Book Reviews / Comptes-Rendus

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W.P.M. Kennedy, introduction by Martin Friedland

The Constitution of Canada: An Introduction to its Development and Law. Oxford: Oxford University Press, 1922. 544 pp.

As a scholar of Canadian constitutional law, I have long been intrigued by W.P.M. Kennedy. I discovered copies of his classic 1922 work *The Constitution of Canada*[1] and his *Documents of the Canadian Constitution, 1759–1915*[2] in the always-obscure and often-limited "law" section at various used book sales. I was thus surprised—pleasantly so—to learn that Oxford University Press had decided to reissue Kennedy's 1922 *The Constitution of Canada* as part of its Wynford book series "representing significant milestones in Canadian literature, thought and scholarship." *The Constitution of Canada* certainly qualifies, even if few are aware of its existence. Hopefully, this republication by Oxford University Press will change that.

I knew little about Kennedy before writing this review. Indeed, the title of Martin Friedland's introduction—"The Enigmatic W.P.M. Kennedy"—indicates that there is a limit to what one can discover about Kennedy. Friedland laments the fact that Kennedy "destroyed all his personal papers in Toronto shortly before he died"; no biography of him has ever been written and the likelihood of someone undertaking such a task is remote.[3] Like many a medieval scholar, Kennedy's bequest and his legacy is his writing, and *The Constitution of Canada* is surely his opus.

From Friedland's introduction, we learn that the founder of the modern University of Toronto Law School, and the man who wrote the most important constitutional history and analysis of his time, was not even a lawyer. Indeed, Friedland is unable to find any indication that Kennedy ever took a formal course in any legal subject (p. iii). That an Irish-born legal autodidact would build the law program that rebelled against the Ontario legal establishment at Osgoode Hall (home of the Law Society of Upper Canada) is perhaps à propos. That the same school would evolve into the school of the Canadian legal establishment is richly ironic.

Kennedy writes wonderfully and his analysis is penetrating. Consider this paragraph explaining the context of Confederation laid against the background of US Civil War:

> The American Civil War without and the tragic political differences within lent special emphasis to the question of Canadian unity in those pregnant autumn days in 1867, when, under the shadow of a party deadlock in

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1 W.P.M. Kennedy, *The Constitution of Canada: An Introduction to its Development and Law* (London and Toronto: Oxford University Press, 1922).

2 W.P.M. Kennedy, *Documents of the Canadian Constitution, 1759–1915* (Toronto: Oxford University Press, 1918).

3 Friedland stated that "[t]o write a full biography of [Kennedy] would be difficult, although not impossible." Martin Friedland, "The Enigmatic W.P.M. Kennedy," introduction to *The Constitution of Canada: An Introduction to its Development and Law*, by W.P.M. Kennedy (London and Toronto: Oxford University Press, 1922), i at v.

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> Canada and of the neighbouring tragedy of disintegration, political faith made a new venture into the unknown. Canada began with a lesson learned. She avoided, as John Macdonald said, "the great source of weakness in the United States"—the centrifugal force of "state rights". But something more was implicit in the lessons learned from the first great experiment in federal government. They contained the germs of Canadian nationality, national sentiment, national feeling, national loyalty—a fatherland. The citizens of Canada are first of all Canadians and secondly citizens of a particular province (p. 5).

Perhaps there is an element of wishful thinking in the last sentence, but throughout *The Constitution of Canada* Kennedy displays an acute awareness of the distinct identity of the French Canadian citizens of Quebec.

The paragraph also exemplifies Kennedy's purpose in writing the book. In *The Constitution of Canada*, Kennedy set out to document the development of the life of the young nation of Canada: "I have . . . endeavour[ed] to present . . . an evolutionary account of the various movements and stages which have issued into the organized political life of the Canada of to-day" (p. vii). He argued that "[t]he history of Canadian constitutional development must be regarded as one of great moment, being full of achievement which once seemed to lie completely outside the possibilities admitted by time-honoured political theory" (p. viii).

