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CONSTITUTIONAL DIALETHESISM: THE PEOPLE'S NOTWITHSTANDING CLAUSE

Note: The expression "human rights" refers to its historical and doctrinal usage.

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Introduction

Nearly two decades have passed since Christopher Forrest won the Canadian Study of Parliament Group's essay competition for his analysis of the notwithstanding clause.. This clause, in section 33 of the *Canadian Charter of Rights and Freedoms*,[1] continues to provoke debate today, as shown by the recent leaders' debate and the controversy surrounding Bill 21, *An Act respecting the laicity of the State*.[2] The coexistence of a mechanism designed to protect fundamental rights and freedoms and a clause that permits them to be overridden reveals an inherent tension. Critics point to the irony of such a clause, which silences the courts in the face of a derogation of these rights, while supporters defend its necessity, arguing that it gives legislatures the flexibility to protect presumed legitimate goals in the name of parliamentary sovereignty.

As controversial as it is, the notwithstanding clause is entirely constitutional. However, while its use is legal, is it legitimate—or even desirable—in a free and democratic society? This essay

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[1] *Canadian Charter of Rights and Freedoms,* Part I of The Constitution Act, 1982, Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[2] *An Act respecting the laicity of the State*, CQLR c L-0.3.

takes a dialectical approach to explore the legal and philosophical tensions the clause creates, ultimately arguing for its legitimacy when exercised in a democratic context.

Prior to an in-depth analysis, the discussion will begin by defining the notwithstanding clause and its formal requirements for application. The thesis will defend the clause's legitimacy, challenging the exclusive role of judges in interpreting the abstract values embodied in fundamental rights and freedoms. The counter-thesis will weigh this against the dangers of majority rule, in which the protection of these rights and freedoms is subordinated to the democratic will of Parliament. The synthesis will argue that the clause's exceptional nature demands specific justifications and constant vigilance, particularly in light of controversial uses such as Bill 21. The essay will conclude by summarizing the arguments within this dialectical framework and open the discussion to the role of the public in decisions to invoke the notwithstanding clause.

2. The notwithstanding clause: definition and criteria

Also known as an override provision or parliamentary sovereignty clause, the notwithstanding clause, provided for in section 33 of the Canadian Charter, was introduced at the very end of the process to adopt the Charter.[3] A political compromise to secure the repatriation of the Constitution, it serves as a safeguard of parliamentary sovereignty, which, as Brunelle notes, is inseparable from the spirit of Canadian Confederation.[4] The clause can be invoked by both the federal Parliament and provincial or territorial legislatures to exempt an entire law, or specific

[3] Department of Justice Canada, *Manual of Commentaries on the Charter of Rights and Freedoms,* Ottawa, 1982, p. 5.
[4] Dorval Brunelle, "Les droits et libertés à l'heure de la derogation" (1989) Cahiers de recherche sociologique, 15 (Fall) 103, p. 109.

provisions of it, from the application of the Charter.[5] It's worth noting that legislatures may override more than one section at a time.[6]

The Supreme Court of Canada (SCC) clarified the scope of the notwithstanding clause in Ford v. Quebec (Attorney General), 1988,[7] the first decision to directly address its use. The SCC held that its role is limited to verifying compliance with the clause's formal requirements, without assessing the merits of its invocation. These requirements are mandatory. First, the clause applies only to sections 2 and 7 to 15 of the Canadian Charter, which protect fundamental freedoms such as freedom of expression and religion, as well as key legal rights. Other rights, such as democratic rights and mobility rights, are excluded from its reach. Notably, the possibility of applying the notwithstanding clause to section 28, which guarantees gender equality, was initially contemplated but later abandoned under pressure from feminist groups.[8] The SCC has recognized that such exclusions signal the fundamental importance of these rights.[9]

