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# **“Thank God We’re Here”: Judicial Exclusivity in Charter Interpretation and Its Consequences**

**Grant A. Huscroft\***

I hope we are not pushing too many problems that are too complex into the courts. We are having thrust upon us many policy issues of profound importance left unresolved by the other branches of government. People in increasing numbers are coming to the courts for the assertion of rights to political, economic, and social equality. The courts cannot shy away from decision-making on controversial questions. The judges have tenure and they must give some answer, right or wrong; from the judicial system people expect, and get, in the words of one observer, “enforced fairness”. It is presumably easier and cheaper to look to the courts for social changes than to go through the laborious and time-consuming process of persuading legislators. Litigation is being substituted for politics; the judicial process for the political process.<sup>1</sup>

## I. INTRODUCTION

The concern underlying this quotation is a familiar one. It has been raised with increasing frequency, as more and more issues have become the subject of Charter litigation. It underlies the complaint of “judicial activism” that is so often heard.

It comes as a surprise, then, to learn not only that the concern was expressed by (then) Justice Dickson, but that it was expressed in 1983 — prior to the first wave of Charter litigation reaching the Supreme

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<sup>1</sup> Dickson, “The Public Responsibilities of Lawyers” (1983) 13 Man. L.J. 175, at 187 [internal footnote omitted].

Court of Canada. Whatever he may have thought then,<sup>2</sup> any diffidence he had about the role of the Court soon gave way to confidence, not only in the Court's ability to resolve complex issues of profound importance but in its legitimacy in doing so. Dickson's legacy is his Charter jurisprudence, which embraced the Charter and the possibilities it presented, and established the Court as the "guardian of the constitution."<sup>3</sup>

Has judicial review been substituted for the political process in the Charter era? How are we to judge? The debate over judicial activism cannot be won or lost on the basis of statistical analysis. It might be asked whether it is a debate worth having at all. After all, once it is acknowledged that it is the Court's responsibility to redress violations of the Charter, it follows that the Court must strike down legislation at least some of the time. If it does so having interpreted the Charter correctly, then complaints that it does so too often are really beside the point. On the other hand, if the Court interprets the Charter incorrectly, then decisions striking down legislation are properly criticized on this basis, whether they be many or few.<sup>4</sup>

This is not a satisfactory answer to the debate over judicial activism, however, because the premises are problematic. It is meaningless to speak in terms of "correct" and "incorrect" Charter interpretation. Even

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<sup>2</sup> The quoted passage follows a lengthy discussion of the importance of the Charter and the Court's new responsibilities. On one hand, Dickson J. lamented the failure of the Court under the *Canadian Bill of Rights* [S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III], caused by concern about the legitimacy of judicial review. "That thinking and those misgivings are now behind us," he wrote (at 185). He acknowledged how much about the Charter "depends upon how it is interpreted" and, while urging "reasonable sense, restraint and self-control," emphasized the need for generosity in interpretation (at 186). On the other hand, in the passage quoted above, he appeared to be concerned about the Court's ability to deal with complex policy issues that are being forced upon it, and about the wisdom of substituting litigation for the political process.

<sup>3</sup> *Hunter v. Southam (sub nom. Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.)*, [1984] 2 S.C.R. 145, at 155 [hereinafter "Hunter"].

<sup>4</sup> Sujit Choudhry and Claire Hunter acknowledge that "a proper definition of the rate of activism would be as follows: the percentage of cases that governments lose, less the percentage of cases that governments should lose." Nevertheless, they proceed to analyze judicial activism on the basis that any second guessing of legislatures constitutes activism, and conclude that "[t]he question should no longer be merely whether judicial activism is good, but also whether judicial activism is real." See "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on Newfoundland (Treasury Board) v. NAPE" (2003) 48 McGill L.J. 525, at 533 and 557.

if we assume, as Ronald Dworkin argues, that right answers exist,<sup>5</sup> as Jeremy Waldron has argued we have no way of determining what they are; it will always be reasonable to disagree about the meaning of rights and what they require in particular circumstances.<sup>6</sup> Whether one thinks that there is too much or too little judicial review depends ultimately upon normative assumptions about the bounds of the political and legal processes — what is properly a matter for the people, on one hand, versus the courts on the other. Here too, reasonable disagreement is inevitable.

Faced with these sorts of disagreements, the way in which the Supreme Court, Parliament, and the provincial legislatures perceive their roles under the Charter is obviously of crucial importance. At the outset of our second generation under the Charter, the Court's role is clear: it has claimed the role of "guardian of the constitution." For their parts, however, neither Parliament nor the provincial legislatures have asserted any claim to authority where the Charter is concerned. On the contrary, judicial exclusivity in Charter interpretation is a norm that has been factored into political deliberations. Only a few years following Dickson C.J.'s retirement his successor, Lamer C.J., took the offensive in responding to the charge of judicial activism by pointing this out:

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.<sup>7</sup>

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<sup>5</sup> Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), at 119.

<sup>6</sup> Reasonable disagreement about rights is a recurring theme in Waldron's work. See *Law and Disagreement* (Oxford: Oxford University Press, 1999), at 10-17 and 221-31. As Waldron says in "Some Models of Dialogue Between Judges and Legislators" in Brodie & Huscroft (eds.), *Constitutionalism in the Charter Era* (Toronto: LexisNexis, 2004) at 11-12:

The assumption of disagreement has nothing to do with moral relativism or non-cognitivism. It is perfectly compatible with there being a truth of the matter about rights and the principles of constitutionalism — only, it assumes that our condition is not one in which the truth of the matter discloses itself in ways that are not reasonably deniable.

<sup>7</sup> Tibbetts, "Politicians Duck Divisive Issues, Chief Justice says" *The National Post* (12 July 1999) A1.

These comments confirm that judicial review has been substituted for the political process. According to Lamer C.J., however, responsibility for the substitution lies with politicians rather than the Court. Canadians are fortunate, in his view, to have a court willing to do its job when politicians cannot be counted upon to do theirs.

Political inertia on rights-based issues *is* a problem in my view, but the Court is as much part of the problem as the solution. The pending reference to the Supreme Court on same-sex marriage provides a clear demonstration of the problem. It also provides an important opportunity for the Court to consider the importance of institutional roles where the Charter is concerned, and the debilitating effect judicial exclusivity in Charter interpretation can have on the political process.

## II. ESTABLISHING THE COURT'S INTERPRETIVE MONOPOLY

The focus of constitutional law in the Charter era is undoubtedly the Supreme Court. Its decisions are studied not only to determine the current state of the law but to attempt to predict its future trajectory. Will the Court announce new analogous grounds of discrimination under section 15(1)? Will it expand the concept of fundamental justice under section 7, or broaden the scope of the right with new interpretations of life, liberty, or security of the person? Preoccupation with these sorts of questions is a natural consequence of the Court's commitment to progressive interpretation. Concern with future appointments to the Court is another such consequence. With so much at stake, the composition of the Court matters more than ever before.<sup>8</sup>

There seems little support for the idea that the legislative branch of government has a role to play in interpreting the Charter. The question "whether legislatures are suited to interpreting the rights of minorities and the accused and long term fundamental values"<sup>9</sup> is asked rhetorically. Why is this so?