Kennedy's *Constitution of Canada* begins with the "paternal absolutism" of the government of New France (p. 1). He argues that

> every important landmark in Canadian history bears marks of New France. Indeed, there are few other cases in the world's history where a conquered people have left, within such a short period, so many permanent impressions on the government set up by their conquerors…At every step in modern Canada we are forced inevitably back to that romantic failure which in reality triumphed on the Heights of Abraham (pp. 24–25).

A short review of recent constitutional events confirms this analysis.[4] We need only consider the patriation of the Constitution in 1982, the attempts to bring Quebec into the Constitution through the failed Meech Lake and Charlottetown Accords, the near-death experience of the Quebec referendum on secession in 1995, and the latest debates about reforming the Senate.

Kennedy situates Canadian constitutional history within the broader geopolitical context. Thus, in writing about linkages to the American Revolution, he notes the invitation extended by the first Continental Congress to the inhabitants of Quebec to forget mutual differences of religion and to join the cause of liberty against "the new inquisition" of Great Britain (p. 63). The inhabitants of Quebec were not persuaded.

Instead, according to Kennedy, the *Quebec Act* "saved the province" of Quebec from joining in the rebellion of the thirteen colonies against Great Britain: "The loyalty of the French-Canadian church and upper classes was secured and proved a powerful influence against disintegration" (p. 69). Kennedy credits the *Quebec Act*

[4] See Reference re Supreme Court Act, ss 5 and 6, 2014 SCC 21; Reference re Senate Reform, 2014 SCC 21.

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for keeping Canada together: "In so far as Quebec is to-day a strong centrifugal force it can be traced to 1774. One thing is certain, the Quebec Act strengthened the imperial tie, and we may too lightly exaggerate the defects and too lightly appreciate the virtues" (p. 70).

But the American Revolution did have a significant impact on Canadian constitutional history. According to Kennedy, it "made a new constitutional development inevitable." The influx of United Empire Loyalists from the United States brought advanced political thought, the experience of popular institutions, and opposition to arbitrary government. The Loyalists' arrival helped precipitate the new constitutional development of responsible government (p. 71).

The passage of the *Constitutional Act, 1791*, creating Upper and Lower Canada, quickly followed suit. Kennedy criticises British Prime Minister William Pitt ("the Younger") for his naiveté in holding to the belief that Lower Canadians (i.e., Quebeckers) would see the benefits of the workings of British constitution in Upper Canada and "would sigh for the gift and embrace the whole system from conviction" (p. 85). In Kennedy's description of Pitt's perspective:

> The future unity was to come, because the French-Canadians, initially satisfied by being separated from the British, would actually become dissatisfied because of the separation. They would finally sink race, religions, and traditions and rush to accept the British constitution out of sheer jealously, lest Upper Canada should enjoy a monopoly in such a life-giving, wonder-working scheme" (p. 85).

Kennedy's criticism of constitution-making divorced from local conditions bears consideration in light of the constitutional euphoria that has erupted from time to time in different regions around the world, whether postcolonial Africa or post-Saddam Iraq.

To Kennedy, Pitt's *Constitutional Act* was an absolute failure. It was "charged with friction, and in time Upper Canada found the eighteenth-century British constitution an excuse for radicalism, and Lower Canada used it to increase rather than to diminish separatist tendencies" (p. 86).

Kennedy advocates for flexibility in a constitution and for the constitution to fit the people, not the other way around. He clearly believed that a constitution was an important document, but a functional and not a holy one. Thus, of Lieutenant-Colonel John Graves Simcoe, the first governor of Upper Canada, Kennedy writes with a note of slight disdain: "To him the British constitution was only less sacred that the bible, and it was almost with reverence that he undertook the work of organizing the government of the new province" (p. 117).

Kennedy has a notable perspective on the War of 1812. He certainly saw the War of 1812 as "a real turning-point in Upper Canadian history" (p. 127). But he avoids the jingoist themes recently expressed by the Government of Canada in its bicentennial celebrations of "the War for Canada". Instead, Kennedy saw the war as opening up the expansion of Upper Canada: "American soldiers took back accounts of the splendid lands of Upper Canada, and soon thousands came to conquer with the axe what they failed to conquer with the sword" (pp. 127–28).