Second, the legislature must expressly state, in the text of the law, its intention to override the sections covered by the notwithstanding clause.[10] For example, Quebec's *Charter of the French Language*[11] and Ontario's now repealed *Keeping Students in Class Act*[12] expressly provide for these sections to be overridden. Third, any override is temporary: it cannot exceed five years,[13] though it may be renewed indefinitely.[14] This limitation is not accidental, as it corresponds to the

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[5] *Charter, supra* note 1, s. 33 (1,2).
[6] Nicole Duplé, *Droit constitutionnel : principes fondamentaux,* Wilson & Lafleur, 2019, p. 544.
[7] [1988] 2 SCR 712.
[8] Canada, *The notwithstanding clause of the Charter,* Ottawa, Library of Parliament, August 22, 2024, p. 4.
[9] *Frank v. Canada (Attorney General),* 2019 SCC 1, para. 25.
[10] Charter, *supra* note 1, s. 33(1).
[11] CQLR, c-11, s. 214.
[12] SO 2022, c 19, s 13.
[13] Charter, *supra* note 1, s. 33(3).
[14] Charter, *supra* note 1, s. 33(4).

maximum interval between two elections, ensuring that a new parliamentary majority can revisit the decision,[15] thereby giving voters democratic oversight of its use.[16] If the time limit lapses without renewal, the SCC emphasized that the affected Charter rights automatically regain full force.[17]

Despite these clarifications, several grey areas remain regarding its interpretation and application, particularly in the context of regulations or administrative decisions.[18] It is also essential to distinguish section 33 from section 1 of the Charter, which allows courts to uphold reasonable limits on rights and freedoms, provided they can be demonstrably justified in a free and democratic society.[19] In essence, the notwithstanding clause allows legislatures to override certain fundamental rights and freedoms under specific, formal conditions, treating the constitutional provisions "as if they did not exist."[20]

3. Thesis: derogation as a legitimate claim

Critics regard the notwithstanding clause as a flagrant violation of fundamental rights and freedoms. However, this position warrants nuance on two closely related grounds: first, because of the content of the Charter itself and, second, because of the jurisprudential interpretations that shape its definition and scope.

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[15] "Fascicule 5 Charte canadienne : application et structure d'une cause," No. 76, in Pierre-Claude Lafond, ed., JCQ Droit public - Droit constitutionnel (QL).
[16] Halsbury's Laws of Canada (online), *Constitutional Law (Charter of Rights),* "Section 33 Notwithstanding Clause: Democratic Check on Notwithstanding Clause" (IV.5(1)) in HCHR-28 "Democratic check on use of notwithstanding clause."
[17] Ford v. Quebec (Attorney General), [1988] 2 SCR 712, para. 37.
[18] "Fascicule 5 Charte canadienne : application et structure d'une cause," No. 76, in Pierre-Claude Lafond, ed., JCQ Droit public - Droit constitutionnel (QL).
[19] Charter, *supra* note 1, s. 1.
[20] Duplé, *supra* note 6, p. 544. [Translation]

3.1 : A charter of individual rights

Although presented as symbols of a universal normative ideal essential to democracy,[21] human rights have been the subject of significant criticism since their origins in the *Magna Carta* of 1215. The inspiration for the modern conception of these rights,[22] the *Declaration of the Rights of Man and of the Citizen*,[23] was exclusionary from the outset, omitting women from the French Revolution. Burke denounced the emergence of such rights as a "vast hypocrisy,"[24] warning that excessive equalization could create new inequalities.[25] Marx saw them as an instrument for the "egoistic individualism"[26] of the bourgeoisie. Kneen summarized this concept of rights as arising from the "particular culture of individualism, materialism and rationalism spawned by the European Enlightenment in the 18th century."[27] Contemporary critics, such as Mutua, describe human rights as "Eurocentric,"[28] lamenting their use in service of Western interests, constituting a "political weapon"[29] for Herrmann and an "ideological strategy"[30] for Bachand.

