

*Compromise and the Notwithstanding Clause:
Why the Dominant Narrative Distorts our Understanding**

Janet L. Hiebert
Queen's University
hiebertj@queensu.ca

No section of the Canadian Charter of Rights and Freedoms has generated as wide ranging opinion on its merits as the notwithstanding clause, which allows provincial and federal legislatures to pre-empt judicial review, or set aside the effects of a judicial decision on most sections of the Charter, for renewable five-year periods. Although some commentators approve of the clause, they comprise a minority position. The clause has become so unpopular that some perceive it to be largely irrelevant, if not rendered unconstitutional by convention. Politicians are reluctant to openly contemplate its use, never mind invoke this power, even to protect impugned social policies for which they have strong commitment.

At one level, public and political disdain for a clause so infrequently used is perplexing, particularly as the Charter was not placed on the constitutional agenda in response to strong public demand to alter either of Canada's constitutional principles: the finality of political judgment for legislation¹ or the accommodation of provincial-based differences, as authorized by federalism. Although a small contingent of supporters have long pressed for a bill of rights to redress concerns about unchecked political powers, particularly the post-war powers of federal governments,² the decision to pursue a constitutionally entrenched bill of rights was largely an elite-driven project that quickly gained strong public support.

The paper asks the following two questions. To what extent is Canada's disdain for the notwithstanding clause a legacy of our failure to disentangle different notions of 'compromise' as they relate to its origins³ and function? The explanation of compromise reflects at least three different meanings that distort and muddy debate. Second, does Canada's constitutional myopia contribute to the legitimacy deficit of this power, in that we tend towards an insular vision of constitutionalism, unchallenged by comparative experiences?

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¹ In Canada, the idea of parliamentary supremacy, even when modified for a federalism context, has never been absolute and has recognized a judicial supervisory role for ensuring that legislation is consistent with the rule of law and within the appropriate sphere of jurisdiction.

² See Christopher MacLennan, *Toward the Charter* (Montreal: McGill-Queen's University Press 2003).

³ I am referring to the origins of the notwithstanding clause in the Charter. Although the 1960 statutory Bill of Rights also contained a notwithstanding clause, it has a different role under the Charter. Rather than function to constrain the scope of judicial review as it did in the earlier Bill of Rights, its incarnation in the Charter creates an opportunity for political disagreement with judicial review that otherwise could result in the invalidation of legislation.

Compromise and the Notwithstanding Clause

Three different uses of compromise inform explanations of the origins and role of the notwithstanding clause in s. 33 of the Charter. These can be referred to as: 1) **compromise as political necessity**, because political circumstances compelled the political negotiators in the Charter project to settle for an arrangement they would not have accepted had they sufficient political resources to maintain their preferred position; 2) **compromise of principles**, because s. 33 is said to be inconsistent with a core principle of legal constitutionalism, which authorizes legal adjudication of disagreements about rights principles; and 3) **compromise of competing constitutional ideas**, because this power helped establish a new equilibrium in inter-institutional powers between the primary (and rival) constitutional models prevalent at the time.

Movement exists across some of these categories. Some believe that although the notwithstanding clause may have been necessary to secure political agreement (1), it was a deal-breaker that undermines the purpose and integrity of the Charter because compromise is neither consistent nor desirable with a new emphasis on legal adjudication (2). Others view the genesis of the notwithstanding clause as a political act to broker a political compromise (1) but one with salutary benefits for striking a new constitutional equilibrium between juridical and political views of constitutionalism (3).

Debate about the notwithstanding clause has lacked clarity as to what participants are criticizing or supporting when they refer to compromise, or whether compromise is considered regrettable or desirable in constitutional politics. This lack of clarity has reinforced the popular perception that the notwithstanding clause lacks redeeming value (it was not born of any grand theory but of pragmatism) and contradicts the purposes of the Charter (legal adjudication of claims that governments have improperly transgressed rights). Debate has focussed mostly on the first and second uses of compromise. The dominant narrative emphasizes both this power's pragmatic origins and its supposed tension with the legal rights project many associate with the Charter. But, with notable exceptions, insufficient attention has been paid to the third understanding of compromise.⁴ In the paper I will argue that although the origins of this clause were clearly inspired by political necessity (1), the third notion of compromise is also a persuasive interpretation of the ideas behind this power.

Compromise as Political Necessity

⁴Exceptions include Paul Weiler, "Rights and Justice in and Democracy: A New Canadian Version," *University of Michigan Journal of Law Reform* v. 18 (1984) pp. 51-92; Peter H. Russell, "Standing up for Notwithstanding," *Alberta Law Review* v. 29 (1991); Christopher P. Manfredi, *Judicial Power: Canada and the Paradox of Liberal Constitutionalism*, 2nd edition, (Don Mills, Ont: Oxford University Press 2001; Mary Ann Glendon, *Rights Talk. The Impoverishment of Political Discourse*. (New York: Free Press, 1993), Janet L. Hiebert, *Charter Conflicts. What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002). Kent Roach also accepts the legitimacy of the notwithstanding clause, as part of his interpretation of a dialogue model. Kent Roach, *The Supreme Court on Trial. Judicial Activism or Democratic Dialogue?* (Toronto: Irwin Law, 2001).

The first use of compromise focuses on its instrumental value in brokering a political agreement for constitutional reforms between federal and provincial leaders. In the wake of the Supreme Court's clever ruling⁵ on the federal proposal to amend the constitution unilaterally (which managed to convey both victory and loss for each side), an immense political pressure arose to seek a compromise. The First Ministers reconvened November 2 1981 for one more round of negotiations, characterized by a "mixed mood of grudging necessity, persistent mistrust, and modest hope."⁶ At this stage, an alliance of premiers of the eight dissenting provinces opposed the federal proposals. As is widely known, a resolution to bridge the two opposing groups was worked out late in the process. Ottawa would accept the provincial government's preferred amending formula, but without fiscal compensation for opting out, and seven of the eight opposing provinces would accept the Charter, but with a notwithstanding clause that would apply to fundamental freedoms, legal and equality rights.

