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Routing

A Seismic Shift

How Canada's Supreme Court Sparked a Patients' Rights Revolution

by Jacques Chaoulli

Executive Summary

Early efforts by Western democracies to restrict freedom of contract were rationalized on the ground that such restrictions were necessary to prevent the suffering of ordinary citizens. People who oppose the freedom to opt out of state-run health insurance schemes turn that rationale on its head: they oppose freedom of contract even when it is necessary to prevent the suffering of ordinary citizens. A recent ruling by the Canadian Supreme Court has helped to restore that freedom and the right of patients to make their own medical decisions.

On June 9, 2005, to the surprise of many observers, the Canadian Supreme Court struck down two Quebec laws that gave the state-run Medicare system a virtual monopoly. The court ruled that Quebec's ban on private health insurance for services already covered under the Medicare program violated Canadian patients' rights to life, liberty, and security of person.

The ruling in *Chaoulli v. Quebec* has expanded the right of Canadians to obtain private medical care and opened the door to a parallel, private health care system. Canada's Supreme Court has thus validated freedom of contract as an important component of patients' rights. The ruling also provides a basis for challenging other government activities in health care and could have a significant impact on the U.S. Medicare program, compulsory health care programs in other nations, and certain forms of health care regulation.

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My adopted home of Canada has historically maintained one of the world's most rigid state-run health care schemes.

Introduction

In advanced nations, the financing of medical care is dominated by state-run insurance schemes.[1] In most cases, governments limit expenditures by limiting the supply of services in the face of heavy demand. As a result, many governments force patients to wait for care—often in pain, and often at the cost of the patient's life.

My adopted home of Canada has historically maintained one of the world's most rigid state-run health care schemes. With funding from the national government, Canada's provincial governments administer a compulsory, monopolistic health care system known as Medicare. All Canadians are compelled to finance Canada's Medicare system through general taxation. All Canadians must enroll in the Medicare program. Until recently, Canadians were forbidden purchase private health insurance to pay for Medicare-covered services outside the Medicare system.

That rigidity has been particularly problematic, given the economics of socialized medicine. Because the state offers "free" health care services, Canadians demand more services than they would if they had to pay. The provincial governments—like many nations—deal with that excess demand by forcing patients to wait for medical care.

In Canada, as in other nations, rationing-by-waiting inflicts considerable harm. According to the Fraser Institute, the average wait for treatment in Canada is 17.7 weeks after referral from a general practitioner. That means that if a general practitioner gives a patient a referral to a specialist on January 1, the average patient does not receive treatment from the specialist until May 5. That is an average; some patients do not wait that long, others wait longer. However, the majority of patients generally wait much longer than what physicians consider "clinically reasonable." The average wait has been increasing since 1993 (though in 2005 it fell slightly), and these delays seem impervious to additional funding. When the state pumps more money into Canada's Medicare system, waiting times often increase.[2]

Those imposed waits can have painful and even fatal consequences. As Canada's Supreme Court noted in *Chaoulli v. Quebec*:

> The evidence shows that, in the case of certain surgical procedures, the delays that are the necessary result of waiting lists increase the patient's risk of mortality or the risk that his or her injuries will become irreparable. The evidence also shows that many patients on non-urgent waiting lists are in pain and cannot fully enjoy any real quality of life.[3]

> Dr. Daniel Doyle, a cardiovascular surgeon, testified that when a person is diagnosed with cardiovascular disease, he or she is [translation] "always sitting on a bomb" and can die at any moment. In such cases, it is inevitable that some patients will die if they have to wait for an operation. Doyle testified that the risk of mortality rises by 0.45 percent per month.[4]

> [Dr. Doyle] confirmed, without challenge, that patients die while on waiting lists.[5]

> Dr. Eric Lenczner, an orthopaedic surgeon, testified that the usual waiting time of one year for patients who require orthopaedic surgery increases the risk that their injuries will become irreparable. . . . According to Dr. Edwin Coffey, people may face a wide variety of problems while waiting. For example, a person with chronic arthritis who is waiting for a hip replacement may experience considerable pain. Dr. Lenczner also stated that many patients on non-urgent waiting lists for orthopaedic surgery are in pain and cannot walk or enjoy any real quality of life.[6]

> In a study of 200 subjects aged 65 and older with hip fractures . . . the risk of death within six months after surgery increased significantly, by 5 percent,

with the length of pre-operative delay.[7]

> [A] Statistics Canada study demonstrat[ed] over one in five Canadians who needed health care for themselves or a family member in 2001 encountered some form of difficulty, from getting an appointment to experiencing lengthy waiting times. . . . Thirty-seven percent of those patients reported pain.[8]
>
> Studies confirm that patients with serious illnesses often experience significant anxiety and depression while on waiting lists. A 2001 study concluded that roughly 18 percent of the estimated five million people who visited specialists for a new illness or condition reported that waiting for care adversely affected their lives. The majority suffered worry, anxiety or stress as a result. This adverse psychological impact can have a serious and profound effect on a person's psychological integrity, and is a violation of security of the person.[9]

A man named George Zeliotis suffered in just that manner while waiting for a hip replacement.

The rigidity of Canada's Medicare system has traditionally meant that such patients typically have no opportunity to alleviate their suffering by purchasing medical care through private health insurance. Many Canadians have traveled to the United States and other nations to obtain care that they have been promised—but cannot obtain—at home.[10] However, those patients are the exception. Most who suffer while waiting do so at home, forbidden to take steps that would stop their pain or save their lives.

I have long practiced medicine in Canada. I have seen the suffering of patients firsthand—suffering caused by the state-run Medicare system and reinforced by the prohibition on private insurance for medical services that the state is supposed to provide. To me, that suffering violates the dignity and the fundamental human rights of my patients and hundreds of thousands more. The injustice is all the more grave because it is committed by the very government that was created to protect the rights and dignity of all Canadians.

The Canadian Charter of Rights and Freedoms is Canada's constitution. Section 7 of that charter is a rough equivalent of the Fifth and Fourteenth Amendments to the U.S. Constitution. It reads, "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[11] Just as each of the United States has its own state constitution, the province of Quebec has its own Charter of Rights and Freedoms, which contains similar language.[12] Yet Canada's Medicare monopoly deprives Canadians of their personal security and even their lives because it subjects Canadians—at random—to suffering and even death as they endure unreasonably long waits for medical treatment. Moreover, Canada's Medicare monopoly deprives Canadians of the liberty to arrange for medical care on their own. Weighing the highest law of the land against what I had seen in my own practice, I realized that Canada's Medicare system was not only cruel and unjust but unlawful as well.

