Sometimes Constitutions are Made in the Streets: the Future of the Charter's Notwithstanding Clause

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This article examines the future of section 33 of the *Charter of Rights and Freedoms* (the notwithstanding clause)[1] — specifically, its political future. It explores whether it is a constitutional instrument which is likely to be used in the future by legislatures or by Parliament.[2] The article is premised on the idea that popular political notions about political and constitutional legitimacy, while often formed by the constitutional text, sometimes evolve independently of the text. When this happens, these new conceptions of legitimacy will constrain the exercise of constitutional powers no matter how clearly the powers are conferred by the text. From this perspective, this article argues that in an apparent regime of entrenched rights, such as Canada's, the legislative suspension of rights will be regarded as less reflective of the constituted order — and, hence, less legitimate — than will having legislatures insist that their choices should prevail over constitutional rights in some circumstances.

This claim is made in full recognition that Canada's constitutional order includes only a weak version of entrenchment — it subjects some rights to suspension by the legislative order in full acknowledgement that the creation of competing structures for vindicating constitutional rights in the *Charter* can hardly be considered politically incoherent. But, in the great competition to establish a nation's constitutional essence — a competition that will always follow a period of constitutional enactment — it is the recognition of rights that will triumph over the legislative power contained in the notwithstanding clause. That legislative power is, after all, a form of constitutional declaratory power and, hence, is by definition an instrument which, while clearly within Canada's constitutional structure, will also be seen as one of constitutional suspension. This means that it is the capacity of the notwithstanding clause periodically to suspend the rights regime that will be seen as anomalous. In short, a constitution which protects rights, but only until a democratic majority decides that they should be suspended, will come to strike citizens as unintelligible.

In exploring the political legitimacy of overriding rights in some circumstances, Jeremy Waldron has made the useful distinction between conflicts over the determination of what conduct is actually protected by a right and the claim that, in a specific context, it is inappropriate to entertain rights claims at all.[3] The former he labels rights disagreements: all authorities of the state — the executive, the legislature and the courts — accept that in the particular circumstance a rights claim can legitimately be made, but they do not agree on whether the exercise of governmental power abridges the right that has been claimed. The latter class he labels rights misgivings: the executive or the legislature believes that in a particular situation rights claims are simply not as important as achieving governmental policy and, therefore, should not be

allowed.[4]

Waldron's distinction bears on the question of the intent behind the enactment of the *Charter*'s notwithstanding clause and, possibly, on the question of its political legitimacy. That clause grants Parliament and provincial legislatures the power to enact that some element of their legislation will be treated as valid, and be allowed to operate, in spite of any legal claims that may be made based on the constitutional recognition of fundamental liberties, due process, and equality. Legislative action taken under the notwithstanding clause is simply a declaration of the inapplicability of some of the rights provisions found in the Constitution. As a matter of form, although not always as a matter of legislative motive, an exercise of the notwithstanding clause is a suspension of the rights listed in a named section of the *Charter* and is not a legislative act taken to correct a rights determination made by a court. Neither is it legislative preemption of a future court's rights determination, prompted by the fear that there will be mistaken or imprudent judicial protection of a right affected by legislation.

Of course, there is nothing to suggest that the notwithstanding clause cannot serve double duty, acting sometimes as a grant of power used to sidestep rights analysis of some state actions by a court, and acting sometimes as an expression of the view that, in certain circumstances, preference should be given to a legislature's understanding of what is properly protected by a designated right. The language of the notwithstanding clause, however, unmistakably confers legislative power to suspend rights claims. This being the form of the notwithstanding clause, it will tend to be seen as a suspensive power and its use will tend to be characterized as the suspension of rights almost regardless of actual legislative motive. Legislative suspension of rights (even legislative suspension specifically permitted by the Constitution) is very likely to attract greater popular suspicion and opposition than is the resort to the notwithstanding clause to correct (or to preempt) a specific and quite possibly unpopular court decision with respect to a rights claim. In other words, the language of the notwithstanding clause, granting the broadest power to exclude certain *Charter* protections, conduces to a skeptical view of the legitimacy of exercises of the power it grants.