But this political resolution would suffer two legitimacy problems, both with serious, persistent political consequences. One was the widespread perception, primarily although not exclusively within Quebec, that this agreement violated constitutional justice in its treatment of Quebec, owing to Quebec's strongly held belief that constitutional changes should not adversely impact one of the original partners of the federation without its explicit consent. Quebec representatives were not part of the negotiating team that worked out this resolution and when presented with this 'fait accompli' the next day, Quebec Premier Rene Levesque refused to assent and would not sign the constitutional accord.

The legitimacy of the notwithstanding clause would also suffer because of its 'deal-breaking' connotations. Jamie Cameron aptly captures the cynicism associated with the origins of the clause in her suggestion that its genesis "can hardly be described as aspirational".⁷ The demand for the clause was a 'pawn', not an 'idea', in the entrenchment process.⁸ Howard Leeson, less sceptical about the virtue of the notwithstanding clause, argues that the version of the notwithstanding clause that was ultimately enacted "had more to do with the raw politics of bargaining and chance phone calls late at night than with reasoned debate about what might constitute a rational compromise between democracy and constitutional law."⁹

Notwithstanding – A Compromise of Principles

⁵*Reference Re Amendment of the Constitution of Canada, (Nos. 1, 23 and 3) [1981] 1 S.C.R. 753.* For discussion of this case see Peter H. Russell, "Bold Statescraft, Questionable Jurisprudence," in Keith Banting and Richard Simeon, eds., *And No One Cheered* (Toronto: Methuen Publications, 2003) pp. 210-238

⁶ Roy Romanow, John Whyte and Howard Leeson, *Canada . . . Notwithstanding. The Making of the Constitution 1976-1982* (Toronto: Carswell, 1984), p. 193.

⁷ Jamie Cameron, "The Charter's Legislative Override: Feat or Figment of the Constitutional Imagination?" In Huscroft and Brodie (eds.,) *Constitutionalism in the Charter Era* p. 141

⁸ *Ibid.*

⁹ Howard Leeson, "Section 33. The Notwithstanding Clause: a Paper Tiger?" in Paul Howe and Peter H. Russell, eds., *Judicial Power and Canadian Democracy* (IRPP, McGill-Queen's University Press, 2001), p. 298.

This second use of compromise considers the notwithstanding clause as inconsistent with a robust and coherent legal-based rights project. This view is heavily influenced by assumptions that a legal form of constitutionalism requires not only judicial review, but also judicial finality (short of formal constitutional amendment). According to this interpretation, a bill of rights authorizing judicial review conveys i) a commitment to rights as the criteria for determining the legitimacy of state actions; ii) an agreement to use legal adjudication to resolve disagreements about whether rights have been respected by state actors; and iii) does not accept the legitimacy of legislative revision to constitutional interpretations through ordinary legislative means. Thus, according to these assumptions, a legal-adjudicative approach to constitutionalism recognizes the exclusive authority of judges to determine the meaning and scope of rights unless the political community engages in the extra-ordinary effort to formally amend the constitution, and therefore alters the commitments for which the state is obliged. The problem with the notwithstanding clause is that it allows political considerations to displace judicial determinations of constitutional meaning and obligations through ordinary legislative means.

A legal view of constitutionalism was espoused by Pierre Trudeau, who never accepted the merits of the notwithstanding clause. Trudeau saw its inclusion as inconsistent with the purpose of the Charter. As he stated, its inclusion “violated my sense of justice: it seemed wrong that any province could decide to suspend any part of the Charter, even if the suspension was only temporary”.¹⁰ Trudeau, like others who consider the notwithstanding clause inconsistent with legal constitutionalism, equated the meaning of Charter rights with judicial decisions. This view is espoused by many legal scholars who consider the notwithstanding clause to be inherently incompatible with Canada’s new constitutional order, which privilege legal adjudication over political resolution. Consider, for example, John Whyte’s scepticism about the value of the notwithstanding clause.

. . . Canada, in enacting the *Charter of Rights*, accepted that some political problems were capable of adjudication and at the same time, created a normative order (a text, in other words) to ensure that those issues could be resolved through adjudication. The nation expressed its commitment to, first, the rightness of social resolution being produced by the interpretation of rights and, second, the capacity of the terms of the *Charter* to be interpretable – to be the subject matter of adjudication. This assessment of what was possible and appropriate for adjudication does not fit well with the idea that the ultimate method of resolution of conflicting claims is through a purely political process. In other words, once the advantages of constitutional interpretation were accepted, as a general matter, it is not easy to see why the framers of the 1982 *Constitution* then saw political judgment to be a preferred form of political accommodation in each and every

¹⁰ Pierre Trudeau, *Memoirs*, (Toronto: McClelland & Stewart, 1995), p. 327.

instance in which political interests wished to suspend the operation of legalism.”¹¹

While Whyte believes it is perfectly legitimate for a political community to determine its constitutional principles, he believes it is fundamentally inconsistent, and of little intrinsic value, to decide upon a legal form of constitutionalism and then choose to allow political judgment to prevail, even if only occasionally.

Compromise of Competing Constitutional Ideas

A third use of compromise considers the notwithstanding clause in terms of contributing to a new constitutional equilibrium; one rooted neither in Canada’s Westminster heritage of parliamentary supremacy, as altered to fit a federal state, nor based on judicial supremacy for interpreting constitutional norms, as characterized by American constitutionalism (at least as it as evolved).

At the time of the entrenchment debate in Canada, conventional wisdom portrayed the relevant constitutional models as conforming to one of two rival paths, one emphasizing a more political brand of constitutionalism, the other stressing a more juridical form. The first path was equated with parliamentary supremacy, and rejected the idea of construing political debates as legal disagreements that would require judicial participation in their resolution. The second path included the codification of rights in a manner different from what Canada had attempted with the 1960 Canadian Bill of Rights, with rights forming part of the higher law and with judges empowered to interpret rights and determine the appropriate remedies for their breach (which could include declaring the impugned legislation invalid). This second path, influenced by American-style judicial review, treated judicial review as being synonymous with judicial supremacy, and assumed that the constitution, including its commitment to rights, could only be considered a superior form of law if it could not be amended through ordinary legislative means.¹²

The notwithstanding clause is significant because it represented the final attempt by those provincial premiers critical of the proposed Charter, to envisage a different constitutional model from either of these traditional rival approaches. But before this argument can be made, it is important to first consider the reservations of those who opposed the idea of having to reject the political form of constitutionalism for the more juridical form.

