

Seeking the Court's Advice

The Politics of the Canadian
Reference Power

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Introduction: Reference Cases as a Mix of Law and Politics

Political and constitutional crises can arise in unexpected or unusual places. The so-called “chicken and egg war” between the provinces of Ontario, Quebec, and Manitoba is perhaps one of the most curious places in which a battle over Canadian federalism has originated. The chicken and egg war began in the mid-1960s when Ontario producers of broiler chickens gained control over production of their product through the creation of the Ontario Broiler Chicken Production Marketing Board. Once in place, the board established quotas for the production of broiler chickens within the province. Although the purpose of the board was to protect producers from competition within Ontario, it did not shield them from the competitive threat of producers outside the province, specifically neighbouring Quebec, a chicken-producing powerhouse without a marketing board (Moore 1971). As a result, without the imposition of quotas, Quebec had an excess of less expensive chickens. On the egg side of the conflict, Ontario was a powerful hub of egg production, and although there was an egg marketing board in place, unlike the chicken board, it was relatively powerless. With no strict limits on production, Ontario egg producers flooded the egg market in Quebec, with over 40 percent of the eggs sold in Quebec originating in Ontario or Manitoba (Moore 1971). In response, egg producers in Quebec sought to gain greater control over their market, much like the chicken producers in Ontario.

With marketing boards in place in both Ontario (for chickens) and Quebec (for eggs), not only did the prices of each product become controlled in each province, but the marketing boards also introduced additional measures that excessively favoured the marketing of internal products, resulting in discrimination against products from other provinces. Although Ontario may have been the target of Quebec's marketing scheme and Quebec may likewise have been the target of Ontario's, the restrictions introduced into the chicken and egg markets within Ontario and Quebec had a negative effect on agricultural producers in other provinces. Such was the case for farmers in Manitoba, who were now unable to sell their surplus chickens and eggs to the larger markets in Ontario and Quebec. Thus Manitoba "was the classic innocent and injured bystander in the 'chicken and egg war'" (Weiler 1974, 156).

From this account, it may be puzzling what the war over chickens and eggs, a political-economic dispute, has to do with courts and the reference power. Indeed, in response to the restrictive marketing schemes enacted by Ontario and Quebec, Manitoba could have responded by seeking an interprovincial agreement on agricultural policy through negotiation with the other governments. Perhaps, as Weiler (1974) suggests, the federal government could have been included to help broker an arrangement. However, instead of selecting what might have been the traditional political route, the Manitoba government decided to seek judicial review and ask for an advisory opinion from the courts through the reference power. But instead of simply asking the Manitoba Court of Appeal to review the constitutionality of the agricultural-marketing policies of Ontario or Quebec, Manitoba took the unusual step of passing legislation that mirrored the Quebec policy. After enacting the replica policy, Manitoba promptly submitted it to the Manitoba Court of Appeal for review, requesting an advisory opinion on the constitutionality of the agricultural regulation. In response to the Manitoba reference, the Court of Appeal rendered an advisory opinion that found the legislation to be unconstitutional. The Court of Appeal held that the Manitoba government's plan was *ultra vires* (outside) provincial jurisdiction and infringed on the Parliament of Canada's constitutional authority

over trade and commerce provided in section 91(2) of the *British North America Act, 1867*.¹ This decision was promptly appealed to the Supreme Court of Canada in *Reference re Manitoba (AG) v Manitoba Egg and Poultry Association [Egg Reference]*,² and the Supreme Court agreed with the Court of Appeal, finding the restrictive agricultural policy constitutionally invalid.

