I. INTRODUCTION

At the outset of Canada’s most venerated human rights document—the Canadian Charter of Rights and Freedoms—is a short but profound declaration: “… Canada is founded upon principles that recognize the supremacy of God and the rule of law.”

This reference to the “supremacy of God” and the “rule of law”, of course, appears in the Preamble—the part of the Constitution that the Supreme Court of Canada has called the “grand entrance hall to the castle of the Constitution”, wherein “the political theory which the Act embodies” is found. Accordingly, the “rule of law” has played a rather remarkable role in the jurisprudence of the courts, most notably the Supreme Court. It has been called a “fundamental postulate” of our “constitutional structure”, a notion that comprises “indispensable elements of civilized life”, and a principle

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6 Manitoba Language Reference, ibid. at 749.
with “profound constitutional and political significance.” In stark contrast, the “supremacy of God” has suffered a much different fate. As recently noted by Professor Lorne Sossin, the reference to the “supremacy of God” in the Preamble—herein referred to as the ‘supremacy of God clause’—has been almost entirely ignored by the Supreme Court of Canada. Further, the few times it has received attention from courts and academics, it has been consistently marginalized. For Professor Peter Hogg, the supremacy of God clause provides little assistance in understanding the Constitution. For Professor Dale Gibson, “its value [is to be] … seriously doubted.” To others it is a “contradiction”, a “dead letter” stemming from “inglorious origins”. And to Justice Bertha Wilson, the clause is possibly in conflict with values of a “free and democratic society”.

10 Peter W. Hogg, Canada Act 1982 Annotated (Toronto: Carswell, 1982) at 9 (“… [I]t is difficult to see what aid can be derived from the references to ‘the supremacy of God’ and ‘rule of law’… ”).
14 Sossin, supra note 8 at 232.
15 R. v. Morgentaler, [1988] 1 S.C.R. 30 at 178, 44 D.L.R. (4th) 385 [Morgentaler cited to S.C.R.]. In Morgentaler, Justice Wilson stated that while she was “not unmindful” that the Charter “opens with an affirmation that ‘Canada is founded upon principles that recognize the supremacy of God’”, she was “also mindful that the values entrenched in the Charter are those which characterize a free and democratic society.” As David M. Brown has noted, this statement suggests that “God and democracy … stand opposed to each other” (Brown, supra note 9 at 561).
So the supremacy of God clause finds itself on the margins of Canadian constitutional discourse. The question is, why? The title of this paper evokes the work of well-known American scholar Sanford Levinson, whose article entitled “The Embarrassing Second Amendment” provocatively suggested that many legal commentators have ignored the Second Amendment to the United States Bill of Rights because they were embarrassed about the implications of its proper interpretation. Many, like William Klassen, would prefer a Canadian constitution without any reference to ‘God’ or any other notion of established religion. But this is not the Constitution we have. The Constitution must be dealt with as written, not as people wish it were written. Courts and scholars should muster the “constitutional courage” to acknowledge the existence of the supremacy of God clause and make a good faith attempt to determine its meaning and role in Canadian constitutionalism. This paper constitutes one such attempt.

16 U.S. Const. amend. II.

17 See Sanford Levinson, “The Embarrassing Second Amendment” (1989) 99 Yale L.J. 637. Levinson sets out an argument that the purpose of the Second Amendment is grounded in the American republican political tradition and protects an individual right of citizens to bear arms. Before doing so, however, he notes the lack of scholarship on the purpose and scope of the provision, writing at 642: “I cannot help but suspect that the best explanation for the absence of the Second Amendment from the legal consciousness of the elite bar, including that component found in the legal academy, is derived from a mixture of sheer opposition to the idea of private ownership of guns and the perhaps subconscious fear that altogether plausible, perhaps even ‘winning,’ interpretations of the Second Amendment would present real hurdles to those of us supporting prohibitory regulation.” We are not the first to suggest that academics and courts are “embarrassed” about the “supremacy of God” in the Preamble. David Brown has written that “… courts and academics have treated the Preamble, especially in its reference to the ‘supremacy of God’, as an embarrassment to be ignored” (Brown, supra note 9 at 561).

18 See Klassen, supra note 12. Klassen argued that the supremacy of God clause ought to be removed.

19 Writing for the majority, Iacobucci J. held in Vriend v. Alberta, [1998] 1 S.C.R. 493 at para. 136, 156 D.L.R. (4th) 385: “In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself.”

20 We borrow this term, albeit ironically, from a recent paper by Harry Arthurs. In contrast to Arthurs, who argues that citizens have the courage to say “No” to the Constitution, this paper advocates that citizens, courts and scholars have the courage to finally say “Yes” to the supremacy of God clause. That said, Arthurs might counter that the fact that courts have unjustifiably ignored the supremacy of God clause as further proof that courts sometimes do a bad job of masking ideology with judicial technique. See Harry Arthurs, “Constitutional Courage” (2004) 49 McGill L.J. 1.
Our thesis on the meaning of the supremacy of God clause is straightforward. Contrary to the title of this paper, the Charter’s21 Preamble is nothing to be embarrassed about. As will be argued, the clause recognizes a very simple but fundamental principle upon which the theory of the Charter is based: that people possess universal and inalienable rights derived from sources beyond the state, sources more recently referred to as natural human dignity;22 and that the Charter23 purports to enumerate specific positivist protections for these pre-existing human rights. We argue that this understanding of the clause is rooted in a historical analysis of the development of human rights theory (beginning with the natural law tradition) and finds support both in the dicta of the Supreme Court of Canada as well as the thinking of the Charter’s framers. In contrast with received wisdom, this view of the supremacy of God clause restores its meaning and dignity as an important component of the normative and political theory of the Charter. The notion that the supremacy of God clause speaks to a fundamental constitutional principle means that the Charter’s Preamble truly is, in its entirety, the “grand entrance hall to the castle of the Constitution”.24

Part II of the paper briefly outlines the way in which the supremacy of God clause has received the silent treatment both from academics and courts—in particular, the Supreme Court of Canada. We contend that this dismissive approach is not justified, arguing that the supremacy of God clause should, in contrast, play a fundamental role in Canadian constitutionalism, much like the “rule of law”.

Part III begins with a discussion of the problems associated with the current academic treatment of the clause. From there, the paper goes on to provide the proper historical context for the meaning of the supremacy of God clause, including the historical development of the modern rights theory. The supremacy of God clause is linked to the modern notion of human rights and their antecedents in the natural law tradition—that rights are not derived from the processes and laws of the state, but from other sources. In the past, human rights were said to derive from God. More recently, rights have been said to derive from human dignity. This paper argues that the supremacy of God clause points to this historical premise that developed in the natural law

21 Supra note 1.

22 See e.g. the majority opinion of Cory J. in Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438 [Kindler cited to S.C.R.].

23 Supra note 1.

24 Provincial Court Judges Reference, supra note 2. In addition, our understanding of the clause lives up to the dicta of Chief Justice Lamer who wrote, citing Justice Rand in Switzman (supra note 3 at 306), that “the preamble articulates ‘the political theory which the Act embodies’”: Provincial Court Judges Reference, ibid. at para. 95.
tradition—that rights are derived from sources beyond the state—and to the fact that the Charter is an attempt to codify and protect those rights in a constitutional document. This understanding is supported by the historical context of the Charter, the Preamble’s earliest draft, as well as the constitutionalism of Prime Minister Pierre Elliott Trudeau—a primarily secular thinker who supported the inclusion of the supremacy of God clause in the Charter’s Preamble. In addition, other political actors who supported the inclusion of the clause shared this meaning.

Part IV of the paper explains how this understanding of the Charter’s Preamble has important normative implications for the Charter itself. We argue that the supremacy of God clause confirms what the Supreme Court has, from time to time, said about the nature of the Charter: that it purports to enumerate inalienable rights and is therefore best understood as a social contract, albeit in a modern constitutional form. This theoretical framework will necessarily have an impact on how the Charter’s substantive provisions are conceptualized. The final Part of the paper begins this discussion, exploring the impact of this new understanding on, in particular, the contours of section 1, the provision of the Charter that embodies the ‘constitutional promise’ that the Canadian Government will respect peoples’ Charter rights and limit them only where such limits can be demonstrably justified in a free and democratic society. One implication of this constitutional promise is an outer boundary on the extent to which the government may limit rights under section 1. If the rights in the Charter purport to embody universal and inalienable rights derived from sources beyond the state, then the state cannot completely abrogate or remove those rights, no matter how pressing a government objective might be. In other words, the state cannot completely take away what it did not bestow.

This re-conceptualization of section 1 would prevent the courts from ever condoning or approving a government measure that completely removes or abrogates a Charter right—even in times of apparent national peril where the Oakes test might lead to the opposite result. Thus, should Parliament or a

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25 Supra note 1.


[T]he Court must first ask whether the objective the statutory restrictions seek to promote responds to pressing and substantial concerns in a democratic society, and then determine whether the means chosen by the government are proportional to that objective. The proportionality test involves three steps: the restrictive measures
provincial legislature wish to undertake such conduct, the body at issue would be forced to explicitly invoke section 33 of the Charter.\(^{27}\) This scenario, rather than judicial approval through section 1, is more desirable for a number of reasons.

II. THE SUPREMACY OF GOD CLAUSE: UNREASONABLY IGNORED

A. THE SILENT TREATMENT

Though there has been much judicial and academic attention devoted to elucidating the meaning and legal force of the “rule of law” in the Charter’s Preamble, there has been a striking lack of consideration of the reference to the “supremacy of God”. Typical of the courts’ dismissive approach is the Ontario Court of Appeal’s decision in Zylberberg v. Sudbury Board of Education.\(^{28}\) In Zylberberg, the majority of the Court considered the effect of the supremacy of God clause as follows:

It is a basic principle in the construction of statutes that a preamble is rarely referred to and, even then, is usually employed only to clarify operative provisions which are ambiguous. The same rule, in our view, extends to constitutional instruments. There is no ambiguity in the meaning of s. 2(a) of the Charter or doubt about its application in this case. Whatever meaning may be ascribed to the reference in the preamble to the “supremacy of God”, it cannot detract from the freedom of conscience and religion guaranteed by s. 2(a) which is, it should be noted, a “rule of law” also recognized by the preamble.\(^{29}\)

Thus, the Court in Zylberberg was content to relegate the supremacy of God clause to the sidelines of constitutional adjudication, essentially holding that it was of no legal import as either an independent source of law or an interpretive aid. Similarly, the British Columbia Court of Appeal deemed the supremacy of God clause a “dead letter”.\(^{30}\) Such comments are not surprising

\(^{27}\) Supra note 1.


\(^{29}\) Ibid. at para. 44.

given that Justice Wilson, writing in *R. v. Morgentaler*, 31 implied that it conflicted with the values of a “free and democratic society”. 32 Add this judicial commentary to the views of prominent scholars such as Peter Hogg and Dale Gibson (who, as already noted, have questioned the value of the supremacy of God clause) and you have a recipe for irrelevance. 33

that it violated “access to justice”, which was an aspect of the “rule of law” in the Charter’s Preamble. In her dissenting reasons, she held at paras. 22-23:

To put all this another way, the words “rule of law” in the preamble do not create any substantive independent ground upon which a court can find duly enacted legislation to be “inconsistent with the provisions of the Constitution” and therefore of no force and effect.

