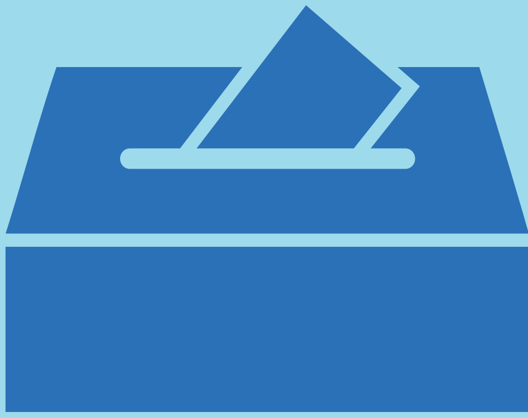

Democracy
AND THE
Rule of Law

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Legal Information for Everyone

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Democracy AND THE *Rule of Law*

2018 (Version 1.0)

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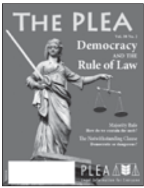

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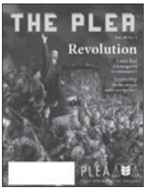

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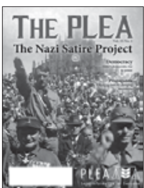

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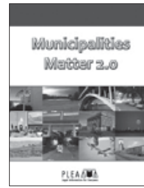

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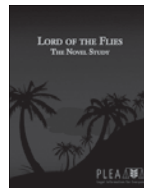

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Introduction

Democracy isn't doing so well. The Economist Intelligence Unit, a global provider of economic and political analysis, reported in 2018 that the democratic health of 89 countries is in decline. From Poland to Venezuela to the United States, elements important to democracy—fair electoral processes, freedom of the press, and the rule of law—are under threat.

To ensure that democracy works for all of us, we need to understand what democracy is, how democracy works, and how checks and balances keep the powerful in check. This learning resource can help accomplish these goals.

Democracy and the Rule of Law is written for Saskatchewan's Law and Social Science classrooms. Using Jerome Bruner's concept of instructional scaffolding, its seven lessons begin with the idea of democracy, then scaffolds students into understandings about liberal democratic systems of government and the rule of law. Each lesson builds new understandings while reinforcing concepts established in earlier lessons.

Lessons in this resource include:

- step-by-step instructions, including objectives, procedures, and discussion questions
- a student handout
- a case study to help demonstrate—in either a Canadian or an international context—the strengths and weaknesses of democracy and the rule of law
- links to further resources for teachers wishing to reinforce the lesson topic.

The ultimate objective is to help teach high school students how the rule of law supports democracy, and how democracy supports the rule of law.

Of course, no learning resource is perfect. Because teachers are closest to the learning taking place in Saskatchewan's classrooms, your feedback on *Democracy and the Rule of Law* is welcomed and valued. Email questions and comments to **plea@plea.org**.

LESSON ONE: What is Democracy?

OBJECTIVE

Students will learn about the concept of democracy. This lesson will be a foundation for understanding the norms of modern western liberal democracy.

PROCEDURES

1. Brainstorm with students what democracy means to them. Write varied answers on the board.

2. Engage in a conversation that narrows the list to two definitions.

3. Have students vote on what they believe to be the best definition of the two.
   a) Did the winning definition receive all of the votes?
   b) What does the victory and the process that led to it tell us about democracy?

4. To better establish the idea that it is hard to narrow down a precise definition of democracy, distribute and read the handout *Defining Democracy*.

   KEY QUESTION

   - **It is often said that in a democracy, the majority gets its way but the minority has its say. Why is this principle important to democratic rule?**

5. Assign Think questions. Teachers may wish to break students into discussion groups to tackle each question.

CASE STUDY

6. *Indigenous People and the Right to Vote* explores the slow expansion of voting rights for Indigenous people in Canada's federal elections.

FURTHER EXPLORATION

7. Teachers wishing to more deeply explore definitions of democracy should check out *Lesson 1.1: What is Democracy* in *Our Government, Our Election*. Find it at **teachers.plea.org.**

HANDOUT:

Defining Democracy

In a democracy, the people rule. This is the very meaning of the word democracy. In Greek, *demos* means people and *kratein* means rule.

