 1980-84. Trudeau may justly be called the James Madison of Canada, it being doubtful in either case that a constitutionally entrenched bill of rights would ever have been achieved without the doggedly persistent idealism and political skill of each leader.

Canada’s original constitution was the British North America Act of 1867 (renamed the Constitution Act in 1982, a literal rewriting of history), enacted by the U.K. Parliament to govern what was then a royal dominion of the British Empire. Canada, a famously loyal British colony during and after the American Revolution, became self-governing under this arrangement, but remained largely subservient to the United Kingdom in foreign policy until after World War I. An 1865 law of the British Parliament, suitably called the Colonial Laws Validity Act, remained in force in Canada until the 1982 patriation; it provided that applicable British laws would prevail over conflicting Canadian legislation. Canada could not amend its own constitution, but had to bring such requests hat in hand to Parliament in London, though a custom developed that the United Kingdom would only make such amendments upon terms requested by Canada’s Parliament and government.

Canada’s highest court of appeal during that era was the Judicial Committee of the British Privy Council in London. Canadian law students

and lawyers studied that court’s rulings much as my students (and yours truly) puzzle over the Delphic pronouncements of our own U.S. Supreme Court. The king or queen in Buckingham Palace, represented by a governor-general, was (and indeed remains to this day, even after the 1982 revolution) Canada’s formal head of state.

This sort of stuff, recounted by Strayer in readable and informative style, is all very amusing to Americans, who revel in our own early independence from the empire upon which the sun never set. (I often tease my husband about why it took so much longer for India to break free—if indeed it fully has, psychologically and culturally, see afternoon tea and biscuits, cricket, etc.—to which he retorts, “You Americans were not colonized long *enough!*” More seriously, at least the more or less indigenous population of India did wrest control of its homeland from the British colonizers, a tragically unachievable goal for American and Canadian Natives, the “Indians” swamped by my and Strayer’s European American ancestors. American Indian law is another of my academic specialties. Unlike South Asian Indians, we Americans and Canadians actually *are* the British in large part, plus major infusions of the French, Germans, Italians, Iberians, Scandinavians, Africans, Asians, etc. It is all so complicated!)

Those who have slogged through typically more pompous tomes penned by sitting or retired U.S. Supreme Court justices and other high-ranking officials (from Henry Kissinger to Hillary Clinton) may be skeptical of my description of Strayer’s book as “entertaining.” But it really is, very much so. What could easily have been an unrelievedly ponderous exposition of constitutional law and history is leavened by Strayer’s disarmingly informal and witty recollections of the leading personalities in Canadian politics from the 1950s to the 1980s. Just one example is his account of a 1971 mission to Newfoundland to help the local premier (affectionately referred to as

“Joey”). Joey desired an amendment (dealing with church-state relations) to the constitutional union between Canada and Newfoundland (who knew Newfoundland was a separate British colony, not even part of Canada until 1949?!), in order to curry favor with a local religious denomination during a heated provincial election campaign. Under the curious strictures of Canada’s pre-1982 constitution described above, this required joint approval by three governments (United Kingdom, Canada, and Newfoundland).

Joey lost his race for reelection shortly thereafter, mooting the “so-cleverly-crafted” amendment that Strayer (Trudeau’s constitutional Mr. Fix-It) had come up with, which was never heard from again. Sighs Strayer: “It is thus always for constitutional reformers” (p. 52). Passages like this remind one what a small country (in population anyway!) Canada really is (or at least was), where many leading figures knew each other quite well, as in his description of collaborating with Newfoundland attorney Clyde Wells in 1981 litigation leading up to the patriation. Strayer casually mentions that Wells had been a member of Joey’s cabinet years before and later became premier of Newfoundland himself and then chief justice of the province. And what a civilized country: the worst “hostility” Strayer recounts, during one of the most contentious phases of this very Canadian revolution, was to be snubbed out of a dinner invitation (p. 171).

Strayer’s book is remarkably informative on a wide range of topics. Of particular interest to me as a teacher and scholar of American Indian aboriginal and treaty rights are his discussions of Canada’s difficult relations with its aboriginal peoples (or First Nations as referred to in Canada). A key provision added to Canada’s constitution by the 1982 revolution—sorely lacking in the U.S. Constitution—guarantees the aboriginal and treaty rights of Canada’s First Nations. This provision was abruptly dropped, and then just as abruptly reinstated in late 1981 during the final

run-up to patriation, as Strayer dramatically recounts. Strayer includes a poignant recollection of bigotry against Canadian Natives in his home province of Saskatchewan, reminiscent of bigotry against American Indians known to persist into recent times in the nearby American states of Montana and the Dakotas, among others.

But Strayer also points with justifiable pride to Saskatchewan’s pioneering role in progressive social and legal reforms, including the first comprehensive human rights legislation in Canada in 1947 and, in 1962, the first universal government-guaranteed medical insurance program in all of North America. Saskatchewan played a major role in the founding of the Co-operative Commonwealth Federation (CCF), later the New Democratic Party (NDP), a democratic socialist movement with which Strayer remained proudly affiliated his entire career, even while serving in Trudeau’s more mainstream Liberal Party government. The CCF and NDP, which have come to power at times in provinces such as Saskatchewan, Manitoba, and Ontario, but never yet at the national level in Canada, are reminiscent of the progressive political tradition in America’s nearby Upper Midwest states like Minnesota, Wisconsin, Michigan, and the Dakotas.

Strayer was involved (though only marginally, he modestly insists) in the tumult surrounding Saskatchewan’s pioneering medical insurance program. Strayer’s account of this historic episode in health-care reform is a fascinating revelation for me and I think should be much more widely known. Most Americans vaguely assume that Canadians have somehow always had their famous “single-payer” health-care system. American sympathizers take for granted that Canadians have always loved it, while right-wing U.S. opponents of such programs feverishly insist (with laughable cluelessness) that Canadians mostly hate this “socialistic” monster.

