

**God and the Constitution: the Significance of the Supremacy of God in the
Preamble of the Canadian Charter of Rights and Freedoms**

by

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ABSTRACT

Despite being a unique part of the Canadian Constitution, the reference to the supremacy of God in the preamble of the *Canadian Charter of Rights and Freedoms* has received relatively little scholarly attention. This study will demonstrate that the supremacy of God reveals something significant about the Canadian Constitution, the theory of rights, Canadian nationalism and the theory of the state.

A review the supremacy of God's historical origins will draw links to the foundation of rights and nationalism. A legal analysis will reveal that it represents the source of rights and nationhood without religious exclusivity. Engagement with rights discourse will demonstrate that the supremacy of God corresponds to the idea that universal rights require a foundation that transcends human affairs. Finally, the supremacy of God will be shown to serve as the transcendent principle that underlies both the symbolism of civic nationalism and the theory of the state.

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INTRODUCTION

GOD AND THE CONSTITUTION: THE SIGNIFICANCE OF THE SUPREMACY OF GOD IN THE PREAMBLE OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. The Meaning and Significance of the Supremacy of God

The patriation of the Canadian Constitution in 1982 resulted in the addition of a number of new terms to the Constitution that have generated a considerable degree of public attention and scholarly focus. Terms such as multiculturalism, equality and the rule of law have received extensive attention and are arguably as representative of the Canadian Constitution as the older phrases such as peace, order and good government. One addition to the Constitution at the time of patriation that has not received the same degree of consideration as some of the other terminology is a reference to the supremacy of God in the preamble of the *Canadian Charter of Rights and Freedoms*.¹ The preamble of the *Charter* reads as follows: “Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law.” At the time of patriation the inclusion of a reference to God in the Constitution was the subject of considerable debate, but despite being a unique aspect of the Constitution it has since received very limited legal or scholarly attention, and very few serious attempts at explaining its significance and historical origins have been made.

The brevity of the preamble not only makes the reference to the supremacy of God a difficult subject for an in-depth study, but it has also resulted in a number of negative reviews and surface-level analyses that fail to provide a satisfactory account. Much of the existing literature questions the relevance of the supremacy of God based on an incomplete review of its origins during the patriation process, a brief account of its limited legal application, or by

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [hereinafter “*Charter*”].

automatically tying it to specific religious interests. The purpose of this thesis is to undertake a broad and comprehensive study of the supremacy of God clause in order to ascertain why a reference to God was included in a defining legal document of a secular and multicultural state in the 20th century, and to consider its overall meaning and significance. In the course of the next four chapters, the supremacy of God will be shown to be an important provision that reveals something significant about the Canadian Constitution, the theory of rights embodied by the Constitution, Canadian nationhood and the theory of the state more generally.

The limited results achieved by the existing literature in ascertaining the full meaning of the supremacy of God is due in large part to its complexity. The comprehensive account which is the goal of this study requires a broad and multidisciplinary approach that includes aspects of historical inquiry, legal analysis, and legal and political theory. Discerning the supremacy of God's origins and concrete links to the foundation of rights and nationalism requires a historical inquiry concerning the circumstances surrounding its inclusion in the preamble of the *Charter*. An examination of the Canadian constitutional structure and the jurisprudence on the supremacy of God is also necessary in order to determine how the courts have interpreted and applied the reference, as well as to ascertain its link to the freedom of religion in the *Charter* and the practice of secularism in Canada. Lastly, engagement with numerous perspectives on rights discourse, political and legal theory will assist in revealing the deeper theoretical significance of the reference to the Supremacy of God as the transcendent foundation of rights protection, civic nationalism in Canada and the theory of the state.

B. Chapters

Chapter I will present the intriguing story of how the supremacy of God found its way into the short preamble to the *Charter* by considering the rich and varied debate on the reference

that occurred in Parliament at the time of patriation, and by analyzing the draft preambles to the Constitution and the quasi-constitutional *Canadian Bill of Rights*.² This will help display the thought process of the *Charter's* framers and the theory that inspired them. A review of the history behind the supremacy of God will reveal that, contrary to the arguments of some scholars, it is much more than a last minute addition to the *Charter*.

While some have suggested that the supremacy of God is attributed to the influences of a religious lobby, this chapter will consider the tension of the social climate at the time of patriation, which was marked by both increasing secularism and the rise of the religious right that sought to influence social policy debates. As such, this chapter will present a nuanced explanation of the inclusion of the supremacy of God in the preamble and will demonstrate a more complex link between the supremacy of God and religion – one which points to higher spiritual values and transcendence without religious exclusion and which is linked to the foundation of rights and nationhood. The historical analysis will thus lay the groundwork for a more in-depth legal and theoretical analysis to follow later in the thesis.

The complicated relationship between the supremacy of God and religion identified in chapter I will be pursued further in chapter II through a consideration of the legal significance of the reference. In particular, chapter II will trace how the courts have interpreted the supremacy of God in light of the Canadian constitutional structure as a whole, and more specifically, the freedom of religion, and will consider what this interpretation reveals about the reference. Just as chapter I will rebuke the claim that the supremacy of God was a mere afterthought in the patriation process, chapter II will likewise dispute the contention made by a number of authors that question its value or express concerns for what they perceive to be a religious statement in a

² *Canadian Bill of Rights*, SC 1960, c 44.

legal document.³ These authors question the value the supremacy of God in light of the freedom of religion guaranteed in the *Charter* or by focusing on a limited number of comments by the courts in cases that appear to marginalize the reference.⁴

In the course of this legal analysis, chapter II will engage with subjects such as secularism and the protection of religious freedoms, and will consider the supremacy of God in light of the practice of secularism, which in the Canadian context means that the state both protects religious freedoms and rejects religious exclusivity while also recognizing the importance of a sense of sacredness in public life. In doing so, this chapter will provide considerable insight on how the supremacy of God can represent the higher source of our rights and our nationhood and yet not simply represent a specific set of religious principles. This will be shown to be supported by the jurisprudence since the courts have barred attempts by individuals to use the supremacy of God to help interpret the law in accordance with their religious beliefs. Lastly, this chapter will also consider the relationship between the supremacy of God and the second component of the preamble – the rule of law, and will display the complimentary theoretical role served by the two.

Chapter III will proceed to consider whether there is a theoretical basis for the link between the supremacy of God and the foundation of rights first made in chapter I, and whether this is an assertion that rights have a religious basis. While the link between the supremacy of God and the theory of the foundation of rights has been suggested by a number of authors, this observation has not been accompanied by a full engagement with theory. Chapter III will thus

³ See especially: William Klassen, "Religion and the Nation: An Ambiguous Alliance" (1991) 40 UNBLJ 87; David Brown, "Freedom from or Freedom for? Religion as a case study in defining the content of Charter rights" (2000) 33 UBCL Rev 551; Peter W. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982).

⁴ Specific focuses is often placed on comments made by the courts in the following two cases: *R v Sharpe* (1999), 175 DLR (4th) 1, [2000] 1 WWR 241, 136 CCC (3d) 97, 25 CR (5th) 215, 65 CRR (2d) 18, 69 BCLR (3d) 234; *R v Morgentaler*, [1988] 1 SCR 30 at 178, 44 DLR (4th) 385, 63 OR (2d) 281.

further examine this link and conduct the in-depth analysis that is lacking in the existing literature.⁵ In doing so, chapter III does not seek to definitively resolve the discourse on the theoretical foundation of rights, but rather intends to engage with a range of theorists and approaches from the natural law tradition, to the skepticism of legal positivism to modern secular accounts of human dignity.

Chapter III argues that every claim to universality requires a foundation that transcends regular human affairs, even if the precise relationship between a higher power and universal rights varies depending on theorist and historical period. This chapter will demonstrate that the supremacy of God corresponds with the idea that there is a transcendental foundation for rights protection, and it directs us to engage with rights discourse. Chapter III will not only reveal the various notions of a higher source as the transcendent foundation of rights, but will also balance it with more secular understandings. Lastly, this chapter will bring us from human rights theory to nationhood through an examination of Hannah Arendt's unique understanding of human dignity with its focus on the right to membership in a political community.

The fourth and final chapter will examine the supremacy of God's role in the symbolism of civic nationalism and its more foundational relationship to the theory of the state and constitutionalism. This chapter will thus consider whether there is a theoretical relationship between the supremacy of God and the foundation of Canadian nationhood, since earlier versions of the preamble tied these two concepts together. This will begin with a theoretical examination

⁵ The link between the supremacy of God and the foundation of the rights has been suggested by a number of authors including: Jonathon W Penney & Robert J Danay, "The Embarrassing Preamble? Understanding the "supremacy of God" and the Charter" (2006) 39 UBCL Rev 287; Lorne Sossin, "The 'supremacy of God', Human Dignity and the Charter of Rights and Freedoms" (2003) 52 UNBLJ 227; John Von Heyking, "God and the Canadian Constitution" University of Calgary Research Unit for the Study of Civil Society online: <<http://people.uleth.ca/~john.vonheyking/CharterGod.htm>>.

of the importance of symbolism to help bind the citizenry to the state, and the corresponding idea of a civil religion.

This theoretical analysis will be followed by an examination of the experiences with symbolism and civil religion in both the Canadian and the American contexts, and will reflect on the Canadian struggle of devising nationalistic symbolism.⁶ The relevance of a reference to the divine in such nationalistic symbolism will also be displayed, and concrete links will be made to the supremacy of God. It will be demonstrated that a reference to the divine is commonly employed as the transcendent principle that defines the ultimate source of a nation's bonds in order to attribute to the nation an innate and enduring character. Yet references to the divine serve a more foundational function as the transcendent principle in the theory of the state and constitutionalism. This will be conducted firstly through an examination of the role of God in the democratic movement, and finally in liberal constitutionalism which attributes constitution-making power to the sovereign people, or the 'nation,' whereby popular sovereignty takes on the form of creator.

c. Definitions

A number of terms which come up frequently will be defined at the onset. Reliance will be placed on Abdullahi Ahmed An-Na'im for many of the definitions because they were developed in the context of his work on the theory of human rights and the intersection of secularism and religion. We will begin with An-Na'im's definition of human rights since rights will comprise an important part of the analysis of the supremacy of God, particularly in chapter III. An-Na'im first

⁶ Mary Ellen Turpel briefly referred to the supremacy of God as "a declaration of a civil religion," in a scathing review of the preamble of the *Charter* in which she declared it to "represent[s] a kind of cultural hegemony" over Aboriginal peoples. Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in Richard F Devlin, ed, *Canadian Perspectives on Legal Theory* (Toronto: Montgomery Publications Limited, 1991) 503 at 529 footnote 10.

considers what he refers to as the “rough and intuitive” understanding of rights as the “historic struggle for freedom and justice.”⁷ However, as he intends on engaging with theory he relies on the understanding of human rights as being “due to all human beings by virtue of their humanity, without distinction on groups such as race, sex, religion, language, or national origin.”⁸ An-Na’im points out that universality is the key feature of this definition, and this is also important for the purposes of this thesis as the idea of the supremacy of God’s link to the foundation and universality of human rights will be considered.

References have already been made to religion, and while there is a general understanding of what constitutes a religion it is still necessary to define it in order to emphasize several key elements that are important for this study. The definition of religion by An-Na’im has been adopted because of the focus of his research on the intersection of religion and human rights. An-Na’im defines religion as follows:

A system of beliefs, practices, institutions, and relationships within a community that distinguishes itself from other communities. The key feature of religion in this sense is the exclusivity of any community of believers, but that is not to say that understanding some religious traditions in more inclusive terms is impossible. ... Some form or degree of exclusion (at least moral – and often material – exclusion) seems necessary for vindicating the faith of one religious community and distinguishing it from that of all others.⁹

The interesting aspect of this definition, aside from the fact that it does not make explicit references to the divine or otherworldliness in order to capture a wide range of beliefs, is its emphasis on exclusivity. An-Na’im’s emphasizes exclusivity because of his interest in human rights and the reluctance of religions to accept values which do not specifically stem from their

⁷ Abdullahi An-Na’im, “The Interdependence of Religion, Secularism and Human Rights: Prospects for Islamic Societies” (2005) 11 *Common Knowledge* 56 at 57.

⁸ *Ibid* at 58.

⁹ *Ibid*.

beliefs. This definition, with its emphasis on exclusivity, is relevant to chapter II which will consider the practice of secularism.

This definition of religion therefore necessitates a definition of secularism, which An-Na'im also provides. An-Na'im defines secularism as:

A principle of public policy, applied variously in distinct contexts, for organizing the relationship between religion and the state. Historical experience shows that religious exclusivity tends to undermine solidarity and even peaceful coexistence among differing communities of belief, and secularism apparently evolved as a means of encouraging pluralism in the state. ... The principle can be applied differently under various regimes of government.¹⁰

The relevance of this definition is in its emphasis on both pluralism and solidarity, a subject of particular interest in a multicultural state such as Canada, and one which will be shown to be relevant to a study of the supremacy of God's link to nationalism in chapter IV.

Lastly, a definition of civil religion is required for the purposes of the supremacy of God's link to nationalism. The Lutheran World Federation has developed the following definition of a civil religion:

Civil religion consists of a pattern of symbols, ideas, and practices that legitimate the authority of civil institutions in a society. It provides a fundamental value orientation that binds a people together in common action within the public realm. It is religious in so far as it evokes commitment and, within an overall worldview, expresses a people's ultimate sense of worth, identity, and destiny. It is civil in so far as it deals with the basic public institutions exercising power in a society, nation, or other political unit. A civil religion can be known through its observance of rituals, its holidays, sacred places, documents, stories, heroes, and other behaviour in or analogous to recognized historical religions. Civil religion may also contain a theory that may emerge as an ideology. Individual members of a society may have varying degrees of awareness of their civil religion. It may have an extensive or limited acceptance by the population as long as it serves its central function of legitimating the civil institutions.¹¹

¹⁰ *Ibid.*

¹¹ Yoshiro Ishida, "About this Issue" in Frances Maher, ed, *On Civil Religion* (Geneva: The Lutheran World Federation, 1982) 1 at 1.

While this definition was developed by a religious organization, it corresponds to An-Na'im's definition of religion as it does not necessarily require a reference to the divine, but rather emphasizes the symbols and rituals in a society that help bind people to the state.

CHAPTER I
THE ORIGINS OF THE SUPREMACY OF GOD
AND ITS INCLUSION IN THE PREAMBLE OF THE CHARTER

A. Introduction

The starting point in an undertaking into the meaning and significance of the supremacy of God in the preamble of the *Charter* is an account of its origins in order to ground the reference in a concrete historical context. Establishing the historical context is a necessary part of this study since much of the existing literature seeks to undermine the significance of the supremacy of God through a rudimentary account of its origins. A number of incomplete or selective accounts of the supremacy of God's origins have resulted in simplistic conclusions on its significance with little attempt at a more developed theoretical explanation. This chapter is therefore meant to provide, to the extent possible, a comprehensive account of the origins of the supremacy of God in order to help reveal its place in the complex relationship between religion, secularism, human rights and nationalism in the Canadian constitutional arrangement. In doing so, it will be demonstrated that the supremacy of God is much more than a last minute addition to the Constitution meant to appease religious interests, and that its complex and interesting historical origins sets the groundwork for a more in-depth legal and theoretical analysis.

This chapter will begin by reviewing some of the historical accounts and explanations provided by the existing literature, and by considering the debates in Parliament during the patriation process. It will then proceed to consider the wider social context which is paradoxically characterized by both a decrease in the moral content of law as well as a wave of religious interests in politics. Finally, the origins of the supremacy of God will be traced back to

the 1960 *Canadian Bill of Rights*¹ and the federal government's failed attempt of a preamble to the entire Constitution.

B. The Supremacy of God, Secular Politics and Religious Interests

The inclusion of the supremacy of God in the preamble of the *Charter* came about at the time of the patriation of the Canadian Constitution by the Liberal government of Prime Minister Pierre Elliott Trudeau in 1982, and represents the first time that God was mentioned in a Canadian constitutional text, with no equivalent in either the *British North America Act, 1867*,² or Britain's unwritten constitution.³ The precise point of its inclusion in the *Charter* is April 22, 1981, when Justice Minister Jean Chrétien first proposed the addition of the current preamble as an amendment.⁴ This was only a year before the constitutional package proceeded through both the Canadian and British parliaments and was formally proclaimed as law.⁵ Prior to this amendment the government's constitutional package contained neither a reference to God nor a preamble to the *Charter*. The Justice Minister's amendment stemmed from a debate on including a reference to God in the Constitution first commenced by Progressive Conservative MPs David Crombie and Jake Epp in early 1981 in the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, and soon thereafter included MPs from all three federal parties, a number of both religious and non-religious organizations, and regular citizens.

Several commentators have relied on the timing of the debate and inclusion of the supremacy of God near the end of the patriation process to question its relevance. Dale Gibson insisted that the supremacy of God "is not likely to play a very significant interpretative role"

¹ *Canadian Bill of Rights*, SC 1960, c 44 [hereinafter "*Canadian Bill of Rights*"].

² *British North America Act, 1867* (UK), 30 & 31 Vict, c 3.

³ 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.

⁴ *House of Commons Debates*, 32nd Parl, 3rd Sess (22 April 1981) at 1510 (Hon Jean Chrétien).

⁵ The Constitution was proclaimed law on April 17, 1982.

because of its “incompleteness, and its obvious last-minute nature and political inspiration.”⁶ Lorne Sossin argued that the supremacy of God stems from “inglorious origins” because it was the “last to be drafted.”⁷ Such comments can only be directed towards the short version of the story behind the supremacy of God as reviewed above, which in itself also raises intriguing questions because the timing of its inclusion in the *Charter* corresponds with some of the most liberal reforms that have been undertaken by the federal government to reduce the moral content of law. To this end George Egerton considers the significance of the supremacy of God in light of two paradoxical sets of events which culminated in the early 1980s: the liberal reforms of the Trudeau government that reduced the moral content of law, and the increasing influence of religious groups that became actively involved in public policy debates.⁸

Trudeau sought to modernize Canadian law from much of its religious basis beginning in 1967 while serving as Justice Minister in the Liberal government of Lester B. Pearson, and continuing into his time as Prime Minister. Trudeau’s changes to divorce law are the most well-known of the liberal reforms that he initiated, although he also changed the criminal statute of many other areas that were subject to moral regulation, such as lotteries, birth control, homosexuality and abortion.⁹ Being heavily influenced by the British Wolfenden Report that advocated a separation between morality and criminality, the changes undertaken in this period have been characterized as a process which divested religion of “its former role as arbiter of public morals, with churches being transformed from the ‘conscience of the nation’ to privatized suppliers of spiritual services to consumers.”¹⁰ With many of these transformations having been

⁶ Dale Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 67.

⁷ Lorne Sossin, “The ‘Supremacy of God’, Human Dignity and the *Charter* of Rights and Freedoms” (2003) 52 UNBLJ 227 at 232.

⁸ Egerton, *supra* note 3.

⁹ *Ibid* at 96.

¹⁰ *Ibid* at 97.

implemented by the early 1980s, it seems to have been an unusual time to first include a reference to God in the Constitution, and it is within this context that one needs to question both the linear portrayal of the evolution Canadian society from religious to secular, as well as simply attributing the supremacy of God to the influence of religious interests.

Along with the liberal reforms which had been ongoing for over a decade by the early 1980s, one also needs to consider the influence of religious groups at the time of patriation. These groups initially became involved in debates concerning topics such as the status of denominational schools, abortion and sexual orientation. A loose coalition of evangelical, fundamentalist and Pentecostal Christians began to develop in this period based on the inspiration of the political successes of the ‘new religious right’ in the United States, to oppose the marginalization of their views in the secular agenda of the Trudeau government.¹¹ The most prominent of these groups were the Evangelical Fellowship of Canada (EFC), which served as a lobby, Renaissance Canada, which sought to build a ‘moderate’ Christian political majority, and 100 Huntley Street, which reached out to its constituents through a national television broadcast. Egerton outlines how these Christian organizations mobilized during the patriation debate to advance a number of the issues which were important to their constituents, and explains that they were “anxious to see an explicit reference to the supremacy of God stipulated in a preamble to the draft *Charter*.”¹² These groups mobilized in a number of ways to ensure the inclusion of a reference to God in the Constitution: David Mainse of 100 Huntley Street directed his viewers to write to Members of Parliament in support of the inclusion of a reference to God in the

¹¹ *Ibid* at 101.

¹² *Ibid*.

Constitution; Renaissance Canada took out full page ads in various daily newspapers in support of the issue; and the EFC petitioned Members of Parliament and the Prime Minister directly.¹³

Egerton also stresses the increasing political support that the evangelical cause was receiving in Parliament for the inclusion of a reference to God in the Constitution during the patriation debate, mainly from Progressive Conservative MPs, but also from a number of Liberals.¹⁴ Liberal Deputy House Leader David Smith is identified as a chief proponent of the evangelical cause in the Liberal Party, and he was particularly influential in the inclusion of the reference to the supremacy of God in the *Charter* because of a brief which that he wrote for Trudeau and his advisors on the topic. Smith's brief called for the immediate inclusion of a reference to God in the Constitution on the basis that it is a relatively straightforward undertaking which would immediately appease the only aspect of the constitutional debate understood by some evangelicals, which they viewed as a type of "litmus test" on the spiritual values of the Liberals and the Prime Minister.¹⁵

Political lobbying by the evangelicals and political pragmatism on the part of the Trudeau Liberals likely had some influence in the inclusion of the supremacy of God in the preamble of the *Charter*. However, the degree of this influence should not be overstated, and it does not, on its own, provide a satisfactory explanation of the meaning and significance of the supremacy of God. To begin with, it is unlikely that the evangelical lobby would be instantly and fully appeased with a symbolic measure without the advancement of some of their substantive interests. The rise of evangelism represents a backlash to the increasing liberalization of North American society as seen in concrete social issues including abortion, homosexuality, divorce

¹³ *Ibid* at 104.

¹⁴ *Ibid* at 102-104.

¹⁵ *Ibid* at 105.

and changes to the traditional family.¹⁶ It is thus difficult to accept the claim that the inclusion of a reference to God in the Constitution was one of the only issues understood by some evangelicals. The media often presented many of these issues together in a simplified fashion such as: “God and the West are in, abortion and capital punishment are out, and Canadians have a chance at last to glimpse at the final version of the government’s constitutional resolution.”¹⁷

To complicate the relationship between the supremacy of God and religious interests even further, the zealous drive to have God included in the Constitution by evangelical Christian groups was for the most part not matched by the mainstream Christian denominations or by other religions. Only a handful of religious organizations provided written submissions or appeared before the Special Joint Committee on the Constitution. Of the three religious organizations that appeared before the Committee only two were mainstream denominations – the United Church of Canada and the Ontario Conference of Catholic Bishops.¹⁸ Neither of these two denominations requested the inclusion of a reference to God in the Constitution – a fact which Trudeau was quick to point to when the Liberals were being pressed on the matter near the end of the patriation process.¹⁹

¹⁶ Peter C Emberley, *Divine Hunger: Canadians on Spiritual Walkabout* (Toronto: Harper Collins Publishers Ltd, 2002) at 31.

¹⁷ Aileen McCabe, “New Constitution: It’s ready at last”, *The Ottawa Citizen* (21 April 1981) 1 at 1.

¹⁸ The third religious organization that attended was the Church of Jesus Christ of Latter Day Saints. A number of religious organizations expressed an interest in attending but ultimately did not, such as Agudath Israel of Canada, the Canadian Protestant League, Eglise la Mission Chrétienne Evangélique, Renaissance International and the Ukrainian Greek Orthodox Church of Canada.

Library of Parliament Research Branch, *Special Joint Committee of the Senate and of the House of Commons: Statistical Account of Written Submissions* by Stephen J Fogarty, et al, (Ottawa: Library of Parliament Research Branch, 1981) at 8.

¹⁹ Aileen McCabe, “‘Electorate’s wrath’ put God in Constitution”, *The Ottawa Citizen* (25 April 1981) 8 at 8.

For the position of the Catholic Church see: Letter from Ursula Appolloni, MP to all members of the Ontario Liberal Caucus (27 September 1980) regarding the Canadian Conference of Catholic Bishops; Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Written Submissions by the Canadian Catholic School Trustees Association* (6 January 1981) (PJ Hammel, President).

The Catholic Church was occupied with a more pressing matter – maintaining the right to public funding for Roman Catholic Separate Schools in the new constitutional arrangement.²⁰ The Anglican Church of Canada and the Canadian Protestant League made written submissions to the Special Joint Committee, but likewise did not request the inclusion of a reference to God in the Constitution.²¹ Lastly, none of the numerous organizations representing various ethnic groups called for the inclusion of a reference to God in the Constitution, despite the fact that some likely had a religious membership base.²² Most of these ethnic groups were concerned with the official recognition of multiculturalism or with substantive rights in the *Charter* in light of their historic experiences with discrimination.²³

²⁰ *Ibid*, Letter from Ursula Appolloni at 2, *Written Submissions by the Canadian Catholic School Trustees Association* at 1-4.

²¹ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Brief to the Joint Committee on the Constitution of Canada by the Anglican Church of Canada* (January 1981) (the Most Reverend Edward W Scott, Primate); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Brief of the Canadian Protestant League to the Special Joint Committee of the Constitution of Canada 1980* (Jonas E.C. Shepherd, General Secretary).

²² See: Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 1st Sess (20 November 1980) at 9103 (Mr. Jan Kaszuba, President, Canadian Polish Congress); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 1st Sess (20 November 1980) at 9140 (Mr. Jan Federorowicz, Canadian Polish Congress); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 1st Sess (9 December 1980) at 2211 (Mr. J.A. Mercury Executive Secretary, National Black Coalition of Canada); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 1st Sess (9 December 1980) at 2274 (Mr. Laureano Leone, President, Council of National Ethnocultural Organizations of Canada); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Written Submission to the Select Committee on the Constitution of Canada – Canadian Jewish Congress* (13 November 1980) (Maxwell Cohen, Chairman); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Brief on Constitutional Reform submitted by the Canadian Polish Congress Inc* (August 1980) (W Gertler, National President); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Brief of the National Black Coalition of Canada on the Entrenchment of Bill of Rights in the Canadian Constitution* (27 November 1980) (Wilson Head, President); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *The Japanese Position on the Proposed Charter of Rights* (25 November 1980) (George Imai, National Executive Committee - National Association of Japanese Canadians); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Submissions by the Baltic Federation in Canada* (24 November 1980) (Laas Leivat, vice-president, For TE Kronbergs, President. Representing the Estonian Central Council in Canada, the Latvian National Federation in Canada and the Lithuanian Community); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Brief to the Joint Committee on the Constitution of Canada by the Canadian Slovak League* (1 December 1980) (Imrich Stolarik, President).

²³ See also: Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (27 November 1980) at 1454-1464 (Professor Manoly Lupul, Director, The Institute of Canadian Studies).

Most importantly, it is difficult to accept that lobbying from the religious right would instantly sway the Trudeau Liberals to incorporate evangelical notions into the Constitution when they ran contrary to the *raison d'être* of their entire program since Trudeau's entry into politics. While Trudeau was in many respects a devout Catholic, he considered religion to be a private matter, or as he phrased it, "a communication between man and his God" – a position which was reflected in his opposition to the close ties between the Roman Catholic Church and the Quebec government of Maurice Duplessis, as well as his own liberal reforms.²⁴ Thus, if political pragmatism was a factor that led to the inclusion of the supremacy of God in the Constitution one needs to consider more nuanced accounts of its meaning that would have been more acceptable to the Trudeau Liberals. These nuanced accounts will be shown to be revealed in part by the *Canadian Bill of Rights* and the proposed preamble to the entire Constitution.

C. *The Supremacy of God – From the Canadian Bill of Rights to the Charter of Rights*

The inclusion of a reference to God in the Constitution became a contested political issue on January 19, 1981, when David Crombie questioned Robert Kaplan, the Solicitor General and acting Minister of Justice, on the lack of an inspirational preamble to the *Charter* analogous to the preamble of the 1960 *Canadian Bill of Rights*. The preamble of the *Canadian Bill of Rights* reads as follows:

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;

²⁴ Pierre Elliot Trudeau, *Conversation with Canadians* (Toronto: University of Toronto Press, 1972) at 10.

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada²⁵

The close proximity of the supremacy of God, Canadian nationhood and individual human rights is apparent in the first paragraph of this preamble.

Crombie's concerns surrounding the lack of a preamble for the Charter were curiously left to the last five minutes of his time with the Minister, which, while being seriously insufficient to get to the core of the matter, was all the time needed to see that many of the theoretical and foundational questions surrounding the *Charter* and the entire patriation process remained unresolved.²⁶ Kaplan indicated that he personally liked the preamble of the *Canadian Bill of Rights* and that the government intended on including a preamble but ultimately decided not to because the proposals were controversial and lacked consensus.²⁷ Seeing that such foundational issues could not be resolved in five minutes, Crombie resumed questioning the Minister on the following day. After outlining the principles that the Canadian nation is founded upon according to the preamble of the *Canadian Bill of Rights*, namely 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, Crombie asked the Minister whether the same principles apply to the *Charter* or whether the government had other foundations in mind.²⁸ Kaplan responded by suggesting that the preamble of the *Canadian Bill of Rights*, while being a "fine statement of principle," displays the difficulty associated with an exercise of defining broad theoretical

²⁵ *Canadian Bill of Rights*, *supra* note 1, Preamble.

²⁶ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (19 January 1981) at 4032 (Hon David Crombie).

²⁷ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (19 January 1981) at 4032 (Hon Robert Kaplan).

²⁸ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (20 January 1981) at 417 (Hon David Crombie).

principles and would likely not survive scrutiny because it fails to acknowledge the Indians, multiculturalism and the founding of Canada by the English and French.²⁹

The starting point of a broader analysis of the significance of the supremacy of God in the preamble of the *Charter* is therefore with the quasi-constitutional *Canadian Bill of Rights*. The *Canadian Bill of Rights* is largely associated with the former Conservative Prime Minister John G. Diefenbaker, who was a long-standing advocate of civil liberties as well as an unwavering proponent of a single Canadian nation. Diefenbaker regarded a bill of rights as not only the best instrument to protect civil liberties, but also “to build a new Canada where racial, ethnic, and religious origins were cast aside in favour of an ‘unhyphenated Canadianism.’”³⁰ Diefenbaker clearly expressed this in the following passage:

I regarded a Canadian Bill of Rights as fundamental to my philosophy of social justice and nation development ... If historic freedoms were not protected, then my programs to ensure a climate of expansion and development from Atlantic to Pacific and my concern that all Canadians should enjoy a reasonable share of the good life ... would be for naught.³¹

The initial draft of the *Canadian Bill of Rights* did not contain a preamble, although Diefenbaker agreed to have the matter considered by the Special Committee on Human Rights and Fundamental Freedoms after repeated calls from the Liberal opposition.³² Most of the members and witnesses before the Special Committee stressed the need for a rhetorical preamble since it was suggested that the *Canadian Bill of Rights* outlines “the principles by which we live,” and because it contained an important educative component.³³

²⁹ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (20 January 1981) at 417 (Hon Robert Kaplan).

³⁰ Christopher MacLennan, *Toward the Charter: Canadians and the Demand for a National Bill of Rights, 1929-1960* (Montreal: McGill University Press, 2003) at 120.

³¹ *Ibid.*

³² *House of Commons Debates*, 24th Parl, 3rd Sess, Vol VI (7 July 1960) at 5948 (Rt Hon John Diefenbaker).