It is important to explicitly address the strategic actions of the Manitoba government during the chicken and egg war. In short, Manitoba passed legislation that copied a regulatory scheme with the sole purpose of asking the courts to weigh in through a reference case. This means that the Government of Manitoba passed a law that it did not want for the sole purpose of sending it to the courts for review in the hope that the courts would find it unconstitutional. For this plan to work, Manitoba needed to “lose” its case at the Court of Appeal and the Supreme Court of Canada in order to obtain a national ruling that would equally apply across the provinces. This national ruling would have the additional effect of invalidating the policies of Ontario and Quebec, Manitoba’s intended targets. As Weiler (1974, 157) aptly explains, “Manitoba purported to argue for, and then appeal on behalf of, laws which it was proposing to enact with the sole purpose of having the Supreme Court declare them unconstitutional.” The strategic use of the reference power by the Manitoba government resulted in a positive outcome for the province, as following the Supreme Court’s decision in the *Egg Reference*, all ten provinces and the federal government reached an agreement on a national agriculture policy that instituted quotas in each province.³

Ordinarily, judicial review is relied upon to obtain a decisive outcome in an ongoing conflict – that is, when one party sues another, when an individual is charged with a criminal offence, or when a government alleges that another government has overstepped its legislative jurisdiction. Importantly, as regards the political role of the courts, it is the third grounds for judicial review that has played an important role in Canadian governance, doing so even before the adoption of the *Canadian Charter of Rights and Freedoms* in 1982. The judicial review of the constitutional division of powers requires courts to arbitrate conflicts between governments through the application of the legislative jurisdiction outlined in

the Constitution. This judicial function has had a profound effect on many facets of Canadian federalism and governance (Monahan 1984, 1987; Lederman 1985; Bzdera 1993; Schertzer 2016). The judicial review of federalism-based disputes has meant that courts can play an instrumental role in the arbitration of debates regarding public policy, which sometimes results in a determinative effect on policy content – thus allowing for some form of judicial policy making. This activity provides a role for the courts that is fundamentally distinct from that of simply adjudicating a criminal law case or a private legal dispute. Reflecting on the role of the courts in arbitrating federalism, Lederman (1985, 2) notes that because of this responsibility, Canadians were acquainted with this form of judicial review, or what he refers to as judicial supremacy, prior to the adoption of the Charter.

Importantly, when judicial review is relied upon to sort out an existing conflict, whether it be between two private individuals or two orders of government, courts are asked to apply the law to a set of accepted facts with the goal of reaching a just outcome. Yet, in the *Egg Reference*, the courts were not asked to review the arguably discriminatory effects of the Quebec legislation on Manitoba farmers. Nor was one province suing another. Instead, in this case, through the reference power, the Manitoba government was able to successfully enlist the courts to resolve an ongoing conflict, in the abstract, by issuing an advisory opinion.

Yet Manitoba's use of the reference power in such a manner is not unique. Time and again, political actors have done so to ask questions aimed at sorting out highly divisive issues such as the constitutionality of same-sex marriage, the reform of the Senate, the requirements for appointment to the Supreme Court, the ability of the Parliament of Canada to amend the Constitution without the participation of the provinces, the legal authority of Quebec to unilaterally separate from the federation, and the role of Quebec in endorsing constitutional amendment.⁴ As Russell (2011) argues, one would be hard-pressed to find another constitutional democracy that has relied on its courts as frequently as Canada to answer controversial issues related to the core of its survival. Many of the cases that have considered controversial and fundamental issues of Canadian politics and governance have been reference cases.

The Canadian Reference Power

The reference question procedure allows the executive branch of both the provincial and federal governments to obtain an advisory judicial opinion from a provincial appellate court or the Supreme Court of Canada on the constitutionality of legislation, either proposed or enacted, in the absence of a live legal dispute. When reference cases focus on an abstract question, which the majority do, they stray from the traditional adversarial nature of Canadian courts, as there is no concrete legal problem for the court to resolve. Instead, through the reference power, courts can be referred questions that must be considered in terms of a largely hypothetical or speculative context. Section 53 of the *Supreme Court Act* provides the federal government the power to pose questions directly to the Supreme Court of Canada.⁵ Provincial governments rely on comparable provisions in provincial judicature Acts to submit questions directly to provincial appellate courts.⁶ Whereas the federal government can seek a reference directly at the Supreme Court, provincial governments must first submit reference questions to a provincial court of appeal before they may appeal “by right” to the Supreme Court of Canada.⁷ In the federal case, this power was created by Parliament through a provision of the *Supreme Court Act* in 1875.

