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Political Litigation and the Role of the Court

Grant Huscroft

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I. INTRODUCTION

Fear of "politicizing the court" has always been the primary argument against reforming the judicial appointment process, and in particular the process of appointing the justices of the Supreme Court of Canada. As arguments opposing change go, it is a good one: no one favours politicization. On the contrary, everyone is sure that politicization would be a bad thing, and that we should do all that we can to avoid it.

The trouble is that "politicization" has no inherent meaning, and no definition is usually proffered. Courts engaged in the business of constitutional judicial review are necessarily engaged in politics, and the highest courts are the most political of all: not only do their decisions inform the political agenda for the elected branch of government, they shape the constitutional order itself.

In this paper I want to discuss two recent decisions involving highly important and highly politicized issues. In *Reference re Same-Sex Marriage*[1] the Court had no choice but to hear a reference from the federal government, but it decided *not* to decide whether limiting marriage to opposite-sex couples was constitutional, the only serious question in dispute. Conversely, in *Chaoulli v. Quebec (Attorney General)*,[2] the Court chose to hear the appeal, only to fail to reach a majority decision on the constitutionality of Quebec's health care legislation. Both cases are revealing of the way in which the Court perceives its role — in particular its relationship with the executive and

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[*] Faculty of Law, The University of Western Ontario. Thanks to James Allan, Richard Ekins, Randal Graham, Joanna Harrington and Paul Rishworth, who commented on earlier drafts, and Cameron MacDonald, who provided research assistance.

[1] [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 [hereinafter "*Marriage Reference*"].

[2] [2005] S.C.J. No. 33, [2005] 1 S.C.R. 791 [hereinafter "*Chaoulli*"].

legislative branches of government, and thus its place in the constitutional order.

1. The Politics of Same-Sex Marriage

The *Marriage Reference* is one of the most nakedly political cases in which the Court has been involved,[3] and the way in which the Court handled the reference is more important than most commentators have noted.[4]

I have outlined the background to this reference in another context, so will provide only a brief summary here.[5] The federal government defended the common law definition limiting marriage to opposite-sex couples when challenges under the *Canadian Charter of Rights and Freedoms*[6] were brought by same-sex couples seeking marriage licences in several provinces. This position was in accordance with the wishes of Parliament, which in 1999 reaffirmed its commitment to the traditional definition of marriage.[7] Courts in Quebec and British Columbia held that the traditional definition of marriage infringed the equality guarantee in the Charter, but those courts suspended their declarations of unconstitutionality in order to allow Parliament to address the situation.[8] A committee of Parliament was considering the matter, and had held hearings across the country.

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[3] In rejecting the argument that the reference questions were not justiciable, the Court noted, *id*., at para. 11 that: "The political underpinnings of the instant reference are indisputable", but added that politics was only a contextual consideration, and did not colour the substance of the matter.

[4] John McEvoy is one of few scholars in Canada to have expressed any interest in the reference power. See McEvoy, "Separation of Powers and the Reference Power: Is There a Right to Refuse?" (1988) 10 S.C.L.R. (2d) 429, and McEvoy, "Refusing to Answer: The Supreme Court and the Reference Power Revisited" (2005) 54 U.N.B.L.J. 29 [McEvoy, "Refusing to Answer"]. I am grateful to the author for providing me with a copy of the latter paper. Jamie Cameron discusses the Marriage Reference in "2004: A Year of Mixed Messages From the Court" (2005) 29 S.C.L.R. (2d) 15, at 18-21 [Cameron, "Mixed Messages"].

[5] A fuller account is found in Grant Huscroft, "Thank God We're Here: Judicial Exclusivity in Charter Interpretation and its Consequences" (2004) 25 S.C.L.R. (2d) 241, at 255-63 [Huscroft, "Judicial Exclusivity"].

[6] Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

[7] *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 1.1 [repealed S.C. 2005, c. 3, s. 15].

[8] *Hendricks c. Québec (Procureur général)*, [2002] J.Q. no 3816 (Sup. Ct.), vard [2004] J.Q. no 2593 (C.A.); *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] B.C.J. No. 994, 13 B.C.L.R. (4th) 1 (C.A.) [hereinafter "*EGALE*"]. The Ontario Divisional Court had also suspended its declaration of unconstitutionality in *Halpern v. Canada (Attorney General)*, [2002] O.J. No. 2714, 60 O.R. (3d) 321 (Div. Ct.).

The government might well have anticipated that it would lose in pending litigation in the Ontario Court of Appeal, but I doubt that it anticipated that Court's decision in *Halpern v. Canada (Attorney General)*[9] to give its declaration of unconstitutionality immediate effect. The practice of suspending controversial Charter rulings had become more generous than the Supreme Court's decision in *Schachter v. Canada*[10] contemplated, and the government had every reason to believe that this practice would be followed by the Ontario Court of Appeal, in line with the decisions of courts in other provinces. *Halpern* changed the dynamic considerably, both legally and politically.

Marriages began to take place immediately following that Court's decision, thus creating a new status quo. The government announced that it would not be appealing the decision in *Halpern*; instead, it would be introducing legislation to change the definition of marriage, thus extending the result in *Halpern* across the country. First, however, the government would be referring its proposed legislation to the Supreme Court of Canada for its advice.

(a) Three Reference Questions

The government's reference raised three questions:

1. Is the proposed legislation within the exclusive legislative authority of Parliament?
2. Is same-sex marriage consistent with the Charter?
3. Are religious officials protected from compulsion to perform same-sex marriage by the freedom of religion guarantee?