On the other hand, it may be mistaken to overstate the significance of this distinction between rights disagreements and rights misgivings. Possibly, in the modern liberal democratic state, the principle of separation of powers, in its more recent developments, recognizes that many governmental functions should properly be assigned to specific agencies that enjoy a degree of immunity from political interference (for example, electoral commissions, central banks, information and privacy commissions and, as always, courts). This principle, which is thought to enhance democracy by altering structures of political accountability, may have become, in the wider political community, as strong a principle of constitutional ordering as is the protection of rights. If this is indeed the case, overriding a judicial decision that has already been made by a legislature — an agency that can hardly be considered to be well suited to assess norms designed to protect individuals from injury through state action — might also be seen as defying constitutionalism even when, according to the constitutional text, it clearly is not.[5]

As has been stated, to describe the notwithstanding clause as a legislative instrument for suspending rights, and not just particular rights decisions, is to demonstrate neither statecraft anomaly nor statecraft pathology. It is, however, valuable to get the right description of the notwishstanding clause's structure and its function in order to explore its likely future in Canadian constitutionalism. Having characterized the notwithstanding clause as suspensive, two questions seem pertinent. First, what kind of rights regime did the framers of this constitutional text actually want and, second, what kind of rights regime do those of us who stand here, now, in our own place and time, actually want?[6]

Perhaps a word needs to be said about the appropriateness of the second question. It suggests a degree of malleability in our constitutional arrangements that may not fit our idea of constitutional constancy based on acceptance

of the constitutional text as the central reference point for government acting legitimately under law. However, one of the things that we know about constitutional application and interpretation is that, in spite of the significant legitimacy dividend that some will claim for sticking to original understandings of what is permitted and what is restrained by our constitutional framework,[7] constitutional powers acquire new salience as political contexts and values change, and as new political imperatives shape the content of our constitutional order.[8] For instance, within thirty years of Confederation in 1867, judicial interpretation of the *British North America Act* had turned the constitutional text upside down in response to the adamantine refusal of two provinces in particular to be drawn into the spirit, or the machinery, of a strong and dominant national government.[9] The 1867 constitutional text offered the prospect of every sort of federal pre-emptive and supervisory power over provinces, from the power to appoint to provincial agencies, to the disallowance of provincial legislation, to the promotion of federal legislative uniformity, to the power to declare provincially regulated enterprises to fall under federal jurisdiction, to the federal review of provincial administration of sectarian education, and to the overarching general power of the federal government to provide peace, order and good government.

Within a few decades, the tower of provincial power based on its authority over legal relations between private persons (then a chief function of the state), was affirmed as the centerpiece of the 1867 constitutional arrangement. At the same time, the prime source of national capacity — the Constitution's Peace, Order and Good Government clause — was reduced to a contingent and largely temporary power, no longer serving as the foundation of federal authority. Likewise, almost every one of the federal declaratory and supervisory powers fell into disuse as inappropriate instruments for a mature federal state. Relationships between the elements of a state change (including their relationship with the state's most basic element — the people), and with these changes clearly expressed constitutional powers wither or, in some cases, find a new vitality. In light of this experience of informal constitutional change, we can well ask whether the *Charter's* notwithstanding clause has remained an accepted feature of our Constitution which lives on as a true reflection of the constitutional order we want. Or have we, on the other hand, come to regard it as we have other special constitutional powers, as an exigent and temporary device, politically necessary when created but now detached from the real and vibrant world of the lived constitution.

Through our political choices and the reshaping of our political morality we have "rewritten" many of our constitutional arrangements. We have overcome the perpetuation of some constitutional beliefs we find hard to remain committed to through an informal normativization of the political order, shaped by our self-conscious practices.[10] From this perspective, it is sensible to ask whether the notwithstanding clause, too, has ceased to be a part of Canada's current political and constitutional culture.