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[21] Stéphane Bauzon, *Le Métier de juriste : du droit politique selon Michel Villey,* Quebec, Université Laval, 2003, p. 114.
[22] Mario Bettani et al., *La Déclaration universelle des droits de l'homme,* Paris, Folio actuel, 1998, p. 30.
[23] *Déclaration des droits de l'homme et du citoyen (*National Archives of France). September 30, 1789, AE/II/1129.
[24] Bauzon, *supra* note 21, p. 114. [Translation]
[25] François De Smet, *Les droits de l'Homme : origine et aléas d'une idéologie moderne*, Paris, Cerf, 2021, p. 78.
[26] Ibid., pp. 84–86.
[27] Brewster Kneen, *The Tyranny of Rights,* Montreal, Écosociété, 2014, p. 18.
[28] Makau Mutua, *Human Rights: A Political and Cultural Critique,* Philadelphia, University of Pennsylvania Press, 2022, p. 204.
[29] Irène Herrmann, "Une universalité vue de l'Est ? Compréhension, présentation et instrumentalisation soviétiques de la DUDH (1948-1976)" in Valentine Zuber, Emmanuel Decaux and Alexandre Boza, eds., *Histoire et postérité de la Déclaration universelle des droits de l'Homme,* Rennes, Presses universitaires de Rennes, 2022, pp. 61–70.
[30] Rémi Bachand, *Les subalternes et le droit international : une critique politique,* Paris, Pedone, 2018, p. 185.

Like the international instruments that inspired it, the Canadian Charter does not embody a universally binding ideal; rather, it reflects the common law's emphasis on individual rights.[31] It omits formal protection for social, cultural or economic rights,[32] and applies strictly to public activity.[33] The deliberate exclusion of private activity reveals a desire to preserve the common law principles of private property and contractual freedom.[34] Stuart Rush argues that the absence of public consultation during the Charter's adoption has contributed to a judicial reluctance to prioritize human rights over contractual rights.[35] Moreover, the constitutional framework does not formally recognize certain collective rights, creating tensions with the claims and realities of provinces and territories. Charles Taylor notes the incompatibility between the Charter's framework and Quebec's civil law culture and philosophy,[36] which may explain Quebec's recent constitutional amendment reaffirming French as the province's sole official language.[37]

3.1 Abstract rights at the discretion of judges

The interpretation of Charter rights is also unavoidably shaped by an individualistic approach. Aligning with a classical natural law perspective, Villey joins the ranks of philosophers who doubt the attempt to frame human rights as a universal principle. While valuing the fundamental moral ideals behind human rights,[38] he criticizes the dogma of human

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[31] Michael Mandel, *La Charte des droits et libertés et la judiciarisation du politique au Canada,* Montreal, Boréal, 1996, p. 110.
[32] Christine Vézina, "Culture juridique des droits de la personne et justiciabilité des droits économiques, sociaux et culturels : tendances à la Cour suprême du Canada" (2020). 2: 61 Les Cahiers de droit, pp. 495–500.
[33] Charter, *supra* note 1, s. 32.
[34] Mandel, *supra* note 31, p. 98.
[35] Ibid., p. 98.
[36] Max Nemi, "la Charte canadienne des droits et libertés : reflet d'un humanisme chrétien," Options politiques, February 2007, p. 60.
[37] *Constitution Act, 1867,* 30 & 31 Vict., c. 3 (U.K.), s. 90Q.2.
[38] Bauzon, *supra* note 21, p. 113.

rights expressed in "indistinct and dangerously vague language."[39] In his view, these rights are abstract principles that are not absolute and whose meaning depends entirely on interpretation: "[e]ven when enshrined in the constitution, human rights remain moral laws that have been given positivist force by case law."[40] Michael Mandel applies this critique to the Canadian Charter, calling it "mostly a collection of vague incantations of lofty but entirely abstract ideals, incapable of either restraining or guiding the judges in their application to everyday life."[41]