It is important to emphasize that none of these questions was seriously in dispute.[11] The government knew that Parliament possessed exclusive legislative authority in regard to marriage capacity; the parties

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[9] [2003] O.J. No. 2268, 65 O.R. (3d) 161 (C.A.) [hereinafter "*Halpern*"].

[10] [1992] S.C.J. No. 68, [1992] 2 S.C.R. 679. See Bruce Ryder's critique of subsequent practice in "Suspending the *Charter*" (2003) 21 S.C.L.R. (2d) 267.

[11] Huscroft, "Judicial Exclusivity", *supra*, note 5, at 257-58.

to the litigation conceded as much.[12] The government knew that permitting same-sex marriage was consistent with the Charter; the litigation had concerned the question whether *precluding* same-sex marriage was consistent with the Charter. The third question had not arisen in the marriage litigation. It was included in the reference in the expectation that the Court would provide an affirmative answer, and so assuage fears about the impact of the proposed change in the law. In sum, no one doubted that Parliament could legislate a new definition of marriage if it chose to do so. The decision to refer these questions to the Supreme Court of Canada was designed to delay Parliament from dealing with the legislation, thus taking the issue off the political table in the short run. The only meaningful question was whether or not the traditional opposite-sex definition of marriage infringed the Charter, but the government did not refer this question, and in fact did all that it could to preclude this question from being answered by the Supreme Court. Not only did it not appeal the decision in *Halpern*, it insisted that no other group should be granted standing to do so.[13]

(b) Adding a Fourth Question

The retirement of Prime Minister Jean Chrétien and the assumption of leadership by Prime Minister Paul Martin saw the appointment of a new Minister of Justice, Irwin Cotler, and a revision of the government's strategy. Before the case could be argued, the government added a fourth question to the reference, this one raising the very question that appeared to have died with the government's decision not to appeal the decision in *Halpern*. Specifically, the government asked whether the

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[12] Justice Pitfield in the B.C. Supreme Court appears to have been the only one to think otherwise. He held that same-sex marriage was barred by the *Constitution Act, 1867* on the basis that the concept of marriage was constitutionally fixed: *EGALE Canada Inc. v. Canada (Attorney General)*, [2001] B.C.J. No. 1995, 95 B.C.L.R. (3d) 122 (S.C.). But both the B.C. Attorney General and the Attorney General for Canada agreed that capacity to marry falls within Parliament's exclusive jurisdiction under s. 91(26), and the B.C. Court of Appeal agreed: *EGALE*, at para. 10 (S.C.), *supra*, note 8, at para. 62 (C.A.), following *Halpern*.

In one minor respect, the Supreme Court held that the legislation overstepped federal competence. The Court held that a declaratory provision ("Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs") was not within the exclusive jurisdiction of Parliament on the basis that "a federal provision seeking to ensure that the Act within which it is situated is not interpreted so as to trench on provincial powers can have no effect and is superfluous" (*supra*, note 1, at para. 38).

[13] [2003] S.C.C.A. No. 337.

traditional opposite-sex definition of marriage is consistent with the Charter. The addition of this question allowed opponents of same-sex marriage to have the "day in court" they sought but further delayed the Court in dealing with the reference, thus buying the government additional time in which to hold an election without Parliament having to debate the proposed legislation.

The government's performance was disingenuous, to say the least. It pretended that same-sex marriage was a judicial issue even as it proposed to legislate, and attempted to rely on the reference proceedings for political cover. At the same time, the government did all that it could to ensure that it received the answer it wanted on the fourth question. It conceded the unconstitutionality of the traditional definition of marriage in litigation in other provinces and territories that continued while the reference was pending. The lower courts obliged with declarations of unconstitutionality, and by the time the Supreme Court decided the reference case courts in seven provinces and territories had declared that the traditional definition of marriage was unconstitutional. Thousands of same-sex couples had been married as a result. The government had, through its litigation strategy, established a new status quo that the Court was unlikely to disturb, even if it were dubious about the unconstitutionality of the traditional definition of marriage.[14]

(c) The Court's Advice

When I discussed this situation in 2004, I argued that the Court should repudiate the government's political strategy, and I think that is in essence what the Court's decision in the *Marriage Reference* did. But the Court's repudiation was implicit rather than explicit: it repudiated the government's political strategy by refusing to answer the fourth question in the reference. Although on the face of things this may seem an apolitical decision, in fact it is political from top to bottom.

In order to refuse to answer the fourth question, the Court first had to establish that it had the power to refuse. It had to establish, in other words, that it is entitled to decide whether or not it will answer particular reference questions. The problem here is that nothing in the

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[14] The former Minister of Justice, Irwin Cotler, has written an account of his government's handling of the same-sex marriage issue. See Cotler, "Marriage in Canada — Evolution or Revolution" (2006) 44 Fam. Ct. Rev. 60 [Cotler, "Evolution or Revolution"]. He does not respond to any of the points made here, or in Huscroft, "Judicial Exclusivity", *supra*, note 5.

language of the reference power in the *Supreme Court Act* supports this position. The relevant provision is section 53:

> *Referring certain questions for opinion*
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> 53(1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
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> (*a*) the interpretation of the *Constitution Acts*;
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> (*b*) the constitutionality or interpretation of any federal or provincial legislation;
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> (*c*) the appellate jurisdiction respecting educational matters, by the *Constitution Act, 1867*, or by any other Act or law vested in the Governor in Council; or
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> (*d*) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.
>
> *Other questions*
>
> (2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court *esjudem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.
>
> *Questions deemed important*
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> (3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.
>
> *Opinion of Court*
>
> (4) Where a reference is made to the Court under subsection (1) or (2), *it is the duty of the Court to hear and consider it and to answer each question so referred, and the Court shall certify to the Governor in Council, for his information, its opinion on each question, with the reasons for each answer, and the opinion shall be pronounced in like manner as in the case of a judgment on an appeal to the Court*, and any judges who differ from the opinion of the majority shall in like manner certify their opinions and their reasons. ...[15]

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[15] R.S.C. 1985, c. S-26 [hereinafter "*Supreme Court Act*"] (emphasis added).