Let us return to the first question. What kind of rights regime did the framers want? We normally speak only tentatively of the framers of the *Constitution Act, 1982*,[11] since we lack a clear sense of their identity. But, with respect to the notwithstanding clause, we know exactly whom we are speaking of. The section's presence in the Constitution is the consequence of an initiative taken by the premiers who led the Anglophone members of the Gang of Eight — that group of provinces which opposed Prime Minister Trudeau's plan for virtually unilateral constitutional patriation. During the constitutional negotiations of the summer of 1980, provinces generally strenuously resisted entrenching rights. This resistance took the form, first, of some premiers simply arguing against constitutionally entrenched rights altogether. Then, they urged weak expression of the rights to be recognized, particularly the right to due process, and the rights of accused persons and persons under criminal investigation. Finally, premiers proposed a broad and sweeping clause for limiting rights. A notwithstanding clause, however, did not form part of those intergovernmental constitutional negotiations. That

clause first entered into political currency during the final days of the First Ministers' meeting of September 1980 when Quebec tried to develop a "common stand of the provinces."[12] Quebec suggested that fundamental and legal rights be entrenched, but that some legal and equality rights be subject to a notwithstanding clause. Although other provinces did not endorse this proposal, it did form part of the "Chateau consensus" presented to Prime Minister Trudeau, who quickly rejected it. Quebec did not advance this proposal again.

In October 1981, when the Gang of Eight met in Toronto, it faced two important political circumstances. First, it seemed clear that the people of Canada now wanted provinces to negotiate with Mr. Trudeau to achieve constitutional resolution and, second, that substantial alteration of the text of the Charter of Rights, which had been developed and refined between October 1980 and February 1981 in the Joint Parliamentary Committee, was no longer an available choice. Since the idea of a notwithstanding clause was not necessarily inconsistent with these conditions, the provinces in the Gang of Eight put that proposal in its bag of options to take to Ottawa for the meetings with the prime minister to be held in early November.

That provinces seized on the notwithstanding clause is not remarkable. It is, in essence, a form of declaratory power and, as we have seen, in constitution making such powers are not unusual. They are used to give power to interrupt the ordinary course of constitutional relations between the branches and orders of government. Such powers permit a rebalancing of relationships which may have been altered through new constitutional recognitions and empowerments, and they are especially attractive when the effects of constitutional changes are uncertain and, hence, worrying. This is precisely the situation created by the 1982 Constitution. Judicial review of governmental action was accorded a significantly broader scope through the extensive new constitutional norms of the *Charter*, and the impact of this change on government was not at all clear. There was a compelling case to be made for a legislative trumping power that could be used to ameliorate the potentially unfortunate effects of the new Constitution. However, such special powers, especially when they are prompted by anxiety over, or resistance to, constitutional change will often become otiose as experience with the newly created powers unfolds and the fear that there will be intolerable outcomes weakens. It is for this reason that special powers allowing usurpation of the basic constitutional order have proven to be a less durable form of constitutional arrangement than provisions which establish basic relationships.

Also, as was to be expected in connection with the creation of a power that permits alteration of a basic constitutional arrangement, the decision was made to make exercises of the notwithstanding clause subject to two restraining features. The first was to require that exercises of the clause be politically visible in terms of their rights-restricting effect. The second was that exercises of the notwithsanding clause be time-limited. What the premiers gained, then, was suspension of the rights-recognition regime and the return of legislative supremacy, but only when a legislature believes that this visible choice will be politically attractive, or at least bearably unattractive. As for the time limit on uses of the notwithstanding clause, this feature underscores the idea that this override power interrupts normal constitutional relations, and it confirms the idea that it is to be used only as long as circumstances warrant the removal of normal constitutional processes and norms.[13]

Beyond these structural and strategic explanations for the clause, there were principled bases for the premiers wanting to find an instrument to blunt the effect on legislative action of introducing constitutionalized rights. In brief, the premiers believed in the inherent superiority of political judgment over judicial judgment in accommodating competing interests, including interests that bear on the characterization of rights claims. Their campaign against the Charter of Rights, as it was reflected in the federal patriation package, was driven by their faith in the virtues of the legislative process.