I ask rhetorically this question: If the preamble creates, because of the words “the rule of law”, a constitutional foundation for striking a statute down, do the words “supremacy of God” which precede those words, also create such a foundation and how are we to define and apply it?

The reason for the ‘rhetorical’ nature of Madam Justice Southin’s question would appear to be the notion that the supremacy of God could never strike down legislation. Justice Southin thus appears to be impugning the majority of the Court’s robust interpretation of the “rule of law” in the preamble by tying it to the anchor of the perpetually ignored preambular reference to the supremacy of God. Implicit in all of this is yet another judicial jab at the relevance of the supremacy of God clause.

31 *Supra* note 15.


33 One might draw some parallels here between Canadian judicial treatment of the reference to ‘God’ in the Charter’s Preamble and American judicial treatment of similar references to religion in American law and politics; what the United States Supreme Court has called “ceremonial deism”. According to the United States Supreme Court, “ceremonial deism” refers to the traditional practice of revering ‘God’ in law and politics in order to acknowledge the important historical role religion has played in both society and the legal system. The term was first used in 1962 by Yale Law School Dean Walter Rostow to describe the common and historical practice of referring to Divinity in law and politics, but has come to play a broader role in American constitutionalism after being cited and applied by the U.S. Supreme Court in a number of Establishment Clause cases. See Steven B. Epstein, “Rethinking the Constitutionality of Ceremonial Deism” (1996) 96 Colum. L. Rev. 2083 at 2091-92. For example, in the recently decided *Elk Grove Unified Sch. Dist. v. Newdow*, 124 S. Ct. 2301 (2004) at 2323, Justice Sandra Day O’Connor found that the reference to ‘God’ in the U.S. Pledge of Allegiance did not violate the Establishment Clause of the U.S. Constitution (which prevents the state from advocating or establishing any religion) because the reference constituted a form of ceremonial deism that had, over time, lost all religious significance. Many commentators believe that such judicial treatment has rendered references to ‘God’ in law and politics meaningless and irrelevant. See e.g. Charles Gregory Warren, “No Need to Stand on Ceremony: The Corruptive Influence of Ceremonial Deism and the Need for a Separationist Reconfiguration of the Supreme Court’s Establishment Clause Jurisprudence” (2002-03) 54 Mercer L. Rev. 1669; Arnold H. Loewy, “The Positive Reality and Normative Virtues of a ‘Neutral’ Establishment Clause” (2003) 41 Brandeis L.J. 533. Thus, one might compare this treatment of ceremonial
Furthermore, at the level of Canada’s highest court, when the supremacy of God clause is not being denigrated or interpreted narrowly, it is simply ignored. Though the Supreme Court of Canada has referred to the supremacy of God clause in a number of judgments, it has never undertaken a substantial investigation into its history, meaning, or purpose. As recently deism to the denigration of “supremacy of God” in Canadian constitutionalism. Yet, the comparison is not very helpful as the reference to ‘God’ in a pledge of allegiance is very different from a reference to ‘God’ in a constitutional preamble. More likely, these parallels are simply an indication about how uncomfortable both the Canadian and American judiciary remain when it comes to dealing with religion in the context of secular constitutional systems.


See e.g. Chamberlain v. Surrey School District No. 36, [2002] 4 S.C.R. 710 at para. 137, 221 D.L.R. (4th) 156, 2002 SCC 86: “In my view, Saunders J. below erred in her assumption that ‘secular’ effectively meant ‘non-religious’. This is incorrect since nothing in the Charter (supra note 1), political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy. Note that the preamble to the Charter itself establishes that ‘... Canada is founded upon principles that recognize the supremacy of God and the rule of law’.”

The silent treatment given by the Supreme Court of Canada to the supremacy of God clause has not gone unnoticed by the provincial appellate courts. For example, in Sharpe (supra note 13) Southin J.A. considered the argument, advanced by an intervener to a child pornography prosecution, that the supremacy of God clause necessitates a robust legal protection of children as an incident to the “moral standards” of Canada’s philosophical and legal tradition at paras. 78-80:

I accept that the law of this country is rooted in its religious heritage.

But I know of no case on the Charter in which any court of this country has relied on the words Mr. Staley invokes. They have become a dead letter and while I might have wished the contrary, this Court has no authority to breathe life into them for the purpose of interpreting the various provisions of the Charter.

... The words of the preamble relied upon by Mr. Staley can only be resurrected by the Supreme Court of Canada [emphasis added].
noted by Lorne Sossin, the supremacy of God clause has been “all but ignored by the Supreme Court and by most constitutional observers as well.”

Not surprisingly, many public and political commentators also view the supremacy of God clause as being constitutionally irrelevant. This was evident during the failed attempt in 1999 on the part of Hon. Svend Robinson (a Member of Parliament representing Burnaby-Douglas in British Columbia) to petition members of Parliament to remove the supremacy of God clause from the Preamble to the Charter. As was typical, one commentator noted with regard to the reference to God:

God, in this context, is simply out of place. It is not necessary to compel belief in God, or to pretend, via the Constitution, that such belief has been exacted . . . . But if it was silly to put God in, it would be equally silly to get too worked up about it. The reference is in the preamble: It has no legal weight. It is simply a statement of belief. If it is unnecessary, it is also essentially harmless.

Thus, in the courts, scholarly halls, and the news media, the prevailing opinion is that the supremacy of God clause is of trifling importance.

B. TAKING THE SUPREMACY OF GOD CLAUSE SERIOUSLY

A serious investigation illustrates that the silent treatment that has befallen the supremacy of God clause cannot be justified. To begin with, as a general matter of statutory interpretation it has been long established that preambles do indeed have an important role to play. In 1966, Walter Tarnopolsky wrote:

Although some early authorities did not accept preambles as forming part of the statute, they have been so accepted at least since the mid-19th century and they have long been regarded as being a legitimate aid to construction.

Indeed, the Supreme Court of Canada has itself acknowledged the importance of preambles in the interpretation of legislation. Moreover, in the context of a
constitutional text, one would expect that a preamble would take on even more significance. As Lorne Sossin points out, “[p]reambles are arguably more significant when the object of a constitutional document is to protect rights and freedoms … .”\textsuperscript{43} Thus far, this intuitive point has not been acknowledged by the courts, at least not with respect to the supremacy of God clause.

There are other difficulties with the dismissive approach that has coloured our collective understanding of the supremacy of God clause. Such an approach might be justified had the constitutional preambles contained in the \textit{Charter}\textsuperscript{44} and the \textit{Constitution Act, 1867}\textsuperscript{45} (and, to some extent, the \textit{Bill of Rights}\textsuperscript{46}) played little or no role in constitutional jurisprudence. However, this has simply not been the case. For example, the Supreme Court of Canada has, on a number of occasions, cited and applied the “rule of law”—referred to in the Preamble to the \textit{Charter} in the very same sentence as the supremacy of God clause—with quite remarkable results. To see this, one need look no further than the Supreme Court of Canada’s extraordinary decision in \textit{Manitoba Language Reference}.	extsuperscript{47} In that case the Court held that all of the Province of Manitoba’s statutes enacted since the end of the 19th century were unconstitutional as they were adopted in English only. To deal with this sweeping declaration, however, the Court invoked the foundational constitutional principle of the “rule of law” to prevent the “chaos” that would result if all of the laws were immediately ruled invalid.\textsuperscript{48} In its judgment, the Court held that the declaration of invalidity be suspended for a set period of time to allow the Province to respond.

But where did this “unwritten” constitutional principle come from? It was not set out in any particular provision of the Constitution. However, the Court stated that the “constitutional status” of the rule of law was “beyond question”, being clearly recognized as a foundational principle implicitly in the Preamble to the \textit{Constitution Act, 1867} and explicitly in the Preamble to the \textit{Charter}.	extsuperscript{49} For the Court, these inclusions had important implications for

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But the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language.
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\textsuperscript{43} Sossin, \textit{supra} note 8 at 231.

\textsuperscript{44} \textit{Supra} note 1.


\textsuperscript{46} \textit{Canadian Bill of Rights}, S.C. 1960, c. 44 [\textit{Bill of Rights}].

\textsuperscript{47} \textit{Supra} note 4.

\textsuperscript{48} \textit{Ibid.} at 749-50.

\textsuperscript{49} \textit{Ibid.} at 750.
its legal status: it was a clear confirmation of the important role to be played by that principle in the Canadian constitutional order. If the preambles to Canada’s constitutional texts have such remarkable significance when the rule of law is at issue, at least some significance cannot, without further justification, be denied when the supremacy of God is being construed.

Even putting these points aside, the best indication that the supremacy of God clause has been unjustifiably ignored is what the Supreme Court of Canada has explicitly said about the role for constitutional preambles in Canadian constitutionalism. In the Provincial Court Judges Reference, in discerning an unwritten but “foundational” constitutional principle of judicial independence, the Court provided an extensive analysis of the Preamble to the Constitution Act, 1867. For the Court, the importance of the Preamble is found not only as an aid to construing the substantive provisions, but also as an articulation of the underlying logic and theory of the Constitution:

Although the preamble has been cited by this Court on many occasions, its legal effect has never been fully explained. On the one hand, although the preamble is clearly part of the Constitution, it is equally clear that it “has no enacting force”. In other words, strictly speaking, it is not a source of positive law, in contrast to the provisions which follow it.

But the preamble does have important legal effects. Under normal circumstances, preambles can be used to identify the purpose of a statute, and also as an aid to construing ambiguous statutory language. The preamble to the Constitution Act, 1867, certainly operates in this fashion. However, in my view, it goes even further. In the words of Rand J., the preamble articulates “the political theory which the Act embodies”. It recognizes and affirms the basic principles which are the very source of the substantive provisions of the Constitution Act, 1867. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.

Here, Chief Justice Lamer recognizes that constitutional preambles are central in formulating the normative and theoretical basis for the express provisions of the Constitution. They articulate the theory upon which the entire constitutional order is based. Most importantly, the (then) Chief Justice focuses on the notion of sources of law. He states that the preambles, though not a ‘source’ of positive law, still act as a ‘source’ of basic principles that

50 Supra note 2.
51 Supra note 45.
52 Supra note 2 at paras. 94-95 [emphasis added, citations omitted].
constitute the “substantive provisions” set out in the constitutional text. This is an important point that will be returned to in Part III.