In 1997, with George Zeliotis, I launched a court case, *Chaoulli v. Quebec*, to restore the freedom of Canadians to arrange for their own medical care. In my capacity as a physician, and a citizen in good health but subject to illness or injury at any time, and in his capacity as a patient, we challenged the ban on private insurance for services covered by the Medicare monopoly. We argued that this ban violated the rights to life, liberty, and personal security guaranteed by section 1 of the Quebec Charter of Rights and Freedoms and by section 7 of the Canadian Charter of Rights and Freedoms.[13]

Though not a lawyer, I represented myself all along. In court, I argued against a number of lawyers and top expert witnesses called by the governments of Quebec and Canada. For example, during the trial I cross-examined Yale

I realized that Canada's Medicare system was not only cruel and unjust but unlawful as well.

University professor Theodore Marmor, a former adviser to U.S. Vice President Walter Mondale and President Bill Clinton and an expert on the U.S. Medicare program.[14] Zeliotis and I lost twice before lower courts. Up to the end, most legal experts thought we would fail.

On June 9, 2005, our arguments finally prevailed before the highest court in Canada. The Supreme Court of Canada overturned the lower courts' rulings and upheld our claim that the ban on private payment for medical care violated the fundamental rights guaranteed by the Quebec Charter of Rights and Freedoms.[15] The high court found that the waiting times under the Medicare system are "real and intentional"[16] and that "there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care."[17]

Across Canada and beyond its borders the elite were astonished. The strongest reactions came from people who are most dedicated to the idea of complete egalitarianism in health care. The motivation for Canada's Medicare monopoly was a desire to create a health care system under which all patients would be treated equally and no one would be denied medical care because he was unable to pay. The dissenting Supreme Court justices expressed this sentiment in their opinion when they wrote that the purposes of the Canada Health Act included "the equal provision of medical services to all residents, regardless of status, wealth or personal insurability."[18] What the state has achieved, however, is a decidedly unequal system under which some people obtain the care they need and many others are randomly subjected to more than their share of suffering.

Nonetheless, for Canadians the Medicare system is a great source of national pride, and highly sensitive politically. Thus it is important to note that every quotation in this analysis that criticizes Canada's Medicare system, or state-run health insurance schemes generally, is taken from those who support such schemes, including the Supreme Court of Canada and the World Health Organization.

The *Chaoulli* ruling is a victory for human freedom. In Canada, it has ended the state's monopoly over the provision of medical care and restored the right to contract for medical services. It is also a victory for citizens of other nations, particularly those in the U.S. Medicare program, who are subject to similar prohibitions on the right to contract for medical care. Finally, the *Chaoulli* verdict has sent a message around the world that health care regulations that result in the suffering and death of patients violate those patients' fundamental human rights to life, liberty, and security of person. One hopes that this ruling will hasten the day when such regulations are struck down and governments uphold the right of all individuals to opt out of state-run health insurance schemes.

The Supreme Court of Canada found that the waiting times under the Medicare system are "real and intentional" and that "there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care."

Majority Opinion

The Canadian Supreme Court ruled that the Quebec Medicare system leads to patients suffering and dying on waiting lists, in violation of their rights to life, liberty, and security of person. The highest court in the land invalidated two Quebec legislative measures,[19] which also exist, one form or another, in most other Canadian provinces. Those two measures prohibit any Quebec resident to enter into a contract for private insurance for services already covered under Medicare, and they prohibit any private contract for hospital services already covered under the Hospital Insurance Act. Those two measures had the intentional effect of preventing the emergence, in the province of Quebec, of a parallel private health care system, such as exists in every other advanced nation. Four justices of a bench of seven struck down the two measures as violating the Quebec Charter. In addition, three justices also struck them down as violating the Canadian Charter.

The majority opinion was an indictment of the performance of the Medicare system, an admission that the system violates the rights of Canadians, and an affirmation that Canada already has a two-tiered medical system. The majority wrote:

> Low-quality services can threaten the lives of users.[20]
>
> Inevitably, where patients have life-threatening conditions, some will die because of undue delay in awaiting surgery.[21]
>
> Access to a waiting list is not access to health care. As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care.[22]
>
> We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the *Charter*.[23]
>
> The prohibition on private insurance creates an obstacle that is practically insurmountable for people with average incomes. Only the very wealthy can reasonably afford to pay for entirely private services.[24]
>
> It is common ground that the effect of the prohibition on insurance is to allow only the very rich, who do not need insurance, to secure private health care in order to avoid the delays in the public system. Given the ban on insurance, most Quebeckers have no choice but to accept delays in the medical system and their adverse physical and psychological consequences.[25]

To my knowledge, this is the first time that a court anywhere has invalidated a government action in health care that effectively resulted in the suffering and death of individuals.

In Canada, health care financing and delivery are largely the responsibility of the provincial governments. Still, a federal statute, the Canada Health Act,[26] has been interpreted by legal scholars as discouraging private health care. But in a blow to that interpretation, the Canadian Supreme Court ruled that the Canada Health Act does not prohibit private health care. Furthermore, the majority ruled that neither does Quebec law prohibit private health care or private hospitals. Here are the two relevant extracts, the first from Justice Deschamps and the second from the three other justices who joined her in the majority:

> The Canada Health Act does not prohibit private health care services. . . .[27]
>
> The *Canada Health Act*, the *Health Insurance Act*, and the *Hospital Insurance Act* do not expressly prohibit private health services. However, they limit access to private health services by removing the ability to contract for private health care insurance to cover the same services covered by public insurance. The result is a virtual monopoly for the public health scheme.[28]

Upholding the legality of private medical practice was another important victory afforded by this ruling.

Perhaps the greatest obstacle to our efforts was the inability of many observers to focus on the issue we presented: whether the prohibition on private health insurance violated a patient's rights to life, liberty, and security of person as protected under the Quebec and Canadian Charters. All along, we encountered people who focused instead on how our claim, if successful, might affect their policy preferences, in particular the widespread preference of elites for (the appearance of) complete egalitarianism in health care. Fortunately, the majority of the Supreme Court saw the issue clearly. In fact, the majority took the dissenting justices to task for inserting their political preferences, including a preference for Marxist class struggle, into the matter at hand:

> The debate about the effectiveness of public health care has become an emo-

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> tional one. . . . The tone adopted by my colleagues Binnie and LeBel JJ. [in dissent] is indicative of this type of emotional reaction. *It leads them to characterize the debate as pitting rich against poor* when the case is really about determining whether a specific measure is justified under either the *Quebec Charter* or the *Canadian Charter*.[29]
>
> It must be possible to base the criteria for judicial intervention on legal principles and not on a socio-political discourse that is disconnected from reality.[30]
>
> The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them.[31]
>
> Given the tendency to focus the debate on a sociopolitical philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens.[32]

In my view, the unconstitutionality of other provinces' prohibitions is implicit.