Villey further argues that the designation of an enshrined right as "fundamental" raises an ideological choice that is inseparable from the context in which it is adopted—a perspective that is consistent with the sociology of law: "law is a product of specific social and historical circumstances."[42] Similarly, Kant criticized the *Declaration of the Rights of Man and of the Citizen* for its "empirical impurity,"[43] grounded in historical circumstance rather than pure reason. Mandel distinguishes between the primacy of the rule of law and "judicial primacy," rejecting the positivist belief that constitutional reasoning produces a single truth accessible only to the legal community.[44] Ultimately, the inflexibility of positivist law give courts a monopoly on interpreting the abstract norms that fundamental rights embody within a given context; a reality that, for Mandel, amounts to giving judges "a blank check."[45]

In the 1987 *Labour Law Trilogy*, the SCC was slow to recognize the right to collective bargaining, despite section 2(d) of the Charter guaranteeing freedom of association.[46] This

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[39] Ibid. [Translation]
[40] Bjarne Malkevik, *Philosophie du jugement juridique,* Quebec City, Presses de l'Université Laval, 2010, p. 138. [Translation]
[41] Mandel, *supra* note 31, p. 73. [Translation]
[42] Jade Boivin, "La Loi sur la laïcité de l'État au Québec et les droits individuels et collectifs comme pilier de l'unité nationale canadienne : un écho au rapport Pepin-Robarts," (2021) Bulletin d'histoire politique, 29:2 178, p. 182. [Translation]
[43] Ibid., p. 61.
[44] Mandel, *supra* note 31, p. 74.
[45] Ibid., p. 107.
[46] Charter, *supra 1*, s. 2(d).

hesitancy reflects the "early discouragement of the common law"[47] and reveals the limitations of the "living tree" doctrine, which ostensibly calls for a large and liberal interpretation of the Charter.[48] By contrast, property rights, especially intellectual property, are justified in common law as rewards for labour in the Lockean sense, while civil law regards them as natural extensions of the creator's personality in the Hegelian sense.[49] Indigenous conceptions of property, however, are grounded in belonging, relationships and cultural continuity, values largely absent from the individualized, categorical approach of Western legal systems.[50] The Charter's emphasis on individual liberty is further illustrated in Ward,[51] where the SCC permitted a dark humour comedian to mock a disabled child who had attained a certain degree of public notoriety. In contrast, Quebec courts give greater weight to vulnerable groups.[52]

If law is the expression of democratic will,[53] then the Constitution's inclusion of the notwithstanding clause safeguards parliamentary supremacy as a principle of Canadian federalism. It is therefore inaccurate to suggest that the notwithstanding clause allows rights and freedoms to be circumvented as immutable absolutes. Rather, it suspends the application of the SCC's current interpretation of these rights, giving priority to individual rights.

2.1 Counter-thesis: the potential drift of the democratic majority

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[47] *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia,* 2007 SCC 27, para 66.
[48] See, for example*, Reference re Same-Sex Marriage,* 2004 SCC 79, paras. 22–23.
[49] Maxence Rivoire and E. Richard Gold, "Propriété intellectuelle, Cour suprême du Canada et droit civil" (2015) 60:3 RD McGill 381, p. 386.
[50] Catherine E. Bell et al., "Indigenous Law, Intellectual Property Law, and Museum Policy" (2015) 38:3 Anthropologie et Sociétés 25 at p. 31.
[51] *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse),* 2021 SCC 43.
[52] See, for example, *Ward v. Commission des droits de la personne et des droits de la jeunesse (Gabriel et* al.), 2019 QCCA 2042.
[53] Duplé, *supra* note 6, 2019, p. 83.