As McEvoy puts it: "[t]he will of Parliament is manifestly clear … No margin of appreciation or discretion is conferred on the Court by its organic document, the *Supreme Court Act*, to refuse to answer a reference question."[16] Indeed, both the language of the reference power and its purpose suggest the opposite of any sort of judicial discretion. The Court has no role in determining the appropriateness of a question; that is the province of the government. Although the power to refer questions is styled as a discretion to refer "important questions of law or fact", it is for the government to determine the importance of a matter, and there is a conclusive presumption that questions in accordance with subsection (1) or (2) are important questions. Subsection (4) makes the Court's obligation clear: it is duty-bound to hear and consider reference questions and must provide opinions with reasons in regard to each such question.[17]

How does the Court deal with this problem? In short, it does not deal with it at all. It simply ignores its statutory duty. The Court's reasons for refusing to answer the fourth question are essentially pragmatic, policy-based considerations rather than legal justification. The Court begins by begging the question as to its authority on a reference question:

> *The first issue is whether this Court should answer the fourth question*, in the unique circumstances of this reference. This issue must be approached on the basis that the answer to Question 4 may be positive or negative; the preliminary analysis of the discretion not to answer a reference question cannot be predicated on a presumed outcome. The reference jurisdiction vested in this Court by s. 53 of the *Supreme Court Act* is broad and has been interpreted liberally: see, e.g., *Secession Reference*, *supra*. The Court has rarely exercised its discretion not to answer a reference question reflecting its perception of the seriousness of its advisory role.[18]

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[16] McEvoy, "Refusing to Answer", *supra*, note 4, at 38.

[17] Peter Hogg has acknowledged that the *Supreme Court Act* and the counterpart provincial reference legislation "impose on the Court a duty to answer reference questions". Nevertheless, he does not challenge the Court's asserted discretion not to answer. On the contrary, he expresses the view that "the Court has not made sufficient use of its discretion not to answer a question posed on a reference" (Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Scarborough: Carswell, 1997, updated in looseleaf) c. 8.6(d)) [Hogg, *Constitutional Law*].

[18] *Marriage Reference*, *supra*, note 1, at para. 61 (emphasis added).

Citation of the *Secession Reference*[19] to establish the breadth and liberal interpretation of the reference power is ironic. That was a case in which the Court answered far *more* than it was asked, and essentially presents the opposite problem: what is it that allows the Court to *supplement* the questions it is asked pursuant to the reference procedure?[20]

The suggestion that the Court has rarely exercised the discretion it claims for itself is said to reflect the Court's perception "of the seriousness of its advisory role" rather than compliance with its statutory duty. Plainly, the Court regards the performance of its advisory role as a matter of its own prerogative as opposed to a statutory duty. But the precedents the Court cites for refusing to answer reference questions concern cases in which sufficient legal content was lacking, or in which there were deficiencies in the question posed (ambiguity or lack of precision) or inadequacies in the record. Arguably these are not matters that give rise to a discretion at all; they are circumstances that in effect preclude the Court from performing its statutory duty. That is, they allow the Court to say: "we *cannot* answer the question posed", rather than "we refuse".

The Court acknowledges the inaptness of the precedents to the context of the *Marriage Reference*. This was not a case involving a problematic question or an inadequate record. Nevertheless, the Court asserts that the categories highlighted important considerations, but are "not exhaustive". According to the Court, the circumstances of the *Marriage Reference* were unique, "the combined effect of which persuades the Court that it would be unwise and inappropriate to answer the question."[21]

What were those circumstances? First, the Court noted the government's stated position that it would be proceeding to introduce legislation regardless of the answer to the fourth question. According to the Court, it followed that an opinion from the Court "serves no legal purpose".[22] This would be a telling point if the Court had the discretion it asserts, but the Court never establishes that it has the discretion it

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19 *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217.

20 *Reference re Amendment of Constitution of Canada*, [1981] 1 S.C.R. 753 is a famous example of the Court not only asking and answering its own questions, but doing so in the context of political conventions, which are legally unenforceable.

21 *Marriage Reference*, *supra*, note 1, at para. 64.

22 *Id.*, at para. 65.

exercises so it is simply irrelevant. The government was acting disingenuously in pressing an unnecessary reference question, but that is its statutory right. It is entitled to ask questions regardless of its motivation for doing so, and the Court is duty-bound to answer.[23]

Even on its own, however, the Court's position is problematic. The concession it wrested from counsel during the oral argument — that the government would be legislating regardless of the Court's advice on the fourth question — should have been irrelevant, since the Crown cannot bind Parliament. The Crown is a supplicant for legislation: it introduces bills, but cannot guarantee that Parliament will pass them. We may be used to conflating "Parliament" and "government", but even in the context of a majority government it is not for the Court to assume that the government can legislate at will. In any case, by the time the matter was decided by the Court, the government was in a minority position. It could not, in theory or in practice, ensure that Parliament would pass same-sex marriage or any other legislation.