At first glance, the idea of democracy seems simple. The people rule. However, the more we think about this concept, the more complicated it becomes. Surely not every person can rule. If not, then who actually rules?

To understand who actually rules in a democracy, we need to look more closely at the origins of democracy. Our first stop will be the original democracy: Athens of 5th century BC.

Athens and Direct Democracy

In ancient Athens, democracy meant that citizens would assemble in the public square to debate policies, vote on laws, and choose public officials. This type of democracy—where everybody directly participates in all law-making—is called *direct democracy*.

Athenians took their direct democracy seriously. The city-state even paid citizens a day's wages to attend the assembly. However, not everybody who lived in Athens could participate in direct democracy. Only free males 20 or older—an estimated 10-20% of the population—had the right to participate in political rule.

Direct democracy could work in a small city-state like Athens. However, numbers alone make it unlikely that modern-day Canada could be governed like ancient Athens. Consider that:

- Canada's population is about 100 times bigger than Athens, and
- virtually every adult Canadian has the right to vote.

Because there are so many voters in Canada today, it would be impossible for Canada's 25 million voters to assemble into a single square to debate and vote on laws.

Could technology solve this problem? Perhaps, though an online debate amongst 25 million people would be unwieldy.

Direct democracy in Canada would also be difficult because the Canadian government has more responsibilities than the ancient Athenian government had. The Athenian government was only responsible for a handful of issues. On the other hand, modern governments oversee countless issues. From taxes on junk food to evacuation rules for aircraft, government plays a huge role in our lives. Would Canadians have the time to thoroughly understand and vote on *every* law and policy of the land?

These reasons illustrate why it would be almost impossible to govern Canada today as a true, direct democracy.

Rome and Representative Democracy

Because direct democracy is difficult to achieve, many countries rely on *representative democracy*. Representative democracy first appeared in ancient Rome, around the same time that direct democracy appeared in Athens.

In a representative democracy, citizens elect representatives who will govern on their behalf. These elected representatives assemble to consider and vote on laws and public policies. Representative democracy allows citizens to have a say in governing, without citizens needing to be directly involved in every issue.

Elected representatives have many responsibilities. They must understand how government works. They must understand proposed laws. And most importantly, they must represent the collective views of their constituents.

Periodic elections ensure that citizens have the opportunity to pass final judgment on their representatives.

Today, almost every democracy in the world is a representative democracy. In Canada, municipal councils, provincial legislatures, and the House of Commons are all representative democracies.

The Majority Gets Its Way

Regardless of whether it is direct democracy or representative democracy, democracy—the people rule—does not mean that every single person will get their way. Democracy means that each individual's vote should count equally. When all the votes are counted, the will of the majority should be enacted.

As societies have advanced, so too has the understanding that the will of the majority cannot be left unrestrained. Today, the consensus is that the majority should only get their way so long as their desires do not trample the rights of minorities.

THE RIGHT TO VOTE

Virtually every adult Canadian has the right to vote. However, it was not always this way. Barely 100 years ago, many citizens were excluded from voting. Women, many minorities, prisoners, younger adults, people with mental illness, and people without property were not allowed to vote. Gradually, these restrictions were lifted. The most recent recognition of voting rights came in 2002, when the Supreme Court recognised that prisoners must have the right to vote.

THINK

1. Life is complex. Very few issues are black and white.
   a) Is the average citizen capable of fully understanding every issue and law that governments consider?
   b) Are politicians capable of fully understanding every issue and law that they consider?

2. Proposed laws are reviewed by specialised government committees. Committees try to ensure that:
   - proposed laws are written using the best research
   - proposed laws will achieve their intended public policy objective.

   To help build these understandings, the committees interview and hear testimony from experts in relevant fields.
   a) Does all this scrutiny necessarily mean that the best laws will be passed?
   b) Why do you think inadequate laws are sometimes passed?