The reference power provides governments the ability to sidestep the normal litigation route to the Supreme Court or provincial appellate courts, giving the executive privileged and timely access to judicial review, which is denied to citizens, interest groups, or opposing political parties. Political actors involved in these contentious episodes abide by the decisions made by the courts, making reference decisions more binding than advisory (Rubin 1960; Hogg 2012). The reference procedure allows governments to insert the courts and the judiciary into often highly controversial and normative partisan debates, with the goal of obtaining an authoritative judicial decision.

The Canadian reference power provides evidence of judicialized politics and a political role for the judiciary that is independent of Charter politics. In essence, politics is judicialized when decisions made about public policy and governance are, to a large extent, transferred to the courts and the judiciary at the expense of the bureaucracy, legislature, and executive (Vallinder 1995, 13). In the Canadian context, many scholars

point to the entrenchment of the *Constitution Act, 1982*, which includes the *Canadian Charter of Rights and Freedoms*, as the demarcation point for the judiciary's enhanced role in Canadian politics and government.⁸ As explained by Chief Justice Beverley McLachlin (1990, 49) of the Supreme Court of Canada, the adoption of the Charter has resulted in an "increasing tendency to transmute political and social questions to legal questions, thus placing the task of their resolution on the shoulders of the courts." This emphasis on the Charter has generated a dizzying array of political science, law, and sociological literature that assesses the impact of the Charter on the Canadian public, rights discourse, governance, and politics (see Mandel 1994; Morton and Knopff 2000; Hiebert 2002; and Kelly and Manfredi 2009).

However, many of these scholars overlook a striking example of courts engaging in a political role that predates the Charter: the Canadian reference power. Yet there is relatively little known about reference cases. Previous scholarship, although important, either focuses extensively on single reference cases or engages in analysis that relies on an examination of a limited number of leading, or high-profile, reference cases rather than conducting a more comprehensive analysis.⁹ As a result, in addition to not knowing the total number of references, we have little understanding of how the reference process works, the implications of reference cases for the role of courts in Canadian politics, and why political actors would give up decision-making power to the courts by asking reference questions. This book fills this void by providing novel insight and original analysis of many of the unknown aspects of the Canadian reference power. In taking a comprehensive focus, I find that political actors increase judicial power for strategic purposes and that seeking judicial review through a reference case can help elected officials to achieve political ends, beyond the legal or constitutional clarification provided by a reference decision.

The Canadian Case

The Canadian practice of seeking advisory opinions through the reference power is quite distinctive when compared to many common law countries. Although the Parliament of Canada adopted a reference power to mirror a similar practice in the United Kingdom, advisory opinions

there have essentially fallen into disuse (see Jay 1997). In comparison to most former British colonies, Canada is unique.¹⁰ Advisory opinions and abstract review are prohibited in all American federal courts, New Zealand, and Australia. It is useful to briefly consider why each of these countries has eschewed advisory opinions – as these considerations can have important lessons for Canada.

In the American context, the United States Supreme Court also inherited the United Kingdom's practice of advisory opinions and initially provided advice to Congress ("Advisory Opinions" 2011). However, in 1793 the Supreme Court, led by Chief Justice John Jay, refused to issue an advisory opinion in response to twenty-nine questions submitted by the Cabinet of George Washington. The Washington government sought advice about American obligations to international law and treaties in the context of an ongoing war between the British and the French. The Jay Court responded by explaining that answering such questions would require the court to participate in an extrajudicial activity that would be improper in light of the separation of powers between the judicial, legislative, and executive branches (Jay 1997).

As a consequence, the United States Supreme Court has refused to provide advisory opinions since 1793. There are several reasons for this refusal. First, the ban on advisory opinions has been defended by interpreting the clause on cases and controversies in Article 3 of the American Constitution.¹¹ For example, in *Ashwander v Tennessee Valley Authority*, the Supreme Court explained that Article 3 prevents the court from considering "the constitutionality of legislation in a friendly, non-adversary proceeding," as with abstract review.¹² In short, if there is no controversy, there is no case. Second, the court has explained that, in the spirit of judicial independence and the separation of powers, the judiciary must operate as a coequal branch of government and, as such, that it cannot be compelled to advise the executive or legislature ("Advisory Opinions" 2011). Third, the court has objected to the abstract nature of the advisory process, finding that hypothetical questions can prevent the dynamic representation of all sides of an argument and thereby undermine the adversarial nature of courts ("Advisory Opinions" 2011).¹³

Although advisory opinions have been prohibited in American federal courts since the late eighteenth century, several state supreme courts

do accept requests for advisory opinions from state legislatures and/or the governor. The state Constitutions of Colorado, Florida, Maine, Massachusetts, Michigan, New Hampshire, Rhode Island, and South Dakota authorize advisory opinions, whereas Alabama and Delaware provide the advisory power through statutes. Finally, North Carolina allows for advisory opinions based on judicial initiative (see Rogers and Vanberg 2002).