In any event, if we are to take these pronouncements of the Supreme Court seriously, then the reference to the supremacy of God clause has a very important role to play in the Canadian constitutional order. In arguing thus, we are not alone. Lorne Sossin has also advocated a more instrumental role for the supremacy of God clause in Canadian constitutionalism:

The reference to the supremacy of God in the Charter’s Preamble should be given meaning as an animating principle of constitutional interpretation on par with the rule of law with which it is paired. To embrace the rule of law while abandoning the supremacy of God is to neglect the governing premise of the Charter.53

It is time to take the supremacy of God clause seriously. Explicitly recognized in the Preamble to the Charter,54 the “supremacy of God” ought to have some special constitutional status, like the rule of law, being, in the least, a recognition of certain values, principles, or, as we shall argue, the basic theory upon which the Charter itself is based.

III. TOWARDS A PROPER UNDERSTANDING OF THE SUPREMACY OF GOD CLAUSE

A. THE STORY OF THE SUPREMACY OF GOD CLAUSE

Given that the supremacy of God clause ought to have some special constitutional status beyond the sidelines of Charter litigation, the most challenging task is giving substantive content to the phrase. One of the problems with scholarly and judicial treatment of the supremacy of God clause thus far has been an inability to understand the proper historical context of the clause in the broader development of Canadian constitutionalism. To begin with, courts and commentators have largely assumed that the supremacy of God clause must relate, in some way, to the references to religion in the explicit provisions of the Charter, such as those in section 2(a). For example, in R. v. Gruenke,55 a case involving asserted violations of religious freedoms, Justice L’Heureux-Dubé held:

Freedom of conscience and religion in Canada as well as freedom of thought and belief are guaranteed by the Canadian Charter of Rights and Freedoms and cannot be ignored in this discussion. The preamble to the Charter reads: Whereas Canada

53 Sossin, supra note 8 at 228. As we shall see, however, we have differences with Lorne Sossin on the precise role that the supremacy of God clause ought to play.

54 Supra note 1.

is founded upon principles that recognize the supremacy of God and the rule of law ... 56

But why must the reference to ‘God’ necessarily relate only to the religious protections set out in the Charter?57 Though not an unreasonable assumption, it does not follow that a reference to ‘God’ must be connected to enumerated religious rights. Even if this assumption were correct, what could it possibly mean? That religion and religious beliefs ought to receive greater protection under the Charter? That cannot be the case. Any interpretation of the supremacy of God clause that results in the privileging of certain belief systems over others is clearly inconsistent with the purpose and text of the Charter itself.58

Yet this is not the only problem. Even more troubling is the fact that many scholars and judges often justify the marginalization of the supremacy of God clause by repeating the common misconception that the clause was born solely of political expediency. For example, Dale Gibson has stated: “In view of the preamble’s incompleteness, and its obvious last-minute nature and political inspiration, it is not likely to play a very significant interpretative role.”59 More recently, Lorne Sossin, after noting that its words were the “last to be drafted”, similarly stated that the reference to “supremacy of God” was born of “inglorious origins”.60 As a result, these alleged political origins likely led many, like Gibson above, to relegate the supremacy of God clause to the margins of constitutional law. There are many problems with this view. First, it is factually incorrect. The reference to ‘God’ in the Preamble was not a last-minute idea. In fact, the Liberal Party’s constitutional draft of 1980 contained a reference to ‘God’ in its Preamble.61 Though this reference disappeared from subsequent drafts, Liberal M.P.s insisted that another reference to ‘God’ would appear in the final draft.62 Second, this prevailing view ignores history.

56 Ibid. at 301.
57 Supra note 1.
58 This point was made by Sossin, supra note 8 at 229.
59 Gibson, supra note 11 at 67.
60 Sossin, supra note 8 at 232.
61 Egerton, “Trudeau”, supra note 9 at 100.
62 For example, speaking of the reference to ‘God’ in the Liberals’ early draft of the Charter, Liberal M.P. John Roberts stated: “I still want that preamble in the Constitution. The government still wants that preamble in the Constitution. We are determined in our further discussions with the provinces, and there will be continuing discussions with the provinces, to have that preamble in the Constitution.” See House of Commons Debates, 7 (18 February 1981) at 7438-39 (Hon. John Roberts). See also the remarks of Liberal M.P. Walter McLean: House of Commons Debates, 7 (20 February 1981) at 7523 (Hon. Walter McLean) [McLean, House of Commons Debates].
Far from stemming from “inglorious origins”, the recognition of the “supremacy of God” did not suddenly appear out of nowhere onto the scene of constitutionalism in the late 1970s and early 1980s. After all, one cannot forget that the Preamble to the Bill of Rights also contained an acknowledgement of the “supremacy of God”.  

A proper understanding of the “supremacy of God” extends well beyond the ambit of the Bill of Rights. In its 1976 decision Re Jensen, the Federal Court of Canada addressed a challenge to the requirement that new citizens swear an oath that includes a reference to God. In dismissing the challenge, Justice Addy stated that “the common law has always recognized the supremacy of God … .” What exactly did Justice Addy mean by this? To what history was he referring? Surely there is some story underlying the supremacy of God clause that remains untold.

That is one of the purposes of this paper—to tell the full story of the supremacy of God clause, which, as will be seen, is very much tied to the story of the Charter itself. The actual origins and evolution of the supremacy of God as a legal and philosophical concept spans several centuries (if not millennia), and involves the development of the modern human rights doctrine both internationally and within Canadian constitutionalism itself.

B. THE RE-EMERGENCE OF RIGHTS IN THE POST-WAR PERIOD

The story of the supremacy of God clause did not begin with a last-minute draft amendment in 1980. Rather, it began much earlier, at a time when the notion of human rights was in its developmental stages. The development of modern human rights doctrine has been documented elsewhere, and its elucidation is certainly beyond the scope of this paper. However, in order to understand the history of the supremacy of God clause, one must understand some key aspects of the development of rights theory.

Recall again the statements of the Supreme Court of Canada concerning the role of constitutional preambles. Chief Justice Lamer wrote that though the Preamble is not a “source of positive law”, it does articulate the “political theory which the Act embodies” and “recognizes and affirms the basic principles which are the very source of the substantive provisions” of the

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63 Supra note 46.
65 Ibid. at para. 19.
66 Supra note 1.
Constitution. Notice again the distinction here between positive and other sources of constitutional law. In other words, the constitutional Preamble—including the reference to the supremacy of God—is not a source of positive law. Rather, it elucidates other sources of the constitutional provisions and rights.

What could these ‘other’ sources of constitutional law be? They apparently do not concern the processes of the state, as such sources would concern positive law. And, in particular, what “basic principle”—the source of the Charter’s substantive provisions—does the supremacy of God clause recognize? In our view, the fundamental principle that the supremacy of God clause recognizes is quite simple: The most important rights held by individuals are derived not from Parliament, or any other lawmaking branches of the state, but rather from other ‘higher’, or ‘supreme’, sources. As we will argue, this basic principle developed out of the natural law tradition and remained a central tenet of modern notions of human rights that spread internationally in the years following the Second World War. The Charter was born within this post-War historical context. Consistent with this context, the supremacy of God clause invokes this basic principle of modern rights by speaking to its origins in the natural law tradition.

C. THE CHARTER AND THE RE-EMERGENCE OF RIGHTS IN THE POST-WAR PERIOD

It is generally accepted that the Charter, like the Bill of Rights before it, arose out of the internationalization of human rights that followed the Second World War. As Chief Justice McLachlin has written:

During the latter half of the 20th century, the world turned to rights as a way to prevent recurrence of the atrocities of the Third Reich and the Second World War. The United Nations’ Universal Declaration of Human Rights was adopted by the United Nations General assembly in 1948. In the decades that followed, country after country adopted domestic bills of rights, guaranteeing fundamental freedoms to all persons. Canada moved to adopt human rights statutes at the provincial and federal level, as well as the Diefenbaker Bill of Rights and finally, the Charter of Rights and Freedoms.

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68 Provincial Court Judges Reference, supra note 2 at paras. 94-95.
69 Supra note 1.
70 Supra note 46.
72 Beverley McLachlin, “Canada’s Coming of Age” in Joseph Eliot Magnet et al., eds., The Canadian Charter of Rights and Freedoms: Reflections on the Charter After Twenty Years
Similarly, Lorraine Weinrib has argued that this period involved an international shift towards what she calls the “Post War Rights Model of Rights Protection”, which was characterized by a greater emphasis on the enshrinement of human rights in constitutional documents, including their protection by a conscientious and independent judiciary.  

Many scholars assert that such ‘rights talk’ re-emerged after the Second World War after falling into disfavour during the mid-19th to early-20th centuries, particularly in Europe and North America. Emblematic of the thinking during this era was Jeremy Bentham’s famous remark that rights were “nonsense on stilts”. At that time, positivist accounts of the law and legal rights—like utilitarianism—captured the imaginations of legal philosophers and law reformers. It became received wisdom that if a person had any right or claim at law, then that right would be a positive right—that is, a right derived solely from the laws of the state.

Yet as the fog of war cleared in 1945 and the atrocities of Nazi Germany were unveiled, it became evident to the world community that the predominantly positivist account of rights—that rights are only conferred by the state—was simply not enough to protect people from the excesses of even democratically established governments. As rights historian Michael Ignatieff wrote:

“One terrifying aspect of Nazi Germany is how gross and immoral injustice was given the semblance of legality, and how these injustices basked in popular support … . The lesson of this story is that even a Reichstadt, even a lawful society, can lend its support to measures that turn fellow citizens into pariahs. From the denial of civic rights to the obligation to wear a yellow star in public was but one step. And from the yellow star to deportation to the east was but another. And with deportation to the east, as far as most Germans were concerned, the problem simply disappeared … .


73 This model involves a shift towards the protection of civil liberties and human rights within a constitutional model and the ascendance of the role of the judiciary in protecting those rights. See Lorraine E. Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights under Canada’s Constitution” (2001) 80 Can. Bar. Rev. 699.

74 Orlando Patterson, “Freedom, Slavery, and the Modern Construction of Rights” in Olwen Hufton, ed., Historical Change and Human Rights: The Oxford Amnesty Lectures 1994 (New York: Basic Books, 1994) 132 at 173. Micheline Ishay argues that there was some development of human rights during this period, but many of the advances were undercut by various forms of European nationalism: Ishay, supra note 67 at 171-72.

75 Patterson, ibid. at 174.
This terrible story tells us that there must be some higher law, some set of rights that no government, no human authority can take away.\textsuperscript{76}

The theory of rights that emerged internationally at this time held that rights could not be fully trusted in the hands of government. Thus, the rights conceptualized at this time were not derived from any government, state, or man-made law. Rather, they were understood to derive from sources beyond these positivist sources of law. The short hand term for the repository of such sources was the concept of human dignity.