³³ *Ibid.*

Representatives from two churches appeared before the Special Committee – the Seventh-Day Adventist Church in Canada and the Christian Science Church for all of Canada, neither of which specifically requested a reference to God in the *Canadian Bill of Rights*.³⁴ Surprisingly, the Special Joint Committee requested a draft preamble from the Seventh-Day Adventist Church representative, who in fact intended on presenting one but was ultimately unable to because of time constraints.³⁵ With respect to the content of their submissions, the Seventh-Day Adventist Church mainly called for “the complete separation of church and state as the surest guarantee of freedom of conscience,” while the Christian Science Church pressed for the protection of the freedom of religion.³⁶

The first person to propose a draft preamble was Maxwell Cohen, professor of law at McGill University.³⁷ While Professor Cohen’s draft did not contain a reference to God, it did refer to human dignity and Canadian nationhood – two matters which will be shown to be closely linked to the history and theory behind the reference to the supremacy of God.³⁸ At least seven additional draft preambles were proposed by individual MPs and the Prime Minister: three

³⁴ The Canadian Jewish Congress also appeared before the Special Committee, and likewise did not request a reference to God in the *Canadian Bill of Rights*. Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 1 (15 July 1960) at 86.

³⁵ Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 1 (15 July 1960) at 70 (Rev Darren L Michael).

³⁶ *Ibid*; Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 4 (20 July 1960) at 305-6 (Leslie A Tufts).

³⁷ Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 5 (21 July 1960) at 362-3 (Maxwell Cohen).

³⁸ *Ibid* at 375. His proposed preambles reads as follows: Whereas the people of Canada believe in the dignity of man and assert that every human being deserves respect; Whereas all Canadians claim as a historic right to have that dignity and respect safeguarded by law; Whereas the human rights and fundamental freedoms of Canadians have been defined and protected by the laws, customs and conventions of the Canadian constitution and by the provinces; Whereas these rights and freedoms now have received international recognition and further enlargement under the United Nations charter and the universal declaration of human rights; Whereas the charter is part of the law of Canada and the universal declaration has been adopted by Canada as ideal toward which all civilized peoples should direct their law and their policy; Whereas Canada is a federal state, uniting within a single nation many ethnic and religious groups while yet encouraging the preservation of any respect for all heritages; Be it resolved that the parliament of Canada express as a high aim of Canadian nationhood the respect for and protection of human dignity, rights and fundamental freedoms.

contained a reference to God; one referred to spiritual values; all but one referred to human dignity and/or Canadian nationhood.³⁹

The draft presented by MP Eric Winkler referred to spiritual institutions rather than explicitly to God:

Canadians being a proud and vigilant people, of many lands, desire to maintenance and preservation, against government, of their spiritual and democratic Institutions, their traditional respect for the rule of law, their love of freedom and cultural ties. Recognizing their responsibilities one to another, and internationally through the United Nations charter regarding the sovereignty of the individual in his relationship to the state as the highest aim of Canadian nationhood and of fundamental rights and freedoms request Her Majesty...⁴⁰

The first draft preamble to contain a reference to God was from Liberal MP Hubert Badanai:

In recognition that the Canadian people believe in the dignity of man and are composed of many races and religious beliefs, the parliament of Canada hereby declare and re-affirm the people's fundamental liberty to work and to worship his God to the satisfaction of his conscience and Her Majesty, the Queen, with the advice and consent of the Senate and the House of Commons of Canada enact as follows:⁴¹

³⁹ The various drafts that did not contain references to God include:

Recognizing the desire of all Canadians to understand the principles on which the peace, order and good government of Canada are founded, and desiring to establish these principles in writing, and to declare them as fundamental to the laws of the parliament of Canada.

Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 6 (22 July 1960) at 461 (Hon Mr. Aiken).

We, the people of Canada, believe that the strength of a nation lies in the protection of the fundamental freedoms and human rights of all men with equality before the law regardless of race, religion, national origin, colour or sex and we believe that by setting forth these rights and freedoms that we reaffirm faith in the essential dignity of man.

Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 6 (22 July 1960) at 462 (Hon John AW Drysdale).

The Canadian people conscious, appreciative and determined to retain the fullest extent their common heritage of basic human rights and fundamental freedoms obtained through centuries of united efforts and sacrifices and now firmly enthroned as part of the law of Canada and being desirous that these rights and freedoms be declared and confirmed by an act within the legislative capacity of the parliament of Canada and for this purpose and to express this intention.

Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 9 (26 July 1960) at 544 (Hon Mr. Stewart).

⁴⁰ Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 10 (27 July 1960) at 592 (Hon Eric Alfred Winkler).

⁴¹ Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 10 (27 July 1960) at 592 (Hon Hubert Badanai).

Liberal MP Paul Martin Sr. was the most vocal advocate for the inclusion of a reference to God in the *Canadian Bill of Rights*, and presented a draft preamble containing two references to God:

Before God the Canadian people, united for the common pursuit of their well-being, composed of persons of various races and religions from many nations; intent on preserving (the heritage of the past), especially that of the dignity of the individual in his rights and freedoms which have been secured through the institution of parliament and the law, desire to reaffirm their faith in these human rights and fundamental freedoms.

Having joined with other nations and their peoples in the universal declaration of human rights, the people of Canada hereby rededicate themselves to the principles of that charter in their human, social, political, economic and legal terms, particularly those concerning the sanctity and inviolability of the family as the fundamental unit of society, the right of the individual to participate in government and to earn a living for himself and his family.

The Canadian people, therefore, believe that it is meet and proper that, for the better understanding of all, the parliament of Canada declare both man and God, on behalf of the nation, those human rights, fundamental freedoms, and objects of nations purpose that are within its competence so to do.

Her majesty, by and with the advice and consent of the Senate and House of Commons of Canada, therefore enacts:⁴²

Even the Prime Minister presented his preferred wording for the preamble in the House of Commons which also included a reference to God:

On these great truths we stand, and pledge by heart and under law, that God makes all men free in human dignity, whatever their colour, race or creed, to worship and to live, each equal with his neighbour; to speak his mind out clear, without reproach or fear; to tread where heroes for generations have trod, to freedom under God; on these eternal truths we pledge, by heart and under law, to keep these truths true; with all our strength to strive, and keep these truths alive.⁴³

During the discussion on the preamble a number of MPs and the Minister of Justice, Edmund Davie Fulton, expressed the difficulties associated with drafting a preamble.⁴⁴ Fulton

⁴² Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 10 (27 July 1960) at 493 (Hon Paul Martin).

⁴³ *House of Commons Debates*, 24th Parl, 3rd Sess, Vol VII (1 August 1960) at 7416 (Rt Hon John Diefenbaker).

⁴⁴ See for example: Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 6 (22 July 1960) at 432 (Hon Paul Martin); Special Committee on Human Rights

explained that the Department of Justice initially intended on including a preamble to the bill, but ultimately decided to proceed without one because of the difficulty associated with deciding on what to include.⁴⁵ Once the Minister had a number of draft submissions to work with, it was decided that the Department of Justice would attempt to amalgamate them into a suggested preamble.⁴⁶ The amalgamated draft was presented to the Special Committee two days later, and resembles the final version of the preamble in almost every respect except for the omission of the reference to the supremacy of God.

The Minister explained that while the draft did not explicitly contain everything that was submitted, it did “incorporate them either in principle, by reference, or by implication,” while at the same time “avoiding ... those things which might be offensive to some of our people.”⁴⁷ The Department of Justice evidently opted for Winkler’s indirect mention of the divine through the word ‘spiritual’ over Badanai’s and Martin’s explicit mention of God. He rationalized this based on the need to recognize Christian beliefs while at the same time not being offensive to any other group.⁴⁸

At that point Paul Martin gave an impassioned justification for including God in the preamble. While Martin accepted the need to ensure that the *Canadian Bill of Rights* does not contain anything offensive to any religious denomination, whether they are Christian, Jewish, Muslim or otherwise, he claimed to have spoken to Jewish friends and members of other

and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 10 (27 July 1960) at 591 (Hon Mr. Batten).

⁴⁵ Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 6 (22 July 1960) at 424 (Hon Edmund Davie Fulton).

⁴⁶ Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 10 (27 July 1960) at 591 (Hon Edmund Davie Fulton).

⁴⁷ Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 11 (29 July 1960) at 714 (Hon Edmund Davie Fulton).

⁴⁸ *Ibid.*

religions who ultimately did not object to a reference to God in the *Canadian Bill of Rights*.⁴⁹ One of his main justifications for including a reference to God was the need to distinguish Canada from totalitarian societies that are based on dialectical materialism that deny God and view religion as a force that “hold[s] down the progress of human beings.”⁵⁰ After Martin’s speech and the support of another MP, Fulton requested that the Committee hold off the record discussions on the matter – returning on the record with the adoption of the final version of the preamble which oddly incorporated the supremacy of God while also maintaining the reference to “moral and spiritual values” which was initially intended as a substitute to God.⁵¹

Tracing the origins of the supremacy of God to the *Canadian Bill of Rights* displays that its inception stems not from a religious lobby active at the time of patriation, but rather a human rights instrument enacted two decades prior to the patriation process. Moreover, the process that resulted in its inclusion in the *Canadian Bill of Rights* begins to reveal some of its links to the foundation of rights and nationhood, which will be shown to continue in the proposed preambles to the entire Constitution at the time of patriation.

D. The Supremacy of God, Patriation and a Preamble to the Entire Constitution

Incorporating a symbolic preamble into the Canadian Constitution was a goal pursued by the Liberal governments of both Lester B. Pearson and Pierre Trudeau, and draft preambles have been considered since at least the Federal-Provincial Constitutional Conference of 1968. Referring to national unity as the “most important issue of [his] career,” Pearson revealed in his memoirs that his goal at the Constitutional Conference was to “use the subject of a constitutionally entrenched Bill of Rights to lead up to a general discussion on the whole

⁴⁹ Special Committee on Human Rights and Fundamental Freedoms, *Minutes of Proceedings and Evidence*, 24th Parl, 3rd Sess, No 11 (29 July 1960) at 715 (Hon Paul Martin).

⁵⁰ *Ibid* at 715-6.

⁵¹ Edmund Davie Fulton, *supra* note 7 at 718.

question of unity.”⁵² When Pearson appointed Trudeau to the Justice portfolio in September of 1967 he announced the Liberal government’s intention of entrenching a bill of rights in the Constitution.⁵³ Trudeau proved to be particularly passionate about combining individual rights and national unity at the Constitutional Conference, which according to Pearson provided both the principle and the venue for Trudeau “to reveal himself to the public mind.”⁵⁴ The link between the protection of civil liberties and the development of a Canadian nation was always at the forefront of Trudeau’s vision of the *Charter*:

the adoption of a constitutional bill of rights is intimately related to the whole question of constitutional reform. Essentially we will be testing – and hopefully establishing – the unity of Canada.⁵⁵

The ability of the *Charter* to contribute to the building of a Canadian nation was something which Trudeau continued to believe in long after his retirement from politics. He had the following to say about the *Charter* in his memoirs:

Writers and poets have always searched for the Canadian identity; ... Almost instinctively, Canadians have tended to say that they are French Canadians or English Canadians or Ukrainian Canadians or whatever, or simply new Canadians. But what is Canada itself? With the charter in place, we can now say that Canada is a society where all people are treated equal and where they share some fundamental values based upon freedom. The search for this Canadian identity, as much as my philosophical views, held led me to insist on the *Charter*.⁵⁶

The provinces generally accepted the importance of a rhetorical preamble to the Constitution that would define and promote the principles of Canadian nationhood. Various provinces suggested that the preamble should reflect the “hopes and aspirations of the Canadian

⁵² John A Munro & Alex I Inglis, *Mike: The Memoirs of the Right Honourable Lester B. Pearson, Volume 3 1957-1968* (Toronto: University of Toronto Press, 1975) at 236 and 255.

⁵³ *Ibid.*

⁵⁴ *Ibid* at 257.

⁵⁵ Christopher MacLennan, *supra* note 30 at 151.

⁵⁶ Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland & Stewart Inc, 1993) at 323.

people,”⁵⁷ “stipulate their rights and responsibilities,” and showcase “national accomplishment and identity.”⁵⁸ Quebec was the notable exception, and even a Liberal government under Daniel Johnson stressed the fact that “the Canadian people is not homogeneous,” that “Canada is made up of two nations,” and “a new Canadian Constitution will have to be the product of an agreement between our two nations.”⁵⁹ The important point for Quebec was the recognition of “two nations” in the Constitution, and the province made concrete suggestions at the Constitutional Conference which would solidify this proposition, including designating Canada as a republic, changing the official name of the country to the “Canadian Union,” and replacing the term “province” with “state.”⁶⁰

In a pamphlet published for the 1969 Constitutional Conference entitled *The Constitution and the People of Canada*, Prime Minister Trudeau advocated for the inclusion of a preamble to the Constitution that would, in his words:

express the purpose of Canadians in having become and resolving to remain associated together in a single country, and it must express as far as this is possible in a Constitution what kind of country Canadians want, what values they cherish, and what objectives they seek.⁶¹

⁵⁷ Nova Scotia, Nova Scotia Delegation to the Constitutional Conference – Continuing Committee of Officials, *Propositions Submitted by the Province of Nova Scotia to the Constitutional Conference – Continuing Committee of Officials* (February 1969) at 8.

⁵⁸ Ontario, Ontario Delegation to the Constitutional Conference – Continuing Committee of Officials, *Propositions Submitted by the Province of Ontario to the Constitutional Conference – Continuing Committee of Officials* (December 1968) at 5 (John P Robarts, Prime Minister of Ontario).

See also: Newfoundland, Newfoundland Delegation to the Constitutional Conference – Continuing Committee of Officials, *Propositions Submitted by the Province of Newfoundland to the Constitutional Conference – Continuing Committee of Officials* (6 February 1969) at 4.

Alberta, Newfoundland Delegation to the Constitutional Conference – Continuing Committee of Officials, *Propositions Submitted by the Province of Alberta to the Constitutional Conference – Continuing Committee of Officials* (February 1969) at 2.

⁵⁹ Constitutional Conference Ottawa, *First Meeting* (February 5-7 1968) (Mr. Daniel Johnson) at 55.

⁶⁰ Quebec, Quebec Delegation to the Constitutional Conference – Continuing Committee of Officials, *Propositions and Working Documents for Constitutional Reform* (24 July 1968) at 12-14.

⁶¹ Canada, *The Constitution and the People of Canada: An Approach to the Objectives of Confederation, the Rights of People and the Institutions of Government* by Pierre Elliott Trudeau (Ottawa: February, 1969) at 6.

However, three years later at the Constitutional Conference in Victoria in 1971 the participants could still not agree on what to include in a preamble.⁶² By 1972 the Special Joint Committee recommended in its Final Report that “the Canadian Constitution should have a preamble which would proclaim the basic objectives of Canadian federal democracy.”⁶³ In 1978 the federal government proposed the *Constitutional Amendment Bill*, which contained the following preamble in addition to a new part of the Constitution referred to as the statement of aims of the Canadian Federation purporting to set out the objectives of the Canadian federation:⁶⁴

The Parliament of Canada, affirming the will of Canadians to live and find their futures together in a federation based on equality and mutual respect, embracing enduring communities of distinctive origins and experiences, so that all may share more fully in freer and full life;

Honouring the contribution of Canada’s original inhabitants, of those who build the foundations of the country that is Canada, and of all those whose endeavours through the years have endowed its inheritance;

Welcoming as witness to that inheritance the evolution of the English-speaking and French-speaking communities, in a Canada shaped by man and women from many lands;

And being resolved that a renewal of the Canadian federation, guided by aims set forth in its Constitution, can best secure the fulfillment of present and future generations of Canadians;

Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:⁶⁵

The interlude of Joe Clark’s minority Progressive Conservative government temporarily halted the Trudeau Liberal’s drive for patriation and put an end to the 1978 proposal.⁶⁶ The

⁶² Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 1980) at 911-912 (Mr. Wells).

⁶³ Canadian Intergovernmental Conference Secretariat. *Proposals on the Constitution: 1971-1978: Collation by the Canadian Intergovernmental Conference Secretariat* (Ottawa: 1978) at 48.

⁶⁴ Bill C-60, *An Act Amending the Constitution*, 3rd sess, 30th Parl, 1978.

⁶⁵ Canada, *The Constitutional Amendment Bill: Text and Explanatory Notes. Published to Encourage Public Discussion of Proposed Changes in the Canadian Constitution, as set out in a Bill Introduced in Parliament by the Government of Canada* (June, 1978) at 1.

⁶⁶ Rainer Knopff & FL Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992) at 14.

possibility of patriation reemerged with the Liberal's sudden defeat of the Progressive Conservatives in 1979, and in fact gained urgency upon the announcement of the Quebec sovereignty referendum. The Constitution was hardly mentioned in the election that resulted in a majority Liberal government, but Trudeau made a pledge for the renewal of Canadian federalism immediately after the announcement of the Quebec sovereignty referendum campaign.⁶⁷ The idea of a preamble to the entire Constitution was added to the constitutional reform agenda at a meeting of the first ministers at the Prime Minister's residence on June 9, 1980, and made its way to the top of Trudeau's agenda, equaling that of patriation, an amending formula, an entrenched charter of rights with language provisions, and equalization and regional development.⁶⁸

Constitutional negotiations began in June of 1980, and the provincial premiers accepted the federal government's invitation to draft a preamble to the entire Constitution.⁶⁹ The meetings produced twenty-seven different themes and suggestions, although few were supported by the majority of participants.⁷⁰ The federal government's proposed draft contained similarities to its version in the *Constitutional Amendment Bill* of 1978 although for the first time it contained a reference to God by claiming that the Canadian people, "shall always be, with the help of God, a free and self-governing people."⁷¹

As in the preamble of the *Canadian Bill of Rights*, there is a close proximity between the reference to God and Canadian nationhood. This draft generated considerable disagreement between the federal and the Quebec delegations, whereby the premier of Quebec argued that the

⁶⁷ Guy Laforest, *Trudeau and the End of a Canadian Dream*, translated by Paul Leduc Browne and Michelle Weinroth (Montreal and Kingston: McGill-Queen's University Press, 1995) at 45.

⁶⁸ Roy Romanow, John Whyte & Howard Leeson *Canada ... Notwithstanding: The Making of the Constitution 1976-1982* (Toronto: Carswell, 1984) at 63-65.

⁶⁹ *Ibid* at 85.

⁷⁰ *Ibid* at 84.

⁷¹ George Egerton, *supra* note 3 at 100.

reference to “the people” was meant to imply a single Canadian nation, which as a result denied Quebec’s status as a nation.⁷² The issue was of such importance to Trudeau that he wrote an open letter to Quebecers on the issue of the preamble, in which he argued that the term “people of Canada” was used to describe all citizens of Canada regardless of their ethnicity. Trudeau also addressed a specific demand of the Quebec government to include the right to self-determination in the preamble, which he refused on the ground that it is analogous to including the right to divorce at the “beginning of a wedding contract.”⁷³

The second draft preamble presented by the federal government had two objectives: firstly, to ‘modernize’ the language of the preamble to the *British North America Act, 1867*, which contained ‘archaic’ references to the “Crown of the United Kingdom”, and “the Interests of the British Empire”; and secondly to refer “to the distinct French-speaking society centred in though not confined to Quebec.” This draft was also rejected. Quebec insisted on a preamble stating that “the Provinces of Canada chose to remain freely united in federation,” and which recognized the “distinctive character of Quebec society with its French-speaking majority.”⁷⁴ The debate over the preamble continued to the very end of the negotiations, and began to take on a new form as a battle between Quebec and the federal government with considerable animosity between Trudeau and Quebec Premier René Lévesque. While Trudeau insisted on a preamble referring to Canada as “an indissoluble federation,” and “a union of people,” Lévesque continued

⁷² Roy Romanow, John Whyte & Howard Leeson, *supra* note 68 at 85.

The Fédération des Francophones hors Québec stated the following: “The Francophones outside Quebec are convinced that no valid project can be conceived if it is not based, first and foremost, upon the double fact of the association of two peoples and of ten provinces. This is a basic requirement for Canada.”

Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (20 November 1980) at 1350 (Ms. Jeanie Seguin, President, La Fédération des Francophones hors Québec).

⁷³ Roy Romanow, *Supra* note 68 at 85.

⁷⁴ *Ibid* at 86.

to demand a preamble which recognizes the “right to self-determination for the provinces.”⁷⁵ The rest of the provinces were split on the issue, some subscribing to the concept of the provinces being “freely united” or “freely associated,” while others were against this concept.⁷⁶ The Ontario delegation was adamantly against the idea of including the principle of self-determination in the Constitution, and proposed the following draft preamble which had originally been submitted in Victoria and which had been worked on by a group of citizens in an Advisory Committee on Confederation:

Proud of our heritage, confident of our future, acting of our sovereign will under God, we as Canadians, declare our common purpose: to establish the rule of justice, to respect the dignity and worth of persons, families and communities, to protect their rights in free association, to foster the contribution of our native people and peoples from many lands towards our common destiny, to honour each sex, race, colour and creed as equal, to seek from want for all of our people, to preserve and share the wealth of the land and to defend for the freedom and enjoyment of future generations and to seek peace through justice in the world at large. In recognition of these purposes we therefore establish institutions of a democratic, parliamentary, constitutional monarchy, choose federalism for the system for sharing government best suited to the achievement of unity in diversity, recognize our fundamental, linguistic dualism and declare English and French to be our official languages and proclaim our Constitution.⁷⁷

The strong link between God, Canadian nationhood, and individual human dignity is even more apparent than the federal draft with references to “our sovereign will under God,” a “common purpose,” “a common destiny”, and “the dignity and worth of persons.”

⁷⁵ *Ibid.*

⁷⁶ At least New Brunswick, Newfoundland and Prince Edward Island supported the concept of “freely united” or “freely associated.” See:

Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 11, 1980) at 892-894 (Hon Richard Hatfield, for New Brunswick); Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 11, 1980) at 913-914 (Hon G. Ottenheimer, Attorney General for Newfoundland); Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 11, 1980) at 918 (Hon Horace Carver for Prince Edward Island); Allan Blakeney reserved judgment on the issue and said that Saskatchewan “can probably accept almost any preamble that meets with the view of the other First Ministers.” Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 11, 1980) at 918 (Hon Allan Blakeney for Saskatchewan).

⁷⁷ Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 11, 1980) at 912-13 (Mr. Wells).

The First Ministers' Conference collapsed in September of 1980, after only four months of negotiations. The reasons behind the failure are multiple and debatable. The fact that the governments could not even agree on the language of a preamble revealed both the limited possibility of patriation without the unilateral action of the federal government, and the importance of symbolism. Among the many surprises that came along with the federal government's unilateral action following this collapse was an attempt to entrench a charter of rights in the Constitution which would apply to both levels of government. Most provinces expected a charter which would only apply at the federal level, with an optional opt-in clause for the provinces.⁷⁸

The federal government did not further pursue the issue of a preamble for the entire Constitution, although elements of this initiative can still be found in the Constitution. While the preamble of the *British North America Act, 1867* was not updated, the title of that statute was changed to the *Constitution Act, 1867*. Oddly enough, the sole comprehensive review of this change is unable to discern the origin of the idea, nor the official government reason for abandoning the term British North America. The author concludes that it was an attempt to make the Constitution appear 'more Canadian,' and laments its loss on the grounds that Canada lacks a unifying national idea.⁷⁹ Interestingly, the reference to the supremacy of God is a small component of Trudeau's intended 'unifying national idea' that the author criticizes the Constitution for lacking.

⁷⁸ Roy Romanow, John Whyte & Howard Leeson, *supra* note 68 at 106.

⁷⁹ Robert Martin, "A Lament for British North America" in Anthony A Peacock ed, *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Don Mills: Oxford University Press, 1996) 3 at 4-5.

E. From a Preamble to the Entire Constitution to a Preamble to the Charter

The sudden debate in the Special Joint Committee and in the House of Commons on the inclusion of a reference to God in the Constitution caught the Trudeau Liberals by surprise since the federal government abandoned the idea of a preamble during its unilateral initiative to patriate the Constitution. The debate was surprisingly in the context of discussions on the *Charter*, and while some of the discussion focused on religious reasons for including a reference to God, a significant amount also concerned an acknowledgment of the natural law origins of rights, or as an indication of the larger significance of constitutional law as a moral and spiritual guide for the nation. The following are two examples of comments made by MPs that make links between the supremacy of God and human rights:

A charter, to mean anything, must contain an acknowledgment of the supremacy of God in order to demonstrate that rights do not come from man or from some leader; rights are ours because we are human beings created in the image of God.⁸⁰

It would have us believe that rights are conferred on people by their governments. This is quite the reverse of reality. In fact, human rights are inherent in human beings. ... These rights exist because they are implanted in every human being by God, the Creator of life. How ironical that not only does the charter ignore this, it even ignores the pre-eminence of God.⁸¹

The following examples are comments made by MPs that make links between the supremacy of God and nationhood:

What is wrong with the basic premise that God should be respected and written into our Constitution, as He has always been an inspiration in our society? Why is it that God, the cornerstone of our heritage, has been so blatantly left out? The founders of this country fell down on their knees and praised God for helping them find the land, and they thanked God for all the bountiful gifts He bestowed on them. What is now wrong with referring to the role which God plays in the lives of Canadians?⁸²

⁸⁰ *House of Commons Debates*, 32nd Parl, 3rd Sess (16 March 1981) at 1620 (Hon Mr. Andre).

⁸¹ *House of Commons Debates*, 32nd Parl, 3rd Sess (16 March 1981) at 2120 (Hon Douglas Roche).

⁸² *House of Commons Debates*, 32nd Parl, 3rd Sess (18 March 1981) at 1700 (Hon Mr. Corbett).

What the Diefenbaker words would do, is, I believe, to establish once and for all that the supremacy of the nation must come from God; that we must up from in our *Charter*, respect and enshrine the dignity and worth of the human person...⁸³

Trudeau kept insisting that the proper place for the supremacy of God was in a preamble to the entire Constitution, and put the blame for the loss of the reference solely with the provinces that rejected his preamble. He said the following in the House of Commons:

We would like to see God in the preamble; we would like to see the preamble brought back which we presented the provinces last September.

If ever proof were needed that a consensus and unanimity are not possible in this matter, it was given last June when the preamble was rejected. One of the reasons was that the preamble indicated that Canada was a nation. That was the reason, as is well-known, that at least one province did not want to accept the preamble.⁸⁴

The Liberals maintained that it was the provincial premiers who thwarted their attempt to have God placed in the Constitution up to the day that Justice Minister Jean Chrétien proposed the government's amendment to the *Charter*.⁸⁵ The opposition was always quick to rebuff this claim on the basis that the premiers rejected the preamble because of a number of other issues which were entirely unrelated to the reference to God.⁸⁶ The Progressive Conservatives displayed considerable dissatisfaction with the preamble introduced by Chrétien, which they called the most "sterile or arid description of ... a very fundamental principle," and ultimately voted against the amendment.⁸⁷ While the Conservatives' initial attempt to amend the *Charter* by inserting the preamble from the *Canadian Bill of Rights* at the Special Committee on January 22, 1981 was defeated,⁸⁸ their disdain of the Liberals' preamble led them to unsuccessfully attempt it

⁸³ *House of Commons Debates*, 32nd Parl, 3rd Sess (21 January 1981) at 4238 (Senator Tremblay).

⁸⁴ *House of Commons Debates*, 32nd Parl, 3rd Sess (23 March 1981) at 1730 (Rt Hon Pierre Elliott Trudeau).

⁸⁵ *House of Commons Debates*, *supra* note 4.

⁸⁶ *House of Commons Debates*, 32nd Parl, 3rd Sess (21 April 1981) at 1740 (Hon Gordon Taylor).

⁸⁷ *House of Commons Debates*, 32nd Parl, 3rd Sess (21 April 1981) at 1610 (Hon Perrin Beatty).

⁸⁸ The amendment was introduced by Epp and Senator Tremblay on January 21, 1981, and defeated in a vote of 14 Nays to 10 Yeas on January 22, 1981. See: Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *supra* note 26; Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (21 January 1981) at 423 (Hon

again in the House of Commons on the same day that Chrétien introduced the Liberals' amendment.⁸⁹

Trudeau was well-known for making contradictory remarks on subjects of public policy, and the issue of the inclusion of a reference to God in the Constitution was no exception. He made the following remarks a month after his initial statements in the House of Commons: "I find it rather strange, so far from the Middle Ages, we felt the obligation to carry all this out with respect to the supremacy of God."⁹⁰ He also declared at a Liberal caucus meeting that "I don't think God gives a damn whether he's in the Constitution or not."⁹¹ These contradictory comments have to be considered in light of Trudeau's religious beliefs, as well as his disappointment with the failure to get consensus on a preamble to the entire Constitution. Even in the final hours when the Minister of Justice presented the amendment which resulted in the current preamble to the *Charter*, he stressed that the government's initial intention was to incorporate a reference to the supremacy of God in a preamble to the entire Constitution.⁹² Trudeau was never satisfied with this compromise, and stated that "God won't be very flattered by the mention He is getting in the Canadian Constitution."⁹³ Comments made by the Minister of Justice subsequent to the amendment attempted to lighten the mood on the matter: "My name is

Jake Epp); Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (22 January 1981) at 4321.

⁸⁹ The amendment was introduced by Baker and Clarke on April 23, 1981, and defeated in a vote of 175 Nays to 93 Yeas. See: *House of Commons Debates*, 32nd Parl, 3rd Sess (23 April 1981) at 2330. NDP members such as Broadbent, Robinson and Blakie voted against the Conservatives' motion. The Liberal's amendment was introduced by Pinard and Chrétien and was easily passed in a vote of 173 Yeas to 94 Nays. See: House of Commons, *House of Commons Debates*, 32nd Parl, 3rd Sess (21 April 1981) at 2240.

⁹⁰ Aileen McCabe, "'Electorate's wrath' put God in Constitution," *supra* note 19.

⁹¹ George Egerton, *supra* note 3 at 90.

⁹² *House of Commons Debates*, *supra* note 4.

⁹³ Aileen McCabe, "'Electorate's wrath' put God in Constitution", *supra* note 19.

Jean Chrétien. My initials are J.C., like Jesus Christ. I live on Boulevard Pius XII, and my mother's name is Marie."⁹⁴

While some Liberal MPs had reservations about including a reference to God in the Constitution, Svend Robinson, a New Democratic Party MP, was an all out vocal opponent to the idea. His initial opposition to the idea when the issue was first raised at in the Special Joint Committee was that it would conflict with the freedom of conscience – a fundamental right which is enshrined in the *Charter* but not found in the *Canadian Bill of Rights*.⁹⁵ Robinson clearly presented the view to be his own and not that of the party in an attempt to quell potential disputes within his own party since Robert Ogle, an NDP MP and Catholic priest, spoke out in strong support of including a reference to God in the Constitution immediately before Robinson.⁹⁶ Over eighteen years after this event, at a time when there was virtually no other political attention being placed on the supremacy of God, Robinson tabled a petition in the House of Commons on June 8, 1999 on behalf of the Humanist Association of Canada calling for the immediate removal of the supremacy of God from the Constitution and its replacement with a preamble which asserts that Canada was “founded upon principles of intellectual freedom and the rule of law.”⁹⁷ He justified his petition on the basis that “Canada is a secular country,” and that “non-religious people in Canada have the right to be represented by the Constitution as well.”⁹⁸ Interestingly, Robinson’s move didn’t achieve the positive response which he was likely expecting. He found very little support in the House of Commons, and members of his own party

⁹⁴ John Gray, “Will recognize supremacy of God”, *The Globe and Mail* (22 April 1981) 1.

⁹⁵ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (21 January 1981) at 42:41 (Hon Svend Robinson).

⁹⁶ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (21 January 1981) at 42:39 (Hon Robert Ogle).

⁹⁷ “Canadians Debate God Reference in Constitution”, *Church and State* 169 (July-August 1999) 25 at 25.

