


Volume 53, Issue 2 (Winter 2016)
Special Issue: Non-Constitutional Influences on
Constitutional Law and Constitutional Design
Guest Editors: Richard Albert and Vanessa
MacDonnell

Article 11

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Citation Information

Haigh, Stephen Paul. "Book Review: The Strategic Constitution: Understanding Canadian Power in the World by Irvin Studin."
Osgoode Hall Law Journal 53.2 (2016) : 729-735.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol53/iss2/11>

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Book Review: The Strategic Constitution: Understanding Canadian Power in the World by Irvin Studin

Abstract

This is a book review of *The Strategic Constitution: Understanding Canadian Power in the World* by Irvin Studin

Keywords

Book Review

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***The Strategic Constitution: Understanding Canadian Power in the World* by Irvin Studin¹**STEPHEN PAUL HAIGH²

AS IRVIN STUDIN BEGAN SCOURING the *Constitution Act, 1867*, he discovered a “somewhat shocking”³ statement buried in the preamble to our founding document. Federation, he learned, would “conduce to the Welfare of the Provinces and promote the Interests of the British Empire.”⁴ Jurisdictionally, this “most underserved line in the entire Canadian constitutional framework”⁵ seemed *prima facie* to Studin to suggest that Canadian foreign policy—and national high strategy more generally—belonged to Westminster, not Ottawa.

Is this true? Must whatever Canada seeks to accomplish in the wider world “reckon with the original ‘colonial’ and ‘tactical’ iron constitutional cage that arguably has dictated much of the country’s logic over the past century and a half?”⁶ After close and detailed readings of the *Constitution Act, 1867*, the *Charter of Rights and Freedoms*, and associated statutes and case law, Studin comes down firmly, if unsurprisingly, on the side of Canadian domestic legal, political, and thus strategic agency:

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1. (Vancouver: UBC Press, 2014).
 2. BA (Calgary); MA (Calgary); PhD (Dunedin).
 3. *Supra* note 1 at ix.
 4. *Ibid.*
 5. *Ibid* at x.
 6. *Ibid.*

Canada has a *Strategic Constitution* [which], despite its manifestly astrategic conception, and despite a correspondingly weak tradition of strategically sensitive constitutional jurisprudence, can be employed with great flexibility by the federal government ... to project considerable power to advance national strategic ends and purposes.⁷

To students of international relations (IR), this observation appears somewhat trite. Surely it is in the very nature of sovereignty that the state, having, as is famously said, no equals inside and no superiors outside, is master of its own house? Surely national security and foreign policy are exclusive prerogatives of the Canadian government?

Without naming it, Studin hits upon a fundamental tension between liberty and power. Indeed, his exploration of state power vis-à-vis the Constitution brings into stark relief an issue of overarching importance to constitutional government, and inasmuch as Studin has cast light on the underpinnings of that relationship in the Canadian context, he has performed a valuable service. As such, before addressing the tension, it would seem worthwhile to summarize how he goes about his task.

The book is divided into two parts. In Part I, Studin develops a conceptual framework in which he outlines the notion of strategic power as it pertains to the Constitution, and then—paying particular attention to the means by and extent to which they are available to the Canadian government in pursuit of strategic ends—undertakes a detailed and comprehensive audit of the key factors and instruments of strategic power. Part II consists of four case studies: Canadian strategic leadership in Central and South America and the Caribbean; *bona fide* war; Arctic sovereignty; and post-9/11 counterterrorism policy.⁸

Part I forms the conceptual backbone of the book. At stake here is the degree to which the Constitution empowers the Canadian state across each of the essential strategic tools, or factors, that the author deems relevant. Through nuanced discussions of constitutional, statutory, and case law, Studin traces the contours of strategic license granted either explicitly or by implication to the federal government in respect of the following core elements of state power: the diplomatic and military aspects (according to Studin the two “cardinal

7. *Ibid* at 103 [emphasis in original].

8. Part II, the case study section, ranges from the rather fanciful (leadership in the Americas) to the eminently real and actual (counterterrorism). Readers will find much to reflect upon, but time and space limitations conspire against any treatment here. Suffice it to say that Part I covers all of the conceptual bases: As regards constitutional implications, nothing in the case studies would come as a surprise to attentive readers of Part I.

instruments” of national strategy⁹); “government, or pure executive potency”¹⁰; natural resources and food; national economic might; communications; and population. Each of these mechanisms merits a full chapter, and is given thorough treatment. With the exception of “government or pure executive potency,” all are uncontroversial aspects of state power. Indeed, IR scholars, or at least those of realist persuasion, would have no trouble endorsing the list. On the other hand, one might well object to Studin’s decision to bracket out geography on the ground that as a factor of power it is “excessively abstract.”¹¹ The exclusion is as unusual as the claim. Along with sheer size, Canada’s geographical position (like the United States, it is the beneficiary of what John Mearsheimer famously calls the immense stopping power of water¹²) has probably done as much to influence and inform our foreign policy as anything else. As for abstraction, could there be anything more concrete than Canada’s colossal landmass?¹³

