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**THE EMBARRASSING PREAMBLE? UNDERSTANDING THE**

**“SUPREMACY OF GOD” AND THE *CHARTER***

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I. INTRODUCTION

At the outset of Canada’s most venerated human rights document—the

*Canadian Charter of Rights and Freedoms*1—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”,2 wherein “the political theory which the Act embodies” is

found.3 Accordingly, the “rule of law” has played a rather remarkable role in

the jurisprudence of the courts, most notably the Supreme Court.4 It has been

called a “fundamental postulate” of our “constitutional structure”,5 a notion

that that comprises “indispensable elements of civilized life”,6 and a principle

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representing the views or opinions of the Department of Justice or the Government of Canada.

1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.),

1982, c. 11 [*Charter*].

2 *Reference re Remuneration of Judges of the Provincial Court (P.E.I.)*, [1997] 3 S.C.R 3

at para. 109, 150 D.L.R. (4th) 577 [*Provincial Court Judges Reference*].

3 *Ibid*. at para. 95. Lamer C.J.C. here quotes Rand J. from his judgment in *Switzman v.*

*Elbling*, [1957] S.C.R. 285, 7 D.L.R. (2d) 337 [*Switzman* cited to S.C.R.].

4 See *e.g. Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, 19 D.L.R. (4th) 1

[*Manitoba Language Reference* cited to S.C.R.].

5 *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 142, 16 D.L.R. (2d) 689. See also *Manitoba*

*Language Reference*, *ibid*.

6 *Manitoba Language Reference*, *ibid.* at 749.

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with “profound constitutional and political significance.”7 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.8 Further, the few

times it has received attention from courts and academics, it has been

consistently marginalized.9 For Professor Peter Hogg, the supremacy of God

clause provides little assistance in understanding the Constitution.10 For

Professor Dale Gibson, “its value [is to be] … seriously doubted.”11 To others

it is a “contradiction”,12 a “dead letter”13 stemming from “inglorious origins”.14

And to Justice Bertha Wilson, the clause is possibly in conflict with values of

a “free and democratic society”.15

7 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 71, 161 D.L.R. (4th) 385.

8 Lorne Sossin, “The ‘Supremacy of God’, Human Dignity and the *Charter of Rights and*

*Freedoms*” (2003) 52 U.N.B.L.J. 227 at 232.

9 There are some exceptions. For more thoughtful treatments of the “supremacy of God

clause”, see *e.g.* Sossin, *ibid.*; David M. Brown, “Freedom From or Freedom For?: Religion as a

Case Study in Defining the Content of *Charter* Rights” (2000) 33 U.B.C. L. Rev. 551; George

Egerton, “Trudeau, God and the Canadian Constitution: Religion, Human Rights, and

Government Authority in the Making of the 1982 Constitution” in David Lyon & Marguerite

Van Die, eds., *Rethinking Church, State, and Modernity: Canada Between Europe and America*

(Toronto: University of Toronto Press, 2001) 90 at 90 [Egerton, “Trudeau”]; Brayton Polka,

“The Supremacy of God and the Rule of Law in the *Canadian Charter of Rights and Freedoms*:

A Theologico-Political Analysis” (1987) 32 McGill L.J. 854.

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’… .”).

11 Dale Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at

65.

12 William Klassen, “Religion and the Nation: An Ambiguous Alliance” (1991) 40

U.N.B.L.J. 87 at 95.

13 *R. v. Sharpe* (1999), 175 D.L.R. (4th) 1, 136 C.C.C. (3d) 97 (B.C.C.A.) [*Sharpe*]. See

the comments of Southin J.A. at paras. 78-80.

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).

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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*16 because they were embarrassed about the implications

of its proper interpretation.17 Many, like William Klassen, would prefer a

Canadian constitution without any reference to ‘God’ or any other notion of

established religion.18 But this is not the Constitution we have. The

Constitution must be dealt with *as* written, not as people wish it were

written.19 Courts and scholars should muster the “constitutional courage”20 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.

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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 *Charter*23 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.

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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*’s25 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*26 test might lead to the opposite result. Thus, should Parliament or a

25 *Supra* note 1.

