

Access to Care, Access to Justice:

The Legal Debate Over Private Health
Insurance in Canada

Edited by

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Worse than *Lochner*?

SUJIT CHOUDHRY*

Ripstein's E-mail

On the morning that *Chaoulli*¹ came down, I received an e-mail from my colleague Arthur Ripstein asking: 'What do you think of the Supreme Court's *Lochner* decision?'

At first blush, this way of gauging my reaction was deeply puzzling, because the cases appear to have little in common. *Lochner* was a judgment of the United States Supreme Court, finding unconstitutional an obscure New York statute that set maximum hours of work in bakeries and which affected perhaps a few thousand workers.² *Chaoulli* struck down Quebec's ban on private health care insurance, a core design feature of Canada's most cherished social program, Medicare, and could fundamentally reshape health care delivery to tens of millions. But the differences do not stop there. *Chaoulli* was decided a few weeks ago, whereas *Lochner* is now a century old. Finally, the judgments involved the interpretation of two distinct constitutional documents, the United States' *Bill of Rights* and Canada's *Charter*. Although those documents share striking similarities, they also differ fundamentally in many respects.³

But despite these differences, approaching *Chaoulli* through the lens of *Lochner* yields a number of critical insights. To understand why, we need only look at how Ripstein posed his question. *Lochner* was invoked as an implicit benchmark for evaluation, without any introduction or explanation for why it may be relevant to constitutional analysis in Canada. *Lochner's* meaning was assumed to be so obvious that its mere mention would be immediately understood, even though it is from another country and another century. And in assessing *Chaoulli*

through the lens of *Lochner*, Ripstein is not alone. Of the nine *facta* filed in *Chaoulli* in opposition to the constitutional challenge, at least four cited *Lochner* to buttress their submissions, without any sense that this reference was eccentric or incomprehensible.⁴

The invocation of *Lochner* by counsel in *Chaoulli* speaks volumes about the character of Canadian constitutional argument. It has often been said that our constitutional culture is inherently comparative in orientation. Throughout our history, comparative experience has been looked to as a source of models to be adopted and adapted, but also of lessons to be learned and dangers to be avoided. As we have grappled with the decisions of whether to adopt a constitutional bill of rights, how to draft it, and how to interpret it, the American constitutional experience has figured prominently in the Canadian constitutional consciousness. One recurrent theme has been the repeated invocation of *Lochner* and the era of American constitutional jurisprudence to which it gives its name.⁵ Over the last four decades of Canadian constitutional development, the *Lochner* era has lurked as a spectre over the drafting and interpretation of the *Charter*, relied on by politicians, civil servants, academics, and legal counsel as a negative, anti-model of comparative experience to be avoided at all costs.

So Ripstein's use of *Lochner* as a negative frame of reference in *Chaoulli* is part of a much older constitutional practice. If we want to understand *Chaoulli* better, it would pay dividends to grapple in more detail with the *Lochner* metaphor. And since *Lochner* has multiple and divergent meanings – standing for judicial activism and economic libertarianism – the real issue is not why *Lochner* matters, but *how* it matters. Some of *Lochner*'s meanings are more apposite than others in shedding light on *Chaoulli*. But taken together, they should give us considerable pause for concern.

To equate a case with *Lochner* is about the worst insult a constitutional lawyer can make. As we shall see, *Chaoulli* may be even worse than that thoroughly discredited judgment.

Judicial Activism?

When constitutional scholars refer to *Lochner*, they are in fact referring to the *Lochner* era, a forty-year period of American constitutional jurisprudence that began in 1897. During the *Lochner* era, the U.S. Supreme Court struck down close to two hundred state and federal laws regulat-

ing American economic life. The most infamous judgments found unconstitutional laws establishing conditions of work, such as minimum wage laws. The *Lochner* era came to an end in 1937, when the Court rejected much, if not all, of its *Lochner*-era jurisprudence.

Although *Lochner* is now part of America's constitutional past – its 'Constitution in Exile,' as Randy Barnett has termed it⁶ – it is still the topic of intense academic interest. American constitutional theorists have sought to come to terms with *Lochner*'s ongoing significance for the American constitutional project. With some notable exceptions, they take the wrongness of *Lochner* as a fixed point, and feel compelled to explain why exactly *Lochner* was in error. And so the answer to this question tells American courts how they must *not* engage in constitutional interpretation today.

If we sift through American constitutional discourse, we find that *Lochner* entails at least three different kinds of mistakes. First and foremost, *Lochner* is synonymous with judicial activism. On this account, the sin of the *Lochner* court was that it imposed its own policy preferences on democratically elected legislatures, while maintaining the pretence of engaging in constitutional interpretation. The *Lochner* court made two sets of doctrinal moves that gave rise to this suspicion. First, it set limits on the range of permissible ends of governmental regulation, ruling some government objectives off-limits. In *Lochner* itself, for example, the Court held that redressing inequality of bargaining power was an illegitimate end for state law, because it was inherently paternalistic. Second, the Court demanded a 'real and substantial' connection between legislative ends and the means chosen to vindicate them. As Michael Perry has explained, this entailed the courts' second-guessing legislative assessments of costs and benefits, as well as the failure to opt for regulatory means less intrusive of freedom of contract.⁷

According to the dissenting judgments in *Lochner*, this approach to constitutional adjudication was tantamount to turning the court into a super-legislature. Legal reasoning was rhetorical cover for the reality that the Court struck down policies simply because it disagreed with them, pretending all the while that it was engaged in the objective enterprise of applying the constitution. The hero for opponents of *Lochner*'s alleged activism was Justice Holmes, who argued in dissent that 'the accident of *our* finding certain opinions natural and familiar or novel and even shocking ought not to conclude *our* judgment upon the question of whether statutes embodying them conflict with the Consti-

tution.⁸ For *Lochner's* critics, the Court's jurisprudence was driven by personal allegiances of class, which led it systematically to favour capital in its struggles with labour.

This scathing critique naturally raised the question of what sort of judicial review would *not* be open to this charge. Fortunately, Justice Harlan's dissent in *Lochner* points the way forward to an alternative conception of the judicial role. Justice Harlan began by suggesting that there would have been little legal controversy if New York had set a maximum work day of 18 hours, as opposed to 10. The question then became at what point state legislation would be too intrusive, and hence unconstitutional. In a key passage, Justice Harlan argued that:⁹

[w]hat is the true ground for the state to take between legitimate protection by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. ... 'The manner, occasion, and degree in which the state may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science.'