3. We live in a representative democracy. However, direct democracy still exists. Sometimes, voters directly decide an issue through referendums or plebiscites.
   - Referendums are binding votes. The result of the vote must be respected. For example, in 1992 a national referendum on reforming Canada's constitution took place. Voters rejected the reforms. The constitutional changes were shelved.

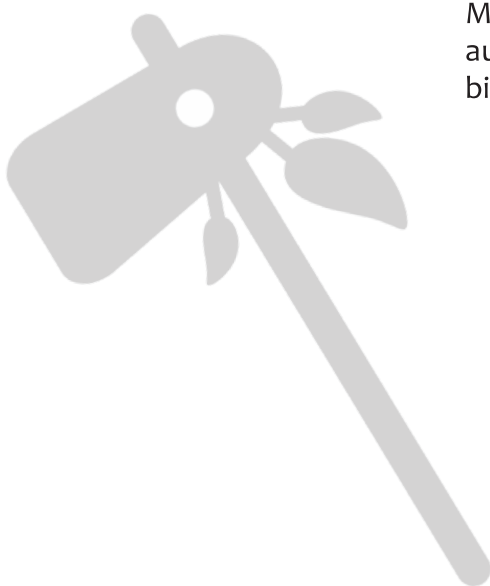
   a) What are the benefits and drawbacks of holding a binding referendum?
   - Plebiscites are non-binding votes. The government only needs to consider the results. For example, in 1991, Saskatchewan held a plebiscite on whether or not abortion procedures should be publicly-funded. People voted 63% in favour of defunding abortion procedures. However, the government refused to respect the result of the referendum. One of the many reasons they cited was that defunding abortions was discriminatory against women.

   b) What are the benefits and drawbacks of holding a non-binding plebiscite?

4. In a representative democracy, people are often elected into office based on their party affiliation.
   a) Do voters start with opinions or beliefs, then choose a party that best reflects their opinions and beliefs? Or do voters start with a party, and use the party's position as the basis for their opinions and beliefs?
   b) How do you form your opinions and beliefs?
   c) How can you know if your opinions and beliefs are on stable ground?

CASE STUDY:

Indigenous People and the Right to Vote



Indigenous people have not always had the right to vote in Canada's federal elections. The pathway to recognising this right has been complex.

Before Confederation: A Patchwork of Rules

Before Confederation, there was a patchwork of rules determining voter eligibility. Each colony of British North America had its own set of rules. In most colonies, Indigenous people were not explicitly restricted from voting. However, voter eligibility was determined through land ownership, British citizenship, and/or the ability to read and write English. These requirements excluded most Indigenous people from voting.

1867-1898: Growing Restrictions

Following Confederation, each province of the newly formed Dominion of Canada retained the right to determine who was eligible to vote in all elections: provincial, municipal, and federal. However, the federal government took control of many Indigenous voting rights in 1876, when the *Indian Act* came into force.

Anyone defined as "Indian" under the *Indian Act* did not have the right to vote in federal elections. "Indians" could only gain the right to vote if they gave up their Indian status, had completed a university degree, became a doctor or lawyer, or joined the clergy.

Nine years later, in 1885, the Conservative government of Sir John A. Macdonald proposed a sweeping electoral reform bill. Macdonald wanted the federal government to have complete authority over federal elections. Included in Macdonald's reform bill were proposals to:

- extend the right to vote to single women and widows, and
- extend the right to vote to Indigenous people.

Opposition to Macdonald's bill was widespread. He was forced to withdraw several of his most radical proposals in order to get it passed. Voting rights for women were taken off the table. As well, the right to vote for Indigenous people was limited to Indigenous people who lived outside of:

> Manitoba, British Columbia, Keewatin, and the North-West Territories, and any Indian on any reserve elsewhere in Canada who is not in possession and occupation of a separate and distinct tract of land in such reserve, and whose improvements on such separate tract are not of the value of at least one hundred and fifty dollars.

In other words, almost no Indigenous person gained the right to vote in a federal election under Macdonald's reforms.