26 The analytical approach to section 1 of the *Charter* has been considered by the Supreme

Court of Canada on numerous occasions. *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200

[*Oakes*], in which Dickson C.J. outlined a two-stage test for justifying a statutory provision that

infringes a *Charter* right, remains the leading case on section 1. The Court briefly summarized

the *Oakes* test in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569 at para. 38, 151

D.L.R. (4th) 385:

[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

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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

chosen must be rationally connected to the objective, they must constitute a minimal

impairment of the violated right or freedom and there must be proportionality both

between the objective and the deleterious effects of the statutory restrictions and

between the deleterious and salutary effects of those restrictions.

27 *Supra* note 1.

28 (1988), 65 O.R. (2d) 641, 52 D.L.R. (4th) 577 (C.A.).

29 *Ibid*. at para. 44.

30 *Sharpe*, *supra* note 13 at paras. 78-80. More recently, Southin J.A. obliquely derided the

import of the supremacy of God clause in her dissenting reasons in *Christie v. British Columbia*

*(Attorney General)*, [2006] 2 W.W.R. 610, 48 B.C.L.R. (4th) 267, 2005 BCCA 631 [*Christie*],

leave to appeal to S.C.C. granted, [2006] S.C.C.A. No. 59. In *Christie*, the majority of the

British Columbia Court of Appeal struck down a legislative tax on legal services on the basis

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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.

32 *Ibid.* at 178. See *supra* note 15 for an explanation.

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

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Furthermore, at the level of Canada’s highest court, when the supremacy of

God clause is not being denigrated or interpreted narrowly,34 it is simply

ignored. Though the Supreme Court of Canada has referred to the supremacy

of God clause in a number of judgments,35 it has never undertaken a

substantial investigation into its history, meaning, or purpose.36 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.

34 In a number of decisions in the 1980s and 1990s, Justice Muldoon of the Federal Court

provided what Lorne Sossin has correctly deemed a “narrow and literalistic” interpretation of

the supremacy of God clause, as a rationalization of Canada’s secular state. See *R. v. McBurney*

(1984), 84 D.T.C. 6494, [1984] C.T.C. 466 (F.C.T.D.); *Vanguard Coatings & Chemicals Ltd. v.*

*Minister of National Revenue*, [1987] 1 F.C. 367, [1986] 2 C.T.C. 431 (T.D.); *Gerard*

*O'Sullivan v. Her Magesty The Queen (No. 2)* (1991), 84 D.L.R. (4th) 124, 7 C.R.R. (2d) 310

(F.C.T.D.); *Canada (Canadian Human Rights Commission) v. Canada (Department of Indian*

*Affairs & Northern Development)* (1994), 25 C.R.R. (2d) 230, 89 F.T.R. 249 (F.C.T.D.). But

see Sossin, *supra* note 8 at 234-35.

35 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’.”

36 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].

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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.”37

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*.38 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.39

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.40 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.41

Indeed, the Supreme Court of Canada has itself acknowledged the importance

of preambles in the interpretation of legislation.42 Moreover, in the context of a

37 Sossin, *supra* note 8 at 232. In terms of scholarly attention, there have been some

exceptions to this rule. See *supra* note 9.

38 *Supra* note 1.

39 Andrew Coyne, “Oh, for God’s sake!” *National Post* (18 June 1999), online: Andrew

Coyne <http://andrewcoyne.com/columns/NationalPost/1999/19990618.html>.

40 In the words of Professor Sossin, “[p]reambles serve as an important interpretive tool

…” (Sossin, *supra* note 8 at 231).

41 See Walter S. Tarnopolsky, *The Canadian Bill of Rights* (Toronto: Carswell, 1966) at

100.

42 In the *Provincial Court Judges Reference* (*supra* note 2), the Court noted at para. 95:

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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 … .”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

*Charter*44 and the *Constitution Act, 1867*45 (and, to some extent, the *Bill of*

*Rights*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 *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

*Manitoba Language Reference*.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.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 *Constitution Act, 1867* and explicitly in the Preamble to

the *Charter*.49 For the Court, these inclusions had important implications for

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.

43 Sossin, *supra* note 8 at 231.

44 *Supra* note 1.

45 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

46 *Canadian Bill of Rights*, S.C. 1960, c. 44 [*Bill of Rights*]**.**

47 *Supra* note 4.

48 *Ibid.* at 749-50.

49 *Ibid.* at 750.

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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*,50 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*.51 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.*52

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].

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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.

55 *R. v. Gruenke*, [1991] 3 S.C.R. 263, 6 W.W.R. 673.

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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 lastminute

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*].