The premiers' case was based on five claims. First, regardless of the nature of a claim, representative democracy is superior to judicial deci-

sion-making because it requires consideration of the long-term interests of the whole political community: it is not one-time adjudication between state and citizen in a specific circumstance. Legislative accommodations are made in recognition of a broad range of political considerations and with the knowledge that there have been, and there will in future be, other accommodations to be made.[14] Second, although courts, under the *Charter*, would in one sense be engaged in making rights determinations, in another sense they would also be engaged in resolving political disputes; important public interests would be frustrated — or vindicated — in this process. But judges are not accountable to electors for the choices they make and electors would have no opportunity to express their approval or disapproval of these outcomes. Third, judicial mediation of these politically important issues relating to every kind of public interest would deteriorate political engagement through the increased irrelevance of channels of political input and response. Fourth, judges are too often ignorant of, or oblivious to, the social and economic conditions that legislators devote so much of their energy to understanding, and to which they are accustomed to responding. As a class, judges are not suited to the essential task of measuring the value of social and economic policies — a task that is likely to determine general wellbeing far more significantly than does the protection of rights, and a task to which rights protection should sometimes bow. Finally, the language of entrenched rights is highly indeterminate and the claim that judges, in applying rights, are engaged in the constrained and principled exercise of applying pre-established norms and rules is simply not convincing. Entrenching rights, the premiers felt, represents the inappropriate delegation of a largely discretionary power to resolve social disputes.

Although these concerns represented a case against the general entrenchment of rights more coherently than they represented a case for including a notwithstanding clause, the premiers seized whatever instrument at hand to preserve an ascendant role for legislative action, at least with respect to some legislative programs. What this examination of the premiers' case for limiting the *Charter*'s operation tells us is that they were not, at heart, motivated by the desire for the power to correct judicial determinations of rights questions. They were motivated more by their sense of the need for a device to let legislatures alone respond to issues of such great political importance, or of such high political risk, that the political community would be better served if the normal legislative function of mediating interests for the public good were not interfered with by the courts. The record, however, also shows that some premiers wanted only to create a power to correct bad judicial outcomes.[15] Possibly, those premiers, realizing that gaining legislative capacity to suspend the *Charter* when rights claims seemed too costly was not a real option, sought the more limited power to correct bad judicial decisions out of a sense of political realism. The language of the notwithstanding clause does not support this sense of their purpose. Neither was it seen as compelling from the point of view of constitutional design since, in constitution making, we tend to believe that review of governmental actions for the purpose of ensuring constitutionality is never appropriately performed by the agency that is responsible for initiating the action under review. On balance, then, it seems that the premiers' interest was probably not simply to acquire the power to correct mistaken and dangerous rights decisions of the courts, but rather to gain the ability to suspend rights determinations so that, in some instances, public interests could be pursued without the uncertainty and attenuation of public policies brought about by successful rights claims.

We now come back to the second question: what kind of rights regime does the nation here and now expect? The analysis that follows is purely speculative and, perhaps, abstract and so may be discounted on that basis. However, statecraft, or constitutional design, will always be speculative in that it draws on ideas of how historical structure have worked, and it requires imagining how the imperatives and incentives created by new configurations of power will actually play out. But there is no rigid channel of future political action; in fact, the disruption of patterns, and the upending of expectations, is as much a part of constitutional history as is the predicted unfolding of the national narra-

tive according to current plans for, and understandings of, institutional behaviour. All of this is to acknowledge that the bravado of political prediction, as useful as it can sometimes be in gaining a sense of our actual condition, is properly treated with skepticism and subjected to doubt.