Indeed, Claude Castonguay, the Quebec health minister who implemented those prohibitions in the 1970s, was my witness at the trial. He testified about the prevalent Marxist ideology in the 1970s in Quebec, at the time of the enactment of those prohibitions.[33]

Since one of the justices, Justice Deschamps, ruled only on the Quebec Charter, some legal experts believe that this judgment does not apply to similar prohibitions in other Canadian provinces. I respectfully disagree. In my view, a proper reading of Justice Deschamps's reasoning leads to the conclusion that similar legislation in other provinces may already be considered to be violating section 7 of the Canadian Charter. Justice Deschamps wrote:

> With regard to certain aspects of the two charters, the law is the same. For example, the wording of the right to life and liberty is identical. It is thus appropriate to consider the two together.[34]
>
> As I mentioned above, the right to life and liberty protected by the *Quebec Charter* is the same as the right protected by the *Canadian Charter*. Quebec society is no different from Canadian society when it comes to respect for these two fundamental rights. Accordingly, the trial judge's findings of fact concerning the infringement of the right to life and liberty protected by s. 7 of the *Canadian Charter* apply to the right protected by s. 1 of the *Quebec Charter*.[35]

It is true that Justice Deschamps recognized that the Quebec Charter *may* afford broader protection to certain rights than does the Canadian Charter. However, she also noted an equivalence between the limits that each charter places on the protection of fundamental rights.[36] Since Deschamps clearly stated that her finding of a violation of the rights to life, security, and liberty under to Quebec Charter would apply the same way under an analysis based on the Canadian Charter, that constitutes a de facto endorsement of the conclusion of the three other majority justices who voted to strike down the prohibitions under section 7 of the Canadian Charter as well.

However, Justice Deschamps's failure to rule on those provisions under the Canadian Charter is unfortunate. Justice Deschamps also stated that since the litigation is about Quebec legislation subject to the Quebec Charter, her ruling under the Quebec Charter was enough to solve the issue. To the contrary, the charters of other Canadian provinces don't protect the rights to life, security, and liberty as the Quebec Charter does. Three other justices from the majority also ruled about a violation under the Canadian Charter, precisely to send a message to the other provinces.

For those reasons, in my view, the unconstitutionality of other provinces' prohibitions is implicit. Some entrepreneurs have

started to sell private services, particularly in British Columbia, Manitoba, Ontario, and Quebec. In future litigation, it would be up to the provincial governments to prove that the Supreme Court ruling does not apply.

This ruling is a blow to the old assumption that compulsory universal health coverage is key to universal access and to "equality." It has unveiled what politicians from many Western democracies do not want to acknowledge publicly, although they know it firsthand: state-run health insurance schemes subject citizens to unnecessary suffering.

Minority Opinion

The trial judge held that, given the fact that Medicare's waiting lists resulted in low-quality care, Quebec's prohibition of private health insurance threatened the rights to life, liberty, and security of person.[37] According to Justice Deschamps, the Canadian Charter's "scope may include certain economic rights that are intimately connected with the right to life, liberty and security of the person."[38] On those points, the trial judge and the majority of the Supreme Court agreed. However, the trial judge found that this violation of the freedom of contract "was in accordance with the principles of fundamental justice" and therefore permissible under section 7 of the Canadian Charter. The majority Supreme Court opinion disagreed, holding that the prohibition was not in accordance with fundamental justice.

The minority justices on the Supreme Court differed from both the majority opinion and the trial judge. First, the dissenting justices disagreed with the trial court and the majority when they wrote that the freedom of contract is not protected by the Canadian Charter because the charter does not protect economic rights:

> We do not agree with the appellants, however, that the Quebec Health Plan puts the "liberty" of Quebeckers at risk. The argument that "liberty" includes freedom of contract (in this case to contract for private medical insurance) is novel in Canada, where economic rights are not included in the *Canadian Charter* and discredited in the United States. In that country, the liberty of individuals (mainly employers) to contract out of social and economic programs was endorsed by the Supreme Court in the early decades of the 20th century on the theory that laws that prohibited employers from entering into oppressive contracts with employees violated their "liberty" of contract; see, e.g., *Lochner v. New York*, 198 U.S. 45 (1905). . . .[39]
>
> Nor do we accept that s. 7 of the *Canadian Charter* guarantees Dr. Chaoulli the "liberty" to deliver health care in a private context.[40]

Second, although they concurred with the majority justices to the effect that the prohibitions were infringing on the rights to life and security of a person,[41] they disagreed with the majority (and concurred with the trial judge) when they wrote that the prohibitions were necessary to avoid an "unequal" situation in which one individual could get better access to care than another. The dissenting justices quoted the trial judge approvingly:

> The purpose of the impugned provisions is to guarantee equal and adequate access to health care for all Quebeckers. [Their enactment] was motivated by considerations of equality and human dignity, and it is therefore clear that there is no conflict with the general values expressed in the Canadian Charter or in the Quebec Charter of human rights and freedoms.[42]

As a result, the dissenting justices held that this situation was "not capable of resolution as a matter of constitutional law."[43]

The dissenting justices' opinion deserves careful analysis. It is significant in that it shows how far the Left has gone in its hostil-

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ity to the freedom of contract and the lengths to which it will go to protect a state-run Medicare *program* rather than the *people* the program was created to serve. Those lengths appear to include undermining the rule of law and making individual citizens powerless before the state.

It is noteworthy that the dissenting justices criticized the 1905 U.S. Supreme Court case *Lochner v. New York*. In the U.S. experience, the rationale for restricting the freedom of contract post-*Lochner* was that doing so was necessary to assist certain individuals in need. For the dissenting justices, however, the ability of the state to restrict the freedom of contract is not limited to such cases; the state may also restrict freedom of contract whenever it interferes with the pursuit of an absolute equality. Whereas restrictions on the freedom of contract were once permitted only insofar as a restriction would prevent individuals from suffering, the dissenting justices allow freedom of contract to be prohibited even when that freedom itself is necessary to prevent suffering.

The dissenting justices' position that my claim is "not capable of resolution as a matter of constitutional law" also must be understood for what it portends. Those justices held that even when a state action violates a citizen's right to life, the courts should not interfere—they should let the state continue the violation. The dissenting justices seem not to realize the implications of their position: that the state can effectively kill innocent, nonwealthy individuals at random, and the potential victims should have no recourse to a court for the protection of their own lives. Those justices are not alone. That was the position taken by the Quebec and Canadian governments, both acting as defendants in my case.

