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The Dangers of the Reference Question: SCC v. SCOTUS

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THE DANGERS OF THE REFERENCE QUESTION: *SCC V. SCOTUS*

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ABSTRACT: This article deals with diverging approaches to the question of a legal reference in Canada and the United States. A reference is a hypothetical question of law posed to a court. In Canada references are accepted whereas in the United States they are prohibited as violating the separation of powers doctrine and unconstitutional under Article III of the U.S. Constitution. Canada should eliminate the reference procedure and limit judges to opine on matters of actual controversy, as is the case in the United States.

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I. INTRODUCTION

In American law schools, first-year students are taught the parameters of judicial power.[1] The exercise of judicial power in the United States is limited to "cases" and "controversies."[2] Thus, the U.S. Constitution precludes the judicial arm from offering advisory opinions.[3] This is because, as Justice Frankfurter stated, "it is extremely dangerous to encourage extension of the device of advisory opinions to constitutional controversies, in view, of the nature of the crucial constitutional questions and the conditions for their wise adjudication."[4] In a broad sense, the reasoning for this is that "the statutory and constitutional

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[1] U.S. CONST. art. III, § 1 ("The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish,").

[2] Muskrat v. United States, 219 U.S. 346, 356 (1911) ("Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.").

[3] Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 n. 2 (1792) ("That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.").

[4] Felix Frankfurter, *A Note on Advisory Opinions*, 37 Harv. L. Rev. 1002, 1002 (1924).

elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even confining them from acting permanently regarding certain subjects."[5] Indeed, the Supreme Court of the United States ("SCOTUS") has opined that granting advisory opinions, which is when a court "pronounce[s] upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*."[6] Chief Justice Roberts, writing for the majority in *Hollingsworth v. Perry*, reiterated that Article III, Sec. 2 of the U.S. Constitution is vitally important in limiting the judiciary's power, as it forbids judges from becoming policymakers and "ensures that [they] act *as judges*."[7] Thus, SCOTUS has unequivocally admonished the idea of rendering advisory opinions.

In contrast to the U.S. judiciary, the Canadian judicial branch actively engages in policy creation. This is especially evident in the Supreme Court of Canada's ("SCC") use of advisory opinions, i.e., "reference questions."[8] A reference question is defined as a request for an advisory opinion, which is granted before actual litigation regarding the validity of proposed action or legislation. Because of its strategic usage of advisory opinions, some scholars have referred to the SCC "as a court of law *and* a political court."[9]

II. ROADMAP

In Part I, this paper defines a reference question as implemented in Canada. Part II, III and IV provides a brief background on the constitutional and historical roots of reference questions and examines the current implementation of the reference procedure by the SCC and its authoritative effect. Part V and VI examine the positive and negative effects of the reference procedure, and the abuse of the device by the executive and legislative branches. Part VII analyzes the constitutional policies admonishing advisory opinions in the United States. Finally, part VIII concludes that Canada should eliminate the reference procedure and limit judges to opine only on matters of actual controversy, as in the United States.

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[5] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 101- 02 (1998). *See also* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 227 (1974); United States v. Richardson, 418 U.S. 166, 179 (1974).

[6] *Steel Co.*, 523 U.S. 83, at 102.

[7] Hollingsworth v. Perry, 133 S.Ct. 2652, 2659 (2013).

[8] *See* EMMETT MACFARLANE, GOVERNING FROM THE BENCH: THE SCC AND THE JUDICIAL ROLE 1 (UBC Press 2013) ("The Court has evolved from a largely legal, dispute resolving body into a policy-making institution whose decisions have far reaching implications for virtually all areas of Canada's political, social, cultural, and economic life.").

[9] *See* DONALD R. SONGER, THE TRANSFORMATION OF THE SCC: AN EMPIRICAL EXAMINATION 7 (University of Toronto Press 2008) ("[W]hile it is still fashionable to think of the work of courts as divorced from the often disdained world of politics, to properly understand the current Court one must understand it as a court of law *and* a political court.").