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<sup>8</sup> At time of writing, two appointments to the Court were pending, and speculation about who might be appointed was common, not only amongst lawyers but the public as well. See Makin, "All bets off in top-court race" *The Globe and Mail* (3 May 2004) A5, establishing odds on a number of oft-discussed appointment possibilities.

<sup>9</sup> In Roach's view, "[t]he track record of legislatures on Charter issues is not strong." Roach, "Dialogic Review and its Critics" in *Constitutionalism in the Charter Era*, *supra*, note 6, at 53.

## 1. Asserting the Need for Judicial Interpretation

The starting point is the widely held assumption that legislatures are the enemy of rights. It follows that they cannot be allowed to determine the answers to rights-based questions. As well, it is usually assumed that rights analysis is beyond their ken. Kent Roach sums up these points as follows: “[t]he dangers are not only that legislatures will gang up on the unpopular and act as a judge in their own majoritarian causes, but also that they will avoid or finesse issues of principle.”<sup>10</sup> This is the old “tyranny of the majority” argument along with an appeal to the *nemo iudex in sua causa* principle, casually made as though there is no rejoinder.<sup>11</sup> So great is the rhetorical force of this argument that it causes the deficiencies in judicial review to be overlooked or even ignored. It is considered better for the Court to decide Charter questions, even at the cost of erroneous decisions from time to time, than to risk the spectre of majoritarian excess.

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<sup>10</sup> *Id.*

<sup>11</sup> Jeremy Waldron provides the rejoinder in *Law and Disagreement*, *supra*, note 6, at 296-301. Critiquing Dworkin’s argument in *Freedom’s Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), Waldron says:

Unless we envisage a literally endless chain of appeals, there will always be some person or institution whose decision is final. And of that person or institution, we can always say that since it has the last word, its members are *ipso facto* ruling on the acceptability of their own view. Facile invocations of *nemo iudex in sua causa* are no excuse for forgetting the elementary logic of authority: people disagree and there is a need for a final decision and a final decision-procedure [at 297]....

Sometimes we talk carelessly as though there were a *special* problem for the legitimacy of popular majority decision-making, a problem that does not exist for other forms of political organization such as aristocracy or judicial rule. Because the phrase “tyranny of the majority” trips so easily off the tongue, we tend to forget about other forms of tyranny; we tend to forget that legitimacy is an issue that pertains to *all* political authority. Indeed it would be very odd if there were a *graver* problem of legitimacy for popular majoritarian decision-making. Other political systems have all the legitimacy-related dangers of popular majoritarianism: they may get things wrong; they may have an unjust impact on particular individuals or groups; in short, they may act tyrannically. But they have in addition one legitimacy-related defect that popular majoritarianism does not have: they do not allow a voice and a vote in a final decision-making procedure to every citizen of the society; instead they proceed to make final decisions about the rights of millions on the basis of the voices and votes of a few [at 299].

## 2. Asserting Judicial Review's Democratic Credentials

It is an "ineluctable reality" Alexander Bickel wrote, that judicial review is a counter-majoritarian force: "when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now ... [J]udicial review is a deviant institution in the American democracy."<sup>12</sup>

The counter-majoritarian objection to judicial review continues to animate American thinking about the topic, even two centuries after the United States Supreme Court asserted its constitutional authority in *Marbury v. Madison*.<sup>13</sup> Whatever might be said about the origins of judicial review under the U.S. *Bill of Rights*, however, the Charter specifically empowers courts to strike down legislation. It is supposed to be a counter-majoritarian instrument<sup>14</sup> and, what is more, it was enacted pursuant to democratic processes. Far from being a deviant institution in Canadian democracy, judicial review is said to have a democratic pedigree.<sup>15</sup> As Justice Bertha Wilson put it:

What right have [judges] to frustrate the will of the people's duly elected representatives? None, I would say, except for the fact that in

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<sup>12</sup> Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, Conn.: Yale University Press, 1962), at 16-18. The extraordinary nature of judicial review is a common feature of American scholarship. As Fred Schauer has observed, Americans regard judicial review as legitimate on the understanding that it is "an exceptional event," and the Court's power is to be exercised "only with the greatest reluctance" (Schauer, "Ashwander Revisited" (1995) Sup. Ct. Rev. 71, at 71).

<sup>13</sup> 5 U.S. 137 (1803). Numerous articles were written on the two-hundredth anniversary of *Marbury v. Madison*. The Wake Forest Law Review devoted its Summer 2003 issue to the case.

<sup>14</sup> Jeremy Waldron points out that the term counter-majoritarian is misleading, since it overlooks the fact that courts, like legislatures, operate on the basis of a bare majority vote. See "Some Models of Dialogue Between Judges and Legislators," *supra*, note 6, at 27.

<sup>15</sup> Jeremy Waldron objects to the suggestion that judicial review is democratic because it was the result of democratic process:

[I]f the people want a regime of constitutional rights, then that is what they should have: democracy requires *that*. But we must not confuse the reason for carrying out a proposal with the character of the proposal itself. If the people wanted to experiment with a dictatorship, principles of democracy might give us a reason to allow them to do so. But it would not follow that dictatorship is democratic.

"A Right-Based Critique of Constitutional Rights" (1993) O.J.L.S. 18, at 46.

enacting the *Charter* these same duly elected representatives conferred not just that right but that duty upon them.<sup>16</sup>

In addition to emphasizing the democratic nature of the Court's mandate, Supreme Court Justices have usually sought to downplay their powers, or professed a lack of interest in them. Chief Justice Dickson emphasized the Court's role as dutiful servant, describing the Charter as something the judges "did not ask for," but had "thrust upon us."<sup>17</sup> According to McLachlin C.J., "[t]here is no evidence that judges, individually or collectively, particularly wanted the *Charter*."<sup>18</sup>

### 3. The Impact of Living Tree Constitutionalism

Living tree constitutionalism — the idea that the Canadian Constitution is "capable of growth and expansion within its natural limits"<sup>19</sup> — emphasizes the importance of the interpreted Charter, and in particular Ronald Dworkin's conception of judicial review. Dworkin suggested in *Law's Empire* that the task of interpreting constitutions is like the writing of a chain novel, each judge adding to the constitutional story with his or her interpretations of the text. Judges are constrained by the "dimension of fit," according to Dworkin, and must choose from amongst

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<sup>16</sup> Wilson, "We Didn't Volunteer" in Howe & Russell (eds.), *Judicial Power and Canadian Democracy* (Montreal: McGill-Queen's University Press, 2001) 73, at 75. The argument from the Charter's democratic origin is sometimes invoked by politicians to tout the democratic credentials of Charter decisions they support. Following the government's decision not to appeal the decision of the Ontario Court of Appeal in *Halpern v. Canada (Attorney General)* (*sub nom. Halpern v. Toronto (City)*; *Halpern v. Ontario*) (2003), 65 O.R. (3d) 161, 225 D.L.R. (4th) 529 (C.A.), establishing same-sex marriage, then-Justice Minister Martin Cauchon stated: "Let us remember that the Charter was not put in place by the judiciary. Its adoption in 1982 was a political decision following a heated debate in Parliament." Campbell Clark, Jane Taber & Tu Thanh Ha, "Chrétien Prepares Pivotal Speech" *The Globe and Mail* (19 August 2003) A1.