Like the United States Supreme Court, the High Court of Australia refuses to provide advisory opinions. During the Australian Constitutional Convention of 1897–98, delegates reviewed and considered the process provided in the United Kingdom's *Judicial Committee Act* of 1833 and in the Canadian practice of reference opinions.¹⁴ Many convention participants found that the determination of abstract questions was not within the proper scope of the judiciary and thus rejected the practice of the United Kingdom and Canada, ultimately preferring to follow the American model (Zines 2010). The restriction on Australian advisory opinions was confirmed by the High Court in *Re Judiciary and Navigation Act*, where it found that Parliament does not have the ability to “confer power or jurisdiction upon the High Court to determine abstract questions of law without the right or duty of any body or person being involved.”¹⁵ Although the formal practice of advisory opinions is prohibited in Australia, Zines (2010) notes that the High Court has, on occasion, provided advice to governments through obiter dicta.¹⁶

When New Zealand engaged in institutional reform in the early 2000s, it too considered the practice of reference opinions. In creating the New Zealand Supreme Court in 2004, the government explicitly rejected a proposal to create a reference jurisdiction, citing the Canadian model (Office of the Attorney General 2002). The New Zealand Advisory Group for the Office of the Attorney General reviewed the Canadian reference power and found that “it has been a common complaint that some of the opinions rendered in references have propounded doctrine that was too general and abstract to provide a satisfactory rule” (48). After its brief review of the Canadian experience with a reference power, the Advisory Group recommended against adopting such a power for the New Zealand Supreme Court, shutting the door to a New Zealand reference-like power.

The United States, Australia, and New Zealand either explicitly rejected the creation of an advisory power for their high appellate courts or, if one had been provided in the past, abandoned it before the turn of the nineteenth century. New Zealand's rejection of the advisory function was a reaction to the Canadian experience with the reference power. Australia found that providing the judiciary the power to issue advisory opinions would require the courts to engage in a process that was ostensibly unjudicial. The American rejection of an advisory function for the Supreme Court was born out of concerns over judicial independence and the limited institutional capacity of the court to consider abstract and hypothetical questions. The American unease with advisory review is not unwarranted, and the present study demonstrates that many of the American concerns have arisen with the Canadian reference power. The implications of these concerns animate the critical analysis that follows.

When juxtaposed with its more common comparators, the Canadian reference power is unique. However, if the scope is expanded beyond the routine comparative cases, we find that abstract review, similar in principle to the Canadian reference power, is a routine feature in the constitutional courts of several European civil law countries. As discussed in [Chapters 1](#) and [6](#), the high courts of many European civil law jurisdictions regularly engage in abstract review and issue advisory opinions to governments. The process of some European countries, such as Germany, France, and Italy, is considered in greater detail in the chapters that follow.

It is important to note here that institutional features, such as the executive-centred nature of the Canadian political system and reference process, distinguish the Canadian case from many of the constitutional courts of Europe. For example, abstract review in European constitutional courts is more accessible and often available to the legislature and groups outside the governing party. In Canada the power to initiate abstract review is the sole prerogative of Cabinet through the governor in council (or lieutenant governor in council). Moreover, there are few restrictions on the timing and nature of questions that a government can ask in a reference case, which creates a concentration of power not found in civil law countries, like France and Germany. Yet, even with a

different institutional arrangement and a decentralization of the power to request abstract review, many European constitutional courts often find themselves at the centre of political and normative disputes, which has been well documented by scholars (see Stone 1992; Kommers 1994; Shapiro and Stone 1994; and Stone Sweet 2000). Comparatively little is known about the Canadian case and its parallels with European constitutional courts, despite some of the similarities.

