"You Can't Always Get What You Want"[1]: Regime Politics, the Supreme Court of Canada, and the Harper Government

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Accepted wisdom suggests that the federal Conservative government under Prime Minister Stephen Harper had a combative relationship with the Supreme Court of Canada. Observers portray the government's loss record before the Court as distinctive and the Court as a significant roadblock to its policy agenda (Gerson, 2014; Ling, 2014). According to some commentators, "Harper became convinced that the Court had set itself up as the unofficial opposition" (Campion-Smith, 2015). Yet as Manfredi notes, this narrative about the Court-government relationship emerged in response to only a handful of cases (2015: 952). Two questions thus present themselves. First, was the Court's record under the Harper government (2006–2015) distinct from previous governments of the Charter period, specifically the Progressive Conservatives (1984–1993) and the Liberals (1993–2006)? Second, if there was something distinctive about the Harper period, what explains it?

This paper draws on the regime politics approach to the study of American judicial behaviour, which regards the Supreme Court as largely operating in a way that advances and protects the policy agenda of the existing dominant government coalition. It posits that until 2006, a bipartisan pro-Charter regime in favour of the Court's role and supportive of judicial power held government. The 2006 federal election signalled an electoral shift to a government hostile to the Charter project and judicial review

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generally. Under regime politics, a new, long-lasting governing coalition is normally able to sway the Court via the appointment of justices sympathetic to its policy agenda. However, the Harper Conservatives were unable to achieve this, in part due to the political culture surrounding Canada's non-partisan, less openly political appointments process and in part due to the durability of the pro-Charter regime's supporting players, including the legal community and the Court itself. The Harper government's attempt to disrupt the dominant regime was ultimately stymied by the Court. Applying this analysis, and drawing on the work of Skowronek (1997), I conclude that, at least as it applies to policies implicating the constitution, former Prime Minister Harper's tenure marked the "politics of preemption," an oppositional leader facing a resilient regime.

After laying out the contours of the regime politics approach, the paper examines how a regime politics understanding of judicial behaviour might operate in the Canadian context. I do not purport to test the regime politics thesis in the sense of promoting it as a full-fledged generalizable theory of judicial behaviour; instead, part of this paper's contribution is to examine the extent to which identifying the political regime and exploring its impact on Court decision making is heavily context-dependent and complex. Nor is this an examination of political regimes broadly construed: as explored below, and in a manner consistent with the judicial behaviour literature on political regimes, the focus is on the dominant coalition's understanding of the constitution, and the Court's role and its relationship with the elected branches of government. The paper's focus is on how judicial behaviour consistent with the regime politics thesis manifests in the case of Canada.

Two major findings are examined. First, there is evidence to support the basic core of the regime politics thesis as it relates to judicial politics. The Canadian Court rarely invalidates laws passed by the sitting government. Second, further analysis reveals that the Court's behaviour during the Conservative government's tenure was nonetheless distinctive. When issue salience—the relative importance of the policies affected—is considered, the Court's impact on the Harper government's policy agenda stands in sharp contrast to previous governments. When applying a proxy for issue salience (specifically, the presence of a policy issue in the governing party's election campaign platform), the analysis finds that the Conservative government is the only government of the Charter period to have specific platform promises declared unconstitutional by the Court. Further, the Conservative government is the only government in Canadian history to lose all of the constitutional reference opinions issued by the Court during its time in office. These findings are significant because they confirm that the uniquely fractious relationship the Harper Conservatives had with the Court went beyond rhetoric and implicated outcomes in a manner distinct from previous governments. Regime politics provides a

Abstract. Applying the regime politics approach to the study of judicial behaviour, which regards the Supreme Court as largely operating to preserve the policy agenda of the existing law-making majority, this paper evaluates the Court's behaviour during the Conservative government's tenure. There is evidence to support the basic core of the regime politics thesis. The Court rarely invalidates laws passed by the sitting government. Nonetheless, the Court's behaviour during the Conservative government's tenure was distinctive. Incorporating a measure of issue salience—the relative importance of the policies affected—into the analysis demonstrates the Court's impact on the Conservatives' policy agenda stands in sharp contrast to previous governments. It is the only government of the Charter period to have policies in its election platforms blocked by judicial review and the only government in Canadian history to effectively lose all of the constitutional reference cases it posed to the Court.

Résumé. En appliquant l'approche de la politique du régime à l'étude du comportement judiciaire, qui considère que la Cour suprême opère dans une large mesure pour préserver l'agenda politique de la majorité legislative en place, cet article évalue le comportement de la Cour pendant le mandat du gouvernement conservateur. Il y a de fortes indications à l'appui des fondements de la thèse de la politique du régime. La Cour invalide rarement les lois promulguées par le gouvernement au pouvoir. Néanmoins, le comportement de la Cour pendant le mandat du gouvernement conservateur s'est différencié de façon distinctive. L'introduction dans l'analyse d'un degré de saillance de la question- l'importance relative des politiques affectées - démontre que l'incidence de la Cour sur l'agenda politique des conservateurs se démarque nettement des gouvernements précédents. C'est le seul gouvernement, pendant la période de la Charte, dont les politiques dans ses plateformes électorales ont été bloquées en vertu d'un contrôle judiciaire et le seul gouvernement dans l'histoire du Canada qui a perdu pratiquement toutes les affaires judiciaires présentées devant la Cour en matière constitutionnelle.

useful lens of analysis to explain why the Court exhibited counter-majoritarian behaviour when it did.