⁹⁸ “‘God’ and the charter of rights”, *CBC News* (7 June 1999) online: CBC News <http://www.cbc.ca/news/story/1999/06/07/bc_godcharter990607.html>.

said that they were “angry, embarrassed and disgusted by Robinson’s behaviour.”⁹⁹ NDP leader Alexa McDonough made it clear that the party’s position is was keep the references to God in the Constitution, and ultimately demoted Robinson to the back bench because of his move.¹⁰⁰

Even more important than the resistance that Robinson’s move received in the House of Commons was the reaction from citizen groups. Two religious groups, Chinese Christians in Action and the B.C. Muslim Association, quickly mobilized and prepared their own petition to keep the reference to the supremacy of God in the Constitution.¹⁰¹ Indeed, the supremacy of God received considerable public attention both during Robinson’s attempt to remove it from the Constitution in 1999 as well as when the Constitution was patriated. During the patriation process one MP stated that he received “more correspondence on the matter of the supremacy of God in the Constitution than on any other aspect of the constitutional package,”¹⁰² and the Minister of Justice indicated that he had received about 8,000 letters on the issue.¹⁰³ Indeed the public interest in this issue is witnessed by the widespread media attention that it received across the country, as most major Canadian newspapers reported on some aspect of the debate and the government’s amendment.¹⁰⁴

⁹⁹ “Svend Robinson has been benched”, *CBC News* (9 June 1999) online: [CBC News <http://www.cbc.ca/news/story/1999/06/09/bc_mp990608.html>](http://www.cbc.ca/news/story/1999/06/09/bc_mp990608.html).

¹⁰⁰ “NDP leader mends rift with Svend Robinson”, *CBC News* (10 November 2000) online: <http://www.cbc.ca/canada/story/1999/06/20/ndp990620.html>.

¹⁰¹ “‘God’ and the charter of rights” *supra* note 98.

¹⁰² *House of Commons Debates*, 32nd Parl, 3rd Sess (13 March 1981) at 1250 (Hon Kenneth Robinson).

¹⁰³ *House of Commons Debates*, *supra* note 4.

¹⁰⁴ See for example: “Adaption des amendements : La constitution acquiert sa forme finale”, *Le Soleil* (24 avril 1981) B1; “Backroom negotiations on Constitution expected”, *The Winnipeg Free Press* (21 April 1981) 15; “Chrétien ridicules PC proposals: Tory constitutional package described as turning clock back 50 years”, *The Winnipeg Free Press* (23 April 1981) 19; “Constitutional reference to God gets mixed reaction here”, *The Winnipeg Free Press* (23 April 1981) 4; “Constitution : Mémoires des provinces en Cour suprême”, *Le Soleil* (23 avril 1981) A17; Michael Doyle, “God, Prairies earn Liberal recognition”, *Winnipeg Free Press* (22 April 1981) 1; Bill Fox & Andrew Szende, “Ottawa bows to public over God Clause”, *Toronto Star* (22 April 1981) A1; Bill Fox, “Premiers lose Tory support on Charter”, *Toronto Star* (22 April 1981) A1; John Gray, “Will recognize supremacy of God”, *supra* note 94; Mary Janigan, “Ottawa Puts God back in Constitution”, *The Gazette* (22 April 1981) 1; Gary Lautens, “Did anyone ask God if He wanted to be supreme here?”, *Toronto Star* (24 April 1981) A10; Charles Lynch, “PCs are trying to stop the clock”, *The Gazette* (22 April 1981) 8; Aileen McCabe, “New Constitution: It’s ready at last”, *supra* note 17; “Ottawa to Change BNA package: Clark says provinces must approve plan”, *The*

The political debate on the inclusion of a reference to God in the Constitution has been shown to be part of a larger discussion concerned with defining, in a preamble to the entire Constitution, the broad theoretical principles on which the Constitution, individual human rights and the Canada nation are based on. This debate initially only contained minor references to God, but somehow, at the very moment that the government decided for the purposes of political expediency to leave out a preamble, the discourse suddenly focused on God. Many of the criticisms levelled against the supremacy of God are based on deficient accounts that consider it in a vacuum in its final form, and they generally fail to consider its full development.

Tracing the origins of the supremacy of God to the *Canadian Bill of Rights* and the proposed preamble to the entire Constitution and considering the rich and varied debate that occurred demonstrates that it defies a simplistic explanation. If during the patriation process the Trudeau government sought to appease a religious lobby, the history behind the supremacy of God demonstrates that it has a much more intricate meaning than a simple religious reference, and it is closely connected to the foundation of human rights and Canadian nationhood. These two themes will be pursued further in chapters III and IV respectively. However, before this will be undertaken, the legal significance of the supremacy of God will be considered in the next chapter in order to make sense of jurisprudence that in many respects suffers from similar shortfalls as the literature addressed in this chapter, and in order to further explore the complex relationship the reference has with religion and secularism.

Chronicle Herald (22 April 1981) 1; Gilles Paquin, "Débat constitutionnelle : Libéraux et conservateurs présentent de nouvelles formules d'amendement", *La Presse* (22 avril 1981) A2; "PCs reverse stand on charter", *The Winnipeg Free Press* (21 April 1981) 1; André Préfontaine, "Constitution : Trudeau propose la suprématie de Dieu", *Le Droit* (22 avril 1981) 10; André Préfontaine, "Débat Constitutionnel: Chrétien fustige les amendements proposés par les conservateurs", *Le Droit* (22 avril 1981) 12; Andrew Szende, "Liberal wording on God won't get PC vote – MP", *Toronto Star* (22 April 1981) A17.

CHAPTER II

THE LEGAL SIGNIFICANCE OF THE SUPREMACY OF GOD AND THE ROLE OF RELIGION

A. Introduction and the Existing Literature

Chapter one established that the origin of the reference to the supremacy of God in the preamble of the *Charter* can only be understood in the historical context of the debates concerning a preamble to the entire Constitution and the preamble to the *Canadian Bill of Rights*. Thus, the comments by Dale Gibson and Lorne Sossin that seemingly seek to diminish the value of the supremacy of God are based on the factually incorrect premise that it was a last-minute addition to the *Charter*. Yet other commentators have expressed considerable reservations about the legal significance of the supremacy of God over and above the process which led to its inclusion. These reservations are typically linked to concerns related to the role of religion in public life.

The same year that the Constitution was patriated, constitutional expert Peter Hogg stated that “it is difficult to see what aid can be derived from the reference,” and suggested that it would likely not be of assistance in the interpretation of the freedom of conscience and religion found in section 2(a) of the *Charter* because “the reference to ‘conscience’ in s 2(a) must surely protect systems of belief which do not accept the existence of God.”¹ Similarly, Professor Dale Gibson stated that “its value as an interpretative aid is seriously to be doubted,” and that it could serve to narrow or devalue other important matters in the Constitution.² Even a theologian has questioned the validity of the supremacy of God and has likewise called for it to be excised from the *Charter* in favour of a preamble that would read as follows: “Whereas Canada is founded upon

¹ Peter W Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 9.

² Dale Gibson, *The Law of the Charter: General Principles* (Toronto: Carswell, 1986) at 65-66.

transcendent principles and the rule of law,”³ a position which is supported by at least one other author.⁴

Some of the more recent accounts of the supremacy of God have been critical of these statements, although they consider them to be reflective of how the courts have interpreted and used the reference. David Brown said that “courts and academics have treated the preamble, especially in its reference to the ‘supremacy of God,’ as an embarrassment to be ignored.”⁵ Jonathon Penney and Robert Danay likewise state that the supremacy of God “finds itself on the margins of Canadian constitutional discourse,” a fact which they find to be unfortunate given that the rule of law “has played a rather remarkable role.”⁶ Penney and Danay have been critical of the judicial considerations of the supremacy of God by virtue of two quotes: a comment from Justice Southin of the Ontario Court of Appeal referring to it as a “dead letter,” and from Justice Bertha Wilson’s contrast between the supremacy of God and a “free and democratic society.”⁷ While one can criticize the courts for their use and interpretation of the reference with relative ease by focusing on isolated quotes, the purpose of this chapter is to make sense of the jurisprudence that at face value seems to be unsystematic and of little relevance, and to come to terms with the role that religion plays in a developed account of the supremacy of God.

In developing an understanding of the supremacy of God as a representation of the higher source of our rights and nationhood, much emphasis has thus far been placed on refuting the claim that the reference merely represents the interests of religious groups active at the time of

³ William Klassen, “Religion and the Nation: An Ambiguous Alliance” (1991) 40 UNBLJ 87 at 95.

⁴ Lorne Sossin, “The ‘supremacy of God’, Human Dignity and the Charter of Rights and Freedoms” (2003) 52 UNBLJ 227 at 237.

⁵ David Brown, “Freedom from or Freedom for? Religion as a case study in defining the content of Charter rights” (2000) 33 UBC L Rev 551 at para 20.

⁶ Jonathon W Penney & Robert J Danay, “The Embarrassing Preamble? Understanding the “supremacy of God” and the Charter” (2006) 39 UBC L Rev 287 at paras 2-3.

⁷ *Ibid* at para 10. Justice Southin made the “dead letter” comment in *R v Sharpe* (1999), 175 DLR (4th) 1, [2000] 1 WWR 241, 136 CCC (3d) 97, 25 CR (5th) 215, 65 CRR (2d) 18, 69 BCLR (3d) 234 at paras 78-80. The quote from Justice Wilson is from *R v Morgentaler*, [1988] 1 SCR 30 at 178, 44 DLR (4th) 385, 63 OR (2d) 281.

patriation. This is not to suggest that the supremacy of God is entirely disconnected from religion. Rather, religion and secularism play an important role in a fully developed account of the supremacy of God. Through an analysis of the jurisprudence on the supremacy of God and the broader constitutional framework, this chapter will show that secularism in Canada allows the state to rigorously uphold religious freedoms while at the same time maintaining a relationship to religion and recognizing the importance of the sacred in public life. This will provide considerable insight on how the supremacy of God can represent the higher source of our rights and a unifying symbol for our national identity in a way that does not simply enshrine or promote a specific set of Judaeo-Christian principles. In addition, this analysis will reveal the supremacy of God's relationship to the second component of the preamble – the rule of law. The first step in the analysis requires consideration of the development of the freedom of religion, secularism and the relationship between church and state in Canada, and how this is reflected in the overall structure of the Constitution.

B. Secularism, Establishment and the Wall of Separation

Penney and Danay call for the supremacy of God to have more substantive application, although they are critical of attempts by the courts to link it to the religious freedoms found in section 2(a) of the *Charter*. In concerns that mirror those of Professor Hogg, they reject the link to the freedom of religion on the basis that religious beliefs cannot be guaranteed greater protections under the *Charter* than non-religious belief systems.⁸ Penney and Danay focus on a brief quote from the Supreme Court of Canada in the case of the *R v Gruenke*, where the Court makes a surface-level link between the supremacy of God and the religious freedoms guaranteed

⁸ Jonathon W Penney & Robert J Danay, *supra* note 6 at para 24.

in the *Charter* by beginning its analysis of section 2(b) with a recital of the preamble.⁹ That is the basis of Penney and Danay's criticism of linking the supremacy of God to the religious freedoms in the *Charter*. A deeper consideration of the supremacy of God's link to the freedom of religious helps reveal the nature of the church-state relationship in Canada and provides a practical basis from which to begin exploring the case law on the reference.

The freedom of religion is commonly associated with the American model which not only guarantees the freedom of religious practices, or the "free exercise of religion" as it is referred to in the United States, but also the non-establishment of a particular religion.¹⁰ While the records of the American Continental Congress contain numerous references to God, the Creator, Christ, and the Christian religion, and the *Declaration of Independence* of 1776 refers to "Nature's God," the American Constitution does not contain a direct reference to God, and the freedom of religion in the United States is closely tied to a firm separation of church and state.¹¹ The freedom of religion is guaranteed in the First Amendment of the American Constitution along with the separation of church and state and a number of other rights. The First Amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹²

One can clearly see the two branches of the protection of religious freedoms in the United States – anti-establishment and free exercise, although the clause does not present a hierarchy between the two principles. Recounting the voluminous and complex jurisprudence under the

⁹ *Ibid* at paras 23-24; *R v Gruenke*, [1991] 3 SCR 263, 6 WWR 673 at 301.

¹⁰ Rex Ahdar & Ian Leigh, "Is Establishment Consistent with Religious Freedom?" (2004) 49 McGill L J 635 at para 38.

¹¹ Richard E Morgan, *The Supreme Court and Religion* (New York: The Free Press, 1972) at 20.

¹² US Const amend I.

First Amendment is well beyond the scope of this undertaking, and it is sufficient to say that it was considered by former Chief Justice Brian Dickson of the Supreme Court of Canada in the context of arguments that anti-establishment is not a principle in Canada. This led to the conclusion that American jurisprudence under the First Amendment is not of particular assistance when defining the right to the freedom of religion in Canada. Specifically, Chief Justice Dickson stated that:

In my view this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the *Charter*. The adoption in the United States of the categories “establishment” and “free exercise” is perhaps an inevitable consequence of the wording of the First Amendment. The cases illustrate, however, that these are not two totally separate and distinct categories, but rather, as the Supreme Court of the United States has frequently recognized, in specific instances “the two clauses may overlap”. Indeed, according to Professor Tribe in his leading textbook, *American Constitutional Law* (1978), at p. 815, Sunday closing cases are paradigmatic examples of such overlap. Perhaps even more important is the fact that neither “free exercise” nor “anti-establishment” is a homogeneous category; each contains a broad spectrum of heterogeneous principles...¹³

While secularism in popular parlance has gradually come to mean that society and the state are “liberated from any and every imposition of religion, and from any positing of the sacred, or even of faith in the sacred, as a category with public relevance,” this is not reflective of secularism in practice.¹⁴ It is common to look at the American First Amendment as a model for the protection of religious freedom, although a strict non-establishment rule is not the only way of protecting religious freedoms, and in fact the meaning and practice of secularism varies

¹³ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321, [1985] 3 WWR 481 at para 105. This was quoted with approval in *Zylberberg v Sudbury Board of Education*, 65 OR (2d) 641, 52 DLR (4th) 577, 34 CRR 1, 29 OAC 23 at 29.

¹⁴ Douglas Farrow, “Of Secularity and Civil Religion” in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen’s University Press, 2004) 140 at 160.

from one society to the next based on historical experiences and social conditions.¹⁵ Religious liberty has been achieved in societies with diverse models of church-state relationship which range from those that have an established church to others that adhere to the strict separation theory.¹⁶ Establishment is not a uniquely English phenomenon in the West; other European states, such as Denmark, Finland, Norway, and Greece have established churches, while a number of European states which are commonly considered to be traditionally Catholic, such as Spain, Portugal and Ireland, have opted for a constitutional reference of the separation of church and state.¹⁷

Viewing an established church as an arm of the state is another common misconception. The British House of Lords has gone to great lengths to distinguish between the British state and the Church of England, and has stated the following:

[the Church of England] has nothing whatever to do with the process of either central or local government. It is not accountable to the general public for what it does. ... it is in a position which is no different from that of any private individual. ... The state has not surrendered or delegated any of its functions or powers to the Church. None of the functions that the Church of England performs would have to be performed in its place by the state if the Church were to abdicate its responsibility ... The relationship which the state has with the Church of England

¹⁵ See in particular Rex Ahdar & Ian Leigh, *supra* note 10; Abdullahi An-Na'im, "The Interdependence of Religion, Secularism and Human Rights: Prospects for Islamic Societies" (2005) 11 *Common Knowledge* 56 at 62-63.

¹⁶ Douglas A Schmeiser, *Civil liberties in Canada* (London & New York: Oxford University Press, 1965) at 56.

¹⁷ Rex Ahdar & Ian Leigh, *supra* note 10 at para 10.

Constitution, 1953 (Denmark) s 4 - "the Evangelical Lutheran Church shall be the Established Church of Denmark, and, as such, it shall be supported by the State." s 6 - "the King shall be a member of the Evangelical Lutheran Church."

Constitution Act of Finland, 1999 (731/1999), s 76.

The Constitution of the Kingdom of Norway, 1814. s 2(2) - "The Evangelical-Lutheran religion is the "official religion" of Norway. s 4 - "the King of Norway must belong to the Church and "uphold and protect the same."

Constitution of Greece, 1975, s 3.1. "The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ. The Orthodox Church of Greece, acknowledging our Lord Jesus Christ as its head, is inseparably united in doctrine with the Great Church of Christ in Constantinople and with every other Church of Christ of the same doctrine, observing unwaveringly, as they do, the holy apostolic and synodal canons and sacred traditions..."

Constitution, 1978 (Spain), s 16(3).

Constitution of the Portuguese Republic, 1976, s 41(4).

Constitution of Ireland, 1937, s 44(2.2). An amendment in 1972 removed a reference to the "special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens."

is one of recognition, not of the devolution to it of any of the powers or functions of government.¹⁸

Interestingly, a number of scholars from other religious groups have defended a weak form of establishment in Britain as “a symbolic reminder of the spiritual sphere of life.”¹⁹

The perspective by the House of Lords on the relationship between church and state is in line with international law as well as the domestic law of other states. The freedom of religion in international law focuses exclusively on free exercise and is completely silent on the issue of establishment.²⁰ The protection of religious freedoms found in Article 18 of the *Universal Declaration of Human Rights* is reflective of how the matter is addressed in other international and domestic human rights instruments:²¹

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.²²

Article 9 of the *European Convention on Human Rights* protects freedom of thought, conscience, and religion, although like other international human rights instruments it is silent on the issue of establishment. The European Court of Human Rights has held that “mild forms of state

¹⁸ *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank*, [2003] 3 All ER 1213, [2003] UKHL 37 at paras 59-61.

¹⁹ Rex Ahdar & Ian Leigh, *supra* note 10 at para 85. Ahdar and Leigh are referring to the Muslim scholar Tariq Modood, and the Chief Rabbi Jonathan Sacks. See Tariq Modood, “Establishment, Multiculturalism and British Citizenship” (1994) 65 Pol Q 53; Jonathan Sacks, *The Persistence of Faith: Religion, Morality & Society in a Secular Age* (London: Weidenfeld and Nicolson, 1991) at 97.

²⁰ Rex Ahdar & Ian Leigh, *supra* note 10 at para 52.

²¹ Rex Ahdar & Ian Leigh, *supra* note 10 at para. 30 & footnote 70. Ahdar & Leigh make this point by referring to the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976) [ICCPR]; [European] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), art 9(1) [ECHR]; and the *New Zealand Bill of Rights Act 1990* (NZ), 1990/109.

²² *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess, Supp No 13, UN Doc A/810 (1948) 71.

preference for one religion,” and the establishment of a national church do not necessarily violate the *Convention*,²³ and that an established church is not merely a branch of the state.²⁴

In addition to the direct form of establishment present in England and a number of other European states, Rex Ahdar and Ian Leigh review other more indirect forms of establishment. Firstly, more than one religion may be favoured by the state, as is the case in Germany where there is a form of “quasi-establishment” of three religions that have a long historical lineage in Germany: Evangelical Christianity, Catholicism and Judaism.²⁵ Secondly, there may be what Ahdar and Leigh refer to as “de facto establishment of religion,” which occurs when the state passes laws that “broadly concur with Judaeo-Christian principles.”²⁶ Finally, they refer to symbolic establishment, which occurs when a national constitution appeals to a deity, such is the case in the preambles of the Canadian, Australian, Irish and Polish constitutions as the higher source of principles.²⁷ Indeed George Egerton notes that at least forty other states have constitutions that make a reference to God, Allah, or the Creator.²⁸ The wide variety of church-

²³ Rex Ahdar & Ian Leigh, *supra* note 10 at para 58. *Otto-Preminger Institute v Austria* (1994), 19 EHRR 34 at para 52, 69 Eur Comm HRDR 173; *Darby v Sweden*, (1991), 13 EHRR 774 at para 45, 56 Eur Comm HRDR 166.

²⁴ *Holy Monasteries v Greece* (1995), 20 EHRR 1, Application No 0073092/87 (Eur Ct HR); *Hautanemi v Sweden* (1996), 22 EHRR CD155.

²⁵ Rex Ahdar & Ian Leigh, *supra* note 10 at para 14.

²⁶ *Ibid* at para 15.

²⁷ *Ibid* at para 12.

The Australian constitution states that the people were “humbly relying on the blessing of Almighty God” when they formed a federal Commonwealth. *Constitution Act*, 1900 (Cth).

Ireland's constitution states “In the name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred, We, the people of Ireland, humbly acknowledging all our obligations to our Divine Lord, Jesus Christ.” *Constitution of Ireland*, 1937.

The preamble of the 1997 constitution of Poland refers to “those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith, ... our culture rooted in the Christian heritage of the Nation” and “recognizing our responsibility before God ...” *Constitution*, 1997 (Poland).

See also the preamble to the *Basic Law for the Federal Republic of Germany* which reads “Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.” *Basic Law for the Federal Republic of Germany* (Promulgated by the Parliamentary Council on 23 May 1949) (as Amended by the Unification Treaty of 31 August 1990 and Federal Statute of 23 September 1990).

²⁸ 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.

state relations in Western societies suggests a degree of flexibility in secularism. At its core, secularism opposes state enforcement of ‘religious exclusivity,’ although aside from this there is a degree of latitude on how it can be applied, and it certainly does not require the complete banishment of all references to the sacred in public life.²⁹

While Ahdar and Leigh point to the supremacy of God in the preamble of the *Charter* as representative of symbolic establishment in Canada,³⁰ Egerton has gone even further than this and suggests that one can speak about “a quasi-establishment of the major denominations, or ‘national churches,’ which ... included Roman Catholicism.”³¹ This is in recognition of the fact that the Canadian church-state relationship is distinct from the establishment of England and the separationist models of the United States and France.³²

The supremacy of God made its way into the *Charter* well over a century after the church-state relationship was settled in Canada. The early history of Canada is characterized by a struggle over establishment and religious freedoms. The Roman Catholic Church was the established church in the colony of New France.³³ When France ceded Hudson Bay, Nova Scotia and Newfoundland to Great Britain under the *Treaty of Utrecht* in 1713, Article XIV stipulated that the French colonists that remained were “to enjoy the free exercise of their religion, according to the usage of the Church of Rome, as far as the laws of Great Britain allow the same.”³⁴ Despite this assurance, the precarious legal position of Roman Catholics in England at the time meant that the remaining French colonists were essentially denied full religious

²⁹ Abdullahi An-Na’im, *supra* note 15 at 58.

³⁰ In a similar argument Douglas Farrow says the following: “Canada cannot be regarded as a strictly secular country, in the popular sense of the term, so long as its constitutional documents, not to speak of its anthem, continue to offer this sanctuary for the sacred.” Douglas Farrow, “Of Secularity and Civil Religion” *supra* note 15 at 161.

³¹ George Egerton, *supra* note 28 at 92.

³² *Ibid.*

³³ Douglas A Schmeiser, *supra* note 16 at 60.

³⁴ *Ibid.*

freedoms, and by the mid-18th century efforts were underway to establish the Church of England in the Maritimes.³⁵ The three Maritime Provinces were the only part of Canada where the Church of England was established, and there do not appear to be any subsequent statutes disestablishing the Church. While in theory a statute never ceases to apply through disuse, the Church of England would not claim any preferential treatment today on that basis, and all religions are essentially treated as equal.³⁶

The British conquest of Quebec in 1759 brought about widespread anxiety over religious freedoms throughout the French Catholic population of Canada. When Britain's claim to all of Canada was formally recognized by France in the *Treaty of Paris* of 1763, it contained a provision granting the freedom of religion to Roman Catholics.³⁷ Freedom of religion was given statutory force by Westminster in the enactment of the *Quebec Act* in 1774, which formally allowed Roman Catholic subjects in Quebec to freely exercise their religion.³⁸ The effect of the *Quebec Act* can be viewed from the two angles of individual and collective identity: it protected the liberty of the individual to practice his or her faith without the fear of reprisals; while this

³⁵ *Ibid* at 60, 61 & 68.

The First General Assembly of the Province of Nova Scotia passed two statutes affecting religious freedom in 1758, the first of which placed severe restrictions on the ability of Roman Catholics to own land, while the second essentially proclaimed the Church of England as the established church of Nova Scotia. Prince Edward Island and New Brunswick soon followed suit.

An Act for Confirming Titles to Lands and Quieting Possessions (32 Geo II, c 2), s 2.

An Act for the Establishment of Religious Public Worship in this Province and for Suppressing Popery (32 Geo II c 5). s 1 provided:

... That the sacred rites and ceremonies of divine Worship, according to the liturgy of the Church established by the laws of England, shall be deemed the fixed forms of worship among us, and the place wherein such liturgy shall be used, shall be respected and known by the name of the Church of England as by law established ...

PEI established the Church of England on similar terms used by Nova Scotia - (43 Geo III, c 6, sec I (1802)), and religious freedoms were only granted to "Protestants dissenting from the Church of England." New Brunswick passed a statute entitled *An Act for preserving the Church of England, as by Law established in this Province, and for securing Liberty of Conscience in matters of Religion* (26d Geo III, c 4 (1786).

³⁶ Douglas A Schmeiser, *supra* note 16 at 70-1.

³⁷ The Right Honourable Beverley McLachlin, "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill University Press, 2004) 12 at 17 & footnote 10. Art VI of the *Articles of Capitulation of Quebec*.

³⁸ Douglas A Schmeiser, *supra* note 16 at 63. *An Act for making more effectual Provision for the Government of the Province of Quebec in North America*, 14 Geo III, c 83.

right belonged to the individual it was also deemed to be an important characteristic of the French nation in Canada and thus helped ensure its survival; it facilitated the possible development of a larger Canadian nation under the British Crown by promoting the peaceful coexistence of the French Catholic and British Protestant populations.³⁹

Even though early Canadian history is marked by the struggle over establishment and religious freedoms, it did not take on the strict separationist form followed in the United States and even more rigidly in France. The practice of secularism in Canada does not reject religion in the public sphere, nor does it value non-religious convictions over religious values. Justice Gonthier of the Supreme Court of Canada describes it as follows, and made concrete links to the supremacy of God:

In my view, Saunders J. below erred in her assumption that “secular” effectively meant “non-religious”. This is incorrect since nothing in the *Charter*, 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. I 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”. According to the reasoning espoused by Saunders J., if one’s moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has “belief” or “faith” in something, be it atheistic, agnostic or religious. To construe the “secular” as the realm of the “unbelief” is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.⁴⁰

³⁹ In terms of the Western provinces, initial attempts to establish the Church of England in British Columbia were quickly abandoned, and establishment never became a significant political issue in Prairie Provinces since the Canadian model of church-state relationship had largely developed before the colonization of the rest of Western Canada. Douglas A Schmeiser, *supra* note 16 at 70-71.

⁴⁰ *Chamberlain v Surrey School District No. 36*, [2002] 4 SCR 710, (2002), 221 DLR (4th) 156, (2002), 100 CRR (2d) 288, (2002), 46 Admin LR (3d) 1, (2002), 46 Admin LR (3e) 1 at para 137. (Dissenting Judgement of Gonthier and Bastarache JJ).

This understanding of secularism was to a large extent recognized by the Consultation Commission on Accommodation Practices Related to Cultural Differences in Quebec, which provides the most recent discussion of secularism in practice in the Canadian context. The Commission was announced in 2007 by Quebec Premier Jean Charest in response to public discontent with a number of high profile cases of religious and cultural accommodation in the previous year, and was headed by Quebec academics Gerard Bouchard and Charles Taylor. Public discontent began with the case of Gurbaj Singh Multani, whose right to wear the kirpan, a religious dagger of the Sikh faith, in school was confirmed by the Supreme Court of Canada. Additional incidents subsequently occurred involved Hasidic Jews and Muslim women wearing the hijab, and reached a critical point in January of 2007 when the village council of Hérouxville passed its infamous “code of life” which advised “foreigners” of practices prohibited in the community including “stonings, burnings and genital mutilation of women.” The Commission held public consultations in the province and released its final report in May of 2008.⁴¹

The Commission outlined the four principles that underpin secularism which every secular society must try to balance: moral equality of persons; freedom of conscience and religion; the separation of Church and State; the neutrality of the State with respect to religions and deep-seated secular convictions. It defined the first two principles as the final purposes of secularism, and the latter two as being expressed in institutional structures that make it possible to achieve the first two.⁴² While all liberal democracies adhere to these principles, a different balance of the principles is achieved in their various models or systems.⁴³

⁴¹ Quebec, Consultation Commission on Accommodation Practices Related to Cultural Differences, *Abridged Report - Building the Future: A Time for Reconciliation* (Quebec, 2008).

⁴² *Ibid* at 45.

⁴³ *Ibid*.

In attempting to define the system best suited for Québec society, the Commission rejected the systems that impose strict limitation on the freedom of religious expression, as in France, where religious symbols are prohibited in public places such as schools and government. The Commission did so on the basis that the freedom of conscience and religion is one of the principles of secularism, and the neutrality of the state “should be designed so as to foster, not hinder, its expression.”⁴⁴ The Commission accounts for the development of this system in France to the elevation of the neutrality of the state to the level of an ultimate purpose. This is displayed in some of the recent debate in France where secularism is presented as an essential component of the Republic’s identity to the extent that religious and cultural identities are deemed to impede social cohesion and schools are viewed as the institutions mandated “to emancipate students from religion.”⁴⁵ In rejecting this system, the Commission advocated in favour of the prevailing practice in Quebec, what it referred to as open secularism, whereby the separation of church and state and the neutrality of the state with respect to religions and deep-seated secular convictions work towards the final purposes of secularism, namely the moral equality of persons and the freedom of conscience and religion. Integration and social cohesion in this system, which is commonly referred to as Quebec’s interculturalism model, are achieved through the exchanges that occur among citizens. In order to have these exchanges, cultural and religious differences are thus not confined to the private domain.⁴⁶

Secularism thus does not necessarily entail the rejection of all notions of religion from public life. At its core, secularism protects religious freedoms and rejects state enforcement of religious exclusivity, although aside from these fundamental principles we have seen that its practice varies considerably from one society to the next based on historical experiences. In

⁴⁴ *Ibid* at 46.

⁴⁵ *Ibid*.

⁴⁶ *Ibid* at 46-47.

reviewing the historic development of the relationship between church and state in Canada we are better able to appreciate the unique features of the practice of secularism in Canada. It is now necessary to determine how this is reflected in the Canadian Constitution and its relevance to the supremacy of God.

C. Religion and the Canadian Constitution

This practice of secularism is much more than a mere oddity of Canadian history – it is reflective of the state’s relationship to religion which affirms religious freedom while at the same time maintaining a relationship with religion. This relationship is visible in the Canadian Constitution. As Justice Lacourcière from the Ontario Court of Appeal describes it:

One cannot ignore the positive features of the Canadian Constitution which suggest a different relationship between church and state than that which exists in the United States. The Attorney General, in its factum, claims that the *Constitution Act*, 1867, and the *Charter* have “built a bridge between church and state rather than a wall of separation.” Reference is made to the preamble of the *Charter*, which states: Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law. The preamble of the *Canadian Bill of Rights* contains a similar acknowledgment.⁴⁷

One must look at a number of provisions of the Constitution in order to fully appreciate the relationship between the state and religion. The freedom of religion found in section 2(a) of the *Charter* reads as follows:

2. Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.

In addition to not addressing the issue of establishment, s 2(a) needs to be considered in light of other provisions in the Constitution that address religion. Section 93(1) of the *Constitution Act*, 1867 provides constitutional protection to denominational schools:

⁴⁷ *Zylberberg v Sudbury Board of Education*, *supra* note 14 at 17. While this statement was in the context of a dissenting opinion on whether the recital of the Lord’s Prayer in a public school violates section 2(a) of the *Charter*, this does not detract from the accuracy of the description of the overall structure of the Canadian Constitution.