The Court then pursued a second objection, noting that rights had, in effect, vested on the refusal of the government to appeal the decision in previous litigation and its subsequent concessions in the other courts:

> The parties in *EGALE*, *Halpern* and *Hendricks* have made this intensely personal decision [to marry]. They have done so relying upon the finality of the judgments concerning them. We are told that thousands of couples have now followed suit. There is no compelling basis for jeopardizing acquired rights, which would be a potential outcome of answering Question 4.[24]

This concern was predictable;[25] yet the Court's view about the undesirability of jeopardizing acquired rights is legally irrelevant since Parliament has the ability to legislate retroactively, and may unwind vested rights if it so chooses.[26] If those rights were acquired improperly in the first place, based on an erroneous interpretation of the Charter in which the government acquiesced, why should it matter to the Court

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[23] This is another good reason why the reference power is problematic, quite apart from the traditional reasons proffered by courts for refusing to perform advisory functions in jurisdictions like the United States — but this is a topic for another occasion.

[24] *Id.*, at para. 67.

[25] Huscroft, "Judicial Exclusivity", *supra*, note 5, at 262-63.

[26] Parliament is only constitutionally disabled from retrospective legislation in the context of the criminal law, as a result of s. 11(*g*) of the Charter. See *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] S.C.J. No. 50, 2005 SCC 49.

whether they would be jeopardized? The vesting of rights is something that *Parliament* is properly expected to take into account in deciding whether, and how, to legislate, but it is no legitimate concern of the Court, even assuming that the Court has a discretionary power to refuse to answer reference questions.

In effect, the Court's refusal to answer entrenches the results of the government's litigation strategy in the lower courts. By refusing to appeal *Halpern* and conceding unconstitutionality in the other provincial courts, the government achieved a change in the law without legislating. This would be recognized as a more pressing concern if the government had changed hands rather than leaders; it is difficult to see how it is legitimate for a successor government to be bound by the decisions of its predecessor in this way, since the possibilities for abuse are so great.[27] In any event, the fourth question was germane to legislation that would soon be debated in Parliament. The litigation decisions that vested the rights of the couples who married were made by the Crown; they did not bind Parliament.

The Court supplements its argument for refusing to answer by noting that there is no precedent for answering a reference question in circumstances where an appeal route has not been pursued. Here again, however, this should be irrelevant: questions were referred to the Court pursuant to an exercise of statutory power by the government. The government has the discretion to use the reference procedure, and is under no obligation to act in accordance with precedent in doing so.

The final point raised by the Court concerns the lack of efficacy of the reference procedure, given the government's intention of achieving uniformity in regard to civil marriage across the country. According to the Court, answering the fourth question had the potential to undermine the uniformity the government's proposed legislation would establish.

> The uniformity argument succeeds only if the answer to Question 4 is "no". By contrast, a "yes" answer would throw the law into confusion. The decisions of the lower courts in the matters giving rise to this reference are binding in their respective provinces. They would be cast

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[27] For example, a government could vest the rights of claimants whose cause it supports by purporting to concede unconstitutionality at any stage of litigation, and could do so in the knowledge that it is likely to lose the next election. The notion that the successor government should be disadvantaged by such a concession is deeply problematic, in my view, and a reason why concessions of unconstitutionality should normally be inappropriate, especially in the context of Charter challenges to legislation. See Grant Huscroft, "The Attorney-General and *Charter* Challenges to Legislation: Advocate or Adjudicator" (1995) 5 N.J.C.L. 125.

> into doubt by an advisory opinion which expressed a contrary view, even though it could not overturn them. The result would be confusion, not uniformity.[28]

The problem here is that any confusion that a "yes" answer to question four would engender would be the government's responsibility to address. It is not for the Court to attempt to stave off political controversy for the government — especially when the government has engendered that controversy — and it is not obvious how a refusal to answer the fourth question avoids political confusion in any event. The government's decision to legislate was tied to the assumed correctness of the lower court decisions — the notion that the Charter required a change in the definition of marriage. The Supreme Court's decision to refuse to answer the fourth question created confusion of a different sort, by leaving open the possibility that the traditional definition of marriage was constitutional after all.[29]

It is telling that the Court's exercise of its purported discretion met with neither resistance nor even criticism from the government. After all, the government had insisted that the reference was required in order to inform the debate that was to occur in Parliament. For its part, the academic community was largely complimentary of the decision, praising it as though it were an act of statesmanship.[30]

At the end of the day, however, it has to be asked whether refusing to answer the fourth question was the right thing to do, even assuming that the Court has the discretionary power it asserts.[31] From the Court's

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[28] *Marriage Reference*, *supra*, note 1, at para. 70.

[29] As McEvoy notes, the circumstances that persuade the Court not to answer the fourth question are all premised on the constitutionality of the traditional definition of marriage. McEvoy, "Refusing to Answer", *supra*, note 4, at 32.

[30] Dean Patrick Monahan of Osgoode Hall Law School described the Court's decision as "a beautifully crafted judgment": John Ibbitson, "Same-Sex Ruling: Here's the Bottom Line: The System Works" *The Globe and Mail* (10 December 2004) A8. Ibbitson paraphrases Jennifer Koshan from the University of Calgary Faculty of Law as saying that the Court's judgment defended and upheld the Constitution, proving that the system works. Kirk Makin's story in *The Globe and Mail* also praised the decision: "Same-Sex Ruling: Analysis: Deft court crafts elegant opinion" (10 December 2004) A7, quoting Professors Bruce Ryder and Alan Hutchinson of Osgoode Hall Law School, and Professor Errol Mendes of the University of Ottawa Faculty of Law (Common Law).