Political Regimes and American Judicial Decision Making

In the American political science literature on judicial behaviour, the regime politics approach regards courts, particularly the Supreme Court, as largely operating in a way that advances and protects the policy agenda of the dominant governing coalition. Where judicial review is often portrayed as counter-majoritarian, a regime politics perspective suggests that courts often act in accordance with the views of at least some part of the current political regime. The regime politics approach emanates from Dahl's 1957 article "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," which challenged the conventional view of the US Supreme Court as a champion of minority interests and judicial review as regularly producing counter-majoritarian outcomes. According to Dahl, the Court rarely challenges the dominant political alliances reflected in national politics except during "short-lived transitional periods when the old alliance is disintegrating and the new one is struggling

to take control of political institutions," including the Court (293). Dahl's methodology was minimalist, examining whether instances of invalidation occurred within a four-year lifespan of the "lawmaking majority" that passed the legislation, and his conclusions continue to generate robust scholarship from both critics and defenders (Adamany and Meinhold, 2003). Nevertheless, a number of contemporary scholars of the Court have elaborated on Dahl's basic premise and challenged the enduring consensus about judicial decision making's counter-majoritarian nature (Graber, 1993, 2008; Rosenberg, 1991).

For proponents of the regime politics approach, the Supreme Court is not always (or even primarily) a check on majority power but an institution that defends and legitimates the policy agenda of the dominant governing coalition.

> In effect then, the exercise of judicial review can be understood as a mechanism for repealing outdated legislation from previous constitutional periods, for extending the values of the current political regime to recalcitrant local jurisdictions, for protecting the policy commitments of a current majority that are becoming democratically vulnerable, or for managing cross pressures within the dominant governing coalition. (Clayton and Pickerill, 2006: 1391)

As Gillman writes, "the influence of regime politics ensures that federal judges, especially at the top of the judicial hierarchy, will have concerns and preferences that are usually in sync with other national power holders" (2006: 108). Central to understanding how this operates in practice, proponents argue, are influences like the legal positions articulated by political elites during elections and in party platforms, the judicial appointments process, and positions taken by legislators, the solicitor general, state governments and interest groups (Clayton and May, 1999).

Critics of the regime politics approach argue that there is a tendency to overstate the impact of the political regime (Keck, 2007: 511). Hall (2012) finds that the Court frequently invalidates statutes when the ideology of the sitting regime and that of the Court diverges or when the ideology of the regime that enacted the law and the sitting regime converges. Graber writes that no one elaborating regime politics theory claims that the Supreme Court simply mirrors party platforms or consistently selects policies favoured by most political elites, rather, "at least some, often shifting, subset of the lawmaking elite supports particular judicial decisions or the trend of judicial decision making. The judicial power to declare laws unconstitutional often privileges some members of the present lawmaking majority at the expense of others" (2008: 364). While the regime politics approach may be best suited to explaining why national courts *uphold* acts of the national government, its proponents assert that it also explains

instances that seem like judicial independence from the dominant regime. Gillman (2008) notes that it would be perfectly consistent for courts to display policy-making independence over less salient issues or issues where the dominant coalition is divided.

In what follows, I explore how regime politics might impact judicial decision making in the Canadian context. Canada shares many features of the US, including the fact that it is a common law country and has a nine-member high court empowered with judicial review of a constitutionalized bill of rights; however, its parliamentary system, partial separation of powers, judicial appointments process, party system, and legal community all differ markedly from the American case. As I discuss below, this has important implications for understanding how the dominant governing coalition in the Canadian context might affect the Supreme Court.

Regime Politics in the Canadian Context

In certain respects it might be thought that a regime politics explanation of judicial behaviour could fit the Canadian case even better than the American one. Scholars have long noted that the parliamentary system—and especially conventions of practice and the relatively commonplace election of single-party majority governments in Canada—lends itself to a significant concentration of power in the hands of the executive, particularly the prime minister (Savoie, 1999). From the perspective of electoral politics, at least, identifying the dominant national coalition in Canada is easier because it tends to be less fragmented than in the US context, given the latter country's explicit separation of powers.

Regime politics is also consistent with academic and journalist portrayals of the dominant governing coalition in Canada reflected in the "Laurentian Consensus" (Bricker and Ibbitson, 2013; Cooper, 2009). The argument advanced by these commentators is that Canadian national politics have been dominated by elites from the Toronto, Montreal, and Ottawa region (the Laurentian elites), who advance a particular conception of Canadian political identity. Although analyses view the federal Liberal party as a key component of the Laurentian consensus, they emphasize the extent to which it is a bipartisan phenomenon.

