
“Harper’s New Rules” for Government Formation: Fact or Fiction?

Rainer Knopff and Dave Snow

When the minority government of Stephen Harper faced a non-confidence motion and likely defeat by an opposition coalition shortly after the 2008 election the Prime Minister argued that a coalition could not legitimately take power without an election. The impending defeat was staved off by prorogation and subsequent events but the so called “New Rules” of the Prime Minister were criticized by constitutional experts who saw them as infringing the established principles of responsible government which allow the Governor General to appoint a new government following an early vote of non-confidence. The Prime Minister’s later claim that the 2011 election was a choice between a Conservative majority or coalition – seemed to reject his own “New Rules” and was seen as evidence of his political expediency. This paper considers the constitutional politics concerning coalition governments that arose, first in 2008 and then again in 2011. It focuses on the question whether, and if so under what circumstances, a coalition can displace a minority government without holding new elections. It surveys the work of both critics and supporters of the “New Rules” and argues that Mr. Harper’s 2008 and 2011 positions are not inconsistent or contradictory.

Prime Minister Stephen Harper is said to have taken a new and constitutionally suspect approach to government formation in 2008, insisting that only new elections could change parliamentary governments. “Harper’s New Rules,”¹ generated an outpouring of criticism from constitutional scholars.

We challenge the critique of “Harper’s New Rules” primarily as it appears in two of its leading exemplars: the work of Peter Russell, a constitutional scholar of high repute whose writings always merit careful consideration, and of the late Peter Aucoin, Mark D. Jarvis and Lori Turnbull (cited hereafter as Aucoin) co-authors of *Democratizing the Constitution* a fine, prize-winning book on responsible government.² Even the best authors and books are open to question and debate, as we think both Russell and Aucoin are with respect to “Harper’s New Rules.”

Background and Context

When facing possible defeat in the Commons just six weeks after being re-elected with a strengthened

minority government in 2008, Stephen Harper asserted that a proposed coalition of the Liberals and NDP (with the promised stable support of the Bloc Québécois) could not legitimately be appointed as an alternative government by the governor general, even at this very early stage of the Parliament’s life. While “the opposition has every right to defeat the government,” Mr. Harper maintained, “Liberal leader Stéphane Dion does not have the right to take power without an election. Canada’s government should be decided by Canadians, not backroom deals. It should be your choice — not theirs.”³ Days later, in a heated parliamentary debate with Mr. Dion, he claimed “the highest principle of Canadian democracy is that if one wants to be prime minister one gets one’s mandate from the Canadian people and not from Quebec separatists.”⁴ The Prime Minister’s statements have been widely understood as meaning that defeat of a plurality minority government must always trigger new elections, because only elections can legitimate a new government. For Harper, says Peter Russell, “the *only* way to get rid of a government that does not have the confidence of the House of Commons is to elect another House of Commons.”⁵ Aucoin agrees, “If Harper’s view were to be accepted,” he maintains, “the only option would be ... dissolution and an election to choose a new

Rainer Knopff is a Professor of Political Science at the University of Calgary. Dave Snow is a PhD Candidate in the Department of Political Science at the University of Calgary.

House after *every* loss on a confidence vote.”⁶ Of course, requiring an election after *every* loss of confidence or as the *only* way of replacing a defeated government raises the spectre of a “diet of successive elections in a short period of time.” Especially in circumstances of the kind of “fragmented electorate” that generates minority governments, says Russell, Harper’s approach could mean being “bombarded by an unending series of elections until one party secures a majority.”⁷

Such an “elections-only” theory of governmental change, its critics rightly insist, is inconsistent with well-established practices of our system of parliamentary government, namely, that the governor general may appoint an alternative government following a vote of non-confidence, at least early in the life of a parliament. “Until recently,” writes Aucoin, “most experts would probably have agreed that the governor general could properly refuse the prime minister’s advice for a dissolution following the government’s defeat on a confidence vote in the House of Commons if the loss of confidence came shortly after an election.”⁸ But this established consensus is now eroding in the face of contrary opinions, led by Prime Minister Harper. In other words, a previously dominant viewpoint is under challenge from the novel and disturbing theory known as “Harper’s New Rules.”

Because Harper’s own statements concerning these “new rules” are brief and made in the heat of political battle, Russell indicates that it would be better to call them the “Harper/Flanagan rules, because political scientist Tom Flanagan, a long-time adviser of Harper,” provided a more “extensive elaboration” of them than Harper himself. Aucoin similarly associates Flanagan with the view that “elections should be the only way to change a government from one party to another” and attribute to him the “scholarly rhetoric” in support of Harper’s constitutionally suspect elections-only theory of governmental change. Other authors have also seen Flanagan as best reflecting and explaining Harper’s views on this issue.⁹ While Flanagan is universally considered the chief theoretician of “Harper’s New Rules,” Aucoin considers Michael Bliss and Andrew Potter as providing additional support for this position.

