AN HISTORIC CANADIAN COMPROMISE:

FORTY YEARS AFTER THE PATRIATION OF THE CONSTITUTION SHOULD WE CHEER A LITTLE?

Thomas S Axworthy

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"Compromise is odious to passionate natures because it seems a surrender; and to intellectual natures because it seems a confusion". George Santayana[1]

"It (the notwithstanding clause) was something you would rather not have, because you could guess as to who might use it. But my approach was that it may be a way to break the deadlock." William Davis, Premier of Ontario [2]

More than forty years ago, in the first week of November 1981, the Prime Minister of Canada met Canada's ten premiers in the Government Conference Centre - a former Ottawa railway station - to negotiate a constitutional settlement about three goals that had eluded Canadian leaders since 1927. These were: first, to end Canada's formal legal status as a colony of Great Britain, second, to achieve an amendment formula to change the constitution to meet evolving conditions, and third, to enhance the rights of Canadians. Over four days - from Monday November 2 to Thursday November 5, 1981 - the leaders occasionally reached heights of eloquence as they defined their contending visions of Canada, sometimes stooping to invective and meanness more appropriate to street gang rumbles. Right to the end most participants despaired of ever achieving agreement. But finally, and somewhat amazingly, during the evening of Wednesday November 4th and the morning of Thursday November 5th, the leaders cobbled together a series of compromises that allowed nine provinces (except for Quebec) and the Government of Canada to unite in sending to Great Britain a resolution that finally ended Canada's quest for a new constitution.

Evaluating those compromises and assessing the results of the November 1981 Constitutional bargain, now that more than a generation has passed, is the purpose of this paper. Previously, I have written about the contending ideological frameworks that animated the participants (Colliding Visions: the Debate over the Canadian Charter of Rights and Freedoms, 1985[3])and the specifics behind the suggestion of an non obstante or notwithstanding clause that would restore parliamentary supremacy over much of the Charter of Rights and Freedoms (Sword of Damocles or Paper Tiger: Canada's Continuing Debate over the Notwithstanding Clause, 2007)[4]. But my focus in this paper is the concept of compromise itself. What were the main compromises or trade-offs in the 1981 constitutional negotiations, why were they made and how have they stood the test of time?

The Art of Compromise

The Merriam- Webster dictionary defines compromise as "a settlement of differences by arbitration, or consent reached by mutual concession." The two key words are *mutual*, i.e., you must deal with a party that has the power to influence the outcome and *concession* i.e., you must give in order to get. The art of effective compromise means bending without breaking - a trade-off between your longing or desired position and the possibilities of achieving it. You make a concession to get a desired result or to avoid a worse one if you assess that you are in risk of losing it all. Compromise is not the same as consensus thought it may lead to that result.

When negotiators reach consensus, they agree that a particular course of action is the best choice to make. But compromise is support for an inferior position according to your values or interests, but one you felt compelled or were persuaded to make after assessing risks and possibilities. On the constitutional settlement of 1981, for example, two of the main actors had very different views. Jean Chretien not only defends the constitutional deal but extols it: in 2012 in responding to criticism from Quebec nationalists, Chretien said Quebecers favored ending Canada's status as a "legal colony" and "they use the Charter of Rights all the time in Quebec ". "The courts," he said, "have gone further than expected," in expanding minority education rights- a boon for francophones outside Quebec and anglophones in Quebec. In his opinion the use of the notwithstanding clause by provincial governments had so far been restrained and it had the advantage of being a useful brake on potential judicial activism: "I'd rather have too many freedoms than not enough. But it is for the court to decide where there are limits because society evolves so rapidly. Yet, if the courts 'go too far' Parliament will not accept it."[5]

Pierre Trudeau, however, held a different view: he ultimately accepted the compromises that Jean Chretien and William Davis urged upon him, but he never wavered from his opinion that the Federal amendment proposal that contained a Quebec veto on changes with a referendum provision to go to the people in a referendum if deadlock was intolerable, was superior to the Alberta proposal of seven provinces with 50 percent of the population. He regretted that the Charter of Rights was not fully entrenched because governments could still diminish rights through use of the notwithstanding clause; and had he gone to the country in a referendum to decide between the competing federal and provincial packages, Quebec would not have been left out of the final decision. He said in 1992 "I should have gone for an election or a referendum. Quebec wouldn't have been able to say it was left out because everyone would have been left out and Canada would have gotten a better amending formula and a better Charter."[6] Trudeau assumed in this statement, of course. that he would have won such a contest, though he would have had to win in every region including the West. He might well have done so-the Charter was overwhelmingly popular with voters in every region- but it was a risk he was not willing to take in 1981. He mused, however, about the constitutional 'what might have been' for the rest of his life.

Mr. Chretien's defence of the 1981 compromise- in effect federal acceptance of the Alberta amending formula in exchange for a Charter of Rights and Freedoms with a notwithstanding clause allowing parliamentary supremacy over judicial decisions in the areas of fundamental, legal and equality rights - certainly reflects the mainstream tradition in extolling the necessity of compromise. Aristotle argued for the mean as the surest guide to live the good life. Thomas Hobbes argued in 1651 that because men are diverse in interest, and not always harmonious in principle, they incline to war, so a way had to be found to adjudicate disputes without violence. His solution was a Leviathan or an all-powerful king. A generation on, however, the Glorious Revolution of 1688-89 dethroned a king and made Parliament the dominant political institution, so politics, legislatures, and parties became the way to reconcile interest.