Another factor is that the prime minister has historically enjoyed near complete discretion in the appointment of justices to the Supreme Court of Canada. The judicial selection process occurs behind the scenes and, unlike in the US context, there is no confirmation process for appointments. So long as the selection meets very basic statutory requirements under the *Supreme Court Act* (a prospective judge must have at least ten years good standing with the bar, in addition to specific requirements for the three "Quebec seats"), the prime minister can choose whomever he or she wishes.

These features of the Canadian system might imply that a governing national regime—particularly a long-lasting one—can easily ensure the Supreme Court is staffed with judges who share their disposition towards policies and the constitution. Complicating this story, however, is a significantly less partisan atmosphere around judicial appointments in Canada. Partisan opposition to the prime minister's appointments is rare. The lack of a confirmation process has likely helped to ensure a tradition of consensus and (at least the façade of) an apolitical process. Further, research suggests the party of the appointing prime minister has a limited or heavily conditional impact on judicial behaviour, at least from a straightforward ideological perspective (Ostberg and Wetstein, 2007; Songer and Johnson, 2007). This is not to say that a prime minister cannot have an impact on the Court's decision making through appointments. Former Prime Minister Pierre Trudeau famously sought "reformist" judges who would take the Court in a more assertive direction. Scholars argue that he succeeded in revolutionizing the Court, particularly with controversial decisions like considering the academic credentials of appointees important and elevating Bora Laskin to the chief justiceship after only three years on the bench in defiance of a convention that the most senior judge take the position (Hirschl, 2004: 80; Macfarlane, 2013a: 42). Nevertheless, there is little evidence that Canadian prime ministers have considered the ideological proclivities of their appointees to the extent modern American presidents do.

The regime politics approach does not deny judicial policy-making power or "activism"; rather, it posits that courts are unlikely to serve as serious rivals to the *current* governing regime. While there has been no study of the Canadian Court applying the regime politics approach, a number of other important works reflect its basic aspects. For example, regime politics shares with the Court Party thesis (Morton and Knopff, 2000) the idea that some parts of the dominant governing coalition actively support the utilization of judicial power in order to advance or support its own interests. Under the Court Party thesis, the outcomes reached by the Court are sustained by the organized collective effort of these interests and they receive government assistance. For example, they have been directly aided by federal governments friendly to the "Charter revolution," particularly through the Court Challenges Program, which provided funding to language and equality rights advocates to launch challenges against government legislation and policy. Similarly, in his comparative study on the origins of judicial empowerment, Hirschl (2004) argues that a strategic interplay between three key groups—political elites, economic elites, and judicial elites and national courts—contribute to a "hegemonic preservation" of the ruling elites' preferred policy preferences. Hirschl finds that in countries with recently enacted bills of rights, national high courts are strongly inclined to rule in accordance with the expectations of ruling elites.

Evidence for the regime politics approach

In this section, I evaluate evidence for the "core" of the regime politics thesis in Canada by examining the extent to which the Supreme Court invalidates or alters policies passed by the government in office at the time of the decision. Despite the complexity described above, there is evidence that the Canadian Court decides in a manner consistent with the regime politics approach.

At the broadest level, in cases implicating statutes on Charter of Rights grounds, the law is upheld in nearly two-thirds of cases (Manfredi and Kelly, 2004). More significantly, in instances where the Court has invalidated or altered federal legislation on Charter grounds, it has most often done so with respect to laws passed under a previous government. In the context of the three long-serving governments since 1982 (under the Progressive Conservative party from 1984 to 1993, the Liberal party from 1993 to 2006, and Conservative party from 2006 to 2015), 44 of 51 findings on constitutionality by the Court that invalidated federal legislation involved laws passed under a previous regime. As Manfredi (2015) notes, only one out of 22 invalidations during the PC government and only two of 17 instances of invalidation under the Liberal government were enacted under those respective governments (*Baron v. Canada*, 1993; *R. v. Hall*, 2002; *United States v. Burns*, 2001). Meanwhile, four of 12 invalidations under the Harper government involved legislation it enacted (see discussion below).[2] This is strong, albeit simplistic, validation of the idea, as formulated by Dahl, that the Supreme Court rarely interferes with the policy agenda of the current governing regime. Although the numbers are small, there is some confirmation that the Harper government suffered more direct losses before the Court on this particular score than predecessor governments. Further, this has happened as the Court's caseload, and the percentage of Charter cases as a proportion of that caseload, have both fallen. The Court typically heard roughly 90 cases per year in the 1980s, 75 per year in the 1990s, and closer to 65 per year during the Harper period, while Charter cases represented over 30 per cent of that caseload in the late 1980s and the 1990s and less than 20 per cent over the last 15 years (McCormick, 2015: 175–76). Simply put, the recent spate of Charter losses are not a result of an increase in Charter litigation reaching the top court.