<sup>17</sup> Quoted in Sharpe & Roach, *Brian Dickson: A Judge's Journey* (Toronto: University of Toronto Press, 2003), at 380. Justice Bertha Wilson makes the same point in an article aptly titled "We Didn't Volunteer," *supra*, note 16.

<sup>18</sup> McLachlin, "Courts, Legislatures and Executives in the Post-Charter Era" in *Judicial Power and Canadian Democracy*, *supra*, note 16, 63, at 68.

<sup>19</sup> *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, at 136, *per* Lord Sankey (P.C.).



the possible interpretations the one that “makes the work in progress best, all things considered.”<sup>20</sup>

The obvious complaint about this conception of judicial review is that it begs the question as to the proper role of a judge engaged in constitutional adjudication.<sup>21</sup> In Richard Posner’s view, Dworkin’s chain novel analogy fails because it gives judges too much power:

[D]ecisions interpreting an authoritative legal text ... inherently stand on a different, and lower level than the text. Only the text is fully authentic; all the interpretive decisions must return Antaeus-like to the text for life-giving strength. Dworkin’s analogy equates the judges who interpret the Constitution to the framers of the Constitution.<sup>22</sup>

This is a powerful criticism in the United States but in Canada it is not. Dworkin’s chain novel analogy is an apt description of the Supreme Court of Canada’s approach to Charter interpretation,<sup>23</sup> which emphasizes the importance of progressive interpretation of the Charter over the text itself, along with the intentions of those who drafted it and their understandings of it. The Court’s approach in *Figueroa v. Canada (Attorney General)*<sup>24</sup> is typical. There, an ostensibly simple right — the

<sup>20</sup> *Law’s Empire* (Cambridge: Harvard University Press, 1986), at 228-38. Dworkin discusses the moral reading theory of constitutional interpretation and the requirement of “constitutional integrity” in *Freedom’s Law*, *supra*, note 11, at Ch. 1.

<sup>21</sup> As Michael McConnell has written:

Why does [Dworkin] assign the role of “author” to the judge? In the context of law making subject to constitutional judicial review, it seems more accurate to view the various legislative, executive, and common law decision makers as the authors, and to view judges as editors or referees. The judges’ task, it seems, is to ensure that the author of each chapter conforms to the rules of chain novel writing, not to write the books themselves.

McConnell, “The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s ‘Moral Reading’ of the Constitution” (1997) 65 *Fordham L. Rev.* 1269, at 1274.

<sup>22</sup> Posner, *Law and Literature* (Cambridge: Harvard University Press, rev. ed., 1998), at 246. Posner adds that as Dworkin defines it, the chain novel

places no constraint on the authors of subsequent chapters. Each author can in the first sentence of his chapter kill off all the existing characters and start anew. Of course this would not be thought cricket, but that just means that the writing of a chain novel is a more complex practice than Dworkin’s description of it. It is thus unclear to what exactly he is analogizing the legal interpretive process [*id.*].

<sup>23</sup> Justice Bertha Wilson has referred to Dworkin’s metaphor with approval in extrajudicial writing. See “The Making of a Constitution: Approaches to Judicial Interpretation” [1988] P.L. 370, at 373. (“The Constitution is always unfinished and is always evolving.”)

<sup>24</sup> [2003] 1 S.C.R. 912, [2003] S.C.J. No. 37.

right to vote and to run for office (section 3) — was interpreted by the majority of the Court as requiring “effective representation,”<sup>25</sup> thus rendering legislation governing political party status and privileges unconstitutional. Justice Iacobucci acknowledged the narrowness of the right but said that it was only narrow “[o]n its face,” adding that Charter analysis “requires courts to look beyond the words of the section.”<sup>26</sup> On this approach, many chapters of the Charter story remain to be written by the Court. Echoing Dworkin, McLachlin C.J. has described the Charter as “a work in progress.”<sup>27</sup>

#### 4. Equating the Court’s Decisions with the Charter Itself

Once the need for judicial interpretation of the Charter, the democratic legitimacy of judicial review, and the Court’s interpretive discretion have been established, it seems natural to equate the Court’s decisions interpreting the Charter with the Charter itself. This equation is captured in former United States Supreme Court Chief Justice Hughes’ aphorism: “We are under a Constitution, but the Constitution is what the judges say it is.”<sup>28</sup>

Ontario Chief Justice McMurtry has invoked Hughes in explaining judicial review under the Charter,<sup>29</sup> and Hughes is often cited by legal scholars as well.<sup>30</sup> Peter Hogg and Allison Bushell are forthright in

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<sup>25</sup> The concept of “effective representation” was first invoked in *Reference re Electoral Boundaries Commission Act ss. 14, 20 (Saskatchewan) (sub nom. Reference re Provincial Electoral Boundaries)*, [1991] 2 S.C.R. 158, [1991] S.C.J. No. 46, to limit the scope of the right to vote by not requiring parity of voting power across electoral boundaries.

<sup>26</sup> *Supra*, note 24, at para. 19.

<sup>27</sup> I criticize this conception in “A Constitutional Work in Progress? The Charter and the Limits of Progressive Interpretation” in *Constitutionalism in the Charter Era*, *supra*, note 6, at 413.

<sup>28</sup> Hughes, Speech before the Elmira Chamber of Commerce, May 3, 1907, in *Addresses and Papers of Charles Evans Hughes, Governor of New York, 1906-1908* (New York: G.P. Putnam’s Sons, 1908) 133, at 139. I am grateful to Richard Friedman of the University of Michigan Faculty of Law for a discussion of Hughes and his famous remarks, and help with the references here.

<sup>29</sup> Speech by Chief Justice of Ontario, Roy McMurtry (August 26, 2003, Ontario Justice Education Network, University of Western Ontario).

<sup>30</sup> Hughes’ quotation is used to explain interpretive discretion in Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough: Carswell, 1997), at ch. 5.5(b). John Saywell’s summation of the history of Canadian federalism echoes Hughes’ remarks: “[T]he law of the

observing that “judges have a great deal of discretion in ‘interpreting’ the law of the constitution, and the process of interpretation inevitably remakes the constitution into the likeness favoured by the judges.”<sup>31</sup> Originalists find this anathema,<sup>32</sup> of course, yet in Canada it appears to be uncontroversial, as though it is the obvious consequence of the decision to adopt the Charter.

Hughes’ remark is not an accurate description of American constitutionalism. In fairness to Hughes, however, it wasn’t proffered as such.<sup>33</sup> Nor was his remark even made while he was a judge. Hughes made the remark in a speech he gave as a candidate for governor of New York, well prior to his appointment to the Supreme Court.<sup>34</sup> In response to criticism of public service administration, Hughes is said to have abandoned his prepared text and made the following remarks:

I have the highest regard for the courts. My whole life has been spent in work conditioned upon respect for the courts. I reckon him one of the worst enemies of the community who will talk lightly of the dignity of the bench. We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our

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constitution is what the judicial lawmakers have said it is, and will be what they say it may be.”: *The Lawmakers* (Toronto: Osgoode Society, 2002), at 309.

<sup>31</sup> Hogg & Bushell, “The Charter Dialogue Between Courts and Legislatures” (1997) 35 *Osgoode Hall L.J.* 75, at 77.