Compromise became the lubricant to make the system run. Edmund Burke argued that" All government- indeed, every human benefit and enjoyment, every virtue, and every prudent act- is founded on compromise and barter. We balance inconveniences; we give and take; we remit some rights that we may enjoy others."[7] After Burke and the development of the party system in the 18th century, the operative questions of politics became: when to compromise and how far to go? So basic was compromise to the normal give and take of politics that John Stuart Mill, the great 19th century philosopher, but also the Member of Parliament for the City of Westminster, wrote that "one of the indispensable requisites in the practical conduct of politics, especially in the management of free institutions, is conciliation; a readiness to compromise "[8]

But Mr. Trudeau's questions about the appropriateness of his readiness to compromise in 1981, given his political ideals, also find philosophical support. John Morley was a great British liberal voice in the 19th and early 20th centuries. He favoured Home Rule for Ireland, opposed the Boer War, and resigned from the British government in 1914 when Britain allied itself with Russia at the start of the First World War given that the Czar stood for everything that Morley opposed. Morley is also the author of *On Compromise*,[9] one of the best book-length examinations of this critical concept. Given his long involvement in politics and the high offices he held, Morley praised "the right kind of compromise" based on a "rigorous sense of what is real and practicable "[10]. Yet he was troubled by the tendency "to lose some excellence of aim" in the rush to compromise. His book is about the relationship between principle and expediency: principle as he defines it is the long-term interest, the product of thought and reflection. Expediency is the desire for immediate advantage. Compromise was a tool to achieve ends but too often the tool became an end in itself in the rush to have a deal. Burke said that no one would barter away "the jewel of his soul" but Morley was not so sure about this. In what he called the current "Age of Comfort ", Morley worried that leaders were too quick to simply split the difference losing sight of the potential impact on the long term. He was opposed to" counting the narrow, immediate and personal expediency for everything" and believed that leaders had to have a "sense of intellectual responsibility"[11], an admonition readily accepted by Pierre Trudeau in his approach to politics.

Compromise is overwhelmingly praised but some compromises turn out to be the kind of disasters that Morley feared. In 1938, for example, British prime Minister Neville Chamberlain negotiated the Munich Agreement with Adolph Hitler which allowed German annexation of territories of Czechoslovakia despite past treaties guaranteeing Czechoslovakia military support. Chamberlain sacrificed morality to prevent war but within a year the Second World War came anyway, and ever since, the Munich compromise has become a synonym for betrayal.

What criteria then can we apply to the contending views of Burke and Morley about compromise: Burke seeing it as necessary for the political system to function, Morley worried that principles are too easily sacrificed? John Stuart Mill created a set of enduring principles and

ethics to apply to life generally (which greatly influenced Morley), but as he also knew politics and served as a Member of Parliament, he applied his standards to political comprise too. He always emphasized principle, in his writings but after getting involved in elected politics he wrote "I became practically conversant with the difficulties of moving bodies of men, the necessities of compromise, the art of sacrificing the non- essential to preserve the essential ".[12]The art of compromise then is to sacrifice the non-essential for the essential - but what is essential.? That is the question we will explore in assessing the three key compromises that defined the constitutional settlement of 1981.

The Amending Formula

Compromise depends on what is real and practicable John Morley advised. What was real and practicable in the 1981 negotiations was that Prime Minister Trudeau had begun negotiating a new constitution in 1968 with the provinces and in 1981 he was still at it. "The Constitution was Trudeau's Magnificent Obsession" writes Christina McCall and Stephen Clarkson[13], and by 1981 the end- game was underway. There is no need to go over the ins and outs of the long constitutional battle, but three salient points set the framework for the last-ditch bargaining sessions of November 1981. The first was that despite the federalist victory in the 1980 Quebec referendum the provinces reverted to their default position of opposing the federal goals of Patriation and a Charter of Rights. After the failure of the September 1980 Federal-Provincial conference, Trudeau announced that the Government of Canada would unilaterally go to Great Britain and ask the British Parliament to amend the Canadian Constitution one last time - with or without provincial support. The battle lines quickly formed: Ontario and New Brunswick supported the Federal package and the so-called Gang of Eight of eight provinces were opposed and resolved to fight the Trudeau initiatives in the courts and in lobbying the United Kingdom Parliament to say no. Rene Levesque and Peter Lougheed were the die-hard leaders of the Gang of Eight. Both believed if the Gang of Eight stayed united in opposition they would succeed in persuading the British Parliament not to approve Trudeau's radical plan. In April 1981, to maintain the unity of the provinces opposed to the federal initiative, Quebec even signed on to the April 1981 Accord of the Gang of Eight which promoted an Alberta proposed amendment formula of seven provinces and 50% of the population: dropping in the process Quebec's traditional demand for a veto over constitutional change.

The second key point was that success in Great Britain for the federal package was not assured. Margaret Thatcher gave her word to Trudeau that she would support his initiative, but her parliamentary majority was a narrow one of only 44 and many Conservative MPs were not sympathetic to a package that had little provincial support and contained the innovation of a written entrenched Charter of Rights. There was a large Euro skeptic faction in the Conservative caucus, and they opposed the European Court of Justice promoting the primacy of European Union law over Parliament's traditional authority. The debate in Canada over the Charter had many similarities with fears about written constitutions that so energized Conservative MPs in the United Kingdom. What would eventually be presented to the Parliament of the United

Kingdom and what obstacles that package might face was a constant factor in the minds of all the negotiators in November 1981.