If the timing and nature of legislative invalidations is one indicator of the relevance of regime politics, another important one is the government's reaction to the Court's decisions, particularly in the guise of non-compliance with decisions (Clayton and May, 1999: 248). In Canada as in the United States, formal imposition of constraints on the Court, such as the threat of removal from office or changes to the institution's size or jurisdiction, are exceedingly rare. Although Canadian legislatures have a unique

formal mechanism to respond to judicial decisions under certain sections of the Charter in the form of the "notwithstanding clause," in practice, the federal government has never employed it (Kahana, 2001). From a regime politics standpoint, the lack of use of section 33 might be regarded as tacit support for judicial power.

A more comprehensive assessment of the federal government's compliance with the Court's decisions is found in the extensive scholarly debate about Charter "dialogue." Proponents of dialogue argue that legislatures have plenty of latitude to respond to judicial decisions on constitutionality, not only by virtue of section 33 but also via section 1 of the Charter, the "reasonable limits" clause (Hogg and Bushell, 1997). Yet systematic study of legislative responses to Supreme Court invalidations suggest legislatures normally accept the policy prescriptions laid out by the Court, either by taking no action following an invalidation or by repealing or amending the legislation in accordance with the dictates of the decision. At the federal level, Parliament has attempted to enact legislation that *departs* from the policy prescription expressed by the Court following only 14 per cent of cases involving a statutory invalidation (Macfarlane, 2013b). The lack of a frequent, competitive "dialogue" following judicial decisions is further evidence in favour of the regime politics approach.

As noted above, simply counting cases provides a limited picture as to whether the justices are deciding in accordance with a dominant coalition. For the first few years of any new government, the cases decided by the Supreme Court are invariably going to involve laws passed by previous governments, as it typically takes several years for cases to reach the top of the judicial hierarchy. Similarly, although the Canadian Court has a retirement age of 75 and appointments are thus more frequent than in the US, since 1982 prime ministers nonetheless enjoy fewer than one judicial appointment per year. No prime minister in the period since the Charter's enactment has been able to appoint more than four justices in the first Parliament they held office. Indeed, it was nearly four years before Prime Minister Jean Chrétien was able to appoint his first. To the extent the Court's composition matters, the influence of the previous regime may persist for some time during the early tenure of a new one.

It is worth reiterating here that the dominant regime is not simply the governing party; as noted above, regimes as represented by the Laurentian Consensus idea can be bipartisan in practice. This is evident as it relates to the respective parties' general values and their approach to the Charter and other aspects of the constitution. Mulroney's Progressive Conservative government explicitly sought to emulate much of the Liberal Party's approach to governing by keeping "close to the ideological centre by embracing Liberal-implemented universal social programs as a 'cornerstone to our party's philosophy' and 'a sacred trust'" (Bickerton et al., 1999: 39). Mulroney was also a fervent champion of the Charter of Rights and the

Supreme Court's role in exercising its powers of judicial review.[3] Further, in a bid to win favour with the socially progressive interest groups that support the Charter project, it was Mulroney who expanded the Court Challenges Program to include government funding for equality rights challenges (Brodie, 2002: 100). In fundamental respects, the Mulroney government shared the Trudeau and Chrétien governments' general values and attitudes towards the Supreme Court.

By contrast, the Harper government's critical view of the Charter and of judicial power distinguishes it from its predecessor Liberal and Progressive Conservative governments. Writing in 2000, Harper states in a national editorial, "I share many of the concerns of my colleagues and allies about biased 'judicial activism' and its extremes. I agree that serious flaws exist in the Charter of Rights and Freedoms, and that there is no meaningful review or accountability mechanisms for Supreme Court justices" (Makin, 2011). Yet after eventually making eight appointments to the Court, there is little evidence the justices were willing to decide in accordance with the government's wishes on a host of policies central to the Conservative's electoral platform, particularly its "law and order" approach to criminal law. In the next section, I explore two sets of salient constitutional cases and examine how the regime politics approach might help explain the Harper government's relationship with the Supreme Court.

The Conservative Government and the Supreme Court

Issue salience

While the core of the regime politics thesis is that courts generally refrain from counter-majoritarian behaviour in opposition to the current regime, a relevant consideration is the relative importance of specific policies to the government of the day. Courts are sometimes strategic actors (Macfarlane, 2013a), and may be more willing to affect policy when the governing party is divided or not particularly committed to a particular action. By contrast, and consistent with the regime politics thesis, courts may be even less willing to invalidate or alter laws that are particularly important to the current lawmaking majority. When comparing the Harper government to its predecessors it is therefore important to consider the relative salience of the policies affected.

In the judicial behaviour literature issue salience is often gleaned from the extent and prominence of news coverage. Hall writes that the "most prominent measure of issue salience" in the American political science literature uses whether a Supreme Court ruling appeared on the front page of the *New York Times* (2012: 906). This proxy does not transfer very well in the Canadian context, where the *Globe and Mail*, the only national

newspaper in Canada during the period examined (1984–2015), has sometimes used poster-style front pages in its Saturday editions. This means that many of the most prominent constitutional cases decided by the Court—sometimes released on Fridays—do not make the "front page" of the country's newspaper of record, making salience comparisons across time using this measure impossible.