Instinctively, majority rule seems synonymous with legitimacy; it rests, after all, on the very logic of democracy. On this basis, PQ MNA Pascal Bérubé vigorously defended the legitimacy of the majority that supported Bill 21 in 2019, describing it as "a normal act of political affirmation by a state [...] elected with a democratic mandate and having a majority."[54] Yet, as Lampron cautions, "the very spirit of fundamental rights and freedoms"[55] rests on a principle that goes beyond the mere fact of majority rule. The protection of minorities is the cornerstone of modern human rights, as enshrined in the *Universal Declaration of Human Rights (*UDHR).[56] Auschwitz has left an indelible scar on our collective conscience; the UDHR was drafted in the wake of the unspeakable.[57] Hatred had been explicit in *Mein Kampf,* yet the National Socialist German Workers' Party was democratically elected. The separation of powers thus becomes imperative, preventing the majority from becoming "the judge of its own case."[58]

Countless philosophers have warned of the potential dangers of "the worst form of government, except for all the others,"[59] to use a famous quote from Churchill. Rousseau's ideal of the general will, while celebrated,[60] risks "totalitarian democracy."[61] John Stuart Mill and Tocqueville both denounced the threat of the "tyranny of the majority,"[62] a concern that Camus crystallized when he observed that "democracy is not the rule of the majority but the protection of the minority."[63] Like Benjamin Constant, Proudhon contended that democracy is simply an evolved form of the

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[54] Quebec, National Assembly, Committee on Institutions, "Consultations particulières et auditions publiques sur le projet de loi n° 21, Loi sur la laïcité de l'État," *Journal des débats de la Commission des institutions,* Vol. 45, No. 34, Wednesday, May 8, 2019, p. 33. [Translation]
[55] Ibid.
[56] *Universal Declaration of Human Rights,* GA Res 217A (III), UNGAOR, 3rd Sess., Supp No. 13, UN Doc. A/810 (1948) 71.
[57] Bettani et al., *supra* note *22,* p. 24.
[58] Mandel, *supra* note 31, p. 97. [Translation]
[59] Stéphane Dion, "« Libéralisme et démocratie : plaidoyer pour l'idéologie dominante" (1989) Politique 9 (Winter) 5, p. 37.
[60] Jean-Jacques Rousseau, *Du contrat social (1762),* Paris, Flammarion, 1966, p. 76.
[61] Danièle Lochak, *Les droits de l'homme,* Paris, La Découverte, 2018, p. 73.
[62] Ibid.
[63] Albert Camus, *Carnets III, March 1951 - December 1959,* Paris, Gallimard, 1962, p. 260.

Sovereign, legitimizing "passions instead of justice"[64] in the name of the majority. In the same vein, Voisard criticizes the legal construct of the reasonable person as an "abstract and ideal reference model,"[65] one that imposes a homogenized standard of conduct grounded in consensus but, as Fromm reminds us, "has nothing to do with reason."[66] These criticisms echo Nietzsche, who scorned the "herd morality"[67] of democracy and likened it to a subtler form of slavery.[68] The debates on cultural relativism are worth mentioning, with Yasuaki warning that a people's culture and customs cannot serve as a pretext for violating human rights.[69]

These arguments show that the majority may indeed serve to legitimize injustice. Without judicial oversight, the risks of abuse become too great. As French judge Daniel Labetoulle reminds us, the role of a judge is to "listen to society without following its impulses."[70] The Charter, as an instrument of the separation of powers, responds to such potential dangers. In Pierre Elliott Trudeau's words, it safeguards the "primacy of the individual"[71] against the domination of "fleeting majorities."[72] From the perspective of the "idealists" who reject the politicization of the judiciary, the Charter ensures social justice, protecting the political interests of the disadvantaged.[73]