III. DEFINITION OF REFERENCE QUESTION

Prior to conducting an analysis on the nature of the reference question, a working definition is required. As discussed above, the term "reference question" is synonymous with "advisory opinion," which has been defined as follows:

> Nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose. [American] Federal courts are constitutionally prohibited from issuing advisory opinions by the case-or-controversy requirement, but other courts, such as the International Court of Justice, render them routinely.[10]

The opening words of this definition point most clearly to the blatant characteristics of the advisory opinion. A "nonbinding statement by a court of its interpretation of the law" is characterized by two main features: (i) it cannot be a decision by a court on the actual merits, and (ii) there is an absence of rival litigants.[11] That is, the advisory opinion is rendered not on demand of a complaining party, but on demand of an administrative body. A "reference question" is defined as "the act of sending or directing to another for information, service, consideration or decision; esp., the act of sending a case to a master or referrer for information or decision."[12] In other words, a "reference question" is the formal request for an advisory opinion.

Equipped with an understanding of these terms, let us turn our attention to the statutory jurisdiction of the SCC.

IV. JURISDICTION OF THE SCC

The Supreme Court Act ("SCA") authorizes the SCC to render reference opinions on proposed questions of law that are submitted by legislators and other governmental officials, even though they are not actually presented in the form of a concrete case at law. Section 53 of the SCA provides:

> (1) The Governor in Council [i.e., the federal cabinet] 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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[10] BLACK'S LAW DICTIONARY 1265 (10th ed. 2014).
[11] *Id.*
[12] *Id*. at 1470.

> (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.
>
> (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 *ejusdem generis* with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.
>
> (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.[13]

In the seminal case, *In Re Secession of Quebec*,[14] the SCC concluded that it had both the authority and *duty* to issue reference opinions.[15] In its opinion, the SCC noted that since the Canadian Constitution does not require a strict separation of powers, both Parliament and provincial legislatures "may properly confer certain judicial functions on the courts."[16] In addition, the SCC determined that it had the authority to render such an advisory opinion on the proposed separation of Quebec from Canada, since secession involved a "legal question touching and concerning the future of the Canadian federation."[17] As the SCC was (and still is) not under the same "case and controversies" requirement like the SCOTUS, it did not have to wait until the conclusion of the Quebec referendum prior to opining on the legality of the proposed referendum.

V. CONSTITUTIONAL?

Though the rendering of advisory opinions may appear to constitute an *ultra vires* act, answers to reference questions are unequivocally constitutional. However, in the 1910 *References by the Governor-General in Council*, every province except for Saskatchewan moved that the SCC ought not deliberate on certain issues, such as the validity of the Insurance Act. The provinces reasoned that this should be the case because a court cannot properly consider these

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[13] Supreme Court Act, § 53(1-3) (2014).

[14] In short, the federal government requested an opinion regarding the legality of Quebec's separation from Canada via a provincial referendum.

[15] Reference Re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.) [hereafter referred to as *In Re Secession of Quebec*, ¶8 ("Section 53 is defined by two leading characteristics – it establishes an original jurisdiction in this Court and imposes a duty on the Court to render advisory opinions.")].

[16] *Id.* at ¶15 ("[T]he Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts. . . Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the Supreme Court Act is therefore constitutionally valid.")

[17] *Id*. at ¶ 19.

matters or by the individual members thereof in the proper execution of their judicial duties.[18] On appeal, Lord Loreburn, writing for the Board of Commerce, rebuffed their concerns, as follows:

> The provinces . . . say that when a Court of Appeal from all the provincial Courts is authorized to be set up, that carries with it an implied condition that the Court of Appeal shall be in truth a judicial body according to the conception of judicial character obtaining in caviling countries and especially obtaining in Great Britain, to whose Constitution the Constitution of Canada is intended to be similar . . . And they say that to place the duty of answering questions, such as the Canadian Act under consideration does require the Court to answer, is incompatible with the maintenance of such judicial character or of public confidence in it, or with the free access to an unbiased tribunal of appeal to which litigants in the provincial Courts are of right entitled. This argument in truth arraigns the lawfulness of so treating a Court upon the ground that a Court liable to be so treated ceases to be such a judiciary as the Constitution provides for. . . If, notwithstanding the liability to answer questions the Supreme Court is still a judiciary within the meaning of the British North America Act, then there is no ground for saying that the impugned Canadian Act is *ultra vires*.[19]