<sup>32</sup> Most prominently United States Supreme Court Justice Antonin Scalia. See Scalia, *A Matter of Interpretation* (Princeton, New Jersey: University of Princeton Press, 1997), at 41-47; Scalia, “The Bill of Rights: Confirmation of Extant Freedoms or Invitation to Judicial Creation?” in Huscroft & Rishworth (eds.), *Litigating Rights* (Oxford: Hart Publishing, 2002), at 19; and Scalia, “Romancing the Constitution: Interpretation as Invention” in *Constitutionalism in the Charter Era*, *supra*, note 6.

<sup>33</sup> Hughes’ biographers record that he was troubled by the use to which his remarks were put:

Through the remainder of his life he was to hear and see this casual phrase, torn from the context of an extemporaneous speech, repeated again and again as if he had, in a moment of candor, exposed the solemn function of judging as a sort of humbuggery. Of course he had done nothing of the sort. “The inference that I was picturing constitutional interpretation by the courts as a matter of judicial caprice,” he wrote in his Biographical Notes, “... was farthest from my thought...”

Pusey, *Charles Evans Hughes*, Vol. I (New York: Macmillan Group, 1951), at 204.

<sup>34</sup> Hughes served as governor of New York for two terms before being appointed an Associate Justice of the Supreme Court in 1910. He resigned from the Court in 1916, ran for President and lost, but returned to the Court in 1930 as Chief Justice.<sup>35</sup> Hughes was speaking on the Public-Service Commissions bill, which was criticized by John Stanchfield, a political opponent. *Supra*, note 28, at 133 and 139.

liberty and of our property under the Constitution. I do not want to see any direct assault upon the courts, nor do I want to see any indirect assault upon the courts. And I tell you, ladies and gentlemen, no more insidious assault could be made upon the independence and esteem of the judiciary than to burden it with these questions of administration — questions which lie close to the public impatience, and in regard to which the people are going to insist on having administration by officers directly accountable to them.

Let us keep the courts for the questions they were intended to consider<sup>35</sup>  
...

Hughes was explaining, in other words, why it was appropriate to keep matters of administration out of the courts. He considered that the courts should not have to waste time on such matters when it had more important things to do.<sup>36</sup>

The U.S. Supreme Court has rarely asserted the power Hughes' aphorism suggests.<sup>37</sup> On the contrary, the view that constitutional interpretation is a shared enterprise is mainstream in the United States. Laurence Tribe makes this point rhetorically:

What if, for example, Congress enacted a law (over the President's veto) ordering the imprisonment or summary execution of a suspected terrorist by name and a politicized Supreme Court upheld it? Shouldn't the President have the power — even the duty — to refuse to carry out the sentence? Similarly, suppose that in the year 1863 the same Supreme Court that decided *Dred Scott* ruled that the emancipation proclamation was unconstitutional as a taking of property. Would Lincoln have been obligated to return freed blacks to slavery? These examples illustrate the gravity of the separate oath requirement that the

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<sup>36</sup> Hughes continued:

You must have administration, and you must have administration by administrative officers. ... Under the proper maintenance of your system of government and in view of the wide extension of regulating schemes which the future is destined to see, you cannot afford to have that administration by your courts. *Supra*, note 28, at 141.

<sup>37</sup> The paradigm exception is *Cooper v. Aaron*, 358 U.S. 1 (1958), in which the Court pronounced that it was "supreme in the exposition" of the Constitution (at 18). See Tribe, *American Constitutional Law* (New York: Foundation Press, 2000), at 254-58, describing the Court's claim of constitutional supremacy as "quite understandable given the open state resistance to the principles announced in *Brown*," and noting that "subsequent assertions of ultimate authority have tended to be more restrained" (at 255-56).

Constitution imposes on the President ... and the legitimacy of differing interpretations of the Constitution itself.<sup>38</sup>

Thus, in regard to American law Hughes' remark is more aptly described as a quip.<sup>39</sup> Yet, it has considerable force as a description, and for some a normative conception, of Canadian constitutionalism. Canadian governments have never had a *Dred Scott*<sup>40</sup> or a *Lochner*<sup>41</sup> moment to deal with; they have not had to issue a direct challenge to the Court or its decisions.<sup>42</sup> Nor has there been anything like the willful disobedience that followed the U.S. Supreme Court's decision in *Brown v. Board of Education*.<sup>43</sup> On the contrary, as we will see, Canadian governments have built judicial exclusivity in interpreting the Charter into their political plans.

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<sup>38</sup> Tribe, *id.*, at 266-67. See also Devins & Fisher, "Judicial Exclusivity and Political Instability," (1998) 84 Va. L. Rev. 83, and Tushnet, *Taking the Constitution Away from the Courts* (1999) 6-32. Cf. Alexander & Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110 Harv L. Rev. 1359, and "Defending Judicial Supremacy: A Reply" (2000) 17 Const. Commentary 455; and Farber, "The Supreme Court and the Rule of Law: *Cooper v. Aaron* Revisited" [1982] U. Ill. L. Rev. 387.

<sup>39</sup> Cox, *The Court and the Constitution* (Boston: Houghton Mifflin, 1987), at 68. Nevertheless, Alexander and Schauer specifically invoke Hughes in arguing that the Court's interpretation of the Constitution should be understood as equivalent in status to the Constitution itself:

We argued, to put it starkly, that "the Constitution is what the judges say it is" may well be bad jurisprudence because it is incomprehensible as an attempt to explain what it means to argue to the Supreme Court, but that it is nonetheless a desirable attitude for non-judicial officials to have towards the Court and its product, in much the same way, but far less controversially, that it is a desirable attitude for lower court judges to have towards the Court and its opinions.

"Defending Judicial Supremacy: A Reply," *id.*, at 455.

<sup>40</sup> *Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>41</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>42</sup> Parliament's action following the Court's decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98 is an exception, but is not so momentous. Nevertheless, it is criticized strongly by Cameron, "Dialogue and Hierarchy in Charter Interpretation: A Comment on *R. v. Mills*" (2000) 38 Alta. L. Rev. 1051.

<sup>43</sup> 347 U.S. 483 (1954).

### III. REINFORCING JUDICIAL EXCLUSIVITY: THE POPULARITY OF THE COURT AND JUDICIAL REVIEW

One of the key factors reinforcing the idea of judicial exclusivity in interpreting the Charter is the popularity of the Court itself. Supreme Court Justices are as respected and admired as politicians are distrusted and scorned. They are treated as celebrities, and honoured as politicians almost never are. Judges may not court popularity, but neither do they appear to discourage it.<sup>44</sup>

It might be argued that the Court is well regarded because it deserves to be — that it is respected and admired for the way in which it has exercised its duties under the Charter. There is much to this.<sup>45</sup> But it is also fair to say that popularity is a relative thing, and it is easy to be popular compared to politicians. In comparison to politicians, judges are treated almost reverentially by the media. Supreme Court Justices are not subject to a public vetting process prior to their appointments, and politicians are cautious about criticizing them once they are appointed, lest they be seen as undermining the independence of the judiciary. A

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<sup>44</sup> It is not unusual for Justices to be honoured for their work, not only in Canada but internationally. In 2003, the “Peter Gruber Foundation,” based in the U.S. Virgin Islands, awarded retired Supreme Court Justice Bertha Wilson and current Ontario Court of Appeal Justice Rosalie Abella its Justice Award for their work in human rights. According to the Gruber Foundation website, the award comes with a gold medal and a \$200,000 cash award. See online: <[http://www.petergruberfoundation.org/justice/justice\\_frameset.htm](http://www.petergruberfoundation.org/justice/justice_frameset.htm)> (viewed March 29, 2004).