This brief discussion of the comparative context of advisory opinions helps to establish that the Canadian reference power is a compelling case for analysis. Reference cases combine the abstract judicial review typically found in civil law jurisdictions with the executive-centred Westminster parliamentary system. This combination creates institutional and actor variables that provide interesting and unique circumstances for analysis, as well as fruitful opportunities for comparison with the constitutional courts of Europe. It is the intention of this study to encourage scholars of comparative law and judicial politics to take up this task, which requires eschewing the barriers imposed by the differences between common law and civil law legal systems.

Puzzle and Central Argument in Brief

The Canadian reference power raises several questions. Why would political actors effectively cede a portion of their decision-making power to the courts in reference cases? How does the reference power encourage or permit political tactics and strategic litigation?¹⁷ Why would governments request, and choose to be bound by, an advisory opinion from the courts that could run counter to their policy or political goals? Why would elected officials value a definitive judicial decision over a flexible approach that could be conducted via interinstitutional or intergovernmental bargaining? Finally, what are the implications of the Canadian reference power for the relationship between courts and elected political actors? Each of these questions is considered in this book.

This study is driven by two central inquiries. First, how have Canadian governments used the reference power? Understanding how the reference power has been used over time and the nature of reference cases provides the necessary foundation for addressing the second question. Specifically, what are some of the reasons why a government would use

the reference power? These questions raise several theoretical concerns regarding the relationship between the reference power and democratic governance. Chief among these considerations is the effect of the reference power on judicial independence and the separation of the judiciary from the partisan branches of government, with a particular focus on the executive.

I argue that Canadian governments ask reference questions to benefit strategically from the unique characteristics of the reference power and to draw on some of the advantages inherent in judicial review. There are five explanations that help to establish why governments rely on the reference power. Before reviewing some of the reasons, it is essential to note that these explanations should not be understood as mutually exclusive. Instead, my analysis makes it clear that a single reference case can be the product of several different strategic considerations on behalf of a government and that a reference case can satisfy multiple goals. Although governments may rely on the reference power more often to satisfy one strategy over another, it is unfortunately not possible to definitively state which type of strategy has been employed in each and every case. This finding highlights a key implication of this research: the Canadian reference power uniquely provides governments with many strategic opportunities that may not be achieved through routine litigation or the regular political process.

A government's decision to use the reference power can be the product of several considerations. First, governments will ask reference questions for strategic reasons and to avoid political controversy. Instead of dealing with a highly salient issue, governments will avoid their decision-making responsibilities by asking the courts to decide for them. Second, references help governments to understand the limits of constitutional jurisdiction and other matters related to federalism, such as negotiating with other governments, and to clarify their own constitutional or legal powers. In a related sense, throughout Canadian history, governments have used the reference power to protect constitutional jurisdiction from the intrusions of other governments. Third, a reference case can allow a government to benefit from the institutional authority and protection of the courts. A reference can protect government policy from future legal challenges or, at the very least, make it difficult to mount a challenge

similar to that addressed in a reference. Fourth, because the reference process is relatively quick compared to routine review, governments can rely on the reference power to address pressing issues in a timely manner. Finally, governments will use the reference power to benefit from the structural advantages made possible through abstract review. Rather than waiting for routine litigation to materialize, governments have used reference cases because they allow for an amount of control, and even manipulation, in the framing of questions and issues considered by a court that is not possible in routine litigation.

In addressing these reasons for using the reference power, this book makes several important contributions. First, it provides a comprehensive political analysis of Canadian reference cases and the reference power since its creation in 1875. This book examines all reference cases adjudicated by provincial appellate courts and the Supreme Court of Canada from 1875 to 2017, a total of 209 cases.¹⁸ Second, this project analyzes litigation strategy in reference cases and assesses why delegating decision making to a court can be a viable political option for a government, providing insight into this most common, yet generally understudied, litigant.

