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Red, White, and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture, by David Schneiderman

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Book Review



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Abstract

In the 2010 case of *Citizens United v Federal Election Commission*, a narrow 5–4 majority of the United States Supreme Court overturned decades of jurisprudence by striking down any limitation on what corporations can spend on indirect electioneering. While the Canadian Charter of Rights and Freedoms upholds a similarly robust protection of political speech under its freedom of expression provision, an analogous case at the Supreme Court of Canada (“SCC”) in 2004 resulted in a much different outcome.

Book Review

***Red, White, and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture*, by David Schneiderman¹**

JOSEPH MCDONALD²

IN THE 2010 CASE OF *Citizens United v Federal Election Commission*, a narrow 5–4 majority of the United States Supreme Court overturned decades of jurisprudence by striking down any limitation on what corporations can spend on indirect electioneering.³ While the *Canadian Charter of Rights and Freedoms* upholds a similarly robust protection of political speech under its freedom of expression provision, an analogous case at the Supreme Court of Canada (“SCC”) in 2004 resulted in a much different outcome.⁴

In *Harper v Canada*,⁵ Stephen Harper, then president of the National Citizens Coalition (Harper later became the Prime Minister of Canada in 2006), launched a constitutional challenge in June 2000, arguing that sections 350 and 351 of the *Canada Elections Act* amounted to an unconstitutional infringement

1. (Toronto: University of Toronto Press, 2015)

2. Student-at-Law, JD (Osgoode), MA (Carleton), Hons BA (McMaster).

3. *Citizens United v Federal Election Commission*, 558 US 310 (2010).

4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 2(b) [*Charter*].

5. 2004 SCC 33, [2004] 1 SCR 827 [*Harper*].

on the fundamental freedom related to expression.⁶ These sections of the *Canada Elections Act* placed limitations on the amount of money a third party could contribute to an election campaign. While the SCC did find that these provisions violated individual freedom of expression protected under the *Charter*, it determined that the infringement was justified due to the legislation's pressing and substantial objective of preserving fair and equitable elections.⁷

In an address to the Canadian Parliament in 1961, as regards to the Canadian-American relationship, President John F. Kennedy said: "What unites us is far greater than what divides us."⁸ In revisiting this statement in the context of the two countries' respective constitutional cultures, what divides us is actually much clearer than what unites us. Although the US *Bill of Rights* and the Canadian *Charter* are textually quite similar, judicial interpretation of the rights contained within them is crucial to understanding our differences.⁹

In *Red, White, and Kind of Blue? The Conservatives and the Americanization of Canadian Constitutional Culture*, David Schneiderman presents a bold, comprehensive overview of the impact Stephen Harper's government had on Canada's parliamentary system, its conventions, and culture. The work illustrates an attempt at the "presidentialization of prime ministerial authority" by taking its reader through constitutional crises (*e.g.*, prorogation), and common practices (*e.g.*, appointment of senators and Supreme Court justices). This review will similarly explore these areas.

While textual similarities between the US *Bill of Rights* and the Canadian *Charter* are evident in several areas, the practical differences between the two regimes are rather stark. Schneiderman begins by describing the intended legislative omnipotence under the Canadian regime compared to the sentiment in the United States that excessive concentration of power is a dangerous thing.¹⁰ It is from this launching point that Schneiderman outlines the ways in which Canadian constitutional culture is much more centralized compared to that of the United States.

6. Although the Conservative Party of Canada under Stephen Harper's leadership made some modifications to the legislation, these sections are largely the same as they were at the time of this case. See *Canada Elections Act*, SC 2000, c 9, ss 350, 351.

7. *Harper*, *supra* note 5 at paras 26-27.

8. John F Kennedy, "Address to Canadian Parliament" (Delivered at the House of Commons, Ottawa, 17 May 1961), online: <www.jfklibrary.org/Asset-Viewer/Archives/JFKPOF-034-027.aspx>.

9. See Paul Bender, "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison" (1983) 28:4 McGill LJ 811.

10. Schneiderman, *supra* note 1 at 25.

Schneiderman acknowledges Harper-era efforts to promote the perception that the prime minister, not unlike the US president, is an elected, separate, and distinct branch of government.¹¹ This would not be the most difficult task for a sitting prime minister insofar as over half of Canadians already believe the prime minister is directly elected, rather than appointed by the Governor General.¹² Schneiderman argues that in recent times we have seen a further centralisation of policy-making, marginalisation of Parliament, and the personalisation of leadership—all of which suggest a presidentialisation of Canadian authority (*i.e.*, the executive branch).¹³ Indeed, rebranding federal authority as the “Harper Government” is in itself an indication of the administration’s preoccupation with agenda-setting.¹⁴ Schneiderman goes on to point out that this process of presidentialising Canadian authority might actually only be public perception. In reality, Canadian constitutional power is already much more centralised compared to the United States, and nowhere is this more evident than through the government’s use of the prorogation power, perhaps reaching its zenith (or nadir, depending on your view) in the prorogation of Parliament by the Harper Government throughout its mandate.