The three members of the Ontario Court of Appeal whose decision in *Halpern v. Canada*, *supra*, note 16, held the law of marriage unconstitutional were named “Nation Builders of the Year” by *The Globe and Mail*. They were interviewed and profiled at length, and posed for a full-page colour photo. See online: <<http://www.globeandmail.com/servlet/story/RTGAM.20031212.wnat1212/BNStory/Front/>> (viewed March 29, 2004). The awards are discussed in the “Report of the Chief Justice of Ontario Upon the Opening of the Courts of Ontario for 2004” online: <[http://www.ontariocourts.on.ca/court\\_of\\_appeal/speeches/opening\\_speeches/coareport2004.htm](http://www.ontariocourts.on.ca/court_of_appeal/speeches/opening_speeches/coareport2004.htm)>.

<sup>45</sup> It is common for Canadians to assume that the Supreme Court of Canada enjoys greater respect than its American counterpart, which is assumed to be more political in nature. However, an Ipsos-Reid poll from 2001 found that even though 93 per cent said decisions of the U.S. Supreme Court are influenced by partisan politics, fully 64 per cent said they approved of the Court’s decisions over the past year (which included the controversial decision in *Bush v. Gore*, 531 U.S. 98 (2000)), while 85 per cent said that they have respect for Supreme Court Justices (45 per cent have a “great deal” of respect; 40 per cent have a “fair amount” of respect). See Ipsos-Reid Press Release, “Supreme Decisions: Public’s view of the Supreme Court” (5 July 2001).

number of conventions operate to insulate the judiciary from the sorts of criticism to which politicians are subjected routinely. This needn't be so — it is certainly not the case in the United States, for example — but it is so. Despite the nature of the task they are performing in the Charter era, Supreme Court Justices are presumed to be doing law rather than politics, and have managed to remain above the political fray as a result.

I have no doubt that this will change in time. My point is simply that the popularity of the Court, combined with the unpopularity of politicians, helps reinforce the idea of judicial exclusivity in interpreting the Charter. Chief Justice McLachlin has explicitly linked the Court's popularity to the widening scope of the tasks it is asked to fulfill. But while she acknowledged it was a "radical alteration in the public perception of the role of judges in modern society,"<sup>46</sup> she did not deprecate it. On the contrary, the public's "increasing confidence in judges to sort out society's problems" appears to be a matter of pride for the Chief Justice.<sup>47</sup>

The Chief Justice is right to say that the public has increasing confidence in the ability of judges to sort out society's problems. But public support is no proof of the legitimacy of judicial review or its democratic

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<sup>46</sup> *Id.*

<sup>47</sup> McLachlin, "The Role of Judges in Modern Society" (Speech at the Fourth Worldwide Common Law Judiciary Conference, 5 May 2001). Justice Rosalie Abella of the Ontario Court of Appeal has also used public opinion polls to argue in support of judicial review:

We spent the last decade listening to a chorus moaning over the fate of a majority whose legislatively endorsed wishes could theoretically be superceded by those of judges, only to learn in poll after poll that an overwhelming majority of that majority is happy, proud and grateful to live in a country that puts its views in perspective rather than in cruise control; who prefers to see judicial rights protection as a reflection of judicial integrity or independence rather than of judicial trespass or activism; and who understands that the plea for judicial deference may be nothing more than a prescription for judicial rigor mortis.

"Public Opinion, the Courts, and Rights: The Charter in Context" in Magnet, Beaudoin, Gall & Manfredi (eds.), *The Canadian Charter of Rights and Freedoms: Reflections on the Charter After Twenty Years* (Toronto: LexisNexis, 2003) 421, at 434.

Justice Abella's assertion that "poll after poll" demonstrates overwhelming majority support is not supported by recent polls. An Angus Reid survey in 1999 found that while 50 per cent considered that judges do not have too much power, 45 per cent considered that they do. See Makin, "Opinion mixed on power of judges" *The Globe and Mail* (23 November 1999). An Ipsos-Reid poll in 2003 showed that 54 per cent thought judges have too much power, while 44 per cent considered that they do not (Ipsos-Reid Press Release, 10 August 2003). This survey also revealed that 71 per cent agreed that Parliament, rather than the courts, should make law. Nevertheless, 78 per cent agreed that the courts had the right to issue legally binding decisions under the Charter.

credentials, just as public opposition is no proof of its illegitimacy or democratic failings. The Court should not shrink from upholding the Charter in the face of unpopularity, but nor should it infer an expanded mandate from its popularity. There is more to the Constitution than judicial review.

#### IV. JUDICIAL EXCLUSIVITY AND SAME-SEX MARRIAGE

Same-sex marriage affords a chance to move from the abstract to the particular in assessing the impact of judicial review, and in particular the consequences of judicial exclusivity in interpreting the Charter. It demonstrates that judicial exclusivity in interpreting the Charter is not only well-established as a constitutional norm, but that it has become an important consideration in the political process. It also demonstrates, I think, the way in which judicial exclusivity can have a debilitating effect on the political process.

##### 1. A Long-Developing Controversy

Same-sex marriage has been before Canadian courts for over a decade.<sup>48</sup> During that period, successive governments have taken the position that the limitation of marriage to opposite-sex couples does not violate the Charter, a position that has been maintained as the Court's approach to the equality right in section 15 of the Charter evolved. Faced with decisions precluding different treatment of same-sex couples in a variety of contexts, Parliament and the provincial legislatures amended numerous laws. Significantly, however, Parliament stopped short of amending the law to establish same-sex marriage. On the contrary, in 1999 Parliament expressly endorsed the traditional concept of opposite-sex marriage.<sup>49</sup>

Litigation continued during this time, and precedents began to build up in the lower courts. The Ontario Divisional Court held that the common law definition of marriage infringed the Charter, but suspended the

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<sup>48</sup> See *Layland v. Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 O.R. (3d) 658, [1993] O.J. No. 575 (Div. Ct.).

<sup>49</sup> *Modernization of Benefits and Obligations Act*, S.C. 2000, c. 12, s. 1.1.



declaration for two years to allow Parliament to respond.<sup>50</sup> Subsequently, a Quebec trial court reached the same conclusion, and also suspended its declaration for two years.<sup>51</sup> The British Columbia Court of Appeal held that the definition of marriage violated the Charter and suspended its declaration to coincide with the date the suspension in the Ontario decision was set to expire.

The decision of the Ontario Court of Appeal in *Halpern v. Canada*<sup>52</sup> brought things to a head. Not only did the Court hold that the definition of marriage infringed the Charter, it reformulated the definition to mean the “voluntary union for life of two persons,” and its order was made effective immediately, thus pre-empting any legislative response.