Misreading Flanagan, Bliss, and Potter

Those who attribute to Flanagan the view that loss of confidence must always trigger new elections rely exclusively on a single *Globe and Mail* op-ed, published on January 9, 2009. Aucoin clearly sees this article as justifying the elections-only position on governmental change¹⁰ and reproduces much of the article on pages 175-76 of *Democratizing the Constitution*. A key notion in Flanagan’s piece is that “the most important decision in

modern politics is choosing the executive of the national government, and democracy in the 21st century means the voters must have a meaningful voice in that decision.”¹¹ This view, says Aucoin, “empowers parties, rather than individual MPs or Parliament as a whole, by seeing government as the entitlement of the party that has won the most seats,” and it “follows logically ... that if the party loses confidence, then the people must elect a new ‘party’,”¹² or, as Russell puts it, “that the prime minister cannot be changed without another election being called.”¹³

But that position — which the critics clearly ascribe to Flanagan — is difficult to square with another *Globe and Mail* piece that Flanagan had published just one month earlier, a contribution that none of the critics we are considering (so far as we can tell) ever acknowledge.¹⁴ The December 2008 article, entitled “This coalition changes everything,” provides the following answer to the question whether the governor general should grant the likely request for a new election upon defeat by the coalition:

Normally, the question would be easy to answer. Since the last election was so recent, a defeated prime minister *should not* expect a new election, and the opposition *should* get the chance to govern if it can offer a plausible plan for stability, which the opposition has done with its proposal for a Liberal-NDP cabinet supported by the Bloc.¹⁵

This is very far from saying that if the governing “party loses confidence then the people must elect a new ‘party’.” Indeed, it explicitly acknowledges that “normally” this *should not* occur early in a parliament’s life, that “normally” the governor general *should* in such circumstances refuse a dissolution request and appoint an alternative government. We have emphasized the use of the word “should” in Flanagan’s piece in order to underline how thoroughly it fits into the older consensus represented in the upper right cell of the table on the following page, perhaps as far to the right as Eugene Forsey, who the table describes as thinking not only that refusing dissolution is constitutionally permissible but also that it *should* occur under specified conditions.

Flanagan’s December 2008 piece explicitly invokes Forsey in support of his view that dissolution should not “normally” be granted early in a parliament’s life. However, he then goes on to rely on the same Forsey to conclude that the 2008-09 situation is not “normal.”

But this is not a normal situation. Constitutional expert Eugene Forsey famously supported Lord Byng’s refusal of Mackenzie King’s request for an election in 1926, but even Mr. Forsey had to admit that an election would have been necessary if “some great new issue of public

Opinions Concerning Governmental Change in Minority Circumstances

| Constitutional Legitimacy | Democratic Legitimacy | | |
|---------------------------|---|---|--|
| | <i>Should Not</i> | <i>Could under unclear conditions</i> | <i>Should under specified conditions</i> |
| Can | Flanagan 2009 Bliss 2008 Potter 2009 | Hogg 2009 Coyne 2008, 2011 Fox 2011 | Forsey 1953 Heard 2009 Franks 2011 |
| <i>Cannot</i> | Bruni 2008 McWhinney 2009 Tremblay 2008 | | |

Table reproduced from Peter Aucoin, Mark D. Jarvis, and Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government*, (Toronto: Emond Montgomery Press, 2011), pp.179-180.¹⁶

Aucoin arrays the variety of Canadian options concerning governmental change in minority circumstances along two dimensions: constitutional legitimacy (can the Governor General refuse a Prime minister's request for dissolution?) and democratic legitimacy (should the Governor General refuse such a request?)

According to Aucoin, "nearly all" Canadian commentators, including Flanagan/Harper, agree that a governor general can, constitutionally speaking, refuse a dissolution request. In other words, Harper's new election-only rules for governmental change are based solely on considerations of *democratic* legitimacy. The governor general may have the formal constitutional discretion to refuse dissolution but it would be democratically illegitimate for him or her to do so.

On the issue of democratic legitimacy, "Harper's New Rules" (as represented by Flanagan, Bliss, and Potter) occupy one end of the continuum displayed in the top half of the table. At the other end are those who insist that a governor general "should refuse a prime minister's request for dissolution and allow for a change in government between elections" when the prime minister "has lost confidence shortly after the most recent election" – i.e., in precisely the circumstances of the planned defeat of the Harper government in 2008. As examples of this position, he invokes the estimable Eugene Forsey, along with Andrew Heard and Ned Franks.

Between the two poles of the continuum are "most Canadian academics, pundits, and politicians" – exemplified in the table by Peter Hogg, Andrew Coyne, and Graham Fox – who believe a governor general "*democratically could* refuse dissolution only under certain circumstances" (with those circumstances varying among authorities and generally being unclearly defined). For this group, a governor general deciding whether or not to grant dissolution should consider such factors as the likely stability of and public support for an alternative government.

The middle and right-hand positions in the table are contained in the same cell to represent their common opposition to the elections-only approach to changing government. This cell represents the older consensus about the legitimacy of appointing an alternative government in at least some circumstances, especially early in a parliament's life. It is this previously dominant consensus that is said to be under attack from the new elections-only perspective of the upper left-hand cell, with its threat of a steady "diet" of elections. We argue that, in fact, none of the authors included in the upper left-hand cell actually hold the elections-only position ascribed to them.

policy had arisen, or there had been a major change in the political situation."¹⁷

For Flanagan, "the emergence of the opposition coalition has satisfied both of Forsey's conditions for going back to the voters."¹⁸ It did so for two reasons: first, because the coalition relied on the promised stable, ongoing support of a separatist party; second, because key participants in the coalition had explicitly rejected the very idea of a coalition during the just completed election campaign.¹⁹ Flanagan's 2008 op-ed clearly did *not* take the general position in favour of new elections every time a minority government was defeated on a confidence vote that critics ascribe to the piece he wrote just one month later. Moreover, the clear

implication of his 2008 piece is that if a new election – this time fought with the possibility of coalition obviously in mind – returned another Conservative plurality, the opposition parties should expect the governor general to appoint the coalition if it defeated the Conservative government on a confidence vote soon after the election.