To expect the legislature to prove definitely that a 10 hour work day was scientifically justified was impossible. In such a situation, the issue was whether 'the question is one about which there is room for debate and for an honest difference of opinion,' or whether 'the state has acted without reason.'¹⁰ On the basis of the extensive factual record tendered before the Court, this test was easily met.

Justice Harlan laid the seeds for a jurisprudence of self-doubt. This is an attitude or a mindset of judicial modesty, flowing from the courts' own awareness of the limits of their institutional competence, relative to that of legislatures, in marshalling and digesting reams of social science evidence. It counsels self-imposed judicial deference when confronted with a challenge to legislation whose factual basis is itself subject to debate and dispute among 'those having special knowledge' of the policy area at hand. Because courts lack the expertise and the experience to second-guess these judgments, the preferable policy is judicial non-intervention, always subject to the limiting case of public policy without any factual foundation whatsoever. Judicial self-doubt also entails accepting most, if not all governmental objectives as legitimate.

Fast forward a century to *Chaoulli*. In the debate over whether governments should allow a parallel private system to deliver medically

necessary services, there are two types of disagreements. The first is a disagreement at the level of principle, over whether individuals should be able to purchase faster and/or higher quality care on the private market. The second is the empirical disagreement over the impact of a parallel private system on Medicare. Quebec had defended the ban on private insurance on the basis that so doing was necessary to preserve the integrity of the public system. This claim was the key point of disagreement between the majority and the dissenting judges, and, indeed, was the focus of extensive expert testimony at trial. Health services researchers testified that a parallel private system would reduce public support for the public plan because of the possibility of exit. Indeed, those most likely to exit – the wealthy – also have the greatest power to protect the public system, because they are disproportionately powerful politically. The trial court also heard testimony that a private sector would lead to the bleeding of human resources from the public sector, either if physicians leave Medicare entirely, or if physicians practicing in both sectors prioritize their private patients. Finally, because private insurers would cherry-pick the healthiest and wealthiest patients, public health insurance would be left holding the bag for the sickest and the poorest, without the ability to pool risk across the entire population.

But there was evidence on the other side. An expert witness, and an interim report prepared by the Standing Senate Committee on Social Affairs, Science and Technology pointed to the co-existence of public and private sectors in a number of OECD countries (e.g. the United Kingdom and New Zealand) to dispute Quebec's claim that a ban on private insurance and a public monopoly were necessary to maintain quality of care in the public sector.

The trial judge made a definitive finding of fact that Quebec's fears were well-founded: 'We cannot act like ostriches. The result of creating a parallel private health care system would be to threaten the integrity, sound operation and viability of the public system.'¹¹ The dissenters in the Supreme Court argued that absent a palpable error, the trial judge's findings of fact could not be disturbed, and was equally certain in its conclusions: 'Failure to stop the few people with ready cash does not pose a structural threat to the Quebec health plan. Failure to stop private health insurance will, as the trial judge found, do so.'¹²

But the majority strenuously disagreed. Justice Deschamps, writing for herself, stated that the trial judgment was 'based solely on the 'fear' of an erosion of services,'¹³ and that 'no study was produced or dis-

cussed¹⁴ which substantiated this claim. Chief Justice McLachlin was even harsher, characterizing the empirical arguments both for and against Quebec's ban on private health care as 'competing but unproven 'common sense' arguments, amounting to little more than assertions of belief.'¹⁵ 'We are in the realm of theory,' she wrote.¹⁶ The tie-breaker was the evidence from OECD countries, which 'refutes the government's theoretical contention that a prohibition on private insurance is linked to maintaining quality public health care.'¹⁷

Underlying this factual disagreement, though, was a remarkable degree of agreement on the nature of the judicial role. Chief Justice McLachlin was clearest, stating that the courts' task in *Charter* challenges to government policies 'is to evaluate the issue in the light, not just of common sense or theory, but of the evidence.' Testable, provable facts drive adjudication; judges must 'look to the evidence rather than to assumptions.'¹⁸ And for the most part, the dissenting judges defined their task as producing firm conclusions grounded in evidence, which pointed in the opposite direction. Thus, the trial judge's definitive findings of fact merited deference from the Supreme Court. And the majority's treatment of OECD data was dismissed as amateur public policy tourism. The dissenting judges' assumption through most of its reasons, like the majority's, appeared to be that governments had to meet a stringent test of justification; they only differed on whether that test had been met.

But in an important sense, setting up the nature of judicial review in this way misconceived the character of the problem. The trial judge was too definitive in concluding that private health care posed an unequivocal threat to the viability of the public system, and so too was the majority's position that there was an absence of evidence on the issue. In reality, the Court was presented with a case in which the evidence was inconclusive or conflicting. Consider the two most comprehensive studies of health care reform in recent years, the Romanow Commission and the Kirby Committee. On the impact of a parallel private system on public health care, both are equivocal. Thus, the Romanow Commission states that 'Private facilities ... *may* actually make the situation worse for other patients because much-needed resources are diverted from the public health care system to private facilities.'¹⁹ The Kirby Committee is likewise qualified in its conclusions, suggesting that: 'allowing a parallel private system ... *may* even make the public waiting lines worse.'²⁰ The regulation of private health care, then, is not dissimilar from the problem which faced the court in *Lochner*, in which

experts disagreed on the extent of the threat posed to the health of bakers by long working hours. It would have been more honest for both the majority and dissenting judges to acknowledge that public policy in this area is based on approximations and extrapolations from the available evidence, inferences from comparative data, and, on occasion, educated guesses. Absent a large-scale policy experiment, this is all the evidence that is likely to be available. Former Justice LaForest offered an apt observation in another *Charter* case which rings true in the current context: '[d]ecisions on such matters must inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society.'²¹

In *Charter* adjudication, the two provisions which focus the judicial mind on these questions are s. 1, which authorizes 'reasonable limits' on *Charter* rights if they are 'demonstrably justified in a free and democratic society,' and s. 7, which grants everyone the right not to be deprived of life, liberty, and security of the person except in accordance with 'the principles of fundamental justice.' The two provisions have a complicated relationship, since the principles of fundamental justice are an internal limit on the scope of s. 7 which in theory could do some of the work of s. 1. The Court recently sought to differentiate the two provisions in *Malmo-Levine*, suggesting that

... for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.²²

By contrast, the inquiry under s. 1 is different. In its first decision interpreting s. 1, *Oakes*,²³ the Supreme Court laid down a now-familiar test to determine if a limit on a *Charter* right is justified. The rights-limiting measure must pursue a 'pressing and substantial objective,' and the means chosen to achieve this objective must meet a test of 'proportionality' – i.e. that there be a rational connection between the infringing measure and the objective behind it, that the measure minimally impair the right in question, and that the salutary effects of the measure outweigh the deleterious effects of the rights-infringement.