This study provides an examination of the central features of all Canadian reference cases, documenting important descriptive characteristics and trends over time. Addressing the use of references since 1875 shows that the use of the reference power has mirrored periods of great political and social contestation. This book also makes important contributions to understanding how reference cases compare to routine litigation across several dimensions, such as type of review (abstract or concrete), intervener participation, unanimity rates, authorship styles, and case disposition. This analysis engages with important theoretical questions that concern the ability of courts to refuse to answer reference questions and the implications of question refusal for the separation of powers and judicial independence.

Finally, building on the analytical description of reference cases, this study examines why reference cases are a viable political strategy. It addresses the benefits and potential pitfalls for governments that flow from the unique nature of the reference power. This dimension of the research is evaluated through in-depth interviews with individuals involved in past

reference cases, such as former attorneys general, constitutional experts, government counsel, and a former first minister. These interview data are grounded in secondary scholarship and analysis of historical and archival documents. While demonstrating the benefits of the reference power, this study also analyzes potential drawbacks to references through an analysis of two cases in which governments considered a reference but ultimately abandoned this option. This analysis is conducted through the lens of delegation theory – a perspective that seeks to explain why principal decision makers will empower independent agents, such as the courts, by allowing them to control and manage some issues (Graber 1993; Salzberger 1993; Ginsburg 2003; Hirschl 2004; Finkel 2008; Hilbink 2009). Employing delegation theory helps to link the Canadian case to a larger literature that has been underexplored in previous Canadian scholarship.¹⁹ In pursuing this delegation-based explanation, the study applies this theoretical framework in a novel manner to understand the relationship between courts and the executive as it relates to the reference power. This study demonstrates that the actual outcome of a reference case – win or lose – is *almost* secondary to the political benefits that can be attained from simply involving the courts through the reference power.

Scope of the Book

The intention of this book is not to engage in doctrinal analysis and detailed review of reference jurisprudence and related law. I leave much of this important work in the capable hands of legal scholars. Instead, the goal is to consider the political aspects of the Canadian reference cases, to address how political actors have used the reference power in the past, and to illustrate how references can influence and animate political debates, institutional contexts, and Canadian politics, shifting attention away from an exclusive focus on the courts. Although this book employs an original dataset of reference cases adjudicated by Canadian appellate courts, the focus here is less on the legal answers provided by the courts in these cases and more on the nature and use of the reference power. Specifically, the approach is to address the types of questions that are asked, the individuals and groups that participate, and how the courts respond to reference questions. Focusing on *how* and *why* the reference power is used by political actors, this book

provides insight into its institutional implications, its effect on the centralization of power within the executive, and its consequences for judicial independence. This line of inquiry also helps to explain why governments will limit their own decision-making power by turning to the courts to resolve political disputes, and it considers the normative implications when litigation becomes a political strategy. Finally, this book is concerned with providing a greater understanding of the nature of judicial power and behaviour in Canadian politics within the context of reference cases.

This book approaches the study of the reference power and Canadian appellate courts with an understanding that courts are political institutions, a focus shared by many political scientists who study the judiciary and courts (Russell 1987; Knopff and Morton 1992; Macfarlane 2013; Hausegger, Hennigar, and Riddell 2015). Canadian courts have an important role to play in policy debates because other political actors recognize and appreciate the role that reference decisions can play in shaping both political debates and outcomes. To be sure, this is not to suggest that the decisions rendered by courts in reference cases are fully politicized and thus devoid of legal principle and analysis. Instead, the intention of this book is to appreciate and explain the highly political context in which courts can operate when governments seek judicial advice through reference cases.

Overview and Summary of Findings

This book consists of six substantive chapters. Chapter 1 details the origins of the Canadian reference power by looking at the parliamentary debates concerning its use in the late nineteenth and early twentieth centuries. This discussion also addresses the adoption of a reference power by the provinces. In addition to examining the statutory foundations of the reference power in Canada, this chapter considers the legal rationale used by the Supreme Court of Canada to defend its advisory jurisdiction in the two instances when the court was asked to review the legality of the power: *Reference re References* (1912) and *Reference re Secession of Quebec* [*Secession Reference*] (1998).²⁰ Chapter 1 also provides insight into the government process for seeking a reference opinion, with special consideration of the actors involved. The remainder of this

chapter sets out the theoretical issues related to judicial independence, the separation of powers, and abstract review that are implicated by the analysis that follows.