It is possible, of course, that Flanagan changed his mind over the course of that month, and that he had moved to the "elections only" position by January 2009. But there is evidence that he had *not* fundamentally changed his mind. Part of that evidence is found in the 2009 article itself, in passages that Flanagan's critics never quote (just as they systematically ignore

his 2008 piece). Even Aucoin, who reproduces almost everything else in the January 2009 article, leaves out the part in which Flanagan elaborates his statement that “gross violations of democratic principles would be involved in handing government over to the coalition without getting approval from voters”:

Together, the Liberals and the NDP won just 114 seats, 29 fewer than the Conservatives. They can be kept in power only with the support of the Bloc, whose *raison d'être* is the dismemberment of Canada. The Liberals and NDP have published the text of their accord but not of their agreement with the Bloc.

The coalition partners, moreover, did not run on a platform of forming a coalition; indeed, the Liberals' Stéphane Dion denied that he would make a coalition with the NDP. In countries where coalition governments are common, parties reveal their alliances so that citizens can know how their votes will affect the composition of the executive after the election. In stark contrast, those who voted for the Liberals, NDP or Bloc in the last election could not possibly have known they were choosing a Liberal-NDP government supported by a secret protocol with the Bloc.

Put it all together, and you have a head-spinning violation of democratic norms of open discussion and majority rule.²⁰

Here, as in the 2008 piece, Flanagan is emphasizing the particularities – the abnormalities – of *this* attempt to replace a government without an election, not arguing the illegitimacy of *any* attempt to replace a government without an election.

The same can be said of Michael Bliss, the second resident of the upper-left, elections only cell in Aucoin's table. Bliss wrote three *National Post* op-eds criticizing the proposed 2008 coalition.²¹ Appearing in quick succession – December 2, 4, and 6 – these op-eds should obviously be read together as a connected series. To show that Bliss, like Flanagan, believes “that we must have elections to select governments,” Aucoin quotes only Bliss's statement in the first op-ed that “some kind of electoral mandate from the Canadian people” was required to legitimate the coalition.²² In fact, like Flanagan, Bliss favoured an election with respect to *this coalition* because “the situation goes far beyond what some might see as a ‘normal’ test of wills in a minority Parliament.”²³ It goes beyond the normal, moreover, for the same reason identified by Flanagan – that the coalition depends on the stable support of a “party explicitly and historically dedicated to the destruction of Canada.”²⁴

For Bliss, “there is a huge difference between playing footsie” with the Bloc, as Canadian parties regularly do on an *ad hoc* basis, and “jumping into bed ... with

someone whose fondest desire is to become pregnant with a new country.” Just as it would be “irresponsible for the people dedicated to protect the future of a corporation, a university or any other institution, to enter into a managerial agreement with the people who believe the institution should be broken up,” it would be equally “irresponsible for the Governor-General to allow the creation of a similar new status in Ottawa without testing the will of the people.”²⁵ For Bliss, the legitimacy of the 2008 coalition needed voter confirmation just as much as the mega-constitutional the Charlottetown accord had,²⁶ a comparison that underlines just how much he thought the coalition went beyond the “‘normal’ test of wills in a minority Parliament.” Bliss's series of op-eds is overwhelmingly focused on the illegitimacy of this particular coalition. He does not take an elections only view of government transition in which no coalition of any kind could ever legitimately replace a plurality minority government without an election.

Neither does Andrew Potter, the third exemplar of the elections-only view in Aucoin's table. Potter is concerned that not enough academic attention has been paid to the “honestly held concerns about the democratic legitimacy of the coalition.” Note: *the* coalition, not *any* coalition. Potter summarizes the views of three people expressing “honestly held concerns”: Norman Spector, Richard Van Loon, and Michael Bliss. In Spector's case, Potter notes only his “interesting argument suggesting that Kyng-Byng was a historical anomaly, a one-off that should not be used as a precedent in favour of the coalition.” More significantly, Potter considers Van Loon's most “important argument” to be that the prospect of coalition “should never come as a surprise to the electorate – the people should know going into the election that a coalition is a possible outcome,” which is “not what we had during the last election, when Stéphane Dion and the Liberals repeatedly rejected the possibility of forming a coalition with the NDP.”²⁷ This clearly implies that the same minority coalition *could* legitimately take power after an election in which the prospect of coalition was not a surprise, which is not an elections-only view.

Potter then presents Bliss as arguing “that the legacy of Meech and Charlottetown was that Canadians would never again allow the fate of the country to be decided by political elites, cooking up deals in the backrooms without consulting the people in either an election or a plebiscite.”²⁸ But the 2008 coalition can be considered this kind of cooked up deal only because, as Spector notes, it was sprung on the electorate immediately after an election in which it had been explicitly rejected. Had

the coalition been an open electoral option – as Harper made sure it was in 2011 – it could not be considered a backroom deal without electoral consultation. Indeed, Bliss’s view that the coalition needs an electoral mandate clearly implies that it could legitimately take power after an election, even as the kind of minority coalition, with BQ support, that was proposed in 2008. Potter’s brief account of Bliss’s views is quite consistent with this interpretation.