Unfortunately, the Court has not entirely succeeded in minimizing

the overlap between the two provisions. The key problem is that the Court has held s. 7 protects individuals from 'arbitrary' deprivations of life, liberty and security of the person, where arbitrary is defined as a deprivation that 'it bears no relation to, or is inconsistent with, the objective that lies behind [it].'²⁴ This replicates the 'rational connection' analysis of the *Oakes* test, albeit in a very deferential fashion. Chief Justice McLachlin's reasons in *Chaoulli* further run the two provisions together by interpreting arbitrariness as connoting necessity – exactly the sort of inquiry mandated by *Oakes*. This move makes directly relevant to the interpretation of the principles of fundamental justice under s. 7 the case-law under s. 1 subsequent to *Oakes*.

As is well known, *Oakes* sets up a stringent test of justification; however, what has largely escaped observation is that empirics are central to every stage of the *Oakes* test. The leading proponent of this view on the Court has been Chief Justice McLachlin, a fact that goes a long way to explaining the tone of her reasons in *Chaoulli*. As she explained in *RJR MacDonald*, the *Oakes* test sets up a process of 'reasoned demonstration,' as opposed to simply accepting the say-so of governments.²⁵ By this, she means that '[t]he s. 1 inquiry is by its very nature a fact-specific inquiry.'²⁶ As she continued:

In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the *actual objective* of the law. In determining proportionality, it must determine the *actual connection* between the objective and what the law *will in fact achieve*; the *actual degree* to which it impairs the right; and whether the *actual benefit* which the law is calculated to achieve outweighs the *actual seriousness* of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.²⁷

Later on, in *Sauvé*, Chief Justice McLachlin built upon these themes.²⁸ She held that governments seeking to justify the denial of the right to vote to prisoners under s. 1 cannot rely on 'vague and symbolic objectives,' such as inculcating respect for the rule of law.²⁹ Rather, rights can only be justifiably limited in response to concrete, precise and real problems or harms whose existence can be demonstrated to the satisfaction of a court through the normal trial process.

In other words, disputes over justifiable limits on *Charter* rights have in many important cases – like *Chaoulli* – been *factual* disputes about the

nature of social problems, and the effectiveness of government policy instruments in combating them. This approach to interpreting s. 1 has created a major institutional dilemma for the Court, given the practical reality that public policy is often made on the basis of incomplete knowledge. This problem has given rise to an extensive jurisprudence. Although it has never been framed in this way, the basic question in these cases is the same: Who should bear the risk of empirical uncertainty with respect to government activity that infringes *Charter* rights? This has become one of the unarticulated yet central questions in *Charter* litigation.

One answer would be that in a constitutional, rights-based regime, in which rights are the rule and of presumptive importance, limitations on rights are the exception, and governments bear the onus of justification in upholding rights-infringing measures, the state bears the risk of empirical uncertainty. But to set such a high bar for governments may be to ask too much of them. It may simply be impossible to prove with scientific certainty that the means chosen to combat the problem actually will do so, and that other, less intrusive means to tackle the problem are equally effective. As Justice LaForest wrote in his dissenting judgment in *RJR MacDonald*, to require governments to bear the risk of empirical uncertainty 'could have the effect of virtually paralyzing the operation of government ... it will be impossible to govern ... it would not be possible to make difficult but sometimes necessary legislative choices. There would be conferred on the courts a supervisory role over a state itself essentially inactive.'³⁰

The Court has struck a compromise between these two extremes, creating its own jurisprudence of self-doubt that is largely identical to Justice Harlan's dissent in *Lochner*. In cases where there is conflicting or inconclusive social science evidence, the question is whether the government has a 'reasonable basis' for concluding that an actual problem exists, that the means chosen would address it, and that the means chosen infringes the right as little as possible.³¹ This standard is understood as expecting something less of governments than definitive, scientific proof. But as with Justice Harlan's dissent in *Lochner*, an absolute lack of evidence is unacceptable; there must be some factual basis for the public policy.

A pair of examples explains how these principles have operated in practice. In *Irwin Toy*, the Court upheld a Quebec statute prohibiting advertising directed at children under 13 years of age, on the basis that children were unable to distinguish fact from fiction and were suscep-

tible to manipulation. The evidence before the Court clearly demonstrated that children between 2 and 6 could not distinguish fact from fiction, whereas expert opinion was divided on at what point between 7 and 13 'children generally develop the cognitive ability to recognize the persuasive nature of advertising.' However, this evidence, albeit inconclusive, was enough for the Court. As it said, the cut off age of 13 was made 'without access to complete knowledge,' but as long as 'the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence ... it is not for the court to second guess. That would only substitute one estimate for another.' Conversely, in *Tétrault-Gadoury*,³² the Court found unconstitutional a cut off age of 65 for the receipt of unemployment insurance benefits. One reason offered in defense of the cut off was to prevent abuse by individuals who no longer intended to seek employment. In finding the cut off unconstitutional, the Court noted that the federal government had not adduced any evidence to substantiate this claim.

To get a handle on where *Chaoulli* fits into the Court's larger jurisprudence of self-doubt and empirical uncertainty, we need to briefly explore the contours of the case-law. The 'reasonable basis' test has largely been worked out in the context of cases on freedom of expression. The Court has rejected conventional morality as an acceptable justification for limiting free speech, opting instead for the principle that speech can only be limited if it is harmful. This interpretive choice has had the unanticipated effect of locking the Court into a search for evidence of the real, concrete harms of prohibited speech. The difficulties this has created for the Court have come home in a set of cases concerning laws prohibiting pornography and hate speech.³³ Unable to rely on morality-based justifications for these laws, the Court has been confronted with the absence of definitive evidence demonstrating that these forms of speech are harmful. In three of its pornography decisions (*Butler, Sharpe, Little Sisters*) the Court has been able to point to *some* social science evidence, which satisfies the reasonable basis test. But in cases on hate speech (*Keegstra, Ross*), where such evidence was entirely absent, the Court has relied on 'experience and common sense'³⁴ and 'reason or logic'³⁵ to bridge the empirical gap. Moreover, common sense and logic were relied on in two of the pornography decisions (*Butler, Sharpe*) as additional supports for those judgments. Interestingly, Chief Justice McLachlin has explicitly endorsed this approach, in *Sharpe*.