This paper considers another proxy for issue salience: policies that are part of the party's electoral platform. The campaign platform measure may have even more relevance for examining the political regimes approach than news media measures because it indicates directly the policy desires of the particular governing regime. While this measure does not cover all favoured policies—governments may enact legislation in response to new or unexpected policy challenges, and they may also support many laws enacted under previous regimes—the presence of a policy promise in a campaign platform is arguably the clearest indication of its support by the party that has formed government.

I cross-referenced the policies at stake in all 51 Supreme Court cases that invalidated or altered federal legislation on Charter grounds with all of the governing party's campaign platforms since the election that first won them office. A review of the relevant party platforms for the PC (1984 and 1988) and Liberal (1993, 1997 and 2000) governments failed to identify *any* cases that vetoed policies reflected in those platforms. The following analysis of the Harper government's record before the Court thus focuses on prominent Charter cases implicating a part of the governing party's platform. The analysis of cases in this section also examines all constitutional reference opinions rendered by the Court since 2006. References are typically recognized as involving many of the most important questions of constitutional law (Hausegger et al., 2014: 199). While governments will employ reference questions strategically, sometimes to shift politically sensitive decision making to the Court, in many instances, as discussed below, the issues at stake are deeply important to the government posing the reference. As a result, the set of cases analyzed below broadly covers two key areas of the Conservative policy agenda: criminal justice and institutional change.

Criminal justice cases

The Court's approach to criminal justice cases reveals a considerably more counter-majoritarian approach under the Harper government than the preceding aggregate analysis reveals, for a number of reasons. First, as noted above, a focus on when legislation subject to judicial review was passed does not clarify whether the current government favours the policy at stake. In many instances, a new government will support existing legislation even though it was passed by a previous government. For example,

the Harper government vigorously contested recent Charter challenges against the Criminal Code's provisions relating to prostitution (*Canada v. Bedford*, 2013) and assisted suicide (*Carter v. Canada*, 2015).

Second, examining legislative invalidations does not account for other, major government policies subject to judicial review. Executive decisions not reflected by statute but nonetheless subject to judicial review on Charter grounds are often a significant part of a government's policy agenda. Court decisions implicating a government's executive prerogative powers over foreign affairs, such as the ruling that the federal government's long-term refusal to request the return of Omar Khadr, the lone Canadian held by the United States at Guantanamo Bay, violated his Charter rights, involved a highly salient issue and marks a significant loss for the government (*Canada v. Khadr*, 2010).

Similarly, the federal health minister's decision to refuse to extend an exemption under the *Controlled Drugs and Substances Act* for Insite, Vancouver's supervised drug injection site (established under the previous Liberal government) resulted in a Charter claim that the refusal violated Insite's clients' right to life, liberty and security of the person. The Court found that while the act and the provision allowing ministerial discretion were constitutional, the minister's decision in this instance was unconstitutional (*Canada v. PHS Community Services Society*, 2011). As a result, the Harper government's desire to shut down Canada's only supervised drug injection facility—in keeping with its broader antipathy to harm reduction in favour of a crime and punishment approach to drug policy—was directly stymied by the Court.

These cases share in common the Court's repudiation of policies adopted in line with the Harper government's "law and order" agenda, which has been a core feature of all of the Conservative party's electoral platforms since 2004. They join Charter decisions by the Court that invalidated legislation passed under the Harper government, including reverse-onus provisions in the Criminal Code as part of its *Tackling Violent Crime Act* (2008) concerning the police use of breathalyzers (*R. v. St-Onge Lamoureux*, 2012), retrospectively abolishing early parole under the *Abolition of Early Parole Act* (2011) (*Canada v. Whaling*, 2014), mandatory minimums inserted into the Criminal Code under omnibus legislation (*R. v. Nur*, 2015), and changes to regulations affecting the use of medical marihuana (*R. v. Smith*, 2015). Abolition of early parole and mandatory minimums were specific promises in several CPC platforms (CPC, 2004: 37; CPC, 2006: 22; CPC, 2008: 36–38; CPC, 2011: 50). Coupled with lower court rulings invalidating other "law and order" laws, such as those imposing mandatory "victim's surcharge" on those convicted of offences (Seymour, 2014), which was also a specific campaign promise (CPC, 2011: 47), the Harper government saw many elements of its criminal law agenda vetoed by judicial review. Notably, many of these decisions

came after the Harper government obtained majority government status in 2011; there is no evidence to support that the Court's behaviour changed depending on the government's minority or majority status.