Returning to Flanagan, his insistence that “voters get a chance to say whether they want the coalition as a government” – i.e., in an election where that possibility is on the table – also indicates that after that election the coalition can legitimately oust even a plurality of Conservatives without yet another election. Moreover, he makes this point quite clear in the context of the 2011 election campaign, during which various “parliamentary experts” were asked what would happen if the Conservatives won another minority government and were quickly defeated by the opposition. Flanagan is quoted as follows:

Right now, it looks like a Conservative majority and all this is going to be moot anyway, but things happen. So let’s say the Liberals catch fire and you get this quite close result; in a situation like that, Harper would still be prime minister, but if he chose to stay on and meet Parliament he would be vulnerable to being defeated at an early date, and the Governor General might well give Ignatieff the chance, not to form a coalition, he said he wouldn’t do that, but just to run a minority government on the same basis that Harper has been running a government.²⁹

This bears out the interpretation we have given to the December 2008 and January 2009 articles by Flanagan. The issue of either an opposition “coalition” or an opposition “minority government” (led by the second place party and supported by others) had been well aired in 2011 election campaign, meaning that there had not been the kind of “head-spinning violation of democratic norms of open discussion and majority rule” that Flanagan saw in 2008-09. In these circumstances, the “normal” expectation of a governor general making an early appointment of an alternative government would prevail. To be fair, of course, such critics of Flanagan as Russell and Aucoin did not have this 2011 statement at their disposal when they cast him as the leading academic proponent of the elections only perspective.

The critics might, however, have consulted an op-ed Flanagan wrote in 2007, in which (as in 2011) he described circumstances in which it would be legitimate for a Liberal-NDP-Bloc alliance to displace Harper’s minority government. In this piece, Flanagan

criticized as irresponsible “back-seat driving” the opposition’s tactic of passing private members’ bills legislating policies the government disagreed with – e.g, “Pablo Rodriguez’s bill to require the government to implement the Kyoto treaty [and] Paul Martin’s bill to force the government to implement the Kelowna accord.”³⁰ The constitutionally appropriate way for the opposition to pass such legislation, he argued, was for the opposition to assume “the responsibility to govern.” This they could have done soon after the 2006 election by announcing

their readiness to govern as a coalition or as a Liberal minority government with stable support from the NDP and Bloc. If the Governor-General had invited Stephen Harper, as the leader of the largest party in the House, to form a government, they could have quickly defeated him in a vote of no-confidence, and the Governor-General could have offered the leader of the Liberals a chance to form a government.³¹

In the 2006 election campaign, as in 2011, there had been no 2008-style explicit rejection of a coalition. Neither, however, had the prospect of a coalition or a “minority government with stable support from the NDP and Bloc” been openly aired as it was in 2011. One might thus plausibly conclude that Flanagan was more sanguine about the hypothetical Bloc-supported coalition he described in 2007 than the actual (but substantively similar) coalition he denounced in 2008 and 2009. But even if Flanagan changed his mind about the circumstances in which such an alliance could claim a sufficient electoral mandate to take the reins of power without a new election, he never changed his view that an appropriate electoral mandate was quite possible. In other words, he has consistently rejected an elections-only view of government transition.

But perhaps the logic of Flanagan’s overall position implies an elections-only view even if he does not realize it. Consider his 2009 statement that “the most important decision in modern politics is choosing the executive of the national government, and democracy in the 21st century means the voters must have a meaningful voice in that decision.” Aren’t the critics right in thinking that it “follows logically from this line of thought that if the party loses confidence, then the people must elect a new ‘party’”? The critics might have been right had Flanagan said that “democracy in the 21st century means the voters must *determine* that decision” – and that appears to be how they read him – but in fact he called only for a “meaningful voice” in the decision, specifying both why they had not yet had a meaningful voice in this decision and what would be necessary to have a meaningful voice.

Flanagan's insistence on a meaningful voice for voters in the choice of the executive also informs his statement that our "antiquated machinery of responsible government from the pre-democratic age of the early 19th century" needs to evolve (in the form of adjusted conventions) to accommodate new democratic realities. Bliss makes a similar claim when he argues that "Canada has evolved a long way since the era when Sir John A. Macdonald opposed universal suffrage and condemned democracy as an American disease," and that we cannot ignore "the democratic conventions that ... have been moving constantly in the direction of shifting sovereignty from Parliament to the people."³² Flanagan's rhetoric of "antiquated machinery" is, in our view, mistaken and unfortunate, as is Bliss's insinuation that our constitution was originally anti-democratic.³³

Such rhetoric detracts from a legitimate underlying point, namely, that the conventions of responsible government must evolve sensibly to accommodate evident realities, in this case the reality that most voters do not now (if, indeed, they ever did) enter the polling booth looking only to elect the best possible local member, and leaving the selection of the executive entirely in the hands of the collectivity of local members thus chosen. In practice, voters tend to use their local votes as proxies for their leadership choices,³⁴ so much so that they often mark their X beside the name of someone they know little or nothing about other than his or her party affiliation. This reality is no reason to reject or dismiss the fact and importance of indirect election; the central convention of responsible government – that government depends on the confidence of a majority in the Commons – is itself a reality of considerable and enduring significance.³⁵ Certainly, the common expectation of voters that they are electing a government as well as a parliament is no reason to insist on an elections-only view of governmental change. At the same time, it is neither outside the bounds of legitimate constitutional discourse nor insufficiently "respectful of ... voters"³⁶ to underline the democratic need for voters to have a "meaningful voice" in the choice of the executive in circumstances when even Eugene Forsey might think an early election is called for.