93.(1) Nothing in any such law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any class of Persons have by law in a Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissident Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

Denominational schools are also safeguarded by s 29 of the *Charter*:

29. Nothing in this *Charter* abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

This right has been described as the “recognition of special or unequal educational rights for specific religious groups in Ontario and Quebec,”⁴⁸ and as such suggests that there is “no firm wall of between church and state in Canada.”⁴⁹ Finally, section 27 of the *Charter*, which enshrines Canada’s multicultural heritage, has also been linked to the freedom of religion.

Section 27 reads as follow:

27. This *Charter* shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Religion has been held to be an aspect of culture which section 27 of the *Charter* seeks to “preserve and enhance.”⁵⁰

This constitutional structure suggests a unique relationship between church and state which is marked by a form of secularism that rejects both the separationist and the establishment models. Justice Muldoon of the Federal Court describes this overall legal structure as follows:

It is apparent, then, that both the advancement of education and the advancement of religion are firmly and favourably rooted in the public policy of our law. Moreover, it is not stretching matters to say that even in the modern, secular age

⁴⁸ *Reference re an Act to Amend the Education Act*, (1986), 53 OR (2d) 513 at 575.

⁴⁹ *Zylberberg v Sudbury Board of Education*, *supra* note 13 at 21. (Dissenting Judgement of Justice Lacourcière).

⁵⁰ *R v Videoflicks Ltd. et al.* (1984), 48 OR (2d) 395 at 427-28, 15 CCC (3d) 353. This was quoted with approval in the dissenting judgment of Justice Lacourcière in *Zylberberg v Sudbury Board of Education*, *supra* note 13 at 22.

the advancement of religion is rooted in our law and in our Constitution. That policy is readily discernable in the declaratory preambles to the *Canadian Bill of Rights* ... and the *Canadian Charter of Rights and Freedoms* which both affirm that Canada “is founded upon principles that” acknowledge and recognize “the supremacy of God,” and “the rule of law.” That is not to say that our country is even remotely similar to a theocracy such as have been established in past ages and in the present day in some countries. Far from it. We do not have any established church or State religion. Those Canadians who profess atheism, agnosticism or the philosophy of secularism are just as secure in their civil rights and freedoms as are those who profess religion. So it is that while Canada may aptly be characterized as a secular State, yet, being declared by both Parliament and the Constitution to be founded upon principles which recognize “the supremacy of God”, it cannot be said that our public policy is entirely neutral in terms of “the advancement of religion.”⁵¹

The courts have pointed to the supremacy of God in the *Charter* in other instances in support of this claim.⁵²

The practical significance of this fine balance between religious freedoms and the state’s relationship to religion for an analysis of the supremacy of God is partially exemplified in the case of *Allen v Renfrew*, which involves an unsuccessful challenge by a member of the Humanists Association of Canada to a generic reference to God in a prayer recited by the

⁵¹ *McBurney v The Queen* (1984), 84 DTC 6494 at 6496. This was quoted with approval in the dissenting judgment of Justice Lacourcière in *Zylberberg v Sudbury Board of Education*, *supra* note 13 at 22.

⁵² This assertion has been made by Justice Muldoon of the Federal Court in three different cases *See: Canada (Canadian Human Rights Commission) v Canada (Department of Indian Affairs and Northern Development)*, [1994] FCJ No 1998, [1994] ACF no 1998, 89 FTR 249, [1995] 3 CNLR 28, 25 CRR (2d) 230, 52 ACWS (3d) 864 at para 7; *Baquiul v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 279, [1995] ACF no 279, 53 ACWS (3d) 1046 at para 7; *O’Sullivan v MNR (No 2)*, [1992] 2 CTC 117 at 125.

Justice Campbell J Miller of the Tax Court of Canada referred to Justice Muldoon’s comment on the supremacy of God in *O’Sullivan v M.N.R. Ibid*, in the case of *Jacqueline and Theodore Pappas v The Queen*, 2006 TCC 692 at footnote 3.

Justice Muldoon’s statement in *O’Sullivan, Ibid* was also cited by Justice Reed of the Federal Court in *Grant v Canada (Attorney General)* (TD), [1995] 1 FC 158, (1994), 81 FTR 195.

Interestingly, Justice Muldoon of the Federal Court appears to be familiar with some of the history surrounding the inclusion of the supremacy of God in the *Charter* and refers to it as a “counter to the then Soviet Union and its repression if not outright persecution of believers of all creeds,” which resembles Paul Martin’s comments on the supremacy of God in the *Bill of Rights* referred to on pages 14-15 of chapter 1. *See Canada (Canadian Human Rights Commission) v Canada (Department of Indian Affairs and Northern Development)*, above at para 7.

Renfrew County Council.⁵³ The following prayer was adopted by the Renfrew County Council as a non-sectarian replacement to the Christian Lord's Prayer:

Almighty God, we give thanks for the great blessings which have been bestowed on Canada and its citizens, including the gifts of freedom, opportunity, and peace that we enjoy. Guide us in our deliberations as [County Councillors], and strengthen us in our awareness of our duties and responsibilities. Grant us wisdom, knowledge, and understanding to preserve the blessings of this country for the benefit of all and to make good laws and wise decisions. Amen.⁵⁴

The municipality explained that the prayer is similar to the one used by the Ontario Legislature and in the House of Commons, and that a reference to God is found in the national anthem, "in other anthems, in 'God save the Queen,' in coats of arms, oaths and many other governmental contexts."⁵⁵ While the recital of the Christian Lord's Prayer by a city council was been found to violate the *Charter* in a previous case,⁵⁶ in this case Justice Hackland held that "the mere mention of God in a governmental meeting" cannot be considered to be a "coercive effort to compel religious observance."⁵⁷

Justice Hackland's finding that the prayer imposes "a moral tone on the proceedings" and seeks "good governance" and the preservation of the country, suggests that the participants were united in their desire to govern their community in accordance with principles that are higher than their mere individual inclinations – a desire which also provides them with a sense of

⁵³ *Allen v Renfrew (Corp. of the County)*, (2004), 69 OR (3d) 742, (2004), 117 CRR (2d) 280. (Ontario – Superior Court of Justice).

⁵⁴ *Ibid* at para 3.

⁵⁵ *Ibid* at para 21.

⁵⁶ The Ontario Court of Appeal in *Freitag v Penetanguishene*, (1999) 47 OR (3d) 301, 179 DLR (4th) 150, 67 CRR (2d) 1, 125 OAC 139 held that the recital of the Lord's Prayer at a municipal meeting violated the rights of non-Christians to freedom of conscience and religion, contrary to section 2(a) of the *Charter*. The court also held that when the purpose of legislation or governmental action is to compel religious observance, it cannot be justified under section 1.

⁵⁷ *Ibid* at paras 19 & 21. The court also noted at para 22 that an unsuccessful challenge to the practice of the Speaker reciting the Lord's Prayer in the Legislative Assembly of Ontario under the Ontario *Human Rights Code* was decided on the basis that parliamentary privilege prevented a review of this practice. *Ontario (Speaker of the Legislative Assembly) v Ontario Human Rights Commission*, (2001) 54 OR (3d) 595, 201 DLR (4th) 698, 85 CRR (2d) 170, 40 CHRR 246, 33 Admin LR (3d) 123, 146 OAC 125.

solidarity.⁵⁸ Justice Hackland recognized that the prayer is not necessarily representative of a number of minority groups that do not subscribe to beliefs that acknowledge the existence of a supreme being, such as textual Confucianists, Buddhists, Humanists as well as “other analogous, modern, secular movements,” although he reasoned that “in a pluralistic society” not every government action can “meet with universal acceptance,” and this alone does not necessarily signify an infringement of an individual’s freedom of religion.⁵⁹ This was then concisely tied into the supremacy of God:

“it would be incongruous and contrary to the intent of the *Charter* to hold that the practice of offering a prayer to God per se, is a violation of the religious freedom of non-believers. This conclusion derives considerable support from the fact that the preamble to the *Charter* itself specifically refers to the supremacy of God.”⁶⁰

This case demonstrates that a collective spiritual affirmation can be made while at the same time balancing it with the protection of religious freedoms and preventing state enforcement of religious exclusivity. This should not be viewed as mere state protection of the religious beliefs of the majority. While generic references to God have generally withstood

⁵⁸ *Ibid* at para 18.

⁵⁹ *Ibid* at paras 13 & 19.

⁶⁰ *Ibid* at para 19.

The complete opposite result was achieved by the Quebec Human Rights Tribunal under the *Quebec Charter of Human Rights and Freedoms*, (RSQ C-12) in *Québec (Commission des droits de la personne et des droits de la jeunesse) v Laval (Ville)*, 2006 33156 (QC TDP). The case involved a successful challenge to a similar non-sectarian and non-Christian prayer recited by the Laval City Council. The difference could be a result of a stronger case being made that the practice was ‘coercive’ contrary to section 2(a) as espoused by former Chief Justice Brian Dickson in the case of *R v Big Drug Mart Ltd.*, *supra* note 14. The Tribunal stipulated that the prayer “had the effect of excluding,” which led to being ‘stigmatized’ “compared to with the dominant trend and the majority.” At para 153. Another interesting yet outdated case is *Trenton Construction Workers Assn., Local Number 52 v Tange Co.* [1963] OJ No 163. (Ontario Supreme Court - High Court of Justice). This case involves the review of a refusal by the Ontario Labour Relations Board to certify the Trenton Construction Workers Association as the bargaining agent for the employees of Tange Company Limited on the basis that the Ontario *Labour Relations Act* prevents the Board from doing so if a union discriminates on the basis of creed. The refusal was based on the fact the Trenton Construction Workers Association was affiliated with the Christian Labour Association of Canada, which opens their meetings with prayers. The court quashed the decision of the Board and referred to the fact that “the Legislature that passed the *Labour Relations Act* opened its sessions the day the Act was passed with prayer. Likewise, the Parliament of Canada opens its daily sessions with prayer. The British National Anthem, used as the Canadian National Anthem, is a prayer. The *Bill of Rights* ... affirms ‘that the Canadian Nation is founded upon principles that acknowledge the supremacy of God.’ The oaths of allegiance and the prescribed oaths of office of Her Majesty’s Judges and Ministers together with the oaths of office of all public officials, all acknowledge the supremacy of God.”

constitutional scrutiny, the courts have consistently held that specific Christian references to God in a public context can violate the freedom of religion. As former Chief Justice Dickson explained, it is contrary to the principles of the freedom of religion to take “religious values rooted in Christian morality and, using the force of the state, translate them into a positive law binding on believers and non-believers alike.”⁶¹ While some minor mentions of the supremacy of God have been made by judges in the context of crimes deemed to be immoral,⁶² the Supreme Court of Canada has stated that the old distinction between moral offences and offences without moral guilt is “now pretty well discredited.”⁶³

This has proved to be beneficial to minority religions, as revealed in the case of *Grant v Canada*.⁶⁴ This decision concerns a challenge of amendments to the RCMP regulations which allow the wearing of the Khalsa Sikh turban instead of the traditional wide brimmed ‘mountie’ Stetson. The plaintiffs argued that the constitutional guarantee of freedom of religion is breached when members of the public are forced to interact with police officers who are wearing religious symbols as part of the uniform of the state. In dismissing the plaintiff’s claim, Madame Justice Reed of the Federal Court reasoned that interaction with a police officer who identifies his religious belief as part of his uniform cannot constitute an infringement on the freedom of

⁶¹ *R v Big M Drug Mart Ltd*, *supra* note 13 at para 97.

⁶² See for example *R v Ghnaim*, [1988] AJ No 1025, 92 AR 27, 23 CIPR 102, 28 CPR (3d) 463, 6 WCB (2d) 84, which involves a prosecution for the illegal copying and selling of adult videos. Justice Ketchum of the Alberta Provincial Court stated that “The opening words of the *Canadian Charter of Rights and Freedoms* recognizes the supremacy of God and the rule of law. All of the world’s great religious leaders have consistently taught that it is the divine spark in men and women that sets them apart from the animals. That view of humanity is the foundation of the Judeo-Christian tradition. It is also a foundation of our law and morality. It would be a tragic irony if the freedom of expression clause (Section 2(b) of the *Charter*) were interpreted so as to subvert the intent conveyed in the opening words of the *Charter*. I reject such an interpretation and have no hesitation in finding this material to be grossly immoral; subversive of good public morals; and contrary to the standards of tolerant Canadians.”

⁶³ *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, [1985] 2 SCR 486, [1985] SCJ No 73 at para 112.

⁶⁴ *Grant v Canada (Attorney General)*, *supra* note 53. Appeals to the Federal Court of Appeal and the Supreme Court of Canada were dismissed. *Grant v Canada (Attorney General)*, [1995] FCJ No 830, [1995] ACF no 830, 125 DLR (4th) 556, 184 NR 346, 31 CRR (2d) 370, 55 ACWS (3d) 1151. *Grant v Canada (Attorney General)* (SCC), [1995] SCCA No 394. The Supreme Court of Canada dismissed the appeal without reasons.

religion because “there is no necessary religious content to the interaction between the two individuals.”⁶⁵

The overall constitutional framework reflects the unique Canadian form of secularism which, unlike the various establishment and separationist models, both ensures the freedom of religion and prevents state enforcement of religious exclusivity, while at the same time supporting the advancement of religion. The jurisprudence further demonstrates this unique relationship and makes concrete links to the supremacy of God. The next step is to further examine the jurisprudence to consider how courts have addressed attempts by individuals to rely on the supremacy of God to advance an understanding of the law based on their religious beliefs.

D. Judicial Considerations of the Supremacy of God

Numerous unsuccessful attempts have been made by individuals to rely on the supremacy of God to help interpret the law in accordance with religious beliefs in a wide array of criminal and civil matters which range from arguments that are somewhat plausible, to ones that are humorous and even some that are outright absurd. One can begin with *R v Sharpe*, the infamous decision from the British Columbia Court of Appeal in which Justice Southin referred to the supremacy of God as a “dead letter.”⁶⁶ The case involves an appeal by the Crown of an acquittal of the accused of two counts out of four for the possession of child pornography. The “dead letter” statement by Justice Southin is in the context of arguments made by the Evangelical Fellowship of Canada and Focus on the Family Association, which appeared as interveners. These groups argued that in the particular context of this case the supremacy of God should be used to acknowledge that “the social goal of protecting children in Canadian society has

⁶⁵ *Ibid* at paras 1, 77 & 84.

⁶⁶ *R v Sharpe*, *supra* note 7 at para 79.

developed from the principles and beliefs of the religions that have shaped Canadian society.”⁶⁷ The court rejected any attempts at facilitating a conviction through the use of the supremacy of God on the basis that these words “have become a dead letter” which the “court has no authority to breathe life into ... for the purpose of interpreting the various provisions of the *Charter*.”⁶⁸ While Justice Southin has been harshly criticized for this comment by Penney and Danay, less attention has been paid to the arguably more important statement that “the law of this country is rooted in its religious heritage.”⁶⁹ The combination of these two statements suggests both a recognition of the claim that our principles stem from a higher source, as well as a rejection of an attempt to circumvent the law with religious views.

A notable case in point on the courts’ rejection of attempts to use the supremacy of God to exempt an individual from the law based on his or her individual beliefs is *R v Poulin*, in which an attempt was made to use the supremacy of God as a defence to assault charges.⁷⁰ The accused in this case resided in a religious commune which followed a literal approach to the Old Testament, including disciplining children by strapping them with the rod.⁷¹ As part of her defence the accused unsuccessfully argued that her conduct was “justified and/or authorized in various passages of the Bible,” and attempted to have the *Criminal Code* read and applied in a manner consistent with this approach by relying on the supremacy of God.⁷² Similarly in *R v Langlais*, a 2008 decision from the New Brunswick Court of Appeal, an unsuccessful attempt

⁶⁷ *Ibid* at para 77.

⁶⁸ *Ibid* at para 79.

⁶⁹ *Ibid* at para 78.

⁷⁰ *R v Poulin*, [2003] 218 Nfld & PEIR 68, (2002), 7 CR (6th) 369.

⁷¹ *Ibid* at paras 2-3.

⁷² *Ibid* at paras 47-48.

was made to use the supremacy of God as a defence to a charge of public nudity on the basis that “simply nudity cannot be a crime” because “God created us nude.”⁷³

A number of attempts have also been made to rely on the supremacy of God to challenge tax laws on the basis of religious opposition to certain government expenditures. The case of *Pappas v The Queen* involved an unsuccessful attempt to use the supremacy of God to challenge the requirements on business owners to collect and remit GST to the federal government in the *Excise Tax Act*.⁷⁴ The argument was that it is “sinful in the eyes of God to be a tax collector,” and that “any legislation forcing citizens to be such is contrary to the *Charter*” since the supremacy of God demonstrates that the *Charter* is “subject to certain biblical strictures.”⁷⁵ While the court jokingly questioned whether it was sinful to be a tax collector according to the Bible on the basis of the well-known passage in *Mark* 13:13-17, “Render unto Caesar the things which are Caesar’s, and unto to God the things that are God’s,” the challenge was ultimately denied on the basis that “the supremacy of God is not an invitation to superimpose passages from the Bible onto the country’s legislation.”⁷⁶

Others have attempted similar challenges to tax schemes on the basis that they cannot support taxation because their Roman Catholic beliefs conflict with government funding of abortion procedures. This argument was attempted without success in *O’Sullivan v Canada*⁷⁷ and more recently *R v Little*.⁷⁸ A more direct challenge to Canada’s abortion laws through the use of

⁷³ *R v Langlais*, [2008] NBJ No 74, [2008] AN-B no 74, 2008 NBCA 20, 77 WCB (2d) 225 at paras 3 & 5. The court did not decide the case on the merits of this point but rather dismissed this argument on the basis that it concerns a constitutional question which was not raised at trial.

⁷⁴ *Jacqueline and Theodore Pappas v The Queen*, *supra* note 52.

⁷⁵ *Ibid* at para 9.

⁷⁶ *Ibid* & footnote 4. See also *Giagnocavo v Canada*, [1995] FCJ No 1312, [1995] ACF no 1312, 95 DTC 5650, 58 ACWS (3d) 401 at para 7, which is a similar case with the same outcome. The applicant in this case attempted to challenge tax law on the basis that it creates “involuntary servitude.”

⁷⁷ *O’Sullivan v Canada (Minister of National)*, [1992] 1 FC 522, [1991] FCJ 803.

⁷⁸ *R v Little*, [2007] NBJ No 495, 2008 NBPC 2, 328 NBR (2d) 1, 76 WCB (2d) 437.

the supremacy of God was also ineffective in the case of *R v Demers*.⁷⁹ The argument in this case was that the supremacy of God serves as confirmation that there are “certain ‘inherent’ or ‘inalienable’ rights, including foetal rights,” which are “a gift of God, not a state creation,” and which “cannot be changed by secular law, whether common law or statutory law.”⁸⁰ The Court denied the appeal on the basis of the long-line of jurisprudence that excludes a foetus from the word “everyone” in section 7 of the *Charter*.⁸¹ Failed attempts have also been made to use the supremacy of God to set aside an adoption order and to have the child returned to the biological mother on the basis that Mary and Joseph were the best and most proper parents for Jesus Christ,⁸² to have a widow’s dependency benefit restored which were terminated when she remarried on the basis that her rights under the supremacy of God were violated because she is a Catholic and thus unable to live with a man outside of marriage,⁸³ and to have a judge recused from presiding in a case on the grounds that that he “demonstrated total disbelief in the supremacy of God.”⁸⁴ Indeed the absurdity of some of the arguments has irritated judges to the point that they sometimes flat out refused to hear any submissions on the supremacy of God.⁸⁵

⁷⁹ *R v Demers* (2003), 102 CRR (2d) 367. This decision by the British Columbia Court of Appeal was initially heard by the British Columbia Provincial Court, *R v Demers*, [1997] BCJ No 3000 (BC Prov Ct), and then the Supreme Court of British Columbia, *R v Demers*, (1999), 176 DLR (4th) 741, (1999), 137 CCC (3d) 297.

⁸⁰ *Ibid* at para 15.

⁸¹ *Ibid* at para 17. The court specifically relied on: *Borowski v Attorney General for Canada* (1987), 39 DLR (4th) 731 (Sask CA); *Winnipeg Child and Family Services v DFG*, [1997] 3 SCR 925, 152 DLR (4th) 193, [1998] 1 WWR 1, 31 RFL (4th) 165, 121 Man R (2d) 241; and *Tremblay v Daigle*, [1989] 2 SCR 530, 62 DLR (4th) 634.

⁸² *JHG v WAO*, [1997] AJ No 257, 201 AR 65, 69 ACWS (3d) 1081 at para 37. (Alberta Court of Queen's Bench). See also *Saleh v Reichert*, [1993] OJ No 1394, 104 DLR (4th) 384, 50 ETR 143, 41 ACWS (3d) 227 at para 20, (Ontario Court of Justice - General Division). in which the father of a deceased women unsuccessfully attempted to use the supremacy of God to petition the court to have her remains buried pursuant to Muslim rites contrary to husband’s effort to have her cremated based on her dying wishes. The court addressed this argument on the basis that the *Charter* does not, in the absence of state or governmental action, apply to private parties involved in litigation.

⁸³ *Ontario Workplace Safety and Insurance Appeals Tribunal*, 2005 ONWSIAT 936 Decision No 2072/03 at para 27.

⁸⁴ *Dempsey et al. v Envision Credit Union et al.*, 2005 BCSC 1730 at para 5. (Supreme Court of British Columbia). See also *Kilini Creek/Patricia Hills Area Landowners v Lac Ste. Anne (County) Subdivision and Development Appeal Board*, [2001] AJ No 422, 2001 ABCA 92, 104 ACWS (3d) 1142 at para 2 (Alberta Court of Appeal), in which a Reverend claimed inherent standing to appear in a case as a Minister of God and requested that McClung JA swear an oath to the supremacy God for his own use, which was declined.

These cases demonstrate that while the supremacy of God can be viewed as representing the foundation of our social and legal order, it cannot be used to challenge laws according to individual religious beliefs. As Justice Quigley of the Alberta Court of Queen's Bench explained:

the temporal law does not exist merely for those who adhere to no spiritual values or that have no specific religious affiliation. Sinner and saint are equally subject to the law and indeed the history of man has shown that saints are more willing to honour the law and have its administration unimpeded than sinners. By that I mean, without entering into a theological dissertation, that they seldom attempt to thwart the just application of the temporal law, because they recognize its inherent good purpose and the fact that it is necessary to the well-being of an ordered society.⁸⁶

Courts have been explicit about this point in its relation to the supremacy of God. Justice Addy of the Federal Court said the following in regards to the supremacy of God in the *Canadian Bill of Rights*:

Although the common law has always recognized the supremacy of God and, although that principle is now enshrined in the preamble of the *Canadian Bill of Rights*, the common law does not grant nor does the *Canadian Bill of Rights* give to any citizen the right to invoke his own interpretation of the will of God, or of any of His precepts, as a valid motive for avoiding the duties of a citizen as they are defined and imposed by the state and it matters not whether the interpretation originates from the individual himself or from the precepts of a recognized religion.⁸⁷

See also *Fott v Fott*, 2000 ABQB 503 (Court of the Queen's Bench of Alberta), in which Mr. Fott brought a motion for contempt against his wife's lawyer on the grounds that she abused the process, created undue hardship, ill advised her client, and entered into a conspiracy with Mr. Fott's former law firm to defraud the Fott children of their inheritance – which were alleged to be contrary to the supremacy of God.

See also *Young v Young*, (1990), 75 DLR (4th) 46, (1990), 29 RFL (3d) 113, (1990), 50 BCLR (2d) 1 (Court of Appeal for British Columbia).

⁸⁵ See for example *International Forest Products Ltd. v Pascal* [1991] BCJ No. 718, where the judge refused to hear arguments that an injunction was contrary to the supremacy of God in the preamble of the *Charter*.

The most absurd attempted use of the supremacy of God is arguably found in *Sterritt v Canada*, [1995] FCJ No 1102, [1995] ACF no 1102, 98 FTR 72, 57 ACWS (3d) 279, a case which Justice Muldoon of the Federal Court called “patently bizarre” and “absurd.” The plaintiff in this case, without any authority, claimed to be pursuing an action on behalf of all Indians and the Kingdom of God, on the basis that he is the “rightful heir of God's Crown,” the “messiah” and “God's Agent,” and as such is “the private equity holder of all the crown properties including lands designated as Indian reserve lands.” The plaintiff asserted that he is the “beneficiary of the supremacy of God,” and that the “defendant is subject to the supremacy of God.”

⁸⁶ *R v Sells*, [1981] AJ No 517 at para 8.

⁸⁷ *Jensen (Re)*, [1976] FCJ No 72, [1976] ACF no 72, [1976] 2 FC 665, [1976] 2 CF 665, 67 DLR (3d) 514 at para 18. See also *R v Reed*, [1983] BCJ No 1190, 8 CCC (3d) 153, 10 WCB 482, where this was quoted.

In *R v Cyrenne* [1981] OJ No 329, 62 CCC (2d) 238 at para 91, the court said: “While I have great sympathy for persons who hold, as did these accused, honest and sincere beliefs that certain medical practices are abhorrent and

Even more revealing is the case of *R v Drainville*.⁸⁸ Father Dennis Drainville, a Protestant Priest and a Member of the Ontario Provincial Parliament, sought to help an Aboriginal group that was contesting the construction of a roadway through their ancestral land, and was charged with mischief for his participation in a protest and blockade. He knew that the province held title to the land, and while he accepted that it was wrong to disobey the law, he pointed to what he deemed to be greater laws found in the supremacy of God and advanced the defence of colour of right. Justice Fournier of the Ontario Court of Justice found that colour of right to be “an honest belief in the existence of a state of facts which, if it actually existed, would at law justify or excuse the act done,” and held that “an honest belief in a moral as opposed to legal right cannot constitute a colour of right defence.”⁸⁹ In reaching this conclusion Justice Fournier stated that when a conflict occurs “between our ‘legal’ rules, and our ‘moral’ rules,” the “courts invariably have ruled in favour of ... the rule of law.”⁹⁰

ineffective, this does not give them the right to reject on behalf of a 12 year old child a treatment which any reasonable parent, even with the adverse knowledge of these accused, would recognize as the only hope of preserving that life.”

⁸⁸ *R v Drainville*, [1991] OJ No 340, [1992] 3 CNLR 44, 5 CR (4th) 38, 12 WCB (2d) 59 (The Ontario Court of Justice).

⁸⁹ *Ibid.* The court referred to the case of *R v Hemmerly* (1976), 30 CCC (2d) 141 at 145.

⁹⁰ *Ibid.*

See also *Mooney v Dibblee*, [1992] NBJ No 511, [1992] AN-B no 511, 129 NBR (2d) 22, 35 ACWS (3d) 231. where McLellan J of the New Brunswick Court of Queen's Bench said that the supremacy of God does “not provide any legal justification for a father to evade his responsibilities for child support under the guise of freedom of religion.”

See also *R v Lindsay*, [2008] BCJ No. 1337, 2008 BCPC 203 at para 19, in which Justice Sinclair of the British Columbia Provincial Court says: “The income Tax Act is obviously man made law and, as I stated, separation of Church and State, while allowing one to have his or her religious beliefs, requires that man made law be obeyed. As I said, conflict between the laws of God and the laws of man, I assume, are resolved in the afterlife.”

A related proceeding began in the British Columbia Provincial Court three years prior to this case which went on to the British Columbia Supreme Court and twice to the British Columbia Court of Appeal. *R v Lindsay*, [2005] BCJ No 543, 2005 BCPC 84, [2005] 2 CTC 220 (British Columbia Provincial Court Criminal Division). *R v Lindsay*, [2005] BCJ No 735, 2005 BCSC 484, 197 CCC (3d) 468, 65 WCB (2d) 354, [2005] BCTC 484 (British Columbia Supreme Court). *R v Lindsay*, [2006] BCJ No 636, 2006 BCCA 150, 265 DLR (4th) 193, 224 BCAC 172, 207 CCC (3d) 296, [2006] 3 CTC 146, 70 WCB (2d) 773 (British Columbia Court of Appeal). *R v Lindsay*, [2007] BCJ No 924, 2007 BCCA 214, [2007] 4 CTC 153, 73 WCB (2d) 521 (British Columbia Court of Appeal).

The notable trend in the jurisprudence on the supremacy of God is that the courts have unequivocally barred all attempts by individuals to use the reference to help interpret the law in accordance with their religious beliefs. Justice Fournier's statement in *R v Drainville* that the "courts invariably have ruled in favour of ... the rule of law," when addressing Father Drainville's attempt to rely on the supremacy of God for his defence brings to question the relationship between the two parts of the preamble.

E. The Relationship between the Supremacy of God and the Rule of Law

This restriction against the use of the supremacy of God as providing individuals an exemption to laws based on their religious beliefs helps reveal its relationship to the second component of the preamble – the rule of law. As previously mentioned, Penney and Danay lament the uses and interpretation of the supremacy of God, which they believe finds itself in "the margins of Canadian constitutional discourse," particularly in contrast to the reference to the rule of law in the preamble, which has been used to achieve "quite remarkable results."⁹¹ Their comment on the "remarkable results" achieved with the rule of law was in reference to the *Manitoba Language Reference* case, in which the Supreme Court of Canada struck down all of Manitoba's statutes as unconstitutional because they were enacted solely in English, and then relied on the rule of law to temporarily uphold the laws to prevent its declaration from causing "chaos" and lawlessness until the provincial legislature remedied the infringement.⁹²

Rather than relying on the "remarkable results" achieved by the Supreme Court through the rule of law to display the "different fate" of the supremacy of God as Penney and Danay have done, one can also regard the Supreme Court's analysis of the rule of law from a different angle

⁹¹ *Supra* note 6.

⁹² *Reference re Manitoba Language Rights*, [1985] 1 SCR 721, 19 DLR (4th) 1, [1992] 2 WWR 385, 76 Man R (2d) 124.

to display a coordination between the two parts of the preamble. The Supreme Court of Canada has described the rule of law as “a fundamental postulate of our constitutional structure,”⁹³ which “lie[s] at the root of our system of government,”⁹⁴ and has held that it encompasses at least three principles. Firstly, the rule of law precludes the use of “arbitrary power” as the “law is supreme over officials of the government as well as private individuals.”⁹⁵ Secondly, the rule of law “requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order.”⁹⁶ Lastly, the rule of law has been held to denote that “the relationship between the state and the individual [is to] be regulated by law.”⁹⁷ In these three points the Supreme Court has relied on the rule of law to establish the preeminence of the law in the governing apparatus of Canadian society.

The first and third principles of the rule of law establish the law as the governing intermediary in the relationship between the individual and the state, although they do not answer the foundational question of why the individual is the ultimate holder of rights. Why can the state not act arbitrarily and why is a system of law required to govern the relationship between the individual and the state? These are theoretical questions on the source of rights that go to the heart of the drive for a constitutionally entrenched bill of rights in Canada. As was displayed in Chapter I, links were made to a reference to God in the Constitution when the theory and source of rights was debated in the political arena at the time of patriation. One can refer back to the comments made by MPs during the patriation process which were first considered in Chapter I:

⁹³ *Roncarelli v Duplessis*, [1959] SCR 121 at 142.

⁹⁴ *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70, 161 DLR (4th) 385, 55 CRR (2d) 1.

⁹⁵ *Reference re Manitoba Language Rights*, *supra* note 92 at 748.

⁹⁶ *Ibid* at 749.