A constitutional rights regime is based on the recognition that democratic majorities might choose policies that injure interests the constitution makers have identified as ones that majorities should not be allowed to harm. There are two bases for identifying such interests. First, is the potential harm to some interests (those identified as rights), which creates what is considered to be an intolerable risk for every person — at least, every person who does not know what her or his future condition or needs will be, or who does not know what the democratic majority's future interests and priorities will be. That is to say, constitution makers recognize the possibility of acts of state coercion that, for many, will be intolerable and they seek to forestall the state from reaching that point. Second, constitution makers conclude that if there are some interests that cannot be harmed by the state, we shall likely have a healthier, safer, and more stable state. This belief is really just a matter of faith and prediction — it could be wrong. We could possibly have a state that could serve most needs better if it were, in fact, more tyrannical. Nevertheless, the constitutional calculation is that the security of the state and the well-being of its people are best realized through the placing of limits on the exercise of ordinary, or non-constitutional, politics. While constitution makers can also decide that the best, most stable of all states are the ones in which the limits placed on state authority can be removed (in extraordinary circumstances), they should not expect citizens to consider this consistent with the other statecraft calculation that there must be limits on state action to achieve the goals of protection against majority tyranny, and preservation of a stable society.

If it is concluded that it is better to protect some interests from majority driven curtailment because we wish to avoid the general risk of intolerable injury, and if it is concluded that we shall have a stronger and more stable state if we protect some interests from majority power, then we cannot also sensibly conclude that it is tolerable to subject citizens to injury to their interests some of the time, or that we shall have a stronger state if we were to abridge those interests some of the time. What is being claimed when we permit legislative suspension of rights is that what is best for people is to protect their key interests until we decide not to, and what best builds the stable state is to protect key interests until we decide it is better that we not recognize key interests. As I have said, these may be plausible calculations of statecraft but they are not compelling, and they are certainly not easy to grasp. The result is that politicians have been given a power the use of which will not, from the perspective of constitutional design, appear to be principled or logical. It is exactly this sort of constitutional power that over time will stop being exercised because it is based on inconsistency.

Even if the sole justification for the use of the notwithstanding clause were that it permits substitutions of judicial decisions about the scope of a right with the legislature's calculations about the scope of a right, even if citizens could see that all branches of government were equally committed to the same concepts of individual and minority rights (so that there was no longer a serious problem with the intelligibility of the constitutional plan), there would still be three reasons why such exercises of the notwithstanding clause are likely to fall outside our sense of legitimate constitutional ordering.

First, although citizens will hear and see legislators talking about citizens' rights, they will not believe that rights protection, as opposed to rights suspension, is going on. This is not because there is anything morally suspect in the legislators' motives or actions. The purity of legislative motive will be doubted simply because, as has already been noted, the Constitution describes the use of the notwithstanding clause as the suspension of rights not as the correction of rights determinations. More to the point, the interests of legislators are structurally determined to be driven by majoritarian interests, and this structural feature of representative

democracy will colour popular understandings of what a legislature is actually doing when it corrects what it merely considers to be judicial error. Even though we know that legislators can be fully committed — as committed as any constitution maker or any judge — to protecting individual and minority rights from the impact of legislative programs, this will not forestall the belief that the legislators have decided, in respect of this particular policy, that rights are less important than the broader political interests that will inevitably appear to have generated a rights-limiting policy.

The second basis for believing that the purpose of rights correction will not generate legitimacy, is that our firmly established understanding of the constitutional order is that it has taken the form and force of law. An equally established constitutional understanding[16] is that law application is the province of the courts. Naturally, one does not want to advance naïve conceptions about the nature of legal determinations — that they are the product of legal science, that they are devoid of discretionary judgment, that they do not reflect political preferences, that *Charter* language is not immensely indeterminate, or that policy review does not often lie at the heart of applying the *Charter*'s notwithstanding clause. However, the *Charter of Rights and Freedoms* is a legal text, and the general expectation is that the application of law gains legitimacy when performed by the specific state agency that has independence; is trained in legal reasoning; is politically neutral; is bound by processes that are open, considered, and even-handed; and is committed to fidelity to established legal norms. Structurally speaking, legislators are not seen as doing law, nor do they have any of the trappings that are associated with law-based adjudication. As a consequence, their decisions about what our constitutional law requires will be suspect, not as a matter of judging their good faith, but on the question of whether those decisions count as legal determinations. Of course, we could well prefer to construct our Constitution not on law-based rights application, but on purely political assessments of rights. Politically assessed rights claims may be exactly the right marriage of democratic process and constitutional objective. However, this view would represent a significant shift in general conceptions of Canadian constitutionalism, and, I think, is not very likely to emerge as an element of our political culture.