[31] I emphasize the notion that the Court refused to answer because it is unlikely that the various members of the Court refused to *consider* the question — that they did not even turn their minds to it in light of their decision to refuse to provide an answer. I have no doubt that the individual members of the Court considered the question, which makes the refusal to answer all the more troubling.

perspective there are only two possibilities: either the lower courts were right in concluding that the traditional definition of marriage infringed the Charter or they were wrong. If the Supreme Court thought that they were right, what possible harm would there have been in saying so?[32] If, on the other hand, the Supreme Court thought that the lower courts were wrong — if it thought that the traditional definition of marriage did *not* infringe the Charter — different considerations would have arisen. If the lower courts were wrong, the consequence of the Court's refusal to answer the fourth question was to leave unchallenged a series of erroneous decisions.[33] That would be bad enough in terms of the precedential value those decisions might come to have, but the impact of the lower court decisions went well beyond their precedential value: they informed a series of political decisions that had been made, and would inform the votes that were to be held in Parliament. A decision that the traditional definition of marriage did *not* infringe the Charter would undoubtedly have caused some Members of Parliament to change their minds, and the outcome of the political process might have been different. No doubt, there would have been significant political upheaval in the short run, but nothing that could not have been managed in the ordinary political processes.

Every decision of the Supreme Court that interprets the Constitution has political consequences — both intended and unintended — because every such decision creates incentives and disincentives for political action. It is impossible for the Court to act apolitically where the Constitution is concerned, and the *Marriage Reference* must be understood in this light. It is clear that the government sought to use the reference procedure and the Court for political purposes. It should be

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[32] Irwin Cotler acknowledges only that the Court did not "directly" answer the fourth question. See Cotler, "Evolution or Revolution", *supra*, note 14, at 63. He argues that the Court "affirm[ed] the constitutionality of the government's approach" (at 63), but as I have said this was never in doubt. The only significant question was whether or not the traditional definition of marriage was *in*consistent with the Charter, and the Court pointedly refused to answer. The Court did say this about the government's proposal to legislate to change the law of marriage to include same-sex couples: "far from violating the Charter, [it] flows from it" (*Marriage Reference*, *supra*, note 1, at para. 43). But any proposal to extend rights by legislation arguably flows from the Charter. Whether or not such an extension is *required by* the Charter is a different question. *Cf.* Cameron, "Mixed Messages", *supra*, note 4, at 20.

[33] Of course, a decision on a reference question is advisory only, and cannot overrule a lower court decision. Nevertheless, as Hogg notes, decisions on reference questions are treated like ordinary decisions of the Court despite their advisory character. See Hogg, *Constitutional Law*, *supra*, note 17, at c. 8.6(d).

equally clear that the Court used the reference to advance its own political purposes. The Court has sent the message that while the government can initiate the reference procedure, the Court defines the constitutional role it is willing to play, and performs its statutory advisory duty in accordance with that role. In short, the Court will decide whether, and to what extent, it will advise the government.

Successive governments have acquiesced in the Court's conception of its role in the reference procedure. The consequence is that, despite the terms of the *Supreme Court Act*, governments refer questions to the Court at their peril.[34]

2. The Politics of Health Care

In the past few years the shortcomings of the Canadian health care system have seemed glaring: soaring costs and extensive waiting lists are prominent problems. Senate reports, a Royal Commission, two federal and several provincial elections have propelled health care to the top of the list of political concerns. It was only a matter of time until the Supreme Court was asked to enter the fray, and it did so in *Chaoulli*.

Chaoulli concerned the claim of Mr. Zeliotis, a patient in the public health system who had experienced a number of health problems, and Dr. Chaoulli, a physician who sought to operate outside the public system. They argued that Quebec legislation prohibiting the sale and purchase of private health insurance infringed section 7 of the Charter. They were unsuccessful at trial and in the Quebec Court of Appeal but prevailed in the Supreme Court of Canada, which allowed the appeal in a fractured 4:3 decision. Three judges held that the Quebec law infringed section 7 of the Charter and could not be justified under section 1; three judges held that there was no section 7 infringement; and one judge expressed no opinion on section 7, holding that the law infringed the Quebec Charter and that it was unnecessary to consider the Canadian Charter in the circumstances.

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[34] John McEvoy describes the Court as a "fickle friend" for this reason. He goes on to argue that the Court's refusal to answer reference questions must be understood as a judgment that the statutory duty to answer reference questions is unconstitutional (McEvoy, "Refusing to Answer", *supra*, note 4, at 40). This is an important argument that I cannot consider here. I note only that so long as the federal government continues to acquiesce, the Court will not have to ground the discretionary authority it claims in constitutional form.

The decision in *Chaoulli* caught many by surprise, presumably because they supposed that medicare was sacred, and as a result essentially immune from judicial review. But *Chaoulli* is not the first case in which the Court has used its judicial review authority under the Charter to venture into "sacred" territory and it will not be the last: there are no categorical limits to the scope of judicial review under the Charter. There is no Charter right to health care *per se*, but the Court interprets the Charter as a "living tree" and may extend constitutional protection to additional rights from time to time.[35]

I raise *Chaoulli* not to discuss the Court's approach to section 7,[36] but instead to consider what the decision says about how the Court perceives its role in the constitutional order. Two questions come to mind. First, why did the Court agree to hear *Chaoulli* in the first place? Second, having decided to hear the case, why was the Court unable to reach a majority decision on the Charter question?

(a) Why Did the Court Grant Leave to Appeal?

No reasons are given when leave to appeal is granted, but they are not difficult to discern from the decisions in the case. The judges who granted leave all voted to overturn the impugned legislation,[37] and their remarks in doing so are telling.