Third, the Supreme Court in Canada ruled in September 1981 that the Federal package was legal in that the Government of Canada could take to Great Britain a request that the British Parliament amend the Canadian Constitution without the consent of the provinces. But by a 6-3 majority the Court also ruled as a matter of constitutional convention a substantial degree of provincial consent was required (without defining what substantial meant). To maintain popular support for the Federal package Trudeau would have to try once again to negotiate with the provinces which meant in turn that the unity of the Gang of Eight would have to be shattered. Some argued that given the Court's ruling on legality, the Trudeau government should still attempt to go to London unilaterally. But I met Mr. Trudeau at Harrington Lake soon after the Court's ruling, and he understood the necessity of trying one more time to get the provinces aboard. We also discussed that if no agreement was achieved in November (the most likely outcome we thought) Canadians would be asked in a referendum if they supported the Charter of Rights and the Federal amending formula. One way or the other we had to show the British Parliament that the Federal package enjoyed substantial support.

The basic compromise of November 1981 was that the Federal government accepted the Alberta amending formula in exchange for provincial acceptance of a Charter of Rights. And the tactic that broke up the Gang of Eight so that this swap could be consummated, was Trudeau's initiative on Wednesday morning November 4th to suggest that a referendum might be the way to break the deadlock, a fallback position he had been contemplating at least since September 1981.

Pierre Trudeau believed that the source of legitimacy for any constitution was the people rather than Canada being a compact between the provinces. He presented to the House of Commons in June 1980, for example a preamble to the Constitution(eventually dropped in the ensuing federal-provincial negotiations) that stated "We the people of Canada, proudly proclaim that we are and always shall be, with the help of God, a free and self- governing people… we have chosen to live together in one sovereign country, a true federation, conceived as a constitutional monarchy and founded on democratic principles"[14]Therefore, it is not surprising that he included in the federal amending formula a referendum provision as a deadlock-breaking mechanism. He also briefed his allies William Davis of Ontario and Richard Hatfield of New Brunswick that at some point in the proceedings he might suggest a national referendum with the requirement that the Charter of Rights and the federal amending formula (with the permanent referendum provision) be approved by a majority of electors in each of the regions of Atlantic Canada, Quebec, Ontario and the West.

On the morning of Wednesday November 4th with the conference stalemated and near breaking up, Trudeau sprang his referendum idea and Premier Levesque immediately agreed believing perhaps that he would beat Trudeau in a second referendum and avenge the Parti Quebecois' defeat on sovereignty association in May 1980. Trudeau immediately went to the

media announcing a Quebec-Canada alliance to democratically break the impasse and then added mischievously, "And the cat is among the pigeons."[15]

The cat was among the pigeons in two backyards, both in the Gang of Eight and the provincial allies of Pierre Trudeau. The English-speaking premiers in the Gang of Eight were surprised at Levesque rising to Trudeau's challenge The initial response was bravado with Peter Lougheed saying, "We'll fight them, and we'll win,"[16] but many premiers were not so sure that they could win a referendum opposing a Charter of Rights. This was due in part to one of the wisest decisions made by the Trudeau government in the entire constitutional saga. Cabinet had approved a draft Charter of Rights and Freedoms, but the government decided to open up the process by creating a Special Joint Committee on the Constitution and inviting MPS and the wider public to improve the Charter. The public response was tremendous: the Committee met for 56 days, held 267 hours of hearings and received more than 1200 representations from individuals and groups[17], and it soon became clear that Canadians wanted A Charter of Rights. But as Robert Shepard and Michael Valpy write in The National Deal "they wanted a much better one than was being offered."[18] Members of Parliament from all parties put forward 123 amendments to strengthen and improve the Charter, of which more than half were accepted by the government. Just as important, the Committee hearings were televised so for 56 days Canadians saw an intense debate about rights, perhaps the greatest public education exercise that has ever engaged Canadians. Aboriginal rights, protection for the disabled and strengthened guarantees for gender equality all emerged from this mass participation exercise in strengthening the Charter. A Bill of Rights may have been supported in the abstract by the public before the hearings of the Special Committee but by the end of the process the Charter had truly become a Peoples Charter. The Premiers found this out when they took out Section 35 on aboriginal rights and applied the notwithstanding clause to Section 28 on equality of persons in the final negotiations on November 4th and 5th. An enraged public soon forced them to retreat and both provisions were restored.

So, the premiers were right to fear being on the wrong side of the debate in a national referendum on the Charter, as appeared likely after the Trudeau-Levesque referendum entente emerged at noon on November 4th. A scramble began Wednesday afternoon to find a compromise that would meet some Federal objectives while hoping that Trudeau could be persuaded to meet provincial demands halfway. Saskatchewan took the lead in trying to craft this compromise. Saskatchewan had a critical supporter in this effort, and this was the government of Ontario. Premier Davis reluctantly supported the referendum provisions in the federal amending formula but neither he, nor Richard Hatfield, wanted a winner-take-all national referendum on the Constitution. Davis thought a negotiated settlement was the best course and his delegation worked closely with Saskatchewan officials and ministers to bring this about. As described by Hugh Segal, one of the Premiers closest advisors, Davis' view of the constitutional debate was" that there is considerable merit to both sides of a question, and that the Canadian challenge is finding the instrument that builds consensus around those points of merit"[19]