⁹⁷ *Reference re Secession of Quebec*, *supra* note 94 at para 71. See also *British Columbia v Imperial Tobacco Canada Ltd.*, [2005] 2 SCR 473, 2005 SCC 49 at para 58; *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350, 2007 SCC 9 at para 134. A good overview of these principles is also given by the Supreme Court in *British Columbia (Attorney General) v Christie*, [2007] 1 SCR 873, 2007 SCC 21 at para 20.

A charter, to mean anything, must contain an acknowledgment of the supremacy of God in order to demonstrate that rights do not come from man or from some leader; rights are ours because we are human beings created in the image of God.⁹⁸

It would have us believe that rights are conferred on people by their governments. This is quite the reverse of reality. In fact, human rights are inherent in human beings. ... These rights exist because they are implanted in every human being by God, the Creator of life. How ironical that not only does the charter ignore this, it even ignores the pre-eminence of God.⁹⁹

This displays a close connection in the theoretical purposes of the supremacy of God and the rule of law. The second principle of the rule of law arguably makes an even more direct link to the supremacy of God as a representation of source of rights as it requires the establishment of a body of positive laws which preserve and embody the “more general principle of a normative order.” The Supreme Court provides sparse details on what this normative order signifies, and has only gone as far as requiring the existence of a body of positive law, although one can suggest that that it is in reference to a larger natural law order which provides a frame of reference for the positive law. In the *Manitoba Language Reference* case the Supreme Court stated that “law and order are indispensable elements of civilized life,” and they quote from natural law theorist John Locke that “a government without laws is ... a mystery in politics, inconceivable to human capacity and inconsistent with human society.”¹⁰⁰ It is this wider context that Penney and Danay overlooked when they suggested that the courts should give the supremacy of God “special constitutional status beyond the sidelines of *Charter* litigation”

⁹⁸ *House of Commons Debates*, 32nd Parl, 3rd Sess (16 March 1981) at 1620 (Hon Mr. Andre).

⁹⁹ *House of Commons Debates*, 32nd Parl, 3rd Sess (16 March 1981) at 2120 (Hon Douglas Roche).

¹⁰⁰ *Reference re Manitoba Language Rights*, *supra* note 92 at para 60. The Supreme Court refers to Lord Wilberforce for the quote from John Locke in *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd. (No. 2)*, [1966] 2 All ER 536 (HL) at 577.

analogous to the “remarkable results” achieved by the courts through the use of the reference to the rule of law.¹⁰¹

These three principles help reveal the connection between the theoretical purposes of the rule of law and the supremacy of God, while decisions from the Supreme Court following the *Manitoba Language Reference* case have helped to decrease the gap in how the two parts of the preamble can be applied. While authors such as Penney and Danay call for an increase in the substantive use of the supremacy of God to match that of the rule of law, the Supreme Court is arguably moving in the other direction and restricting the substantive application of the rule of law. In *British Columbia v Imperial Tobacco Canada Ltd.*, the Supreme Court of Canada suggested that the rule of law is not to be routinely applied as a regular substantive provision of the *Charter*. In this case, a group of tobacco companies challenged the constitutionality of a British Columbia statute which authorized legal action by the government against tobacco manufacturers to recover the health care costs of treating individuals that suffer from health problems as a result of tobacco consumption.¹⁰² The challenge was based on a number of grounds, including the argument that the law violates the rule of law. In rejecting the tobacco manufacturers’ arguments on the rule of law, Major J. said:

The rule of law is not an invitation to trivialize or supplant the Constitution’s written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution’s text, and apply, by whatever its terms, legislation that conforms to that text.¹⁰³

This was further elaborated on in the decision of *British Columbia (Attorney General) v Christie*, where the Supreme Court also suggested that the foundational purpose of the reference

¹⁰¹ *Supra* note 6 at paras 17 & 23.

¹⁰² *British Columbia v Imperial Tobacco Canada Ltd*, *supra* note 97.

¹⁰³ *Ibid* at para 67. Justice Guy Cournoyer of the Superior Court of Quebec relied on this decision for the assertion that “the reference to “rule of law” in the preamble to the Charter does not give an independent right.” *Teitelbaum c 9093-8119 Québec Inc*, 2008 QCCS 5625 at para 42.

to the rule of law in the preamble is mostly captured in the substantive provisions of the *Charter*.¹⁰⁴ *Christie* concerns an attempt to have a British Columbia statute, which imposes a tax on legal services, declared unconstitutional on the basis that make it impossible for low-income individual to retain legal counsel. The court held that while “access to legal services is fundamentally important in any free and democratic society,” there is no “broad general right to legal counsel as an aspect of, or precondition to, the rule of law.”¹⁰⁵ The court reached this decision on the basis of the constitutional text, the jurisprudence and the history of the rule of law. The Court referred to the need to first look at the substantive provisions of the *Charter*, and reasoned that a finding of a general right to counsel under the guise of the rule of law would essentially render redundant section 10(b) of the *Charter*, which provides the right to counsel “on arrest or detention”.¹⁰⁶ This was recently interpreted to imply that the “the Supreme Court of Canada has confirmed that the rule of law is not to be regarded as an invitation to supplant the Constitution’s written terms. Instead, the text of the Constitution is to be afforded primacy.”¹⁰⁷ Thus, the more recent decisions from the Supreme Court display much less of a contrast between the two parts of the preamble than that suggested by commentators that focus solely on the application of the rule of law in the *Manitoba Language Reference* case.

Just as the courts have barred the use of the supremacy of God to challenge laws according to individual religious beliefs, they have also resisted attempts to rely on individual understandings of the rule of law to challenge laws or disregard the substantive provisions of the

¹⁰⁴ *British Columbia (Attorney General) v Christie*, *supra* note 97.

¹⁰⁵ *Ibid* at para 23.

¹⁰⁶ *Ibid* at para 24.

¹⁰⁷ *PD v British Columbia*, 2010 BCSC 290 at para 151. See also *Morrow v Zhang*, 2008 ABQB 98, [2008] 5 WWR 285, 167 CRR (2d) 20, 86 Alta LR (4th) 137; *R v Yung*, 2010 BCSC 1023; *Canadian Bar Assn v British Columbia*, 2008 BCCA 92, 290 DLR (4th) 617, [2008] 6 WWR 262, 167 CRR (2d) 161, 76 BCLR (4th) 48; *Stanley J Tessmer Law Corporation v The Queen*, 2008 TCC 469; *893134 Ontario Inc. (Mega Distributors) v Canada (National Revenue)*, 2008 FC 715, 329 FTR 242; *British Columbia (Director of Civil Forfeiture) v Fischer*, 2010 BCSC 568; *Sahyoun v Ho*, 2011 BCSC 567.

Charter. In *British Columbia v Imperial Tobacco Canada Ltd.*, Major J. quoted Strayer J.A. from *Singh v Canada (Attorney General)* that “[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be.”¹⁰⁸ Indeed, some of the arguments advanced on the rule of law match those reviewed above on the supremacy of God in their attempt to interpret the law in accordance with individual beliefs. In the *Imperial Tobacco* case, for example, the tobacco companies unsuccessfully argued that the rule of law requires legislation to be “(1) be prospective; (2) be general in character; (3) not confer special privileges on the government, except where necessary for effective governance; and (4) ensure a fair civil trial.”¹⁰⁹ As these arguments were crafted in accordance with the tobacco companies’ views of what the law should be, without any basis in Supreme Court jurisprudence, Major J. disregarded them on the basis that “a brief review of this Court’s jurisprudence will reveal that none of these requirements enjoy constitutional protection in Canada.”¹¹⁰

This chapter illustrates the importance of the sacred in public life, and how the practice of secularism in Canada achieves a balance between the protection of religious freedoms and the prevention of state enforcement of religious exclusivity on the one hand, and the advancement of religion on the other. This helps reveal how the supremacy of God can represent transcendent principles in the Constitution and the foundation of right, without enshrining or promoting specific religious beliefs. The case law reinforces this as the supremacy of God cannot be used to supersede laws based on individual religious beliefs.

While the supremacy of God has not been used for a substantive application to the same extent as the rule of law, some of the more recent cases demonstrate that the courts have been

¹⁰⁸ *British Columbia v Imperial Tobacco Canada Ltd.*, *supra* note 97 at para 62. *Singh v Canada (Attorney General)*, [2000] 3 FC 185 (CA), 183 DLR (4th) 458; 20 Admin LR (3d) 168 at para 33.

¹⁰⁹ *British Columbia v Imperial Tobacco Canada Ltd.*, *supra* note 97 at para 63.

¹¹⁰ *Ibid* at para 64.

increasingly restricting the substantive use of the rule of law, insisting on the primacy of the *Charter's* substantive provisions, and thereby bringing the two parts of the preamble closer in line as theoretical elements of the Constitution. Moreover, the desire to find a legal application to the supremacy of God has distracted commentators such as Penney and Danay from the important inquiry into its theoretical role and significance. Given that the case law and the constitutional framework demonstrate that the supremacy of God has a deeper, more theoretical significance, a richer account of the relationship between the supremacy of God and the theoretical foundations of rights will be undertaken in the next chapter.

CHAPTER III

THE SUPREMACY OF GOD AND THE FOUNDATIONS OF HUMAN RIGHTS

A. Introduction and the Existing Literature

As it was established in chapter I that the intention of the *Charter's* framers was to link the supremacy of God to the foundation of rights, and the supremacy of God's complex relationship to religion and its position in the Canadian constitutional framework was set out in chapter II, the purpose of this chapter is to review the theory of human rights and consider the role of God in the theoretical debates. By tracing the discourse on rights theory from its roots in the natural law tradition of antiquity to the modern conception of human rights, it will be shown that a notion of a higher power, often expressed as God, is required as a foundation in claims to universally applicable rights. This precise relationship between a higher power and universal rights varies depending on theorist and historical period, although every claim to universality requires a foundation that transcends regular human affairs, without which the concept of right breaks down. We saw in the introduction that Abdullahi Ahmed An-Na'im in his work on the human rights theory considers universality to be a key feature to the definition of human rights, and the vital question that this raises is what the source is of this universality.¹

The idea that the supremacy of God in the preamble of the *Charter* represents the foundation of the enumerated rights is not in itself a novel idea. Several commentators have already suggested this relationship, although their observation has not come with a

¹ Abdullahi An-Na'im, "The Interdependence of Religion, Secularism and Human Rights: Prospects for Islamic Societies" (2005) 11 *Common Knowledge* 56 at 58.

thorough historical and legal analysis to properly make the link, or with sufficient engagement with the theory. Lorne Sossin stated that the supremacy of God “can only play a meaningful role in constitutional interpretation if it is taken as a general statement regarding the universal, normative aspirations of the *Charter*...”² John von Heyking phrased it as follows: “It signifies their recognition that the most fundamental questions of human origins and ends transcend their knowledge and especially their political machinery.”³ Jonathon Penney and Robert Danay state the role of the supremacy of God as the foundation of the rights enumerated in the *Charter* in the clearest fashion:

Our thesis on the meaning of the supremacy of God clause is straightforward. .. 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, and that the *Charter* purports to enumerate specific positivist protections for these pre-existing human rights.⁴

Even more importantly, Penney and Danay observe the fact that the supremacy of God as a representation of the foundational transcendent elements of rights is not instantly apparent, but rather demands engagement both with the history and theory of human rights:

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. ... What is clear from this bold recognition is that the supremacy

² Lorne Sossin, “The ‘supremacy of God’, Human Dignity and the Charter of Rights and Freedoms” (2003) 52 UNBLJ 227 at 228.

³ John Von Heyking, “God and the Canadian Constitution” University of Calgary Research Unit for the Study of Civil Society at para 2 online: <<http://people.uleth.ca/~john.vonheyking/CharterGod.htm>>.

⁴ Jonathon W Penney & Robert J Danay, “The Embarrassing Preamble? Understanding the “supremacy of God” and the Charter” (2006) 39 UBCL Rev 287 at para 2.

of God clause directs us to engage in the history of modern rights, rather than to ignore it.⁵

Despite this assertion, Penney and Danay only conduct a rudimentary review of theory. While they correctly begin with natural law theory from antiquity, they present the development of rights theory from this tradition in a rather linear fashion. As a result, they almost entirely sidestep the complex discourse in rights theory – even though they assert that the supremacy of God requires broad engagement. Moreover, the presentation of theory in such a linear fashion has led Penney and Danay to undervalue the important role played by the atrocities in the Second World War in the return to a discourse on rights which seeks a transcendent foundational element that stems beyond the state. Thus, it is not that the existing literature has arrived at an incorrect conclusion about the supremacy of God’s representation of the foundation of rights, but rather that it is lacking full engagement with theory. The purpose of this chapter is to undertake this broader engagement with theory. In doing so, it will be demonstrated that the search for a transcendental element is as important as the final conclusion itself, and that the supremacy of God represents a manifestation of this need to constantly deliberate on the foundation of rights. Moreover, it will also be demonstrated that more recent attempts to find a completely secular and culturally sensitive foundation for rights, most commonly expressed as human dignity, do not fully address the issue of foundations, and questions still arise on the source of this dignity. Ultimately this chapter does not purport to definitively resolve the complex controversies in rights theory, which is well beyond the scope of this undertaking, but rather seeks to achieve the more modest goal of

⁵ *Ibid* at para 49.

demonstrating how the supremacy of God requires engagement with these theoretical debates.

B. Natural Law and God

The roots of human rights have been traced to the natural law tradition which stretches back several millennia to the ancient Greeks and Romans, and continues in various forms to modern times.⁶ As a result of its long lineage, the natural law tradition has a considerable amount of variation from era to era and from theorist to theorist.⁷ Despite these variations, the natural law is a tradition and it contains a basic core set of beliefs which are discernable in all of its forms. Richard Devlin conveniently sums up these core beliefs into three themes. Firstly, natural law seeks “absolute values, justice and truth,” and as such natural law “claims to be universal, immutable, eternal, objective, and beyond any particularized political or historical context.” Secondly, “there is an integral relationship between law and morality,” in that the law depends on its consistency with a universally applicable morality for its validity. Lastly, as an extension of the second theme, “natural law is said to be superior to human law and therefore has the justificatory and censorial power to determine whether enacted laws are morally binding.”⁸

Considering the basic core set of beliefs of the natural law is a good starting point for an introduction to the tradition as a whole, although it is far from being sufficient or conclusive when one seeks to discern the meaning of the supremacy of God in light of

⁶ Jacques Maritain, “The Natural Law and Human Rights” in J. Stanley Murphy, ed, *Christianity and Culture* (Baltimore: Helion Press, 1960) 39 at 40.

⁷ A Ezzati, *Islam and Natural Law* (London: Islamic College for Advanced Studies Press, 2002) at 11.

⁸ Richard F Devlin, “Mapping Legal Theory” (1994) 32 *Alta L Rev* 602 at para 7.

this tradition. While all theorists that fit within the natural law tradition require some form of metaphysical or transcendent foundation for the law, there are debates and disagreements on, among other things, the extent of the need for such a foundation as well as its source. After conducting a rudimentary review of some of the salient features of the natural law tradition, Penney and Danay explain that the “natural law had to be based on some metaphysical foundation,” and simply declare that foundation to be God.⁹ This not only overly simplifies a complex and diverse theoretical tradition, but it also opens it up to criticism that the natural law merely reflects particular religious beliefs. Moreover, even when a natural law theorist traces its metaphysical foundations to God, such as is the case with St. Augustine or Aquinas, the analysis is a much more developed and nuanced than Penney and Danay suggest, and they also overlook the important role of human reason.

Penney and Danay review the natural law tradition through a short quote from Cicero, make their assertion that God serves as the foundation of law, and then leap through eighteen centuries, bypass countless theorists and arrive at William Blackstone who they claim supports the same assertion. That is the extent of Penney and Danay review of the natural law prior to the social contract theory and John Locke. Thus, while Penney and Danay correctly assert that the supremacy of God requires broad engagement, the engagement is evidently left for future work. Penney and Danay also attempt to respond to “sceptics” that may “raise the concern that this analysis imports into the *Charter* certain natural law concepts that do violence to its multicultural character.”¹⁰ They respond to such sceptics by suggesting that the supremacy of God “merely

⁹ Jonathon W Penney & Robert J Danay, *supra* note 4 at para 2.

¹⁰ *Ibid* at para 63.

acknowledges” the transcendent foundation to rights, and that “a proper understanding of the supremacy of God clause is no more denominational (or even religious) than modern human rights doctrine itself.”¹¹ The response itself is satisfactory, although it is not supported with proper analysis, and their prior declaration that the foundation of rights is God suggests the contrary. Thus, while some of Penney and Danay’s conclusions will be relied upon in this undertaking, some backtracking is required for a fully developed analysis that will support those conclusions.

The most significant differences in the natural law are found between the tradition’s three principal eras: its “pagan rationalistic forms” in classical Greek and Roman philosophy; its “Christian divinic forms” during the Middle Ages; and its “secularized, social contractarian and rights-based forms” in early modernity.¹² Retracing the natural law’s origins through each of these eras will help ascertain the supremacy of God’s link to this tradition. Indeed, the supremacy of God’s representation of the transcendent foundation of rights is primarily revealed in the points of transition from one era to the next, as well as some of the shifts that occurred within each of these three eras.

The only author that Penney and Danay referred to from antiquity was Cicero, to whom they attributed the declaration that the foundation of natural law is God. The natural law tradition in antiquity was much more rich and varied than this, and it began to develop much earlier than Cicero. To begin with, prior to the development of the natural law tradition in antiquity the source of all authority was deemed to be the ancestral.¹³ The pre-Socratic Heraclitus believed that law is based in convention, and that “the distinction

¹¹ *Ibid.*

¹² Richard F Devlin, *supra* note 8 at para 7.

¹³ Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953) at 91.

between just and unjust is merely a human supposition.”¹⁴ Heraclitus stated that “in God’s view, all things are fair and good and just, but men have made the supposition that some things are just and others are unjust.”¹⁵ This belief was uprooted in a shift that occurred in classical philosophy from an interest in the physical world to a concern with human affairs, where the principal question for philosophy became “what is the basis of the just social order?”¹⁶ With this shift emerged the idea that human affairs are part of a greater whole – what was referred to as the “cosmic order.”¹⁷ The cosmos was seen as having natural “ends and limits,” and it “transcended the historical and cultural particulars of a given people.”¹⁸ Thus, with this shift the conventional was no longer regarded as the source of all authority, and suddenly there was a desire to seek out what is intrinsic and found in nature.

In classical philosophy law is deemed to have its basis in nature and humans are considered to have “an inborn notion of right and wrong, and law in its very essence rests not upon the arbitrary will of a ruler or upon the decree of a multitude, but upon nature.”¹⁹ Leo Strauss tells us that it was the discovery of the idea of nature and the distinction between nature and convention that lead to the idea of natural right.²⁰ Thus, in classical philosophy, particularly in Plato and Aristotle, the concept of right was seen as

¹⁴ *Ibid* at 93.

¹⁵ *Ibid* at 91.

¹⁶ JM Ross, “Introduction,” in Marcus Tullius Cicero, *The Nature of the Gods*, translated by Horace CP McGregor (London: Penguin Books Ltd, 1972) at 35.

¹⁷ Tom Darby and Peter C Emberley, “‘Political Correctness’ and the Constitution: Nature and Convention RE-examined” in Anthony A Peacock, ed, *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory* (Don Mills: Oxford University Press, 1996) 233 at 240.

¹⁸ *Ibid* at 240.

¹⁹ Heinrich A Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, translated by Thomas A Hanley (London: B. Herder Book Co, 1949) at 22-23.

²⁰ Leo Strauss, *supra* note 13 at 93.

something that is consistent with the natural order.²¹ Plato looked beyond the city-state to nature for “guidance about how humans ought to live.”²² Plato taught that justice and dignity were not just “temporary or arbitrary or mere cultural preferences,” but rather natural and inextricably tied to the idea of the perfectibility of men.²³ For Aristotle, humans fulfill their natural ends by engaging in politics.²⁴ Ultimately, classical philosophy related human undertakings to a larger order that is not of human making. This natural order and the cosmos is the transcendent principle in classical philosophy and the source of natural right.

We can now begin to appreciate how some of the theoretical roots of the transcendent foundation for rights stem from classical philosophy. However, while classical philosophy linked human affairs to a cosmos ruled by a single supreme principle, we need to refrain from simply declaring that the source was God. While aspects of classical philosophy were integrated into the philosophy of the Abrahamic monotheist religions,²⁵ one cannot simply conflate Plato’s theory of the forms, the Demiurgos of Plato’s *Timaeus* or the Unmoved Mover of Aristotle’s *Metaphysics* with the concept of God as it is understood in present day religions. The appeal to nature in classical philosophy is vastly different in many important respects from the concept of God in present day religions, and simply equating the ideas of classical philosophy with God as Penney and Danay have done unfortunately suggests otherwise. Moreover, classical philosophy places great emphasis on the need to discover nature, as what is

²¹ Tom Darby and Peter C Emberley, *supra* note 17 at 245.

²² *Ibid* at 239.

²³ *Ibid* at 240.

²⁴ *Ibid*.

²⁵ For a straightforward account see: A Ezzati, *Islam and Natural Law*, *supra* note 7.

good and natural does not simply appear to us through instant revelation but rather requires “much human effort and artifice.”²⁶

The role of God in the natural law tradition is more clearly revealed in the second shift that occurred in classical philosophy around the time of Aristotle’s death with the emergence of Epicureanism and Stoicism. While these schools continued to recognize the order of the universe and nature, they represent a shift in focus from ascertaining the just social order to the individual’s relationship to the universe and how one finds peace of mind.²⁷ This was an age that required “emotional satisfaction,” and as such there was a need for “something much simpler than the complexities of the Platonic and Aristotelian systems.”²⁸ There was considerable debate between these two schools on, among other things, the role of God and religion in nature and the cosmos. Epicureans generally believed that while gods exist they cannot make a difference in the world and thus they considered religion and worship to be superstitious and from which humans should be freed.²⁹ The Stoics, on the other hand, placed more emphasis on the role of the gods, as the world was seen as being an organic and purposeful whole which formed a unity referred to as God, Nature, or Reason.³⁰ However, Stoicism, unlike Epicureanism, was not a static dogmatic theory, and there were considerable variations from theorist to theorist. Zeno, the founder of Stoicism, considered everything to be divine and thus left

²⁶ Tom Darby and Peter C Emberley, *supra* note 17 at 240.

²⁷ JM Ross, *supra* note 16 at 35.

²⁸ *Ibid.*

²⁹ *Ibid* at 25.

³⁰ *Ibid* at 42.

little room for the popular religions, and Chrysippus poured scorn on the popular mythologies.³¹

While the Stoics continued to view God in light of their holistic outlook on the world and their belief in nature, they gradually began to tolerate popular religions which they began to use to help express Stoic principles.³² Thus, while Epicureanism and Stoicism developed out of the need for something simpler than the Platonic and Aristotelian systems, it became apparent that they could not inspire or move the masses in the same way as the popular religions. Consequently, Cleanthes, Zeno's successor and the second head of the Stoic school, wrote a hymn in praise to Zeus. This allows us to understand the important role played by the popular poets, dramatists and playwrights in the conveyance of the natural law to a general audience. One can turn to Sophocles for this portrayal, where in his tragedy *Antigone* the heroine declares that by burying her brother she is following a law which is higher than the law of King Creon who has specifically banned such burial:

Because it was not Zeus who ordered it,
Nor Justice, dweller with the Nether Gods,
Gave such a law to man, nor did I deem
Your ordinance of so much binding force,
As that a mortal man could overbear
The unchangeable unwritten code of Heaven;
This is not of today and yesterday,
But lives forever, having origin
Whence no man knows: whose sanctions I were loath
In Heaven's sight to provoke, fearing will of any man.³³

While this portrayal provides a straightforward account of the natural law and its transcendent basis for the benefit of the public consumption of its general principles, it

³¹ *Ibid* at 44.

³² *Ibid*.

³³ Heinrich A Rommen, *supra* note 19 at 12 and footnote 7.

does so at the expense of the important philosophical debate on the transcendent foundation of the natural law.

It is in light of these developments that we need to consider the quote from Cicero that Penney and Danay hastily link to the supremacy of God in the preamble of the *Charter*. Penney and Danay referred to the following quote from Cicero's *De Re Publica*:

There 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.³⁴

In properly interpreting this quote it needs to be remembered that Cicero belonged to the sceptical school of the Academy, and he generally believed in the impossibility of certainty, including certainty about God, the physical world and morality. However, like some of the Stoics, Cicero makes it clear in *The Nature of the Gods* that he does not intend on undermining the role that religion plays in society, and he attributes to religion the role of giving the ordinary person “more or less probable guidance about right conduct.”³⁵ Thus, in the *The Nature of the Gods*, which is written as a fictional dialogue between Stoics and Epicureans, he indicates “in advance that the scales are going to be more heavily weighed against Epicurus than against the Stoa.”³⁶

Some theorists went beyond this passive support for popular religions. Posidonius, for example held that God is superior to nature.³⁷ Posidonius had a considerable influence over theorists in the Late Stoa such as Seneca, Epictetus and Marcus Aurelius, and to some extent his thought also helps explain the transition to the

³⁴ Jonathon W Penney, & Robert J Danay, *supra* note 4 at para 42.

³⁵ JM Ross, *supra* note 16 at 21.

³⁶ *Ibid* at 28.

³⁷ *Ibid* at 46.

Christian Scholastic thinkers of the Middle Ages.³⁸ Identifying the law of nature with the law of God allowed Scholastic thinkers, with some important alterations, to make what was once a pagan philosophy “compatible with revealed Christianity” and acceptable to the Church.³⁹ To fully understand the shift to Scholasticism one also needs to consider attempts to have theory directly influence the practice of law and politics. While the ancient Greeks were interested in the philosophical aspects of nature and the natural law, for the most part they were not “juristically minded.”⁴⁰ In contrast, some Roman theorists such as Cicero and Marcus Arelius attempted to have theory influence the practice of law and politics.⁴¹ Such attempts, combined with the fact that some pre-Christian thinkers had already concluded that God is superior to nature, made for a smooth transition from late antiquity to the early Middle Ages, and allowed for Scholastic thinkers such as St. Augustine and John Duns to declare that it is divine will that rules the universe and provides a pattern for human laws rather than nature.⁴² This early period of Medieval thought thus considered law “as a way of fulfilling the mission of Western Christendom to begin to achieve the kingdom of God on earth.”⁴³

This transition in philosophy is matched by a more dramatic historic and political transition that witnessed the evolution of the Roman Empire into an Eastern-based empire with the loss of its dominion over the West. During this period the influence of theory in the practice of law and politics culminated in references to the natural law in the *Corpus*

³⁸ *Ibid* See also: Heinrich A. Rommen, *supra* note 19 at 21.

³⁹ A Ezzati, *supra* note 7 at 21.

⁴⁰ *Ibid* at 18.

⁴¹ Heinrich A Rommen, *supra* note 19 at 26.

⁴² Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York: The Continuum International Publishing Group Inc, 2005) at 45. See also: A Ezzati, *supra* note 7 at 23.

⁴³ Hard J Berman, *Law and Revolution* (Cambridge: Harvard University Press, 1983) at 521.

Juris Civilis, which was a codification of the law that occurred between 529 and 534 by decree of Roman Emperor Justinian.⁴⁴ The *Corpus Juris Civilis* originally consisted of three parts: the *Codex*, which contained all statutes back to Emperor Hadrian; the *Institutes* or elementary instructions for schools which was given the force of law; and the *Digest*, which was collection of excerpts taken from the legal treatises of various authors and given the force of law.⁴⁵ A fourth part, the *Novellae*, which consisted of the laws enacted after 534 was eventually included, and was later refashioned into the *Syntagma*, which served as a practical lawyer's guide. The natural law, or *jus naturale*, was distinguished in the *Digest* from both the *jus civile* and *jus gentium* with conflicting explanations given in excerpts from authors such as Ulpian and Gaius.⁴⁶ The *Institutes* also made this distinction, but it also “portrayed natural law as a set of immutable divine laws which could be used in judging the validity of civil laws.”⁴⁷ This allows us to appreciate both the role of God as the metaphysical foundation of the natural law in Late Antiquity and the Early Middle Ages, as well as the natural law’s concrete legal application at the time.

While the early Christian thinkers considered divine will as the foundation for all human laws, it should not be assumed that they removed all references to human reason. For example, St. John Chrysostom suggested that natural law could be discovered through reason in addition to revelation. He said the following:

We use not only Scripture but also reason in arguing against the pagans. What is their argument? They say that there is no law implanted by God in nature. My answer is to question them about their laws concerning

⁴⁴ Howard P. Kainz, *Natural Law: An Introduction and Re-examination* (Chicago: Open Court, 2004) at 15.

⁴⁵ *Ibid.* at 16.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

marriage, homicide, wills, injuries to others, enacted by their legislators. Perhaps the living have learned from their fathers, and their fathers from their fathers and so on. But go back to the first legislator! From who did he learn? Was it not by his own conscience and conviction? Nor can it be said that they heard Moses and the prophets, for the Gentiles could not hear them. It is evident that they derived their laws from the law which God engrafted in man from the beginning.⁴⁸

While we can see traces of human reason in the work of the early Christians, by the late Scholastics the balance completely shifts and “law belongs more to the reason than to the will.”⁴⁹ In the 13th century St. Thomas Aquinas pronounced the best known definition of natural law which had a lasting impact on both law and Christianity, in which he refines the relationship between reason and revealed religion.⁵⁰ Aquinas distinguishes between four types of law: first is eternal law which is divine wisdom and only known to God; second is natural law, which is the part of eternal law which humans can perceive by reason; third is human law, which should stem from natural law and which is binding within the state; the fourth category is divine law, which God gives to humans in the form of revelation and which humans are incapable of perceiving by reason.⁵¹ In Aquinas’ scheme the eternal law overarches everything else, while the natural law is the part of eternal law which is accessible to humans through their reason, and which is to be incorporated, whenever possible, in human laws.⁵² Thus, for Aquinas the natural law is grounded in reason and not mere absolute will or God’s power.⁵³

⁴⁸ Heinrich A Rommen, *supra* note 19 at 35.

⁴⁹ *Ibid* at 63.

⁵⁰ Fulvio Di Blasi, *God and the Natural Law: A Reading of Thomas Aquinas* (South Bend, Indiana: St. Augustine’s Press, 2006) at 1.

⁵¹ Sally Falk Moore, ed, *Law and Anthropology: A Reader* (Oxford: Blackwell Publishing, 2005) at 8. See also: Jean Porter, *Nature As Reason: A Thomistic Theory of the Natural Law* (Grand Rapids: William B. Eerdmans Publishing Company, 2005) at 328.

⁵² Howard P Kainz, *supra* note 44 at 17.

⁵³ Heinrich A Rommen, *supra* note 19 at 62.

This allows us to appreciate some of the salient features of the development of God as the foundation of rights during this early period of the natural law tradition. Of the many developments during this period, two need to be highlighted. Firstly, beginning in Late Antiquity, the theoretical reflections of God as the foundation of rights were able to accommodate popular religions which were deemed to provide some positive guidance on human action and which could move the masses more than philosophy. Secondly, while philosophy was further influenced by religion and theology in the Middle Ages, a balance was sought with human reason. These developments helped set the stage and had a lasting influence into Modernity with its increasing secularization and rejection of religious exclusivity.