Strayer’s section on this episode, coming early in the book as it did in his own career, provides

an extremely educational corrective to both sides of the American debate. Canadians do indeed generally love their health-care system, which with all its glitches and expenses (what system does not have those?) produces better health outcomes than Americans enjoy at lower cost. But it dates only from the 1960s, and as Strayer recounts, Canadians were deeply divided at its origin, which was a very chancy thing. It was achieved only after a hard-fought political battle against the very same kinds of opponents (for-profit insurance companies, idiotic right-wing politicians, and deeply conservative and misguided doctors' associations) who have furiously opposed, in the United States, the enactment of Medicare and Medicaid under President Lyndon B. Johnson in the 1960s; the failed universal health-care efforts of President Jimmy Carter in the 1970s and President Bill Clinton in the 1990s; and (though less so as to some doctors and insurance companies) the enactment and implementation of President Barack Obama's Affordable Care Act since 2010.

Strayer, describing the "bogeymen" invoked by Saskatchewan opponents in the early 1960s, sniffs dismissively: "The same nonsense was heard recently in the corridors of Congress in Washington" (p. 12). Doctors in Saskatchewan actually went on strike in a desperate last-ditch attempt to block the new system, but the province's progressive NDP government, having won election on the promise of universal health care, held firm. It was only the program's success in Saskatchewan that persuaded Canada's federal government to offer funding for similar programs in other provinces, which soon led to its nationwide adoption and the widespread popularity it enjoys today. As Strayer concludes with evident satisfaction: "For once, 'the good guys won'" (p. 17). And it was only because of the courageous commitment of a relative handful of progressive political activists and leaders in a single, sparsely populated, prairie province. There is a lesson here, perhaps a surprisingly "conservative" les-

son, about the value of local democracy, decentralization, and federalism.

Strayer touches on other hot-button issues of human rights and social reform, including women's rights and gay rights. For example, he makes clear his sympathy for an unsuccessful effort to include sexual orientation among explicitly prohibited grounds of discrimination in the Canadian Human Rights Act of 1977, a legislative predecessor to the 1982 Charter of Rights and Freedoms. The charter itself, while not expressly addressing the issue, provided the foundation for later Canadian court decisions and legislation supporting LGBT (lesbian, gay, bisexual, and transgender) equality, including the relatively early allowance of open gays in Canada's military and the full legalization of same-sex marriage by 2005.

Somewhat ironically, given the Canadian Supreme Court's famously expansive application of the charter, which Strayer played a key role in framing, he frequently criticizes that court's post-1982 progressive judicial activism. He identifies himself as a somewhat unusual breed (which I happen to belong to as well): a politically liberal "positivist" who takes seriously "the logic and the text of the constitution" (p. 103). This used to be a widely held stance on the left, during the days (which Strayer recalls) when both U.S. and Canadian courts (and the British Privy Council), tacking to the activist right, undermined progressive social and economic legislation using vaguely defined business and corporate rights. Come to think of it, this may be coming round again as a concern with our present Roberts Court in the United States!

Among the most interesting and entertaining parts of Strayer's book is his account of the surprisingly contentious effort to get British parliamentary approval of patriation. Prime Minister Margaret Thatcher had given her personal assurance to Trudeau that the United Kingdom would approve whatever Canada requested (and in the end it did), but she proved unable to control all

members of her caucus. Strayer bristles with justified resentment at the colonialist arrogance of some British politicians who thought they knew better than Canadians what was best for Canada. I am generally in sympathy with him here, and yet I do not think he offers an entirely convincing answer to the more thoughtful critiques offered by some British members of Parliament (MPs).

For example, Strayer describes Enoch Powell, a notoriously cantankerous Conservative MP and former cabinet minister, noting how “paradoxical” it seemed “that Canada should be asking Westminster to abdicate its power over our constitution and also at the same time to legislate major constitutional change for us” (i.e., the Charter of Rights and Freedoms). Powell was on to something here. Strayer’s answer is that Canadians, unlike Americans, did not wish to undertake an outright revolution by breaking with the established legal order, but rather wished to work within “the continuity of our institutions” by “coming to London for its validation” (p. 213). Fair enough, and eminently Canadian, but this would really only explain seeking British approval for patriation itself and the new, and henceforth exclusively Canadian, amending procedure for the constitution that was a central part of the 1982 change. Once that new amending procedure was adopted and the constitution fully patriated, Canada could then have amended it to enact the charter. Indeed, Strayer had previously conceded that most of the British controversy over approving patriation involved (as his British counterparts had warned him it would), not patriation itself, but some of the substantive details of the charter.

The real answer, as far as I can tell (and more an explanation than a justification), is that separate enactment of the charter as a purely Canadian constitutional amendment, post-1982, may have been politically impossible at the time. Trudeau had a hard enough time as it was getting nine out of ten provinces to swallow the charter as part of the overall patriation process. He never

did get approval from Québec, which rankles that province to this day.

But then, constitution making is a messy business. We Americans, in our veneration of our own ancient document, now creaking along toward its 227th birthday, tend to forget what a contentious process our own ratification was (even without having to involve the British!). Major political change is always a leap in the dark to some extent. As Strayer notes at the end of his tale, “that is how it happens with any revolution: there are unintended consequences” (p. 291). It is clear enough by now, however, that Canada’s constitutional revolution has worked overwhelmingly positive changes for that country, advancing the dignity and stature of a great nation and providing a globally relevant model for protecting human rights and individual freedom. For that and other reasons, Judge Strayer can look back with pride on his life’s work.

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