Questions asked by the executive, although broad, can be lawfully reviewed by the SCC. Law, wisdom, and comity require the SCC to accept requests to issue an advisory opinion. One can argue that an advisory opinion is helpful as it gives direction to the "rudderless ship of state on its first voyage."[20]

As legal scholar Peter Hogg explains, the "reference question" procedure deviates from typical judicial duties in two key ways: (1) there is an absence of a genuine dispute or controversy between two parties; and (2) the judiciary is engaging in a function that is traditionally the responsibility of the executive branch of government. Notwithstanding, the Canadian system is one that facilitates, and requires, the judiciary to review and decide not only constitutional questions, but also political questions.[21] Aharon Barak, former Chief Justice of the Supreme Court of Israeli, speaking on the increased reliance on high courts in dealing with issues of law states that, "nothing falls beyond the purview of the judicial review; the world is filled with law; anything and everything is justiciable." Though the Canadian legislature routinely defers to the judiciary through the "reference question" procedure, it is at times viewed as an intrusion

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[18] *In Re* References by the Governor-General in Council, [1910] 43 S.C.R. 536, 537 (Can.).

[19] *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571 at pp. 584-85 (Can.).

[20] *In re* Request for Advisory Op. etc., 281 N.W.2d 322, 327 (Mich. 1979).

[21] PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, p. 8-17 (Carswell, Student ed. 2012).

"into the prerogatives of legislatures and executives, and a corresponding acceleration of the process whereby political agenda have been judicialized."[22]

VI. BINDING?

Prima facie, the SCC's rationale behind the "reference question" opinion is not to bind parties; rather, it is to obviate (to whatever degree it can) the extent to which problematic questions of law naturally proceed to appellate courts. Specifically, in *Manitoba Education Reference*, the SCC held that:

> . . . our answers to the questions submitted will bind no one [. . .] not even this court. We give no judgment, we determine nothing, we end no controversy, and whatever our answers may be, should it be deemed expedient at any time by [an interested party] to impugn the constitutionality of any measure that might hereinafter be taken by the federal authorities. . . whether such measure is in accordance with or in opposition to, the answers to this consultation, the recourse in the usual way, to the courts of the country remains open to them.[23]

Interestingly, the SCC describes the rendering of an advisory opinion as a mere "consultation." Thus, it is apparent from early Canadian judicial history, that the rendering of such opinions was purely diagnostic, ameliorative and designed to increase the scope of preventative justice. More recently, in *In Re Secession of Quebec* the Court reiterated this position:

In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.[24]

Even though from an academic perspective reference opinions are deemed "advisory only," in actuality they are treated like binding opinions. Specifically, Lord Simon stated:

> Their lordships do not doubt that in tendering humble advice to His Majesty they are not absolutely bound by previous decisions of the Board. . . But on constitutional questions it must be seldom indeed that the

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[22] Ran Hirschl, *Resituating the Judicialization of Politics: Bush v. Gore as a Global Trend*, 15 CAN. J. OF L. AND JURIS 191, 19 (2002).

[23] *In Re Statutes of Manitoba relating to Education*, [1894], 22 S.C.R. 577 at p. 678 (Can.).

[24] *In Re Secession of Quebec*, [1998], 2 S.C.R. 217 at p. 219 at ¶25 (Can.).

> Board would not depart from a previous decision which it may be assumed will have been acted on by governments and subjects.[25]

Nevertheless, though reference questions are not actually binding on anyone (as there is an absence of rival litigants, only government hypotheticals), they are regarded as authoritative.[26]

VII. EFFECTIVE?

As one can imagine, the history behind the use of reference questions is less than perfect. That is, the effectiveness of the process has been questioned in the past and continues today. One of its proponents is Justice Barry Strayer, former Justice of the Canadian Federal Court of Appeal and later a Deputy Judge of the Federal Court of Canada. Justice Strayer argues that the reference procedure is a bureaucratic device that allows each level of government to police the constitutional authority of the other.[27] As a result, it swiftly enables each arm of government indirect oversight over the other. That is, the use of reference questions provides a quasi-flexible path for each branch of government to challenge the constitutionality of the others actions.