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[64] Pierre-Joseph Proudhon, *Qu'est-ce que la propriété?,* Paris, Flammarion, 2010, p. 51.
[65] Anne-Marie Voisard, *Anne-Marie, Le droit du plus fort : 10 ans de Noir Canada,* Montréal, Écosociété, 2018, p. 175.
[66] Anne-Marie Voisard, *Le droit du plus fort,* Montreal, Écosociété, 2018, p. 174.
[67] De Smet, *supra note* 25, Cerf, 2021, p. 108.
[68] Ibid., p. 109.
[69] Onuma Yasuaki, "Towards an intercivilizational approach to human rights: For universalization of human rights through overcoming of a westcentric notion of human rights," in Sik Ko Swan, M.C.W. Pinto and Surya and Subedi, eds., *The Asian Yearbook of International Law,* Leiden, Brill, 2001, 21, p. 27.
[70] Bauzon, supra note, at p. 9.
[71] Nemi, *supra* note 36, p. 64.
[72] Mandel, *supra* note 31, p. 90.
[73] Pascale-Sonia Roy, "Droit du travail et les décisions formant la trilogie de la Cour Suprême du Canada. Optimisme ou Scepticisme?" (1990) 19:2 Man LJ 219, pp. 225–226.

Within this framework, the notwithstanding clause carries obvious risks: to claim that political power, however legitimate, majority-based and democratic it may be, may be exercised without limit is political heresy. The thick conception of the rule of law requires protection against the majority: in a democracy, it is not the strength of numbers that matters, but the strength of the argument, which must be heard in good faith, in keeping with the principle of *audi alteram partem.*

4. Synthesis: implicit conditions as democratic guarantee

The tension between the judiciary's monopoly on interpreting abstract norms and the risk of majority tyranny reveals a central paradox. Yet it is precisely in this tension that the role of citizens, whether belonging to the majority or the minority, is reinforced. Recourse to the notwithstanding clause can be justified in exceptional circumstances only; otherwise, there is a political cost. Its use is therefore a matter of legitimacy and not, *a priori,* of arbitrariness.

4.1 The notwithstanding clause: an exceptional mechanism

Contrary to popular belief, the notwithstanding clause is not unique to the Charter. Several international instruments have a notwithstanding clause,[74] which requires an emergency context for its use and imposes specific conditions. Australia has incorporated a similar clause,[75] requiring that "exceptional circumstances" justify its use. All such clauses share a requirement for exceptional circumstances. Canada is no exception: the use of the notwithstanding clause remains extremely rare, apart from its systematic application in Quebec following the challenges

[74] See, for example*, International Covenant on Civil and Political Rights,* December 19, 1966, 999 UNTS 171 (entry into force: March 23, 1976), art. 4.
[75] *Charter of Human Rights and Responsibilities Act 2006* [Australia], s. 31(1)).

to the repatriation of the Constitution in 1982.[76] In 1981, Jean Chrétien described the clause as a "safety valve" to be used only "in non-controversial circumstances,"[77] acknowledging the significant political cost inherent in its use.[78]

In practice, the seriousness of a truly exceptional situation may justify the use of the notwithstanding clause but its use cannot be assumed to be arbitrary. For instance, Quebec's decision to protect the French language reflects an identity deeply rooted in its history, and the decline of French is evident.[79] It would be excessive to deny any legitimacy to the use of the notwithstanding clause, provided that its use remains limited to exceptional, clearly defined circumstances.

4.2 Defining the boundaries of the notwithstanding clause

The exceptional nature of the clause is not a guarantee in itself: this implicit framework presupposes conditions of use that extend beyond the purely formal requirements recognized by the judiciary. Professor MacKay argues that legislators and the constitutional framework deserve the benefit of the doubt, provided the clause is not used to suppress the legitimate aspirations of a genuinely marginalized group.[80] Quebec's Bill 21 offers a telling example.

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[76] Fascicule 5*, supra* note 15.
[77] Canada, *The notwithstanding clause of the Charter,* Ottawa, Library of Parliament, August 22, 2024, p. 5.
[78] Department of Justice Canada, *supra* note 3, p. 6.
[79] Canadian Press, "La nouvelle ministre des Langues officielles reconnaît le déclin du français au Québec," *Radio-Canada*, December 20, 2024, online: https://ici.radio-canada.ca/nouvelle/2128607/declin-francais-quebec-ministre-langues.
[80] LOP, *supra* note 8, p. 11.