Taken together, the Court terms this approach the 'reasonable appre-

hension of harm' test. But although the Court has been unanimous in accepting the reasonable basis test to assess inconclusive social science evidence, and in permitting governments to rely on common sense or logic to surmount evidentiary gaps, there have been significant disagreements in recent cases over the boundaries of these doctrines. In some cases, the disagreement has centred on what kinds of *inferences* governments are entitled to draw from inconclusive evidence. The most famous clash occurred in *RJR MacDonald*, and centred on the link between tobacco advertising and consumption, given the absence of definitive evidence linking the two. The Court divided on whether governments were entitled to infer from the widespread use of 'brand preference' and 'informational' advertising by tobacco companies that such a link existed. Four dissenting judges (led by Justice LaForest) were willing to infer that by convincing smokers not to quit, these advertisements had the effect of sustaining levels of consumption, while three judges in the majority (led by then Justice McLachlin) refused to do so.³⁶

And the Court has also split on the circumstances in which it is appropriate to apply 'logic' or 'common sense' to surmount an absence of evidence. The Court, concerned that too broad an approach could undermine entirely the idea that governments can only justifiably limit constitutional rights to respond to real problems, has attempted to set some limits on when it could accept the existence of harm without evidence. It suggested in *Thomson Newspapers* that its common sense or logic approach to the existence of harm applied to hate speech and pornography because 'the possibility of harm is within the everyday knowledge and experience of Canadians, or where factual determination and value judgments overlap.'³⁷ Thus, the Court refused to infer from the fact that opinion polls influence voter choice in election campaigns that inaccurate polls mislead large numbers of voters and have a significant impact on the outcome of an election, 'without more specific and conclusive evidence to that effect.'³⁸ The message was that pornography and hate speech were in a special and narrow category.

But then in *Harper*, a divided Court disregarded this self-imposed limitation, and upheld restrictions on third party expenditures during election campaigns on the eve of the last federal vote.³⁹ The justifications for the restrictions were to further the value of political equality (to equalize participation in political debate, to protect the outcome of an election from being distorted by third party expenditures, and to safeguard the public's confidence in the electoral process) and to pro-

tect the integrity of spending limits for candidates and political parties. The majority openly acknowledged that both the alleged harm and the efficacy of legislative responses to it were ‘difficult, if not possible, to measure scientifically,’⁴⁰ but nonetheless was willing to reason that both the harm existed and the cure was effective. The dissent, led by Chief Justice McLachlin, argued that in the absence of evidence, ‘[t]he dangers posited are entirely hypothetical’ and ‘unproven and speculative’ and ‘the legislation is an overreaction to a non-existent problem,’ and was completely unwilling to entertain the common sense argument.⁴¹

Against this backdrop, *Chaoulli* is merely the latest episode in an ongoing story in which the Court has struggled to come to terms with the institutional task it set itself in *Oakes*. In response to the question of who bears the risk of empirical uncertainty with respect to government activity that infringes *Charter* rights, the rights-claimant or the government, the answer has been, in effect, both. But even though the Court has agreed on this compromise, deep disagreements persist along its ragged edges.

Given that Chief Justice McLachlin has figured prominently in Canada’s jurisprudence of self-doubt and empirical uncertainty, and given the direct and significant relevance of this jurisprudence to *Chaoulli*, one would have expected this material to be front and centre in her judgment. Astonishingly, however, she does not even mention, let alone engage with, these cases. And it is equally surprising that these cases only make a cameo appearance in the dissent.⁴²

The Court’s complete failure to cite, follow, or even attempt to distinguish its own precedents led it to make a fundamental legal error: it posed the wrong question. The question was *not* whether Quebec had convincingly demonstrated that a ban on private insurance was necessary to maintain the integrity of public health insurance. Rather, the question was whether Quebec had a ‘reasoned apprehension of harm’ that opening the door to private insurance would pose this threat. To return to *Lochner*, the Court spoke in the voice of Chief Justice Peckham, when in fact it should have spoken in the voice of Justice Harlan’s dissent. Instead of proceeding with Peckham’s cocksure certainty to repeat the institutional error of the *Lochner* court, the Court should have approached the constitutional challenge with Justice Harlan’s self-doubt and judicial modesty. The empirically complex question of what disincentives best protect the public monopoly over health care financing, is, to repeat Justice Harlan, ‘one about which there is room for debate and for an honest difference of opinion.’ Mere disagreement with the Que-

bec government was not enough. The standard was whether the Quebec government lacked a 'reasonable basis' upon which to proceed, and the materials put into evidence more than met this attenuated standard. The Court's disregard for this evidence is nothing short of astonishing.

Even if the evidence were insufficient, perhaps common sense and logic could have bridged the gap. Ironically, an excellent model of how the Court could have reached that conclusion is offered by then Justice McLachlin's concurring judgment in *Adler*.⁴³ That case involved an unsuccessful constitutional challenge to the selective funding of Roman Catholic schools in Ontario. The government claimed that if public funding were extended to private religious schools, it would lead parents to remove their children from the public system, which would diminish the diversity of the student body, and, in turn, undermine the ability of public schools to promote mutual tolerance in a diverse polity. Justice McLachlin accepted this argument on the basis of common sense and logic. But if she were willing to infer the willingness of parents to exit public schools in response to financial incentives, and the threat this would pose to the goals of public education, why was she so unwilling to infer the willingness of health care providers to exit public health care in response to financial incentives, and the threat this would pose to the integrity of Medicare?

Economic Libertarianism?

Let us now turn to *Lochner*'s second meaning: economic libertarianism. This line of criticism posits that the doctrinal categories employed by the *Lochner* court reflected a normative commitment to the principles of freedom of contract and property, and to strict limits on the scope of state intervention in the economy. To reject *Lochner* is to fight for the ability of the state to redress the inequities and exploitation that arise from the unregulated marketplace. The principal villain is the so-called doctrine of 'substantive due process.' Under the American *Bill of Rights*, individuals enjoy the right not to be deprived of life, liberty or property except by 'due process of law.' Under substantive due process, the *Lochner* court read this clause in two ways that created constitutional roadblocks for the welfare state. Liberty was interpreted to encompass liberty of contract, thereby bringing any law regulating the market under constitutional scrutiny. Then the Court construed 'due process' to impose substantive limits on legislation depriving persons of contractual freedom, such as the law restricting bakers' hours in *Lochner*. It was

substantive due process and the libertarianism of *Lochner* that presented significant constitutional obstacles to Roosevelt's New Deal. And the post-*Lochner* constitutional settlement in the United States has entailed the decisive and explicit repudiation of the aggressive protection of economic rights, so that socioeconomic legislation almost always passes constitutional muster.