While private litigation is considered a compelling method in the resolution of constitutional issues, the use of the "reference question" procedure has been deemed more effective since it is an expeditious process with a timelier judicial opinion.[28] In addition, there are "emergency conditions, such as war [that] make it imperative that government be assured at once of the validity of proposed action."[29] Expeditiousness aside, Justice Strayer believes that the impact of reference is immeasurable:

> In terms of impact on the political, social, and economic affairs of the country the decisions in these cases have had an effect far beyond their numerical proportion. It is therefore essential in any study of judicial review of legislation in Canada to give some particular attention to this device.[30]

Notwithstanding, the ability to swiftly come to a determination of constitutional questions, the use of reference questions is not without disadvantages. First, as seen in *Reference re Insurance Act*, due to a lack of adequate factual context, the opinion was drafted in the abstract.[31] Specifically, in *Reference re Insurance Act*, the single reference question promulgated to the

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[25] Attorney-General for Ontario v. Canada Temperance Federation, [1946] A.C. 193 at p. 206.

[26] *Id.*

[27] BARRY STRAYER, THE CANADIAN CONSTITUTION AND THE COURTS: THE FUNCTION AND SCOPE OF JUDICIAL REVIEW. (2nd ed., Toronto: Butterworths, 1988).

[28] *Id*. at 312; The determination of important reference questions is not only expeditious; it is without expense to private litigants.

[29] *Id*. at 313.

[30] *Id.* at 311.

[31] *Id*. at 315.

SCC was, "[a]re sections 40 and 70 of the 'Insurance Act, 1910, or any or what part or parts of the said sections, *ultra vires* of the Parliament of Canada?" No additional factual information was provided or even presented to the SCC.

While the result in *Reference re Insurance Act* is less important than the steps and process the SCC took to render the advisory opinion, as one can imagine, absent a proper factual foundation, courts often err.[32] In addition, the use of reference questions may revolve around questions that are simply not justiciable. As discussed above, the *Supreme Court Act* allows the executive and legislative arms to refer any "matter" to the courts. *Prima facie*, this appears to include not only questions of law, but perhaps, even non-legal questions, such as politics, science, technology and medicine. In *Re Resolution to Amend the Constitution*, the SCC attempted to clarify the parameters surrounding any matter, stating that courts "have a discretion to refuse to answer such questions [that are not justiciable]."[33]

Initially, the SCC attempted to limit the scope of reviewable questions. Yet, two decades later, in *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, the SCC asserts itself as the entity of government that is "to control the limits of the respective sovereignties."[34] In other words, the SCC unilaterally opens the floodgates for reviewing future legislation. Equipped with this precedent, in *In Re Secession of Quebec,* the SCC goes on to hold that since the Canadian Constitution does not insist on a true separation of powers, there is "no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role."[35] To the SCC, the lack of an advisory opinion can paralyze legislative action or encourage erroneous action that, if ruled unconstitutional, might well be an unrivaled mess to unravel.

VIII. ABUSE?

The Canadian executive and legislative branches have previously abused the purpose of the advisory opinion. This was specifically the case when "reference questions" were used to validate the Bennett New Deal, which is not understood to be W.L. Mackenzie King's attempt to delay the introduction of the law for purely political reasons[36] Another reference posed to the SCC, with the hopes

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[32] *In Reference re Insurance Act*, [1932], 1 D.L.R. 97 (Can.) dealt with legislation requiring federal registration of insurance companies. Ultimately, the Court struck down the legislation as the statute was deemed to regulate a "trade" within a particular province. That is, the Canadian insurance business was deemed to be a "trade," hence not susceptible to federal control.

[33] *In Re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753, at p. 768.

[34] *Northern Telecom Canada Ltd. v. Communication Workers of Canada* [1983] 1 S.C.R. 733, at p. 741.

[35] *In Re Secession of Quebec*, ¶15.