Whether the particular circumstances of the 2008 coalition actually meet Forsey's conditions for early elections is, of course, contentious and debatable. Does the fact that the 2008 coalition emerged in surprising contradiction to what its participants had maintained during the just completed election make it either "some great new issue of public policy" or "a major change in the political situation"? We doubt that any

sensible observer would argue that parties must be so strictly bound by every position they take during election campaigns that new elections are appropriate every time they change their minds. Circumstances change, and flexibility is required. The issue thus turns on whether the 2008 change of mind concerning a coalition falls within the normal range of flexibility, or whether it is the kind of regime-threatening change claimed by the coalition's opponents. On this, there is a significant difference of opinion.³⁷ We make no attempt to settle that important debate here. Our point is simply that those who saw the coalition as sufficiently regime-threatening to require a new election also conceded that in other, more "normal" circumstances – i.e., in most circumstances – a governor general's refusal of early dissolution remains entirely legitimate.

Flanagan, Bliss, and Potter did not, in short, hold the elections-only view of governmental transition that has been attributed to them. To the contrary, they each acknowledge the normal legitimacy of appointing alternative governments without new elections close on the heels of the last one – as is, in fact, the only sensible conclusion to reach in a parliamentary democracy. An elections-only approach to governmental change does indeed raise the unacceptable spectre of "a ton of elections."³⁸ In setting Flanagan, Bliss, and Potter up as exponents of an elections-only view, however, the critics have set up straw men.

Flanagan, Bliss, and Potter actually fit best, along with "most Canadian academics, pundits, and politicians," into the middle category of Aucoin's table in which a governor general "could" – indeed, often "should" – refuse early dissolution, but should grant it under certain limited conditions. Even Forsey, with his acknowledgement that a very early election should be called in certain circumstances, might most appropriately be placed in the middle category. In other words, insofar as the right end of the table's continuum is meant to capture the view that appointing a viable alternative government is always preferable to a very early dissolution, with the only uncertainty being what counts as sufficiently "early,"³⁹ Forsey does not belong in that category. In terms of Aucoin's examples, Flanagan, Bliss, and Potter come closest to Andrew Coyne, who considered the appointment of a coalition legitimate in general, but the appointment of this one "dubious" for a variety of reasons, including "most of all, the involvement of the Bloc."⁴⁰

Harper's 2011 Return to the Old Rules

Depriving the critics of Flanagan, Bliss, and Potter as scholarly apologists for the elections-only view does not mean that the Prime Minister himself did not take

that view in 2008. Did he seriously intend an elections-only view in 2008? Perhaps. But if he did, he was clearly departing from previous support for the older constitutional consensus, as his critics consistently emphasize. Moreover, if he was in 2008 contradicting his earlier views, he did not maintain his “new rules” position very long, as his critics are less apt to observe.

As to Stephen Harper’s pre-2008 views, critics regularly note that in 2004, as opposition leader he had, together with Gilles Duceppe and Jack Layton, written a letter to the governor general, asking her to consult the letter’s three signatories and to “consider her options” in the event that the Martin government was defeated and the Prime Minister asked for a dissolution.⁴¹ Clearly, the letter was asking the governor general to consider appointing an alternative government rather than granting the Prime Minister’s likely dissolution request. Although Jack Layton subsequently suggested that a 2008-style coalition agreement “was one of the options discussed around the table” and Gilles Duceppe concurred,⁴² it is difficult to imagine a Harper-led cabinet that included Layton and other NDP members, to say nothing of Duceppe and other BQ members. In other words, if one defines “coalition” to mean that “leading MPs” from more than one of the coalition members “also become ministers in the cabinet,”⁴³ the Conservatives are ideologically “so far apart” from the NDP and the Bloc “that maintaining a coalition would be extraordinarily costly.”⁴⁴ Using this definition of coalition, it seems more likely, as Andrew Coyne has argued, that the 2004 letter was proposing at most a non-plurality minority government, and not the kind of coalition proposed in 2008.⁴⁵ However that may be, there can be little doubt, as Aucoin rightly notes, that the legitimacy of at least some kind of “change of government between elections is clear” in this letter.⁴⁶ Harper certainly did not hold an elections-only view of governmental change in 2004.