The Conservative platform promises relating to justice matters, although arguably more robust than predecessor governments, are not especially unique. Previous governments had also promised and passed new criminal laws and tougher sentences (Progressive Conservative Party, 1988: 58–59), including in sensitive areas like crimes committed by youth (Liberal Party of Canada, 1993: 84). It is also worth noting that the Supreme Court had for many years been deferential to the federal government on the issue of mandatory minimums, upholding existing mandatory minimums in several cases and exhibiting a reluctance to apply the "reasonable hypothetical" in such cases (Puddister, 2016b; Roach, 2001), an approach it reversed in the *Nur* case. So while the Harper government may have been rolling the proverbial constitutional dice when it enacted laws abolishing early parole, it is difficult to characterize all of its policies as a marked departure from previous governments. Yet, in terms of its record before the Court, it fared much worse (for an examination of the Harper government's arguments in criminal justice cases, see Hennigar, 2017).

Institutional reform cases

The Harper government has also had a number of highly salient policies or policy proposals vetoed by the Court in non-Charter cases, particularly through reference cases. Senate reform, specifically the implementation of "consultative elections" for Senate appointments and the imposition of term limits for senators, was a core element of the Conservative party platform in each of the four federal elections from 2004 to 2011. The government argued that Parliament enjoyed unilateral authority to implement a consultative elections process (either by itself or administered by the provinces) and to impose term limits of eight years on senators. It also argued that abolition of the Senate required only the "general amending formula" (resolutions passed by Parliament and at least two-thirds of the provinces) rather than the unanimity formula (to which all ten provinces would have to agree). On each of these points, the federal argument lost in a unanimous opinion by the Court (*Reference re Senate Reform*, 2014). In effect, by mandating the consent of the provinces for such changes, the Court's decision prevented the government from achieving its desired reforms. Notably, the Court achieved unanimity despite the presence of five Harper appointees.

The Harper government also lost in a unanimous reference decision stating that it did not have the authority to establish a national securities regulator (*Reference re Securities Act*, 2011). The creation of a regulator was a campaign platform promise in 2011. A year prior, in another division of powers reference, much of the *Assisted Human Reproduction Act* was

declared invalid, although that 2004 law had been passed by the previous government (*Reference re Assisted Human Reproduction Act*, 2010).

The only other Supreme Court reference case implicating the federal government during Harper's tenure was the result of an unprecedented dispute over an appointment to the Court itself. Marc Nadon, at the time a supernumerary judge of the Federal Court of Appeal, was appointed to fill one of the three seats designated for justices from Quebec under the *Supreme Court Act*. Nadon's appointment was challenged as not meeting the requirements under the act that Quebec justices be appointed from either the bar of the province or from the Quebec Superior Court or Court of Appeal. The government then referred the matter to the Supreme Court, after passing "declaratory provisions" in the act specifying that a judge is to be considered an advocate from Quebec if they had been a member of the bar for at least ten years (thus reading the provision specific to Quebec in tandem with the general eligibility requirement that applies to all of the Court's justices). The Court was asked to clarify the statutory eligibility rules as well as determine whether Parliament had the unilateral authority to amend the *Supreme Court Act*. In a 6–1 judgment, the Court ruled Nadon ineligible and determined that the eligibility requirements for Supreme Court justices under the act were part of the Constitution and thus changes to them require formal constitutional amendment under the unanimity formula (*Reference re Supreme Court Act*, 2014).

In the aftermath of the ruling, the Prime Minister's Office (PMO) and the Supreme Court engaged in an unprecedented public relations spat. The PMO issued a press release stating that Chief Justice Beverley McLachlin phoned the minister of justice and the prime minister during the appointments process to warn them about the potential legal issue involving the eligibility of Quebec justices. Many commentators regarded the press release as an incendiary attack on the reputation of the chief justice because it suggested a phone conversation would have been "inadvisable and inappropriate" (Kennedy, 2014). The Court issued its own statement in response to the PMO's assertions defending the chief's calls. The back and forth received considerable media attention and even attracted international attention after the International Commission of Jurists demanded the PMO apologize for potentially damaging the Court's independence (Fitz-Morris, 2014). The subsequent release of the Harper government's shortlist for the vacancy revealed a majority of the candidates were Federal Court judges like Nadon. According to one account, this illustrated "how the government, though aware of the risks, worked the selection process to find a more conservative judge than it believed was available in Quebec" (Fine, 2014).

The Harper government's fractious relationship with the Court and its significant record of losses in highly salient constitutional cases evinces considerable counter-majoritarianism by the Court. In fact, the Harper government lost every one of the constitutional reference opinions heard by the

Court during its tenure, something that has never happened to any other government in the history of Confederation.[4] This record provides context for the controversy over the appointment of Nadon and raises the spectre of increased partisanship surrounding appointments.

How does regime politics help us to understand the distinctive counter-majoritarian behaviour by the Court during the Harper government's tenure? As explored in the next section, the Court's behaviour, and the Harper government's inability to pull it into its own sphere of thinking vis-à-vis the Constitution, leads to what regime politics scholars have called "counter-regime" behaviour (Clayton and Pickerill, 2006: 1393). The Conservative government marked a departure—an electoral shift, as political regimes scholarship describes it—from the entrenched "Charter regime" represented by the legal community and interest groups who support it and, until 2006, received the support of successive federal governments.