The decision in *Halpern* came as no surprise; same-sex marriage ceased to be a radical idea from the moment the first court held that the law of marriage violated the Charter. Nevertheless, the remedial aspect of *Halpern* came as a considerable surprise. Suspended declarations of Charter infringements are common,<sup>53</sup> and the Ontario Court of Appeal was well aware that the issue was under political consideration at the highest level. A committee of Parliament had conducted national consultations and was in the process of preparing a report for Parliament.<sup>54</sup>

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<sup>50</sup> *Halpern v. Canada (Attorney General)*, *supra*, note 16.

<sup>51</sup> *Hendricks v. Quebec (Procureur général)*, [2002] J.Q. 3816 (Sup. Ct.). The B.C. Court of Appeal reached the same conclusion of unconstitutionality as the Ontario Court, but suspended its order to allow Parliament time to respond. See *EGALE Canada Inc. v. Canada (Attorney General)* (2003), 13 B.C.L.R. (4th) 1, [2003] B.C.J. No. 994 (C.A.). Following the federal government’s announcement that it would not be appealing the decision in *Halpern*, the B.C.C.A. lifted the suspension order, and the Quebec Court of Appeal followed suit.

<sup>52</sup> *Supra*, note 16 [hereinafter “*Halpern*”].

<sup>53</sup> In *Vann Niagara Ltd v. Oakville (Town)* (2002), 60 O.R. (3d) 1, [2002] O.J. No. 2323, for example, the Ontario Court of Appeal held two relatively inconsequential municipal bylaws regulating the use of billboard advertising to be unconstitutional on the basis that they infringed the freedom of expression, but without discussion suspended its declaration for six months. (The Court’s decision on one of the bylaws was overturned on appeal to the Supreme Court, [2003] 3 S.C.R. 158, [2003] S.C.J. No. 71.) Bruce Ryder criticizes suspended declarations of unconstitutionality in “Suspending the Charter” (2003) 21 Sup. Ct. L. Rev. (2d) 267.

<sup>54</sup> The House of Commons Standing Committee on Justice and Human Rights had been studying the possible recognition of same-sex unions since November 2002, and had held hearings over a period of several months. Following the decision of the Ontario Court of Appeal in *Halpern*, the Committee adopted a motion to support the Court’s decision. The vote was 9-8, after two members of the Committee representing the government who opposed same-sex marriage were replaced. See Clark, “Government steers vote on accepting same-sex ruling” *The Globe and Mail* (13 June 2003).

It is not too much to say that the Court's remedial order was contemptuous of the democratic processes that were underway. Yet no criticism was heard from the government on this account. The task of defending the role of Parliament fell to the Opposition, which opposed the Court's decision and as a result had little credibility as Parliament's defender. For its part, the government announced that it intended to legislate in accordance with the Court's decision rather than appeal it to the Supreme Court of Canada. First, however, it would be submitting a reference to the Court, asking three questions ostensibly designed to clarify the issues.

## 2. The Government's Initial Response and Strategy

The government directed a reference to the Supreme Court of Canada on July 16, 2003, asking the following questions:

Is the annexed Proposal for an *Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?

If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?

Does the freedom of religion guaranteed by paragraph 2(a) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

The answers the Court will give to these reference questions are obvious — specifically, yes, yes, and yes — and in normal circumstances there would be no reason to seek the Court's opinion on them prior to legislating. These are not normal circumstances, however. An election was pending, and same-sex marriage is politically divisive. There is significant opposition to it within the government caucus; it is an issue that separates the government and the Opposition; and it appears to divide Canadians. In these circumstances, the reference serves more than simply legal purposes. The government is using the reference procedure to pursue its political agenda.

The first and third questions have not really been put into issue. The federal government has authority over marriage and divorce under section 91(26) of the *Constitution Act, 1867*,<sup>55</sup> and there is no doubt that this includes the question of capacity to marry.<sup>56</sup> As for the freedom of religious officials to choose which marriages to sanctify, this is surely one of the *least* things that the guarantee of freedom of religion in section 2(a) of the Charter requires, and no legislative authorization is required in order to exercise that freedom.

The second question is simply disingenuous. There is no doubt that Parliament is free to legislate to create same-sex marriage should it wish to do so, and that it always has been. To ask the Court whether Parliament *can* do what it so obviously can is to feign caution where courage is lacking. In terms of crass partisan advantage, the government is using the Court to fend off political criticism and buy time. The reference ensures that the controversy is removed from continued political scrutiny in the short run. Anyone attempting to raise the matter is sure to be met with the refrain that it would be inappropriate to discuss the matter while it is before the Court. The length of time the Court can be expected to take to hear and answer the reference questions is simply an added bonus, given that it allowed the government to go to the polls before the matter could return to Parliament.

### 3. Revising the Strategy

With the end of Jean Chrétien's leadership and the beginning of Paul Martin's came a new Cabinet and a revised strategy on same-sex marriage, albeit to the same political end. The new Minister of Justice, Irwin Cotler, announced that the government remained committed to

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<sup>55</sup> (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

<sup>56</sup> Justice Pitfield held that the law of the *Constitution Act, 1867* bars same-sex marriages, and that constitutional amendment was required in order to change the concept of marriage — this despite submissions from both the Attorney General for British Columbia and the Attorney General for Canada that the opposite-sex requirement related to the capacity to marry falls within Parliament's jurisdiction to legislate under s. 91(26). See *EGALE Canada Inc. v. Canada (Attorney General)* (2001), 95 B.C.L.R. (3d) 122 (B.C.S.C.). On appeal, both Attorneys General agreed that the trial judge erred on this point. See *EGALE Canada Inc. v. Canada (Attorney General)* (2003), *supra*, note 51, at para. 11 (C.A.). The British Columbia Court of Appeal followed the Ontario Court of Appeal in holding that Pitfield J. was incorrect.

same-sex marriage. At the same time, however, the government was expanding the pending reference to include a fourth question:

Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in s. 5 of the *Federal Law — Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

This is the very question that would have been answered had the government appealed the decision in *Halpern*. Not only did it not do so, however, it opposed those intervenors who sought standing to appeal the decision, and was successful in doing so.<sup>57</sup>

The government should have appealed the decision in *Halpern* for several reasons. First, where the constitutionality of federal law is concerned, it is almost invariably inappropriate for the Attorney General to let a provincial court of appeal have the last word. A national solution is required, and if the solution is to come from a court it should come from the highest court.<sup>58</sup> Second, the case raises an important point about remedial discretion, and in particular the circumstances in which it is appropriate to suspend a declaration of unconstitutionality in order to allow a legislative response. This is a question that transcends the importance of same-sex marriage, and further guidance from the Supreme Court would be helpful.

The fact that the law of equality had not changed — the Court in *Halpern* was simply applying the test developed by the Supreme Court of Canada in *Law v. Canada (Minister of Employment & Immigration)*<sup>59</sup> — is another reason that made an appeal in *Halpern* appropriate. If the government was sincere in the position it advanced at trial and on appeal, it is difficult to see why it should not have persevered. Many cases lost in the lower courts are won in the Supreme Court. It is possible, however, that the government's heart was never in the defence of the

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<sup>57</sup> 2003 SCCA 337.

<sup>58</sup> See Huscroft, "The Attorney-General and *Charter* Challenges to Legislation: Advocate or Adjudicator" (1995) 5 N.J.C.L. 125, at 161-62, arguing that "a decision that federal legislation is unconstitutional should normally be reviewed by the Supreme Court of Canada, in order to ensure the equal application of federal legislation across the provinces." The same applies, in my view, where the common law is concerned.