¹¹ John D. Whyte, “On Not Standing for Notwithstanding,” *Alberta Law Review* v. xxviii:2 (1990), p. 351 (emphasis in original).

¹² In the United States, the Supreme Court has ruled that the only rights that should be enforced are those that it has recognized and that “[l]egislation which alters the meaning” of a provision in the Bill of Rights cannot be viewed as “enforcing” this meaning. To presume otherwise would be to recognize that “If Congress could define its own powers by altering [the judicial interpretation of the Bill of Rights], no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’ *City of Boerne*, 521 U.S. at 519 and 529, as referred to by Mark Tushnet, “New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries,” *Wake Forest Law Review*, v. 38 (2003), p. 817.

From the time a bill of rights was placed on the constitutional agenda in the late 1960s, many of the provincial premiers adopted a two-track strategy in their negotiations, with their positions freely moving back and forth between the two. For different reasons, most preferred not having a constitutional bill of rights at all, and used the language of parliamentary supremacy to oppose this proposal for a radical change to constitutional principles (although Ontario and New Brunswick would subsequently change their position). Thus, one track was their categorical rejection of a constitutional bill of rights and insistence that the idea be distinguished from other more ‘pressing’ constitutional amendments, such as changes affecting the division of powers, reform of the Senate, changes to the appointment procedure for the Supreme Court of Canada, and the inclusion of a constitutional clause dealing with regional disparities.¹³

The second track was both more strategic and imaginative. Assuming a bill of rights were to be adopted (as one element in a larger package of constitutional changes), would it be possible to restrict the scope of judicial review in the event that judicial interpretation of rights fundamentally undermined social policy objectives to which political leaders were strongly committed? Could these Charter sceptics conceive of a way to ensure the proposed Charter would evolve differently from the way conventional wisdom anticipated? Was there a way for governments to influence how judges review the justification of legislation?

The intention of this second track was to resist a project that interpreted rights, and government’s relations to them, solely in negative terms – freedom from interference – in which government was assumed the principal threat to rights. Constitutional values and their accommodation were understood by some of the premiers in more expansive terms than the negative liberties historically associated with judicial interpretations of a bill of rights. For some, the interest in recognizing constitutional values beyond those specifically enumerated was inspired by conservatism and a concern to protect public order and morality. Several premiers believed that the parliamentary system had evolved in a manner that provided a healthy balance between rights, security, and other public values, and were worried that judicial review could undermine this balance. Thus, their concern was that rights “should be expressed in a form which will reflect their development in our laws over the years; any new expression of them must be applied so as not to diminish any existing right recognized by law or usage.”¹⁴ But for at least one other (Allan Blakeney), the concern was that judicial review might undermine more progressive views on what rights entail.

Although a majority of the premiers supported measures to limit the effects of judicial review, most did not elaborate on their criticism of a bill of rights, other than stating confidence in Canadian political development and rejecting the need to displace the principle of parliamentary supremacy. An exception was social democrat

¹³ Canadian Intergovernmental Conference Secretariat, *The Constitutional Review 1968-1971: Secretary’s Report*, Canadian Intergovernmental Conference Secretariat (Ottawa; Information Canada 1972) 68-72.

¹⁴ W.A.C. Bennett, Premier of British Columbia, “Opening Statement of the Province of British Columbia to the Constitutional Conference,” Federal-Provincial Constitutional Conference of First Ministers on the Constitution, Ottawa, February 10-12 1969, 7-8.

Saskatchewan Premier Allan Blakeney. In the remainder of the paper, I will focus heavily on Blakeney's position because it offered the most articulate explanation for criticizing judicial review and also reflected a consciously rights-inspired opposition to the proposed Charter. His reasons directly challenge conventional wisdom that political opposition to the Charter was influenced solely by concerns for power, rather than genuine interest in rights.¹⁵

Blakeney was committed to protecting human rights. But he did not equate these solely with the kinds of negative interpretations associated with bills of rights. His concern with a constitutional bill of rights for Canada was that courts would be too conservative in their interpretation of rights and may hinder progressive legislation such as affirmative action programs or policies intended to redistribute power and wealth.

Blakeney's support for the notwithstanding clause arose in part from his idea that parliamentary judgment should not be considered inherently inconsistent with a human rights project just because these decisions may differ from judicial interpretation. His opposition to the Charter, and attempt to restrict the scope of judicial review should the Charter be adopted, represented a nascent and underdeveloped attempt to imagine a different constitutional option. He was prepared to accept judicial review of legislation but only if the bill of rights also recognized a valid parliamentary role for judgments about rights. Preserving this opportunity for parliamentary disagreement with judicial interpretations of rights was important to Blakeney for at least three reasons.

First, Blakeney considered neither the American nor Canadian judicial records to be impressive in terms of respecting policies that, as a social democrat, he believed necessary for equality.¹⁶ His scepticism was greatly influenced by the struggle between Franklin Roosevelt's attempt to enact New Deal legislation and judicial review, which reflected laissez faire assumptions about the conditions for liberty. This focus on negative liberty, he worried, would not be any less a problem for Canada because the Charter was "inspired by 18th-century" assumptions that "the only dangerous source of power was the government".¹⁷ Thus Blakeney considered the proposed Charter a serious threat to progressive governance. If adopted, conservative judicial decisions could frustrate progressive and substantive views of equality.¹⁸ As the author of biography on Blakeney notes:

¹⁵ I have formed the following view from reading the speeches and statements made during the entrenchment debates, others' written accounts of the process (primarily Romanow, Whyte and Leeson in *Canada . . . Notwithstanding*) and interviews with some of the public officials who worked with the premiers and were privy to their concerns.

¹⁶ In his view, judges in the twenty-year period leading up to the Charter were not particularly strong defenders of liberty. But the prescription was not to "convulse the country in a constitutional debate just to persuade the judges to be more active." persuade the judges to be more active." *Inroads*, p. 33.

^{16a} "Judges: Canada's new aristocracy. An interview with Allan Blakeney," *Inroads* v. 18 (winter-spring) 2006, p. 33.

¹⁷ *Ibid.*, p. 32.