[36] With an election on the horizon and with a capable opponent, W.L. Mackenzie King, gaining support, then Prime Minister Bennett promised a more progressive taxation system, a minimum wage, unemployment insurance, health and accident insurance, a revised old-age pension and agricultural support programs for all Canadians. Modeling his strategy on President Franklin Roosevelt's New Deal in the United States, Bennett took to the radio

that a judicial proclamation would ease the political environment, involved the constitutionality of same-sex marriage.[37] Similarly, *In Re Secession of Quebec*, the reference involving the constitutionality of the people of Quebec voting on their separation from Canada, is now understood to have been a political play by the Chrétien government to influence public opinion on the constitutionality of the proposed separation.

However convenient the reference procedure may be in the short run, there are significant dangers accompanying its use. Namely, it provides the unelected judiciary significant latitude to determine politically charged issues, thus shaping Canadian law. As the examples illustrate, by engaging in such review, the SCC places itself in the position of not only judging the constitutionality of proposed legislation, but also the underlying merits. As a result, political scientists and jurists coined the term "judicialization of politics" to both describe the use of the reference procedure to determine hotly contested political issues and imply that courts have intruded on powers, such as law making, originally belonging to the legislature.[38]

A metaphor often used to describe the role of Canadian courts is that of a neutral referee exercising excessive control over a sporting event. While referees are essential to the smooth administration of organized sports, a good referee avoids interference and goes unnoticed in the background. Unfortunately, armed with the ability to review and invalidate proposed laws, Canadian courts have developed a considerably more controversial persona as a non-elected arm of government with, possibly, their own legislative ambitions.

Over 100 years ago, speaking of the challenges Canadian jurists face using the reference procedure, Lord Chancellor Haldane said,

> . . . it is at times attended with inconveniences, and it is not surprising that the Supreme Court of the United States should have steadily refused to adopt a similar procedure, and should have confined itself to adjudication on the legal rights of litigants in actual controversies.[39]

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airwaves with a series of speeches coined the "New Deal for Canada." The New Deal was Bennett's last-ditch effort to rejuvenate the image for the Tories.

[37] Twelve years prior to *Obergefell v. Hodges*, 576 U.S. (2015), the SCC resolved the validity of same-sex marriage laws in *Reference Re Same-Sex Marriage* [2004] 3 S.C.R. 698. As a result of several of the provinces' appellate courts holding that same-sex marriage was constitutionally valid, the Government of Canada submitted three questions to the Supreme Court regarding the validity of its proposed same-sex marriage legislation. In short, the SCC found that the meaning of marriage is not fixed to what it meant in 1867, but rather it must evolve with Canadian society which currently represents a plurality of groups. ("The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life. Read expansively, the word "marriage" in s. 91(26) does not exclude same-sex marriage.")

[38] PAUL HOWE AND PETER H. RUSSELL, JUDICIAL POWER AND CANADIAN DEMOCRACY, 255-96 (McGill-Queens ed. 2001).

[39] *Attorney General for British Columbia* v. *Attorney General for Canada* [1914] A. C. 153, 162. For further animadversions on advisory pronouncements by judges, see Lord Chancellor Sankey in *In re The Regulation and Control of Aeronautics in Canada* [1932] A.

It appears that even influential members of the Privy Council recognized, early on, the risks of utilizing the advisory opinion.

IX. TREATMENT OF ADVISORY OPINIONS IN THE UNITED STATES

The power of English judges to deliver advisory opinions was well established at the time the United States Constitution was drafted.[40] Thus, the implicit policies embodied in Article III, and not tradition alone, impose the rule against advisory opinions on American courts. The rule against advisory opinions recognizes that such suits often "are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests."[41] The SCOTUS recently opined,

> . . . the Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.[42]

The rationale behind American courts refusing to render advisory opinions is simple: (i) Article III requires that there be a case or controversy at issue and (ii) the objection ensures the preservation of the judiciary as an independent body of government. The SCOTUS avoids the high-stakes political thrillers that hinder its northern neighbor.[43] Thus, the SCOTUS renders an opinion only if it is aware of all facts and pertinent stakeholders.