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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”.63

A proper understanding of the “supremacy of God” extends well beyond

the ambit of the *Bill of Rights*. In its 1976 decision *Re Jensen*,64 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 … .”65 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*66 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,67 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

63 *Supra* note 46.

64 (1976), 67 D.L.R. (3d) 514, [1976] 2 F.C. 665 (Cit. App. Ct.).

65 *Ibid.* at para. 19.

66 *Supra* note 1.

67 For a recent and well-documented piece, see Micheline R. Ishay, *The History of Human*

*Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press,

2004).

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Constitution.68 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*’s69 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*70 before it,

arose out of the internationalization of human rights that followed the Second

World War.71 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*.72

68 *Provincial Court Judges Reference*, *supra* note 2 at paras. 94-95.

69 *Supra* note 1.

70 *Supra* note 46.

71 Robert G. Patman, “International Human Rights after the Cold War” in Robert G.

Patman, ed., *Universal Human Rights?* (New York: St. Martin’s Press, 2000) 1 at 1-2.

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*

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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.73

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.74 Emblematic of the

thinking during this era was Jeremy Bentham’s famous remark that rights

were “nonsense on stilts”.75 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 … .

(Markham: Butterworths, 2003) 353 at 365. See also Michel Bastarache, “The Canadian

Charter of Rights and Freedoms: Domestic Application of Universal Values” in Magnet *et al.*,

*ibid.*, 371 at 374-75.

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.

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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.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.77 These documents and instruments affirmed

“human rights”, “equal” and “inalienable rights”, as well as the “dignity” of

all persons.78 To take a central example, the *Universal Declaration of Human*

*Rights*,79 enacted in 1948, is by far the most influential international document

for the recognition of universal human rights.80 The *Universal Declaration*

proclaims the “recognition of the inherent dignity and of the equal and

inalienable rights of all members of the human family”.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 *natural human rights* that are born to each and

every human being. The *Charter of Rights and Freedoms*82 emerged from this

modern notion of rights.

76 Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000) at 47-

48.

77 Gibson, *supra* note 11 at 12.

78 For example, see the *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7

(proclaiming “fundamental human rights”, the “dignity and worth of the human person”, and

the “equal rights of men and women”); *Universal Declaration of Human Rights*, GA Res.

217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 (proclaiming at 71

“inherent dignity” and “equal and inalienable rights of all members of the human family”)

[*Universal Declaration*]. See also the *International Covenant on Civil and Political Rights*, 19

December 1966, 999 U.N.T.S. 171, arts. 9-14, Can T.S. 1976 No. 47, 6 I.L.M. 368 (entered into

force 23 March 1976, accession by Canada 19 May 1976) (proclaiming at 52 “equal and

inalienable rights”).

79 *Universal Declaration*, *ibid.*

80 Ishay, *supra* note 67 at 18.

81 *Universal Declaration*, *supra* note 78.

82 *Supra* note 1.

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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

83 *Ibid*.

84 Olwen Hufton, “Introduction” in Olwen Hufton, ed., *Historical Change and Human*

*Rights: The Oxford Amnesty Lectures 1994* (New York: Basic Books, 1994) 1 at 6. Professor

Micheline Ishay has located “notions of universalism” in every major religious tradition,

including those from ancient Greek and Roman times, the Hebrew Bible and the New

Testament. See Ishay, *supra* note 67 at 18-19.

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.

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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 sponsor.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

87 Cicero, as quoted in George Klosko, *History of Political Theory: An Introduction*, vol. 2

(Toronto: Harcourt Brace College Publishers, 1995) at 51-52. See also Michael Lessnoff, *Social*

*Contract: Issues in Political Theory*, (New Jersey: Humanities Press International, 1986) at 24.

88 William Blackstone, *Commentaries on the Law of England* (Chicago: University of

Chicago Press, 1979) at para. 41.

89 Ignatieff, *supra* note 76 at 28.

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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*.90

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*91 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*92 in the turbulent mid-1600s, was perhaps the

first prominent theorist of modern human rights.93 Locke played an important

90 *Supra* note 1.

91 *Supra* note 78.

92 John Locke, *Two Treatises of Government*, ed. by Peter Laslett (Cambridge: Cambridge

University Press, 1988).