The "Charter Regime" and Counter-Regime Judicial Behaviour

An important aspect of explaining the Harper government's record before the Court centres on what constitutes the dominant political regime. The Harper government is the first of the Charter period that does not support judicial power as it has been exercised since 1982. By contrast, it is appropriate to describe the Trudeau, Mulroney and Chrétien governments and their generally centrist brokerage-style politics as comprising one constant regime, the "Charter regime." The modern Conservative Party is the result of a union of the former Progressive Conservatives and the Reform Party/Canadian Alliance, the latter of which was a regional, conservative ideological party. While many policies the Reform party favoured (such as ending official bilingualism) were moderated under Harper's leadership of the Conservatives, the party's distrust of the courts and general antipathy towards the Charter persisted (Macfarlane, 2017). State institutions, including the courts, were regarded as "Liberal" institutions by the Conservative party (Wells, 2006: 231).

Whether one considers the "Liberal" label apt or not, the legal community and those interest groups that support the Court's general approach under the constitution remained a deeply entrenched part of the Charter regime even during the Conservatives' tenure in government. In 2006, Harper complained that judges appointed by the federal Liberal government were sometimes activists promoting a social agenda (Galloway, 2006). Notably, the Harper government also cancelled the Court Challenges Program soon after taking power. This was one of the central institutional features of government support (under both Liberal governments and the Mulroney Progressive Conservatives) for interest groups that have sought

social change under the constitution (Brodie, 2002; Morton and Knopff, 2000). The federal Conservatives may have been the governing party, but the preceding analysis suggests they were not the only significant force within Canada's political regime when it comes to the constitution.

In the American context, Skowronek's regime-based typology of presidents is instructive. Examining presidents as agents of political change, Skowronek questions the grouping of presidencies into simple historical periods. For example, he writes that "John Adams and Thomas Jefferson shared a set of institutional resources and presumptions about leadership that distinguish them in important ways from presidents in later periods. Yet Adams' presidency ruptured the political regime and shattered the previously dominant governing coalition, while Jefferson forged a new regime, one that would stand as the font of political legitimacy for decades" (1997: 7–8). In Skowronek's view, the political authority of a president "turns on his identity vis-à-vis the established regime; warrants for exercising the powers of the office vary depending on the incumbent's political relationship to the commitments of ideology and interest embodied in pre-existing institutional arrangements" (34). Thus, incoming presidents are either affiliated with or opposed to the existing regime, and they either enjoy the authority and power to displace it or not. Skowronek sets out a typology as follows: an affiliated leader facing a resilient regime faces the politics of articulation; an affiliated leader facing a vulnerable regime faces the politics of disjunction; an oppositional leader facing a vulnerable regime faces the politics of reconstruction; and, finally, an oppositional leader facing a resilient regime faces the politics of pre-emption.

As the preceding analysis reveals, Stephen Harper was ultimately a premptive leader, at least insofar as it applies to his agenda as implicated by the constitution. As Skowronek describes such leaders, "unlike presidents in a politics of reconstruction, their repudiative authority is manifestly limited by the political, institutional, and ideological supports that the old establishment maintains" (43). This effectively describes the Court's role in negating elements of the Harper government's agenda.

One objection to this notion might come from a strictly legal perspective. Critics might simply assert that, rather than reflecting the policy preferences of the Court's justices as protective of the established regime, the Harper government routinely introduced policies that were patently unconstitutional, in contrast to previous governments. This paper adopts as a basic premise the legal realist view that, contra legal positivism, the law is not a product of a closed system in which "correct" decisions can be reached via the application of legal rules. To assume otherwise requires us to discount the political nature of judicial decision making in Canada as established in a host of studies (Macfarlane, 2013a; Ostberg and Wetstein, 2007). Moreover, the presence of dissenting opinions in several of the highly salient cases under the Harper government (*Reference re Supreme Court*

Act, 2014; *R. v. St-Onge Lamoureux*, 2012; *R v. Nur*, 2015) disputes the notion that these policies were blatantly or objectively unconstitutional. Even the Court's unanimous opinions, such as the Senate reform reference, have been subject to effective jurisprudential criticism (Morton, 2015; Macfarlane, 2015).

The judicial appointments process is a central element of how new regimes effectively influence the Court. The culture of appointments in Canada, particularly the extent to which it has tended to avoid explicit partisan contestation, complicates this narrative. Importantly, constitutional experts have noted there were few "like-minded" judges for the Conservative government to choose from (Fine, 2014). While greater study of this phenomenon is needed (there appears to be a lack of scholarship on this aspect of the broader legal culture in Canada), one explanation for this is undoubtedly related to Canadian law schools as incubators of the legal community's culture and attitudes towards judicial power and the Charter. In the United States, the conservative movement over the last several decades, particularly via organizations like the Federalist Society, has undertaken a concerted effort to engage with and transform American legal culture directly within law schools against what is regarded as a dominant liberalism (Avery, 2013; Teles, 2010). There is no equivalent conservative movement against the dominant small-l liberalism in Canadian law schools. Legal scholars and the legal profession in Canada tend to be very supportive of judicial power and the Court's general approach to the Charter.[5] In the view of some commentators, "there are virtually no voices in the Canadian legal academy who consistently and publicly advance arguments that are recognizably conservative or libertarian" (Tarantino, 2014).