The doctrine of separation of powers is the main reason why American courts refuse to render advisory opinions. The SCOTUS has consistently reaffirmed the central judgment of the Framers of the Constitution that the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.[44]

Madison, in writing about the principle of separated powers, said, "[n]o political truth is certainly of greater intrinsic value or is stamped with the

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C. 54, 66: "We sympathize with the view expressed at length by Newcombe, J., which was concurred in by the Chief Justice, [of Canada] as to the difficulty which the Court must experience in endeavoring to answer questions put to it in this way."

[40] K. Davis, *Administrative Law Treatise* 127-128 (1958).

[41] *United States v. Fruehauf*, 365 U.S. 146, 157 (1961).

[42] *Flast v. Cohen*, 392 U.S. 83, 97 (1968).

[43] Hall, *Constitutional Law* (1915) 49; Grinnell, *Supreme Court of the United States and the Advisory Opinion* (1924) 10 A. B. A. J. 522, 523; Beck, *The Supreme Court of the United States* (1925) 31 W. VA. L. Q. 139, 150; cf. Hughes, *Supreme Court of the United States* (1928) 32; Shephard, *Democracy in Transition* (1935) 29 AM. Pol.. Scl. Rev. 1, 17.

[44] *Mistretta v. United States*, 488 U.S. 361, 380, 109 S. Ct. 647, 659 (1989); See *Morrison* v. *Olson*, 487 U.S. 654, 685-696 (1988); *Bowsher* v. *Synar*, 478 U.S., at 725.

authority of more enlightened patrons of liberty."[45] The doctrine of separation of powers was conceived to avoid the pitfalls of the English rule and as a precaution against excessive concentration of power in any one arm of government.[46] Justice Jackson summarized the pragmatic, flexible view of differentiated governmental power:

> [w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.[47]

"[T]he greatest security," wrote Madison, "consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others."[48]

As a result, no one institution can become so powerful in a democracy as to destroy this system. Checks and balances, rights of mutual control and influence, make sure that the three powers interact in an equitable and balanced way. The separation of powers is an essential element of the rule of law, and is enshrined in the American Constitution.

X. CONCLUSION

In summary, there is no constitutional bar to the SCC undertaking an advisory role. The reference procedure has some benefits, such as being a quasi-binding decision on limited stakeholders and lengthy litigation. Nevertheless, Canada should eliminate the reference procedure and limit judges to opine on matters of actual controversy, as is the case in the United States. In the United States, advisory opinions would violate the separation of powers doctrine and are deemed unconstitutional under Article III of the Constitution.

The Canadian reference procedure solicits key questions: why would politicians delegate some of their decision making power to the courts? What does the phenomena of reference questions mean for the notion of a separation of powers in Canada? Why is government the only entity that can make use of the reference procedure? Does the reference procedure reduce litigation at the expense of real parties in interest? Why would Canadian politicians have no quarrels delegating their decision-making authority by way of the reference procedure?

The answers to these questions are complex. However, the question regarding politicians' delegation of power can be answered simply. Canadian politicians give up some power in exchange of being relieved of responsibility

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[45] JAMES MADISON, THE FEDERALIST NO. 47, 324 (J. Cooke ed. 1961).

[46] Many political scientists believe that separation of powers is a key factor in what they view as a limited degree of American exceptionalism. See JOHN W. KINGDON, AMERICA THE UNUSUAL, (1st ed. 1999).

[47] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (concurring opinion).

[48] JAMES MADISON, THE FEDERALIST NO. 51, 349 (J. Cooke ed. 1961).

should the court's opinion not conform with voters' expectations. Therefore, the delegation of powers can benefit the politician by increasing credit, and at the same time, reducing blame attributed to the politician as a result of the policy decision of the delegated body.[49]

In the United States, under a separation of powers analysis, the Executive Office is unable to directly challenge the constitutionality of a piece of proposed legislation and therefore unable to access the SCOTUS through advisory opinions. Thus, in the United States, the executive branch of government is unable to circumvent typical litigation. This is starkly different to Canada, where the executive is able to do so. The Prime Minister can utilize the reference procedure to question the legality of proposed legislation. As you will recall, this was done in *Reference re Same-Sex Marriage*.[50] In the United States, unhindered access to the courts is considered a threat to the traditional notion of the separation of powers. Meanwhile, in Canada, the fusion of the executive with the legislature diminishes the notion of a pure separation of powers.