In the end the Alberta amending formula, which treated the provinces equally by dropping the federal provision of vetoes for Quebec and Ontario and killed forever the concept of national referendums being an entrenched part of the Constitution, was reluctantly accepted by the Federal Government. This was the major Gang of Eight demand (excluding Quebec which simply wanted the whole federal project derailed.) Since 1982's proclamation of the new constitution, there have been 11 amendments to the constitution most of them affecting only a single province: there has been little national controversy over such amendments until recently when Quebec in May 2021 introduced Bill 96 (with the notwithstanding clause) to further French language primacy by placing limits on enrollments in the English college system and new requirements for medium sized companies(with as few as 25 workers) to work in French.To ensure this happens inspectors have been given almost unlimited powers of search and seizure.Bill 96 also.seeks to amend the constitution under section 45(requiring only the approval of the legislature concerned or unilaterally) to affirm Quebec as a nation with French its official language. Many argue that such an amendment would affect Canada as a whole and should be considered under Section 38 or the general amendment formula of 7 provinces making up 50% of the population.[20] Bill 96 was passed on May 24, 2022 with 78 members of the National Assembly in favour and 29 opposed. There were large demonstrations by the anglophone community against Bill 96 and the Legault government and soon after the bills' passage the English Montreal School Board announced that it would be challenging the legislation in court since it enacted " a form of legal discrimination".Since the Legault government has preemptively applied the notwithstanding clause to the entirety of Bill 96 some of the bills' most striking provisions such as expanded powers for the Quebec language police cannot be challenged under sections 7-15 of the Charter but the English Montreal School Board plans to challenge using section 23 on minority language education rights which is exempt from the scope of the notwithstanding clause..[21]

Bill 96 seeks to change the constitution significantly through use of the amendment procedure in Section 45.Two significant proposed national amendments, however, have failed since 1982: the Meech Lake Accord failed to be approved by enough provinces in 1990 under the 7/50 provision within the three-year deadline of section 39 when the Manitoba and Newfoundland legislatures ran out of time to ratify; and the leaders who negotiated the Charlottetown proposals of 1992 decided to submit the package to voters in a national referendum though they were not legally bound to do so. The proposed amendment package was defeated when 54.3% of Canadians said no and only 45.7% said yes. Canada has used the amendment formula negotiated in 1981 to change the constitution but only in single provinces or the Government of Canada by using sections 43 and 44: the famous 7/50 general amendment provisions of sections 38 and 39-the heart of the Alberta amendment proposal- has yet to be successfully employed.

In the immediate aftermath of the November2-5 negotiations the Federal government offered fiscal compensation to Quebec if education or cultural amendments passed which the province opposed to try and lessen the sting of Quebec losing its traditional veto. And Prime Minister

Chrétien later passed a bill requiring that the Government of Canada first obtain the consent of Quebec, Ontario and two provinces from both the Western and Atlantic regions representing 50 percent of the population of those two regions before proposing a constitutional amendment to Parliament. Though not entrenched in the constitution, defacto, Quebec still has a veto.

Was the Federal amendment proposal with its important referendum provisions essential or has the country been able to make do with the Alberta amending formula? Canada's constitution is hard to change under 7/50 but that is not necessarily a bad thing. The referendum provisions were central to Pierre Trudeau's concept of a country where people, not governments, would be the ultimate arbiters of constitutional change. But this centrality was not shared by allies like William Davis and many in the Federal cabinet were quite prepared to let referendums go too.

Referendums are a democratic way to settle constitutional disputes when governments cannot agree: the Mulroney government, for example, organized a national referendum on its Charlottetown proposals in 1992 and British Colombia and Alberta have passed laws requiring that any constitutional amendment first be submitted to a referendum before their legislatures can consider ratification. So, governments are free to turn to referendums if the situation demands it and in our populist age, we may see this device used more frequently. Still by agreeing to drop his idea of formally entrenching a referendum provision into the constitution in order to get provincial agreement on the larger constitutional package, especially the Charter, Mr. Trudeau met Mills' criteria of keeping your eye on the essential prize.

Minority Education and Language Rights

If accepting the provincially inspired amendment formulae was the major Gang of Eight demand, entrenching minority education and language rights was equally crucial to the Federal government. Pierre Trudeau's vision of Canada was one where Francophone and Anglophone Canadians could live anywhere in the country and receive public services and educate their children in their own language. Provinces were reluctant to entrench minority language instruction where numbers warrant: when Roy Romanow, Roy McMurtry and Jean Chretien met in a kitchen in the Government Conference Centre Wednesday afternoon to write a list of 7 points that might constitute a deal, the provincial list had minority education rights only after a referendum (Chretien wrote on the paper "never")[22]. The provinces eventually recognized that Pierre Trudeau would never sign a deal that did not entrench minority language rights: it was his ultimate bottom line. On Thursday morning November 5, eight English-speaking provinces agreed to entrench fully and Manitoba signed the agreement but only with the caveat that the Manitoba legislature would have to vote on Section 23 which entrenched minority language and education rights.Following the Manitoba election of November 1981 which saw the Conservative government of Sterling Lyon defeated, the incoming NDP government of Howard Pawley informed the Federal government that it supported the whole of the November 5 agreement.[23] Later, after further negotiations with Quebec, the Federal

government put into the Constitution the Canada clause to protect the education rights of Anglophones in Quebec. Making language and minority education provision an entrenched right is a major Canadian invention in the human rights field. Many countries grapple with how to protect language minorities from majoritarian democracy. The Canadian Charter of Rights and Freedoms shows them a way. For myself, as a Manitoban, I knew that the 1890 Manitoba Schools question had taken away minority rights from francophones and set Canada on a course of sectarian conflict. I felt especially proud that I was part of a government that had righted this historical wrong,