I. PROROGUING PARLIAMENT

While the *Constitution Act 1867*¹⁵ does articulate separate branches of government, including an executive separate from a legislative branch, scholars argue that constitutional practice is much different and that these two branches have become inextricably fused.¹⁶ Peter Hogg, Canada’s preeminent constitutional scholar, has gone so far as to say that there simply is no separation of powers in Canada.¹⁷ Schneiderman argues that this separation is more of “a textual façade rather than an accurate portrayal of parliamentary practice.”¹⁸

The events began innocuously enough. It had been known for some time that the handing over of detained persons to Afghan authorities could mean

11. *Ibid* at 79.

12. *Ibid*.

13. *Ibid* at 89.

14. *Ibid* at 92.

15. *The Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5.

16. See Schneiderman, *supra* note 1 at 118.

17. *Ibid*.

18. *Ibid*.

torture or death.¹⁹ After a motion for the production of documents introduced by the Liberal Party passed in Parliament, the Harper Government felt it needed to act. Either as a means of avoiding having to comply with the motion or, worse, facing contempt of Parliament, it asked the Governor General to prorogue Parliament (the second time it had done so in as many years). There was considerable outrage at this seemingly callous act; protests took place on Parliament Hill, and some called for clear, enforceable rules that would govern the practice. However, under the separation of powers concept, a veneer that satisfied the majority of the Canadian electorate, the Harper Government would not face a constitutional crisis.

While prorogations have been commonplace throughout Canadian constitutional history, having occurred no less than 121 times (including Harper's four prorogations), those exercised under the Harper Conservatives appeared to be a patent abuse of power as compared to preceding governments. Pierre Trudeau exercised his power to prorogue eight times, but almost all of them lasted less than a day; Brian Mulroney prorogued twice in nine years, for a total of 64 days; and while Jean Chrétien's last prorogation lasted substantially longer, his first three totaled just 37 days.²⁰ Harper's last two prorogations alone totaled 114 days and were the first since 1873 to occur in the context of a Parliamentary controversy.²¹

These prorogations were not the only element pointing to a much more controlling, "presidential" style of Parliament under the Harper-era government. The Upper Chamber would be another area where Stephen Harper would leave his mark.

II. ELECTING THE SENATE

Equally as consequential as these abusive prorogations during the Harper era was the appointment of 18 new Conservative senators to the Upper Chamber, including three who have since been disgraced for various misdeeds: Mike Duffy, Pamela Wallin, and Patrick Brazeau.²² It was a sudden about-face, as from 2005 onwards, Harper had refrained from appointing any new senators in the hopes of implementing a new provincially administered elections approach. However,

19. *Ibid* at 114.

20. Nelson Wiseman, "The use, misuse, and abuse of prorogation," *The Hill Times* (1 March 2010), online: <www.hilltimes.com/2010/03/01/the-use-misuse-and-abuse-of-prorogation/13383/23383>.

21. *Ibid*.

22. Schneiderman, *supra* note 1 at 176.

as Schneiderman explains, the threat of a coalition government resulted in a flurry of appointments.²³

In this chapter of the book, Schneiderman identifies the different ways in which the Harper Government attempted, and largely failed, to mimic American congressional politics. With its genesis in Reform Party proposals for a “Triple-E Senate”—“elected,” “equal,” and “effective”—Schneiderman argues that the Harper Government failed to consider how this kind of reform to the Upper Chamber would impact the lower one.²⁴ While the Supreme Court of Canada has never assessed whether the Senate actually performs its intended function (*i.e.*, the protection of sectional and provincial interests), it has denied the capacity of the federal government to unilaterally abolish or replace the body.²⁵