Justice Deschamps' decision makes clear that, in her view, government had been given more than enough time to solve the problems of delay in the health care system, and that it was time for the Court to take charge:

> The government had plenty of time to act. Numerous commissions have been established… and special or independent committees have published reports. … Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the

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[35] Christopher Manfredi's observation is apt: "[T]here is now an established principle that there is *no* policy dispute that the Court cannot resolve if it chooses to do so." Manfredi, "Déjà vu All Over Again: Chaoulli and the Limits of Judicial Policymaking" in Colleen Flood, Kent Roach, & Lorne Sossin, eds., *Access to Care, Access to Justice* (Toronto: University of Toronto Press, 2005) 139, at 149 [Flood *et al.*, *Access to Care*]. See Grant Huscroft, "A Constitutional Work in Progress? The *Charter* and the Limits of Progressive Interpretation" in G. Huscroft & I. Brodie, eds., *Constitutionalism in the Charter Era* (Markham: LexisNexis Butterworths, 2004), at 413 (also in 25 S.C.L.R. (2d) 413).

[36] See the various contributions to Flood *et al.*, *Access to Care*, *id*.

[37] Leave to appeal was granted May 9, 2003 (McLachlin C.J., Bastarache and Deschamps JJ.).

> tendency to focus the debate on a sociopolitical philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens.[38]

Chief Justice McLachlin and Major J. reiterate the usual line taken by the Chief Justice in defending the Court against charges of judicial activism: the Court is the guardian of the Constitution; it cannot shirk its duty to hear claims that constitutional rights have been breached. They put the point this way:

> The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. As this Court has said on a number of occasions, "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power".[39]

This overstates and oversimplifies things considerably, of course, since the notion of illegality suggests a black and white world where rights are concerned — legal and illegal legislation, easily recognized as such. The real contest in Charter cases is not between legislatures intent on denying rights and courts charged with protecting them, but instead between different conceptions of Charter rights — good faith disagreements about rights and reasonable limits.[40]

In truth, the Court is selective in exercising its role as guardian of the Constitution. The Court controls its docket; it hears only the Charter cases it wants to hear based on the Court's perception as to the importance of those cases.[41] The Court might well have expected that it would have to enter the health care debate eventually, but why choose *Chaoulli* as the entry point? After all, *Chaoulli* was not a case in which the Court was required to resolve conflicts in Charter interpretation across the country. Charter challenges to the health care system were only beginning to make their way through the courts in most other provinces. Those courts were not bound by the Quebec Court of

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[38] *Chaoulli*, *supra*, note 2, at para. 96.

[39] *Id.*, at para. 107.

[40] This is a recurring theme in Jeremy Waldron's work. See *Law and Disagreement* (Oxford: Clarendon Press, 1999).

[41] *Supreme Court Act*, *supra*, note 15, s. 40(1). See Huscroft, "Judicial Exclusivity", *supra*, note 5, at 263-65. The Court is required to hear some criminal law appeals as of right, and in addition must accept reference questions.

Appeal's decision in *Chaoulli*, and might well have expounded different understandings of section 7 in future litigation. Why not wait, then, for a body of law to develop in the other provinces?

The argument for granting leave to appeal in *Chaoulli* would have been stronger had the outcome in the Quebec courts been different; it is difficult to allow a provincial appellate court to have the last word when it comes to making law based on the Charter. But the Charter challenge was unsuccessful in Quebec courts, and as a result the status quo in health care had not been altered. Putting the worst face on things, a decision to deny leave to appeal would have left standing a well-established public health system that was the product of democratic processes, and was amenable to democratic reform. The decision of the Quebec Court of Appeal would have fallen into the range of cases with no definitive precedential value — neither approved by the Supreme Court nor overturned.

In my view the prudent course would have been to deny leave to appeal in *Chaoulli*, thus allowing the issues to percolate across the country. That is, in fact, one of the chief benefits of a federal system: different provincial approaches to health care can be considered in different provincial courts. The Supreme Court could have allowed that process to unfold in the knowledge that eventually it would adjudicate a better-informed case. In the meantime, ongoing political processes would have continued. On the best-case scenario, political reform might have ameliorated some of the problems in health care, perhaps obviating the need for Charter litigation. The cost of denying leave to appeal in *Chaoulli* was, at worst, a delay before the Court would enter the fray.

(b) Why Was the Court Unable to Reach a Majority Decision on the Charter Question?

Having decided to hear the case, the Court took a full year to render its decision but was unable to reach a majority decision on the alleged breach of the Charter. What are we to make of this?

Plainly, the Court was in a difficult position. The resignations of Iacobucci and Arbour JJ. meant that it was operating at less than full strength. A narrow majority one way or the other on something as important as health care might well have done more harm than good. For all of the bluster about the Court's special role as guardian of the Constitution, that role is difficult to justify when decisions on constitutionality hinge on a single vote: if the constitutional issues are so

finely balanced, why should the decision of a bare majority of justices be preferred to that of the elected branch of government?[42] Beyond this, however, loomed a more practical consideration: with two vacancies to be filled, it was always possible that a 4:3 ruling might not be supported by the Court when it reached full strength. That would be embarrassing for the Court, to say the very least, and was no doubt something the Court wished to avoid.

Now, there is no obligation for the Court to hold open even the most controversial issues simply because it is not at full strength; the Court has made law in a number of Charter cases with less than full-strength benches.[43] But there is no doubt that the Court prefers to deal with important matters with a full bench and, what is more, with strong majority judgments — better still, unanimity — whenever possible.

That was not to be in *Chaoulli*, however; the Court was divided on the principles of fundamental justice, a division inspired by different conceptions as to the respective roles of the legislature and the courts.