The claim here is subtly different from the activist critique of the *Lochner* court. This group of critics accepts that the *Lochner* court did not merely impose its personal policy preferences on democratic legislatures. Rather, they argue that the judgments of that Court flowed from larger political ideologies, and that a substantive value choice by the judiciary is not only desirable, but an inescapable feature of constitutional interpretation. Thus, the problem with *Lochner* was not in its appeal to a political theory of the relationship of the state and market, but in its appeal to the wrong political theory.⁴⁵

As I have explored in depth, the libertarian reading of *Lochner* was an important theme in the drafting of the *Charter*. The concern was that a *Charter* worded identically to the American *Bill of Rights* would invite successful constitutional challenges against the Canadian welfare state. The focus of engagement was the Canadian version of the American due process clauses, section 7 of the *Charter*. To pre-empt a libertarian reading of the *Charter*, two important drafting choices were made. First, while the American due process clauses protect 'life, liberty, and property,' the *Charter* protects life and liberty but deliberately omits protection for property, to prevent property rights-based constitutional challenges. Second, property was replaced with 'security of the person,' to send a cue to the courts that they should not interpret liberty like the *Lochner* court to encompass economic liberty and freedom of contract, but rather, to encompass corporeal interests such as bodily integrity and physical liberty.

Notwithstanding these clear textual choices, for the past twenty years, parties have attempted to argue that s. 7 protects freedom of contract.⁴⁶ In large part, this litigation has been made possible by the *Charter's* protection of 'liberty,' a term broad enough to encompass economic freedom. And so liberty has been described by litigants as encompassing the right of a retailer to sell goods (*Edwards Books*), the right to advertise (*Irwin Toy*), the right of a prostitute to contract for her services (*Prostitution Reference*), the right to practice a profession (*Pearlman, Walker*), and even the right to operate video lottery terminals (*Siemens*)! These claims have been consistently rejected by the Court. Indeed,

Lochner has been relied on by the Court as the reason to *not* accept these claims.⁴⁷ Perhaps since hope springs eternal, this did not stop Dr. Chaoulli from framing his challenge to the prohibition on private insurance as based on the right to enter into contracts for medical services. And, not surprisingly, this version of Chaoulli's constitutional claim was unanimously rejected by the Court.

In the face of the text of the *Charter* and the Court's jurisprudence, the oft-repeated claim made by left-wing critics of the *Charter*, such as Andrew Petter and Alan Hutchinson in their contributions to this volume, that constitutional adjudication could launch a Canadian *Lochner* era and the rollback of the Canadian welfare state would appear to be a histrionic exaggeration.⁴⁸ But there is actually much more to the link between *Lochner's* libertarianism and the *Charter*, which should give us considerable pause for concern. To understand why, we need to turn to the early history of the *Charter*, a history which I fear the Court has forgotten.⁴⁹ Notwithstanding that the *Charter* is a human rights document, many early *Charter* challenges were brought by corporations, and created the fear that powerful economic interests would hijack the *Charter* to pursue a deregulatory agenda. Notwithstanding the absence of property and contractual rights in the *Charter*, it was feared that the courts would interpret other *Charter* rights to protect economic interests indirectly. Thus, the first case on freedom of religion was brought by a corporate defendant who challenged the constitutionality of a Sunday closing law on the ground that it compelled the observance of the Christian Sabbath. Without irony, the Court articulated the interests underlying freedom of religion exclusively by reference to human beings, yet granted corporations, which could not hold that right themselves, standing to raise the rights of third parties in defence to criminal prosecutions. The effect of the successful challenge was to permit retail businesses to operate seven days a week. Pending challenges to laws asserting that the right to contract fell within the scope of the *Charter's* right to freedom of association raised the same concerns.

Against this backdrop, the stringent interpretation of s. 1 given by *Oakes* amplified these concerns. Critics suggested that *Oakes* would prevent s. 1 from saving legislation which infringed constitutional rights in many circumstances. This possibility was illustrated by *Oakes* itself. That case involved a constitutional challenge to an evidentiary rule in a federal narcotics control statute, that if the fact of possession was proven, the intention to traffic was inferred unless the accused provided to the contrary. The Court held that the rule contravened the *Charter's* pre-

sumption of innocence, and was not justified under s. 1. The law failed the rational connection branch of the *Oakes* test because of the possibility of erroneous convictions for trafficking where an innocent individual could not adduce enough evidence to rebut the presumption. Critics quickly pointed out that the Court's reasoning demanded an impossibly high degree of fit between legislative ends and means.

Oakes purported to lay down a uniform standard for limitation analysis, which did not vary according to policy context. To apply such an exacting standard to laws regulating economic activity is fraught with problems. Because problems of imperfect information, and the need to limit enforcement costs, most of these laws rely on statistical generalizations that do not hold true in every situation but are convenient to administer. But *Oakes* suggested that laws which produced false positives were for that reason irrational and unconstitutional.

Consider the blanket ban on private insurance in *Chaoulli*. On the Court's reasoning, such a law is irrational because it prohibits private insurance in every case, including those where Medicare cannot provide access to care within a reasonable time. But the 'rational' alternative, the right to exit the public system in the event that care within a reasonable time is not available, is not immune from the possibility of error either. Because a wait-time standard is a statistical generalization based on population-level data, it will not be accurate in every case. And so if error is the gravamen of *Oakes*, no law would pass the muster of s. 1.

Taken together, the incidental protection of economic liberties through rights such as freedom of religion and association and the restrictive approach to justifiable limits on *Charter* rights in *Oakes* threatened to introduce *Lochner's* laissez-faire constitutionalism into Canada through the back door. But less than ten months after *Oakes* was handed down, the Court responded to these criticisms with an astonishing shift in direction, in a case involving the regulation of economic activity. *Edwards Books* was the second constitutional challenge brought to a Sunday closing law by a corporate defendant. The Court found that the law infringed the *Charter's* guarantee of freedom of religion, but was justified under s. 1. The critical feature of the judgment was a decisive shift in tone from the language of stringent justification to the language of deference.