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*

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role in legitimizing ‘rights talk’ and the concept of political society as a social

contract between the state and individuals possessing inherent natural rights.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.95 Similar claims were also made during the

English Puritan Revolution of the 1640s, years before Locke wrote *The*

*Second Treatise*.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.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.98

Despite Oliver Cromwell’s attempt to purge such rights talk in the years

following the execution of Charles I,99 it would later re-surface both in the

clashes of the Glorious Revolution of 1688 and on the drawing board of John

*Feudal Law*: *A Study of English Historical Thought in the Seventeenth Century (A Reissue with*

*a Retrospect)* (New York: Cambridge University Press, 1986).

94 Patterson, *supra* note 74 at 158.

95 *Ibid.* at 159. For an excellent account of natural rights as found in the writing of these

men and other early Christian writers, see Brian Tierney, *The Idea of Natural Rights: Studies on*

*Natural Law and Church Law 1150–1625* (Atlanta: Scholars Press, 1997). See also Walter

Ullmann, *The Medieval Idea of Law: As Represented by Lucas de Penna* (New York: Barnes

and Noble, 1969).

96 Ishay, *supra* note 67 at 73.

97 See Roger E. Salhany, *The Origins of Rights* (Toronto: Carswell, 1986) at 3 and Pocock,

*supra* note 93 at 125-27. For some excellent historical accounts of Leveller history and politics

see Christopher Hill, *The World Turned Upside Down: Radical Ideas During the English*

*Revolution* (New York: Penguin Books, 1991); David McNally, “Locke, Levellers, and Liberty:

Property and Democracy in the Thought of the First Whig”, (1989) 10 *History of Political*

*Thought* 17; and Robert Ashton, *The English Civil War: Conservatism and Revolution 1603-*

*1649* (London: Weidenfeld and Nicolson, 1978).

98 John Milton, “A Defence of the People of England” in R.W. Griswold, ed., *The Prose*

*Works of John Milton: With a Biographical Introduction by Rufus Wilmot Griswold In Two*

*Volumes*, vol. 2 (Philadelphia: John W. Moore, 1847) 5 at 39.

99 Ishay, *supra* note 67 at 73, 93.

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Locke.100 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*,101 the French *Declaration*

*of the Rights of Man and Citizen*,102 as well as the early Canadian ratification

debates.103

As a central figure in these changes, Locke’s work played an important

historical role in the development of modern rights.104 In this regard, a key

difference in Locke’s work was that he attempted to conceptualize rights

based on a theory of human nature.105 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’.106 Yet, in contrast to natural law

theorists before him, Locke distinguished between natural law and natural

rights,107 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,

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.

101 Reprinted in Kevin Reilly, ed., *Readings in World Civilizations: The Development of*

*the Modern World*, 3d ed., vol. 2 (New York: St. Martin’s Press, 1995) at 120-22. On Locke’s

influence, see Patterson, *supra* note 74 at 162.

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.

105 Francis Fukuyama, *Our Post-Human Future: Consequences of the Biotechnology*

*Revolution* (New York: Picador, 2002) at 111.

106 As Walter Tarnopolsky wrote, natural law theory viewed certain legal concepts as

immutable and universal. See Tarnopolsky, *supra* note 41 at 1.

107 Ian Shapiro makes this point in “Locke’s Democratic Theory” in Ian Shapiro, ed., *Two*

*Treatises of Government and A Letter Concerning Toleration* (New Haven: Yale University

Press, 2003) 309 at 312.

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whereas law is what enjoins or forbids the doing of a thing.”108 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.109 This was in contrast to other early rights

thinkers such as Grotius who theorized rights that could be extinguished.110

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.111 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.112

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.113 Consistent with this view, Hannah Arendt observed in

the aftermath of the War that the *modus operandi* of the Nazis was not to deny

108 John Locke, as quoted in Shapiro, *ibid.*

109 Kenneth G. Butler, *Idea of a Right: History and Philosophy of Rights as Embodied in*

*Our Culture and Laws* (Walkwick, N.J.: New Media Publishing, 2001) at 113.

110 *Ibid*.

111 Patterson, *supra* note 74 at 176.

112 *Ibid*. [emphasis in original].

113 *Ibid*. at 176-77.

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rights to the person, but simply to deny the person.114 As a result, Arendt went

on to posit “human dignity” as the new standard to protect humanity.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 *Universal Declaration*,116

appointed to the monumental task of drafting a rights document that had crosscultural

appeal, worked to extend human rights beyond European legal

traditions and sought out a universal language in the various world religious

traditions.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.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

114 Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt’s, 1978) at 295-

96.