In addition to blame avoidance, politicians' delegation of power to the judicial branch through the use of "reference questions" may be a tactical decision to realize a certain goal when there is a lack of political capital. Thus, a lack of political capital is not determinative, as the executive has direct access to the courts to determine the constitutionality of legislation, bypassing the requirement to obtain a certain level of support of voting Members of Parliament. Again, this is impermissible in the United States.

Let us consider a situation where United States Congress members opposed proposed legislation: the Patient Protection Affordable Care Act, commonly referred to as "Obamacare." One of the key issues amongst Republicans with Obamacare is that the United States Constitution is a document intended to preserve liberty, by way of limiting the powers of the federal government and it reserves most governmental powers to the states. From this vantage point, Obamacare strips powers reserved for the states and attacks the freedom of individuals. Whatever the merits of this argument are, opposing Republicans, even the President himself, could not make a lawful request for clarification on the constitutionality of this law. Rather, Obamacare was first passed as law, *then* challenged.

Legislation being passed and then challenged is an important series of events that is starkly different from the Canadian method of reviewing contentious legislation. First, they ensure that all matters of legislation are treated equally in the eyes of the SCOTUS. The SCOTUS does not discuss the constitutionality of hypothetical, or proposed, legislation. Rather, the SCOTUS reviews laws already enacted, those actually ripe for review. Second, by doing so, this leads to an efficient and predictable enforcement process of Constitutional issues. This is important for both lawmakers and citizens, to ensure with absolute certainty, that the SCOTUS, by way of checks and balances, will review overzealous politicians

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[49] Stefan Voigt & Eli M. Salzberger, *Choosing Not to Choose: When Politicians Choose to Delegate Powers*, 55 KYKLOS 289, 294-95 (2002).

[50] *See supra* note 37.

passing unscrupulous laws. Additionally, such procedural parameters prevent the executive from attempting to cherry-pick the SCOTUS's docket.

In addition, the threshold to promulgate a reference case is significantly lower when compared to civil litigation; usual restrictions relating to standing and mootness do not apply. The statutory restrictions that apply in ordinary litigation do not apply to reference questions. Take again the example of *Reference Re Same-Sex Marriage*, where the Government of Canada submitted three questions to the Supreme Court regarding the validity of its proposed same-sex marriage legislation.[51] In that reference, the aggrieved same-sex couples were not even named parties.

The failure to heed to such restrictions results in an inefficient and unpredictable enforcement process of Constitutional issues. The standing doctrine's purpose is to ensure that courts do not render advisory opinions, and instead, resolve genuine controversies between adverse parties. Meanwhile, mootness is "the doctrine of standing set in a time frame: the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)."[52] The U.S. Constitution does not grant the authority for courts to decide cases merely to make precedents. Bypassing such procedural constraints, Canadian courts no longer become "an enduring feature of Canadian constitutional landscape," as described by Osgoode Hall Law School Dean, Lorne Sossin.[53] Rather, Canadian courts become a junior-varsity legislature. This is both worrisome and striking.

By way of a wave of judicial activism, the "reference question" procedure is a detrimental and dangerous device and its use ought to be abolished, or severely restricted, in order to respect the separation of powers doctrine. The Government of Canada must enact and adopt a uniform set of judicial jurisdictional parameters, one that respects the Canadian Constitution as a "living tree," all the while, objectively limiting the types of reviewable cases, thus enabling Justices to: (i) treat all matters equally; (ii) lead to an efficient and predictable enforcement process of Constitutional issues; and (iii) reduce abuse by politicians attempting to use the reference procedure for political gain.

The vicissitudes of Canadian democratic politics illustrate that continued use of the reference procedure is an injustice. That is, even when government attempts to obscure use of the reference procedure in a fog, its use is distinct and so vivid that there can be no mistake as to its clear disregard of the fundamental separation of powers and democratic governance principles.

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[51] *See supra* note 37.

[52] *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000).

[53] Lorne Sossin, *The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights*, 23 CANADIAN JOURNAL OF ADMINISTRATIVE LAW AND PRACTICE 93, 93-113 (2010).