¹⁸ This interpretation is formed from a number of sources, including speeches made by Blakeney during the entrenchment debate, "Judges: Canada's new aristocracy," "Canada . . . Notwithstanding," p. 110; and telephone interview with Allan Blakeney (Feb. 21 2007); and several conversations with John Whyte, who

[Blakeney] had been premier in a social democratic province where there had been at least modest attempts to redistribute wealth and power. He was convinced that [if a national bill of rights was in place] some of Saskatchewan's progressive social programs, including medicare, could have been struck down by a court loaded with judges drawn from Canada's conservative establishment. Saskatchewan had its own human rights code, subject to legislative override. It had been used to create affirmative action employment programs for women and native people. Blakeney feared the courts might strike down those programs if called to pass judgement on them."¹⁹

A second reason Blakeney considered it important that a bill of rights retain political capacity to disagree with judicial decisions was his appreciation for the contestable nature of rights claims. He was troubled that if a bill of rights were adopted, this lack of determinacy in how rights guide or constrain state actions could lead to judicial interpretations that favoured business and property interests,²⁰ and thus could thwart legislative objectives where these were inspired by uses of the state to redress inequalities. This concern about judicial discretion when assigning meaning to constitutional language was also influenced by Blakeney's critical assessment of judicial review of division of powers claims, involving two natural resource decisions affecting Saskatchewan: the CIGOL²¹ and Potash²² cases, which reinforced his concern that not only was legal language malleable, but it could be interpreted in a way unsympathetic to progressive causes.²³

His third reason for resisting a constitutional bill of rights that would give courts the final say arose from differences he perceived in the mission and function of a parliamentary system, where the political process is engaged in an ongoing project of accommodating interests, as contrasted with the mission and function of courts. Blakeney considered a virtue of parliamentary supremacy to be its recognition of a reasoned process of adjustment and change. He saw the political decision-making process as a fluid one; capable, through ongoing discussion, of shaping, mediating and changing the way issues are framed and what decisions are reached. In contrast, judicial review allows rights to be marshalled in a way that vetoes or trumps the possibility for an ongoing process of mediation and accommodation. In his view, principles upon which rights claims are based "should not be divorced from who interprets them and decides on how they interact with other principles"²⁴ These perceived differences contributed to his scepticism about a bill of rights. It also influenced his determination to ensure that, in the

worked for the government of Saskatchewan as Director of Constitutional Law in the Department of the Attorney-General (January and February 2007).

¹⁹ Dennis Gruending, *Promises to Keep. A Political Biography of Allan Blakeney*: Saskatoon: Western Producer Prairie Books 1990), p. 196.

²⁰ "Judges: Canada's new aristocracy. An interview with Allan Blakeney," p. 31.

²¹ *Canadian Industrial Gas & Oil Ltd. v. Saskatchewan* [1978] 2 S.C.R. 545

²² *Central Canadian Potash Company v. Saskatchewan* [1979] 1 S.C.R. 42.

²³ Authors' interpretation was influenced by ongoing conversations with John Whyte (January and February 2007) and telephone interview with Allan Blakeney, Feb. 21 2007.

²⁴ "Judges: Canada's new aristocracy. An interview with Allan Blakeney," p. 40.

event a constitutional bill of rights were accepted, judicial review would be moderated, either by allowing the possibility for parliamentary to contribute to decisions about the scope of rights (through a limitation clause structured so as to encourage judicial respect for political decisions) or failing that, to overturn judicial decisions, where this judicial respect may not occur.²⁵

Relationship between Concerns about judicial review and the choice and design of constitutional instruments

Blakeney's concerns that judicial review might frustrate social policies intended to address human rights (broadly understood) meant that he considered the project of constructing an appropriate bill of rights to be more complicated than proponents of the Charter had suggested. It required a structure to give legal recognition to the different institutional roles necessary to protect and monitor the accommodation of codified (and mostly negative) rights with the positive conditions he (and others) equated with non-enumerated values of substantive equality and social justice. In other words, it was not enough to simply talk about the benefits of a bill of rights. One had to imagine the institutional setting in which a bill of rights functions.

Although Blakeney and his fellow Charter skeptics were not successful in preventing the adoption of the Charter, this does not mean that their concerns about judicial power were ignored in the Charter's final design. The Charter reflects the attempt to conceive of an alternative constitutional model that goes beyond the protection of negative rights from governmental interference, in at least four different ways. These include the recognition that affirmative action is consistent with equality; no recognition of property rights in the Charter; a broad general limitation clause; and the notwithstanding clause.

Affirmative Action

One way to recognize a positive role for the state to interpret rights is found in the affirmative action section for equality rights in s. 15(2) of the Charter. Saskatchewan supported arguments by women's groups to include this clause.²⁶ It reflects the idea that substantive equality may require legislative actions to redress inequalities. Thus programs intended to ameliorate vulnerability should not be interpreted as an infringement of equality. Section 15(2) in the Charter is a conscious attempt to direct courts away from interpreting equality in a manner that is automatically suspicious of government-sponsored distinctions in social policy. As stated earlier, one of the core reasons Blakeney was so reticent about judicial review was his fear that a conservative court might interpret rights in a manner that restricts a legislature from introducing policies intended to ameliorate inequalities and vulnerabilities. He was particularly concerned

²⁵ This interpretation of Blakeney's view on the problems of judicial review was influenced by a series of telephone conversations with John Whyte in January and February 2007. .

²⁶ Information obtained from authors interviews with Allan Blakeney (Feb. 21 2007) and Howard Leeson, former Saskatchewan Deputy Minister of Intergovernmental Relations (Feb. 8 2007).

about protecting the legislative capacity to run affirmative action programs for Aboriginal peoples and for women.²⁷

Property Rights

A second way to guard against the Charter evolving in a manner that treated government as an inherent threat to human rights was the explicit decision not to include property rights. This was an essential condition of the NDP, whose then national leader Ed Broadbent insisted upon as a condition of his party's support for the Charter. In Blakeney's case, the exclusion of property rights was also a necessary (but not only) condition for his support of the Charter. The concern for these NDP leaders was that judicial interpretations of property rights could hinder government policy designed to provide broad social and economic benefits, or to address environmental concerns.