Much of the minority justices' opinion was dedicated to defending the philosophy of Medicare and the need to protect Medicare from the choices of free Canadians. For instance, the dissenting justices embraced Medicare's absolute egalitarian ideology when they wrote:

> It is Quebeckers who have the money to afford private medical insurance . . . who will be the beneficiaries of the appellants' constitutional challenge.[44]
>
> Those who seek private health insurance are those who can afford it. . . . They will be the more advantaged members of society. They are differentiated from the general population, not by their health problems . . . but by their income status. . . . We share the view . . . that the [Canadian] Charter should not become an instrument to be used by the wealthy to "roll back" the benefits of a legislative scheme that helps the poorer members of society.[45]
>
> [T]he impugned provisions were part of a system which is mindful and protective of the interests of all, not only of some.[46]

In my view, those arguments are not only incorrect, but improper. My patient and I challenged the Quebec laws on the grounds that they violated the rights to life, liberty, and security of person as protected under the Quebec Charter and the Canadian Charter. If we were correct, those laws should be invalidated; if not, they should be upheld. The ideals and goals of the people who enacted or support those laws do not enter into it. The role of the judiciary is to interpret and apply the law as written, not to let its political preferences influence its rulings.

Equality of Misery and Degradation

Equality ought to be protected in a free and democratic society. However, the notion of equality espoused by supporters of Canada's Medicare monopoly is different from the type of equality that is properly protected by the state. Supporters of Canada's Medicare monopoly seek complete equality of access to medical care, enforced by the state. That goal is closer to the

Marxist goal of absolute equality than to the traditional Western idea of equality before the law.

According to supporters of Canada's state-run Medicare monopoly, equality, or "social solidarity," has several requirements. Timely access to health care should be available exclusively according to need; it should never be based on a patient's capacity to pay. The decision as to whether a patient needs speedy access to care should be made, not by the patient himself, but by the state or by a bureaucrat operating under rules written by the state. Although a patient is experiencing pain while on a waiting list, supporters of Medicare maintain that it should not be the patient's prerogative to decide whether his pain is severe enough to justify speedy access to a surgical procedure. That would lead to a situation in which any patient could put his own needs ahead of others'—a situation incompatible with "social solidarity." Perhaps more important, supporters of Medicare pretend that "social solidarity" requires that no individual be allowed to opt out from a compulsory health insurance program. In my view, that concept of "social solidarity" is a remnant of the Marxist principle of absolute equality. In practice, maintaining such "social solidarity" requires class warfare and central planning of the economy.

Equality is a key principle in Western political thought, not in the sense of equal socioeconomic status or even of equal access to particular economic goods, but in the sense of equal status before the law. The notion of equality before the law is protected under section 15 (1) of the Canadian Charter of Rights and Freedoms:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[47]

Equality before the law is similarly protected in other Western democracies. For example, the Fourteenth Amendment to the U.S. Constitution provides:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.[48]

In the United Kingdom, the Human Rights Act of 1998 provides:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[49]

The notion of equality before the law is a cornerstone of a stable, liberal society. As we shall see, attempts to achieve absolute equality lead to official mischief and widespread misery.

In 1883, in an effort to stem the growth of the German socialist movement, Imperial Chancellor Otto von Bismarck created the world's first compulsory, state-run health care program. That program was not universal; it covered only a portion of the population. Indeed, the program was rationalized on the grounds that ordinary people were suffering from a lack of medical care. In many respects, it reflected the growing influence of Marxist ideology and marked the beginning of the modern welfare state.

In 1891 Pope Leo XIII wrote the encyclical *Rerum Novarum* to counter the growing support for socialist ideology; to demonstrate the importance of individual freedom, personal responsibility, and compassion; and to explain the role of the state in caring for the poor. The pope also captured the inevitable consequences of efforts to achieve absolute equality:

> To remedy these wrongs *the socialists, working on the poor man's envy of the rich*, are striving to do away with private property, and contend that individual

Supporters of Medicare pretend that "social solidarity" requires that no individual be allowed to opt out from a compulsory health insurance program.

> possessions should become the common property of all, to be administered by the State or by municipal bodies. They hold that by thus transferring property from private individuals to the community . . . each citizen will then get his fair share of whatever there is to enjoy. But their contentions are so clearly powerless to end the controversy that were they carried into effect *the working man himself would be among the first to suffer*. They are, moreover, emphatically unjust, for they would rob the lawful possessor, distort the functions of the State, and create utter confusion in the community.[50]
>
> And in addition to injustice, it is only too evident what an upset and disturbance there would be in all classes, and to how intolerable and hateful a slavery citizens would be subjected. The door would be thrown open to envy, to mutual invective, and to discord; the sources of wealth themselves would run dry, for no one would have any interest in exerting his talents or his industry; and *that ideal equality about which they entertain pleasant dreams would be in reality the levelling down of all to a like condition of misery and degradation*.[51]

In practice, the goal of absolute equality is impossible to achieve. Michael Quinn, a political philosopher I invoked before the Canadian Supreme Court, explained why:

> If the egalitarian wishes to realise his ideal, given the unpromising nature of his material, he might consider rendering all persons equally dead, for perhaps only thus could he eradicate [any] difference.[52]

Even if we judge Canada's Medicare system by its own goals, it has consistently failed to achieve equality of access to medical care.

Indeed, even if we judge Canada's Medicare system by its own goals, it has consistently failed to achieve equality of access to medical care, despite decades of effort. Shortages emerge and persist in some areas but not in others, because there exists in Canada no mechanism that automatically redirects resources to meet emerging needs. Many Canadians use their own money or personal connections either to move to the head of waiting lists at home or to obtain medical care in another province or country. Were Canada's Medicare system to achieve full equality of access, those Canadians would be denied access to necessary medical care. To the extent Canada has achieved equality in health care at all, it has done so, as Leo XIII predicted, through a "levelling down of all to a like condition of misery and degradation."

Fundamental Rights: Freedom of Contract

That "levelling down" was made possible by Canada's (former) prohibition on private health insurance. By preventing ordinary patients from opting out of a Medicare system that failed to provide them timely medical care, that restriction on freedom of contract was itself responsible for millions of Canadians being held in a "like condition of misery and degradation." In medical care as in other spheres of human endeavor, freedom of contract is essential for the protection of the ordinary people whom the "absolute egalitarians" seek to protect.

Without freedom of contract, there is no free society. Indeed, in 1690 John Locke explained that individual initiative, including the right to contract, is essential to survival. In contrast, the suppression of individual initiative and a reliance on collective action would have devastating consequences:

> Will any one say, he had no right to those acorns or apples, he thus appropriated, because he had not the consent of all mankind to make them his? Was it a robbery thus to assume to himself what belonged to all in common? *If such a consent as that was necessary, man had starved*. . . . And thus came in the use of money, some lasting thing that men might keep without spoiling, and that *by mutual consent men would*

> *take in exchange* for the truly useful, but perishable supports of life.[53]

Under civil law, the right to contract carries with it the concept of individual responsibility: a breach of contract entails civil liability. Nonetheless, many Western democracies restrict freedom of contract, in health care and in other areas. In effect, those restrictions deny citizens the full benefit of the values of individual initiative and individual responsibility embodied in their own civil law.