The Notwithstanding Clause

If the Alberta amending formula was the ultimate objective for the provinces and guaranteeing minority language and education rights was the same for the Federal government, the last piece of the compromise puzzle was the acceptance by Pierre Trudeau of the notwithstanding or non obstante clause which allowed legislatures to overturn judicial decisions protecting fundamental, legal and equality rights. The critique of George Santayana about confusion in many compromises certainly applies to the non obstante clause: there is no logical reason why legislatures are prohibited from overturning democratic rights in the Canadian Constitution but are free to do so on fundamental rights like freedom of assembly. But logical or not, we do have a notwithstanding clause in our constitution and like minority language and education rights this is a unique feature of our Canadian rights framework though I would argue a much less positive innovation than language protection.

I have written elsewhere a detailed study of the origins of the non obstante clause so only a few points will be made in this paper. The withstanding clause was a known entity already part of provincial Bill of Rights as in Alberta. Peter Lougheed had raised the idea at previous federal provincial conferences as a way to enshrine rights while maintaining legislative supremacy - a key objective for Premiers like Sterling Lyon of Manitoba and Allan Blakeney of Saskatchewan. Paul Weiler of Harvard University had also achieved the dream of every academic of writing a timely article that influenced public policy by publishing a piece in 1980 in the Dalhousie Review[24] arguing that an override was a positive development since it would enable a rights dialogue between the judiciary and politicians i.e., it was more than a deadlock-breaking compromise. Weiler's article found its way first to officials from British Columbia then to other provincial delegations and he was personally consulted by these delegations as well.

It was not, however, on Pierre Trudeau's agenda until very late in the game: on Tuesday night November 3, 1981, Trudeau met his Cabinet and said he might have to accept the Alberta amending formula in exchange for a fully entrenched Charter but there was no hint that he might accept weakening the Charter itself. On Wednesday afternoon, November 4, after Trudeau had broken up the Gang of Eight with his referendum proposal, the notwithstanding clause was one of the seven points on the Romanow-McMurtry list presented to Chretien as a possible way to get provincial buy in for the idea of a Charter. Chretien told his colleagues "You guys go and sell it to your premiers; I have a bigger job- I have to sell it to Trudeau."[25] But

sell it he did. On the evening of November 4th, as provincial officials and Premiers were meeting in Allan Blakeney 's suite in the Chateau Laurier hotel (no one called Quebec officials), ministers and officials were meeting at 24 Sussex to listen to Chretien explain that he had the makings of a deal- the Alberta amending formula in exchange for a Charter with minority language and education rights but with an override that would maintain legislative supremacy in key areas like equality rights. Then a little after 10 pm, Premier Davis called the Prime Minister and said he favoured the compromise Chretien was advocating and if Trudeau turned it down, Ontario would not support a unilateral package going to London. Trudeau gave Chretien a mandate to see how many provinces would come aboard. The next morning Chretien called the Prime Minister to say he had all of them except Quebec and the deal was done.

Since 1982, according to the excellent research of Caitlyn Salvino, there have been 24 pieces of provincial legislation that included the notwithstanding clause at the point of tabling in the legislature and 16 cases where the laws have been promulgated and come into effect[26](in some cases the intended laws were withdrawn or the law was not put into effect after passage, or the courts ruled on appeal on behalf of the government thereby negating the need for Section 33) There was a flurry of initial usage in the 1980s especially by Parti Quebecois governments which routinely used it on every piece of legislation but Quebec was joined in these early years by Saskatchewan, and the Yukon. Then there was a long hiatus with use of section 33 rare until recently when Saskatchewan, New Brunswick and Ontario joined with Quebec (always the most active user of the notwithstanding clause) in announcing the intended use of Section 33.Saskatchewan in 2017 applied the notwithstanding clause to education legislation, and New Brunswick in 2019 introduced legislation applying the notwithstanding clause to a bill on vaccination policy. In 2019 Quebec used it to restrict the wearing of religious symbols in Bill 21 and in 2021 applied it to Bill 96 to further promote the use of French. Ontario threatened its use over municipal reorganization in 2018 and used it again in 2021 to enact legislation to allow restrictions on third party political advertising.In 2021, according to Ms Salvino Quebec had 6 active acts with the notwithstanding clause and Ontario had one. Quebec, by far, is the province that has most used the notwithstanding clause:with the promulgation of Bill 96 in May 2022 there have been 16 pieces of Quebec legislation that invoked the notwithstanding clause and including the multiple renewals of several of those acts, Bill 96 would be the 41st piece of legislation in the province to invoke the notwithstanding clause to remove the possibility of challenges to laws through use of the Charter.

Supporters of the notwithstanding clause like Peter Lougheed knew the significance of taking away the rights of citizens and he hoped that it would only be used on important matters after serious reflection. This standard has been slipping. When the Doug Ford government threatened to use the clause to ensure the reorganization of the Toronto City Council, the original supporters of the concept- Davis, Chretien, Romanow and McMurtry - all criticized the Ontario Government for using the clause on such a relatively minor matter[27]. The Quebec

Government has been criticized too for using the clause in a proactive manner to exclude the courts from even ruling on legislation like Bills 21 and 96.These actions, however, are far from extraordinary: the provinces since 1982 have applied the notwithstanding clause 19 times pre-emptively, many more times than in response to a court ruling .[28]

This is serious because you cannot have a political- judicial dialogue on rights, as proponents of the concept like Paul Weiler advocated, if governments exclude the courts from even having the opportunity to consider if the rights of citizens have been infringed. We are facing real dangers in the way current governments are using the power given to them in Section 33.