The few Indigenous people who were given the right to vote under Macdonald's 1885 reforms had their rights taken away by Wilfred Laurier's Liberal government in 1898. Laurier reinstated the voting restrictions of the *Indian Act*.

1898-1960: Small Changes

Only two changes to Indigenous voting rights happened between 1898 and 1960. In World War I, the law was changed so that Indigenous people who fought for the armed forces would gain the right to vote. And in 1950, Inuit people were given the right to vote. Lawmakers of the day classified Inuit people as "ordinary citizens" because they did not have treaties or live on reserves.

1960: Major Change

When John Diefenbaker came to power in 1957, he was determined to increase the influence of Indigenous people in Ottawa. He nominated James Gladstone as the first Indigenous senator in Canada, and he changed voting laws, giving the right to vote to people defined as "Indian" under the *Indian Act*.

It may seem peculiar, but not many Indigenous people were particularly interested in having the right to vote. Reasons included:

- Some Indigenous people distrusted the government's motives. They feared that the right to vote would take away treaty rights, or their status under the *Indian Act*.
- Some Indigenous people felt that they were not properly consulted about the change.
- Some Indigenous people believed the federal government's energies should be spent addressing pressing socio-economic issues.

For example, an article in the January 19, 1960 *Ottawa Journal* recounted a meeting at the St. Regis Mohawk Indian Reserve, now known as the Mohawk Nation of Akwesasne. Attendees "left no doubt they wanted nothing to do with White Man's elections." Community members carried banners with such inscriptions as "Diefenbaker Drop Dead," "Would you throw your rights away," "Senator Gladstone is a yes-man for Ottawa," and "Ottawa, did you run out of beads?"

Facing such opposition, Diefenbaker worked hard to assure Indigenous people that his motives were based on a long-standing commitment to increasing rights and justice for Indigenous people. Diefenbaker told Maisie Hurley, the editor of *The Native Voice*, that "I most solemnly assure them that the exercise of this right can and will in no way affect the other rights or the status which our Indian people enjoy."

At the time of Diefenbaker's voting reforms, at least 122 Indigenous people had given up their Indian status in exchange for the vote. The government assured people who surrendered Indian status that they would regain their status when the law changed.

When Indigenous people gained the right to vote, public opinion was muted. Nobody thought much of the accomplishment, including many people in Indigenous communities. It took several years before Indigenous turnout in federal elections rose to significant levels.

Even today, the right to vote in Canada's federal elections is not universally viewed by Indigenous people as desirable. For example, Pamela Palmater, a Mi'kmaq lawyer and Associate Professor in the Department of Politics and Public Administration at Ryerson University, has said that voting is further assimilation. Palmater argues that it undermines the ability for Indigenous people to gain recognition as distinct nations, to make claims of genocide under international law, and to negotiate treaties with the Canadian government.

DISCUSS

1. According to Elections Canada's *History of the Vote in Canada*, suspicions remain that Sir John A. Macdonald inserted voting rights for Indigenous people and women in his 1885 reform bill "as a sacrificial lamb, never intending that it survive final reading of the bill."

   What do you think? Was Macdonald serious about extending voting rights to women and Indigenous people? Can we ever really know?

2. John Diefenbaker discusses his relationships with Indigenous people in his memoirs *One Canada*, beginning with the positive experiences his family had with Indigenous neighbours when they first moved west in 1903. Diefenbaker says that "I felt it most unjust that they were treated as less than full citizens of Canada, that they did not have the vote."
   a) Was Diefenbaker doing the right thing in extending the franchise?
   b) Did he go about it in the right way?

3. How did voting rights for Indigenous people change their relationship with the Canadian state?

LESSON TWO: What is Liberalism?

OBJECTIVE

With a basic understanding of democracy established, students will learn about two philosophical underpinnings of democracy in Canada: reason and individual rights.

PROCEDURES

1. Provide students with the following definition of reason, from the Oxford English Dictionary:

   Reason is the power of the mind to think, understand, and form judgments by a process of logic.

   Ask students to review their answers to question 4b) and 4c) in *Defining Democracy*, from Lesson One. What role does reason play in how they form opinions and beliefs?