For many years, Western democracies defended the right to contract as essential to liberty. In *Lochner v. New York*, the U.S. Supreme Court acknowledged that freedom of contract is a cornerstone of economic liberty and is protected by the U.S. Constitution:

> [A] prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable and fair provision, as to run counter to that liberty of a person and of free contract provided for in the Federal Constitution.[54]

Indeed, according to constitutional law professor Laurence H. Tribe, between 1899 and 1937 the U.S. Supreme Court invalidated 197 state or federal regulations on the basis of their interference with freedom of contract.[55]

However, in a series of cases decided during and after the Great Depression, and under pressure from President Franklin D. Roosevelt, the U.S. Supreme Court began to erode that right. In 1934 the Court ruled in favor of a Milk Control Board that sought to fix minimum and maximum retail prices for milk.[56] In 1937 the Court ruled that whenever the legislative branch believes it necessary to infringe on the freedom of contract for the common good, the courts should not interfere.[57] In 1941 the Court ruled that Congress has the power to restrict freedom of contract for the "national interest in industrial peace."[58]

The original rationale for restricting freedom of contract in the United States was similar to that offered by Bismarck: that by doing so the state could prevent ordinary people from suffering. That idea stemmed from the view of many elites that, if left unchecked, freedom of contract resulted in the suffering of some individuals. By the end of the 20th century, however, the courts had expanded government's power to restrict freedom of contract far beyond that original rationale.

The collapse of the Soviet bloc in 1989 discredited the idea of absolute egalitarianism. Communism caused enormous suffering and yet still failed to achieve the equality it promised. It was the communist states' infringement on the right to contract that caused so much unnecessary suffering among so many ordinary people, while the nomenklatura were able to work around the state prohibitions on private contracting.

Nonetheless, the political Left in the United States and other Western democracies maintains that it has designed a "third way" beyond capitalism and communism. Yet that third way subscribes to the same ideas as the second "way": a goal of absolute equality (even if in limited spheres such as health care) rather than equality before the law, compulsory state programs, and restriction of individuals' freedom to contract with one another. As a result, those "third-way" states have also subjected their citizens to unnecessary suffering.

That result was foreseen by many observers. It is common knowledge that Pope John Paul II played an important role in the fall of communism. In 1987, just two years before the fall of the Berlin Wall, he wrote the encyclical *Sollicitudo Rei Socialis*, in which he praised the right of economic initiative. By doing so, Pope John Paul II was implicitly honoring the right to contract and denouncing the concept of absolute equality:

> It should be noted that in today's world, among other rights, the right of economic initiative is often suppressed. Yet it is a right which is important not only for the individual but also for the common good. Experience shows us that

"Third-way" states have subjected their citizens to unnecessary suffering.

> the denial of this right, or its limitation in the name of an alleged "equality" of everyone in society, diminishes, or in practice absolutely destroys the spirit of initiative, that is to say the creative subjectivity of the citizen. As a consequence, there arises, not so much a true equality as a "leveling down." In the place of creative initiative there appears passivity, dependence and submission to the bureaucratic apparatus which, as the only "ordering" and "decision-making" body—if not also the "owner"—of the entire totality of goods and the means of production, puts everyone in a position of almost absolute dependence. . . . This provokes a sense of frustration or desperation. . . .[59]

There is an important distinction between universal access based on voluntary enrollment and absolute equality pursued by restricting freedom of contract.

However, John Paul II also argued that denial of the ability to contract freely harms the very people whom it is meant to help, not only in the absolute-egalitarian state, but in the modern welfare state. At the same time, he reaffirmed the value of compassion. As the Soviet Union fell apart in 1991, he wrote in the encyclical *Centesimus Annus*:

> In recent years the range of such intervention has vastly expanded, to the point of creating a new type of State, the so-called "Welfare State." This has happened in some countries in order to respond better to many needs and demands, by remedying forms of poverty and deprivation unworthy of the human person. However, excesses and abuses, especially in recent years, have provoked very harsh criticisms of the Welfare State, dubbed the "Social Assistance State." Malfunctions and defects in the Social Assistance State are the result of an inadequate understanding of the tasks proper to the State. . . . By intervening directly and depriving society of its responsibility, the Social Assistance State leads to a loss of human energies and an inordinate increase of public agencies, which are dominated more by bureaucratic ways of thinking than by concern for serving their clients, and which are accompanied by an enormous increase in spending.[60]

That very dynamic is apparent in state-run health care programs, which I would argue are the cornerstone of the modern welfare states.

In 2000 the World Health Organization, a proponent of egalitarianism in health care, issued a report that captures many of the failures common to state-run medical schemes. The WHO described them as "among the most bureaucratic and least effectively managed institutions in the public sector," as "seriously short-sighted," and as disposed to "an exclusive focus on legislation and the issuing of regulations, decrees, and public orders" that are often ineffective.[61] Indeed, the WHO observed:

> Health ministries sometimes turn a blind eye to the evasion of regulations which they themselves have created or are supposed to implement in the public interest. . . . In turning a blind eye, stewardship is subverted; trusteeship is abandoned and institutional corruption sets in.[62]

That describes many government enterprises, but none more than Canada's Medicare monopoly. (It should be noted that the "evasion of regulations" to which the WHO refers is illegal payments made by patients to state bureaucrats for the purpose of obtaining medical care. The report describes such bribes as "a common infringement of patients' rights."[63] The report does not so describe the ineffective state programs that force patients to take such measures.)

There is an important distinction to be made between a goal of universal access based on voluntary enrollment and a goal of absolute equality pursued by restricting freedom of contract. There is no doubt that, historically, among other goals, the implementation of compulsory Medicare programs was intended to reach out to people who didn't have access to health care. Nonetheless, over the years, it has become apparent that

those compulsory programs subject some number of nonwealthy citizens, at random, to suffering and even death. The majority in *Chaoulli* made plain that "waiting lists are . . . real and intentional"[64] and that "in some serious cases, patients die as a result of waiting lists for public health care."[65]

In the name of "social solidarity," many people turn a blind eye to the effects of such policies. According to those individuals (including the three dissenting justices in my case), as long as all citizens are equally subject to a deficient state health care system, even if some suffer or die as a result, "social solidarity" is preserved.

In light of the ruling in *Chaoulli*, it is clear that the refusal to allow individuals to opt out of a compulsory Medicare program constitutes a deliberate state action that results in the unnecessary suffering and death of innocent citizens who are not members of the elite. Now that *Chaoulli* has made that fact plain, we must assume that governments intentionally persist in such action. How else can we describe such an action by the state?

