

The Conservative Assault on Parliamentary Government

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CONSTITUTIONS ORGANIZE and constrain the exercise of political authority. They name the institutions through which that authority is to be deployed, and they define the parameters outside of which authority should not stray. Charters of Rights are the most visible such parameters. But they coexist with others.

There is a variant of political conservatism according to which the constraints on the exercise of political authority cannot all be explicitly codified. Rather, such constraints are embodied in traditions, customs, and habits, which crystallize the accumulated wisdom and virtue of political predecessors. For a conservative of the kind I am describing, such constraints, rooted in history rather than codification, have normative weight. That is, a conservative political agent would see himself as bound by these constraints just as powerfully as he is by the codified rules of political practice.

Another way of putting this point is that there are both written, and unwritten constitutional norms. Our constitutional system is a hybrid one, consisting of both written and unwritten norms.

That such rules coexist, the latter complementing the former, is actually a requirement of the Westminster form of parliamentary democracy we have inherited. Unlike our neighbours to the South, the written Constitution is not the only source of constraint upon the use of political authority. The US Constitution was built on the assumption that it was important to the preservation of liberty from overweening political authority to economize upon political virtue. The Founders of the American constitution built numerous checks and balances into the political system itself, rather than relying on the internalization by politicians of customary norms. Given the status of the United States as a new kind of political system, one built upon an explicit rupture with the past, that may very well have been the only sensible solution to the problem of containing political authority.

Checking political authority through institutional checks of course has its costs. I am after all writing these lines minutes before the equipoise created by the US Constitution between different orders of government is about to give rise to a shutdown of governmental operations!

Our democracy does not explicitly burden the exercise by political authorities in quite the same way. It is often said, for example, that the Office of the Prime Minister in a Westminster-style democracy is, when the government party holds a majority of seats in the legislature, the most concentrated site of political authority in any democratic system. Indeed, the combination of the lack of a real executive branch that might check the legislature, on the one hand, with the institution of party discipline that makes the prime minister

sovereign over the legislature, on the other, is indeed a recipe for concentration of political authority unrivalled in any democratic political system of which I am aware.

This is where traditional constraints on the exercise of political authority, voluntarily taken on and internalized by office holders, and in particular by the prime minister, are of great constitutional importance. Such constraints, rooted in the history of the exercise of political authority, in effect prevent our system from lapsing into the kind of tyranny that the relative lack of checks, combined with party discipline, at least in principle allow.

The government of Stephen Harper, despite its claim to allegiance to political traditions, exemplified most obviously by our prime minister's mawkish celebration of the institution of the monarchy, shows absolutely no signs of caring about these traditional constraints. This unconcern is surprising, coming from a political party that still calls itself "conservative," and which, one would have thought, would be more favourably inclined than politicians of more tradition-defying, leftist stripe, toward the normative pull of historically channeled wisdom.

Two examples that illustrate our Prime Minister's obliviousness toward the traditional constraints that have over time effectively constrained the power vested in the office of the prime minister come to mind.

First, Stephen Harper has made a usage of the prime minister's power to prorogue parliament that has raised eyebrows, and that has attracted the opprobrium of even such Conservative-friendly news outlets as *The Economist*. But it is worth pondering exactly what was wrong with some of the usages that the Conservatives under Stephen Harper have made of this power.

Remember that Stephen Harper prorogued Parliament in 2008 and 2009 in contexts that strongly suggested that he was making a tactical use of the power, one designed to take some of the momentum away from a political opposition that seemed, at least in the 2008 case, prepared to topple his minority government. In 2008, he successfully defused the threat posed to his government by a coalition of opposition parties, led by the federal Liberals, and in 2009, he put an end to persistent questioning on the part of the opposition for access to information about Canada's part in the mistreatment of prisoners captured in Afghanistan by calling off the affairs of parliament until after the feel-good Vancouver Olympics were over.

What is wrong with this use of the political power to prorogue? Tradition has it that the power is used not to allow the prime minister to place himself at a tactical advantage relative to his political opponents. Rather, its use should be reserved for those occasions in which the prime minister judges that the legislative agenda of the governing party, as spelled out in the previous speech from the throne, has been exhausted. Prorogation dissolves parliament in order to prepare it for a new set of marching orders.

Now, a new throne speech can obviously cast the governing party in a favourable light, by showing it to be infused with renewed vigour. But the

purpose of prorogation is not to provide it with a short-term tactical agenda, and it is certainly not to get it out of political hot water when it doesn't like the direction that parliamentary proceedings are taking in a context in which the government's legislative agenda is far from exhausted.

Another example has to do with the combined use of omnibus bills, and of the power to curtail debate in the legislature by invoking closure rules. Omnibus bills, which effectively require that all parts of a piece of legislation be passed, and which therefore often protect bills from effective contestation (for example, because they are bundled together with items that are matters of confidence) make it very difficult to discuss and to bring to the fore concerns over specific aspects of a piece of legislation. The invocation of rules of closure of parliamentary debate exacerbates the problem by cutting down on the time that is available to parliamentarians to examine what are, in the case of omnibus bills, often mammoth pieces of legislation.

The reason why parliamentary custom would have elected politicians make very parsimonious use of both powers is thus quite clear. Excesses in the use of these powers vested in the office of the prime minister make democratic debate well-nigh impossible, and allow the government to push its legislative agenda through with minimum scrutiny. When one reminds oneself of just how concentrated political power is in a majority government in the context of a Westminster-style democracy, the potential for tyranny is very great indeed.

Stephen Harper has made repeated use of omnibus bills and of parliamentary closure. He has thereby thumbed his nose at traditional constraints upon the exercise of political authority which, while not explicitly written down, are nonetheless crucial to our distinctive manner of reigning in overweening political ambition.

All this is to say that to earn the mantle of conservative, one should actually want to conserve something, and in particular, one should want to conserve the political wisdom and virtues that have come down to us from history. Stephen Harper and his government seem to be completely oblivious to the normative pull of political traditions and conventions. They are odd conservatives indeed. The consequences of their disregard for our political history may be far more momentous than we can even imagine.