For Kennedy, the period between the end of the War of 1812 and the rebellions of 1837 was one of constitutional malaise. He lamented the control of the family

compact—the small clique that exercised most of the political, economic, and judicial power in Upper Canada between the 1810s and the 1840s. He said that its "deadly sin" was "that it made criticism sedition and calendared in the criminal code any opposition with disloyalty. The spirit of the Elisabethan council animated the executive of Upper Canada" (p. 135). While it would be an exaggeration to say that such criticisms ring true today, there is a flavour of familiarity to them at the federal level, where all too frequently in recent years legitimate criticism of the executive has been branded as disloyalty.

Kennedy claimed that the Rebellion of 1837 showed that the constitution was "worn out" (p. 154). He lamented its absence of responsible government, going so far as to assert that "[u]nder responsible government Papineau and Mackenzie might never have existed as rebels; perhaps they might have developed into constructive statesmen" (p. 180). Kennedy recounts the establishment of responsible government through the efforts of Lafontaine and Baldwin, which have been popularized in recent years.[5] Kennedy is at his analytical best in describing the constitutional reform movement leading to Confederation. On the challenges of reaching Confederation, he writes: "The [US] civil war, however, provided a more subtle assistance to the political movement in the colonies" (p. 291).

In a phrase we are unlikely to see as we approach the 150th anniversary of Confederation in 2017, Kennedy claims,"Canada was born in a period of mid-victorian gloom" (p. 316). On the *BNA Act, 1867*, Kennedy asserts that the Parliament in Westminster and government in Whitehall did not approach the project with any notion of constitutional import let alone grandeur. He states that "no one seems to have cared much about it, and certainly there was no enthusiasm. [Sir John A.] Macdonald compared its progress to that of 'a private bill uniting two or three English parishes'" (p. 315). He thus concludes his constitutional assessment of Confederation: "The federation of 1867, great though it was in actual accomplishment, was greater in its possibilities" (p. 322).

Kennedy was incredibly prescient in his analysis of Canadian constitutional history. His assessments may provide continuing value to consideration of issues today. Thus, in analyzing the debates over the Senate prior to Confederation, Kennedy wrote:

> There were signs of difficulties over the senate. It was feared that it might block legislation. Suggestions were made that the period of service should be limited and that appointment should be vested in the local legislatures. Some delegates dreaded the creation of an oligarchical second chamber, and proposed that the crown should be given power to appoint additional members in case of emergency. This fitted in with an earlier idea from the colonial office and was finally embodied in the imperial Act (p. 313).

Debates about Senate reform and abolition have captured the attention of Canadians in recent years. These issues date back to Kennedy's time and earlier. Kennedy felt that the Senate's raison d'être of regional representation had been

[5] See John Ralston Saul, *Louis-Hippolyte LaFontaine and Robert Baldwin* (Toronto: Penguin, 2010) (Extraordinary Canadian Series) and see Institute for Canadian Citizenship, Lafontaine-Baldwin Symposium, online: https://www.icc-icc.ca/en/lbs/.

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superseded by the firm entrenchment of regional representation in the cabinet. He thus wrote, "To Macdonald's prophecy, however, of the impossibility of the senate being filled with 'partisans and political supporters' his own political life gave the initial lie. Dorion and Dunkin saw the party possibilities and the weakness in construction. The latter also made an interesting forecast: 'I think I can defy them to show that the cabinet can be formed on any principle than that of a representation of the several provinces in that cabinet, for it is admitted that the provinces are not really represented to any federal intent in the legislative council (i.e., the senate). The Cabinet must discharge all that kind of function which in the United States is performed, in the federal sense, by the senate.'"

The *British North America Act, 1867* gave the federal government the power to "disallow" or invalidate provincial laws, a power that it utilized in the first fifty years of Confederation. Kennedy did not approve of disallowance, advocating that such power was better left to the courts, as in the United States: "The resolution of the problems of intra vires or ultra vires ought not to be left to the minister of justice. This tends to make him too supreme, and to detract from the character of the supreme court of Canada or of the privy council" (pp. 415–16). Of course this is exactly what has happened.