Nor did he maintain his elections-only “new rules” very long after allegedly proclaiming them in 2008. In an interview with *Maclean’s* in January 2009 – less than two months after the coalition scare – Harper maintained that if his government were defeated by the opposition, “the only constitutional, political and moral option is to ask the people to choose who should govern,” thus repeating his insistence that this particular coalition could not take power without an election. However, he followed up by saying that in the ensuing election “the electorate will know that if you’re not electing the Conservative government you’re going to be electing a coalition.” In other words, “if we had an election today somebody will have a majority because it will be either Canada’s Conservative government or

the coalition.”⁴⁷ This statement clearly indicates that a plurality Conservative minority government could be replaced by an opposition coalition without yet another new election. If Harper’s earlier 2008 statements required an election after every loss of confidence, as has been alleged, that view appears to have been short-lived indeed. No endless “diet of elections” can be discerned in this early 2009 remark.

In fact Harper’s January 2009 remarks anticipated the electoral strategy he would use when his government was eventually defeated in 2011, by an opposition that this time intended to trigger the election. During the 2011 campaign, Harper regularly insisted that the practical choice for voters was between a Conservative majority and a coalition majority:

Canadians need to understand clearly, without any ambiguity: Unless Canadians elect a stable, national majority, Liberal Leader Michael Ignatieff will form a coalition with the NDP and Bloc Québécois. They tried it before. It is clear they will try it again. And, next time, if given the chance, *they will do it in a way that no one will be able to stop.*⁴⁸

His point was that yet another Conservative minority government would quickly lose confidence and be displaced by a coalition of other parties, along the lines of the proposed 2008 coalition. But such a coalition government – or, more likely, an alternative (non-plurality) minority government – could be one of Harper’s predicted outcomes *for the 2011 election* only if the Governor General can legitimately appoint an alternative government early in a Parliament’s life government without new elections. This is made especially clear by the emphasized phrase in the above quotation: “they will do it in a way that no one will be able to stop.” Again, this is clearly not an elections-only view of governmental change.

It is true that at one point in the campaign Harper did say that if the Conservatives won a plurality of seats, the other parties had “already decided they’ll vote against our next budget,” and there would be “another attempt at a coalition *and another election.*”⁴⁹ Although this remark *does* fit with an “elections-only” view, it is squarely at odds with his other proclamations before and during the 2011 election, which indicated that he fully anticipated an alternative non-plurality minority government could take power, without new elections, even if the Conservatives won the most seats.

Overall, the evidence that Harper has been promulgating a new elections-only approach that threatens “an unending series of elections until one party secures a majority” seems less clear and obvious than has been suggested. His more prominent statements,

beginning as early as January 2009 and repeated extensively during the 2011 election campaign, seem more consistent with the view that the governor general should not appoint the 2008 coalition (for the reasons given by Flanagan, Bliss, and Potter), but that he or she could make essentially the same appointment after a subsequent election in which the coalition possibility was made explicit. Indeed, Harper's own 2011 election strategy of raising a coalition scare could not work unless a coalition could actually supplant a plurality minority government without new elections. In terms of the table provided by Aucoin, in other words, there is a case to be made that Harper himself best fits into the sizable middle category. Again, to be fair, Aucoin and his co-authors were writing before the 2011 election campaign.

Conclusion

Although the era of mega-constitutional politics is behind us, constitutional politics continues to loom large on the public agenda. Indeed, the constitutional politics of the Harper era is pervasive. Constitutional questions have arisen, both in and out of court, about wide swaths of the government's policy agenda, including its attempts at "piecemeal" Senate reform, abolition of the Wheat Board's marketing monopoly, drug policy, and the tough-on-crime sentencing policies, to name only a few. Even more prominent have been the frequent controversies about the propriety of the government's approach to the norms of responsible parliamentary government especially with respect to the issues of prorogation and dissolution during the minority-government years (2006-2011).

Overall, such allegations of unconstitutionality are so widespread and regular that they collectively portray Stephen Harper as Canada's "unconstitutional prime minister." Where there is so much smoke, there is likely to be at least some fire. But there may also be some exaggeration. Such exaggeration, we argue, is evident in the controversy about "Harper's New Rules."

Our disagreement with Russell and Aucoin on this point in no way undermines their common argument (and the central thesis of *Democratizing the Constitution*) that some of Canada's constitutional conventions need to be clarified and formalized, along the lines of similar clarifying projects in New Zealand and Great Britain. For Aucoin even the middle and right-hand positions in their table – both of which support the traditional view that loss of confidence should not always lead to new elections – leave too much to prime ministerial discretion and risk forcing the governor general to "wade into partisan politics." Indeed, the difference between these two positions exemplifies the lack of clarity that concerns

them. Even the view represented by their right-hand position, that the governor general should *always* appoint a viable alternative government early in a parliament's life (i.e., within the first 6-9 months), is inadequate because it draws the governor general into the political quagmire of determining just what counts as sufficiently "early" within the generally acknowledged 6-9 months. Given the controversy that erupted late in 2008, Aucoin seeks to overcome future political confusion by making explicit the rules for dissolution, prorogation, and confidence.

Even if "Harper's New Rules" turn out to be rather mythical, the question of whether, how, and to what extent to clarify and formalize our constitutional conventions remains important (though beyond the scope of this paper). We suggest only that this formalizing project not waste its time knocking down straw men.