C. Modernity, Revolution and Rights

The 16th century writings of Niccolò Machiavelli mark the first sharp departure from the natural law tradition of the Late Middle Ages.⁵⁴ While the natural law maintained its supremacy until the 19th century, it was radically changed by Machiavelli's dismissal of the claim that law and political authority stemmed from a source higher than human affairs. As Leo Strauss explains, justice in Machiavelli's thought is considered "possible only within a man-made order."⁵⁵ As a drastic departure as Machiavelli's thought was from the natural law tradition, it has also been suggested that he essentially secularized the view from the Early Scholastics, which resulted in the absolute power of God in Occam's doctrine to become the absolute sovereignty of the monarch in the

⁵⁴ Leo Strauss emphasized the important role played by Machiavelli in the break with the ancient and medieval tradition. See especially: Leo Strauss, *supra* note 13 at 179; Steven B. Smith, *Reading Leo Strauss: Politics, Philosophy, Judaism* (Chicago: The University of Chicago Press, 2006) at 54.

⁵⁵ Leo Strauss, *supra* note 13 at 179.

thought of Thomas Hobbes.⁵⁶ Like Byzantine legal theory, the monarch is considered to be above and not under the law.⁵⁷ While Hobbes maintained the idea of natural law, he did so through Machiavelli by suggesting that it is only discernable from the way that people actually live and not through a metaphysical or teleological source.⁵⁸ For Hobbes, natural law is deduced from the most powerful of human passions – the fear of violent death, and individuals quell this fear by entering into a social contract for their collective protection. The state that is formed through the social contract is primarily meant to protect the natural rights of individuals, particularly the right to life, and not to promote the virtuous life as in the philosophy of antiquity.⁵⁹ The foundation of natural law for Hobbes, namely human passions and the fear of violent death, was a radical departure from the natural law tradition of antiquity and the Middle Ages which required a metaphysical foundation.⁶⁰ Justice is no longer seen as being based on “standards that are independent of human will,” but rather becomes synonymous with the fulfilment of the social contract.⁶¹ More important, however, is Hobbes emphasis on rights rather than on duties and the perfection of man.

John Locke continues, to some extent, the individualistic social philosophy of Hobbes with themes such as the state of nature and the social contract, although he rejects both the elevation of the state as the “Mortall God” and the Leviathan as the exclusive

⁵⁶ Heinrich A Rommen, *supra* note 19 at 61.

⁵⁷ *Ibid* at 114.

⁵⁸ Leo Strauss, *supra* note 13 at 180. There has been considerable debate on whether Hobbes belongs to the natural law tradition. Some authors such as Norberto Bobbio and Leo Strauss treat Hobbes as belonging to the natural law tradition, while others, such as H.A. Rommen, treat him as falling outside it. See: David Braybrooke, *Natural Law Modernized* (Toronto: University of Toronto Press, 2001) at 10.

⁵⁹ Leo Strauss, *supra* note 13 at 180-181.

⁶⁰ Leo Strauss refers to the natural right of antiquity and the Middle Ages as the “classical natural right doctrine”, and that which emerged with Hobbes in the 16th century as the “modern natural right doctrine.” See: Leo Strauss, *Ibid* at 120; David Braybrooke, *supra* note 58 at 17.

⁶¹ Leo Strauss, *supra* note 13 at 182 & 187.

source of the law.⁶² Locke emphasizes the role that that the state plays in preserving the ‘inalienable rights’ of the individual, namely the right to life liberty and property, which are prior to the creation of the social contract. If the primary purpose of the state is to preserve these inalienable rights, they provide the criterion from which one can judge the acts of government and its laws.⁶³ A consequence of this is that focus shifts from discerning the idea of the best regime from nature, and the “practical wisdom of the statesman on the spot” in fulfilling this function, to the creation of the “right kind of institutions” that can guarantee the preservation of the inalienable rights.⁶⁴ Locke returned to God for the foundation of natural law, with the concept of “divine law” that can be discerned both by reason and by revelation.⁶⁵ Revelation is important in Locke’s thought because the law of nature must have “rewards and punishments,” and it is only through revelation that we become aware of the “sanctions for the law of nature,” and the promise of the afterlife.⁶⁶

While Locke continues on the theme of the social contract first established by Hobbes, he explains in the *Letter Concerning Toleration* that a belief in God is necessary for the covenant because it provides the mechanism by which people are held to their word.⁶⁷ Hobbes stated it as “there is no swearing by anything which the swearer thinks not God.”⁶⁸ Unlike Hobbes, however, Locke rejected the resolution of social hostilities through the unity of the ecclesiastical and the temporal in the Leviathan as proposed by

⁶² Heinrich A Rommen, *supra* note 19 at 88.

⁶³ *Ibid* at 88-89.

⁶⁴ Leo Strauss, *supra* note 13 at 190-193.

⁶⁵ *Ibid* at 203.

⁶⁶ *Ibid* at 203.

⁶⁷ John Spurr, “A Profane History of Early Modern Oaths” (2001) 11 Transactions of Royal Historical Society at 43.

⁶⁸ *Ibid* at 42.

Hobbes. Rather, he suggests in the *Letter Concerning Toleration* that there should be a separation between church and state, that the state should focus on the preservation of life, liberty, property and the general welfare of the populace, while the church is to concentrate on the spiritual salvation of its members. Locke also suggests, contrary to Hobbes, that it is not the plurality of religious groups that results in civil hostilities, but rather attempts by the state to enforce religious orthodoxy. Thus, for Locke, the solution to the problem of social hostilities or unrest is toleration rather than enforced religious uniformity. This also suits the needs of the state which simply requires allegiance so that it can uphold the social contract, and this can be provided by way of an oath that binds the individual based on his or her own conscience or religious convictions. Locke, however, excluded atheists and Roman Catholics on the basis that oaths cannot take a hold on atheists and because Roman Catholics have allegiance to the Pope which Locke refers to as “another prince.”

As earlier conceptions of natural law were shown to have concrete legal application in the Roman law of Late Antiquity and the Middle Ages, the social contract theory has likewise had considerable legal impact up to the present. In Canada, section 128 of the *Constitution Act, 1867* requires Members of the Senate, the House of Commons or a Provincial Legislative Assembly to swear an oath of allegiance, while the *Citizenship Act* also requires an oath to be sworn as a requirement for Canada citizenship.⁶⁹ The Canadian oath of allegiance stems from a similar oath used in the

⁶⁹ The oath of allegiance reads as follows: I, A.B. do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria. *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

The citizenship oath reads as follows: I swear (or affirm) that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, Queen of Canada, Her Heirs and Successors, and that I will

British Parliament which developed during the political and religious unrest of the sixteenth century.⁷⁰ The original purpose of the British oath of allegiance was to “assert the primacy of the British monarch over all matters, both ecclesiastical and temporal,” and to “prevent Catholics from holding public office.”⁷¹ This incidentally also affected other denominations such as the Quakers, who had religious objections to oaths, and reforms were gradually implemented that allowed them to make an affirmation rather than make an oath.⁷² Similar reforms were implemented in Canada in 1905 which permitted Members of Parliament to make a solemn affirmation.⁷³

The situation is comparable in the judicial setting, where witnesses must indicate that they will be truthful before they testify. Since the mid-18th century the oath did not have explicitly have to be Christian,⁷⁴ although “the witness had to believe in some supreme being who would ensure retribution for breaking the oath.”⁷⁵ Gradually this view of oaths was seen as a vestige of ‘primitive’ and ‘superstitious’ societies that believed that “God could strike you down for blasphemy,” and were thus unfit for more rational societies where even religious believers have a “developed more sophisticated (or vestigial) notions of God.”⁷⁶ While the person giving the oath still has to believe in an almighty being, and must promise to that almighty being that they will tell the truth, “the

faithfully observe the laws of Canada and fulfil my duties as a Canadian citizen. *Citizenship Act*, RS 1985, c C-29, s 24 & schedule.

⁷⁰ Library of Parliament, *Oaths of Allegiance and the Canadian House of Commons* by James R. Robertson (Ottawa: Library of Parliament, Research Branch Law and Government Division, 1990) at 2.

⁷¹ *Ibid.*

⁷² *Ibid* at 5.

⁷³ The affirmation reads: I, ..., do solemnly, sincerely and truly affirm and declare that taking of an oath is according to my religious beliefs unlawful, and I do also solemnly, sincerely and truly affirm and declare that I will be faithful and bear true allegiance to her Majesty Queen Elizabeth the Second.

⁷⁴ See: *Omychund v Barker* (1744), 1 Atk 21, 26 ER 15 (CA).

⁷⁵ Hamish Stewart, *Evidence: A Canadian Casebook* (Toronto: Emond Montgomery Publications Ltd, 2002) at 39.

⁷⁶ John Spurr, *supra* note 67 at 40.

oath does not require the witness to believe in divine sanctions for failing to tell the truth.”⁷⁷ Evidence acts now also allow testimony to be given under oath or solemn affirmation.⁷⁸

These theoretical and historic changes also corresponded to changing views on religion during the Enlightenment. Contrary to popular perception, many of the philosophers and scientists of the Enlightenment did not call for the outright abolition of religion, but rather sought to adjust the balance between reason and revelation while retaining many of the underlying universal moral and benevolent elements of religion.⁷⁹ What emerged were religions based on reason, which eschewed the mystical elements of religion as superstitious, and considered the world as being comprised of unalterable laws.⁸⁰ The most influential of these movements was Deism, which has been described as the “the belief in a rational God who is the Creator and Designer of the rationally ordered universe.”⁸¹ Many of the principles of Deism are revealed in the following passages by Thomas Paine:

Revelation, when applied to religion, means something communicated *immediately* from God to man. ... No one will deny or dispute the power of the Almighty to make such a communication if he pleases. But [if] something has been revealed to a certain person, and not revealed to

⁷⁷ *R v Budin* (1981), 58 CCC (2d) 352 (Ont CA). Hamish Stewart, *supra* note 75 at 43.

⁷⁸ Hamish Stewart, *Ibid* at 39.

People without religious beliefs were deemed incompetent to testify in England until the enactment of the *Evidence Amendment Act*, 1869 (UK), c 68, s 4. Section 14 of the *Canada Evidence Act*, RSC 1970, c E-10, is modelled on the English Act of 1869. An interesting case on point is the 1978 case of *R v Walsh* (1978), 45 CCC (2d) 199 (Ont CA). The trial judge ruled that a proposed Crown witness who claimed to be a Satanist was incompetent to testify because he did not recognize any social duty to tell the truth in court, although he did know that he could be prosecuted and punished if he gave false evidence. On appeal, the court found that the proposed witness was incompetent to take an oath because his absence of religious belief meant that the oath would not bind his conscience. It was held that he was not incompetent to testify on affirmation.

⁷⁹ Robert P Kraynak, *Christian Faith and Modern Democracy: God and Politics in the Fallen World* (Indiana: University of Notre Dame Press, 2001) at 126.

⁸⁰ Heinrich A Rommen, *supra* note 19 at 75.

⁸¹ Robert P Kraynak, *supra* note 79 at 126.

another person, it is revelation to that person only. When he tells it a second person, the second to a third, a third to a fourth, and so on ... it is revelation to the first person only, and *hearsay* to the every other

It is only in the CREATION that all our ideas and conceptions of a *word of God* can unite. ... Do we want to contemplate his power? We see it in the immensity of the creation. Do we want to contemplate his wisdom? We see it in the unchangeable order by which the incomprehensible Whole is governed. ...

The only idea man can affix to the name of God, is, that of a *first cause*, the cause of all things. ...It is only by the exercise of reason, that man can discover God.⁸²

Deism and related movements had a considerable impact on the natural law tradition during the Enlightenment, as well as on the concept of natural rights and their transcendent foundation. Leo Strauss distinguishes between the natural law tradition of antiquity and the Middle Ages, which he refers to as the classic, and that of modern natural law doctrine which emerged in the seventeenth century, and suggests that classic natural law was “essentially conservative,” while modern natural law is “essentially revolutionary”.⁸³ One of the key differences between these two strands of natural law is that the modern doctrine does not claim to provide the best political order as does the classic form, but rather provides the conditions of legitimacy, an important facet of which is the protection of the natural rights of the individual.⁸⁴ We see this clearly in the thought of Thomas Paine, where Deism, natural law and an active promotion of the revolutions in France and the United States were merged.

The founding fathers of the United States and the revolutionaries were heavily indebted to the modern conception of natural law and rights, and many of them also

⁸² Thomas Paine, “The Age of Reason: Being an Investigation of True and Fabulous Theology (1794)” in *Collected Writings* (New York: Library Classics of the United States, Inc, 1995) at 666-668.

⁸³ Leo Strauss, *supra* note 13 at 120.

⁸⁴ David Braybrooke, *supra* note 58 at 19.

embraced Deism which “enabled the intellectual and political leaders of the day to combine belief in God with a rational theory of natural rights, producing the American political creed of God-given natural rights.”⁸⁵ The influence that this has on the *United States Declaration of Independence* necessitates its recital here:

When in the Course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them ...

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes ... But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security. — Such has been the patient sufferance of these Colonies...

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States... And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

There are six variations to the reference to God in the *Declaration*, whether it is the “Laws of Nature”, “Nature’s God”, the “Creator”, the “Supreme Judge of the world”, and “Divine Providence”. Many of these references to the deity are used to make

⁸⁵ Robert P Kraynak, *supra* note 79 at 127.

Universalist claims to rights, such as that “the Laws of Nature and of Nature's God entitle them”, and that all men are “endowed by their Creator with certain unalienable Rights”. Most importantly, the *Declaration* proclaims that such rights are not created by government, and that the government’s role is to secure these rights. The presentation and the multiple variations of the references to the deity in the *Declaration* make it abundantly clear that it pertains to the foundation of human rights rather than a simplistic reference to religion. One commentator accurately described the *Declaration of Independence* as “a hodgepodge of political and religious theories.”⁸⁶ As such, the multiple references to God in the Declaration cannot simply be conflated to the Bible, and its drafters were most not “men of the Bible.”⁸⁷ A number of other national declarations of independence refer to God in a fashion similar to the American, in that they refer to an almighty being in the abstract rather based on a specific religion.⁸⁸

The rights discourse during the Enlightenment and Modernity have left us with a lasting legacy of foundational rights instruments, including the *United States Declaration of Independence*, the *Bill of Rights* and the French *Declaration of the Rights of Man and of the Citizen*. Moreover, the rights discourse of the time also addressed the issue of foundations through a novel understanding of God that was acceptable both to intellectuals during the Age of Reason as well as followers of the Bible, and it also accommodated the numerous sects that were no longer being suppressed in the name of religious exclusivity. In spite of these developments, a movement towards new legal and

⁸⁶ Alan Derschowitz, *America Declares Independence* (Hoboken, New Jersey: John Wiley & Sons, Inc, 2003) at 2.

⁸⁷ *Ibid* at 10.

⁸⁸ *Ibid* at 14.

political theories that considered law a human construct will be shown to have taken the discourse in a new direction.

D. Universalism: Decline and Restoration

Despite the influence that the *Declaration of Independence* has had on governance and constitutionalism in the United States, not to mention the popular psyche, Leo Strauss laments the fact that the universalist principles that it espouses are now often viewed “not as expressions of natural right but as an ideal, if not as an ideology or myth.”⁸⁹ Strauss explains it is commonly believed that this ‘ideal’ is one that was “adopted by our society or our ‘civilization,’” and is not universally applicable because “all societies have their ideals.”⁹⁰ While Strauss laments this fact, his observation reflects the outcome of a long line of criticisms against the natural law theory stemming from Machiavelli in the Renaissance, sceptics and agnostics like David Hume, utilitarians like Jeremy Bentham and cultivating in the legal positivists of the nineteenth and twentieth centuries with authors such as John Austin and H.L.A. Hart. While the natural law tradition has been revived in part from its virtual extinction during the height of legal positivism, its universalist claims still face considerable opposition from more contemporary Nietzschean, post-modern and post-structuralist theorists.

While the most iconic statement against the natural law is arguably Jeremy Bentham's famous remark that rights are “nonsense on stilts,” the polemics against natural law have been mounted on a number of theoretical fronts. Despite the theoretical variations, Richard Devlin has narrowed down the concerns with natural law to a few

⁸⁹ Leo Strauss, *supra* note 13 at 2-3.

⁹⁰ *Ibid.*

principal arguments. Firstly, the critics claim that natural law “is not as universal as it claims to be,” in that it is an “assertion of faith in a particular set of values rather than a demonstration of the truth of such values,” and they commonly point to its Christian roots. Secondly, they claim that natural law’s refusal to take into account historical, empirical, scientific, and anthropological factors makes its principles too general and ambiguous to effectively guide or constrain positive law. Thirdly, they argue that the generality and ambiguity of natural law allows it to be used by any ideology or cause, and it has thus “played conservative, liberal and even revolutionary roles.” Lastly, the critics claim that “there is no rational way to know objectively what is right and what is wrong, and, as such, natural law propositions are necessarily relative, personal and subjective.”⁹¹ These criticisms resulted in the decline of natural law between the late 19th to the mid 20th centuries, when legal positivism dominated theoretical, legal and indeed popular perceptions of the law. As Penney and Danay say, “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.”⁹² Richard Devlin refers to this as the “denaturalization process,” whereby law is “no longer seen as transcendental and autonomous of human activity,” but is rather considered to be “a human construct, an artifact of human agency, contingent, socially and historically located.”⁹³

The turning point in the restoration of rights discourse occurred at the end of the Second World War when the extent of Nazi atrocities were fully revealed, and with the realization that they occurred under what Michael Ignatieff refers to as a “semblance of

⁹¹ Richard F Devlin, *supra* note 8 at para 10.

⁹² Jonathon W Penney & Robert J Danay, *supra* note 4 at para 34.

⁹³ Richard F Devlin, *supra* note 8 at para 6.

legality.”⁹⁴ The defence of Nazi officials charged with war crimes and crimes against humanity was simply that they were following orders which were within the parameters of the law which prevailed during the Third Reich. The question that emerged was whether the accused breached a higher law, and whether this law can trump or invalidate the positive laws of the Third Reich?⁹⁵ This led to a rigorous theoretical discussion following the Nuremberg Trials on whether immoral laws passed according to proper domestic procedures in a state are binding. H.L.A Hart, in the legal positivist tradition, defended the validity of even “bad” laws in the Holmes Lecture at Harvard Law School in 1957.⁹⁶ A debate ensued between Hart and his fellow Harvard professor Lon Fuller, first in the pages of the *Harvard Law Review* and then in a series of books, and which eventually also included Ronald Dworkin.⁹⁷ In contrast to Hart, Fuller and Dworkin promoted the natural law and argued for a relationship between morality and law.⁹⁸ While it is well beyond the scope of this undertaking to attempt to definitively resolve this debate, it is important to note that while both camps outwardly appeared to dig in their heels they in fact gradually influenced each other’s thinking. Hart eventually allowed for a “minimum content” of natural law in these positive law enactments.⁹⁹ Theorists such as Fuller that were inspired by the tradition of Aquinas reinterpreted the claim that “unjust law is no law at all” in light of political and moral theory rather than legal theory. Rather than considering this a statement of the meaning of law, it was suggested that it implies

⁹⁴ Michael Ignatieff, *The Rights Revolution* (Toronto: House of Anansi Press, 2000) at 47-48.

⁹⁵ Howard P Kainz, *supra* note 44 at xiii.

⁹⁶ *Ibid.*

⁹⁷ Some of the writings from this debate include: H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961); Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969); Ronald Dworkin, “Morality and Law: Observations Promoted by Professor Fuller’s Novel Claim,” (1965) U Pa L Rev 668.

⁹⁸ Howard P Kainz, *supra* note 44 at footnote 2.

⁹⁹ *Ibid.*

that “unjust laws do not create moral obligations,” which even legal positivists were able to accept.¹⁰⁰ Nonetheless, the headway made by natural law after the Second World War to the present is demonstrated by the revived interest that it received among mainstream legal and political philosophers.¹⁰¹ At the same time as these theoretical debates on rights, parallel efforts were taking place which sought concrete advances in rights both at the domestic and international levels with the goal of achieving codified and enforceable rights regimes. Like many other rights instruments, the *Canadian Bill of Rights* and the *Charter* are to a large extent products of this development after the Second World War and were influenced by many of the earlier theoretical debates on rights.¹⁰² Indeed, former Prime Minister Pierre Elliot Trudeau, the key proponent and architect of the *Charter*, referred to these theoretical debates while advocating for a constitutionally entrenched bill of rights in Canada. Trudeau began advocating for a constitutionally entrenched bill of rights at the very start of his political career, and in 1968 while serving as Minister of Justice he published *A Canadian Charter of Human Rights*, which largely focused on the theory behind human rights. The following are some of the key paragraphs in which Trudeau considers the theoretical debates on human rights from antiquity to the present:

Interest in human rights is as old as civilization itself. ... In ancient times, and for centuries thereafter, these rights were known as “natural” rights; rights to 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

¹⁰⁰ Philip Soper, “In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All” (2007) 20 Can JL & Juris 201 at para 2.

¹⁰¹ Francis Oakley, *supra* note 42 at 17.

¹⁰² Jonathon W Penney & Robert J Danay, *supra* note 4 at para. 32. 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* (Markham: Butterworths, 2003) 353 at 365.

capacity to reason. These natural 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. ...

As the concept of the social contract theory of government developed in the 18th century, still a 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. So responsive were men to this notion that the greatest social revolutions in the western world took place – one in America and the other in France – in order to preserve for individuals the rights which they claimed belonged to them.

This deep-seated desire for recognition of human dignity is reflected in the memorable words of the American Declaration of Independence.¹⁰³

Although Trudeau never directly refers to the role of God in the theoretical debates on the foundations of rights, he is evidently aware of the need for a transcendent element in the rights discourse and traces, to some extent, its evolution from the natural law of antiquity to the modern conception of rights.

Trudeau also refers to the concept of human dignity in his review of rights theory, which, as Penney and Danay have said, now commonly serves as a more secular recognition of the fact that “people possess universal and inalienable rights derived from sources beyond the state.”¹⁰⁴ Human dignity has made its way in rights regimes worldwide in the domestic law and constitutions of numerous states, as well as in international legal instruments. The first time that human dignity was incorporated into a legal text was in Germany. The German Constitution, which is referred to as the Basic

¹⁰³ Pierre Elliott Trudeau, *A Canadian Charter of Human Rights* (Ottawa: Queen's Printer, 1968) at 9.

¹⁰⁴ Jonathon W Penney & Robert J Danay, *supra* note 4 at para 4.

Law for the Federal Republic of Germany, states in Article 1 that “Human dignity shall be inviolable.”¹⁰⁵ Human dignity is also referred to in the constitutions of other states, including Israel and South Africa.¹⁰⁶ Human dignity is referred to in the most significant international rights instruments including the *Universal Declaration of Human Rights*, which a number of very diverse countries helped draft, including India, China, Chile, Cuba, Lebanon, and Panama.¹⁰⁷ The first paragraph of the preamble reads as follows:

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world

Human dignity is also referred to in the first article of the *Universal Declaration*:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

A number of other international rights instruments, including the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights* also refer to human dignity.¹⁰⁸

In addition to the supremacy of God, the first paragraph of the preamble to the *Bill of Rights* also refers to human dignity:

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.

¹⁰⁵ *Basic Law for the Federal Republic of Germany* (Promulgated by the Parliamentary Council on 23 May 1949) (as Amended by the Unification Treaty of 31 August 1990 and Federal Statute of 23 September 1990).

¹⁰⁶ *Basic Law of Israel; Constitution of the Republic of South Africa*, No 108 of 1996.

¹⁰⁷ Shashi Tharoor, “Are Human Rights Universal?” (1999/2000) 16 *World Policy Journal* 1 at 11.

¹⁰⁸ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976) [ICCPR] preamble & art 10.

International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3/ [1976] ATS 5/6 ILM 360 (1967) (entered into force 3 January 1976) preamble.

While human dignity is not explicitly referenced in the *Charter* or in any other Canadian constitutional text, the Supreme Court of Canada refers to the term on a regular basis when interpreting the rights enumerated in the *Charter*.¹⁰⁹

The concept of human dignity has allowed for some positive inroads in the promotion of human rights worldwide, although there is little agreement on its theoretical and legal meaning. For example, most German legal academics do not consider human dignity to be a right on its own accord, and that all other rights serve as the “expression of dignity.”¹¹⁰ However, a minority of academics believe that dignity “resides on the same plane as all civil rights, and does not occupy a different level.”¹¹¹ This difference of opinion has not been resolved as the German Constitutional Court has not taken a definitive stand.¹¹² The Supreme Court of Canada has also been criticised for “failing to develop a coherent approach” to its use of the term human dignity.¹¹³ It has been suggested that the way that the Supreme Court of Canada ties human dignity to liberty does not clarify its meaning but rather “only heightens the confusion,” because it is an “abstract and contested concept.”¹¹⁴ One commentator has gone so far as to accuse the Supreme Court of Canada as using human dignity “as a tool to shut down legitimate public policy debate.”¹¹⁵

¹⁰⁹ A comprehensive review of the Supreme Court of Canada’s use of the term human dignity is conducted in R James Fyfe, “Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada” (2007) 70 Sask L Rev 1.

¹¹⁰ Joanna Erdman, Chris Essert & Maryth Yachnin, “An Interview with Justice Frank Iacobucci and Professor Dieter Grim” (2003) 2 JL & Equality 197 at para 13.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ R James Fyfe, *supra* note 109 at para 3.

¹¹⁴ Donna Greschner, “The Purpose of Canadian Equality Rights” (2002) 6 Rev Const Stud 290 at 317.

¹¹⁵ Robin Gibbins, “How in the World Can You Contest Equal Human Dignity?” (2000) 12 NJCL 25 at 28.

Hannah Arendt provides one of the most novel interpretations of human dignity, as she identifies the root of the problem with rights abuses in political disempowerment rather than a lack of pronouncements on natural rights.¹¹⁶ The solution for Arendt is thus political empowerment, a genuine form of citizenship and full membership in a political community which alone can guarantee what she refers to in her well-known phrase as the “right to have rights.”¹¹⁷ The two uses of the word ‘right’ form distinct terms in this phrase – the first of which is a “moral claim to membership and a certain form of treatment compatible with the claim to membership,” while the second refers to the rights which belong to members of “an organized political and legal community.”¹¹⁸ Arendt is most concerned with the first of these two terms, and it is within this context that she introduces the concept of human dignity, which serves to distinguish between a citizen losing specific rights, and the loss of a “community willing and able to guarantee rights whatsoever.”¹¹⁹ The benefit of Arendt’s approach is its ability to maintain a transcendent element through the right to belong to a political community, while also taking legal positivism into account by holding specific rights to stem from the community. Importantly for the purposes of this chapter, while Arendt’s concept of human dignity does not make specific references to God or a divine source of rights, it does retain a transcendent principle in the right to belong to a political community, and thus provides a segue from rights discourse to a discussion on the links between the supremacy of God and Canadian nationhood first made in chapter I.

¹¹⁶ For an account of Arendt’s use of the term human dignity see John Helis, “Hannah Arendt and Human Dignity: Theoretical Foundations and Constitutional Protection of Human Rights” (2008) 1 *Journal of Politics and Law* 73.

¹¹⁷ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, Brace & Co, 1951) at 294-295.

¹¹⁸ Seyla Benhabib, *The Right of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004) at 56.

¹¹⁹ *Ibid* at 56-57.

At this stage the obvious question that comes to mind is why the preamble does not simply refer to human dignity, state that “rights are derived from sources beyond the state,” or as William Klassen suggests, “Whereas Canada is founded upon transcendent principles and the rule of law,”¹²⁰ rather than invoking the supremacy of God. At face value such an approach would appear to be more in line with many of the contemporary approaches to natural law that avoid references to God while returning to the notion of the transcendent.¹²¹ This question can be answered through a review of the previous chapters according to the bold thesis of Abdullahi Ahmed An-Na'im that “religion, secularism, and human rights are interdependent, and the apparent tensions between any or among all of them can be overcome by their conceptual synergy.”¹²² The relevance of An-Na'im's framework merits its recital here:

1. Human rights need religion to validate their moral foundation and to mobilize religious adherents in support of universal rights.
2. Religion needs human rights to protect the dignity and rights of religious adherents within any political system, but human rights also ensure freedom of belief and practice within each religion itself and thus ensure the evolution and continuing relevance of each religion to its own membership.
3. Human rights need secularism to provide the political stability and peace among communities of believers and nonbelievers that are necessary for the protection of those rights.
4. Secular governments need human rights for normative guidance in the daily protection of people against the abuse of state power.
5. Secularism needs religion to provide a widely accepted source of moral guidance for the political community, as well as to help satisfy and discipline the non-political needs of believers within that community.

¹²⁰ William Klassen, “Religion and the Nation: An Ambiguous Alliance” (1991) 40 UNBLJ 87 at 95.

¹²¹ Jonathon W Penney & Robert J Danay, *supra* note 4 at para 49.

¹²² Abdullahi An-Na'im, *supra* note 1 at 56.

6. Religion needs secularism to mediate relations between different communities (whether religious or antireligious or nonreligious) that share the same political space.¹²³

This outlines how these three paradigms, which are commonly thought of to be at odds with one another, are not only interrelated, but also work together towards results which could not be attained independently.

An-Na'im's framework is in line with much of the analysis presented on the supremacy of God thus far. We saw in the first chapter that the *Charter's* framers sought a reference to God to ground it in a moral foundation, but there was also a debate on achieving a balance that would not only satisfy the religious adherents that were seeking a reference to God in the Constitution, but that would also contain a degree of theoretical significance that was in line with the increasing secularism of the time. The second chapter further explored the important role played by religion and secularism in a fully-developed account of the supremacy of God, and how the overall constitutional framework provides a form of secularism in Canada in which the state both rigorously upholding religious freedoms while at the same time maintaining a relationship to religion and recognizing the importance of the sacred in public life. Finally, this chapter outlines the development of rights theory from antiquity to the present, and the role of both religious and secular thought. What the supremacy of God does is to provide a good starting point to deliberate the reason for the sacredness of humans as possessors of rights, and as per An-Na'im's point, it also provides value to the faithful. At the same time, a reference to God as the transcendence of rights requires a more complex and nuanced analysis than the dogma of any particular belief, and as Penney and Danay tell

¹²³ *Ibid* at 65-66.

us, “a proper understanding of the supremacy of God clause is no more denominational (or even religious) than modern human rights doctrine itself.”¹²⁴ This is certainly consistent with the jurisprudence on the supremacy of God as reviewed in chapter II, as the courts have resisted attempts to rely on the supremacy of God as interpretative tool of a particular religious belief.

As universality is the key feature of human rights, it is no surprise that the source or foundation of this universality has been the main preoccupation of rights discourse from antiquity to the present. This chapter has presented the rich and varied debate on the search for a transcendent foundation of rights through a comprehensive review of rights discourse from its roots in the natural law tradition of antiquity to the present, and has considered the evolution in thought on how the notion of a higher power, often expressed as God, can serve as the source of rights. More importantly, this chapter has demonstrated how the historic evolution of rights discourse not only displays different and varied understandings of a higher source as the transcendent foundation of rights, it also demonstrates the balance with more secular understandings which can be best understood through the framework of *An-Na'im* on the interrelation and synergy of human rights, religion and secularism. The interplay between human rights, religion and secularism presented on a theoretical level in this chapter is also consistent with the legal analysis in chapter II, in which we saw that the overall Canadian constitutional arrangement displays a balance in the practice of secularism between the protection of religious freedoms and the prevention of state enforcement of religious exclusivity on the one hand, and the advancement of religion on the other. Just as the supremacy of God in

¹²⁴ Jonathon W Penney & Robert J Danay, *supra* note 4 at para 63.

the preamble of the *Charter* provides value to the faithful, we have also seen that references to God in the theoretical debates on rights discourse have also been used to serve this very same function – although in both contexts there have been strict limitations in allowing such notions to be used at the whim of individual religious beliefs.