This much is evident from the many international conventions, treaties, and other instruments enacted in the midst of the “wave of humanitarianism” that followed the Second World War.\textsuperscript{77} These documents and instruments affirmed “human rights”, “equal” and “inalienable rights”, as well as the “dignity” of all persons.\textsuperscript{78} To take a central example, the \textit{Universal Declaration of Human Rights},\textsuperscript{79} enacted in 1948, is by far the most influential international document for the recognition of universal human rights.\textsuperscript{80} The \textit{Universal Declaration} proclaims the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family”.\textsuperscript{81}

This notion of rights represents the crux of modern human rights theory. It conceives rights that are essentially natural and universal to all humans based on the fact that they are born as human beings with natural human dignity. Properly labelled, these are \textit{natural human rights} that are born to each and every human being. The \textit{Charter of Rights and Freedoms}\textsuperscript{82} emerged from this modern notion of rights.

\begin{itemize}
\item \textsuperscript{76} Michael Ignatieff, \textit{The Rights Revolution} (Toronto: House of Anansi Press, 2000) at 47-48.
\item \textsuperscript{77} Gibson, \textit{supra} note 11 at 12.
\item \textsuperscript{79} \textit{Universal Declaration}, \textit{ibid.}
\item \textsuperscript{80} Ishay, \textit{supra} note 67 at 18.
\item \textsuperscript{81} \textit{Universal Declaration}, \textit{supra} note 78.
\item \textsuperscript{82} \textit{Supra} note 1.
\end{itemize}
Understanding this historical development is important to understanding the meaning of the supremacy of God clause. If modern human rights—like those embodied in contemporary constitutions like the Charter—\(83\)—are anchored in common human dignity, then their legitimacy and normative force is derived from sources beyond the positivist lawmaking functions of the state. As noted above, we believe this basic principle is one of the organizing principles underlying the ‘theory’ of Charter rights. But this raises the question: What does the “supremacy of God” have to do with this principle? The history of rights development provides the answer.

D. THE SUPREMACY OF GOD AND THE FOUNDATIONS OF MODERN HUMAN RIGHTS DOCTRINE

The modern notion of human rights did not appear out of a vacuum in the Post-War period. Rather, it has a long and complex history.\(^{84}\) As is commonly recognized, modern rights theory developed, to a large extent, out of a much older school of thought: natural law theory.\(^{85}\) Indeed, as historian Michael Ignatieff has noted, natural law provided the historical foundation upon which human rights developed:

Since Roman times, the European tradition has developed an idea of natural law, whose purpose is to provide an ideal vantage point from which to criticize and revise actually existing law … . Natural law arose from a desire to bring order to the jungle of law, and to remedy its injustice by reference to a universal standard. Natural law has provided a vantage point from which to criticize laws as they were, and to uphold a right of resistance when they could not be changed … .

Our idea of human rights descends from this tradition of natural law. In the contemporary world, human rights have provided an international standard of best practice that has been used to upgrade and improve our civil and political rights.\(^{86}\)

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\(^{83}\) Ibid.


\(^{85}\) Many early and prominent philosophers of law, such as Thomas Aquinas, investigated the relationship and distinctions between divine law and the law of the state: “… [E]very human law has just so much of the nature of law as is derived from the law of nature. But if in any point it deflects from the law of nature, it is no longer a law but a perversion of law.” See Thomas Aquinas, *On Law, Morality and Politics* (Indianapolis: Hackett Publishing Co., 1988) at ST I-II, Q.95, A.II.

\(^{86}\) Ignatieff, supra note 76 at 43.
Natural law theorists held that the law created by the processes of the state was superseded by a higher law of nature. This natural law was universal and applied equally to all. In order to represent a coherent and universal standard that transcended particular laws of a given state and a given time, natural law had to be based on some metaphysical foundation. That foundation was God. Thus Cicero wrote in *De Re Publica*:

> [T]here will be but one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponser.\(^{87}\)

Likewise, many years later, William Blackstone would reiterate this classic statement of natural law theory:

> This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.\(^{88}\)

Clearly, for Cicero and Blackstone, the law of nature is derived not from the state but from a higher, supreme source of law: ‘God’.

This higher, universal ‘vantage point’ provided an important normative attraction and utility to natural law theory. Since natural law was derived from a source beyond the state, one could use those higher laws to justify criticism or disobedience of unjust state laws or conduct. Drawing on this tradition in the Post-War Era, human rights theorists found that same universal vantage point in common humanity:

> Constitutions do not create our rights; they recognize and codify the ones we already have, and provide means for their protection. We already possess our rights in two senses: either because our ancestors secured them or because they are inherent in the very idea of being human … . These inherent rights we now call human rights, and they have force whether or not they are explicitly recognized in the laws of nation-states. Thus human rights may be violated even when no state law is being infringed.\(^{89}\)

So while modern human rights theory does not posit a ‘God’ as a higher source of rights, it does retain the fundamental principle developed within the

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\(^{89}\) Ignatieff, *supra* note 76 at 28.
natural law tradition: *Universal rights are derived from sources beyond the positivist processes of the state.*

The supremacy of God clause affirms and recognizes this basic principle. In other words, the reference to the “supremacy of God” should not be understood as a political afterthought, but rather as a recognition of the historical foundations of modern human rights as embodied in the Charter. The most important rights people possess are not derived from Parliament, or any other governmental body, but rather are derived from other higher, supreme sources. In the natural law tradition the ‘supreme’ source of law was ‘God’, *hence the supremacy of God.* In modern human rights the higher source is human dignity.

At this stage the skeptic would likely retort: If the Preamble to the Charter recognizes that rights are derived from sources beyond the state, why not codify that proposition, or even use the modern notion of ‘human dignity’, rather than the less obvious ‘supremacy of God’? This question oversimplifies the complex historical development of modern human rights doctrine. To invoke the “supremacy of God” is to invoke the historical origins of modern rights in the ancient natural law tradition. It is a bold recognition, to be sure, to speak to the ‘supremacy’ of anything other than the document itself within a constitution that purports to articulate the supreme laws of the land, and bolder still to invoke external sources of law and legitimacy. What is clear from this bold recognition is that the supremacy of God clause directs us to *engage* in the history of modern rights, rather than to ignore it.

The very notion of ‘human dignity’ itself is also historically linked to the natural law tradition. Though it is inaccurate to draw a straight line from Cicero to the *Universal Declaration* or the Charter, there were important developments in natural law theory over time that brought the tradition closer to what we today understand to be human rights. Most importantly, social contract theorists in the 16th and 17th centuries refined aspects of natural law theory to focus on natural *rights* rather than natural *law.*

Emblematic of these developments is the work of English political philosopher John Locke. Locke, who wrote his most important political text *Two Treatises of Government* in the turbulent mid-1600s, was perhaps the first prominent theorist of modern human rights. Locke played an important

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90 *Supra* note 1.

91 *Supra* note 78.


93 Patterson, *supra* note 74 at 158. See also Professor Pocock’s reflection on the role of Locke’s work in the 17th and 18th century: J.G.A. Pocock, *The Ancient Constitution and the*
role in legitimizing ‘rights talk’ and the concept of political society as a social contract between the state and individuals possessing inherent natural rights.\(^\text{94}\)

Locke was certainly not the only rights theorist of his time. His work in this regard was part of a broader movement of revolutionary ideas. Samuel Pufendorf, educated in the work of Hobbes and Grotius, also wrote on natural rights derived from God’s divinity.\(^\text{95}\) Similar claims were also made during the English Puritan Revolution of the 1640s, years before Locke wrote *The Second Treatise*.\(^\text{96}\) In particular, the populist ‘levellers’, who challenged the royal authority of Charles I, recognized in their “Agreement of the People” the idea that all people possessed inalienable rights conferred not by the laws of Parliament, but by God.\(^\text{97}\) Similarly, John Milton would write in 1651 that liberty is a natural right derived from divine sources beyond the political or legal realm:

Our liberty is not Caesar’s; it is a blessing we have received from God himself; it is what we are born to; to lay this down at Caesar’s feet, which we derive not from him, which we are not beholden to him for, were an unworthy action, and a degrading of our very nature.\(^\text{98}\)

Despite Oliver Cromwell’s attempt to purge such rights talk in the years following the execution of Charles I,\(^\text{99}\) it would later re-surface both in the clashes of the Glorious Revolution of 1688 and on the drawing board of John

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\(^{\text{94}}\) Patterson, *supra* note 74 at 158.


\(^{\text{96}}\) *Ibid.* note 67 at 73.


Locke. Thus, Locke was a prominent voice within this movement of ideas that later found expression in various groundbreaking constitutional contexts, such as the American Declaration of Independence, the French Declaration of the Rights of Man and Citizen, as well as the early Canadian ratification debates.

As a central figure in these changes, Locke’s work played an important historical role in the development of modern rights. In this regard, a key difference in Locke’s work was that he attempted to conceptualize rights based on a theory of human nature. True to the natural law tradition, Locke’s rights arise naturally based on the fact that people are the common creations or “workmanship” of ‘God’. Yet, in contrast to natural law theorists before him, Locke distinguished between natural law and natural rights, writing that “[natural law] ought to be distinguished from natural right: for right is grounded in the fact that we have the free use of a thing,

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100 Historian Peter Laslett has convincingly demonstrated that both of Locke’s Treatises were products of 1680, roughly a decade before the events of the Glorious Revolution and many years after the execution of Charles I. See Peter Laslett, “The English Revolution and Locke’s Two Treatises of Civil Government” (1956) 12:1 Cambridge Historical Journal 40 at 40-55. Many have criticized Locke for espousing a political theory in order to support a particular political party. However, as has been pointed out, Locke could have limited his language to tailor it to the specifics of English politics at the time, but he did not. His ideas were expressed in universal terms that could (and would) affect political order beyond the borders of his country; Lessnoff, supra note 87 at 64-65. Indeed, Locke was likely aware of the radical nature of his ideas—he did not acknowledge authorship of the Two Treatises during his lifetime: Klosko, supra note 87 at 93.


102 Reprinted in Reilly, ibid. The American Declaration of Independence took the Virginia Bill of Rights as its model. See Patterson, supra note 74 at 162.

103 The notion of universal rights or the ‘rights of man’ was discussed during the founding debates of the Canadian constitutional order, including a debate between Louis Riel and federal representatives before the Red River Assembly. See Janet Ajzenstat et al., eds., Canada’s Founding Debates (Toronto: Stoddart, 2003) at 180, 191, 418-19.

104 Patterson, supra note 74 at 158.


106 As Walter Tarnopolsky wrote, natural law theory viewed certain legal concepts as immutable and universal. See Tarnopolsky, supra note 41 at 1.

whereas law is what enjoins or forbids the doing of a thing. These ideas brought the classical notions of natural law tradition much closer to modern notions of rights. Grounding rights in the natural creation of all persons leads easily to the logical conclusion that such rights are both universal and inalienable. Locke was the first prominent Enlightenment philosopher to posit inalienable natural human rights—that is, rights people were born with that could not be bought or sold. This was in contrast to other early rights thinkers such as Grotius who theorized rights that could be extinguished.

When rights talk re-emerged after the Second World War, there was an important change in the language in which rights were articulated; rights would no longer be recognized as being conferred by ‘God’, as was the case in the natural law tradition. Rather, ‘humanity’ or human dignity would become the foundation of human rights. Harvard sociologist Orlando Patterson noted this shift in language and linked it to changes in the way people thought about rights:

The shift from talk about natural rights to talk about human rights partly reflected the changed intellectual climate in which it was no longer felt necessary to derive rights from a god, especially a Christian God, or reason, or innate moral sense or nature.