115 Lorraine Weinrib, “Human Dignity as a Rights-Protecting Principle” (Paper presented

at the Third Annual Charter Conference of the Ontario Bar Association, 15 October 2004)

(2004), 17 National Journal of Constitutional Law 325*.*

116 *Supra* note 78.

117 Ishay, *supra* note 67 at 17.

118 Izhak Englard, “Human Dignity: From Antiquity to Modern Israel’s Constitutional

Framework” (2000) 21 Cardozo L. Rev. 1903 at 1917.

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beyond those of the state.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.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 *Universal Declaration*,121 would write:

[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.122

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 *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 *Charter*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

119 Ignatieff, *supra* note 76 at 43.

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 *Declaration of Independence* spoke of a “Creator”, the later ratified U.S. *Bill of*

*Rights* (*supra* note 16) made no mention of rights endowed by God. Similarly, the French

*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 *et al.*, *supra* note 103 at 180, 191, 418-19.

121 *Supra* note 78.

122 Jacques Maritain, *The Rights of Man and Natural Law*, trans. by Doris C. Anson (New

York: Charles Scribner’s Sons, 1951) at 65.

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 *Charter*125 and the *Universal Declaration*126 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

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.

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The inclusion of a clause declaring that “… Canada is founded upon

principles that recognize the supremacy of God and the rule of law”129 was

accomplished by an amendment to the *Charter*130 proposed by Liberal

Member of Parliament Roch Pinard, and seconded by the then Minister of

Justice, Jean Chrétien, on 23 April 1981.131 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.132 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.133

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*.134

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.135 His vision for the *Charter* was that it would unite Canadians under a

“set of values common to all”.136 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.

131 Anne F. Bayefsky, *Canada’s Constitution Act 1982 and Amendments: A Documentary*

*History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989) at 816.

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.

135 Samuel V. Laselva, *The Moral Foundations of Canadian Federalism: Paradoxes,*

*Achievements, and Tragedies of Nationhood* (London: McGill-Queen’s University Press, 1996)

at 108, 111.

136 Trudeau’s comments as reprinted *ibid*. at 81.

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inalienable rights embodied in the documents of the American and French

Revolutions.137 Thus, quoting Thomas Jefferson, he wrote that “[n]othing then

is unchangeable but the inherent and inalienable rights of man.”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.139

Here, in recognizing the inalienable and natural character of human rights,

Trudeau invokes Maritain, one of the fathers of the *Universal Declaration*,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 *Charter*’s141 documentary history. In the preambular statement

to the first draft of the *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:

137 Laselva, *supra* note 135 at 81.

138 Pierre Elliott Trudeau, “A Constitutional Declaration of Rights” in *Federalism and the*

*French Canadians* (Toronto: MacMillan, 1968) 52 at 53.

139 Pierre Elliott Trudeau, as quoted in *The Essential Trudeau*, Ron Graham, ed. (Toronto:

McClelland & Stewart, 1998) at 80.

140 *Supra* note 78.

141 *Supra* note 1.

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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

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.

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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).

147 McLean, *House of Commons Debates*, *supra* note 62.

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law would make it clear that rights derived from God, tradition and history were

merely ‘affirmed’ and maintained by governments—not ‘given’.148

As already stated, the language of the supremacy of God clause that was

included in the *Charter*’s149 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.150

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.151 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.”152

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.

151 See George Egerton, “Writing the Canadian Bill of Rights: Religion, Politics and the

Challenge of Pluralism—1957-1960” (2004) 19:2 C.J.L.S. 1 at 11-17 [Egerton, “Writing”].

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.

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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*153 is not entirely new. Commentators

who have embarked on a more attentive analysis of the *Charter*’s Preamble,

such as David Brown,154 Lorne Sossin,155 and Bruce Ryder,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*.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.158

153 *Supra* note 1.

154 Brown, *supra* note 9 at 563.

155 Sossin, *supra* note 8 at 236.

156 Bruce Ryder, “State Neutrality and Freedom of Conscience and Religion” (2005) 29

Sup. Ct. Law. Rev. (2d) 169.

157 Sossin, *supra* note 8 at 236.

158 Ryder, *supra* note 156 at 177.

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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*159 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

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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*.163 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*,164 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.”165 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.166 In *Saumur v. Quebec (City)*,167

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.168

*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.