Notes

- 1 Peter H. Russell, "Learning to Live with Minority Parliaments," in *Parliamentary Democracy in Crisis*, eds. Peter H. Russell and Lorne Sossin (Toronto: University of Toronto Press, 2009), p. 141.
- 2 Peter Aucoin, Mark D. Jarvis, and Lori Turnbull, *Democratizing the Constitution: Reforming Responsible Government*, (Toronto: Emond Montgomery Press, 2011).
- 3 Quoted in Melissa Bonga, "The Coalition Crisis and Competing Visions of Canadian Democracy," *Canadian Parliamentary Review* (2011), Vol. 33, No. 2, p. 11.
- 4 House of Commons *Debates*, December 2, 2008.
- 5 Russell, "Learning to Live," p. 142, emphasis added.
- 6 Aucoin, Jarvis, and Turnbull, pp. 90, 22, emphasis added.
- 7 Russell, "Learning to Live," p. 147.
- 8 Aucoin, Jarvis, and Turnbull, p. 53.
- 9 Bonga, "Coalition Crisis," p. 11; Jennifer Smith, "Parliamentary Democracy versus Faux Populist Democracy," in *Parliamentary Democracy in Crisis*, p. 185; Graham White, "The Coalition That Wasn't: A Lost Reform Opportunity," in *Parliamentary Democracy in Crisis*, p. 153.
- 10 Aucoin, Jarvis, and Turnbull, p. 179.
- 11 Tom Flanagan, "Only Voters Have the Right to Decide on the Coalition," *The Globe and Mail*, January 9, 2009, p. A13.
- 12 Aucoin, Jarvis, and Turnbull, *Democratizing the Constitution*, p. 180.
- 13 Russell, "Learning to Live," p. 141.
- 14 This list of critics includes Aucoin, Jarvis, and Turnbull, p. 22; Bonga, "Coalition Crisis"; Lawrence Leduc, "Coalition Government: When it Happens, How it Works," In *Parliamentary Democracy in Crisis*, pp. 123-

- 135; Russell, "Learning to Live"; Smith, "Parliamentary Democracy versus Faux Populist Democracy"; White, "The Coalition That Wasn't." All criticized Flanagan's 2009 piece, but none mentioned the December 2008 article.
- 15 Tom Flanagan, "This Coalition Changes Everything," *The Globe and Mail*, December 8, 2008, p. A15, emphasis added.
- 16 Works from this table not discussed and cited elsewhere in this article include: Henri Bruni, "La monarchie réelle est morte depuis longtemps au Canada," *Le Soleil*, December 4, 2008, <http://www.lapresse.ca/le-soleil/opinions/points-de-vue/200812/04/01-807282-la-monarchie-reelle-est-morte-depuis-longtemps-au-canada.php>; Andrew Coyne, "Iggy's Coalition Problem," *Macleans.ca*, March 25, 2011, <http://www2.macleans.ca/2011/03/25/iggys-coalition-problem/>; Eugene A. Forsey, "Professor Angus on the British Columbia Election: A Comment," *Canadian Journal of Economics and Political Science* (1953), Vol. 19, pp. 226-230; Peter W. Hogg, "Prorogation and the Power of the Governor General," *National Journal of Constitutional Law* (2009), Vol. 27, pp. 193-203; Edward McWhinney, "The Constitutional and Political Aspects of the Office of the Governor General," *Canadian Parliamentary Review* (2009), Vol. 32, No. 2, pp. 2-8; Guy Tremblay, "Libre-opinion – La gouverneure générale doit accéder à une demande de prorogation ou de dissolution," *Le Devoir*, December 4, 2008, <http://www.ledevoir.com/non-classe/220782/libre-opinion-la-gouverneure-generale-doit-acceder-a-une-demande-de-prorogation-ou-de-dissolution>. Franks (2011) and Fox (2011) are quoted in Heather Scofield, "Harper's Vision of How to Form a Government Undermined by Constitutional Facts," *Canadian Press*, April 12, 2011, http://www.realclearpolitics.com/news/ap/politics/2011/Apr/14/hl_harper_s_vision_of_how_to_form_a_government_undermined_by.html.
- 17 Tom Flanagan, "This Coalition Changes Everything," quoting Eugene A. Forsey, *The Royal Power of Dissolution of Parliament in the British Commonwealth* (Toronto: Oxford University Press, 1943), p. 262. To these two instances in which a government might be entitled to an early dissolution, Forsey adds situations in which "no alternative government was possible" or "the Opposition had explicitly invited or agreed to a dissolution" (p. 262), neither of which apply to Canada's 2008 scenario. Forsey subsequently notes that "a major change in the political situation" makes a dissolution request "very strong," while stressing that it is "not absolute" (p. 268). Ever an advocate of the governor general's discretion, Forsey further stresses, "to say that... the Crown is entitled to refuse, does not mean that the Crown must refuse" (p. 270).
- 18 Flanagan, "This Coalition Changes Everything," p. A15.
- 19 During the 2008 election, Dion categorically ruled out a coalition with the NDP, saying "We cannot have a coalition with a party that has a platform that would be damaging for the economy. Period." Stephen Chase, "Dion Rules Out Coalition," *The Globe and Mail*, September 23, 2008, <http://www.theglobeandmail.com/news/politics/article710856.ece>.
- 20 Flanagan, "Only Voters Have the Right to Decide on the Coalition," p. A13.
- 21 Michael Bliss, "Alliance Wouldn't Survive a Week," *National Post*, December 2, 2008, p. A1; Michael Bliss, "Playing Footsie with the Enemy," *National Post*, December 4, 2008, p. A23; Michael Bliss, "Ignoring Our Constitutional Tradition," *National Post*, December 6, 2008, p. A27.
- 22 Aucoin, Jarvis, and Turnbull, p. 180.
- 23 Bliss, "Alliance Wouldn't Survive a Week," p. A1.
- 24 Bliss, "Playing Footsie with the Enemy," p. A23.
- 25 *Ibid.*, p. A23.
- 26 Bliss, "Ignoring Our Constitutional Tradition," p. A27.
- 27 Andrew Potter, "Unbalanced Thoughts," *The Literary Review of Canada* (July/August 2009), Vol. 17, pp. 3-4.
- 28 *Ibid.*
- 29 Quoted in Tim Naumetz, "Coalition Government 'Perfectly Legitimate', Say Constitutional and Parliamentary Experts," *Hill Times Online*, March 28, 2011, <http://www.hilltimes.com/news/2011/03/28/coalition-government-perfectly-legitimate-say-constitutional-and-parliamentary/27827>.
- 30 Tom Flanagan, "Liberal Tactics Amount to Constitutional Back-Seat Driving," *The Globe and Mail*, February 20, 2007, p. A19. See also Dennis Baker, "'The Real Protection of the People': The Royal Recommendation and Responsible Government," *Journal of Parliamentary and Political Law* (2010), Vol. 3, pp. 199-215.
- 31 Flanagan, "Back-Seat Driving," p. A19.
- 32 Bliss, "Ignoring Our Constitutional Tradition," p. A27.
- 33 See Janet Ajzenstat, *The Canadian Founding: John Locke and Parliament* (Montreal: McGill-Queen's University Press, 2007); Janet Ajzenstat, "Tom Flanagan's Mistake" *The Idea File*, January 12, 2009, <http://janetajzenstat.wordpress.com/2009/01/12/tom-flanagans-mistake/>.
- 34 Bonga, "Coalition Crisis," p. 11; Peter H. Russell, *Two Cheers for Minority Government: The Evolution of Canadian Parliamentary Democracy* (Toronto: Emond Montgomery Press, 2008), pp. 107-108.
- 35 On the ambivalent relationship between constitutional formalities and behavioural regularities – and the need to acknowledge and give appropriate weight to both – see Dennis Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation*, (Montreal & Kingston: McGill-Queen's University Press, 2010), esp. ch. 4; Philippe Lagassé, "Parliamentary and Judicial Ambivalence Toward Executive Prerogative Powers in Canada," *Canadian Public Administration* (2012), Vol. 55, No. 2, pp. 157-180.
- 36 Aucoin, Jarvis, and Turnbull, p. 23.
- 37 Bliss, "Alliance Wouldn't Survive A Week," p. A1; Bliss, "Playing Footsie with the Enemy," p. A23; Bliss, "Ignoring Our Constitutional Tradition," p. A27; Andrew Coyne, "Notes on a Crisis: The Coalition is not