Broader aspects of Canadian political culture may also help to explain this. Gad Horowitz's famous adaptation (1966) of Hartzian fragment theory to Canada, for example, argued that the existence of a "tory touch" explains the presence of a strain of socialism in Canadian political culture and its relative absence in the United States. Thus Canada's political culture evolved to be less individualistic, and its conservativism less libertarian, than its American counterpart, something that in turn may influence the legal community's own culture. Even the Charter itself arguably illustrates this: while largely focused on the protection of individual rights, it contains explicit protections for ameliorative programs like affirmation action (section 15 (2)), positive groups rights like minority language education (section 23), and recognition of multiculturalism (section 27) and Aboriginal rights (section 25)—and section 35, technically separate from the Charter, formally entrenches of Aboriginal and treaty rights.

Finally, public opinion also reflects—and arguably reinforces—the dynamic of support for judicial power. Polls from the 1980s to present consistently show that the Canadian public has highly favourable views about

the courts, the Supreme Court, and the Charter, especially compared to the elected branches of government, something scholars suggest emboldens justices to make decisions free of any fear of public backlash (Ostberg and Wetstein, 2007: 32).

The only study to attempt to explain public opinion in this context and to investigate whether public attitudes are meaningful (subjectively important, enduring and evaluative) finds that public support for courts is higher among social liberals and that party identification has a significant impact, with Conservative supporters exhibiting lower support for courts (Goodyear-Grant et al., 2013). More importantly for the context of this paper, public attitudes towards the role courts play are affected less by the policy output of courts (given relatively low levels of knowledge about Supreme Court decisions) and more by partisan politics. Specifically, changes in public attitudes over time may be dependent on the party taking power, where public confidence in the courts relative to Parliament was found to be higher following the Conservative government taking power (389–94).

While each of these factors warrants further scholarly attention, they tend to support the overall depiction of the liberal support structure for judicial power identified in previous studies (Hirschl, 2004; Morton and Knopff, 2000).[6] In the context of applying the regime politics approach to the Canadian case, I have identified this support structure, which until 2006 included the federal government, as the Charter regime. This paper has identified how some of these factors might operate in practice within a regime politics understanding of judicial decision making in Canada. More specifically, the inquiry conducted here helps to explain the Harper government's unique relationship to the Court and its significant loss record in salient constitutional cases.

Conclusion

This paper has examined the relevance of the regime politics thesis in the Canadian context. The basic assumptions of the regime politics approach are apparent from the fact that governments win most constitutional cases and, when they do lose, it is rarely in cases involving laws or policies that the sitting government enacted. The regime politics approach, however, does not deny judicial policy-making power, nor does it deny the frequent use of judicial review in relation to laws and policies enacted by previous governing regimes. As a result, this paper makes no claims about what lessons these findings might have for the broader debate about judicial review or judicial activism.

The analysis also demonstrates that despite the general relevance of the regime politics thesis, the Court still wields significant power to engage in

counter-regime behaviour. An assessment of issue salience suggests that the Court's decision making had a distinctive and significant impact on the policy agenda of the Conservative government relative to its predecessors. It is the only Charter period government to have policies specifically outlined in electoral platforms invalidated (and indeed, no fewer than five major promises were affected). It is also the only government to have lost every reference opinion issued by the Court. The Conservative government was unable to influence the Court's behaviour through the judicial appointments process or by other means, in large part due to the remaining elements of the previous long-standing Charter regime, including the Court itself. More research is necessary to examine why the Harper government encountered such apparent difficulty in appointing like-minded judges to the Supreme Court.

Notes

1 Rolling Stones, *Let it Bleed* (United Kingdom: Decca Records, 1969).
2 Updated figures for the Harper government (2006–15) were collected by surveying the Supreme Court decisions published online by Lexum: http://scc-csc.lexum.com/scc-csc/scc-csc/en/nav_date.do
3 Constitutional scholar Peter Russell (2007) refers to Mulroney as a "Charter worshipper" in the context of describing the former prime minister's disdain for the notwithstanding clause, which Mulroney felt watered down its protections.
4 My thanks to Kate Puddister for confirming this with data from her doctoral dissertation (2016a).
5 Which is not to say the legal community fails to engage in (often trenchant) criticism of particular judicial decisions or areas of jurisprudence.
6 Hirschl views much of the support structure for the Charter as a liberal, individualist vision, and as including economic elites, while Morton and Knopff emphasize postmaterialist, social progressive interests.

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