The constitutional compromise of 1981 came together so quickly in the afternoon and evening of November 4th that there was very little time for reflection when the Prime Minister and Premiers met at 9:30 am November 5th to seal the deal. Trudeau did raise the use of a sunset clause after five years so that governments that wanted to continue to overturn rights through use of Section 33 would have to start the legislative process over again." I can live with that" said Lougheed and, in the most famous use of the notwithstanding clause to restrict English on signs, Quebec, indeed, allowed its restrictions on signs to lapse after five years though renewals of notwithstanding clauses in legislation are common.[29] There are ten pieces of Quebec legislation(often on pension administration) invoking the notwithstanding clause that have been renewed, some of them multiple times.

I wish the Prime Minister had similarly pressed Lougheed and the other premiers on lifting the application of Section 33 to fundamental rights. In the debates over the Charter the premiers had mostly been concerned about the implementation of equality and legal rights. Had we pressed on fundamental rights Lougheed might have given in, though he later maintained it was a question of principle for him. As drafted in the constitution, only a bare majority in a legislature is needed to pass legislation authorizing the use of the override: if Mr. Trudeau had argued that there should be a super majority of 60 percent of the legislature, this would have maintained the principle of parliamentary supremacy so dear to premiers like Blakeney and Lyon but in a practical sense it would have ensured that opposition parties would be involved (thereby making it unlikely to be used on trivial cases or forcing governments to search for other means to achieve their aims rather than using the override to take away rights). And the preemptive use of the override to prevent courts from even ruling on whether legislation is a violation of citizen rights is a real abuse of the original intent of the 'framers" who advocated section 33 as a last resort after a court had ruled.

The Federal government has never yet used the notwithstanding clause(Quebec, Yukon, Saskatchewan, Alberta, Ontario and New Brunswick have invoked it). Prime Minister Paul Martin, indeed, once suggested that the national government should voluntarily remove its right to use Section 33. The current Federal government may not want to go as far as Martin advocated by eliminating its power to use Section 33 entirely, but it should present a Clause 33 reform package both to prevent future potential abuses and to set standards that the provinces might one day adopt. Peter Lougheed, one of the initiators of the notwithstanding clause

compromise, thought hard about his creation and in a 1991 lecture[30] suggested a reform package to prevent abuse while still maintaining his core principle of legislative supremacy. Given the recent actions of some provinces, the Lougheed proposals are even more critical today than when he first raised them. The Federal government should adopt the Lougheed plan and pass legislation outlining that if the federal parliament ever contemplated the use of section 33 it would:

- Clearly outline the rationale for using the override so that citizens could evaluate the tradeoffs.
- Pledge that the override would never be used in a preemptive way and would only be applied after a court ruling.
- Use of the override must be supported by 60% of the Members of Parliament.

Conclusion

Edmund Burke said that successful compromises involved giving up some rights so that we may enjoy others and John Stuart Mill had similar advice in "sacrificing the non-essential to preserve the essential." How do the compromises involved in the settlement of 1981 stand up today? The Alberta amending formula has been used 11 times, mostly for single province issues. The Charter broke new ground in entrenching minority education and language rights and these innovations have stoked interest from around the world. After the Premiers disgracefully took out Aboriginal rights from the November settlement, public opinion forced the premiers to retreat, and the courts have skillfully and boldly used Section 35 on recognizing and affirming existing aboriginal and treaty rights to begin the long road towards justice for our Indigenous peoples. Canada is no longer a legal colony of Great Britain. The Charter of Rights and Freedoms is used daily to enhance the rights of Canadians. The most contentious compromise was the acceptance of the notwithstanding clause and there are genuine grounds for worry if governments get into the habit of diminishing rights and preempting judicial review. But reforms can be made to make use of the clause a rare exception. It is up to Canadian citizens to begin to demand such reforms and if they do the political system will respond.

Pierre Trudeau was at the height of his powers in 1981 and he might have been able to win a national referendum on the Charter. In 1981 according to public surveys 70-80% of Canadians favored an entrenched Charter of Rights: A survey released in June 1981, for example, found that 72% of Canadians favored an entrenched Charter with Atlantic Canadians the most favorable at 80%, Quebec and Ontario respondents at 76% and the West at 65%.[31] As the debate went on the Charter became even more popular: a poll released by the Canada West Foundation in October 1981, for example, just before the November showdown with the Premiers, showed 80 percent of Westerners favored a bill or rights compared to 84% of all Canadians.[32] The Charter, however, would have been only one part of the package that voters would have been asked to judge upon: in October 1981 a CROP survey asked how Canadians would vote in a constitutional referendum on the whole federal package and 50% of the sample

would have voted yes, 33% were opposed and 18% were undecided, a solid potential victory indeed. But to succeed, according to the criteria discussed at the November 1981 negotiations, the federal plan would have to win in every region: in Atlantic Canada, Quebec and Ontario support for the federal initiative was 20 points or more higher than the no side but in the West 38% of voters would support Trudeau, 44% were opposed and 18% were undecided.[33] As one of the people who would have had a role in managing the federal referendum campaign, I can tell you that it would not have been a slam dunk