The goal behind the legislation was to protect the rights of retail employees, by granting them the right to a common pause day which is shared with most members of the community. One argument pressed

before the Court was that a policy alternative to achieve this goal that would be less restrictive of the rights of retailers would be to give employees the right to not work on Sundays, while permitting retailers to remain open. The Court rejected this suggestion, because the choice granted to employees by such a law would be more illusory than real. The Court noted that '[t]hese employees do not constitute a powerful group in society,⁵⁰ because they were 'older, more likely to be female, ... low-skilled, non-union and poorly educated employees whose continued earnings are critical for family support, people who have the least mobility in terms of job alternatives and are least capable of expressing themselves to redress their grievances.' And from this specific conclusion, the Court set out a more general interpretive principle that was a decisive repudiation of *Lochner* era libertarianism.⁵¹

In interpreting and applying the *Charter* I believe the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

Accepting the *Charter* challenge in this case, in other words, would have expanded the freedom of relatively advantaged retailers while contracting the freedom of relatively disadvantaged retail employees. The clear message from the Court was that when legislatures intervene in the market to enhance the interests of the vulnerable, the court should defer.

Edwards Books is an important part of the *Charter's* early history against which one must interpret *Chaoulli*. Although *Edwards Books* concerned s. 1 of the *Charter*, *Chaoulli's* approach to the interpretation of s. 7 – reading the 'principles of fundamental justice' to incorporate an *Oakes*-style proportionality analysis – made *Edwards Books* directly relevant. Significantly, however, *Edwards Books* was not cited or discussed by the majority judgments. Indeed, Chief Justice McLachlin made no reference at all to the massive jurisprudence, or even to the very possibility that courts should defer in some *Charter* cases. But the dissent did cite *Edwards Books* with good reason, because it was of direct relevance. Canadian Medicare combines a regime of public financing with private delivery for medically necessary hospital and physician services. Its principal beneficiaries are the poor, who would otherwise be unavailable to afford a comparable level of care in an unregulated marketplace, and who lack the means to purchase private insurance. Conversely,

those who would benefit from the right to exit Medicare and purchase private insurance are the middle and upper classes. The majority did not come right out and say this. Chief Justice McLachlin suggested that ‘the vast majority of Canadians (middle-income and low-income earners)’ would be able to purchase private health insurance,⁵² although she cited no evidence for this claim. Justice Deschamps was more honest. She suggested that ‘people with average incomes’⁵³ would be able to purchase private insurance – which by implication means persons with below average incomes would be unable to do so. If one accepts the factual premise that the government had a reasonable basis to conclude that permitting the relatively well off to exit the system would work to the detriment of those left behind, then the design of Medicare as a universal social program is clearly a case where governments are legislating to protecting the vulnerable – in this case, the poor. This is exactly kind of situation referred to in *Edwards Books* as one where the Court should defer.

Now the majority in *Chaoulli* could conceivably attempt to distinguish *Edwards Books*, on the basis that *Edwards Books* was merely about leisure time spent with family and friends, while *Chaoulli* was about waiting lists that threaten individuals’ health and even their lives. However, to describe both cases in this way would miss an important dimension of the character of the dilemma facing the Court. In *Edwards Books*, the principal beneficiaries of the Sunday closing law were retail workers who observed Sunday as a religiously-mandated day of prayer and rest. Likewise, in *Chaoulli*, Medicare protects the security of the person and the lives of the poor who would be unable to afford care of comparable quality on the private market. So in both *Edwards Books* and *Chaoulli*, *Charter* rights are on *both* sides of the equation, a fact that further warrants judicial deference. The dissent is mistaken when it says that the debate over the design of Medicare is ‘about social values’ and ‘not about constitutional law.’⁵⁴ The institutional question for the Court is who should make the choice of how to balance competing constitutional rights. The lesson from *Edwards Books* may be that when the state legislates to ensure that constitutional rights have equal value, courts should be reluctant to intervene.

Worse than *Lochner*?

Not only does *Chaoulli* repeat many of the judicial mistakes closely identified with the *Lochner* court; it may in fact be worse. In recent years, American legal historians have generated a large body of work

which casts the *Lochner* court in a different light. '*Lochner* revisionists' claim that the *Lochner* court was acting not to further class preferences, but on the basis of a full-blown constitutional theory with deep roots in the American constitutional tradition. Howard Gillman has best described this tradition as being based on a distinction between legislation promoting the interests of narrow interest groups, and laws directed at promoting the public welfare.⁵⁵ Thus understood, *Lochner* was premised on a commitment to neutrality or equality before the law.⁵⁶ Although perhaps rightly criticized today, legal historians now say that *Lochner* should be judged in context, and that it was right for its time.

It is very hard to say the same about *Chaoulli*, for it is very difficult to reconcile *Chaoulli* with two of the Court's recent decisions – so much so that a cynic could suggest that the principal explanation for the resulting pattern of judgments is a class bias.

First compare *Chaoulli* with *Auton*,⁵⁷ in which a unanimous Court rejected a *Charter* challenge to British Columbia's refusal to fund therapy for autistic children. The claimant's argument, that the denial of therapy constituted discrimination on the basis of disability, and hence was a violation of the *Charter's* equality rights guarantee, s. 15, was fairly straightforward. Although the Court dismissed the claim – not itself surprising – what was unexpected was how it did so. The Court found no violation of s. 15, and, indeed, suggested that the funding of non-core health care services was within the discretion of provincial governments and did not engage the *Charter*. This reasoning is so difficult to defend that the only way to read *Auton* as having created a political questions doctrine around the scope of the Medicare envelope. The clear message from the Court was that the Court did not wish judges to be drawn into adjudicating upon the design of Medicare on a case-by-case basis, a task for which they are poorly qualified. Indeed, the dissenting judges in *Chaoulli* suggested that this was the rationale for *Auton*.⁵⁸

But in *Chaoulli*, the Court has held that Quebec's ban on private insurance is unconstitutional because it applies even in circumstances where wait times are unreasonably long. So the judgment has, astonishingly, set up the courts as the arbiters of reasonable wait times on a case-by-case basis – an institutional quagmire, a constitutional quicksand that will severely test the lower courts. And as the dissenting judges in *Chaoulli* point out, the Court's refusal in *Auton* to define 'reasonable health services' is inconsistent with its willingness in *Chaoulli* to define reasonable wait times.⁵⁹ These two questions are not different in any relevant legal respect. But what *is* different, of course, is who the win-

ners and losers are in the two judgments. In *Auton*, at least one parent could not afford private care. In *Chaoulli*, the beneficiaries are likely to be those Canadians who can afford private health care. The net result is that those who can afford private health care have won the right to exit the system, while those trapped in the system without the means to exit get no help at all.