Thus, one of the central reasons for this shift was that it was no longer necessary to speak of rights being derived from a god or ‘God’. But what accounts for this change?

Patterson provides one possible explanation: the conduct of the Nazi regime during the Second World War. In their acts of “moral bestiality” and sheer inhumanity, the Nazis challenged the concept not of the ‘natural’ but of the ‘human’ itself. Consistent with this view, Hannah Arendt observed in the aftermath of the War that the modus operandi of the Nazis was not to deny

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108 John Locke, as quoted in Shapiro, ibid.
110 Ibid.
111 Patterson, supra note 74 at 176.
112 Ibid. [emphasis in original].
113 Ibid. at 176-77.
rights to the person, but simply to deny the person.\textsuperscript{114} As a result, Arendt went on to posit “human dignity” as the new standard to protect humanity.\textsuperscript{115}

Another reason for this change in language was to avoid the perception that the rights document was attached to particular religions or cultural traditions. The Second World War involved most of the world community and, it was theorized, a new concept of fundamental rights ought to be expressed in universal terms. For example, the framers of the \textit{Universal Declaration},\textsuperscript{116} appointed to the monumental task of drafting a rights document that had cross-cultural appeal, worked to extend human rights beyond European legal traditions and sought out a universal language in the various world religious traditions.\textsuperscript{117} For broader appeal, it made sense for the framers to drop references to a god that could be associated with monotheistic religions or, more particularly, Judeo-Christian traditions.

This history of ideas in the rights tradition reveals another explanation as to why it was no longer necessary for rights to be conceptualized as being secured by ‘God’ in the Post-War Period. Since Locke and his contemporaries posited inalienable and universal rights that arose naturally from people’s common humanity, it was no longer necessary to posit a god to guarantee those rights. Instead, human dignity—possessed by all people—could provide the foundation of modern human rights:

The transformation of the notion of dignity into its modern sense was a gradual process ... . John Locke (1632-1704) developed the notion of a person’s identity as an ethical self. In Locke’s view, man’s rational capacity, consciousness, memory, pursuit of happiness, and responsibility before Divinity are the foundations of his individuality. Moreover, since these features of individuality are common to all men, they postulate a right of equality, relating not only to the preservation of life, but also to the exercise of political power.\textsuperscript{118}

As noted earlier by Ignatieff, a central component of natural law theory was that it provided a universal “vantage point” from which one could criticize human laws and conduct because it was derived from a source

\textsuperscript{114} Hannah Arendt, \textit{The Origins of Totalitarianism} (New York: Harcourt’s, 1978) at 295-96.


\textsuperscript{116} \textit{Supra} note 78.

\textsuperscript{117} Ishay, \textit{supra} note 67 at 17.

beyond those of the state.\textsuperscript{119} Similarly, in the Post-War Era human rights theorists found that same vantage point in common human dignity. Ultimately, there is no need for a notion of ‘God’ in this equation.\textsuperscript{120} If one respects human nature, then one must respect human rights.

Whatever the exact reason for the Post-War shift in language, the change in the conceptualization of rights was not paradigmatic. Modern rights are universal and inalienable because they are derived from something that is universal and inalienable in people: their humanity and dignity. This reasoning is perfectly congruent with the natural law tradition. Thus, Jacques Maritain, one of the primary drafters of the \textit{Universal Declaration},\textsuperscript{121} would write:

\begin{quote}
[The] human person possess[es] rights because of the very fact that it is a person, a whole, a master of itself and of its acts ... by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to a man because of the very fact that he is a man.\textsuperscript{122}
\end{quote}

Most importantly, however, each of these aspects of modern rights revolves around the same basic or organizing principle, also borrowed from the natural law tradition, that defined the rights themselves: People’s most important rights are not dependent upon the state but are derived from sources that are greater than, higher than, or \textit{supreme} to those of the state. The supremacy of God clause affirms the supremacy of these sources of rights—human dignity—while simultaneously speaking to their historical origins in the natural law tradition.

The skeptic might, at this stage, raise the concern that this analysis imports into the \textit{Charter}\textsuperscript{123} certain natural law concepts that do violence to its multicultural character, especially given its historical links with certain Christian intellectuals. In response to such valid concerns we would suggest

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\textsuperscript{119} Ignatieff, supra note 76 at 43.
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\textsuperscript{120} Perhaps in support of this point, it is worthwhile noting that as the Lockean notion of natural and universal human rights spread beyond the borders of England and found expression in other legal traditions, references to ‘God’ were much less prominent. For example, though the American \textit{Declaration of Independence} spoke of a “Creator”, the later ratified U.S. \textit{Bill of Rights} (supra note 16) made no mention of rights endowed by God. Similarly, the French \textit{Declaration of the Rights of Man and Citizen} made no mention of ‘God’ or deity, but simply proclaimed the “natural, unalienable, and sacred rights of man”: Patterson, supra note 74 at 162; Reilly, supra note 101 at 120-22. Similarly, when notions of universal rights were debated during the Canadian ratification debates, they were more often invoked as the “Rights of Man” than as rights endowed by “God.” See Ajzenstat \textit{et al.}, supra note 103 at 180, 191, 418-19.
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\textsuperscript{121} Supra note 78.
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\textsuperscript{122} Jacques Maritain, \textit{The Rights of Man and Natural Law}, trans. by Doris C. Anson (New York: Charles Scribner’s Sons, 1951) at 65.
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\textsuperscript{123} Supra note 1.
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that a proper understanding of the supremacy of God clause is no more denominational (or even religious) than modern human rights doctrine itself.124 The Charter125 and the Universal Declaration126 are human rights documents, not natural law documents. Though constitutional theorists now routinely invoke ‘human dignity’ rather than ‘God’ as the source of rights, the supremacy of God clause should not be understood as somehow privileging the natural law foundations of modern rights. Rather, the clause merely acknowledges them. It must be recalled here that the language of the Preamble strongly suggests an acknowledgment of Canada’s historical foundations (“… Canada is founded upon principles that recognize ….”127). Thus, the supremacy of God clause serves as an important reminder of the historic quest for the ‘vantage point’ or transcending source of law from which fundamental rights can be derived—a quest that began in the natural law tradition and continued in the modern era following the Second World War. The Preamble to the Charter recognizes this and asserts that the most fundamental human rights are not dependent upon Parliament or the state.

E. THE INTENT UNDERLYING INCLUSION AND THE SOLUTION TO A RELATED HISTORICAL PUZZLE

The interpretation of the supremacy of God clause advanced in this paper is not merely consistent with the historical development of human rights theory; it also appears to have been shared by those that advocated its inclusion in the Charter’s Preamble. It is, moreover, consistent with the constitutionalism of perhaps the Charter’s most important framer, Prime Minister Pierre Elliott Trudeau (including the text of his initial draft of the Preamble, which was proposed and published in 1968).128

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124 By the mid-1990s, over 160 states had endorsed the Universal Declaration (supra note 78) with all ‘new’ states providing similar recognitions. As anthropologist Kirsten Hastrup notes, such endorsements were “not taken as an acceptance of Westernization of cultural difference”: Kirsten Hastrup, “Collective Cultural Rights: Part of the Solution or Part of the Problem?” in Kirsten Hastrup, ed., Legal Cultures and Human Rights: The Challenge of Diversity (New York: Kluwer Law International, 2001) 169 at 171.

125 Supra note 1.

126 Supra note 78.

127 Charter, supra note 1 [emphasis added].

128 See Pierre Elliott Trudeau, A Canadian Charter of Human Rights (Ottawa: Queen’s Printer, 1968) [Trudeau, Charter of Human Rights]. Trudeau went on, in the discussion, to recognize the importance of the American and French Revolutions as well as the events after World War Two to the development of modern human rights.
The inclusion of a clause declaring that “… Canada is founded upon principles that recognize the supremacy of God and the rule of law” was accomplished by an amendment to the Charter proposed by Liberal Member of Parliament Roch Pinard, and seconded by the then Minister of Justice, Jean Chrétien, on 23 April 1981. Many commentators have been perplexed as to why the Charter’s greatest advocate, Prime Minister Pierre Trudeau, agreed to this inclusion, given his tendency towards secular politics. For example, historian George Egerton writes:

Indeed, the language of the preamble seemed somewhat anachronistic in an increasingly secular age that had witnessed the retrenchment of religion in public life, and where Trudeau and his constitutional advisors had started out with the intention to separate politics from religion. Given this assumption about Trudeau’s politics, Egerton resolved the puzzle by concluding that the inclusion of the supremacy of God clause was not principled, but rather a “political calculation” by Trudeau to garner support for the Charter.

But the mystery as to why Trudeau agreed to the inclusion of such a provision is best explained not by shrewd political expediency, but by Trudeau’s own theory of constitutionalism, which bears a remarkable similarity to the theory developed above. Though Trudeau was a proponent of secular constitutionalism, he was also a “moral universalist” on the issue of rights. His vision for the Charter was that it would unite Canadians under a “set of values common to all”. Stemming from this universalism was Trudeau’s commitment to universal rights, influenced by the notion of

129 Charter, supra note 1.
130 Supra note 1.
132 Interestingly, a recent work by Max and Monique Nemni that draws heavily upon Trudeau’s early papers illustrates he was far from a secular thinker in his younger years, very much dedicated to his Catholic religious teachings well into his twenties. See Max & Monique Nemni, Young Trudeau: Son of Quebec, Father of Canada, 1919-1944, vol. 1 (Toronto: McClelland & Stewart, 2006).
133 Egerton, “Trudeau”, supra note 9 at 91.
134 Ibid. at 107.
136 Trudeau’s comments as reprinted Ibid. at 81.
inalienable rights embodied in the documents of the American and French Revolutions.\textsuperscript{137} Thus, quoting Thomas Jefferson, he wrote that “[n]othing then is unchangeable but the inherent and inalienable rights of man.”\textsuperscript{138} In other words, Trudeau believed, as did the American framers, that rights were natural, universal, inalienable, and transcended the positivist machinations of the state:

The very adoption of a constitutional charter is in keeping with the purest liberalism, according to which all members of a civil society enjoy certain fundamental, inalienable rights and cannot be deprived of them by any collectivity (state or government) or on behalf of any collectivity (nation, ethnic group, religious group, or other). To use Maritain’s phrase, they are "human personalities," they are beings of a moral order—that is, free and equal among themselves, each having absolute dignity and infinite value. As such, they transcend the accidents of place and time, and partake in the essence of universal Humanity. They are therefore not coercible by any ancestral tradition, being vassals neither of their race, nor to their religion, nor to their condition of birth, nor to their collective history.\textsuperscript{139}

Here, in recognizing the inalienable and natural character of human rights, Trudeau invokes Maritain, one of the fathers of the \textit{Universal Declaration},\textsuperscript{140} who understood the importance of the natural law tradition to the development of human rights.