Like Cyrano de Bergerac taking on 100 enemies, Pierre Trudeau might have been able to defeat Peckford, Levesque, Blakeney, Lougheed and the rest of the premiers in a national referendum on the constitution. But the economy was in dreadful shape in 1981-82 and a referendum might have turned on regional or economic grievances rather than the Charter itself. The strategic imperative in elections is to frame the question uppermost in voters' minds when they make their choice: if the hypothetical question had been “do you favour a Charter of Rights?’ the constitutional referendum gamble would have succeeded. But if opponents had made a referendum instead turn on the question “do you approve of Pierre Trudeau’s handling of the economy?” all bets would have been off. The advice of allies like Jean Chretien and William Davis, who both possessed great political intuition, was to take a pretty good - or at least a fair deal - rather than risk it all in a national vote. It was prudent advice and Mr. Trudeau took it.

The results since 1982 have ratified Trudeau’s choice of constitutional compromise over the risk of a winner take all referendum. He dropped what many regarded as the non-essential provision of the federal amendment formula with its referendum clause to compromise with the provinces by accepting their amendment formula. And, in truth, the Alberta inspired amendment formula has functioned not too badly. In so doing, Trudeau won provincial acceptance of long-desired essential Federal government objectives like patriation itself, minority language and education rights, and above all an entrenched Charter.

Prior to the birth of the Charter, Canada was not known as a human rights leader- our Supreme Court was certainly more conservative than the Warren Supreme Court in the United States. But with the Charter Canada broke new ground in linguistic and minority education rights and countries around the world became interested in the Canadian innovations. Canadian jurists and scholars are regularly invited abroad to speak to Canada’s Charter experience. At home the adoption of the Charter has simply been transformative. The Charter of Rights and Freedoms was popular at its birth, it is even more popular now: An Environics study in April 2022 found that 88% of Canadians believed the Charter of Rights to be a good thing with only 4% opposed. As Andrew Parkin, executive director of Environics wrote about the study “whatever our differences there is one part of the Constitution about which we almost unanimously agree...if anything in this country unites us it is support for the Charter".[34] The Charter has become an icon that defines us as a bilingual, multicultural society devoted to human rights, tolerance, and social justice. We are all Charter Canadians now and this transformation is perhaps the biggest single achievement of the hard-pressed negotiators of 1981.

Soon after the constitutional settlement, reflecting the mood of the times with Quebec left out, disputes over the notwithstanding clause and an unknown future for Indigenous rights, a review of the constitutional negotiations by several distinguished academics had the title, *And No One Cheered*.[35] That may or may not have been true then. In 2022, on the 40th anniversary of the Charter and Patriation, we should perhaps be a little more charitable and applaud the negotiators of the historic compromises of 1981 with at least a few hand claps.

Thomas S. Axworthy Public Policy Chair, Massey College, University of Toronto

End Notes

[1] Introductory epigraph quote in Chapter 2 "No Compromise about Compromise" in Alin Fumurescu ,Compromise: A Political and Philosophical History. (Cambridge: Cambridge University Press, 2013) .Chapter 2 of Fumurescu"s book greatly influenced the argument of this paper.

[2] Quoted in Ron Graham, The Last Act (Toronto: Penguin Group,2011),159.Grham has written a dramatic account of the final week of negotiations. Robert Sheppard and Michael Valpy in The National Deal(Scarborough: Fleet Publishers,1982) describe all the major events of the constitutional saga, 1980-1982 and Peter Russell's

Constitutional Odyssey(Toronto: University of Toronto Press,2004) goes back to Confederation and places the Patriation exercise within a broad historical context.

[3] Thomas S Axworthy, "Colliding Visions: The Debate Over the Charter of Rights and Freedoms 1980-1981" in Joseph M Weiler and Robin M. Elliot, Litigating The Values of a Nation(Toronto: Carswell Co.Ltd,1986)

[4] Thomas S Axworthy ' The Notwithstanding Clause: Sword of Damocles or Paper Tiger", Policy Options, March 1,2007. https://policyoptions.irpp.org/magazines/equalization-and-the-federal-spending-power/the-notwithstanding-clause-sword-of-damocles-or-paper-tiger/

[5] " Chretien: Patriation, Charter Benefited Quebec":, IPolitics,,April 17,2012https://www.ipolitics.ca/news/chretien-patriation-charter-benefited-quebec

[6] Quoted in Graham, Last Act,259-60

[7] Edmund Burke " Speech on Moving Resolutions for Conciliation with the Colonies", 1775:https://wisc.pb.unizin.org/ps601/chapter/edmund-burke-on-conciliation-with-america/

[8] Quoted in Rafael Cejudo,"J.S Mill And the Art of Compromise", Human Affairs,20,2010,302

[9] John Morley, On Compromise(London: Macmillan, 1908).The book was first published in 1886.

[10] Quoted in Fumurescu,, Compromise,in Chapter 2 which has an extended discussion on Morley's thought.