The third point relates to the impact of section 1 of the *Charter* on our understanding of when and how, and by what process, *Charter* determinations should be made. One might think that when the application of the tests enunciated by the Supreme Court of Canada in *R. v. Oakes*[17] has become the intellectual process by which, in many *Charter* applications, rights have been found to be violated (or not), there would not be a strong sense of the legalism of rights adjudication. However, there is another implication to be drawn from courts' engagement in something that looks very much like policy review. It is this: section 1 jurisprudence requires courts to review the purposes of legislative policies that are claimed to be rights restricting. This requires governments to present to courts clear evidence of the policy purposes behind a legislative program, as well as evidence of the likely remedial effects of the policy. In other words, the application of section 1 by the courts provides a government with ample opportunity to present a case for why rights may need to be compromised in the pursuit of a public policy, and to show that the policy was designed with as little negative impact on rights as possible.

Under section 1, governments are required to place their rights calculations before a court and to show how they have weighed the relative importance of rights and legislated social purposes. Section 1 determinations provide the exact opportunity for rights discourse from the government's perspective, that the rights-correction model of the notwithstanding clause recommends — except, of course, for the fact that the legislature does not have the final word on the question of whether the rights restriction is justified. The open and democratic debate over how best to restrict or protect rights, preferred by some defenders of the notwithstanding clause, is, in fact, a precondition to a government pleading a section 1 justification. The ultimate outcome of that debate is not determined by legislative votes, but by judicial application of constitutional text; however, the application of section

1 gives legislators the same incentive to engage in rights analysis as they would have were they to use the notwithstanding clause when they believe the courts have made a mistaken rights decision. Certainly it is theoretically significant, but it may not be not be as significant from the perspective of popular perceptions, that legislators do not have the final word under section 1. The reason that it will not be easy to convince the nation that the loss of that final word poses significant risks to constitutional government is that in constitutional design — as in the design of any structure for the exercise of complex and diverse powers — what really matters most is the presence of mediating structures. The legitimacy of governmental power is dependent on its being exercised with full consideration of each branch's interests and each order's goals. The combination of rights-trumping powers with governing powers provides a weak structural context for conducting the inevitable task of mediation required in complex democracies. In addition, this combination is the least stable of constitutional structures because it raises the greatest doubts about state legitimacy.

The premiers, in seeking to add the notwithstanding clause to the *Canadian Charter of Rights and Freedoms*, were driven by real and sensible concerns. But their concerns were, in the long run, not the ones that shape — or should shape — the way democratic constitutions work.

Notes

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1 *Canadian Charter of Rights and Freedoms,* s. 33, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. Section 33(1) of the *Constitution Act, 1982* states: 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 the *Charter*.

2 Howard Leeson has asked the same question. See, Howard Leeson, "Section 33, the Notwithstanding Clause: A Paper Tiger?" (June 2000) 6 Choices 4. He suggests that the notwithstanding clause will fall into disuse, but does not believe that this will be due to popular opposition.

3 Jeremy Waldron, "Some Models of Dialogue Between Judges and Legislators" in Grant Huscroft and Ian Brodie, eds., *Constitutionalism in the Charter Era* (Markham, ON: LexisNexis Canada, 2004) 7 at 36.

4 *Ibid* at 37.

5 For examinations of prudent uses of the separation of powers idea, see Bruce Ackerman, "Meritocracy v. Democracy" (8 March 2007) 29 London Review of Books 5 and Bruce Ackerman, "New Separation of Powers" (2000) 113 Harvard Law Review 633.