Chapter 2 provides an overview of the important trends associated with the Canadian reference power by drawing on an original dataset of over two hundred reference cases adjudicated by provincial courts of appeal, the Supreme Court of Canada, and the Judicial Committee of the Privy Council.²¹ This chapter demonstrates that increases in the use of the reference power are intimately related to periods of political contestation. More specifically, **Chapter 2** engages in a detailed analysis of two periods – the 1930s and the 1980s – when the reference power was used with greater frequency than during all other periods in Canadian political history. Employing a political and historical account of these periods, this chapter advances the argument that use of the reference power corresponds to periods when governments undertake wide-ranging policy projects, engage in debates over the fundamental nature of the Canadian state, or are forced to respond to external pressures brought on by economic or social crises.

A closer look at these two decades shows that the 1930s were characterized by the federal government's attempt to deal with the financial disaster of the Great Depression within the confines of Canadian federalism and the constitutional division of powers. This period demonstrates the difficulty of applying the division of powers to contemporaneous problems of governance such as the expansion of social reform and the making of international treaties. The second period examined, the 1980s, represents a time in Canadian politics when governments were concerned with large-scale constitutional projects such as responding to Quebec nationalism (and separatism), the adoption of a new constitutional amending formula, and the role of the provinces in seeking a new Constitution and a charter of rights. This era is often referred to as one of “mega constitutional” politics – a time in Canadian politics when the fundamental nature of the political community was challenged in a manner that was fraught with intense emotion (Russell 2004, 74). This period was also characterized by several disputes between the provinces and federal government and by the expansion of executive federalism, of which the reference power was an extension. The reference cases of

this period mirrored many of the events of mega constitutional politics, such as the patriation of the Constitution and the jurisdictional disputes between governments over various issues, such as natural resources.

The analysis of data in [Chapter 2](#) demonstrates that although the federal government first created the reference power, provincial governments have made greater use of it over time. This chapter finds that although governments can use the reference power to challenge the legislation of other governments, this has become a less common practice, especially by federal governments, which have not referred provincial legislation since 1994. [Chapter 2](#) concludes with the finding that the reference power has become a valuable tool for provincial governments, regardless of its origins as a federal power aimed at constraining their powers.

[Chapter 3](#) examines the use of the reference power in the post-1949 era, as this year marks when the Supreme Court became the final court of appeal for Canada, fundamentally changing its role within Canadian politics and governance. This chapter analyzes the trends related to the types of reference questions asked, how courts have responded to reference cases, and the relationship between governments and interest groups when the reference power is used compared to routine litigation. [Chapter 3](#) engages with existing scholarship on Canadian courts to highlight the fundamentally distinct nature of reference cases, while also detailing the relatively similar manner in which litigants and courts approach these cases.

The analysis in [Chapter 3](#) demonstrates that the reference power has been used to deal both with issues that are concrete (i.e., live disputes) and with issues that are abstract. Furthermore, it finds that reference cases attract a much higher rate of participation by third-party interveners compared to routine litigation. As the chapter demonstrates, the high rate of intervener participation is linked to the abstract nature of many reference cases and to the unique opportunity that references can provide groups to influence the policy-making process. Additionally, this analysis finds that courts do not view their power to invalidate government legislation or policy as being any different in reference cases compared to routine litigation, regardless of the fact that most references do not arise out of a live dispute. [Chapter 3](#) documents that the unanimity rate in reference cases is actually lower than the unanimity rate of the

Supreme Court in general, with a high number of concurring opinions issued in reference cases. Finally, in terms of government behaviour in reference cases, this chapter demonstrates that governments from all sides of the political spectrum are willing to use the reference power and that governments are most likely to initiate a reference when they have a majority in the legislature.

Along with providing context and explanation for the trends related to the use of the reference power, [Chapters 2 and 3](#) detail the unique structural aspects of references, like the fact they allow governments to obtain judicial review without a live dispute, and explain why these features can be advantageous for political actors. Moreover, in discussing the behaviour of governments in reference cases, these chapters demonstrate how reference cases can be an effective political strategy that helps governments to achieve particular goals. For example, the finding that the reference power is used most often to deal with issues related to the constitutional division of powers speaks to the fact that the reference power is an effective mechanism of federalism and a means to deal with other governments.