These aspects of Trudeau’s constitutionalism might serve to solve the above historical puzzle. If, as we have argued, the supremacy of God clause recognizes and affirms the historical premise of both natural law and modern human rights—that people possess rights that are derived not from the state, but are endowed naturally—then this accords perfectly with Trudeau’s own constitutional politics.

Further support for this explanation is evident if one returns to the earliest portion of the \textit{Charter’s}\textsuperscript{141} documentary history. In the preambular statement to the first draft of the \textit{Charter} tabled by Trudeau at the First Ministers Conference in 1968, Trudeau clearly recognized the importance of natural law and rights in the development of modern human rights:

\textsuperscript{137} Laselva, supra note 135 at 81.


\textsuperscript{139} Pierre Elliott Trudeau, as quoted in \textit{The Essential Trudeau}, Ron Graham, ed. (Toronto: McClelland & Stewart, 1998) at 80.

\textsuperscript{140} \textit{Supra} note 78.

\textsuperscript{141} \textit{Supra} note 1.
Interest in human rights is as old as civilization itself. Once his primary requirements of security, shelter and nourishment have been satisfied, man has distinguished himself from other animals by directing his attention to those matters which affect his individual dignity.

In ancient times, and for centuries thereafter, these rights were known as “natural” rights; rights which all men were entitled because they are endowed with a moral and rational nature. The denial of such rights was regarded as an affront to “natural” law—those elementary principles of justice which apply to all human beings by virtue of their common possession of the capacity to reason. These natural human rights were the origins of the western world’s more modern concepts of individual freedom and equality.

Cicero said of natural law that it was “unchanging and everlasting,” that it was “one eternal and unchangeable law … valid for all nations and for all times.” In the Middle Ages, St. Thomas Aquinas emphasized that natural law was a law superior to man made laws and that as a result all rulers were themselves subject to it. The Reformation brought sharply to the fore the need for protection of freedom of religious belief.

As the concept of the social contract theory of government developed in the 18th century, still greater emphasis came to be given to the rights of the individual. Should a government fail to respect natural rights, wrote Locke and Rousseau, then disobedience and rebellion were justified. Thus was borne the modern notion of human rights.142

This passage illustrates clearly that from the very beginning, Trudeau fully understood and was willing to recognize the historical sources of rights that he would later seek to codify in the Charter. 143 This longer preambular statement under the heading “The Rights of the Individual” is essential to understanding the reference to the “supremacy of God” included in the Charter’s final draft. Both the initial preambular statement and the final inclusion of the supremacy of God clause speak to the historical sources of rights in the natural law tradition. In a sense, the supremacy of God clause retains its original preambular meaning as articulated by Trudeau at the Charter’s inception. Once one understands this, Trudeau’s agreement to include the clause might be viewed not as political calculation, but as a move that accorded with his own theory of constitutionalism and understanding of the historical origins of rights.

This understanding of the supremacy of God clause is supported not only by Trudeau’s constitutionalism but also by the views of many of the Members

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142 Trudeau, Charter of Human Rights, supra note 128. Trudeau went on, in the discussion, to recognize the importance of the American and French Revolutions as well as the events after World War Two to the development of modern human rights.

143 Supra note 1.
of Parliament that supported the inclusion of the reference. Jake Epp, member for Provencher, Manitoba, himself proposed amending the Preamble to include language that more closely (and deliberately) followed that of the Preamble to the Canadian *Bill of Rights*.\(^{144}\) An examination of the debates concerning this amendment indicates that Epp and other advocates like M.P.s David Crombie and (Liberal) M.P. Walter McLean also understood the clause to recognize and affirm that rights in the *Charter*\(^{145}\) are natural inalienable rights and do not derive from the workings of the state. Thus, in addressing the House of Commons on February 17, 1981 on his amendment to add a reference to the “supremacy of God” in the *Charter*, Epp stated:

> What does this charter do? Where does it start from? This charter starts from the premise that the government will grant us rights. That is where the charter starts and that is where the charter is wrong. My rights, our rights in this House, the rights of Canadians, are not granted by any government . . .

> It is for that reason that we moved an amendment, not only because the Right Hon. John Diefenbaker, the then leader of this party and the prime minister of this country, had entrenched in the Canadian Bill of Rights, but because the philosophy underlying the charter was right. What it did was to say that every human being created in the image of God has certain inalienable rights.\(^{146}\)

On the same point McLean remarked:

> On the matter of rights, we come to a question of philosophy which is important for Canadians to address, both in terms of personal worth and in terms of the focus by which they approach life in our nation.

> Let me suggest that the discussion around whether or not our charter will include a reference to God is one which goes to the nub of the issue in terms of the point where we begin. Do we begin with inalienable rights or do we begin with rights which are somehow granted by the government?\(^{147}\)

As noted by historian George Egerton, David Crombie provided similar arguments:

Crombie argued that it was necessary to set out in a preamble the ‘fundamental principles’ that gave legitimacy to the specific rights to be included. A reference to God, the dignity inherent to the human person, and the moral and spiritual basis of

\(^{144}\) *Supra* note 46.

\(^{145}\) *Supra* note 1.

\(^{146}\) *House of Commons Debates*, 7 (17 February 1981) at 7386 (Hon. Jake Epp).

law would make it clear that rights derived from God, tradition and history were merely ‘affirmed’ and maintained by governments—not 'given'.

As already stated, the language of the supremacy of God clause that was included in the Charter’s Preamble mirrors a similar reference in the Preamble to the Bill of Rights, which states:

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions; Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law.

Given the similarity of language, it is also worthwhile to note what was said by the relevant political actors in order to justify this earlier reference to the “supremacy of God”. On this point, similar to the debates in 1981, those that advocated for the “supremacy of God” reference in the Bill of Rights also spoke about the nature and sources of rights. Though there were certainly disagreements among scholars and drafters of the Bill of Rights—such as between F.R. Scott and Paul Martin Sr.—as to whether dignity or ‘God’ should be the main emphasis of the Preamble, implicit in the debate was a consensus that the purpose of the Preamble was the assertion that rights were not given by the state but derived from other sources.

Thus, Senator Arthur Roebuck, the Liberal Party’s leading advocate of human rights at the time, said of the reference: “Such rights are not created by men, be they ever so numerous, for the benefit of other men, nor are they the gift of government.”

The foregoing statements and discussions among the political actors that supported the inclusion of a reference to ‘God’ point to a belief that rights are not contingent upon the benevolence of the state, but are natural and inalienable. This fact provides further proof that the supremacy of God clause indeed affirms this very principle in the Charter. Add to this the original draft of the Charter and its Preamble, as well as Trudeau’s theory of constitutionalism, and a strong case emerges for the proposition that the

148 Egerton, “Trudeau”, supra note 9 at 102-03.

149 Supra note 1.

150 Supra note 46.


152 As quoted in George Egerton, “Entering the Age of Human Rights: Religion, Politics, and Canadian Liberalism, 1945-50” (2004) 3 Canadian Historical Review 85 at 475. See also Egerton’s note that Roebuck was a leading human rights advocate: Egerton, “Writing”, ibid. at 5.
supremacy of God clause does in fact recognize the basic principle that fundamental rights are not contingent upon the mere whims of state actors, but are derived from other, more ‘supreme’ sources, including notions of common human dignity.

IV. THE SUPREMACY OF GOD CLAUSE AND ITS IMPLICATIONS

A. NORMATIVE IMPLICATIONS: THE CHARTER AS SOCIAL CONTRACT

The notion that the supremacy of God clause has something to say about the sources of law expressed in the Charter\textsuperscript{153} is not entirely new. Commentators who have embarked on a more attentive analysis of the Charter’s Preamble, such as David Brown,\textsuperscript{154} Lorne Sossin,\textsuperscript{155} and Bruce Ryder,\textsuperscript{156} have come to similar conclusions. For example, Lorne Sossin writes:

If the supremacy of God is seen as the place where normative claims about Charter rights take on moral legitimacy (again, the example I focus on in this essay is the concept of human dignity), one might well question what remains of God at all in this analysis. Is not God, cleansed of all religious particularity, simply the embodiment of general and metaphysical claims about the sources and scope of law? The answer, I think, is probably “yes”. Moreover, I would argue that this is precisely the reading of the term most compatible with the values of the Charter.\textsuperscript{157}

Sossin argues that the supremacy of God clause works to reconcile the moral and secular elements of the Charter while speaking to the sources of law. Bruce Ryder offers a similar analysis. For him, the “supremacy of God” also concerns reconciling secular and religious values, but, in addition, invokes sources of meaning beyond the positivist processes of the state:

The preamble represents a kind of secular humility, a recognition that there are other truths, other sources of competing world-views, of normative and authoritative communities that are profound sources of meaning in people’s lives that ought to be nurtured as counter-balances to state authority.\textsuperscript{158}

\textsuperscript{153} Supra note 1.

\textsuperscript{154} Brown, supra note 9 at 563.

\textsuperscript{155} Sossin, supra note 8 at 236.


\textsuperscript{157} Sossin, supra note 8 at 236.

\textsuperscript{158} Ryder, supra note 156 at 177.
We agree with Sossin and Ryder when they say that the supremacy of God clause has implications for sources of meaning beyond the state. However, this likely has more to do with a historical rather than metaphysical analysis. Indeed, in this paper we have argued that the supremacy of God clause draws its meaning from sources beyond the state, a principle that developed out of the natural law tradition in the history of rights.

But more than history is at stake here. Given that the Preamble to the Charter is where “the political theory which the Act embodies” is found, it is inevitable that the proper meaning of the supremacy of God clause must have implications for the normative and theoretical understanding of the Charter itself. Thus, once it is understood that the supremacy of God clause affirms that an individual’s rights are not endowed by the state, but are, in fact, pre-existing, then our conceptualization of the rights in the Charter must be refined accordingly. In this regard, the comments of David Brown are helpful:

Now the Charter is very much the product of positive law; but, in addition to setting out some political principles particular to Canadian government, the Charter purports to articulate certain universal principles and import them into Canadian law … . By pointing to certain universal freedoms which positive law is required to protect, the Charter (intentionally or unwittingly) draws on sources which lie outside of positive law. Part of the task which Canadian courts must undertake when interpreting the content of those universal freedoms is to explore and understand the principles which flow from those other sources. Theology and philosophy are those other sources; faith and reason are the methods by which their principles are discerned.160

Again, we agree in part with these remarks. Certainly, as Brown notes, our understanding of the supremacy of God clause implicates sources external to the positive laws of Parliament and the Charter itself. However, these sources are not so expansive as to concern theology or philosophy in general, but merely the notion of natural human dignity that is inherent in the modern form of human rights. This is the same notion of human dignity that the Supreme Court itself has recognized as being of “fundamental importance”161 and that “finds expression in almost every right and freedom guaranteed in the Charter.”162

159 Supra note 1.

160 Brown, supra note 9 at 563.

161 See the comments of Cory J. in Kindler, supra note 22 at 804-05.

162 Morgentaler, supra note 15 at 166, Wilson J. See also Hill v. Church of Scientology of Toronto, [1995] 2 S.C.R. 1130 at para. 120, 24 O.R. (3d) 865 (“Although it is not specifically mentioned in the Charter, the good reputation of the individual represents and reflects the
In sum, the conception of the supremacy of God clause this paper elaborates does not have radical implications for how we understand Canadian constitutionalism, but it does provide an essential piece to the overall normative framework of the Charter. Once we understand that the supremacy of God clause affirms that people possess inalienable rights derived from sources beyond the Charter itself, the rights within the Charter must be understood as positive rights intending to protect those more fundamental rights that pre-exist constitutional protections. The Charter, properly understood, is a modern example of a constitutionalized social contract. That is, it embodies a compromise between the people who possess rights and the Government, which the people collectively allow to enforce and protect those rights by enforcing and abiding by the Charter.