Reaction

In Canada and around the world, the elite were astonished by the Canadian Supreme Court's ruling, for it dealt a blow to the very foundation of the welfare state and compulsory health insurance programs.[66] Particularly disturbing were the reactions of several top constitutional experts, who called on the National Assembly of Quebec to maintain the prohibitions in spite of the Supreme Court ruling, by virtue of section 52 of the Quebec Charter. That section allows the National Assembly of Quebec simply to ignore a Supreme Court ruling—in this case, it enables Quebec's provincial government to continue infringing on the protected rights and freedoms of citizens.[67] However, no Canadian government, provincial or federal, has indicated it would refuse to abide by the Supreme Court ruling, perhaps because that ruling offers a way to get new money into the system.

In fact, since the judgment, a number of provincial governments have suddenly acknowledged a role for private health care.[68] Shortly after the ruling, the Quebec health minister, Philippe Couillard, publicly endorsed an argument I made before the Supreme Court, when he declared:

> It is false and tendentious to establish a link between a private-sector involvement in health care and the level of social advancement of a society. How can one pretend that societies like France, England, Sweden are socially less advanced than Quebec on the very ground of private involvement in the delivery of health care? That is obviously nonsense. Scandinavian countries have a private involvement in their health care systems. As far as I know, nobody accuses them of being conservatives or socially behind.[69]

On the same day the judgment was rendered, Alberta's premier Ralph Klein issued a statement that registered his support:

> The Alberta government is very pleased with this decision. Premier Klein fully supports any change that will allow Canadians more choice in getting timely access to the health care services they want.[70]

Premier Campbell of British Columbia and other provincial premiers have declared that this judgment will open a debate on private health care.

Some people have argued that *Chaoulli* has not won any more freedom for Canadians. According to David Frum, a Canadian and scholar at the American Enterprise Institute, this ruling has not created a new right to contract.[71] Frum argues that under *Chaoulli* the ban on private insurance would be unconstitutional only when delays jeopardize the lives of individuals and the health of Quebec residents. It would be up to the courts to decide whether a waiting time is reasonable or not.

The *Chaoulli* ruling dealt a blow to the very foundation of the welfare state and compulsory health insurance programs.

The dissenting justices foresaw that *Chaoulli* "would precipitate a seismic shift in health policy for Quebec."

I disagree. Should subsequent legal challenges be launched in other Canadian provinces, courts would still be bound by the evidence presented at trial, to the effect that current waiting times entail suffering or a risk of death. Also, the Supreme Court has created a new right to contract, as the dissenting justices have acknowledged.[72]

In order for a prohibition on private health insurance to survive future legal challenges, a government would have to maintain a state-run health care system under which no single individual could demonstrate he was harmed either by the system's delays or by low-quality services. The court implied that, even with no waiting time at all, a compulsory health care system that provides low-quality services can threaten a patient's rights to life and personal security.[73] Given the constant improvements in expensive medical high technology, it is doubtful that any state monopoly could defend such a prohibition against each and every claim of injury that patients are likely to bring.

More important, the argument that the rights secured by *Chaoulli* are illusory is undermined by the rapid growth in private health care options that ruling has spawned. The *New York Times* reports, "Private doctors across the country are not waiting for changes in the law, figuring provincial governments will not try to stop them only to face more test cases in the Supreme Court."[74]

Implications

The dissenting justices foresaw that *Chaoulli* "would precipitate a seismic shift in health policy for Quebec."[75] That was an understatement. The seismic shift has already been felt across Canada and beyond. The *New York Times* recently reported that Canada's "publicly financed health insurance system . . . is gradually breaking down. Private clinics are opening around the country by an estimated one a week, and private insurance companies are about to find a gold mine."[76] I predict that as a result of *Chaoulli* the private health sector will expand in Canada as it has in comparable countries such as Australia and New Zealand. Moreover, I predict that this ruling will help to halt the spread of compulsory state-run schemes, aid in efforts to protect the right to opt out of those schemes, and serve as persuasive case law in efforts to repeal other state health care actions that result in unnecessary suffering and death.

Averting Expansions of Compulsory Health Insurance

The *Chaoulli* ruling will help forestall the creation or expansion of compulsory medical schemes. Though a very old concept, requiring individuals to purchase health insurance has never made much sense. For example, it is a widely accepted principle in Western democracies that a state may not force an individual to undergo medical treatment, except under very narrow circumstances. Since a state may not coerce an individual to undergo medical treatment, it makes little sense that the state should be able to coerce an individual to obtain health insurance. There might be a point in coercing drivers to get liability insurance coverage, since any driver might inflict injury or death on others. But the patient who lets his cancer go untreated harms no one but himself.

Nonetheless, support for compulsory state-run health insurance schemes is alive and well. In the United States such legislation has been introduced in at least 18 state legislatures.[77] In 2005 Vermont passed a bill establishing a single-payer system. Fortunately, Vermont's governor vetoed that bill.[78] That same year, the California Senate passed an even more extreme measure.[79] As was the case in Quebec, that measure would have banned private health insurance for services ostensibly covered under the state program. The Vermont and California laws would have led to Americans suffering and dying on waiting lists.

In the wake of the *Chaoulli* ruling, however, such legislation should be even more difficult to enact, now that a sympathetic authority such as Canada's Supreme Court has made it clear that those measures violate fundamental

human rights. Now more than ever, the proper answer to the issue of uninsured Americans is, not compulsory universal coverage, but for the state to help individuals use their freedom to take personal responsibility for their health care, and for the community and the state to show compassion for the indigent.

Opting Out of Compulsory Insurance

The right to control one's medical care, including the right not to participate in a health insurance scheme, is universal. Every individual has the right to opt out of a state-run health insurance scheme, either on a treatment-by-treatment basis or entirely. It is my hope that *Chaoulli* will hasten the day when these rights can be secured for citizens of all nations.

For example, elderly and disabled citizens enrolled in the U.S. Medicare program are effectively prohibited from purchasing Medicare-covered services from their doctors with their own funds.[80] They are thus effectively prohibited from opting out of the program for particular services. The United States compels participation in Medicare in other ways as well. Workers are required to pay a percentage of their earnings to the program, even if they would prefer not to participate and even if they die before they receive any benefits. If those workers do reach age 65, they are compelled to participate in at least the hospital insurance part of Medicare; failure to do so results in the loss of all Social Security benefits the worker would otherwise receive. Thus the elderly are compelled to participate in Medicare, despite persistent concerns about the quality of care.[81]

There have been legislative proposals to remedy those violations of individual freedom. Rep. Sam Johnson (R-TX) has introduced legislation[82] that would restore the right to contract for medical care on a treatment-by-treatment basis to those in the U.S. Medicare program. Others have proposed allowing seniors to opt out of Medicare entirely without penalty.[83] Prominent economists have proposed allowing workers to opt out of Medicare by saving the Medicare taxes they would otherwise pay to the government in an account that would prefund their health care needs in retirement.[84]

The right to opt out of state-run health insurance schemes on a partial, or treatment-by-treatment, basis is important, but it is a right that only those with higher-than-average incomes can exercise. Despite the availability of parallel private health care systems and private health insurance in most OECD nations, the only people who can access those private options are those who are wealthy enough to pay twice: first through general taxation for the state-run system and again for their own care in the private system. Those who cannot pay twice are still subject to long delays and low-quality care in the state-run system. Thus it is not sufficient to secure a partial right to opt out of state-run health care schemes. To help those who are not wealthy—those whom the egalitarians purport to assist—we must allow all individuals to opt out of such schemes completely. If all individuals had the freedom to stop financing deficient state-run programs, we would see private markets flourish, and many more individuals could then afford to better protect their health.