General Limitation Clause

A third way to construct a constitutional model that did not construe a bill of rights solely in terms of protecting citizens from governmental interference is the inclusion of a general limitations clause. Blakeney was a strong champion of a broad limitation clause; a position shared by other premiers. From the outset, all provincial premiers indicated that any bill of rights they supported would have to include broadly constructed limits on rights. The clear intent of a general limitation clause was to encourage judicial sensitivity to a broad set of non-enumerated values that governments may subsequently claim justify restrictions upon negative rights.²⁸

The first attempt to define the general limitation clause, the failed Victoria Charter of 1971, conceived of limits on rights in much broader terms than would ultimately be adopted in the final Canadian Charter of 1982. When constitutional change was again on the national agenda in 1980, the proposed Charter included a broadly constructed limitation clause with a deliberate overture to the provinces. It would now subject rights to "such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government". This wording had been chosen intentionally to address provincial reticence about a Charter.²⁹

Although federal Charters supporters had tacitly accepted provincial demands for broadly constructed limitations clause for almost a decade, this willingness abruptly changed in 1980 following hostile reception during the joint parliamentary committee hearings on the proposed Charter.³⁰ Federal political leaders were admonished for their

²⁷ Interview Leeson.

²⁸ For an account of the evolution of the limitation clause see Janet L. Hiebert, *Limiting Rights: The Dilemma of Judicial Review*, ch. 2, "The Evolution of Reasonable Limits on Rights," (Montreal: McGill-Queen's University Press 1996), pp. 10-31.

²⁹ 'Revised Discussion Draft of September 3, 1980 – *The Canadian Charter of Rights and Freedoms*' (Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8-12 September 1980).

³⁰ As I argue elsewhere, Federal proponents seemed remarkably untroubled that their endorsement of broad limitations on rights could produce a very different Charter project from what many civil libertarians were championing. This suggests that their theoretical understanding of how a bill of rights should function, in

refusal to make a hard choice in terms of which political project they wished to promote – did they intend to retain parliamentary supremacy, or did they wish to adopt judicial supremacy. As Stanley Cohen argued before the Joint Parliamentary Committee hearings on the proposed Charter in 1980:

To the extent that you want to have equilibrium between a charter regime and parliamentary supremacy, you must accept the fact that, once you introduce a charter regime, parliamentary supremacy is modified for ever to that extent. That is a plain legal and political fact, and you cannot have the best of both worlds, except in an emergency.³¹

Ottawa responded to criticism by re-wording the proposed limitation clause. Removed was the reference to a ‘parliamentary system of government’, which had been an intentional reminder of the principle of parliamentary supremacy. As amended, the clause would now require limits to be ‘prescribed by law’ rather than ‘generally accepted’, and would also change the onus for persuading courts about whether rights had been unconstitutionally restricted, from litigants having to establish the unreasonableness of legislation to governments having to demonstrate the reasonableness of any restriction. Yet despite these changes, the limitation clause still serves the purposes envisaged by the premiers (albeit, with less force than they may have wished). Its reference to the values of a free and democratic society, as the normative context for justifying restrictions on rights, is sufficiently broad it allows parliament and the provincial legislatures to defend a wide range of non-enumerated values that are important to justify restrictions on rights (providing these are reasonable and meet judicial standards of proportionality).

Notwithstanding Clause

The fourth, and most controversial manifestation of the attempt to construct an alternative model is the inclusion of the notwithstanding clause.³² Both Blakeney and Alberta premier Peter Lougheed had earlier raised the possibility of the notwithstanding clause as a condition for accepting the Charter.³³ For Blakeney, the notwithstanding clause would guard against the Charter evolving in a manner that excluded a parliamentary role when defining the scope of protected rights. The notwithstanding clause, in other words, was not thought of to negate rights, but to allow for a more

terms of constraining political power, was neither clear nor coherent throughout much of the entrenchment debate. Hiebert, *Limiting Rights* pp. 26-31.

³¹ Stanley Cohen, Special Joint Committee of the Senate and of the House of Commons on the Constitution, Hearings, October 28 1980, 7:86.

³² Federal strategists had earlier considered the notwithstanding clause as a way of increasing provincial support for the Charter, but eventually chose to focus on a broadly constructed limitation clause, which they considered as the “lesser of two evils”. Courts may curtail the effects of a broad limitation clause, but they feared a notwithstanding clause could be used frequently by the provinces. This information was obtained through interviews by the author with federal officials involved with the entrenchment process in Ottawa (November 1987).

³³ Tom Axworthy, “Sword of Damocles or Paper Tiger: Canada’s Continuing Debate over the Notwithstanding Clause” Paper presented to the Festschrift Conference “Recreating Canada” in honor of Paul Weiler, Harvard University, November 3-4 2006, p. 8.

expansive understanding of human rights, in which parliament as well as the judiciary would be responsible for their articulation and protection.³⁴

The idea of including a notwithstanding clause became more important to Blakeney and other premiers after the above-described changes were made to the general limitation clause. By the time of their final round of negotiations in November 1981, the premiers were not as confident that they could continue their first strategy of opposing a Charter and instead might have to emphasize their second strategy: to place limits on unqualified judicial power to interpret the Charter. By November 1981, the premiers were now on the defensive in arguing against a Charter and many were reluctantly reconciled to its adoption. But they wanted to ensure some way to preserve the political capacity to dissent from judicial interpretations. The notwithstanding clause was a last resort to give effect to an alternative rights framework (in the sense of emphasizing values other than negative liberty). Although it would operate differently from the limitation clause (primarily in terms of which institution adjudicates between protected rights and conflicting legislative objectives), in an important sense these clauses were conceptually similar. Both clauses addressed the provinces' concerns about using a bill of rights to resolve disagreements between citizens and states without a full appreciation for the legislative concerns and objectives that underlie legislation. As Blakeney put it:

I could certainly go along with entrenching and with a non obstante clause, because basically the courts are good places to decide individual cases of human rights issues, but bad places to decide broad social policies in the guise of deciding issues of human rights.

Therefore what we need is some basis whereby the legislatures can override if, in the course of deciding an issue about a single citizen, they have made a decision which affects broad public policy.

I had thought that the resolution before [The Joint Parliamentary Committee] was not too bad in that regard, because it has Section 1 which is a kind of non obstante clause in advance.