These ideas are not so far from what the Supreme Court has itself said about the Charter from time to time. In Vriend v. Alberta, Justice Iacobucci, writing on behalf of the majority of the Court, remarked that the Charter is “concerned with the promotion and protection of inherent dignity and inalienable rights.” Similarly, as Brown has pointed out, the Supreme Court in pre-Charter jurisprudence treated certain rights and freedoms as “original” and prior to any positive laws of the state. In Saumur v. Quebec (City), Justice Rand stated:

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates.

innate dignity of the individual, a concept which underlies all the Charter rights” [emphasis added]).

163 Supra note 1.
164 Supra note 19.
165 Ibid. at para. 153.
166 See David Brown’s discussion of religious freedom as a natural right in various pre-Charter decisions of the Supreme Court in Brown, supra note 9 at 559.
168 Ibid. at 329.
Furthermore, members of the Court have, in the past, said that the Charter embodies a “social contract”. More recently, in Sauvé v. Canada, the Chief Justice stated that “social contract theory” was “enshrined in the Charter”. Even more relevant for the instant discussion, however, are the comments of Justice Gonthier in Sauvé, in which social contract theory is linked to the “rule of law” in the Charter’s Preamble:

The social contract is the theoretical basis upon which the exercise of rights and participation in the democratic process rests. In my view, the social contract necessarily relies upon the acceptance of the rule of law and civic responsibility and on society’s need to promote the same. The preamble to the Charter establishes that “… Canada is founded upon principles that recognize the supremacy of God and the rule of law … .”

The supremacy of God clause also points towards a theoretical understanding of the Charter as embodying a social contract, with positive protections for the rights and freedoms of citizens. This link between the meaning of the “supremacy of God” and the “rule of law” in the Preamble to the Charter provides an explanation, both normatively and theoretically, for their inclusion, side by side, in the Preamble. Thus, this paper’s analysis harmonizes the meaning of both the “supremacy and God” and “rule of law” and allows them to stand not in opposition, but in conjunction to provide the theory upon which the Charter is based.

Unfortunately, these brief comments of the Supreme Court have never been followed with a more thorough exploration. What is needed is a full discussion of the normative and theoretical implications of the supremacy of God clause in respect of the proper conceptualization of the Charter as a whole, and the substantive provisions contained therein. In actuality, the

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169 Supra note 1.


172 Ibid. at para. 115.

173 Former Supreme Court Justice Iacobucci has written on the importance of commentators providing guidance to the courts on the theoretical and normative underpinning of Canadian constitutionalism:

Legal theorists, philosophers, and political scientists all have written volumes about the proper role of rights in the democratic state and, in each instance, have provided valuable insights into the best approach to constitutional decision-making. The increased consideration of academic commentary enhances the quality of constitutional adjudication by ensuring that courts are aware of the various theoretical justifications for the protection of certain rights and freedoms … .
revelation that the *Charter*\(^{174}\) embodies a modern form of social contract expressed in a constitutional document provides a normative explanation for many of the *Charter’s* key provisions, in particular section 1. Section 1 embodies the deep trust between the government and the people—the constitutional promise fundamental to Canadian constitutionalism: the government will respect the rights of people, only limiting them in certain circumstances. Thus, our analysis provides a normative theory, beyond the language and text of section 1, upon which to base the Court’s balancing of interests under *Oakes*.\(^{175}\)

B. SUBSTANTIVE IMPLICATIONS FOR THE LIMITATION OF RIGHTS UNDER SECTION 1

If one speaks of a ‘deep trust’ between the rights holders and government embodied under section 1 of the *Charter*, the question is raised as to how and when that deep trust is betrayed. The understanding of the supremacy of God clause discussed in this paper not only explains the social contract underlying section 1, but also has important *substantive* implications for the manner in which that section ought to be applied by the courts in certain situations. If the rights in the *Charter* purport to represent, in general, universal and inalienable rights derived from greater sources beyond the state, then the state cannot completely abrogate or take those rights away, no matter how pressing or substantial the state objective. Put most simply, *what the state did not bestow, it may never fully take away*.

In other words, our understanding of the supremacy of God clause and the *Charter* as a whole, including the deep trust embodied in section 1, necessitates an outer boundary on the extent to which *Charter* rights can be justifiably limited. This interpretation of section 1 would prevent the courts from ever condoning or approving of a government measure that completely removes or abrogates a right, even where the *Oakes* test might have led to the opposite result. Thus, section 1 allows for limits, but cannot be used to justify a more oppressive treatment of rights, even in times of national peril or crisis. In these instances, Parliament would be forced to invoke the ‘notwithstanding clause’, which is enshrined in section 33 of the *Charter*, in order to validly enact such measures.

Instances where *Charter* rights might be completely abrogated or denied, but might have still passed the *Oakes* test, would (thankfully) be rare. Such

\(^{174}\) Supra note 1.

\(^{175}\) Supra note 26.
cases are most likely to arise during times of intense political crisis. Under such circumstances, the fog of popular (and governmental) panic has historically proven capable of influencing courts into permitting gross violations of constitutional rights on the basis that the dangers being faced by the state were so pressing, monumental, and imminent that only extreme measures (including the complete negation of rights for entire classes of people) could adequately protect the state and its citizens. As we have sought to establish, the supremacy of God clause signifies that the Charter rests on an important principle: that fundamental rights are universal and inalienable, being derived from sources beyond the state. For this reason, even under such exceptional circumstances, the complete denial, abrogation, or negation of Charter rights cannot be justified under section 1.

For example, this interpretation of section 1 would prevent judicial countenance of a gross denial of rights, such as was given by the United States Supreme Court in Korematsu v. United States. In Korematsu, the Supreme Court assessed the constitutionality of a Japanese-American citizen’s conviction based on his failure to comply with a Presidential Executive Order and several congressional statutes. The impugned Executive Order and legislation gave the United States military the authority to exclude (and then incarcerate) citizens of Japanese ancestry from areas deemed critical to national defence and potentially vulnerable to espionage. According to the majority of the Court, in a decision authored by Justice Black, the conviction of Mr. Korematsu—who faced forcible confinement along with thousands of fellow American citizens of Japanese origin, without being suspected, charged, or tried for any crime—did not violate his constitutional equality or due process rights. This was so even though the Court recognized that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and that “courts must subject them to the most rigid scrutiny.”

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176 Supra note 1.

177 323 U.S. 214 (1944) [Korematsu]. The Canadian government also limited the rights of Japanese-Canadians in various ways during the Second World War, as illustrated in Ref Re Persons of Japanese Race, [1946] S.C.R. 248, [1946] 3 D.L.R. 321 [cited to S.C.R]. In that case, a majority of the Supreme Court upheld the unrestricted right of Parliament to take steps “necessary for the security, defence, peace, order and welfare of Canada” (ibid. at 277), which included federal orders-in-council that restricted the liberty and mobility of Japanese-Canadians during the War. But, the Supreme Court of Canada did not have the benefit of a bill of rights to counterbalance state interests at that time. Thus, the reasoning in Korematsu is more informative for our purposes, as the U.S. Supreme Court had to resolve a confrontation between state interests and an entrenched bill of rights.

178 Korematsu, ibid. at 216.

179 Ibid.
Despite deploying its most exacting standard of review, the majority of the Supreme Court upheld Mr. Korematsu’s conviction, as well as the constitutionality of the impugned Executive Order and legislation as being “necessary because of the presence of an unascertained number of disloyal members of the group.” Justice Black further justified the impugned government action in the following terms:

[W]e are not unmindful of the hardships imposed by it upon a large group of American citizens … . But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. The opinion of Justice Jackson, in dissent, is most telling in retrospect. Justice Jackson recognized the reality that, in times of war, it is not generally within the competence of the Court to second-guess and review the decisions of the executive branch of government or the military in their defence of the nation. However, he was also of the view that, even during such times of national peril, the Court should not agree to sanction actions that on their face completely abrogate or deny constitutional freedoms for entire classes of people. In this regard, he held:

[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes … . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a

180 Ibid. at 218.
181 Ibid. at 219-20.
generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.\textsuperscript{182}

The dissenting reasons of Justice Jackson vividly illustrate the manner in which the majority in \textit{Korematsu}\textsuperscript{183} adopted an overly (though understandably) deferential approach to its interpretation of the American Constitution, and sanctioned a gross violation of rights that would never have been countenanced during times of peace.

In our view, if the Supreme Court of Canada was faced with a similar situation today, where an entire class of people were forcibly confined without due process by the state, the Court should not sanction these measures through a successful justification analysis under section 1. Rather, the legislature should be directed to invoke section 33\textsuperscript{184} of the \textit{Charter}.\textsuperscript{185}

Requiring the government to invoke section 33 would necessitate legislation, adding a level of democratic approval for the contemplated measures. The legislative process would enhance public exposure, which would hopefully stimulate a national or provincial debate on the necessity of abrogating \textit{Charter} rights in order to respond the crisis at issue. Additionally, the five-year limitation on the invocation of section 33 would prevent the measures from applying indefinitely without further democratic debate. Finally, heeding Justice Jackson’s “loaded weapon” comment in \textit{Korematsu}, forcing Parliament or the legislature(s) at issue to invoke section 33 in order to fully abrogate \textit{Charter} rights would also avoid importing a potentially harmful precedent into the fabric of \textit{Charter} jurisprudence.

At this point it might be argued that, with or without this analysis, the Supreme Court of Canada (or any other Canadian court) would never find oppressive laws such as those at issue in \textit{Korematsu} justifiable under \textit{Oakes}.\textsuperscript{186}

\begin{footnotesize}
\begin{enumerate}
\item Ibid. at 246 [emphasis added].
\item Ibid.
\item Section 33 of the \textit{Charter} (supra note 1) states (in part):
\begin{enumerate}
\item Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this \textit{Charter}.
\item An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this \textit{Charter} referred to in the declaration.
\item A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
\end{enumerate}
\item Supra note 1.
\item Supra note 26.
\end{enumerate}
\end{footnotesize}
This is a questionable assumption. First, we would again point out that the U.S. Supreme Court in *Korematsu*¹⁸⁷ reviewed the impugned rights violation using the most exacting standard of scrutiny available in its jurisprudence. This “strict scrutiny” standard requires that, in order to pass constitutional muster, apparent breaches of rights must further a “compelling governmental interest” and the means chosen must be “narrowly tailored.”¹⁸⁸ Thus, it is far from fanciful to suggest that, under times of particular crisis, even under the *Oakes*¹⁸⁹ test, Canadian courts might very similarly justify gross violations of rights under section 1.