I did not ask the Canadian courts to protect the right to opt out of Medicare completely, for I knew the courts were unlikely to take such a great step. Indeed, the Canadian Supreme Court has constantly held that property rights and economic rights are not protected under the Canadian Charter of Rights and Freedoms. That situation is unique among Western democracies. What Zeliotis and I did achieve was to have the Canadian Supreme Court rule that, when an individual is suffering or his life is at stake, the Canadian and the Quebec Charters ought to be interpreted so as to protect freedom of contract. I still believe that in the future we may see the Canadian Supreme Court go one step further and acknowledge that a proper interpretation of the Canadian Charter would protect economic rights.

Moreover, the *Chaoulli* ruling might become persuasive case law before the courts of a number of other countries, including the United States, in arguments for the right to opt out of Medicare and other compulsory health insur-

Every individual has the right to opt out of a state-run health insurance scheme, either on a treatment-by-treatment basis or entirely.

ance programs. One hopes that this ruling will help the U.S. Supreme Court return to a jurisprudence that recognizes freedom of contract as a fundamental human right.

Other Health Care Regulations

Governments have also enacted discrete regulations that have the effect of subjecting citizens to unnecessary suffering and death, in violation of their rights to life, liberty, and personal security. For example, the suffering and death endured by those on waiting lists for organ transplants in the United States are similar to what patients face under socialized systems such as Canada's. Those waiting lists are caused by the U.S. Congress, which prohibits payments to organ providers and thereby dries up the supply of transplantable organs. As a result, more than 6,000 American patients die each year while waiting for suitable organs.[85] That prohibition on payments for transplantable organs unquestionably threatens those patients' right to life, as well as their liberty (and the liberty of would-be organ providers and their families) to engage in consensual transfers. The *Chaoulli* ruling could be used as persuasive case law by patients seeking to challenge that ban.

In the same manner, the U.S. Congress prohibits patients and their doctors from accessing drug therapies until they have been approved by the U.S. Food and Drug Administration. As a result, mentally competent terminally ill patients are unable to access investigational drugs that their physicians have recommended, drugs that might save a patient's life. A group of such patients has already filed suit against the FDA.[86] That suit accuses the FDA of violating the patients' rights to life and liberty as protected by the Fifth Amendment to the U.S. Constitution. It is my hope that *Chaoulli* can inform the court's deliberations and that the court will strike down this affront to patients' rights.

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Conclusion

"Social solidarity" was the justification offered by communist leaders from Cuba to Moscow to Beijing for restrictions on private health care and freedom of contract. Today, Russia and China have opened their health care sectors to private enterprise. About Cuba and China, the World Health Organization reported in 2000:

> [S]ignificant barriers to market entry have sometimes been created, such as a legal ban on private practice. This is still the case in Cuba . . . China re-legalized private practice in the 1980s.[87]

Furthermore, China amended its constitution in 2004 to protect economic rights.[88] With *Chaoulli*, Canada is moving toward liberalization along with many former communist nations. I hope that my adopted home will soon come to recognize that economic rights—particularly the right to control one's medical decisions—are fundamental.

Chaoulli attracted international media attention. Commentators felt that a major event had happened. Still, it will take some time before the far-reaching ramifications of that judgment become apparent. In Canada and around the world, this ruling may help force politicians and courts to reevaluate whether using coercion to pursue absolute equality, or "social solidarity," is in fact compassionate or merely a subtle form of tyranny. I hope this ruling will be a first step toward a worldwide revolution in patients' rights that reverses the trend toward the expansion of the welfare state in health care.

Notes

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2. Nadeem Esmail and Michael A. Walker, "Waiting Your Turn: Hospital Waiting Lists in Canada, 15th Edition," *Critical Issues Bulletin* (Fraser Institute), October 2005, http://www.fraserinsti tute.ca/admin/books/chapterfiles/wyt2005.pdf#.

3. *Chaoulli v. Quebec* (Attorney General), 2005 SCC

35, p. 4, http://www.lexisnexis.ca/documents2005SCC035.pdf.

4. Ibid., ¶ 40.

5. Ibid., ¶ 112.

6. Ibid., ¶ 42.

7. Ibid., ¶ 113.

8. Ibid., ¶ 115.

9. Ibid., ¶ 117.

10. See, e.g., Jay Solomon, "India's New Coup in Outsourcing: Inpatient Care," *Wall Street Journal*, April 26, 2004, p. A1; and John Lancaster, "Surgeries, Side Trips for 'Medical Tourists'; Affordable Care at India's Private Hospitals Draws Growing Number of Foreigners," *Washington Post*, October 21, 2004, p. A1, http://www.washingtonpost.com/wp-dyn/articles/A49743-2004Oct20.html.

11. Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, http://www.solon.org/Constitutions/Canada/English/ca_1982.html.

12. "Every human being has a right to life, and to personal security, inviolability and freedom. He also possesses juridical personality." Québec Charter of Rights and Freedoms, R.S.Q., c. C-12, s. 1.

13. Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11; and Québec Charter of Rights and Freedoms, R.S.Q., c. C-12, s. 1.

14. *Chaoulli*, ¶ 214. The majority rejected Marmor's testimony (¶¶ 63, 64, 67).

15. There is some debate as to whether the ruling in *Chaoulli* applies outside Quebec. I will address that debate below.

16. *Chaoulli*, ¶ 39.

17. Ibid., ¶ 123.

18. Ibid., ¶ 236.

19. Health Insurance Act, R.S.Q., c. A 29, s. 15; and Hospital Insurance Act, R.S.Q., c. A 28, s. 11.

20. *Chaoulli*, ¶ 50.

21. Ibid., ¶ 112.

22. Ibid., ¶ 123.

23. Ibid., ¶ 124.

24. Ibid., ¶ 55.

25. Ibid., ¶ 111.

26. Canada Health Act, R.S.C. 1985, c. C-6, http://laws.justice.gc.ca/en/C-6/183947.html.

27. *Chaoulli*, ¶ 16.