<sup>59</sup> [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12.

law. We have to consider the possibility that the decision in *Halpern* was to the government's liking, despite the position the government advanced. The government had to defend the law at first instance, but the emphatic decision of the Ontario Court of Appeal might have galvanized support for same-sex marriage sufficiently to make the decision to legislate politically palatable, if not positively virtuous: in conceding defeat, the government purported to emphasize its respect for the Charter.

In any event, addition of the fourth question allowed the fundamental issue to be addressed by the Court — that is, whether the opposite-sex requirement for marriage is inconsistent with the Charter. This gives objectors the day in court denied them when the government elected not to appeal. At the same time, it allows the government to argue against the constitutionality of the law it has announced its intention to amend.

#### **4. Selling the Strategy**

The Minister of Justice, Irwin Cotler, has sought to portray the government's strategy on same-sex marriage as based in principle:

[T]here is a third important principle, and that is the importance of a full and informed debate before the court, in Parliament and in response to concerns of the public. It is to respect that third principle that the Government is seeking the opinion of the Supreme Court of Canada on a new question in the reference on civil marriage and the legal recognition of same-sex unions.

In particular, the Government of Canada is seeking the opinion of the Supreme Court of Canada on the question of whether the opposite-sex requirement for marriage for civil purposes is consistent with the Canadian Charter of Rights and Freedoms.

We understand that many Canadians are struggling with this question. And as a new administration, one of our key priorities is to address what some have termed "a democratic deficit".

While the Government's position on the reference has not changed, adding this question will allow for a more comprehensive opinion by the Court, and for those groups and individuals who do not agree with the Government's approach to put their case to the Court.

As you may know, the Supreme Court ruled last Friday that 18 groups and individuals can intervene. So we are sure of a full range of views before the Court.

In making this decision to add a new question, the Government was guided by three principles - equality, religious freedom, and the importance of a full and informed debate before the court, in Parliament and in response to the concerns of Canadians on this important social issue.

In summary, the Government continues to believe that the best way to fully respect the two fundamental Charter rights involved here - equality and freedom of religion - is to provide equal access to civil marriage for same-sex couples seeking that degree of commitment as other couples, while ensuring the protection of religious officials who refuse to perform marriage ceremonies where it would be against their religious beliefs.

The final decision on this question will be made by Parliament in the spirit of open debate. But before that happens, we need clear advice from the Supreme Court on the legal framework within which choices must be made.<sup>60</sup>

Consider what is going on here. The government — at the time a majority government, no less, with the power to amend the law on a party vote should it choose to do so — postponed legislating in order to ask the Supreme Court questions to which it knew the answers. Counsel will solemnly attend the hearing, and argue for the answers that the Minister of Justice will have advised Cabinet that the government is sure to receive. Then, we are told, a “full and informed debate” will occur, and Members of Parliament will determine what the law should be. Of course this is preposterous, and the availability and political attractiveness of this sort of strategy is a strong argument against the existence of a reference procedure. Not only is the government’s strategy disingenuous politically, but it undermines the legitimacy of Parliament as a constitutional actor. It reinforces the idea of judicial exclusivity in interpreting the Charter, and suggests that political action would be precipitous in the absence of judicial direction.

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<sup>60</sup> Minister of Justice and Attorney General Irwin Cotler, Press Release, “Government of Canada Reaffirms its Position on Supreme Court Reference” (Ottawa, January 28, 2004).

The addition of the fourth question to the reference demonstrates the problem in sharp relief. The fourth question asks whether the opposite-sex requirement for marriage is consistent with the Charter. The first thing to notice about this question is that it is irrelevant. If the Court holds that the opposite-sex marriage requirement is inconsistent with the Charter, that is simply a reason for the government to do what it has committed to do, and could already have done without the expense and delay the reference litigation will occasion. If, on the other hand, the Court answers the fourth question by stating that the opposite-sex requirement does *not* infringe the Charter, *the Government remains free to change the law of marriage to include same-sex couples in any event.* The Charter is a floor, not a ceiling, for rights, and Parliament is free to establish greater rights protection than the Charter requires. Again, the Court's decision is simply irrelevant. If the government believes in same-sex marriage, then there is no excuse for not legislating immediately.

Is there room for meaningful debate in Parliament about same-sex marriage following the Court's decision? If the Court advises that the opposite-sex requirement for marriage is inconsistent with the Charter, those MPs who oppose same-sex marriage will in essence be left to debate the Court rather than the government. Whether the Court speaks unanimously or through a bare majority, those who disagree can only prevail temporarily, and then only if they can convince Parliament to invoke the notwithstanding clause, thereby staving off same-sex marriage for up to five years. The only way in which meaningful debate could occur is if the Court were to advise that *Halpern* was wrongly decided. Same-sex marriage would be seen as a political decision rather than a legal requirement. Despite the Justice Minister's fine words about the importance of Parliament and the spirit of open debate, this is surely the government's nightmare scenario.

Fortunately for the government this will not occur. It is simply too late in the day for the Court to decide that limitation of marriage to opposite-sex couples does not infringe the Charter, even if it once might have done so. The government's management of the issue has, in effect, precluded the possibility of any other outcome: hundreds of couples have married since the decision in *Halpern*, and hundreds more will

have done so by the time the Court answers the reference questions. A new status quo has been established, and no one should suppose that the Court will disturb it.<sup>61</sup>

## V. CAN THE COURT DISCOURAGE JUDICIAL REVIEW?

It might be objected that my concerns about judicial review and the role of the Court wrongly assume that the Court has a choice in the matter when it comes to exercising its judicial review function. It is often said, for example, that the Court cannot refuse to decide Charter issues. Chief Justice McLachlin has frequently defended the Court against charges of judicial activism on this basis:

The courts cannot say, “go away, we’re not interested in your problem.” Nor can the courts say, the Parliamentarians debated this and voted, and that’s the end of the matter. It is the constitutional obligation of judges to hear a citizen’s complaint and to decide whether it is valid or not.<sup>62</sup>

Kent Roach takes up the argument in *The Supreme Court on Trial* in a chapter titled “The Myth of Judicial Activism.” He deprecates the American practice of avoiding or limiting the extent of constitutional adjudication, a practice Alexander Bickel called the “passive virtues.”<sup>63</sup> There is a rich body of jurisprudence here that Roach does not consider. In his view, avoidance is tantamount to “ducking constitutional issues,” an act he equates with cowardice.<sup>64</sup> He also equates it with the denial of

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<sup>61</sup> I put aside here a number of interesting questions that would arise in the event the Court were to hold that *Halpern* was wrongly decided. It is one thing to advise that a case was wrongly decided, but quite another to deal with rights that have been exercised in good faith reliance on such a decision, especially given that the government elected not to appeal.

<sup>62</sup> McLachlin, “Charter Myths” (1999) 33 U.B.C. L. Rev. 23, at 31.

<sup>63</sup> Bickel, *supra*, note 12, at Ch. 4.