6 Paraphrase of W. Whitman, Poem 6 of "Starting From Paumanok" in William Rossetti, ed., *Poems of Walt Whitman,* (London: John Camden Hotten, 1868) at 70-71. Whitman pays homage to the traditions, including constitutional traditions, that formed him and his nation, but claims for himself and his time the right to be self-determining.

7 See e.g., Antonin Scalia, "Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws" in Amy Gutman, ed., *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997) 3.

8 Clearly, this idea of constitutional change is not everybody's idea of a good idea. See, e.g., Antonin Scalia, "Romancing the Constitution: Interpretation as Invention" in Huscroft and Brodie, *supra* note 5 at 337. Justice Scalia writes at 344: "This is a terrible system . . . the Constitution it produces — a Constitution congenial to the majority — is hardly a Constitution worth having, since the whole purpose of constitutional guarantees is precisely to frustrate the wishes of the majority." But see Mark Tushnet, *The New Constitutional Order* (Princeton: Princeton University Press, 2003), in which the ongoing reconstruction and transformation of the constitutional order is described and defended, or consider the almost universal Canadian approbation of the "living tree" interpretative approach articulated by Lord Sankey in *Edwards v. Canada (Attorney General),* [1930] A.C. 124 at 136.

9 *Constitution Act, 1987* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. More accurately, one might say that the early decisions of

the Judicial Committee of the Privy Council were a response to advocacy by counsel for the provinces, which were determined to preserve a large civil law jurisdiction for themselves, and which presented this capacity as the moral foundation of Confederation.

10 The notion of constitutional dynamism generated outside the process of formal constitutional amendment, through a dualist democracy consisting of constitutional moments effecting non-textual constitutional transformation, and normal politics, is explored in Bruce Ackerman, *We The People: Transformations* (Cambridge: Belknap Press, 1998). See Tushnet, *supra* note 8, for a similar treatment of constitutional reform. Tushnet finds Ackerman's sharp division between constitutional moments and the course of normal politics to be unconvincing (*supra* note 8 at 98-99).

11 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

12 See, Roy Romanow, John Whyte and Howard Leeson, *Canada . . . Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984) at 96-98. This history is also presented in David Johansen & Philip Rosen, "The Notwithstanding Clause of the Charter," Library of Parliament, Parliamentary Information and Research Service PRB 194E (May 2005), available at: <http://www.parl.gc.ca/information/library/PRBpubs/bp194-e.htm>.

13 One of the ideas of the Judicial Committee of the Privy Council, which Canadian constitutional commentators found distorting, was that the peace, order and good government power could support only federal emergency legislation, and that the condition of validity for emergency legislation was that it must be temporary. Implicit in this conception of peace, order and good government, and of the condition of temporariness is that exercises of the Peace, Order and Good Government clause are not considered part of the regular constitutional arrangement. The power was represented as an extraordinary and usurping power, perfectly appropriate when needed, but certainly not a regular feature of the federal plan.

14 These virtues and others are suggested in the writing of Jeremy Waldron. See, Jeremy Waldron, "The Integrity of Law: Legislating with Integrity" (2003) 72 Fordham Law Review 373. Waldron's views on legislative integrity are cited and discussed in Tsvi Kahana, "What Makes for a Good Use of the Notwithstanding Clause?" in Huscroft and Brodie, *supra* note 3, 191 at 206.

15 In truth, there seems to be no clear sense of the nature of the instrument that had been agreed on. At the November 1981 First Ministers' meeting, Premier Allan Blakeney said: "[The] Charter of Rights . . . allows Parliament and legislators to override a court decision which might affect the basic social institutions of a province or region . . . ." (quoted in Johansen & Rosen, *supra* note 12 at 5).

16 The role of courts in preserving the rule of law is not just a popular or political commitment. It is constitutionally expressed in Part VII ("Judicature") of the *Constitution Act, 1867*. See, William Lederman, "The Independence of the Judiciary" (1956) 34 Canadian Bar Review 769.

17 [1986] 1 S.C.R. 103 (CanLII).