167 [1953] 2 S.C.R. 299, 4 D.L.R. 641.

168 *Ibid*. at 329.

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Furthermore, members of the Court have, in the past, said that the *Charter*169

embodies a “social contract”.170 More recently, in *Sauvé v. Canada*, the Chief

Justice stated that “social contract theory” was “enshrined in the *Charter*”.171

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 ... .”172

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.173 In actuality, the

169 *Supra* note 1.

170 See *R. v. Butler*, [1992] 1 S.C.R. 452 at para. 79, 89 D.L.R. (4th) 449; *R. v. Malmo-*

*Levine; R. v. Caine*, [2003] 3 S.C.R. 571 at para. 241, 233 D.L.R. (4th) 415, 2003 SCC 74

[*Malmo-Levine*].

171 [2002] 3 S.C.R. 519 at para. 31, 168 C.C.C. (3d) 449, 2002 SCC 68.

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 … .

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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

See Frank Iacobucci, “The Charter: Twenty Years Later” (2002) 21 Windsor Y.B. Access

Just. 3 at 9.

174 *Supra* note 1.

175 *Supra* note 26.

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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*176 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.*177 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”178 and that “courts must subject them to the most rigid

scrutiny.”179

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.*

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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.”180 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.181

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.

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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.182

The dissenting reasons of Justice Jackson vividly illustrate the manner in

which the majority in *Korematsu*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 33184 of the *Charter*.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 *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 *Korematsu*,

forcing Parliament or the legislature(s) at issue to invoke section 33 in order to

fully abrogate *Charter* rights would also avoid importing a potentially harmful

precedent into the fabric of *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 *Korematsu* justifiable under *Oakes*.186

182 *Ibid.* at 246 [emphasis added].

183 *Ibid.*

184 Section 33 of the *Charter* (*supra* note 1) states (in part):

(1) 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 *Charter*.

(2) 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 *Charter* referred to in the declaration.

(3) 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.

185 *Supra* note 1.

186 *Supra* note 26.

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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

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.

191 [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [*Motor Vehicle Reference* cited to S.C.R.].

192 See *e.g. Malmo-Levine*, *supra* note 170 at para. 95; *Cunningham v. Canada*, [1993] 2

S.C.R. 143, 151 N.R. 161; *Thomson Newspapers Ltd. v. Canada (Director of Investigation &*

*Research)*, [1990] 1 S.C.R. 425 at 539, 67 D.L.R. (4th) 161.

193 *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3

S.C.R. 46 at para. 99, 177 D.L.R. (4th) 124, in which Lamer C.J. cites with approval *Motor*

*Vehicle Reference*, *supra* note 191 at 518 [emphasis added].

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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)*,194 the Supreme Court held that in

order to conform to the requirements of sections 1 and 7 of the *Charter*,195 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*,196 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.197 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*,198 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.”199 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*.200 This kind of state action would appear to cross the outer

194 [2002] 1 S.C.R. 3, 208 D.L.R. (4th) 1, 2002 SCC 1 [*Suresh*].

195 *Supra* note 1.

196 [2001] 1 S.C.R. 283, 195 D.L.R (4th) 1, 2001 SCC 7 [*Burns*].

197 *Ibid.* at para. 133.

198 *Supra* note 177.

199 *Ibid.* at 246.

200 *Supra* note 191.

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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*201 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*202 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 question203

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*.204 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*.

201 *Supra* note 1.

202 *Constitution of the Republic of South Africa 1993*, No. 200 of 1993, s. 33(1) [*Interim*

*Constitution*].

203 *Ibid*., s. 33(1) [emphasis added].

204 [1995] 3 S. Afr. L.R. 391 (Const. Ct.) [*Makwanyane*].

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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*205 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.206

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

205 *Ibid.*

206 *Ibid*. at para. 194.

207 *Ibid.* at para. 195 [emphasis added].

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There is some merit to the conceptual dichotomy set out in *Makwanyane*,208

and it may be useful for deciding when rights are impermissibly negated or

abrogated under the *Charter*.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*,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

208 *Supra* note 204.

209 *Supra* note 1.

210 *Supra* note 177.

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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*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.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”.213

211 *Supra* note 1.

212 We borrow this from Levinson’s work on the Second Amendment. See Levinson, *supra*

note 17 at 658.

213 *Provincial Court Judges Reference*, *supra* note 2 at para. 109.