. . . [T]he suggestion of deleting section 1 raise[s] all my apprehensions, because we are then left with a very large number of judgments to be made by judges.³⁵

Rejecting the Notwithstanding Clause: The Problems with Canada's Constitutional Myopia

Although critics of the notwithstanding clause are often quick to characterize its intent in terms of 'overriding' rights, this interpretation is not warranted. Critics are correct in their apprehensions that this power could be used to disagree with judicial interpretations of rights. But they are unfair if they assume that its advocates considered

³⁴ Authors interview with Allan Blakeney (February 21 2007) and Hugh Segal (Feb. 5 2007)

³⁵ Allan Blakeney, Special Joint Committee of the Senate and of the House of Commons on the Constitution Hearings, December 19 1980, 30:39.

this power as inconsistent with idea of respecting fundamental rights. Two persistent questions continued to trouble some of the provincial premiers: Who interprets rights? And are constitutional values confined to the enumerated provisions in the Charter? As Hugh Segal suggests, from the vantage point of reflecting on Ontario's important role of urging Ottawa to accept the Charter with a notwithstanding clause, the premiers neither intended nor anticipated that the notwithstanding clause would be an instrument to 'gut' or 'undermine' the protection of rights. They firmly believed its role was integral to the protection of rights; albeit defined in ways that may differ from judicial interpretations.³⁶

Three reasons explain the failure of political supporters of this clause to challenge the perception that the notwithstanding clause was intended to override or 'compromise' rights. First, was the historical timing of this innovation. In the absence of the kind of constitutional experimentation that has subsequently occurred (and has challenged the idea that constitutional options require either foregoing judicial review about rights, or choosing a form of review that does not allow for political dissent from judicial interpretations about the meaning and scope of rights) there was no context for defending the idea of construing constitutional options as an equilibrium between competing models. The language of parliamentary sovereignty became inseparable from the premiers' argument for the institutionalization of mechanisms to allow for legislative revision to judicial decisions. But this language of parliamentary supremacy, when juxtaposed against claims that equated rights protection with judicial review, reinforced the perception that those premiers who opposed the Charter were more interested in power than in rights. Just as it was difficult to appear to be arguing against the Charter (provincial concerns with other constitutional issues resulted in disparaging comments that they were willing to trade 'fish for rights'), it was also difficult to argue for a version of a rights project inconsistent with the constitutional discourse (and wisdom) of the day.

Second, most premiers opposing the Charter poorly articulated their objections. Their defence of parliamentary supremacy seemed neither intellectually interesting nor politically progressive in the face of a well-orchestrated federal strategy to "sell the Charter"³⁷ through use of "bold promises" that equated the Charter with "forever guaranteeing" Canadians' rights.³⁸ Blakeney was an exception. But even his explanation had little resonance. Although Blakeney's resistance to the Charter was often grounded in an explicit defence of rights, it was a defence that conferred rights-respecting qualities to parliament and, as such, was inconsistent with the more common view that rights are protected by insulating them from political decision-making. Blakeney, in essence, was arguing that rights have to be restricted (in the sense of disagreeing with judicial decisions), in order for them to be protected (by parliament).

Third, the timing of the decision to include the notwithstanding clause hindered thoughtful debate about how the notwithstanding clause would affect political or judicial behaviour. The clause attracted little discussion during the actual entrenchment debate

³⁶ Interview (Segal)

³⁷ Author's interview with Barry Strayer, 7 December 1987.

³⁸ House of Commons Debates (October 15 1980) at 3704 (Yvon Pinard)

about how it would affect a rights-project that gave courts an important interpretive and adjudicative role.

The tight time frame for scrutiny (much of which focussed on the touchy issue of whether or not it would apply to minority education language rights)³⁹ helps explain why so little attention was paid to this new clause. As Allan Blakeney has since suggested, the atmosphere and context of negotiating complex issues of constitutional reform is simply not conducive for ideal constitution-making.⁴⁰ Yet, in hindsight, it is unfortunate that the provinces' decade-long attempts to craft a limitation clause to recognize their view that fundamental values extended beyond specified (and negative) rights in the Charter, did not encourage them to frame the language for the notwithstanding clause to reflect a similar aspiration. Arguably, the notwithstanding clause would not suffer as serious a legitimacy deficit if rather than stating an intention to "override" rights, it instead referred to political disagreements with judicial interpretations of the Charter or, more specifically, political disagreements with judicial interpretations of what comprises a reasonable limit in s. 1 of the Charter.⁴¹

The tight time frame for debate also explains why the notwithstanding clause included an element unanticipated by some. Everyone understood this power could be used to set aside judicial rulings. But not everyone recognized that it could also be used to pre-empt judicial review.⁴² Tom Axworthy, who served as principal secretary to Pierre Trudeau during the entrenchment debate, suggests that not only had the pre-emptive capacity not been anticipated, but had there been more time to discuss this power, the pre-emptive possibility would have been identified and the clause would almost certainly have been re-worded to preclude this ability.⁴³ Yet others reject the idea that a pre-emptive element was not anticipated. Blakeney has suggested that at the time it was negotiated, he envisaged that the notwithstanding clause could be used both in a pre-emptive and reactive manner. From his perspective, if a government anticipates that the court would likely find the legislation unconstitutional, it may want to apply the power pre-emptively, in order for stability and certainty in the operation of its legislation.⁴⁴

Subsequent federal commentary on the clause has not helped in terms of its legitimacy. For example, a federal Department of Justice press release posted on line for several years (but now removed) characterized the notwithstanding clause as an "escape clause" at the behest of a majority of the provincial premiers, so they can "make some laws as if the *Charter* doesn't exist."⁴⁵ The political attacks on the notwithstanding clause

³⁹ Author's interview with Tom Axworthy, former principal secretary to Pierre Trudeau, January 12 2007.

⁴⁰ Interview (Blakeney).

⁴¹ Christopher Manfredi has subsequently recommended a similar amendment to the wording. Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd edition, (Don Mills, Ont: Oxford University Press 2001), pp. 191-193.

⁴² Author's Interviews with Tom Axworthy (Jan. 12, 18 2007)

⁴³ Ibid.

⁴⁴ Interview (Blakeney).

⁴⁵ This is no longer on the website for the Department of Justice, but it was there for at least three years.