<sup>64</sup> Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001), at 208. I say this because at several points Roach describes judicial decisions under the Charter as “courageous.” The Court’s decision in *Burns and Rafay* (*United States v. Burns*), [2001] 1 S.C.R. 283, [2001] S.C.J. No. 8: precluding extradition to face the possibility of capital punishment) is described as a “courageous and bold change of heart” (at 212), and a “courageous judgment” (at 213). I don’t know what it is that makes a judgment courageous, but I wonder whether it is appropriate to describe any judicial decision in these terms.



rights: “The Court simply must decide constitutional issues, however difficult or divisive they may be,” he argues, because “[d]ucking the issue will only delay the inevitable and often constitute an implicit and unjustified dismissal of the merits of the claim.”<sup>65</sup>

I think that this puts the case too highly. If the claim is that the Supreme Court is powerless to do anything other than decide any constitutional issue raised before it, then it is incorrect as a descriptive matter. For the most part, the Court controls its docket: it has a discretion to grant leave to appeal, and hears only those cases that it chooses to hear — cases that in its view raise matters of public importance.<sup>66</sup> Chief Justice McLachlin’s point that “judges do not have agendas,” but simply “take the laws and the cases as they find them, and apply their interpretative skills to them as the constitution requires,”<sup>67</sup> may be true as far as the lower courts are concerned, but not the Supreme Court of Canada. In deciding which cases it will hear the Supreme Court sets the constitutional agenda and, having done so, reserves the right to determine whether and how thoroughly it will deal with the issues the parties want to litigate. The Court has discretion as to how it chooses to deal with even those cases it must accept. The exercise of the Court’s discretion in dealing with reference questions is a prominent example here. Some of the most famous reference cases are those in which the Court has exercised its discretion to answer questions not raised in a reference.<sup>68</sup> The Court has also exercised its discretion *not* to answer matters raised in a reference.<sup>69</sup>

The larger problem with the argument that the Court *must* decide Charter cases is the assumption that underlies it. The assumption is that

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<sup>65</sup> *Id.*, at 210.

<sup>66</sup> The Court must hear criminal law appeals as of right in some cases, and must accept reference questions. In general, however, the Court decides which cases it will hear based on its opinion that the question raised is a matter of public importance such that it ought to be decided by the Court: *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 40(1).

<sup>67</sup> Chief Justice McLachlin, address to The Canadian Club of Toronto, Tuesday, June 17, 2003.

<sup>68</sup> Prominent here are *Reference re Resolution to Amend the Constitution (sub nom. Reference re Questions concerning Amendment of Constitution of Canada as set out in O.C. 1020/80)*, [1981] 1 S.C.R. 753 [hereinafter “Patriation Reference”], and *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, [1998] S.C.J. No. 61.

<sup>69</sup> Hogg, *supra*, note 30, at Ch. 8.6(d). Hogg advocates that the Court exercise its discretion not to answer a reference question more often.

judicial decisions are necessary because the Charter has no meaning in the absence of judicial explication. The assumption is usually implicit but it is sometimes explicit, as for example when the Court justifies extensive *obiter dicta* on the basis that the parties need to know the law.<sup>70</sup> More problematically, it is also justified on the basis that politicians have abdicated their responsibilities.

Recall the remarks of Lamer C.J. quoted earlier:

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.<sup>71</sup>

The short answer to the Chief Justice is that divine providence has less to do with the scope of constitutional judicial review than the will of the Court. Legislators may well attempt to abdicate their responsibilities and leave matters to the Court, but the Court is a major contributor to the problem. In the Charter era the Court's decisions alter the political landscape, and not only in respect of particular issues. They create structural incentives and disincentives to political action, and it ill-becomes the Court to affect surprise at any of this, or to express disapproval of timid legislatures. By being helpful or more grandly purporting to "do its duty" in Charter cases, the Court diminishes not only the importance of political resolution of rights questions but the likelihood that it will occur.

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<sup>70</sup> Sometimes this is expressed as a matter of fairness to the parties: having argued a matter, they deserve to have the Court answer it.

<sup>71</sup> Chief Justice Lamer, quoted in Tibbetts, *supra*, note 7. Counsel have no compunction about urging courts to resolve questions rather than leaving them to legislatures. Counsel for the plaintiffs in *Halpern v. Canada*, discussed in the text above, argued that the federal government had engaged in "a history of legislative denial or legislative avoidance" when it came to same-sex rights, and that positive change had come only as a result of pressure from the courts. "Do not defer to them in the hope that things will be done," she urged. "They cannot be trusted.": Kari, "Ottawa 'can't be trusted' on gay marriage: lawyer" *The National Post* (24 April 2003) A11.

## VI. CONCLUSION

Historian Michael Bliss has expressed concern that the debate over same-sex marriage may cause a political backlash, and ultimately a confrontation between Parliament and the Court. According to Bliss,

[p]oliticians simply cannot offer easy leadership on divisive social issues, but rather have to follow the tide of opinion, brokering competing positions and waiting for common denominators to develop. Certain problems involving conflicting claims to rights and privileges within society really ought to be left to the courts to sort out. I think the difficult question of the definition of marriage is one such problem.<sup>72</sup>

It does not occur to Bliss that the problems he seeks to avoid — a political backlash and a confrontation between Parliament and the Court — have been caused by the solution he advocates. Nor does it occur to him that removing issues from democratic deliberation may exacerbate those problems. One of the important lessons of American constitutional law is that the judiciary has less ability to resolve pressing social issues than is commonly supposed. It may succeed from time to time, where it is able to identify and reinforce a matter of societal consensus, or perhaps an emerging area of consensus, but for every *Brown v. Board of Education*<sup>73</sup> there is likely to be a *Roe v. Wade*,<sup>74</sup> a cautionary tale about the exercise of judicial power. The U.S. Supreme Court's decision to constitutionalize the law of abortion fanned the flames of that controversy, and put the Court at the centre of a political debate that continues over thirty years later.

If Bliss's solution is problematic, the larger concern is that he supposes there is a problem that needs to be addressed at all. The controversy that accompanies the exercise of deliberative democracy is not something to be regretted, and avoided if possible. It is an inherent part of the process we need to face and resolve in order to act as a self-governing democratic polity. Democracy is not for the faint-hearted, and the Court does Canadians no favours when it promotes reliance upon judicial review as a means of resolving difficult societal problems. The

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<sup>72</sup> Bliss, "Politicians Playing with Fire" *The National Post* (2 August 2003) A18.

<sup>73</sup> *Supra*, note 43.

<sup>74</sup> 410 U.S. 113 (1973).

risk is that it will undermine not only our capacity but our will for political resolution.

This risk is inherent in any system of judicial review. The American scholar James Bradley Thayer warned about the impact of judicial review on the democratic processes over a century ago:

The tendency of a common and easy resort to this great function [judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility. It is no light thing to do that.<sup>75</sup>

Thayer does not receive much attention these days, and virtually none in Canada. But the warning he sounded then is worth heeding now. In the second generation under the Charter, the challenge for the Supreme Court lies in ensuring that there is more to democratic constitutionalism than simply judicial review. Repudiating the government's political strategy in the same-sex marriage reference would be a good start.

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<sup>75</sup> Thayer, *John Marshall* (New York: Da Capo Press, 1901, reprinted 1974) at 107; also quoted in Bickel, *supra*, note 12, at 22.