Drawing on original interviews with individuals involved in past reference cases, [Chapter 4](#) further examines the unique opportunities and advantages that the reference power provides governments. Analysis of the interview data reveals five themes that explain why governments are willing to give up decision-making power to the courts in reference cases. This analysis recognizes that references allow governments to capitalize on the institutional authority and the role of the courts within the Canadian constitutional framework, beyond simply using courts to avoid difficult decisions. I argue in [Chapter 4](#) that by simply involving the courts, references provide governments with a unique strategic tool that affords them many political benefits.

[Chapter 5](#) explores the reality that although the reference power can provide governments with several important political advantages, governments do not submit reference questions on every difficult political issue they face. Indeed, in comparison to all Canadian litigation, references are relatively uncommon. Through an examination of two statutes that prompted governments to consider seeking a reference but ultimately abandoned this option – Quebec’s *Act to Protect the Province against*

Communist Propaganda [Padlock Act] (1937) and its anti-blasphemy *Act Respecting Freedom of Worship and Maintenance of Good Order* (1953–54) – this chapter addresses the limitations of the reference power and engages with arguments against judicial review.²²

Chapter 6 builds on the empirical findings of the book and, by conceptualizing the relationship between the courts and political actors in reference cases as one of delegation, provides a theoretical description of a government's decision to refer. The chapter makes an important normative contribution by analyzing how political actors empower the courts as a means of political strategy, which has two significant implications: first, reference cases present several important and unique problems for judicial independence; and second, the narrow access to the Canadian reference power is quite distinct compared to the advisory function of many European constitutional courts. However, I argue that advisory opinions and abstract review need not operate in such a centralized manner. A brief comparison of the Canadian case with four European constitutional courts that routinely engage in abstract review – those of France, Germany, Italy, and Spain – provides useful examples of institutional arrangements that avoid the concentration of power found with the Canadian reference power, thus suggesting possibilities for its reform.

The arguments presented in **Chapter 6** are grounded in delegation theory. The central tenets and contributions of this theoretical framework, as well as its application to Canadian reference cases, are explored. Delegation provides a useful framework for understanding the relationship between the courts and political actors, as well as why empowering the judiciary is a viable political strategy. This perspective is grounded in the understanding that the decisions made by elected officials reflect a desire either to maintain power or to secure re-election. Based on this motivation, political actors will make decisions to engage in either credit claiming or blame avoidance. The courts provide an effective forum for this behaviour, and counterintuitively judicial review of political actions can be “friendly” and benefit political actors. Aside from blame avoidance, delegation scholarship explains that judicial review can be an effective means to overcome legislative opposition or gridlock and to provide position or policy legitimization. In sum, **Chapter 6** argues

that many of the elements of delegation theory are present in the use of reference cases.

Chapter 6 also notes the contradiction present in this understanding of the reference power: governments that use the reference power appreciate the advantages that can be gained from an authoritative constitutional interpretation in dealing with a political controversy, but at the same time, they do not recognize the threat that the reference power could pose for judicial independence. The chapter argues that for delegation to be effective, respect for the independence of the judiciary is essential – yet the delegation of political controversies to the courts in reference cases can pose a direct threat to this independence. These tensions have been noted by the Supreme Court in the past,²³ as well as by scholarship that has examined the negative public reaction to salient or controversial decisions.²⁴

Finally, the book's Conclusion concisely reviews the central findings of this study and invites readers to consider its broader implications. In particular, the Conclusion focuses on the relationship between political actors and the courts, as well as on the consequences of this relationship for Canadian politics. It emphasizes that when thinking about the Canadian reference power, it is crucially important to move beyond a narrow legal understanding of the power. It is clear that references have essentially become advisory in name only. Indeed, reference cases are not distinguished from other, more routine, types of litigation in practice. Yet, at their core, references are fundamentally different from all other types of litigation because a government can decide when and under what circumstances a particular policy (enacted or proposed) should be reviewed by the courts through a reference. As a result, it is vital to consider the underlying political nature of reference cases and the implications for the judiciary, the courts, and Canadian politics.

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