

Cooper: Harper takes government out of Canadians' lives ^[1]

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EXCERPTS:

This year, Stephen Harper took Canadian politics in a new direction. Liberals and lefty intellectuals are alarmed, but Canadians seem to be pleased. To see the significance of what the prime minister has achieved since he gained his majority in May, a little context is needed.

Before 1982 and the advent of the Charter, domestic politics was mostly about federalism and the division of responsibility between Ottawa and the provinces. Since then, the growth of what my first political science professor, Alan Cairns, called the "embedded state" has changed things enormously. His term referred to the ability of federal and provincial officials to act on behalf of citizens. Ottawa was there to help, which meant to relieve citizens of their responsibilities and render them dependent on government.

Even before 1982, Ottawa had been spending money in areas of provincial jurisdiction and justifying its activity on the basis of the spending power. This power is nowhere to be found in the Constitution. It rests on legal sophistry first advanced by Frank Scott of McGill University that the federal government is a legal person called "the Crown in right of Canada" who can make gifts to citizens or to the provinces, with or without attached strings.

The practical outcome of the embedded state and the use of the spending power was called executive federalism. It was institutionalized in first ministers' conferences that brought together elected political executives, but also on occasion lobby groups such as the Assembly of First Nations. There was seldom any input from either citizens or regular legislators. The chief consequence was that the lines of federal and provincial jurisdiction and responsibility were blurred beyond discernment. Occasionally, as with such egregiously ill-considered proposals as the Meech Lake and Charlottetown accords, there was sufficient opposition from legislators and citizens to check the executive.

Here is a statistic: both Pierre Trudeau and Brian Mulroney on average held well over one such meeting a year. Stephen Harper has called one meeting in five years. Harper has made it clear on several occasions that individuals, not governments, are chiefly responsible for how we lead our lives. From child-care policy, property rights for status Indians or ending taxpayer support for political parties, the Harper government has pursued a strategic objective to dis-embed the federal state from the lives of citizens. This is why the Canadian Wheat Board is going the way of the long-gun registry.

Less remarked upon is the effort of the government to dismantle executive federalism. In the closing weeks of 2011, two events helped push the country in the direction of what might be called classical federalism, the federalism described in sections 91 and 92 of the old British North America Act, now called the Constitution Act (1867). First was the Dec. 19 announcement by Finance Minister Jim Flaherty to the provincial and territorial ministers that health-care transfers would level off over the next few years. This was a unilateral and final decision. More important, Flaherty said there would be no restrictions on how the provinces spent the money. Health-care delivery was a provincial responsibility, period. So ended half a century of coercion by Ottawa in the name of spurious national standards.

Then came the decision by the Supreme Court of Canada on the securities act reference.

The court's reasoning was anticipated by University of Toronto law professor Jeffrey MacIntosh in a series of articles last summer and fall in the Financial Post. The Achilles heel of the federal position was that Ottawa maintained that "systemic risk" to capital markets required a national regulator, but provincial membership was voluntary. Not only were the two arguments contradictory, but the first was mere conjecture without evidentiary support, a polite way of saying it was bogus.

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