Ultimately, while the debate on the source and foundation of rights is inconclusive, the analysis is in many respects more important than the conclusion itself. As Penney and Danay tell us, the supremacy of God in the preamble directs us to “invoke the historical origins of modern rights” and to “engage in the history of modern rights.”¹²⁵ Lastly, an examination of Hannah Arendt’s unique understanding of human dignity with its focus on the right to membership in a political community allows us to draw some theoretical links between human rights theory and nationhood. In chapter I we saw how God, nationhood and individual human rights were linked by promoters of rights documents and Canadian nationhood, ranging from John Diefenbaker and the *Bill of Rights* to Pierre Trudeau and the patriation of the Constitution with the entrenchment of the *Charter*. The final chapter will thus further examine this link between the supremacy of God and Canadian nationhood.

¹²⁵ *Ibid* at para 49.

CHAPTER IV

THE SUPREMACY OF GOD AND THE FOUNDATIONS OF CANDIAN NATIONHOOD

A. Introduction

As chapter III considers the theoretical link of the supremacy of God to the foundation of rights in the *Charter*, this chapter will proceed to consider its connection to civic nationalism and the theory of the state. The links between the supremacy of God and the Canadian nation-building project were first made in the historical account of the preamble in chapter I, and the purpose of this chapter is to undertake an in-depth analysis at both the symbolic and foundational levels of analysis.

When former Prime Minister Lester B. Pearson referred to national unity as the “most important issue of [his] career” in his memoirs, he explained that one of his government’s purposes in this regard was “to develop national symbols which would give us pride and confidence and belief in Canada.”¹ The Canadian flag was one such national symbol that his government achieved, and it was shown in chapter I that a preamble to the Constitution was a measure which was taken up by his successor, Pierre Trudeau, in the successive rounds of constitutional talks first begun by Pearson in 1968. A rhetorical preamble that would define and promote the principles of Canadian nationhood, while not achieved, was shown to be an important part of the process leading to the patriation of the Constitution. While focus is typically placed on a constitution’s legal force, the first part of this chapter will consider its non-substantive function in order to demonstrate

¹John A Munro & Alex I Inglis, *Mike: The Memoirs of the Right Honourable Lester B. Pearson, Volume 3 1957-1968* (Toronto: University of Toronto Press, 1975) at 255 and 270.

the role of symbolism in rousing the popular or nationalist sentiment that helps create attachment to the state.

Once the importance of symbolism for nationalism is determined, this chapter will consider the role that a reference to the divine serves in regards to this symbolism. It will be demonstrated that nationalist sentiment is often accompanied by a corresponding search for the ultimate source of these bonds which are typically sought out in an enduring and transcendent principle such as God. Such a principle is commonly found in the symbols of the nation, and in some notable examples such as the United States, it is infused in the mass mind and becomes the basis of a civil religion. In order to make the link between the importance of symbolism for nationalism and the supremacy of God, this chapter will consider both the theory behind the role of symbolism as well as relevant practical examples from the Canadian and American contexts. This chapter will consider authors such as Jean-Jacques Rousseau that identified the need for a state to create the institutions and symbols that help bind the citizenry to the state, and the corresponding idea of a civil religion. Most importantly, this chapter will consider the struggle of devising nationalistic symbolism in the Canadian context, and will draw concrete links to the supremacy of God.

While the divine can serve as the transcendent principle behind the symbolism that helps create unity, it will also be shown to serve a more foundational role in the theory of the state and constitutionalism. The supremacy of God will be considered at the foundational level of analysis by firstly considering the role of God in the democratic movement. Thinkers such as Alexis de Tocqueville and Jacques Maritain that considered the workings of democracy through the mores instilled in individuals by religion will

help shift the focus from the symbolic to the foundational level of analysis. As the connection between God and democracy is relatively recent, arising in the late 18th and early 19th centuries, the foundational role of God in modern conceptions of the state and constitutionalism is most accurately revealed in the transition from the older conception of the divine right of monarchy. This transition undergone by the theory of the state and constitutionalism closely parallels the “denaturalization” of the theory of law as reviewed in the previous chapter. Yet despite this change, through the use of Carl Schmitt, it will be demonstrated that God as the transcendent principle underlying the modern theory of the state and liberal constitutionalism never entirely dissipated, but is still present in analogy in the way that popular sovereignty takes on the role of creator.

B. *Nationalism and Symbolism*

Rousseau taught that a successful nation needs to create the conditions for the citizen to develop attachments to the political order. This requires the founders of the political order to create social institutions that bond the citizens to the polity by appeal to the sentimental “non-rational characteristics of men.”² Among the institutions that need to be first developed are those that seek to develop a common spirit among citizens such as public honours and a public education.³ A civic education is key social institution for Rousseau as it teaches the love of country and how to be good citizens. In this respect other early modern thinkers, such as Thomas Hobbes and John Locke, overvalued the rationality of people in the creation of a political order and overlooked the importance of sentimental attachment.⁴

² Anne M Cohler, *Rousseau and Nationalism* (New York & London: Basic Books, Inc, 1970) at 19.

³ *Ibid* at 35.

⁴ *Ibid* at 19 and 93.

Rousseau's civic republicanism with its focus on the public good and civic education is inspired in some important respects by classical philosophy. Plato focused on themes such as "the desire for justice, the passion for honour, man's sense of loyalty and the perfectibility of man."⁵ For Aristotle membership in a political community is the path towards fulfilling actual potential.⁶ As discussed in chapter III, the ancients looked to nature as a teleological order which provides direction for how humans ought to live, and through "a lifetime shaped by nature ... habit and education" virtue (*arête*) is achieved.⁷ While these themes from classical antiquity may be the roots of civic republicanism, modern political thought has departed from the teleological understanding of nature with its concrete direction on the good life, to Rousseau's view of nature as our primary impulses and sentiments. The distinction is for our purposes most pronounced in the understanding of virtue, which the ancients defined in a very broad sense and includes "excellence or superiority of all kinds, as well as ethical goodness (with which virtue is now most often identified), and specifically civic virtue (concern for the common goods shared by citizens)."⁸ In contrast, the moderns adopt a more restricted understanding of virtue which is most clearly expressed by Montesquieu in the *Spirit of the Laws*:

virtue in a republic is the love of one's country ... it is not a moral nor a Christian, but a political virtue, and it is the spring which sets a republic working.' It is a passion, not an expression of reason. 'It is a sentiment and not the consequence of knowledge...'⁹

⁵ Tom Darby and Peter C. Emberley, "'Political Correctness' and the Constitution: Nature and Convention Re-examined," in Anthony A. Peacock, ed, *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory* (Don Mills: Oxford University Press, 1996) 233 at 240.

⁶ *Ibid.*

⁷ Iseult Honohan, *Civic Republicanism* (London: Routledge, 2002) at 20.

⁸ *Ibid.*

⁹ Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, Translated by Thomas Nugent, revised by JV Prichard (London: G Bell & Sons, 1914) at 5.2.

Here Montesquieu not only clearly distinguishes civic from moral virtue, but he also defines it in terms of patriotism with appeal to sentiments rather than to reason.¹⁰

Not surprisingly, most of the commentary on civic nationalism and the importance of symbolism is about the United States, which provides us with an interesting comparison for Canada. The United States is now commonly depicted as an example of the civic form of nationalism as it includes citizens regardless of their “ancestry, ethnic origins and religion.”¹¹ American nationality has been described to mean more than the mere possession of American citizenship, as it requires adherence to the liberal ideology of John Locke as articulated and modified by notable figures such as Thomas Jefferson, James Madison, Woodrow Wilson and Franklin D. Roosevelt, and a belief in its underlying ideals such as “liberty, democracy and equality, which have come to be seen as the defining values of the nation.”¹² The United States Supreme Court appears to have adopted this understanding by interpreting the phrase “the people” in the fourth amendment of the *Bill of Rights*, which guards against unreasonable searches and seizures, as not including all persons, but rather a “limited class of members” “who are part of a national community...”.¹³ This is in accordance with Ernest Renan’s classic 1982 essay, “*Qu’est-ce qu’une nation?*,” in which he argues against the conventional wisdom that a nation is based on factors such as a common race, language or religion, shared material interests or geography. Rather, Renan identifies a nation as “a living soul, a spiritual principle: binding people together through common consent to be together and

¹⁰ Iseult Honohan, *supra* note 7 at 82.

¹¹ David T Koyzis, *Political Visions and Illusions: A Survey of & Christian Critique of Contemporary Ideologies* (Downers Grove, Illinois: InterVarsity Press, 2003) at 98.

¹² *Ibid* at 98-99.

¹³ *United States v Verdugo-Urquidez*, 494 US 259 (1990). Pamela A Mason, “Rhetorics of “The People”: The Supreme Court, the Social Contract, and the Constitution” (1999) 61 *The Review of Politics* 275 at 278.

on the basis of shared historic memories,” and exists through a “daily plebiscite,” of its members to maintain nationhood.¹⁴

The close link of American nationality to liberalism requires “putting faith in the ideologies embodied in the Declaration of Independence and the Constitution,” which serve as both the implementing instruments and the symbols of this ideology and its underlying ideals.¹⁵ Edward Corwin was the first to make the important distinction between the instrumental and symbolic aspects of the American Constitution.¹⁶ As an instrument it serves as the country’s foremost legal document. In contrast, as a symbol it has been said to be “part of the mass mind,” capable of arousing intense popular sentiment.¹⁷ In arguments that echo Rousseau, Max Lerner suggests that political thinkers from the English idealists to Karl Marx have overvalued the role of reason in people’s political actions, and since “men behave in their political lives with a disheartening illogicality,” they seek out symbols which they believe “possess supernatural powers” and can control the “unknown forces in a hostile universe.”¹⁸ Such symbols provide the focal point for people’s emotions either in a positive sense through “adoration or deification,” or in a negative sense “in the form of a taboo.”¹⁹ Lerner suggests that the Constitution has become a symbol of “ancient sureness and a comforting stability,”²⁰

¹⁴ Ernest Renan, “What is a Nation?” reprinted in Mark O Dikerson, Thomas Flanagan & Neil Nevitte, eds, *Introductory Readings in Government and Politics*, 3d ed (Scarborough, Ontario: Nelson Canada, 1991) at 32.

¹⁵ David T Koyzis, *supra* note 11 at 98.

¹⁶ Edward S Corwin, “The Constitution as Instrument and as Symbol” (1936) 30 *Am Pol Sci Rev* 1071.

¹⁷ Max Lerner, “Constitution and Court as Symbols” (1937) 46 *Yale LJ* 1290 at 1294.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid* at 1290-1291.

while others have gone as far as calling the Constitution one of the most important symbols of the United States.²¹

How did the American Constitution come to have such a powerful symbolic significance? It was not automatic because the masses at the time of its adoption were small farmers with “slight social experience and vast social suspicions,” who held an “anti-central-government-set.”²² Since symbols can be used to induce loyalty, foster legitimacy, gain compliance and aid in social integration,²³ Max Lerner suggests that they were used in the “struggle for power” by “power-groups” for the purpose of “mass persuasion.”²⁴ In order to arouse patriotism the symbolism of the Constitution was used to support the myths of unique national origin and national destiny, which the victory of the North in the Civil War helped confirmed.²⁵ When the American west was opened and immigration increased from Europe, the Constitution “was more than ever needed to tie together ... the collocation of races and peoples [to] the sprawling geographical expanse.”²⁶

It has been suggested that Canada has not been as successful at creating a nationalist based ideology because of the historic reliance of the symbols of the British Empire for Canadian identity.²⁷ The end of the British Empire and Britain’s new focus on Europe rather than its former colonies required Canada to develop its own national

²¹ Larry R Baas, “The Constitution as Symbols: The Interpersonal Sources of Meaning of a Secondary Symbol” (1979) 23 *American Journal of Political Science* 101 at 101.

²² Edward S Corwin, *supra* note 16 at 1076.

²³ Larry R Baas, *supra* note 21 at 101.

²⁴ Max Lerner, *supra* note 17 at 1292.

²⁵ *Ibid* 1294-1296 & 1303.

²⁶ *Ibid* at 1303.

²⁷ David VJ Bell, *The Roots of Disunity: A Study of Canadian Political Culture*, revised ed. (Toronto: University of Toronto Press, 1992) at 64.

symbols such as a flag, anthem and coat of arms.²⁸ While ‘loyalist myth-makers’ attempted to give Canada symbols comparable to those that the American Revolution gave the United States, they were unable to imagine a separate nation from Britain and Loyalist history is now for the most part forgotten.²⁹ Rather than the bold *Declaration of Independence* with its plenitude of symbols, Canada got the *British North America Act, 1867*, and the few symbols that it contains are mostly in reference to the British Empire.³⁰ As George Grant famously remarked in his *Lament for a Nation*, “a nation does not remain a nation only because it has roots in the past. Memory is never enough to guarantee that a nation can articulate itself into the present. There must be a thrust of intention into the future.”³¹

It is therefore not surprising then that one of the key objectives of the federal government during the patriation process was to modernize the language of the preamble of the *British North America Act* to provide a new set of national symbols. While the federal government did not face opposition from the provinces in seeking to remove the symbolic remnants of the British Empire from the preamble of the Constitution, the difficulty lay in developing new language with wide-ranging appeal. We saw in chapter I that the supremacy of God in the preamble of the *Charter* stems from the preamble to the *Canadian Bill of Rights*. In addition to the substantive force of the *Canadian Bill of Rights*, the government at the time believed that it would provide inspirational and symbolic language for the nation. Former Prime Minister John Diefenbaker said the following during the parliamentary debates on the *Canadian Bill of Rights*:

²⁸ *Ibid.*

²⁹ *Ibid* at 67-68.

³⁰ *Ibid* at 71.

³¹ George Grant, *Lament for a Nation: The Defeat of Canadian Nationalism* (Ottawa: Carleton University Press, 1982) at 12.

No law in the end is more important than the spirit of a people, their traditions and their appreciation of spiritual values. All societies need rules and symbols to express their highest hopes and goals. ... [T]o what depths mankind would have sunk were it not for those supreme declarations of spiritual values which, touching the heart, cause man to know that there are things greater than materialism.³²

The Minister of Justice, Edmund Fulton, expressed the government's hope that the symbolism in the preamble to the *Canadian Bill of Rights* would be inspirational enough to be:

reproduced and framed, mounted on walls of schools, church halls and assembly halls, and other similar places, so that it would become familiar in a readily understandable and easily recognizable form to the greatest possible number of people, and especially to younger Canadians.³³

Despite these lofty ambitions, the symbolic language in the *Canadian Bill of Rights* did not have the wide-ranging symbolic impact that the government desired. Ironically, a debate took place during the patriation process on the possibility of using the preamble to the *Canadian Bill of Rights* for the new constitutional document. While the symbolism in the preamble to the *Canadian Bill of Rights* did not generate the inspiration and national sentiment as expected, at the very least it is uniquely Canadian and ultimately better than no symbolism at all. Numerous attempts were made during the patriation process at developing a new rhetorical preamble for the Constitution and the importance of symbolism was well recognized. For example, an Ontario cabinet minister introduced a draft preamble at the First Ministers Conference on the Constitution and made comments that practically mirrored those made by Edmund Fulton on the *Canadian Bill of Rights*:

... we are now working on a preamble and to me this is an opportunity to put into words, not legal words, not the kind of words that begin with "whereas" and the kind of things that lawyers put at the beginning of a

³² *House of Commons Debates*, 24th Parl, 3rd Sess, Vol VI (7 July 1960) at 5948 (Rt Hon John Diefenbaker).

³³ *House of Commons Debates*, 24th Parl, 3rd Sess, Vol VII (1 August 1960) at 7372 (Hon Edmund Fulton).

will or contract, but it is a chance to put into words some poetry or some feelings that express our country. I would like to see us put here, and the province of Ontario would like to see us put here, the kind of thing that our kids in school can learn and that people will put on the wall of their office if they wish, or that the classrooms will have this preamble on their wall because this expresses what we think of this country of ours. It expresses our dreams, it expresses our hopes and it states our principles.

... I don't think we use a preamble merely as a beginning to the Constitution in legal language but we would like to put forward, sir, the point of view the preamble should be something that in the terminology of the people in the street might say "grabs you a little," perhaps brings a little pride to you ...³⁴

A cabinet minister from British Columbia complained that much of what had been developed "reads more like a warranty for a household commodity than a preamble to the Constitution of one of the greatest nations of the world," and suggested that the best course is to delegate the task to "the finest writers in Canada rewrite the material into a statement that could be inspirational and that would live in the hearts and minds of every Canadian."³⁵ Saskatchewan Premier Allan Blakeney said that he wanted to see "a preamble which would be an uplifting and educational document."³⁶ Lastly, even the Canadian Bar Association, which is clearly more interested in the substantive application of the Constitution than its symbolic significance, pointed out the weak symbolism in the Constitution. Gérard La Forest, who would later become a Supreme Court Justice, represented the Canadian Bar Association before the Special Joint Committee of the Senate and House of Commons on the Constitution, where he said that "the symbolism

³⁴ Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 1980) at 910 (Mr. Wells for Ontario).

³⁵ Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 1980) at 916 (Hon Garde Gardom for BC).

³⁶ Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 1980) at 916 (Hon Allan Blakeney for Saskatchewan).

[in the Constitution] is very bad,” and that while “modern constitutions tend to give some picture of what the aspirations of that society are: it fails to do this completely.”³⁷

There is no doubt that former Prime Minister Pierre Trudeau was aware of the importance of devising symbolic language that would create national sentiments given his drive for a preamble and his impassioned debate with the Quebec premier over its wording relating to nationhood. In fact, he made statements as far back as the 1960s on the importance of symbolism for federalism:

One way of offsetting the appeal of separatism is by investing tremendous amounts of time, energy, and money in nationalism, *at the federal level*. A national image must be created that will have such an appeal as to make any image of a separatist group unattractive. Resources must be diverted into such things as national flags, antes, education, arts councils, broadcasting corporations, film boards...³⁸

This illustrates the importance of symbolism for nationalist sentiment, and explores the non-substantive function foundational documents such as constitutions. The next question that needs to be explored is the relation of God to this symbolism.

C. God and Nationalism

In determining the role of God in nationalistic symbolism we begin with John Jay, the American revolutionary and co-author of the Federalist Papers. In a short passage from the Second Federalist Paper Jay provides us with a clue of the relation of God to nationalism:

Providence has been pleased to give this one connected country to one united people – a people descended from the same ancestors, speaking the

³⁷ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (6 September 1980) at 108 (Gérard La Forest, Canadian Bar Association).

³⁸ Pierre Elliott Trudeau, *Against the Current: Selected Writings, 1939-1996*, Gérard Pelletier, ed, translated by George Tombs (Toronto: McClelland & Stewart, 1996) at 193.

same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side through a long and bloody war, have established general liberty.

In this passage Jay evidently leans more towards an understanding of the United States as exhibiting the ethnic variety of nationalism because the Revolution and the state was forged primarily by colonials of British descent. While the people in the ethnic form of nationalism are presumed to already be bound prior to the creation of the state by non-political factors such as ethnicity, language and religion, the ultimate source of these bonds is still sought. As these bonds are viewed as innate, God or a synonym of the divine becomes the source of choice. Jay's suggestion that the bonds are provided by 'Providence,' is not surprising given that indirect references to the divine were typically preferred by many thinkers during the Age of Enlightenment as discussed in chapter III. While Jay's view of the United States as exhibiting ethnic nationalism is now arguably dated because the country's multi-ethnic makeup, this does not depart from the need for a transcendent principle to account for the bonds in nationalism whether it is the ethnic or civic variety.

This idea of the divine origin of nations is not a uniquely Western concept, and other cultures, including Canadian Aboriginals have similar notions. During the discussions leading to the patriation of the Canadian Constitution, Noel Starblanket, the President of the National Indian Brotherhood had the following to say about the source of First Nations' sovereignty:

The nature of this sovereignty is that it exists in and of its own right. ... It might be better said that it is a gift to each nation, as a nation, from the Great Spirit, our Creator. I believe you people have someone you also refer to as a Great Spirit.

Indians, prior to the coming of the white man, were independent and sovereign people. Indian sovereignty did not come from, nor was it granted by, any earthly authority or entity. If sovereignty is a thing that is granted by an entity other than the one who exercises it, then the grantor, in the Indian's case, is the Great Spirit, the Creator. ...

Our divine right emanated from the Great Sprit, the right of the Indian people to govern themselves; our sovereignty resides in our own people, if I can use that bit of philosophy.³⁹

In the second half of Jay's passage we also see the idea of the people being bound by a common cause, namely "fighting side by side through a long and bloody war..." This concept of people being bound by a common and divinely ordained cause is one of the themes covered by Alexis de Tocqueville in *Democracy in America*, in which he recounts his experience at a public meeting that he attended concerning the turbulence of Poland during its partition in the 19th century. He explains that the meeting began with the following opening prayer:

"Almighty God! Lord of Hosts! Thou who dist strengthen the hearts and guide the arms of our fathers when they were fighting for the sacred rights of their national independence! Thou who didst make them triumph over a hateful oppression, and hast granted to our people the benefit of liberty and peace! Turn, O Lord, a favourable eye upon the other hemisphere; look down with pity upon a heroic nation which is even now struggling as we did in the former time, and for the same rights. Thou, who didst create man in the same image, let not tyranny mar thy work and establish inequality upon the earth. Almighty God! Watch over the destiny of the Poles, and make them worthy to be free. Amy thy wisdom direct their councils, may thy strength sustain their arms! Shed forth thy terror over their enemies; scatter the powers which take counsel against them; and permit not the injustice which the world has witnessed for fifty years to be consummated in our time. O Lord, who holdest the hearts of nations and men alike in thy powerful hand, raise up allies to the sacred cause of right; arouse the French nation from the apathy in which its rulers retain it, that it may go forth again to fight for the liberties of the world."

³⁹ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 30th Parl, 3rd Sess (23 August 1978) at 567 (Noel Starblanket, President National Indian Brotherhood).

“Lord, turn not thou thy face from us, and grant that we may always be the most religious, as well as the freest, people of the earth. Almighty God, hear our supplications this day. Save the Poles, we beseech thee, in the name of thy well-beloved Son, our Lord Jesus Christ, who died upon the cross for the salvation of all men. Amen.”⁴⁰

Here we see the idea of divine support for the nation against its oppressors, and a plea to God from one nation (the United States), that believes itself to have been a recipient of divine intervention, for the divine intervention in the cause of another nation (Poland). This is also echoed in the last paragraph of the *United States Declaration of Independence*:

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these united Colonies are, and of Right ought to be Free and Independent States, that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. — And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

It is not a big leap from the view of the nation as being a recipient of divine intervention to considering it as being “specially called by God to fulfill some larger divine purpose in the world.”⁴¹ The United States has been said to be a “providential nation,” a “chosen nation” and a “City upon a Hill,” which in the various stages of its history has received divine sanction to fulfill Manifest Destiny, banish the European empires from the Western hemisphere through the Munroe Doctrine, contain communism

⁴⁰ Alexis de Tocqueville, “Volume One of Democracy in America” in Olivier Zunz & Alan S. Kahan, eds, *The Tocqueville Reader: A Life of Letters and Politics* (Oxford: Blackwell Publishing, 2002) 64 at 165.

⁴¹ David T Koyzis, *supra* note 11 at 119.

during the Cold War, and most recently, spread democracy and human rights around the world.⁴²

As a result of the perceived divine sanction for the nation to fulfill such causes, the foundational documents of the nation and the state take on, to use the Max Lerner's phrase, "a symbol of divine right."⁴³ The American Constitution, for example, has been described as "a sacred text"⁴⁴ which has a "divine hold ... on the minds and hearts of Americans,"⁴⁵ and "along with the flag, it is [considered] one of the totems of [the American] tribe."⁴⁶ This is witnessed by the fact that the original constitutional document is displayed "for public viewing much as religions display their sacred relics."⁴⁷ It has been suggested that the American Constitution's symbolic function is most clearly apparent in the third clause of article VI, which requires that all state and federal officers must swear or affirm "to support the Constitution."⁴⁸

The symbolic and sacrosanct view of the American Constitution is often pointed to as the most obvious expression of a civil religion in the United States. Sociologist Robert Bellah first devised the term 'American civil religion' in the late 1960s, and he drew extensively on Tocqueville in considering the faith in American public life.⁴⁹ Bellah called this civil religion a "transcendent religious reality" which is "revealed through the

⁴² *Ibid* at 128.

⁴³ Max Lerner, *supra* note 17 at 1291.

⁴⁴ Sanford Levinson, "'The Constitution' in American Civil Religion" (1979) *Sup Ct Rev* 123 at 125.

⁴⁵ Larry R Baas, *supra* note 21 at 102.

⁴⁶ Thomas C Grey, "The Constitution as Scripture" (1984) *37 Stan L Rev* 1 at 17.

⁴⁷ *Ibid*.

⁴⁸ *Ibid* at 18.

⁴⁹ Cushing Strout, "Tocqueville and Republican Religion: Revisiting the Visitor" (1980) *8 Political Theory* 9 at 13.

experience of the American people.”⁵⁰ We return to the definition of a civil religion by the Lutheran World Federation first referred to in the introduction:

Civil religion consists of a pattern of symbols, ideas, and practices that legitimate the authority of civil institutions in a society. It provides a fundamental value orientation that binds a people together in common action within the public realm. It is religious in so far as it evokes commitment and, within an overall worldview, expresses a people’s ultimate sense of worth, identity, and destiny. It is civil in so far as it deals with the basic public institutions exercising power in a society, nation, or other political unit. A civil religion can be known through its observance of rituals, its holidays, sacred places, documents, stories, heroes, and other behaviour in or analogous to recognized historical religions. Civil religion may also contain a theory that may emerge as an ideology. Individual members of a society may have varying degrees of awareness of their civil religion. It may have an extensive or limited acceptance by the population as long as it serves its central function of legitimating the civil institutions.⁵¹

While the separation of church and state in the United States prevented any specific church from serving a unifying role, an alternative was created that could bind in light of plurality.⁵² In accordance with this definition, other commentators have suggested that a civil religion is about recreating the “awe or respect” aspects of religion for the nation’s history, ceremonies and festivals in order to achieve “political unity and respect for the political institutions of the polity.”⁵³ Thus a civil religion is not only about key symbolic documents such as a constitution, but it also involves an active political culture witnessed in general references to God in the speeches of American presidents and in familiar

⁵⁰ Robert N Bellah, “Civil Religion in America,” in Donald R. Cutler, ed, *The Religious Situation* (Boston: Beacon Press, 1968) at 346.

⁵¹ Yoshiro Ishida, “About this Issue” in Frances Maher, ed, *On Civil Religion* (Geneva: The Lutheran World Federation, 1982) 1 at 1.

⁵² Ronald F Thiemann, “The Gospel and American Civil Religion” in Frances Maher, ed, *On Civil Religion* (Geneva: The Lutheran World Federation, 1982) at 5.

⁵³ Iseult Honohan, *supra* note 7 at 175-176.

phrases such as “one nation under God,” or in the pledge of allegiance to which the words ‘under God’ were added in 1954.⁵⁴

The Canadian context may arguably have fewer examples of nationalistic symbolism and a civil religion than the American, although elements are present which have ties to the supremacy of God in the preamble of the *Charter*. To begin with, the Department of Canadian Heritage published a guide called *Symbols of Canada* in which it states that:

Every country has its own set of symbols that establishes its identity and sets it apart from other countries of the world. Symbols tell the story of a nation, its people, environment, history, and traditions. They represent values, goals and aspirations shared by all its citizens.

Canada is a land of diversity, embracing vast differences within its borders and among its people. For Canadians, symbols provide connections across space and time and are a source of unity and pride.⁵⁵

Moreover, the Department of Canadian Heritage also claims that:

The symbols of Canada can heighten not only our awareness of our country but also our sense of celebration in being Canadian. The symbols of Canada are a celebration of what we are as a people.⁵⁶

The Department of Canadian Heritage actively promotes the Canadian national anthem as a national symbol. “O Canada” is of interest in a study of a preamble of the supremacy of God in the preamble of the *Charter* because of its nationalistic symbolism and the phrase “God keep our land glorious and free!” which was added when it was adopted as the Canadian national anthem at around the same time as the patriation of the Constitution. “O Canada” was proclaimed Canada's national anthem on July 1, 1980, a full one

⁵⁴ *Ibid* at 176.

⁵⁵ Canada, Department of Canadian Heritage, *Symbols of Canada* (2010), online: <http://www.pch.gc.ca/pgm/ceem-cced/symb/eng/pub_symb-eng.cfm>.

⁵⁶ Canada, Department of Canadian Heritage, online: <<http://www.pch.gc.ca/pgm/ceem-cced/symb/eng/anthem-eng.cfm>>.

hundred years after it was first sung in French in 1880.⁵⁷ The French lyrics, which were written by Sir Adolphe-Basile Routhier, remain the official French version. There have been numerous English versions over the years, and the official version as adopted by Parliament is a modified version of the lyrics written by Justice Robert Stanley Weir in 1908. The changes made to Weir's version were recommended by a Special Joint Committee of the Senate and House of Commons in 1968.⁵⁸ The two changes recommended by the Special Joint Committee include replacing two of the "Stand on guard" phrases in Weir version's with "From far and wide" and "God keep our land."⁵⁹

Interestingly, Canada patriated its Constitution with an entrenched *Charter of Rights and Freedoms* at around the same time as adopting its own national anthem, and both were amended to include a reference to God. As is the case with the preamble to the *Charter*, there is also a longer history to the addition of the reference to God in "O Canada", which is revealed when one considers previous versions. While Weir's original version did not contain a reference to God, numerous other versions do. The first English language version was written by Toronto doctor Thomas Bedford Richard, and contains a reference to God which is closely linked to nationalism:

O Canada! Our fathers' land of old
 Thy brow is crown'd with leaves of red and gold.
 Beneath the shade of the Holy Cross
 Thy children own their birth
 No stains thy glorious annals gloss
 Since valour shield thy hearth.
 Almighty God! On thee we call
 Defend our rights, forfend this nation's thrall,

⁵⁷ Canada, Department of Canadian Heritage, online: <<http://www.pch.gc.ca/pgm/ceem-cced/symb/anthem-eng.cfm#a2>>.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

Defend our rights, forfend this nation's thrall.⁶⁰

In the phrase “Almighty God! On thee we call - Defend our rights, forefend this nation's thrall,” which is essentially a call to God to ward off or to forbid the enslavement, servitude or bondage of the nation, we see a theme that we first explored in American examples – the idea of divine support for the nation.

There is a slight difference from the American examples which is revealed in another English version of “O Canada” written in 1908 by Mercy E. Powell McCulloch:

O Canada! in praise of thee we sing;
 From echoing hills our anthems proudly ring.
 With fertile plains and mountains grand
 With lakes and rivers clear,
 Eternal beauty, thos dost stand
 Throughout the changing year.
 Lord God of Hosts! We now implore
 Bless our dear land this day and evermore,
 Bless our dear land this day and evermore.⁶¹

In the last three lines of this version we see an appeal to God to bless the land, and the idea of God blessing, bestowing or keeping the land free for the Canadian nation becomes a recurring theme which can be considered equivalent to the ‘cause’ in the American examples. In the *Symbols of Canada* the Department of Canadian Heritage also states that:

Our wilderness is predominant in our symbols and reflects the importance of nature to our Canadian identity. Our abundance of animals and forests, lakes and rivers makes Canada special. We value our natural heritage as we value our people.⁶²

This is also apparent in the official version of “O Canada” with the plea to “God keep our land glorious and free!,” but it is also in line with the some of the comments regarding the

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² Canada, Department of Canadian Heritage, *Symbols of Canada*, *supra* note 55.

supremacy of God in the preamble of the *Charter*. The most obvious example, which we first saw in chapter I, was a comment made in parliament during the debate on the inclusion of a reference to God in the Constitution that “the founders of this country fell down on their knees and praised God for helping them find the land, and they thanked God for all the bountiful gifts He bestowed on them.”⁶³ There are other examples, however, which provide more in-depth analysis. During the patriation process Progressive Conservative MP Jake Epp recounted the story of the origins of the name Dominion of Canada, and the motto “from sea to sea” for the Canadian coat of arms. According to Epp, the word “Dominion” and the motto “from sea to sea” were inspired by verse 8 of Psalm 72 which reads: “And he will have dominion from sea to sea and from the river to the ends of the earth.”⁶⁴ Epp further stated that:

This nation was founded on those principles and the Fathers of Confederation saw it necessary and saw it wise that the nation of the future, if it were to be united, had to recognize the supremacy of God, and they recognized it in that motto. We have always prided ourselves that we are a nation under God.