There have been a number of historic inflection points attempting Senate Reform, including the failed attempts of the Meech Lake (1987) and Charlottetown (1992) Accords. The Harper Government made its own contribution to this history. After appointing 18 new senators in 2008, Harper renewed with vigour his attempts at institutional reform: the imposition of senatorial term limits and “consultative” elections. Had his attempts been successful, the Canadian model would have resembled the American Senate more than ever. These aspirations came to an end with the 2014 *Reference re Senate Reform*, where the SCC ruled that any amendment that engages provincial interests, including those related to the Senate, is beyond the unilateral capacity of the federal government (*i.e.*, the power of the federal government to unilaterally amend the constitution).²⁶ So, while the Harper Government could legislate some of these attempted reformations, without entrenching Senate reform into the Constitution any such changes would be vulnerable to amendment or repeal after Stephen Harper’s tenure as prime minister.²⁷

III. APPOINTING SUPREME COURT JUSTICES

Another area where the Harper Government attempted to edge Canadian constitutional culture closer to that of our neighbours to the south is in the area of the judiciary. Schneiderman begins this discussion with an overview of the spat

23. *Ibid* at 177.

24. *Ibid* at 179.

25. See *e.g. Re Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 at 64, 102 DLR (3d) 1.

26. *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 SCR 704.

27. Schneiderman, *supra* note 1 at 225.

between Stephen Harper and Chief Justice Beverley McLachlin regarding the nomination of Justice Marc Nadon. In an unprecedented event, Prime Minister Harper and then Justice Minister Peter MacKay publicly criticised Chief Justice McLachlin's decision to inform the prime minister that his potential nomination of Justice Nadon may present a legal conflict. Importantly, this advice was provided before Nadon was actually appointed. It later came to light that the prime minister's staff at the time had to talk him down "from launching a full, public assault on the impartiality of the court."²⁸

The Supreme Court and Stephen Harper had already not been on the best of terms. During his time in office, the SCC struck down a wide range of laws and regulations, effectively standing in the way of the Harper Government's attempts at legal reform. These included, but were not limited to, mandatory minimum sentencing, credit for prison time served, physician-assisted death, prohibitions against sex work, and safe injection sites.²⁹

Since as early as 2006, the Conservatives had attempted to address the tenuous relationship between the executive and the judicial branches of government by further flirting with American constitutional culture in introducing judicial confirmations as part of the appointment process. The Harper Government, and Prime Minister Harper himself, were not pleased with what they saw as the usurpation of the powers of Parliament by the SCC.³⁰ Whereas the Harper Government perceived judicial hearings as a means to combat "judicial activism" and its extremes, the legal community feared the overt politicisation of a process which should be conducted under a purely legal framing.³¹

In examining the five nomination processes since 2006, Schneiderman finds that they neither served to elicit the judges' perspectives on law, nor served any educational function, generally, for the Canadian people. Ultimately, argues Schneiderman, anything that causes people to pay attention to courts, even controversial confirmation processes, tends to reinforce the institutional legitimacy of the judiciary—which is a good thing.³² While efforts were made by the Harper Government to move towards a US model, the politicisation of the judicial appointment process has not been a successful endeavour.

28. Tasha Kheiriddin, "Law and Order in the Harper Years" in Jennifer Ditchburn & Graham Fox, eds, *The Harper Factor: Assessing a Prime Minister's Policy Legacy* (Montreal & Kingston: McGill-Queen's University Press, 2016) 196 at 206.

29. Schneiderman, *supra* note 1 at 207.

30. *Ibid* at 208.

31. *Ibid* at 251.

32. *Ibid* at 280.

Schneiderman concludes that despite various Harper Government initiatives, including those that have threatened elements of Canadian constitutional culture, these efforts have been largely unsuccessful.³³ While Schneiderman does not argue that we should be moving towards the US model, he does maintain that some change is required. He worries about the mass of discretion inherited by the prime minister associated with the prerogatives, and the concentration of power in the Prime Minister's Office ("PMO"). His advice is that of Edmund Burke's: constitutional change in Canada requires a "vigorous mind, steady persevering attention, and various powers of comparison and combination, and the resources of an understanding fruitful in expedients."³⁴

Ultimately, Schneiderman offers a clear-eyed perspective on the degree to which our Parliamentary democracy compares to the perceived centralisation of power in the Office of the President of the United States. In doing so, he exposes an important feature of our alleged balance of powers system and points out that power may not be as dispersed as our Parliamentary infrastructure suggests. Insofar as Prime Minister Justin Trudeau's Liberals were elected on the promise to fragment the power that Stephen Harper concentrated in the PMO, they would be well-served in looking back to the previous administration's approach to these formative components of Canada's constitutional democracy.

33. *Ibid* at 290-91.

34. *Ibid* at 295.