[11] Quoted in Bryan Dexter" Morley and Compromise",Foreign Affairs,January 1948:https://www.foreignaffairs.com/issues/2022/101/3

[12] Quoted in Cejudo, " J.S.Mill",302

[13] Stephen Clarkson and Christina McCall, Trudeau and our Times: Volume !,The Magnificent Obsession(Toronto: McClelland and Stewart Inc,!990)

[14] House of Commons Debates,32nd Parliament, !st Session:Volume 2,June 10,1980

[15] Graham,Last Act,94

[16] Shepard and Valpy, National Deal,285

[17] Eddie Goldenburg, The Way It Works9Toronto: McClelland and Stewart Inc,2006) 172

[18]Shepard and Valpy, National Deal, 135

[19] Nathan Nurgitz and Hugh Segal, No Small Measure(Ottawa: Deneau Publishers,1983),112

[20] Emmett Macfarlane, " Quebec's attempt to unilaterally amend the constitution won't fly", Policy Options,May 14,2021https://policyoptions.irpp.org/magazines/may-2021/quebecs-attempt-to-unilaterally-amend-the-canadian-constitution-wont-fly/

[21] https://www.theglobeandmail.com/canada/article-quebec-bill-96-french-language-law/

[22] Shepard and Valpy, National Deal,289

[23] Sterling Lyon, Premier of Manitoba, was one of the fiercest opponents of an entrenched Charter.He left the constitutional negotiations mid way to return home to campaign in the provincial election he had called for November 17, 1981.leaving Attorney General Gerry Mercier to represent the province.Peter Lougheed called Lyon on the morning of November 5 to inform him of the impending deal and because of the inclusion of the notwithstanding clause Lyon claimed to the Winnipeg Free Press on November 6, 1981 that"what we have ended up with today does represent a considerable watering down of the federal position".Gerry Mercier signed the November 5 agreement but wrote beside his signature" subject to approval of Section 3(C) by the Legislative assembly of Manitoba"..This was the part of the agreement that entrenced section 23 on minority language and education rights.Howard Pawley's, NDP, however had opposed Lyon's constitutional position, especially on entrenchment of the Charter in a debate in the Manitoba legislature in May 1981 and Premier-elect Pawley called Prime Minister Trudeau soon after the November provincial election to say that Manitoba now supported fully the constitutional package.Special thanks are due to Michael Decter , former Cabinet Secretary of Manitoba who clarified the sequence of events.The point is not a trivial one: James Matkin, a senior BC negotiator, wrote an article in Litigating the Values of A Nation,op cit, that the Manitoba caveat meant that " Manitoba did not sign without reservation and therefore, like, Quebec, did not commit unequivocally to support an entrenched Charter".(p29).If the political spin after November 5 had been that two provinces-Manitoba and Quebec_ were opposed or not fully on board with the deal rather than the headlines that all the English -speaking provinces were in favour and only Quebec had been left out, the public perception of ganging up on Quebec might have been greatly reduced..

[24] Paul C. Weiler,'Of Judges and Rights:Should Canada Have a Constitutional Bill of Rights?", Dalhousie Review,Vol 60 ,No.2, 1980

[25] Graham,Last Act,194

[2626] Caitlin Salvino,"A Tool Of the " Last Resort": A Comprehensive Account of the Notwithstanding Clause Political Use from 1982-2021", Journal of Parliamentry and Political Law,vol16,no1(March 2022)p247-263

[27] " Creators of " Notwithstanding Clause" Criticize Doug Ford for Using It",Durham Radio News(September15, 2018)
https://www.durhamradionews.com/archives/113539?fb_comment_id=2075145555881842_2075477565848641
[28] Salvino,'Tool of Last Resort".Alberta, Yukon and New Brunswick have been the provinces which have joined Quebec in invoking the notwithstanding clause preemptively.Since Quebec has used Section 33 more than any other provinces and usually pre-empts the courts from ruling on legislation pre-emptive use far outweighs responding to court rulings which was the rationale used by the "framers" to justify use of the clause.
[29] Ibid.Quebec invoked the notwithstanding clause in the 1980s on different laws relating to the pension plan of teachers or retirement benefits of public employees and these have been renewed multiple times, the latest being in 2019. Salvino has useful tables that summarize when pieces of legislation using the notwithstanding clause have ben enacted by the provinces,(mostly Quebec) and if use of the clause has been renewed or not every five years.Her tables also show that the clause was used pre-emptively on these pieces of legislation too so the courts have not had a chance to review such legislation in over 40 years.
[30] Peter Lougheed, " Why a Notwithstanding Clause?", 1991 Merv Leitch lecture.
https://www.constitutionalstudies.ca/wp-content/uploads/2020/08/Lougheed.pdf
[31] 72% of Canadians Favour an Entrenched Charter of Rights", Canadian News Briefs, UPI Archives, November10,1981https://www.upi.com/Archives/1981/11/10/Canadian-News-Briefs/8850374216400/
[32] " A Majority of Western Canadians Support A Bill of Rights" UPI Archives, October 21, !981https://www.upi.com/Archives/1981/10/21/A-majority-of-Western-Canadians-support-a-bill-of/9439372484800/
[33] Environics Institute for Survey Research,'Attitudes Towards the Patriation of the Constitution and the Charter of Rights,1980-81" https://www.environicsinstitute.org/docs/default-source/default-document-library/patriation-1980s.pdf?sfvrsn=6af94cc_0
[34] Andrew Parkin,"Are Canadians Finally at Peace with their Constitution?", Globe and Mail,April16, https://www.theglobeandmail.com/opinion/article-are-canadians-finally-at-peace-with-their-constitution/
[35] Keith Banting and Richard Simeon, eds.And No One Cheered(Toronto: Methuen Publications,1983)