Here we see the idea of the unity of the people or their sovereignty stemming from God.

Not surprisingly, there has been a debate to remove the reference to God in the national anthem, albeit a less vigorous one than was the case with the supremacy of God in the preamble of the *Charter*. The *Globe and Mail* held a panel discussion on the reference to God in the national anthem on Canada Day in 2008 which revealed some points that are similar to those made in chapter II on the legal significance of the supremacy of God and the role of religion. In general, the panelists agreed that God has an important place in the national anthem and should remain there based on an

⁶³ *House of Commons Debates*, 32nd Parl, 3rd Sess (18 March 1981) at 1700 (Hon Mr. Corbett).

⁶⁴ *House of Commons Debates*, 32nd Parl, 3rd Sess (22 January 1981) at 4319 (Hon Jake Epp).

understanding of it as a transcendent force rather than a representation of specific set of religious principles. The most articulate expression of these points was from the first panelist, Michael Higgins, who was introduced as the President of St. Thomas University in Fredericton and the past president of St. Jerome's University in the University of Waterloo. Higgins expressed the belief that God belongs in the national anthem on the condition that:

what we mean by “God” is a transcendent reality that attaches greater significance to our life as a community-in-time than historical record alone can guarantee, if we mean by “God” the attendant recognition of our collective dependence on an encompassing power that perdures beyond our numberless “isms” and sovereign entities, and if we mean by “God” a centre or locus of meaning that is trans-historical, then I am for its retention and celebration.⁶⁵

At the same time, Higgins believes that the reference to God should be removed from the national anthem if it is understood as: “theologically specific” and “intolerant of personal interpretation.”⁶⁶ The one exception to this line of thought were arguments made in favour of removing the references to God from both the national anthem and the preamble of the *Charter* by a representative from the Canadian Secular Alliance and the president of the Freethought Association of Canada.⁶⁷

While the panelists for the most part agreed that the reference to God in the English version of the national anthem has relevance in a multicultural Canadian context because it “is not a static or single-definition concept” but rather “admits of infinite ... variety and resonance,” they also generally agreed that the Christian tone in the French

⁶⁵ “Panel debates God and O Canada”, *The Globe and Mail* (3 July 2008) online: <<http://www.theglobeandmail.com/servlet/story/RTGAM.20080630.wfaithjuly2008/BNSStory/CanadaDay2008/?pageRequested=all>>.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

version could be changed.⁶⁸ While the French version of “O Canada” does not explicitly mention God, it contains the phrase “car ton bras sait porter l’épée, il sait porter la croix,” which roughly translates into English as “since you can carry the sword, you can carry the cross”.⁶⁹ Unlike the case with the supremacy of God in the preamble of the *Charter*, there has not been a political effort to remove the reference to God in the national anthem. Indeed, in an attempt in the Senate to amend the wording of the national anthem to replace the words “thy sons” with the words “of us,” the sponsoring senator made it clear that she was “not proposing that a reference to God be deleted from the anthem.”⁷⁰

In some respects the aspects of civil religion as witnessed in the United States and in Canada are in accordance with Rousseau’s understanding of the term as an institution that could appeal to the sentimental non-rational characteristics of men and generate commitment to the state. For Rousseau, a civil religion is primarily meant to encourage ‘sentiments of sociability’, respect for the law and loyalty to the state, and is to be principally seen in the “celebration be of republican unity.”⁷¹ Rousseau’s concept of a civil religion does not involve complex doctrines or dogmas of faith since political authority is only concerned with the temporal. As Rousseau explains:

The dogmas of civil religion ought to be simple, few in number, precisely fixed, and without explanation or comment. The existence of a powerful, wise, and benevolent Divinity, who foresees and provides the life to come, the happiness of the just, the punishment of the wicked, the sanctity of the social contract and the laws: these are its positive dogmas. Its negative dogmas I would confine to one – intolerance.

This reveals how Rousseau, as well as other thinkers such as Machiavelli and Hobbes, promoted a form of civil religion but yet were sceptical of Christianity. Machiavelli

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Debates of the Senate*, 37th Parl, 1st Sess (21 February 2002) (Hon Vivienne Poy).

⁷¹ Iseult Honohan, *supra* note 7 at 95.

criticized Christianity for “causing men to suffer rather than to achieve great deeds,” while Thomas Hobbes promoted a Christian commonwealth in the *Leviathan* that “placed religion under secular control.”⁷² Rousseau viewed Christianity as a “cause of conflict, and a support for absolute power,” and thus incompatible with republican government.⁷³ He also believed that Christianity’s concern for the afterlife rather than the temporal resulted in “bad citizens,” and that it divided people’s loyalty between the church and state.⁷⁴ Rousseau looked to the ancients where religion was often subordinate to politics – a fact which he believed made good citizens.⁷⁵

In displaying the symbolic importance of the supremacy of God and its relationship to nationalism it has also been demonstrated that its symbolic role goes beyond the principles of a specific religion. Yet in the next section we will return once again to religion where we will move beyond the symbolic importance of the supremacy of God with the idea of a civil religion and the “political myths and rituals studied by sociologists,” to one of “civic theology” and the development of theories of democracy, the state and constitutionalism.⁷⁶

D. God, Democracy and the Theory of the State

While many prominent modern thinkers such as Hobbes and Rousseau were antagonistic towards Christianity, Alexis de Tocqueville took the opposite approach by considering the positive attributes of its indirect influences in politics. Through his

⁷² Sanford Kessler, “Tocqueville on Civil Religion and Liberal Democracy” (1977) 39 *The Journal of Politics* 119 at 122.

⁷³ Iseult Honohan, *supra* note 7 at 95.

⁷⁴ Catherine Zuckert, “Not by Preaching: Tocqueville on the Role of Religion in American Democracy” (1981) 43 *The Review of Politics* 259 at 263.

⁷⁵ *Ibid.*

⁷⁶ Lior Barshack, “Constituent Power as Body: Outline of a Constitutional Theology” (2006) 56 *UTLJ* 185 at 185.

observations on the workings of American democracy, Tocqueville viewed the Christian faith as both the source and the maintenance of liberty and democracy.⁷⁷ What is important for Tocqueville is not the direct influences of religion but rather the mores that it instills in individuals which indirectly produces habits and opinions that promote liberty and democracy.⁷⁸ As Tocqueville said:

it is precisely when [religion] does not speak of freedom that it teaches Americans most about the art of being free. ...

Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for it does not impart a taste for freedom, it facilitates the use of it. ... I do now know whether all Americans have a sincere faith in their religion – for who can search the human heart? – but I am certain that they hold it to be indispensable to the maintenance of republican institutions.⁷⁹

We see this idea reflected in many of the founders of the United States. George

Washington said the following during his farewell address:

Of all the dispositions and habits which lead to political prosperity, religion and morality and indispensable supports ... And let us with caution indulge the supposition that morality can be maintained without religion.⁸⁰

Even Thomas Jefferson, the American founder considered to be the most sceptical of religion, questions whether liberty and rights can be maintained without the foundation provided by God:

And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath?⁸¹

⁷⁷ Sanford Kessler, *supra* note 72 at 123.

⁷⁸ Catherine Zuckert, *supra* note 74 at 263-264.

⁷⁹ Alexis de Tocqueville, *supra* note 40 at 113-114.

⁸⁰ Thomas G West, "Religious Liberty: The View from the Founding" in Daniel C. Palm, ed, *On Faith and Free Government* (New York: Rowman & Littlefield Publishers, Inc, 1997) 3 at 12.

⁸¹ *Ibid.*

It has thus been suggested that while the American founders wanted a separation between church and state, they rejected the idea of a wall of separation between religion and public life.⁸²

Tocqueville believed that religion is necessary to maintain liberty, although he did not support the enforcement of public dogmas. Rather, he advocated for the strict separation of church and state and observed that this had occurred in the United States:

It must never be forgotten that religion gave birth to Anglo-American society. In the United States, religion is therefore mingled with all the nation's habits and all the feelings of patriotism, whence it derives a particular force. To this reason another of no less force may be added: in America religion has, as it were, laid down its own limits. The religious order has remained entirely distinct from the political order, in such a manner that one could easily modify well-established laws without changing well-established beliefs.⁸³

While the mores that Christianity instilled in the individual are imperative for democracy, Tocqueville stressed that religion's domain is over the eternal and that it should not have direct secular power. Tocqueville was thus highly critical of the alliance between the Catholic Church and the Old Regime in his native France, but he was also concerned about the French Revolution because it pitted those "who value morality, religion and order ... on one side, and those who love liberty and legal equality on the other."⁸⁴ This helps explain the paradox in Tocqueville's thought when he praises the separation of church and state in the United States but yet calls religion "the first of their political institutions."⁸⁵ This paradox to various degrees is present in most societies, and as we saw in chapter II while secularism opposes state enforcement of religious exclusivity,

⁸² *Ibid* at 5.

⁸³ Alexis de Tocqueville, *supra* note 40 at 165.

⁸³ David T Koyzis, *supra* note 11 at 119.

⁸⁴ Joachim Wach, "The Role of Religion in the Social Philosophy of Alexis De Tocqueville" (1946) 7 *Journal of the History of Ideas* 74 at 78.

⁸⁵ Sanford Kessler, *supra* note 72 at 127.

there is a degree of latitude on how it can be applied, and it certainly does not require the complete banishment of all references to the sacred in public life. In the Canadian context, we saw in chapter II that the overall constitutional framework ensures the freedom of religion and prevents state enforcement of religious exclusivity, while at the same time supporting the advancement of religion.

Tocqueville also believed that democracy was a “divinely ordained revolution” of which Christianity was at the root because it first introduced the principle that “all members of the human race are by nature equal and alike” and that they have a common birthright to freedom.⁸⁶ Tocqueville was not the only theorist to point to the religious roots of modern democracy. A diverse set of thinkers ranging from the Catholic scholar Jacques Maritain to Georg W.F. Hegel could agree with Friedrich Nietzsche’s statement that “the democratic movement is the heir of the Christian movement.”⁸⁷ These thinkers point to the Christian belief in the “equal dignity and infinite worth of every human being in the eyes of God” as the source of democracy and individual human rights.⁸⁸ Maritain, for example, has repeatedly argued that the Christian teaching that every human being is equal before God has led to the rights of man and democracy.⁸⁹ Leading Protestant thinkers likewise attempted to draw links between the theological ideas of the Reformation with democracy and human rights.⁹⁰

This to an extent helps us appreciate the combination of Christianity, nationalism and the populist movement in the United States, and to a lesser extent in Canada. In the

⁸⁶ *Ibid* at 128.

⁸⁷ Robert P Kraynak, *Christian Faith and Modern Democracy: God and Politics in the Fallen World* (Indiana: University of Notre Dame Press, 2001) at 6.

Friedrich Nietzsche, *Beyond Good and Evil: Prelude to a Philosophy of the Future*, translated by Walter Kauffmann (New York: Vintage, 1966) at 202.

⁸⁸ Robert P Kraynak, *Ibid* at 6.

⁸⁹ *Ibid* at 5.

⁹⁰ *Ibid*.

Canadian context this combination of Christian morality, nationalism and populism was adopted by a number of political movements in the last century, both on the political left and right, including the Progressive Party of Canada, the Social Credit Movement, the Reform Party and the Canadian Commonwealth Federation (CCF) which later became the New Democratic Party of Canada. For example, Preston Manning, the leader of the Reform Party in the 1990s, stated that his personal political convictions were “rooted in the populist political traditions,” as well as his “personal decision at an early age to follow Christ.”⁹¹ This helps provide additional context to the evangelical movement which we saw in chapter I has been attributed a degree of influence in the incorporation of the reference to the supremacy of God in the preamble of the *Charter* partly through the Progressive Conservative Party.

Despite the role played by Christianity in the rise of modern democracy, this does not imply a form of religious exclusivity of Christianity in the theory of the state or democracy. Firstly, despite the claim to democracy’s Christian origins, the link is drawn indirectly through the mores that the religion provides and to the idea of the belief in the “equal dignity and infinite worth of every human being”.⁹² This indirect link is made by the diverse set of thinkers referred to above including Tocqueville, Hegel, Maritain and Nietzsche. It has also been pointed out that the Bible rarely speaks of politics, and that while the New Testament is written in Greek reference is never made to the Greek term *democratia*.⁹³ The indirect link between democracy and the mores of Christianity is in many respects a product of a historical experience in the West, and similar mores can be

⁹¹ Preston Manning, *The New Canada* (Toronto: Macmillan Canada, 1992) at 2.

⁹² Robert P Kraynak, *supra* note 87 at 6.

⁹³ *Ibid* at 1.

found and promoted by other religions. Lastly, the fact that democracy's inception was in the pagan environment of ancient Greece cannot be overlooked.

In current Christian thought the consensus is now that the only form of government compatible with Christianity is democracy, and it has been suggested that Christian political thought has moved from the divine right of monarchy to the divine right of democracy.⁹⁴ In many respects the role of God in contemporary theories of the state is most clearly revealed in this transition from the idea of the divine right of monarchy to the divine right of democracy. While the theory of the state in the 17th and 18th centuries was theological in origin, as the place of the monarch in the state was analogous to the place of God in the Cartesian system of the world, discerning the theological origins of contemporary theories of the state is much more complex.⁹⁵ Carl Schmitt sheds the most light on the theological origins of the modern theories of the state. Schmitt's bold introduction in his *Political Theology* that "all significant concepts of the modern theory of the state are secularized theological concepts," can only be understood when considered along with the two-fold distinction he makes between the theistic and deistic conceptions of God.⁹⁶ The theistic account represents the conventional understanding of the relationship between God and the state in the 17th and 18th centuries, whereby a sole sovereign governs in the political realm as God governs in the world. Schmitt provides the following quote from Descartes to demonstrate the theistic account: "it is God who establishes these laws in nature just as the king establishes laws in his

⁹⁴ *Ibid* at 1 and 131.

⁹⁵ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, translated by George Schwab (Cambridge: MIT Press, 1985) at 46.

⁹⁶ *Ibid* at 36.

kingdom.”⁹⁷ This theistic view involves a notion of the transcendence of God in relation to the world and the transcendence of the sovereign in relation to the state.

The deistic view, in contrast, emerged in the 19th century when theistic and transcendental notions lost credibility in favour of what Schmitt refers to as “imminence,” whereby the theory of public law became positive.⁹⁸ It is here that Schmitt attributes the modern theory of the state and the rule of law with deism, which in its theological application rejects the ability of God to directly intervene in the laws of nature through miracles, and in modern constitutionalism rejects the sovereign’s ability to directly intervene in a valid legal order. This was explained by Schmitt as follows:

The idea of the modern constitutional state triumphed together with deism, a theology and metaphysics that banished the miracle from the world. This theology and metaphysics rejected not only the transgression of the laws of nature through an exception brought about by direct intervention, as is found in the idea of a miracle, but also the sovereign’s direct intervention in a valid legal order. The rationalism of the Enlightenment rejected the exception in every form.⁹⁹

Schmitt maintains that this mode of thinking is modeled upon the natural sciences in an attempt to banish all “arbitrariness,” and every exception.¹⁰⁰ The sovereign is in a similar position to God in the deist tradition because while he was instrumental in creating the system, he now remains outside of it and it runs entirely on its own.¹⁰¹

Schmitt’s account of the transition from a theistic to a deistic understanding of the state where the theory of public law became ‘positive,’ is in line with the process referred to in chapter III when the theory of law underwent a “denaturalization” whereby the natural law theory lost its virtual monopoly between the late 19th and 20th centuries to

⁹⁷ *Ibid* at 47.

⁹⁸ *Ibid* at 51.

⁹⁹ *Ibid* at 36.

¹⁰⁰ *Ibid* at 41.

¹⁰¹ *Ibid* at 48.

legal positivism. The two facets of this process thus resulted in a perception of sovereignty as stemming from the constitution rather than a higher source, and a perspective of rights as stemming solely from the legal enactments of the state rather than a higher source. However, as we saw in chapter III the Second World War and its aftermath served as a catalyst for renewed discourse on legal theory and human rights, and while natural law has not regained its former monopoly on legal theory and rights discourse, it has certainly undergone a revival among legal and political philosophers.¹⁰² The revival of rights discourse after the Second World War brought with it a host of new rights instruments, including the *Canadian Bill of Rights* and the *Charter* in the Canadian context. We also saw in chapter III how the supremacy of God serves as the transcendent principle in these rights instruments, and how a full understanding of its meaning and significance requires full engagement with the theory of rights.

Just as the renewed interest in rights discourse brought with it the search for a transcendent principle, likewise Schmitt searches for the transcendent in the theory of the state, which he finds in a veiled or concealed form in the notion of creation. Schmitt tells us that this concealment occurred through the constitutional theory of liberalism, which avoids the issue of sovereignty by defining it “exclusively in terms of the rule of law.”¹⁰³ According to the rule of law, “power resides in the legal system itself and not in any personal authority representing the state.”¹⁰⁴ Since the rule of law ensures that sovereignty is absent in “the normal course of affairs” in a liberal constitutional framework, Schmitt believes that it can be observed in “turbulent constitutional

¹⁰² Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York: The Continuum International Publishing Group Inc, 2005) at 17.

¹⁰³ Renato Cristi, “Carl Schmitt on Sovereignty and Constituent Power” (1997) 10 Can JL & Juris 189 at para 4.

¹⁰⁴ *Ibid.*

episodes,” the most obvious of which is the creation of a new constitutional order.¹⁰⁵ For this he turned to the French Revolution, and attributes to the French the discovery of both the existence of an unlimited and indivisible sovereign, the *pouvoir constituant*, or constitution-making power, and the “exercise of arbitrary, supra-legal constituent power to the ‘nation,’ the sovereign people.”¹⁰⁶ We must bear in mind that Schmitt’s higher source, or constituent power, is only related to God by analogy in the way that popular sovereignty takes on the role of creator. Schmitt does not intend to draw a direct theological link, but rather makes his observations in light of the way that the concept operates – which he calls a “secularized theological concept.”¹⁰⁷ Thus, the purpose here is not to suggest that the supremacy of God relates directly to Schmitt’s constituent power, although given the links that were drawn to nation-building the patriation process can potentially be further analysed in light of Schmitt’s concept of constituent power and the creation of a constitutional order by the ‘nation.’ While this is beyond the scope of this undertaking, it is interesting that the rule of law was included as the second component of the preamble alongside the supremacy of God during the patriation process.

In further exploring the links between the supremacy of God and nationhood first made in chapter I, this chapter has displayed the importance of symbolism for nationalist sentiment and the role of a transcendent concept such as God for the source of these bonds. Symbolism that appeals to people’s sentiments and helps bind citizens to the state has been not only been discussed by political philosophers, but is also displayed in concrete examples, and we have seen how foundational documents such as constitutions

¹⁰⁵ Lior Barshack, *supra* note 76.

¹⁰⁶ William E Scheuerman, “Revolutions and Constitutions: Hannah Arendt’s Challenge to Carl Schmitt” (1997) 10 *Can JL & Juris* 141 at para 6.

¹⁰⁷ Carl Schmitt, *supra* note 95 at 46.

often have a symbolic in addition to their more well-known instrumental or legal role. Moreover, the corresponding search for a transcendent source of these bonds often points to a divine source – not unlike the search for a transcendent source of right as seen in chapter III. In exploring this in practice in Canada, we saw that there was considerable effort during the patriation process at developing a symbolic and inspirational preamble to the entire Constitution – to which the supremacy of God is linked.

While a reference to the divine as the transcendent source of the nation provides value to the faithful, just as we saw in chapter III with references to the divine as the source of rights, this should not be viewed as a form of religious exclusivity, and a number of theorists, ranging from Machiavelli, Hobbes and Rousseau, promoted a form of civil religion but yet were sceptical or outright antagonistic towards Christianity. Even thinkers such as Tocqueville that drew links between Christianity and democracy did so indirectly through the mores that the religion instilled in individuals. This to a degree helps us understand the transition to the modern theory of the state and liberal constitutionalism. Carl Schmitt tells us that the supra-legal constituent power or constitution-making power is attributed to the sovereign people, or the ‘nation,’ and suddenly popular sovereignty takes on the form of creator in what Schmitt refers to as a “secularized theological concept.”¹⁰⁸

¹⁰⁸ Carl Schmitt, *supra* note 95 at 46.

CONCLUSION

The concept of including an inspirational prelude in a society's most important laws can be traced back to Plato's *The Laws*, in which an old Athenian recommends that the legislator use preambles because "[h]e doesn't give orders until he has in some sense persuaded."¹ In the fashion of classical Greek philosophy, *The Laws* was meant to provide advice to statesmen and legislators on good politics that is both philosophical and practical.² Preambles have since been described as having a role in articulating "aspirations, moral teachings, or 'meta-legal messages,'" and potentially offer a "more romantic understanding of legislation."³ Preambles can contain aspects of rationality as displayed in the Platonic dialogues, although as they are to appeal both to the heart as well as the mind they also need to be "more lyrical and poetic than the body of laws," and as such they should also include aspects of poetry, metaphor, symbols, evocative narratives and theological orations.⁴ Plato's legislator has been described as having to be "a poet-or, in biblical language, a prophet who not only creates a way of life but who leaves behind a comprehensive justification of that life, viewed in the context of the whole of human existence".⁵

This study on the reference of the supremacy of God in the preamble of the *Charter* was initially prompted by dissatisfaction with the simplistic accounts of its meaning and significance in much of the existing literature, and by the belief that it was

¹ Plato, *The Laws*, translated by T.L. Pangle (New York: Basic Books, 1980) at 720d.

² Kent Roach, "The Uses and Audiences of Preambles in Legislation" (2001) 47 McGill LJ 129 at para 15.

³ *Ibid* at para 5.

⁴ *Ibid* at paras 5 & 17.

⁵ Plato, *supra* note 1 at 490. See also Ken Roach, *Ibid* at footnote 45.

included in the preamble to one of the most vital parts of the Canadian Constitution in order to serve an essential theoretical role as in the Platonic understanding of preambles.

Discerning that theoretical role first required a review of its history. This review clarified that the supremacy of God's origins lie in the preamble to the quasi-constitutional *Canadian Bill of Rights* and the failed attempts at developing an inspirational preamble to the entire Constitution. Of interest to this study is not only the considerable debate that resulted in the eventual inclusion to a reference to God in the preamble of the *Canadian Bill of Rights*, but also the government's intention for the preamble to be poetic and include elements of metaphor, symbolism, narrative and theological orations in order to achieve a larger impact. In the words of the Minister of Justice the intention was for the preamble to the *Canadian Bill of Rights* to be:

reproduced and framed, mounted on walls of schools, church halls and assembly halls, and other similar places, so that it would become familiar in a readily understandable and easily recognizable form to the greatest possible number of people, and especially to younger Canadians.⁶

Among the other shortcomings of the *Canadian Bill of Rights* was the failure of its preamble to achieve this type of wider impact.

Nonetheless, the inclusion of a rhetorical preamble to the entire Constitution became an important goal of the federal government during the discussions to patriate the Constitution. The purpose of such a preamble was expressed best by the Ontario delegation to the Federal-Provincial Conference of First Ministers on the Constitution:

... we are now working on a preamble and to me this is an opportunity to put into words, not legal words, not the kind of words that begin with "whereas" and the kind of things that lawyers put at the beginning of a will or contract, but it is a chance to put into words some poetry or some feelings that express our country.

⁶ *House of Commons Debates*, 24th Parl, 3rd Sess, Vol VII (1 August 1960) at 7372 (Hon Edmund Fulton).

... I don't think we use a preamble merely as a beginning to the Constitution in legal language but we would like to put forward, sir, the point of view the preamble should be something that in the terminology of the people in the street might say "grabs you a little," perhaps brings a little pride to you ...⁷

In chapter I we saw how the federal government abandoned its attempt at including a preamble to the entire Constitution upon the collapse of the First Ministers' Conference and its subsequent decision to patriate unilaterally. The ensuing debate on the preamble focused on the omission of a reference to God and the possibility of using the preamble to the *Canadian Bill of Rights* for the Constitution. Links were also drawn between a reference to God, the foundation of rights and Canadian nationhood. This was expressed most clearly by David Crombie, one of the most outspoken proponents of a preamble and the inclusion of a reference to God in the Constitution during the patriation process:

The reason why, Mr. Chairman, we put in the wording is for the very same reason that the wording for all constitutions, in the Western World at any rate, have always included some suggestion that there was a power beyond a government power. In all laws, particularly constitutional laws, there is not only the letter of the law, but the spirit of the law; and the spirit of the law comes from the recognition that there is a supreme being – a God, a life force, an entity, whatever phraseology people would care to use, to indicate that beyond people and beyond governments there is another authority.

Constitutions are made up of the values, interests and beliefs of the people that that constitution is supposed to govern. It cannot do so unless the fundamental source of the principles upon which that society rests are articulated clearly.

The fact of the matter is that our rights do not come from government, but from other sources; from tradition; from God, or whatever other word you would care to use to indicate that there are powers beyond the government and people...

That is why the preamble is necessary. It [also] ... necessary for a fourth reason, and that is that at least in this country, when it comes to a bill of

⁷ Federal-Provincial Conference of First Ministers on the Constitution – September 8-13, 1980, *Verbatim Transcript*, Vol II (11 September 1980) at 910 (Mr. Wells).

rights, it is the only bill of rights that we have ever had, and all we ask in our motion is that the preamble to the one bill of rights we have ever had, that we continue it.⁸

The understanding of the supremacy of God as the transcendent element in the Constitution with links to the foundation of rights and Canadian nationhood stems both from this political debate as well as a deeper analysis of the preamble to the *Canadian Bill of Rights* and the draft preambles proposed for the entire Constitution.

The idea that the supremacy of God represents the foundation of rights enumerated in the *Charter* is not in itself novel, although a full engagement with the various theoretical perspectives in chapter III has provided a deeper insight into its significance and has revealed the fact that it is not a static concept that relates directly to a specific set of religious beliefs. While the supremacy of God can provide value to the faithful, it can also be balanced with more secular understandings of rights. In fact, we can observe this balance in Crombie's comments when he stated that "rights do not come from government, but from other sources; from tradition; from God, or whatever other word you would care to use to indicate that there are powers beyond the government and people."

The interplay between human rights, religion and secularism which was examined on a theoretical level is also consistent with the balance achieved by the Constitution in the practice of secularism between the protection of religious freedoms and the prevention of state enforcement of religious exclusivity, and the advancement of religion. The supremacy of God can stand for the foundation of right in the Constitution without representing specific religious beliefs. Indeed, chapter II demonstrated that the case law

⁸ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (22 January 1981) at 4316 (Hon David Crombie).

is clear that the supremacy of God cannot be used to supersede laws based on individual religious beliefs. While the limited legal application of the supremacy of God in comparison to the reference to the rule of law has concerned a number of observers, some of the more recent cases demonstrate that the courts have been increasingly restricting the use of the rule of law in favour of the substantive provisions of the *Charter*. This has therefore helped to bring the two parts of the preamble closer together as theoretical elements of the Constitution.

Chapter IV explored the importance of symbolism for nationalist sentiment and the role of references to the divine as the transcendent source of national bonds. The importance of symbolism can be discerned from Plato's discussion of preambles in *The Laws*, and it was discussed extensively by later philosophers such as Rousseau in the context of a civil religion. We have seen how foundational documents such as constitutions often have a symbolic role in addition to their legal purpose. Such documents often contain references to the divine as the transcendent source of national bonds. This provides value to the faithful, but just as we saw with the references to the divine as the source of rights, this should not be viewed as a form of religious exclusivity. While a reference to the divine often serves as the transcendent principle behind these bonds, it has also been shown to have a foundational role in the theory of the state and constitutionalism.

How well has the supremacy of God served in this symbolic function? It has often been argued that the Canadian Constitution is not a popular nor a people's constitution,

but rather one that is directed at a legal audience.⁹ This has led one commentator to suggest that “our Constitution no longer fulfils an essential – perhaps the most essential – function of a constitution. It no longer sets out a unifying national idea. Our Constitution gives scant intellectual or emotional direction in the maintenance of a peculiarly Canadian society.”¹⁰

The shortcomings of the preamble to the *Canadian Bill of Rights* and the inability of the federal government to include a preamble to the entire Constitution appear to be a reoccurring theme of most preambles. In a review of preambles in federal legislation, Kent Roach suggests that while the federal government is using preambles appropriately by reserving them for important or symbolic legislation rather than on more technical pieces, “they often do not live up to the Platonic promise of communicating with citizens in an effective or inspiring manner”.¹¹ Preambles are for the most part not poetic nor are they written in popular language, but rather often contain legalese such as ‘whereas’, and refer to technical provisions in the legislation that says very little to common citizens.¹² Roach laments this fact as a “lost opportunity,” although he rejects the suggestion that preambles should be abandoned.¹³ The difficulty faced in drafting inspiration language that speaks to the nation is disheartening, and we can see the wisdom of Harry Daniels, the President of the Native Council of Canada, who during the patriation process said that

⁹ Robert Martin, “A Lament for British North America” in Anthony A. Peacock ed, *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation, and Theory* (Don Mills: Oxford University Press, 1996) 3 at 4.

¹⁰ *Ibid* at 3.

¹¹ Ken Roach, *supra* note 2 at paras 19-20.

¹² *Ibid* at para 20.

¹³ *Ibid* at para 25.

“[it is] apparent that you need even more help today in nation-building than you did 400 years ago.”¹⁴

Despite the fact that the supremacy of God is a relatively recent addition to the Canadian Constitution that has not been extensively used by the courts, this study has demonstrated that it has considerable historical and theoretical significance. While the preamble to the *Charter* arguably falls short of the lofty goals of the federal government at creating an inspirational preamble to the entire Constitution, a comprehensive historical inquiry and theoretical analysis has displayed a deeper meaning and significance of the supremacy of God than the short preamble to the *Charter* would otherwise reveal. The supremacy of God may only be one element of a project that intended on placing a reference to God in a larger context in the Constitution, although its importance is displayed by the sheer fact alone that it made it in the Constitution while numerous other elements that were to be included in a preamble were left out.

As was observed in chapter I, the reference to the supremacy of God is a small component of Trudeau’s intended ‘unifying national idea’ and the planned preamble for the entire Constitution. Removing it from the *Charter* would not better achieve this goal. As David Crombie said, “God knows ... that this country has few enough symbols that unite us.”¹⁵ The failed attempt of placing a reference to God as part of a larger inspirational preamble to the entire Constitution may have been a lost opportunity, but surface-level critiques and attempts at excising it from the Constitution do not get us any closer to this goal. Rather, our focus should be on trying to ascertaining its meaning and

¹⁴ Special Joint Committee of the Senate and House of Commons on the Constitution of Canada, *Minutes of Proceedings and Evidence*, 32nd Parl, 3rd Sess (2 December 1980) at 17106 (Harry Daniels, President, Native Council of Canada).

¹⁵ *Supra* note 8 at 4317.

significance. This study has made a modest contribution towards this goal, but additional work remains to be done.

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