Now compare *Chaoulli* with *Gosselin*,⁶⁰ a constitutional challenge to Quebec's now repealed workfare program. Under the scheme, welfare recipients under 30 received a fraction of the benefit available those over 30. However, most of the difference would be paid to those who participated in on-the-job training, community work, or remedial education. Two critical factual issues were the actual availability of these opportunities, and the impact on welfare recipients of being unable to enrol in these programs. Experts had testified at trial that a very small percentage of welfare recipients under 30 were actually enrolled in these programs, and the total number of welfare recipients was far larger than the number of available positions. The argument was that the legislature had essentially abandoned young welfare recipients. The only first-hand testimony regarding the difficulties of accessing these programs and the impact of not securing access was provided by one welfare recipient. The trial judge found that this testimony was insufficient to make out the case against the government. Chief Justice McLachlin agreed, stating that it was 'utterly implausible ... to find the Quebec government guilty of discrimination [against] ... tens of thousands of unidentified people, based on the testimony of a single affected individual.'⁶¹ Since the claimant had been able to enroll in these programs, Chief Justice McLachlin suggested that 'participation was a real possibility,' and that the claimant had dropped out of programs because of 'personal problems, which included psychological and substance abuse components, rather than to flaws in the programs themselves.'⁶² And like the trial judge, Chief Justice McLachlin dismissed the expert testimony, and noted that 'it was not open to this Court to revisit the trial judge's conclusions absent demonstrated error.'⁶³

But in *Chaoulli*, the majority was willing to rely on the testimony of one patient to impugn the constitutionality of the public health care system of an entire province that serves not tens of thousands, but millions. The trial judge had found that the patient's delay in receiving joint replacement (which he ultimately received) was ultimately 'caused not by excessive waiting lists but by a number of other factors, including his pre-existing depression and his indecision and unfounded medical complaints.'⁶⁴ Yet, the majority disregarded this finding of fact, with

Justice Deschamps simply stating that ‘Zeliotis is a patient who has suffered as a result of waiting lists.’⁶⁵ And the evidence at trial demonstrating that wait lists across Quebec’s health care system as a whole posed a risk to human health and life largely came from practicing physicians, none of them experts on waiting lists, who provided evidence that was anecdotal and vague. Nevertheless, the majority was willing to conclude that waiting lists were a system-wide problem in Quebec. The inconsistencies in the treatment of individual and expert testimony are not tied to any real difference between the issues in *Chaoulli* and *Gosselin*. But again, what was different is whose interests were at stake: welfare recipients, or the relatively advantaged.

It is impossible to say whether a class bias, unconscious or otherwise, is at work.⁶⁶ But, as they say in politics, the optics are bad.

Could *Chaoulli* have been motivated by the Court’s desire to shape the politics of Medicare? Consider the following remarkable passages from Justice Deschamps concurring judgment:⁶⁷

The government had plenty of time to act. Numerous commissions have been established ... and special or independent committees have published reports ... Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a socio-political philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens. ... While the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of the violation of Quebeckers’ right to security. The government has not given reasons for its failure to act. Inertia cannot be used as an argument to justify deference.

Justice Deschamps’ sense of frustration leaps off the page. Perhaps the real explanation for the judgment is the Court’s sense that the political process has failed to address the problem of waiting lists. And so the Court took it upon itself to force governments to act.

But if that is the true reason for the Court’s otherwise indefensible ruling, it is a flimsy one indeed. To be sure, the idea that judicial review should redress the inadequacies of democratic politics is one of the principal justifications for the *Charter*. But it is important to carefully define the circumstances under which one can honestly say that politics systematically and unfairly disadvantages certain interests. One strand of the post-*Lochner* approach to constitutional adjudication in the United States was that courts should selectively intervene to protect ‘discrete

and insular minorities' whose interests are likely to be systematically disregarded in majoritarian politics.⁶⁸ This idea makes sense of an aggressive approach to constitutional adjudication in the defence of the rights of gays and lesbians, criminal accused, and aboriginal peoples.

But *Chaoulli* was exactly the opposite sort of case. It was a challenge to a *universal* social program. And the design feature of the program at issue – the legal and practical inability to opt out of waiting lists – potentially affects everyone at some stage of their lives. The persons on wait lists are not a small minority of Canadians lacking in political power. They are our mothers and fathers, our brothers and sisters, our friends and co-workers, and, indeed, ourselves. To be sure, politics can be difficult and slow. But this was an easy case for the Court to leave to the political process, instead of attempting to save Canada from itself.

The Court should have never heard this case.⁶⁹

Notes

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- 1 *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 [Chaoulli].
- 2 *Lochner v. New York*, 198 U.S. 45 (1905).
- 3 For example, unlike its American counterpart, the *Charter* lacks express constitutional protection for rights of property and contract, so as to not fetter the ability of governments to regulate the economy. Moreover, in contrast to the individualistic overtones of the *Bill of Rights*, the *Charter* explicitly authorizes affirmative action and justifiable limitations on rights, and protects not only rights for all individuals but also for members of Canada's linguistic minorities and aboriginal peoples. Most famously, the *Charter* permits legislatures to override selected *Charter* rights for renewable five year periods, in contrast to American-style judicial supremacy.
- 4 Factum of the Respondent, Attorney General of Quebec at para. 101; Factum of the Respondent, Attorney General of Canada at para. 48; Factum of Intervener, Attorney General of Ontario at para. 27; Factum of Intervener, Canadian Labour Congress at para. 8.
- 5 For a detailed examination, see S. Choudhry, 'The *Lochner* era and comparative constitutionalism' (2004) 2:1 *International Journal of Constitutional Law* 1.
- 6 Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton: Princeton University Press, 2004).
- 7 The *Lochner* court made these moves through its interpretation of 'due process' to encompass substantive limits on government policies depriving individuals of life, liberty, or property. For further discussion see Michael Perry, *The Constitution in the Courts: Law or Politics?* (Oxford: Oxford University Press, 1994) at 162–64. Thus, in *Lochner*, when faced with the argument that New York's law was justified to protect the health of bakers, Chief Justice Peckham found 'that the trade of the baker ... is not an unhealthy one to the degree which would authorize the legislature to interfere with ... the right of free contract on the part of the individual' (*Lochner* at 59), presumably meaning that if some threshold were passed, state regulation of hours of work would be justified. And if health concerns were valid, Chief Justice Peckham suggested that other means were

at the state's disposal short of limiting hours of work, such as setting workplace health and safety standards.