This is the context in which Deschamps J. refused to cast the deciding vote on the Canadian Charter argument. She chose to decide the case exclusively under the Quebec Charter, and her reasons for doing so are far from convincing. The Court's decision to grant leave signalled that it was a case of national importance, and the involvement of so many provincial and national bodies as interveners underscored this point. The case had been argued as a violation of the Canadian Charter from the outset, and dealt with by the lower courts on that basis. Even assuming the logical priority of the Quebec Charter, refusing to say anything on what had always been regarded as the central issue in the case is incongruous — especially in the face of McLachlin C.J.'s insistence that courts could not "abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance when citizens challenge it".[44] The best that can be said of Deschamps J.'s non-decision is that it precluded the Court from reaching a majority

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[42] This is a large point I cannot do justice to here. See Jeremy Waldron, "The Core of the Case Against Judicial Review" (2006) 115 Yale L.J. 1346.

[43] *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (5:2); *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] S.C.J. No. 36, [1989] 1 S.C.R. 927 (3:2) and *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (4:3), are prominent examples.

[44] *Chaoulli*, *supra*, note 2, at para. 107.

decision on the Charter, leaving section 7 to be argued another day before a full court in different circumstances.[45]

Still, the political landscape has been altered by the Court's decision; politicians are on notice that the Court may intervene in the health care debate, and the outcome of that intervention is uncertain. *Chaoulli* creates both incentives and disincentives for political reform, and these must be taken into account even where there is room for ordinary legislation.

The difficulties in legislating — let alone invoking the notwithstanding clause — are usually understated by proponents of dialogue theory, and as a result I have argued that the Court should be more reticent to decide constitutional issues than it is.[46] The Court should, in other words, take responsibility for keeping judicial review in check, lest it become the dominant feature of our constitutional order.

The Court has, however, often expressed the contrary view: judicial review is said to be necessary because politicians cannot be counted on. The point is neatly captured in Lamer C.J.'s candid interview with the press, in which he exclaimed:

> Thank God we're here. It's not for me to criticize legislators but if they choose not to legislate, that's their doing. If they prefer to leave it up to the court that's their choice. But a problem is not going to go away because legislators aren't dealing with it. People say we're activist, but we're doing our job.[47]

Supporters of dialogue theory have, for the most part, lauded the Court for its courage in addressing Charter issues in controversial circumstances.[48] Prior to *Chaoulli*, Kent Roach expressed the view that

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[45] It is difficult not to be suspicious of Deschamps J.'s reasons for refusing to decide the Charter question. As Jamie Cameron puts it, "Whether by design or not, the division is strategic, because it leaves the status of the Charter claim unresolved, thereby preserving the question of section 7's interpretation for the full Court to decide." (Cameron, "Mixed Messages", *supra*, note 4, at 26.) Lorraine Weinrib asserts that a majority of the Court can be taken to have decided the Charter question since Deschamps J.'s decision addressed a parallel protection in the *Quebec Charter*. See Lorraine Weinrib, "Charter Perspectives on *Chaoulli*: The Body and the Body Politic" in Flood *et al.*, *Access to Care*, *supra*, note 35, 56 at 57. But it is inappropriate to extrapolate a majority decision on the Charter in the face of Deschamps J.'s clear and deliberate refusal to address the issue, however similar the provisions in the respective charters may be.

[46] Huscroft, "Judicial Exclusivity", *supra*, note 5, at 263-66.

[47] Quoted in Janice Tibbetts, "Politicians Duck Divisive Issues, Chief Justice says" *The National Post* (July 12, 1999), at A1.

[48] Kent Roach, *The Supreme Court on Trial* (Toronto: Irwin Law, 2001) [Roach, *Supreme Court on Trial*].

techniques designed to avoid ruling on questions of constitutionality — Alexander Bickel's "passive virtues"[49] and Cass Sunstein's "judicial minimalism"[50] — are irrelevant in the Canadian context, and that their use is tantamount to a dereliction of the Court's duty.[51] *Chaoulli* has prompted him to qualify his opposition, however, at least in regard to section 7 cases. He regards the Court's approach to section 7 of the Charter as erroneous,[52] and argues that the Court has essentially read section 1 out of section 7 — it has precluded the ability of governments to justify an infringement of section 7 in all but emergency situations, and so compromised the ability to engage in the dialogue he advocates.[53]

I do not share Roach's concern in regard to the interpretation of section 7. It has always been more difficult to justify limits on some rights than others, and the case for judicial modesty in constitutional interpretation is strong quite apart from cases involving rights that are subject to definitional balancing. I am afraid that much of the criticism of the decision in *Chaoulli* stems not from principled concerns about the scope of judicial review, but instead from having one's ox gored.[54] Many of the strongest proponents of judicial review abhor private health care and are deeply disturbed by the result in *Chaoulli*. As a result, they are now in the unfamiliar position of counselling judicial restraint.[55]

Chief Justice McLachlin's rhetoric in defending the Court against critics of "judicial activism" precludes her from taking a more modest

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[49] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962) c. 4.

[50] Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999).

[51] Roach, *Supreme Court on Trial*, *supra*, note 48, at 147-52.

[52] Kent Roach, "The Courts and Medicare: Too Much or Too Little Judicial Activism?" in Flood *et al*., *Access to Care*, *supra*, note 35, 184, at 189.

[53] Roach also questions whether it was appropriate for the Court to have granted standing in *Chaoulli*. See *id.*, at 186-89. Christopher Manfredi, who has consistently been concerned with the judicial role, has also expressed doubts about the Court's decision to grant standing in *Chaoulli*: Manfredi, "Déjà vu All Over Again: Chaoulli and the Limits of Judicial Policymaking" in *Access to Care*, *supra*, note 35, 139, at 147.