"Section 33: The Notwithstanding Clause. An escape clause for provincial governments"

<http://canada.justice.gc.ca/en/justice2000/s33back.html> (last checked April 2003.)

by successive Prime Ministers reinforced the image of the notwithstanding clause as having been inspired by the power-hungry demands of the premiers. Trudeau subsequently argued that provincial premiers should give up this power, suggesting that the protection of rights would be strengthened by deleting this power and chastised political supporters of the Meech Lake Accord for their failure to remove the clause as part of the bargaining process with the provinces.⁴⁶ Then Prime Minister Brian Mulroney's retaliation did little to elevate the status of the notwithstanding clause, blaming Trudeau for agreeing to a power that so gutted rights,⁴⁷ that the Charter was "not worth the paper it is written on".⁴⁸ So powerful is political repudiation of the notwithstanding clause that Paul Martin thought he could salvage a faltering election campaign by pledging, during a televised political leaders' debate, that if elected, his government would remove the constitutional power of a federal government to invoke the notwithstanding clause.⁴⁹

Continued Disdain for the Notwithstanding Clause. A legacy of Canada's Constitutional Myopia?

The dominant narrative on compromise and the notwithstanding clause emphasizes its deal-breaking aspects. In earlier works I also accepted this pragmatic explanation.⁵⁰ So what has changed? Why revisit this dominant narrative of the origins of this clause?

What has changed is that constitutional developments elsewhere cast a fresh light on the ideas and concerns that animated some of the premiers' arguments for the notwithstanding clause. More specifically, comparative research exposes the shortcomings of focussing on the notwithstanding clause in isolation from the broader ideas and debates associated with giving shape to a new form of rights instrument. In discussing these, my intent is not to refute the pragmatic element of the notwithstanding clause, as the price of the premiers' consent for a Charter they would otherwise have preferred not to adopt. Instead, my intent is to question the assumption that this compromise is inconsistent with ideas about protecting rights, even in a model that is premised on legal adjudication.

Much of the Canadian commentary on the notwithstanding clause treats it as an uniquely Canadian constitutional phenomenon. It is evaluated primarily in terms of the immediate events that led up to its negotiation in the Charter. But this treatment of the origins of this power as a unique and singular moment in Canada's constitutional

⁴⁶ Evidence of the Special Joint Committee of the Senate and of the House of Commons the 1987 Constitutional Accord, Pierre Trudeau, August 27 1987, 14:139-140.

⁴⁷ In parliamentary debate, Mulroney described Trudeau's acceptance of the notwithstanding clause as an unprecedented abuse of rights. As he stated: [N]ever before nor since in our history has a Prime Minister of Canada made a concession of such magnitude and importance. Never before has the surrender of rights been so total and abject." House of Commons Debates, Brian Mulroney, April 6 1989, pp. 152-53.

⁴⁸ *Ibid.*, 153.

⁴⁹ "Martin wraps campaign in constitutional Pledge" CBC Jan. 10 2006, <http://www.cbc.ca/news/story/2006/01/09/elxn-debates-look.html> (consulted March 14 2007)

⁵⁰ "Is it Too Late to Rehabilitate Canada's Notwithstanding Clause?" p. 172.

development fails to recognize the much larger project that was at play. This project was concerned with how to mitigate the consequences of judicial review for the protection and recognition of rights and other fundamental values. For Blakeney, the issue was not whether or not rights should be protected, but how would the Charter affect judicial and political outcomes within the Canadian context? This attempt to imagine a different constitutional option than existed at the time has been subsequently mirrored elsewhere. Research on comparative constitutional developments in other parliamentary systems reveals a similar intent to resist the idea that judicial opinion should be considered the sole authority for interpreting and resolving rights-based disagreements. And like Canada, these concerns have influenced the structure and design of the bills of rights subsequently adopted. The primary difference is that time and familiarity have allowed other political leaders to consciously and unapologetically pursue a hybrid rights instrument.⁵¹

The emergence of a new form of rights instrument in other parliamentary jurisdictions has not gone unnoticed.⁵² These jurisdictions have introduced judicial review but in a manner that does not give courts the full authority normally associated with a bill of rights, such as remedy granting powers. Instead, they introduce a limited form of judicial review, with some systems also introducing mechanisms that would put pressure on parliaments to revisit the legislative objectives should the judiciary rule that these are incompatible with protected rights.⁵³

What is common in these jurisdictions (New Zealand, the United Kingdom and Australia) is that political leaders have rejected the necessity of having to make a stark choice between parliamentary supremacy (reinforced by the absence of any explicit judicial mandate to review rights) and a bill of rights that recognizes courts as the exclusive interpreter of these. In essence, political participants in these debates have sought to imagine a hybrid of British and American principles; a way to introduce judicial review without surrendering political dominion over decisions about the reconciliation of judicially interpreted rights with legislatively-defined rights and values. As such, this alternative, hybrid model challenges earlier assumptions associated with parliamentary supremacy where rights did not function as discrete standards against which parliamentary actions would be judged, and where courts had no explicit role to pronounce on the merits of legislation from a rights perspective. At the same time, this model does not adhere to the central assumption associated with conventional views about a bill of rights – that a bill of rights not only requires judicial review, but also treats courts as having the exclusive authority for determining the meaning of rights and the remedies that are appropriate where rights are infringed.

⁵¹ For more discussion on the adaptation of this idea elsewhere see Janet L. Hiebert, “Parliamentary Bills of Rights: An Alternative Model?” *Modern Law Review* v. 69(1) (2006).

⁵² Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism,” *American Journal of Comparative Law* v. 49 (2001) 707; Jeffrey Goldsworthy, “Homogenizing Constitutions,” *Oxford Journal of Legal Studies*, v. 23 (2003) 483; Mark Tushnet, “New Forms of Judicial Review and the Persistence of Rights – and Democracy – Based Worries,”; Michael J. Perry, “Protecting Human Rights in a Democracy: What Role for the Courts?” *Wake Forest Law Review* v. 38 (2003), 635.

⁵³ Hiebert, “Parliamentary Bills of Rights: An Alternative Model.?”