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- Illegitimate, Just Ill-Advised." *Macleans.ca*, December 3, 2008, <http://www2.macleans.ca/2008/12/03/notes-on-a-crisis-the-coalition-is-not-illegitimate-just-ill-advised/>; Grace Skogstad, "Western Canada and the 'Illegitimacy' of the Liberal-NDP Coalition Government," in *Parliamentary Democracy in Crisis*, pp. 163-174; White, "The Coalition That Wasn't."
- 38 Russell, "Learning to Live," p. 142.
- 39 Aucoin, Jarvis, and Turnbull, p. 182.
- 40 Quoted in *Ibid.*, p. 180.
- 41 *Ibid.*, pp. 61-62.
- 42 Gloria Galloway, "Layton Scoffs At Harper's 'False Outrage' over Coalition," *The Globe and Mail*, March 27, 2011, <http://www.theglobeandmail.com/news/politics/layton-scoffs-at-harpers-false-outrage-over-coalition/article574157/>; Laura Payton, "Harper Wanted 2004 Coalition: Duceppe," *CBC News Online*, March 26, 2011, <http://www.cbc.ca/news/politics/canadavotes2011/story/2011/03/26/cv-kickoff-bloc.html>.
- 43 Aucoin, Jarvis, and Turnbull, pp. 45-46.
- 44 Tom Flanagan, "A Canadian Approach to Power Sharing," *Policy Options* (September 2010), p. 33. See also Thomas Flanagan, *Game Theory and Canadian Politics* (Toronto: University of Toronto Press, 1998), pp. 88-92.
- 45 Andrew Coyne, "Harper's Hypocrisy Problem," *Macleans.ca*, March 26, 2011, <http://www2.macleans.ca/2011/03/26/harpers-hypocrisy-problem/>.
- 46 Aucoin, Jarvis, and Turnbull, p. 62.
- 47 Quoted in Ken Whyte, "Maclean's Interview: Stephen Harper," *Macleans.ca*, January 8, 2009, <http://www2.macleans.ca/2009/01/08/macleans-interview-stephen-harper-2/4/>.
- 48 CBC News, "A Campaign Compendium of Coalition Quotes," *CBC News Online*, April 15, 2011, <http://www.cbc.ca/news/politics/canadavotes2011/realitycheck/2011/04/a-campaign-compendium-of-coalition-quotes.html>, emphasis added.
- 49 *Ibid.*
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