[54] In my view there is no breach of the principles of fundamental justice in *Chaoulli*, and I hasten to add that my ox has not been gored — I am not opposed in principle to private health care.

[55] See, *e.g.*, Sujit Choudhry, "Worse than Lochner?" in Flood *et al*., *Access to Care*, *supra*, note 35, 75. Kent Roach expresses dismay that the Court has not been sufficiently generous in using s. 7 to protect rights, but plainly he prefers some rights to others: "[T]he Court has been cautious, often too cautious, in recognizing rights under s. 7. *Alas* not in *Chaoulli*." Roach, *id.*, at 190 in Flood *et al*., *Access to Care* (emphasis added). In a footnote reference Roach suggests a preference for generous interpretation of s. 7 where social welfare rights are concerned, provided that justification under s. 1 is possible (*id.*, at 202, note 24).

position in *Chaoulli*. Her only concession to the political nature of the case is the understated acknowledgment that the health care issue "may have policy ramifications".[56] Even Binnie and LeBel JJ., who acknowledge that "a correct balance must be struck between the judiciary and the other branches of government", and that "[e]ach branch must respect the limits of its institutional role",[57] give short shrift to arguments about justiciability. They categorically reject the notion of a political questions doctrine, and accept that the appellants had a sufficient interest to be granted standing to bring the case.

It is easy to deprecate constitutional avoidance mechanisms, but if their use is to be disavowed proponents of judicial review must take the bad with the good. Chief Justice Dickson's admonition from *R. v. Edwards Books and Art Ltd.*[58] — that in interpreting and applying the Charter "the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons" — is of little use as an interpretive principle.[59] If, as Binnie and LeBel JJ. argue, the Court has blundered into health care and created a nebulous "reasonable care within a reasonable time" standard[60] — then the only real check on the Court is its confidence in its institutional competence to decide future health care cases.

The signs from *Chaoulli* are disquieting. Justice Deschamps' remarks in the context of assessing the level of deference required suggest overconfidence where caution is required. She acknowledges

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[56] *Chaoulli*, *supra*, note 2, at para. 108. She adds immediately that this "does not permit us to avoid answering" the Charter question.

[57] *Id.*, at para. 184.

[58] [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713, at para. 136 [hereinafter "*Edwards Books*"].

[59] It is in the nature of rights litigation that there will be winners and losers, but Dickson C.J.'s admonition seems to suggest that the Court should perform its judicial review function with a thumb on the social justice side of the scale, as the Court sees it. Who are the less advantaged, and how are they to be determined? And how much weight can disadvantage be given in any event if Charter rights are at stake? *Cf.* Choudhry, *supra*, note 55, at 91 (describing Dickson C.J.'s admonition as a "general interpretive principle" and a "decisive repudiation of *Lochner* era libertarianism"). According to Choudhry, *Edwards Books* was "directly relevant" to the approach the Court should have taken in interpreting s. 7. He adds: "The lesson from *Edwards Books* may be that when the state legislates to ensure that constitutional rights have equal value, courts should be reluctant to intervene" (at 92).

[60] *Chaoulli*, *supra*, note 2, at paras. 162-63. Justices Binnie and LeBel mock this standard when they say "It is to be hoped that we will know it when we see it." This invokes Potter Stewart J.'s famous judgment in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). Stewart said that he could not define the sorts of sexually explicit material unprotected by the First Amendment, "[b]ut I know it when I see it".

the substantial differences of opinion when it comes to health care policy, but insists that "[t]he courts are an appropriate forum for a serious and complete debate",[61] and quotes the following claim with approval:

> [C]ourts do not have to define goals, choose means or come up with ideas. They do not have to create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding.[62]

I think that this seriously underestimates the nature of the task at hand, and at the same time overestimates judicial expertise. There are important questions here beyond institutional competence that go to democratic legitimacy, but they are largely ignored.

II. CONCLUSION

The *Marriage Reference* and *Chaoulli* are the decisions of a Court that is self-defining of its role in constitutional litigation, and as a result its place in the constitutional order. The extent to which either decision will prompt debate about the role of the Court, and the impact that debate will have on the Court, remains to be seen.

The Court cannot help but notice how politicized Charter litigation has become. One of the interesting developments in the *Marriage Reference* and *Chaoulli* concerns the involvement of politicians as interveners in Charter litigation. Two politicians were allowed to intervene in the *Marriage Reference*, a Senator and a Member of Parliament,[63] and 10 Senators were granted intervener status in *Chaoulli*.[64] The participation of politicians in Charter litigation confirms some of the worst fears about the impact of judicial review on the political process: some politicians may have decided that more can be accomplished through Charter litigation than through the democratic

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[61] *Id.*, at para. 87.

[62] G. Davidov, "The Paradox of Judicial Deference" (2000-2001) 12 N.J.C.L. 133, at 143, quoted in *Chaoulli*, *supra*, note 2, at para. 87.

[63] Senator Anne Cools and MP Roger Gallaway.

[64] Senators Michael Kirby, Marjory Lebreton, Catherine Callbeck, Joan Cook, Jane Cordy, Joyce Fairbairn, Wilbert Keon, Lucie Pepin, Brenda Robertson and Douglas Roche, proponents of the "Kirby Report" on health care.

political processes.[65] This is not a sign of a healthy democratic constitutional order, and the Court would do well to reflect on this as it continues to define its constitutional role.

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[65] Manfredi makes the same point in his contribution to Flood *et al*., *Access to Care*, *supra*, note 35, at 155.