The democratic concern with the notwithstanding clause lies less in its use than in the context in which it is invoked. Its preventive use, pre-empting both judicial and public debate, sits uneasily with the spirit of the rule of law, putting "an end to dialogue before it has even begun."[81] In the case of Quebec's Bill 21, Minister Jolin-Barrette refers to the simple necessity of formal conditions as a requirement of the notwithstanding clause, framing its preventive use as a "choice"[82] justified by his party's electoral mandate. In such a context, public hearings and commissions risk becoming symbolic exercises in legitimacy, at odds with the advancement of minority rights since 1988,[83] progress that reflects both legal and social evolutions no longer aligned with the conditions once invoked to legitimize its use.

Moreover, defending abstract principles without consistency or without seeking to mitigate impacts on minorities places the legislature in as questionable a position as the courts. To invoke the clause in the name of secularism, whose legal and historical underpinnings remain contested, raises doubts as to its truly exceptional nature. However desirable and legitimate secularism may be, it is an abstract principle that can be expressed in ways other than through an emphasis on "appearance."[84] Compelling someone to remove their veil, or miniskirt for that matter, does not in any way alter their beliefs, nor does it guarantee the impartiality expected of a state that claims to be governed by the rule of law.

In short, the legitimacy of invoking the notwithstanding clause must rest on substantial conditions: a clear justification rooted in exceptional circumstances, a rationally legitimate cause, genuine public debate and respect for the aspirations of marginalized groups. Absent these

[81] Consultations on Bill 21, supra note 54, p. 29.
[82] Ibid.
[83] Ibid, p. 27.
[84] *Bill 21, supra* note 2, s. 3.

safeguards, the notwithstanding clause risks becoming less a check and balance than an instrument of circumvention, undermining the very principles it purports to uphold.

Conclusion

This essay has explored the legitimacy of the notwithstanding clause in section 33 of the Canadian Charter. After setting out its formal requirements, it highlighted the tension between the abstract ideal of fundamental rights, entrusted to judicial interpretation, and the potential drift of democratic will. In sum, the argument advanced here is that, while recourse to the clause must remain exceptional, its legitimacy rests on a genuinely democratic constitutional framework rooted in consultation and debate and must reject any preventive or arbitrary invocation.

As mentioned in the introduction to the winning essay of 2007, the theory of dialogue offers a useful starting point. This theory views the relationship between courts and legislatures under the Charter not as adversarial but as constructive, fostering public debate.[85] True democracy, however, requires debate and the genuine airing of dissenting voices: fans of *12 Angry Men* will smile at this reference. But the rigidity of this theoretical framework minimizes the role and power of the people, whose representation through elected officials remains a reductive fiction. Challenging the mechanisms of positivist law, Malkevik reminds us that the "last word"[86] must rest with the "owners of the law,"[87] the ultimate expression of democracy. Because the Charter embodies abstract identity values, the people themselves must demand clear limits and conditions around the use of notwithstanding clause, which ultimately belongs to them.

[85] Mary T. Moreau, "La Charte canadienne des droits et libertés comme instrument de dialogue entre le tribunal et le législateur" (2007) 2 R Intl d'études canadiennes 319, pp. 320–321.
[86] Malkevik, *supra* note 40, 2010, at p. 13. [Translation]
[87] Ibid., p. 27. [Translation]

A dialectical lens invites us to recognize that a proposition can be both true and false. Applied to the notwithstanding clause, this means its use can appear legitimate yet remain unjustified when the implicit conditions of its use are ignored. The clause is at once a vehicle for new aspirations, reshaping the *Charter of Rights and Freedoms* through successive demands, and an argument rooted in passion. It represents a choice to respect minorities as citizens rather than treat them as collateral damage. At least in theory, these values are consistent with the aspirations of the people, the legislature and the judiciary alike.

References