Disagreement over geography aside, the strong conclusion to be drawn from Studin’s analysis in Part I is that the federal government has almost unlimited *marge de manœuvre* when it comes to questions of core national interest. Factors that would otherwise place quite formidable constitutional restrictions on federal power—*inter alia*, significant provincial jurisdiction over a number of relevant policy areas, manifold *Charter* injunctions revolving around questions of fundamental human rights, and an array of title protections for, and duties relating to, Indigenous Canadians—turn out more or less to dissolve in what Studin, in this instance referring to supersession of *Charter* rights provisions, calls “a fairly potent cocktail of executive override.”¹⁴ On Studin’s reading, the closer we get to fundamental issues of national security, the more the Constitution bends itself to the will of the state. In times of great need this becomes a sort of strategic imperative, and the author does an excellent job of showing how, *in extremis*, heavy constitutional artillery (primarily the Crown Prerogative; the *Emergencies Act*; Peace, Order, and Good Government (POGG) provisions; and the principle

9. *Supra* note 1 at 29.

10. *Ibid* at 59. For more about this mechanism, see the commentary below.

11. *Ibid* at 55.

12. *The Tragedy of Great Power Politics* (New York: Norton, 2014) at 44, 264.

13. Studin also explicitly brackets out what Joseph Nye terms “soft power,” namely the ability to achieve desired outcomes based on signalling, demonstration, and/or example. This is unfortunate. A good deal of US history has been spent in a tug-of-war between ‘interventionism’ and ‘exemplarism,’ and to ignore that heritage (and its relevance to the Canadian Constitution as a (shining?) example in its own right) is to shortchange the analysis. Or, again, the correct response to IR realists who exclude non-material power is that “ideas matter.”

14. *Supra* note 1 at 51.

or doctrine of necessity) gets rolled out in the service of, say, potential threats to national survival. Indeed, Studin goes so far as to say that “extraordinary or even ordinarily ‘illegal’ measures”¹⁵ come firmly within the constitutional ambit: In particular, the doctrine of constitutional necessity underscores “the signal premise that the Canadian Constitution cannot, in the presence of exceptional circumstances or emergencies, properly or reasonably be viewed as a ‘death pact’, as it were, for the Canadian state and its citizens.”¹⁶

Again, to an IR practitioner, this seems tautological. The international system of sovereign states is a harsh world. Individual members operate in a largely anarchic environment so that, although cooperation is possible and even necessary, the underlying logic of the system is one of self-help. States, in other words, must in the final analysis be supremely self-reliant, which is also to say that they must remain free of domestic constitutional constraint.

To sum up, when push comes to shove, the constitutional tail must not wag the state dog. In this regard, two criticisms spring to mind. First, in Studin’s typology, “government, or pure executive potency” is a “subsidiary”¹⁷ strategic element, or factor, of state power. For this reviewer at least, executive potency is neither subsidiary nor an element. Rather, executive power is precisely what we mean by the state: The state is constituted in and by its executive potency. To call that potency an element of state power is to commit a category error.

Second (and related) is the obvious tension between the rule of law as embodied in the Constitution, and the mechanisms of ‘pure’ state power that those same rules might jam or foul up. Studin is perhaps right to lament the dearth of Canadian scholarship in this area; certainly, he expresses his frustration at various points in the text. Referring specifically to the potential strategic value of communications, he notes: “Canadian jurisprudence ... nowhere invokes ‘strategy’ (or, say, *raison d’etat*) [T]his is in keeping with the ‘astrategic’ constitutional jurisprudence tradition posited in this book.”¹⁸ Similarly, with respect to the power-projection capacity of our natural resources and food, he maintains that a lack of case law and of constitutional literature is “perhaps a measure of the absence of strategic tradition and ... strategic thinking ... in Canadian constitutional culture.”¹⁹ Or again, on population—this time referring to the strategic assertion of Arctic sovereignty, and the attendant need for a

15. *Ibid* at 62.

16. *Ibid* at 49-50.

17. *Ibid* at 46.

18. *Ibid* at 83.