- 8 *Lochner* at 76.
- 9 *Ibid.* at 72.
- 10 *Ibid.* at 73.
- 11 *Chaoulli c. Québec (Procureure Générale)*, [2000] J.Q. 479 at para. 263 (Q.L.).
- 12 *Chaoulli*, at para. 181.
- 13 *Ibid.* at para. 68.
- 14 *Ibid.* at para. 64.
- 15 *Ibid.* at para. 138.
- 16 *Ibid.*
- 17 *Ibid.* at para. 149.
- 18 *Ibid.* at para. 152.
- 19 Canada, Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada – Final Report* (Saskatoon: Commission on the Future of Health Care in Canada, 2002) (Commissioner: Roy J. Romanow, Q.C.) at 139 [italics added], online: Commission on the Future of Health Care in Canada <<http://www.hc-sc.gc.ca/english/care/romanow/hcc0086.html>>.
- 20 Canada, The Standing Senate Committee on Social Affairs, Science and Technology, *The Health of Canadians – The Federal Role, Vol. 6: Issues and Options* (Ottawa: Senate Standing Committee on Social Affairs, Science and Technology, 2002) (Chair: The Honourable Michael J.L. Kirby) at 42 [italics added], online: Commission on the Future of Health Care in Canada <<http://www.hc-sc.gc.ca/english/care/romanow/hcc0362.html>>.
- 21 *McKinney v. University of Guelph* [1990] 3 S.C.R. 229 at 304.
- 22 *R. v. Malmo-Levine*, 2003 SCC 74 at para. 113 [Malmo-Levine].
- 23 *R. v. Oakes* [1986] 1 S.C.R. 103 at 105–06 [Oakes].
- 24 *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at 594–95, 619–20; *Malmo-Levine*, at para. 135; *Chaoulli*, at para. 130.
- 25 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] S.C.J. No. 68 at para. 129 (QL) [RJR].
- 26 *Ibid.* at para. 133.
- 27 *Ibid.* [emphasis added]
- 28 *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68.
- 29 *Ibid.* at para. 21–22.
- 30 *RJR* at para 67.
- 31 *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 994.
- 32 *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22.
- 33 *R. v. Keegstra*, [1990] 3 S.C.R. 697 [Keegstra]; *R. v. Butler*, [1992] 1 S.C.R. 452

- [*Butler*]; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [Ross]; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 [Little Sisters]; *R. v. Sharpe*, 2001 SCC 2 [Sharpe].
- 34 *Sharpe*, *Ibid.* at para. 94.
- 35 *RJR*, at para 154.
- 36 In my view, that decision was largely driven by the refusal of the Attorney-General of Canada to disclose to the Court a study examining the comparative effectiveness of a partial and complete advertising ban on tobacco advertising, which led the court in effect to draw an adverse inference (as emphasized in a separate concurring judgment by Chief Justice Lamer and Justice Iacobucci).
- 37 *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at para. 116.
- 38 *Ibid.* at para. 117.
- 39 *Harper v. Canada (Attorney General)*, 2004 SCC 33.
- 40 *Ibid.* at para. 79.
- 41 *Ibid.* at para. 34; *Ibid.* at para. 41; *Ibid.* at para. 34.
- 42 *Chaoulli* at para. 176.
- 43 *Adler v. Canada*, [1996] 3 S.C.R. 609.
- 44 Although expert evidence was tendered by counsel for the Attorney-General of Ontario at trial, and was referred in the trial judgment, 9 O.R. (3d) 676 at 703-705. I thank Bob Charney for bringing this point to my attention.
- 45 Ronald Dworkin, for example, argued that *Lochner* was mistaken because it endorsed a libertarian, as opposed to an egalitarian conception of liberalism which views the regulatory and redistributive state as an important vehicle for individual freedom. Ronald Dworkin, '*Freedom's Law: The Moral Reading of the American Constitution*' (Boston: Harvard Univ. Press, 1996) at 82.
- 46 *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [Edwards Books]; *Irwin Toy*, *supra* note 31; *Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 [Prostitution Reference]; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 [Pearlman]; *Walker v. Prince Edward Island*, [1995] 2 S.C.R. 407 [Walker]; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3 [Siemens].
- 47 *Prostitution Reference*, at 1164–66.
- 48 See the essays by both Alan Hutchison and Andrew Petter in this volume. See also Allan Hutchison, *Waiting For Coraf: A Critique Of Rights* (Toronto: University of Toronto Press, 1995); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997); Michael Mandel, *The Charter of Rights and the Legalization of Politics in*

- Canada, 2d. ed. (Toronto: Thompson Educational Publishing, 1994); Harry Arthurs, 'Constitutional Courage' (2004) 49 McGill L.J. 1.
- 49 For important contemporaneous academic analysis, see Andrew Petter, 'The Politics of the Charter' (1986) 8 Supreme Court L.R. 472; Patrick J. Monahan & Andrew Petter, 'Developments in Constitutional Law: The 1985–86 Term' (1987) 9 Supreme Court L.R. 69; Andrew Petter, 'Immaculate Deception: The Charter's Hidden Agenda' (1987) 45 Advocate 857; and Andrew Petter & Patrick J. Monahan, 'Developments in Constitutional Law: The 1986–87 Term' (1988) 10 Supreme Court L.R. 61.
- 50 *Edwards Books*, at 778.
- 51 *Ibid.* at 779.
- 52 *Chaoulli* at para. 137.
- 53 *Ibid.* at para. 55.
- 54 *Ibid.* at para. 166.
- 55 Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (Durham: Duke University Press, 1993).
- 56 *Lochner* revisionism has given rise to vigorous debate in the American legal academy. For recent examples, see David E. Bernstein, 'Lochner Era Revisionism, Revised: *Lochner* and the Origins of Fundamental Rights Constitutionalism' (2003) 92:1 Georgetown L.J. 1; David E. Bernstein, 'Lochner's Feminist Legacy' (2003) 101 Michigan L.R. 1960; David Strauss, 'Why Was *Lochner* Wrong?' (2003) 70 U. Chi. L. Rev. 373; Cass R. Sunstein, 'Lochnering' (2003) 82:1 Texas L.R. 65; David E. Bernstein, 'Lochner's Legacy's Legacy' (2003) 82 Texas L.R. 1; Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty*.
- 57 *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78.
- 58 *Chaoulli* at para. 163.
- 59 *Ibid.*
- 60 *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84.
- 61 *Ibid.* at para. 47.
- 62 *Ibid.* at para. 48.
- 63 *Ibid.* at para. 50.
- 64 *Chaoulli* at para. 211.
- 65 *Ibid.* at para. 35.
- 66 Andrew Petter and Allan Hutchison no doubt think that there is. See their essays in this volume.
- 67 *Chaoulli* at paras. 96 and 97.
- 68 This suggestion was made in footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).
- 69 As Kent Roach argues in this volume.