My own research on these developments⁵⁴ has made me conscious of the need to revisit the political arguments of those sceptical about introducing the Charter and to consider the extent to which these concerns affected the Charter's structure. As has been argued, the notwithstanding clause was one of four ways to modify the emphasis of negative liberty and exclusive reliance on judicial resolutions for societal and political disagreements involving claims of rights. But its significance extends well beyond the Charter. It helped provide an impetus for this new form of rights instrument to emerge. What the notwithstanding clause introduced to the realm of constitutional ideas (even if not fully appreciated in Canada) was the possibility of bridging what traditionally had been thought of as competing and opposing models of constitutionalism.⁵⁵ For parliamentary systems, it challenged the presumption that a bill of rights is incompatible with the idea of parliament retaining final judgment about the merits of legislative decisions. It did this because it encouraged the reassessment of the scope and role of judicial review. Judicial review could be distinguished from judicial supremacy. This reassessment was important because it dismantled a fundamental obstacle for introducing a rights regime within a parliamentary system. It meant that the introduction of judicial review need not result in judicial monism; a fundamental requirement for any political system's whose constitution recognizes parliament as having the final authority for determining the constitutional merits of duly enacted legislation.

Other parliamentary systems have not replicated the notwithstanding clause in their bills of rights⁵⁶ (which is not required when courts lack an express power to disallow legislation). But the idea it represents underscores the larger idea that exposure to judicial review will exert significant (although not binding) influence on subsequent political behaviour where legislation has been called into question.

Some will remain sceptical about whether preserving a legislative capacity to disagree with judicial interpretations of rights misses the fundamental point of the exercise: to choose a legal form of adjudication over a political form. But what has to be recognized is that development of and reflection on constitutional ideas since 1982 have led many to reject the premise that constitutional options must comply with one of two mutually exclusive approaches; as if the choice is between choosing to protect rights or choosing to protect power. Instead, the attempt has been to imagine a model that increases the sensitivity given to rights, which is associated with using the legal language of rights and by empowering courts to play an important interpretive role, while also recognizing that the force of these judgments will change how political actors interpret their roles and responsibilities. The objective of the traditional court-centred model and this newer hybrid approach is the same: to give prominence to rights as critical standards for evaluating the legitimacy of state actions. But what is different is the way final

⁵⁴Hiebert, "Parliamentary Bills of Rights: An Alternative Model?" *Modern Law Review* v. 69(1) (2006), pp. 7-28; "Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?" (*I-CON*) *International Journal of Constitutional Law*, v. 4:1 (2006), pp. 1-38; "New Constitutional Ideas. But can new parliamentary models resist judicial dominance when interpreting rights?" *Texas Law Review*, v. 82:7 (2004), pp. 1963-1987.

⁵⁵ Stephen Gardbaum also makes this argument. Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" *American Journal of Comparative Law* v. 49 (2001) 707.

⁵⁶ An exception is the Victorian Charter of Rights and Responsibilities, Victoria Australia.

judgment is reached, and how remedies are determined. Under this hybrid approach, judicial review is conceived as the penultimate rather than final authority on whether legislation appropriately accommodates rights.⁵⁷ It is a model that some commentators have tentatively suggested as introducing a valuable “compromise that combines the best features of both the traditional models, by conferring on courts constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word.”⁵⁸

Conclusions

The notwithstanding clause has had difficulty shedding the pragmatic view of compromise for which it has been so firmly cast. To many Canadians, this clause arose simply to broker an agreement between the provinces and Ottawa to accept the Charter. As such, its origins are widely assumed to have been devoid of any intrinsic value, and its presence presumed to have compromised the essential purpose of a bill of rights.

This paper has questioned the exclusivity of this dominant narrative about the notwithstanding clause. Two arguments have been made. The first, is that most assessments of the notwithstanding clause fail to recognize and distinguish between important differences in how compromise is interpreted. Although there may be a pragmatic element in the decision to adopt the notwithstanding clause, this does not diminish the relevance of the third interpretation of compromise: of trying to establish a compromise between competing constitutional principles. The dominant narrative on the notwithstanding clause pays insufficient regard to the persistent concerns of those who were genuinely troubled by the prospects of Canada adopting an American-style bill of rights, and who tried to navigate an alternative course between the existing regime, with no explicit constitutional framework for rights, and adopting a system that gave courts an authoritative role for interpreting rights without recognition for any explicit opportunity for legitimate political dissent. That the premiers were not particularly persuading Canadians that the notwithstanding clause is a legitimate component of constitutionalism, is not particularly surprising. The power of this dominant narrative is reinforced by the paucity of recorded debate at the time of entrenchment on the consequences or merits of including a notwithstanding clause, by the absence of an accepted framework for imagining or assessing constitutional options other than parliamentary or judicial supremacy, and by continued federal political statements impugning the value of the Charter because of its inclusion.

The second argument is that Canada’s constitutional myopia sustains and reinforces the idea that the notwithstanding clause was simply born out of pragmatism and that it contradicts the basic idea of a bill of rights. Our insistence that the notwithstanding clause is a constitutional novelty and our general disinterest or lack of

⁵⁷ While the notwithstanding clause has been interpreted elsewhere in this manner, it is important to remember that in Canada it does not allow for legislative judgment to replace judicial opinion on the meaning of Charter rights; it only allows for temporary revisions or alterations to that meaning.

⁵⁸ Jeffrey Goldsworthy, *Homogenizing Constitutions*, v. 23:3 (1990), *Oxford Journal Of Legal Studies*, pp. 483-484.

familiarity with other constitutional modes, reinforces the dominance of this traditional narrative. To the extent that we look beyond our own borders, our gaze is generally limited to the United States, where the notwithstanding clause clearly contradicts the essence of American constitutional principles: that the constitution is the supreme law, its meaning is determined solely by the judiciary, and that the force of constitutional law is compromised if judicial decisions (hence its meaning) can be revised or set aside through ordinary legislative means.

But familiarity with constitutional developments elsewhere reveals that the ideas represented by the notwithstanding are not particularly unique. It also suggests that the premiers' advocacy of this power need not be viewed as inconsistent with a rights-respecting project. Assumptions that the notwithstanding clause is inherently inconsistent with a rights project should be re-examined or suspended until more is known about the political and judicial impact of constitutional innovations that have implicitly built upon the ideas it embodies: of imagining a method to introduce greater sensitivity to rights (by articulating rights and authorizing judicial review) without surrendering all political capacity to determine how rights should guide or constrain legislative decisions.