Kennedy was part of a golden age of global constitutional law that waned with the outbreak of the depression and World War II and was not reborn until the end of the last century.[6] Thomas Friedman has attracted much attention for his twenty-first-century catchphrase that "the world is flat," meaning that events and people in one part of the world are quickly linked to others through networks of computers and communication.[7]

The world of constitutional law was surprisingly flat in Kennedy's time. *The Constitution of Canada* received "many excellent reviews" in the United Kingdom and in the United States (p. xvi). That an academic treatise of 519 pages would attract the attention of the *Law Quarterly Review* might be considered a pleasant surprise. That *The Times*, the *Observer*, the *New Republic*, and the *Christian Science Monitor* would see fit to review *The Constitution of Canada* seems unbelievable to 2015 eyes for several reasons. First, *The Constitution of Canada* is a serious and at times dense academic book. That such publications would see fit to review such a book—and garnish it with accolades—shows a level of intellectualism among the readers of the popular press largely lacking today. Second, the interest of such publications in the United Kingdom and the United States in a decidedly "Canadian" constitutional text demonstrates that the editors and the reviewers clearly saw relevance in the topic. They must have viewed the "Canadian" constitution as part of some larger community of constitutional history to which they also belonged. This is a stark contrast with the hostility displayed toward "foreign" law in the United States over the past decades.

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6 See e.g. Claire L'Heureux-Dubé, "The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court," *Tulsa Law Review* 34, no. 15 (1998); Sujit Choudhry, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation," *Indiana Law Journal* 74, no. 819 (1999); Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007).

7 See Thomas L. Friedman, *The World is Flat: A Brief History of the Twenty-First Century* (New York: Farrar, Straus and Giroux, 2005).

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Friedland notes that *The Constitution of Canada* was reported to have sold between 3,000 and 4,000 copies within six months, a number that is remarkable today, and was even more impressive in 1922 (p. xxiv). People in Canada and around the world clearly thought that Kennedy had written something worth reading. That was true in 1922 and it continues to be true today.

Kennedy has been dead barely a half-century (d. 1963) but has long been forgotten along with most Canadian constitutional history that pre-dates the enactment of the *Canadian Charter of Rights and Freedoms*. In this sense, Kennedy is not only enigmatic but also emblematic of the neglect of constitutional history in this country. I often say that Americans are obsessed with their constitutional history and Canadians are oblivious to theirs. It is hoped that the republication of *The Constitution of Canada* will help change this.

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Richard Jochelson and Kristen Kramar, with Mark Doerksen
The Disappearance of Criminal Law: Police Powers and the Supreme Court. Fernwood Publishing: Halifax and Winnipeg, 2014. 120 pp.

Many law scholars do research in law and society to escape the often narrow and insular focus of doctrinal scholarship. *The Disappearance of Criminal Law* does the opposite. It examines recent Supreme Court of Canada cases in the area of police powers as part of a broader socio-legal inquiry. It aims to shed light on the role of the judiciary in the criminal-law policy shift away from the policing of actual harm and toward the management of more abstract fears and concerns. The authors engage with three areas of law and society scholarship—studies by Markus Dubber, Lucia Zedner, and David Garland on the embrace of preventative policing or a "culture of control"[1]; research in surveillance studies by Kevin Haggerty and Richard Erikson, among others, on the "convergence of what were once discrete surveillance systems" into a "surveillant assemblage" (p. 10)[2]; and, finally, "governmentality" studies by Mitchell Dean, Mark Neocleous, and others.[3]

1 Markus Dubber, "Policing Possession: The War on Crime and the End of Criminal Law," *Journal of Criminal Law & Criminology* 91, no. 4 (2001): 829; Lucia Zedner, *Security (Key Ideas in Criminology)* (London: Routledge, 2009); and David Garland, *The Culture of Control* (New York: Oxford University Press, 2001).

2 Kevin Haggerty and Richard Ericson, *The New Politics of Surveillance and Visibility* (Toronto: University of Toronto Press, 2006).

3 Mitchell Dean, *Governmentality: Power and Rule in Modern Society* (London: Sage Publications, 1999); Mark Neocleous, "Security, Liberty, and the Myth of Balance: Towards a Critique of Security Politics," *Contemporary Political Theory* 6 (2007): 131.