28. Ibid., ¶ 106.

29. Ibid., ¶ 16. Emphasis added.

30. Ibid., ¶ 85.

31. Ibid., ¶ 89.

32. Ibid., ¶ 96.

33. The court cites Castonguay's work and testimony in ¶¶ 49, 172, 214. The dissenting justices quote a 1970 report by Castonguay: "The maintenance of the people's health more and more is accepted as a collective responsibility. This is not surprising since it must be admitted that without vigorous State action, the right to health would remain a purely theoretical notion, without any real content" (¶172) and note that he is called the "father of Quebec health insurance" (¶ 214).

34. *Chaoulli*, ¶ 28.

35. Ibid., ¶ 38.

36. Section 9.1 of the Quebec Charter reads: "In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec. In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law." Section 1 of the Canadian Charter "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Justice Deschamps wrote that "in the context of the relationship between citizens and the state, [s. 9.1 of the Quebec Charter] is of the same nature as s. 1 of the *Canadian Charter*" (*Chaoulli*, ¶ 47).

37. *Chaoulli*, ¶ 34.

38. Ibid., ¶ 7.

39. Ibid., ¶ 201.

40. Ibid., ¶ 202.

41. Ibid., ¶¶ 191, 200, 203.

42. Ibid., ¶ 241. Translated from the original French. Emphasis removed.

43. Ibid., ¶ 191.

44. Ibid., ¶ 165.

45. Ibid., ¶ 274.

46. Ibid., ¶ 278.

47. Schedule B to the Canada Act 1982 (U.K.) 1982, c. 11, s. 15, http://www.solon.org/Constitutions/Canada/English/ca_1982.html.

48. U.S. Const., Fourteenth Amendment, § 1, http://www.law.cornell.edu/constitution/constitution.amendmentxiv.html.

49. Human Rights Act 1998, Chapter 42, Schedule 1, article 14, http://www.opsi.gov.uk/ACTS/acts1998/80042—d.htm#sch1.

50. Leo XIII, *Rerum Novarum* (*On Capital and Labor*), 1891, statement 4, http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html. Emphasis added.

51. Ibid., statement 15.

52. Michael Quinn, "Justice and Egalitarianism," in *Political Theory and Political Philosophy*, ed. Maurice Cranston (New York: Garland, 1991), p. 33.

53. John Locke, *Second Treatise of Civil Government* (1690), chapter V, sections 28 and 47, http://etext.library.adelaide.edu.au/l/locke/john/l81s/. Emphasis added.

54. *Lochner v. New York*, 198 U.S. 45, 62 (1905).

55. Laurence Tribe, *American Constitutional Law*, 3d rev. ed. (Los Angeles: Foundation Press, 2000), pp. 1344 (n. 4), 1352, 1357, 1358, 1360, 1361.

56. *Nebbia v. New York*, 291 U.S. 502 (1934).

57. *West Coast Co. v. Parrish*, 300 U.S. 379 (1937).

58. *Phelps Dodge v. N.L.R.B.*, 313 U.S. 177 (1941).

59. John Paul II, *Sollicitudo Rei Socialis* (*On Social Concern*), 1987, statement 15, http://www.vatican.va/edocs/ENGO223/_INDEX.HTM.

60. John Paul II, *Centesimus Annus* (*On the Hundredth Anniversary of Rerum Novarum*), 1991, statement 48, http://www.vatican.va/edocs/ENG0214/_INDEX.HTM.

61. World Health Organization, "The World Health Report 2000—Health Systems: Improving Performance," 2000, chap. 6, p. 120, http://www.who.int/whr/2000/en/whr00_ch6_en.pdf.

62. Ibid., pp. 120–21.

63. Ibid., p. 121.

64. *Chaoulli*, ¶ 39.

65. Ibid., ¶ 123.

66. See, for example, Cristin Schmitz, "Supreme Court Takes on Interventionist Attitude," *National Post* (Canada), June 18, 2005.

67. See, for example, Marie-Claude Prémont, "Le régime public universel de santé du Québec: Le devoir d'agir suite au jugement de la Cour supreme," June 12, 2005, http://www.healthcoalition.ca/chamcp.pdf; Denis Lessard, "Un jugement qui suprend les experts. Québec légitimé de recourir à la clause nonobstant," *La Presse*, June 10, 2005; and Patrice Garant, "Décision de la Cour suprême sur le système de santé—Un choix politique ou judiciaire?" *Le Devoir*, June 11 and 12, 2005.

68. See, for example, Clifford Krauss, "Ruling Has Canada Planting Seeds of Private Health Care," *New York Times*, February 20, 2006.

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71. David Frum, "From Supremes, an Illusory 'Right,'" *National Post* (Canada), June 21, 2005, http://www.davidfrum.com/archive_article.asp?YEAR=2005&ID=252.

72. *Chaoulli*, ¶ 201.

73. Ibid., ¶ 50.

74. Clifford Krauss, "As Canada's Slow-Motion Public Health System Falters, Private Medical Care Is Surging," *New York Times*, February 26, 2006.

75. *Chaoulli*, ¶ 176.

76. Krauss, "As Canada's Slow-Motion Public Health System Falters."

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81. See, for example, U.S. Medicare Payment Advisory Commission, *Report to the Congress: Medicare Payment Policy*, March 2004, pp. 31–54, http://www.medpac.gov/publications/congressional_reports/Mar04_Ch2.pdf; and David A. Hyman, "Does Quality of Care Matter to Medicare?" *Perspectives in Biology and Medicine* 46 (Winter 2003): 55–68, http://home.law.uiuc.edu/%7Edhyman/pdfs/hyman_pibm_medicare2.pdf.

82. Medicare Beneficiary Freedom to Contract Act of 2005, H.R. 709, 109th Cong., 1st sess., 2005.

83. Michael F. Cannon and Michael D. Tanner, *Healthy Competition: What's Holding Back Health Care and How to Free It* (Washington: Cato Institute, 2005), p. 86.

84. See Andrew Rettenmaier and Thomas R. Saving, *The Economics of Medicare Reform* (Kalamazoo, MI: W.E. Upjohn Institute for Employment Research, 2000); and Martin S. Feldstein, "Rethinking Social Insurance," *American Economic Review* 95, no. 1 (2005): 1–24.

85. United Network for Organ Sharing website, http://www.unos.org, accessed February 21, 2006.

86. *Abigail Alliance for Better Access to Developmental Drugs et al. v. Lester M. Crawford et al.*, Case No. 04-5350 (D.C. Cir. 2005).

87. World Health Organization, chap. 6, p. 125.

88. Constitution of China, amended March 14, 2004, sections 11, 12 (1) and 13 (1); and "China Endorses Private Property," *BBC News*, March 15, 2004.

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