Second, this assumption ignores what the Supreme Court of Canada has already stated in previous decisions. Indeed, the seeds for a future Canadian version of *Korematsu* may have already been sown in the jurisprudence of the Supreme Court on the interpretation of section 7 of the *Charter*,¹⁹⁰ which enshrines “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.” In its seminal decision in *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*,¹⁹¹ the Supreme Court expressly contemplated that section 7 rights, which already include a balancing of individual versus collective/public interests,¹⁹² could be limited by the state through section 1 under particularly dire circumstances:

> Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

This is so for two reasons. First, the rights protected by s. 7—life, liberty, and security of the person—are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society.¹⁹³

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¹⁸⁷ *Supra* note 177.

¹⁸⁸ See *e.g.* *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) at 274.

¹⁸⁹ *Supra* note 26.

¹⁹⁰ *Supra* note 1.


As particular examples of when this sort of limitation might occur, the Supreme Court has explicitly theorized that section 1 might operate to permit (in exceptional circumstances) the extradition/deportation of individuals facing the death penalty or a substantial risk of torture. In *Suresh v. Canada (Minister of Citizenship and Immigration)*, the Supreme Court held that in order to conform to the requirements of sections 1 and 7 of the *Charter*, the Minister of Justice should generally decline to deport refugees where, on the evidence, there is a substantial risk of torture. However, the Court expressly contemplated the sanctioning of torture in the future, and left open the possibility that the Minister may indeed deport individuals facing a substantial risk of torture under “exceptional circumstances”. Similarly, in *United States v. Burns*, the Supreme Court found that the *Charter* prohibited the Minister of Justice from extraditing individuals to face capital punishment in a foreign country. However, despite noting that capital punishment was “final and irreversible”, the Court also indicated extradition to face capital punishment might be possible under section 1 where government objectives “were so pressing” as to justify extradition. Although the Court in *Burns* declined to speculate as to the nature of these exceptional cases, the possibility of extradition to face the death penalty within the confines of the *Charter* was not foreclosed.

Recalling the words of Justice Jackson, dissenting in *Korematsu*, it might be argued that by contemplating, even in exceptional circumstances, the complete abrogation of fundamental rights, the Court has articulated a principle that “… lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.” The analysis advanced here would disarm this weapon for good. The Court’s dicta in *Burns* and *Suresh* offer possible predictions of government conduct (i.e., capital punishment or torture) that could represent the complete abrogation of important *Charter* rights. This approach to section 1, based on a proper understanding of the supremacy of God clause, would likely prohibit torture or capital punishment in *any* circumstance, including cases involving the “exceptional conditions” that were catalogued by the Court in the *Motor Vehicle Reference*. This kind of state action would appear to cross the outer

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195 Supra note 1.


198 Supra note 177.


200 Supra note 191.
boundary of section 1 by completely removing or abrogating rights, rather than merely limiting them.

Admittedly, government sanctioned torture or capital punishment would seem to represent easy illustrations of cases where rights are abrogated, negated, or completely denied. Further, determining when rights are ‘negated’ or ‘abrogated’ by government, such that there can be no justification under section 1, is difficult. Since each Charter right has unique characteristics and application in broader Canadian society, this analysis must be done on a case by case basis. What is clear, in any case, is that there is an outer limit on the degree and extent of restrictions on Charter rights permissible under section 1, no matter how compelling the asserted justifications for such restrictions might appear to be. Formulating a clear and cogent test for identifying these limits remains a key challenge.

Some guidance on this point may be found abroad. For example, the Interim Constitution of South Africa provided that the South African government “shall not negate the essential content” of a right:

33(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation:

(a) shall be permissible only to the extent that it is:

   (i) reasonable; and

   (ii) justifiable in an open and democratic society based on freedom and equality; and

(b) shall not negate the essential content of the right in question

Though the Interim Constitution is now repealed, the South African Constitutional Court addressed the meaning of section 33 in its well known decision on capital punishment in State v. Makwanyane & Anor. In Makwanyane, the Court had to decide whether the capital punishment violated, inter alia, the right to life under the Interim Constitution, and, if so, whether such a violation was justifiable under section 33. The Court found that capital punishment represented an unreasonable and unjustifiable violation of the right to life under subsection 33(1)(a), and thus did not pronounce definitively on the meaning of subsection 33(1)(b). However, a number of judges did offer some thoughts on the possible interpretation of that subsection in obiter dicta.

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201 Supra note 1.
203 Ibid., s. 33(1) [emphasis added].
Interpreting subsection 33(1)(b) involved determining when the “essential content” of a right has been negated. Two schools of thought emerged from the various judicial opinions in *Makwanyane* on this point. Justice Chaskalson (President of the Court), who wrote for the majority, discussed a “subjective approach”, whereby the judicial determination of whether the “essential content” of a right has been negated is done from the perspective of the individual affected. But Justice Chaskalson did not fully endorse this approach, leaving it for a future case. Justice Kentridge, who agreed with the majority’s finding on capital punishment, went on to provide her own *obiter* comments on subsection 33(1)(b), expressing concerns over this approach:

I do not find this so-called subjective interpretation convincing. It cannot accommodate the many State measures which must be necessary and justifiable in any society, such as long-term imprisonment for serious crimes. It is true that a prisoner, even one held under secure conditions, retains some residual rights. See Whittaker v Roos 1912 A.D. 92, 122-3, per Innes J. But I find it difficult to comprehend how, on any rational use of language, it could be denied that while he is in prison the essence of the prisoner's right to freedom (section 11), of his or her right to leave the Republic (section 20) or to pursue a livelihood anywhere in the national territory (section 26) is not negated. Many other examples could be given which in my view rule out the subjective approach of the sub-section. Kentridge J. preferred to adopt the “objective” approach to determining whether the essence of a right had been negated:

What must pass scrutiny under section 33 is the limitation contained in the law of general application. This means in my opinion that it is the law itself which must pass the test. On this basis a law providing for imprisonment for defined criminal conduct, cannot be said to negate the essential content of the right to freedom, *whatever the effect on the individual prisoner serving a sentence under that law*. Similarly such a law would not negate the essential content of the right of free movement. Those are general rights entrenched in the Constitution, and a law which preserves those rights for most people at most times does not negate the essential content of those rights. An example of a law which might negate the essence of the right to freedom of movement would be a law (such as the Departure from the Republic Act, 1955) under which no person may leave the Republic without the express or implied consent of the Government. Another possible example could relate to the right of freedom of speech. A law providing for general censorship of all publications would on the face of it negate the essence of the right to freedom of speech. 207

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There is some merit to the conceptual dichotomy set out in *Makwanyane*,\textsuperscript{208} and it may be useful for deciding when rights are impermissibly negated or abrogated under the *Charter*.\textsuperscript{209} However, there are problems with both the subjective and objective approaches that were considered by the Constitutional Court.

For example, the “objective” approach may serve to leave deeply oppressive state measures in place. Justice Kentridge’s finding that “a law which preserves … rights for most people at most times does not negate the essential content of those rights” imports an ill-advised majoritarian aspect to the analysis, at least in the Canadian context. Looking again to *Korematsu*,\textsuperscript{210} the laws at issue in that case preserved “the rights of most people at most times”, while still removing any semblance of due process or equal treatment for an entire class of citizens based on ethnicity. This cannot be the right approach.

There are also concerns about the subjective approach. What conceptual tool can be used to assess when a particular right has been abrogated? If individual rights are treated differently, as we believe they ought to be, how can sense be made of their differing ‘negation points’ in practice? What test can be used to determine when, say, the right to free expression as opposed to the right to equality has been abrogated? Even if the subjective approach is adopted, a workable theory of abrogation of rights must be developed that can sensibly and reasonably determine when an individual *Charter* right will be abrogated. The elucidation of such a theory is clearly beyond the scope of this paper.

Putting aside these brief observations on the implications of the supremacy of God clause for our understanding of section 1, there is still much more to explore here. For example, this analysis also has implications for other key provisions of the *Charter*, such as section 33—the ‘notwithstanding clause’—which also reflects aspects of the compromise between those subject to the *Charter* and government. There is also a need to explain which rights in the *Charter* purport to codify positivist versions of pre-existing natural rights, as we have argued, and which purport to codify other ‘political rights’, such as the right to vote or minority language schooling provisions. The former are more likely to include freedom of speech and conscience, liberty, and the right to equality, while the latter are necessary for the proper functioning of government, or embody certain political and historical compromises. Of course, these points of discussion deserve much greater attention than can be provided here. We raise these issues not with the intention of providing an

\textsuperscript{208} *Supra* note 204.

\textsuperscript{209} *Supra* note 1.

\textsuperscript{210} *Supra* note 177.
authoritative analysis, but simply to point out some of the further implications of a proper understanding of the supremacy of God clause and the *Charter*\textsuperscript{211} itself.

V. CONCLUSIONS

To echo the words of Sanford Levinson, “for too long” scholars and the Supreme Court of Canada have treated the reference to the “supremacy of God” in the *Charter*’s Preamble like an “embarrassing relative” to be ignored or marginalized.\textsuperscript{212} This fate is not deserved. The supremacy of God clause should not be understood as a creation of an expedient political calculus. Rather, it should be seen to embody an essential piece of the *Charter*’s origins. In short, the supremacy of God clause points to the historical sources of the rights codified in the *Charter* and affirms the fundamental principle that those substantive provisions purport to represent natural and inalienable rights that are derived from sources beyond the positivist machinations of the state.

It is time to finally take a sober and honest look at the role of the supremacy of God clause in Canadian constitutionalism. If, as the Supreme Court has held, the Preamble articulates the theory upon which the *Charter* is based, then a proper understanding of the supremacy of God clause must necessarily enrich our understanding of the nature of the *Charter* itself. In our view, the supremacy of God clause tells us that the rights in the *Charter* ought to be understood as positive rights that purport to codify and protect more fundamental natural and inalienable rights that pre-exist constitutional protection. Thus, the *Charter* is a modern constitutional social contract with certain explicit provisions, in particular section 1, embodying the solemn trust and compromise between the government and the people, the office holders and the rights holders. Section 1, when read in light of the supremacy of God clause, embodies that solemn trust by acting as a final bulwark against oppressive government conduct during times of political crisis.

Our analysis of the supremacy of God clause leads to a richer and more complete understanding of the *Charter*. It also restores the dignity and importance of the supremacy of God clause in the broader development of Canada’s constitutional tradition. Though there is still much more work to be done and much more territory to explore in this regard, we hope that the story told here has taken Canadians further, if only a few steps, down that “grand entrance hall to the castle of the Constitution”.\textsuperscript{213}

\textsuperscript{211} Supra note 1.

\textsuperscript{212} We borrow this from Levinson’s work on the Second Amendment. See Levinson, *supra* note 17 at 658.