19. *Ibid* at 63.

substantial (*i.e.*, politically engineered) human presence in the Canadian north—he notes that “there has been no jurisprudence ... to provide guidance [A]s such, my analysis will have to be largely counterfactual.”²⁰

Studin’s book serves as a corrective, or at any rate the beginnings of one, even as the author appears to concede that the essence of the problem may be the Constitution itself. The latter, he frequently asserts, is “largely silent on strategy and strategic power”²¹: In “design”²² and “conception,”²³ it is “astrategic.”²⁴

Deriving a strategic constitution from an astrategic constitution seems suspiciously like squaring a circle, unless and until one accepts a key distinction between internal and external sovereignty. Oddly enough, Studin hovers over this notion in the Introduction, where he takes pains to note:

[C]onceptually speaking, the Constitution and strategy are but flip sides of the same Canadian enterprise (the Canadian state)—or at least the legitimacy of that enterprise. The Constitution, concerned as it is with law, is representative of the *internal* legitimacy of the Canadian state, while strategy, concerned as it is with power, is representative of the *external* legitimacy of the Canadian state.²⁵

He goes on to quote (with approval) Henry Kissinger, who clearly marks off a state’s “internal arrangements” as operating in the realm of justice, whereas a state’s chief external concern must always be “a projection of power that determines its ability to fulfill its minimum functions—that is, to protect its population from foreign dangers and domestic upheaval.”²⁶

In *Democracy in America*, Alexis de Tocqueville mused that in the conduct of their foreign relations, democracies seemed decidedly inferior to other governments.²⁷ It is not too implausible to view the 19th and 20th centuries as a canvas upon which the United States tested Tocqueville’s proposition, confirmed it, and reacted, however reluctantly and hypocritically, in perhaps the only way an aspirational and eventually truly great power could react. Had Studin trained his meticulous gaze on the foreign affairs of our southern neighbour, we would have a clearer picture of how the momentous tension between liberty and power has

20. *Ibid* at 143.

21. *Ibid* at 16.

22. *Ibid* at 3.

23. *Ibid* at 46.

24. *Ibid* at 22.

25. *Ibid* at 4 [emphasis in original].

26. *Ibid* at 5.

27. Alexis de Tocqueville, *Democracy in America*, translated by George Lawrence, ed by JP Mayer (New York: Anchor Doubleday, 1969) at 228-29, 694.

played out in the index case of the world's first truly constitutional democracy. More to the point, we might better appreciate how Canada—for Studin, another aspirational power in an age of increasing interdependence—should reconcile strategy and the rule of law as it acts to further its interests on the global stage.

A comparative study, then, would have highlighted the deeper issue. Now, tyrants and despots need not worry about constitutions; by definition they make them up (or not; it hardly matters) as they go along. Having such license confers upon tyrants certain advantages (and, not incidentally, gives Tocqueville's observation its real force). In the context of a strategic Canadian constitution, it suggests that we should pay heed to the evolution of an American equivalent founded on acute experiential awareness of the dangers and opportunities associated with supreme executive power. Thus we might consider James Madison who, sensitive to the need for checks and balances in a republican system, moved that Congress reserve the power to declare war: For Madison, the President ought not receive exclusive power to make peace and war "because it would have meant 'throwing into his hands the influence of a monarch.'"²⁸ And yet, from the turn of the following century and as American power grew, so too did its strategic objectives—at which point the calculus changed. John Adams led the country into war against France without a formal declaration; Thomas Jefferson employed a "loose construction of his executive powers"²⁹ to purchase and govern Louisiana; and then in a *volte face*, Madison himself, "in the earliest analogue to the Gulf of Tonkin resolution,"³⁰ extracted "vague powers" from Congress to subvert and then seize West Florida.³¹

What was going on? How, at the close of the 19th century, could William McKinley prosecute the Spanish-American War by further "[stretching] the constitutional restraints on his power until they assumed an entirely new shape?"³² The answer seems plain enough. Once a state begins to assert itself on the international stage, the scales start to tip. Woodrow Wilson argued that when domestic politics dominate, congressional power is and ought to be ascendant. But for Wilson, the Spanish-American War "'changed the balance of the parts', for diplomatic questions became paramount and 'in them the President was

28. Walter LaFeber, "The Constitution and United States Foreign Policy: An Interpretation" (1987) 74:3 J Am Hist, 695 at 697 (quoting Pierce Butler).

29. *Ibid* at 699.

30. Abraham D Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* (Cambridge, Mass: Harper Collins, 1976) at 377.

31. *Ibid*.

32. LaFeber, *supra* note 27 at 704.

by necessity leader.”³³ A quick empirical test is instructive: Up until 1930 the United States had concluded fully twenty-five treaties and only nine executive agreements; by 1972, those numbers, respectively, had risen to 947 and 4,359.³⁴ Walter LaFeber speaks of a centrifugal-centripetal effect in which, as military and economic power increasingly move outward, political power is centralized at home. Constitutionally speaking, the rule seems to be that when this happens, the usual rules cease to apply. One might say that once a constitution is put to high strategic purpose, it becomes in a real sense unconstitutional. Indirectly, Studin has revealed the ominous expediency of some of our most important laws.

33. *Ibid* at 708.

34. George W Ball, *Diplomacy for a Crowded World: An American Foreign Policy* (Boston: Little Brown, 1976) 208-09.