   NOTE: Teachers may wish to connect this discussion with dialectic essay requirements in senior Social Studies, or other tools they use for teaching logic and decision-making.

2. To establish the idea that our society subscribes to a broad set of philosophical values that encourages reason, distribute and read the handout *Defining Liberalism*.

   KEY QUESTION

   - **How does listening to others help facilitate reason?**

3. Classic liberalism emphasizes the individual over the group. However, we are all individuals as part of a society. Have students form groups to discuss this idea. The following question can help to guide discussion:
   - What should take priority in society: the individual or the collective?

4. After students report their findings about the individual and the collective, lead class discussion on the following question:
   - What did this group work tell us about the importance of the individual and the importance of the collective?

CASE STUDY

5. *Partisanship, Reason, and Climate Change* explores the role of partisanship and the role of reason in debates surrounding climate change.

FURTHER EXPLORATION

6. Teachers wishing to further explore how Canadians balance individual rights with collective well-being should check out *Lesson 1.3: Public Goods and Services* in *Our Government, Our Election*. Find it at **teachers.plea.org**.

HANDOUT:

Defining Liberalism

The word liberal has many meanings. It can describe everything from a generous spirit to questionable morals. The word's many uses can make it difficult to understand what people mean when they use the word liberal.

When liberal is used in a philosophical context, it is easier to define. Liberal is rooted in the Latin word *liber*, which means free. Being free is the basis of liberal philosophy.

Liberal philosophy flourished in the 17th century, when philosophers such as John Locke, John Stuart Mill, and Adam Smith began to think of what it meant to be free. Work such as theirs led to the development of modern liberalism.

Liberalism generally includes two beliefs:

1. the value of science and reason for making objective decisions, and
2. individuals can maximise their potential if they are free from coercion.

In short, liberalism emphasizes reason and individual rights.

Canadians widely accept liberal values. In fact, every major Canadian political party falls under liberalism's philosophical umbrella, accepting the importance of reason and individual rights. Broadly speaking, the Liberal Party of Canada is just as committed to the values of liberalism as the Conservative Party, the Green Party, and the New Democratic Party.

To be sure, Canada's political parties have differences—differences that are sometimes profound—but no major Canadian political party is foundationally committed to overturning the liberal norms of reason and individual rights.

Considering Reason and Individual Rights: John Stuart Mill

John Stuart Mill has guided much of our modern thoughts on liberalism. His most famous book on the topic is *On Liberty*. Written in 1859, the values it outlines remain important to Canada today.

On Liberty and Reason

Mill believed in the importance of hearing out all viewpoints in order to make a decision:

> He who knows only his own side of the case, knows little of that. His reasons may be good, and no one may have been able to refute them. But if he is equally unable to refute the reasons on the opposite side; if he does not so much as know what they are, he has no ground for preferring either opinion.

Mill went on to say that it is vital to hear counterarguments from the actual source:

> Nor is it enough that he should hear the arguments of adversaries from his own teachers, presented as they state them, and accompanied by what they offer as refutations. [Instead] he must be able to hear them from persons who actually believe them.

In other words, Mill believed that you must hear out a person in their own words. Only then can you make a reasoned conclusion about their views.

On Liberty and Individual Rights

Mill believed in the importance of preserving an element of unrestrained individuality in people:

> There should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself.

In other words, Mill believed that if what you do does not harm others, you should be free to do it.

THINK

1. Classic liberalism asks that people use science and reason to make the most objective decisions possible. However, we are all limited in how much we can know, and how objective we can be.
    a) How can you know you have enough information to make a decision?
    b) How can you know that your information is reliable?

2. If a person only "hears the arguments of adversaries from his own teachers," do they truly know the situation?

3. Are there times when another person's viewpoint is so unreasonable, it does not warrant being heard out?

4. Why are empathy and human decency key to any system of decision-making?

CASE STUDY:

Partisanship, Reason, and Climate Change

In 2018, former US President Barack Obama delivered the Sixteenth Annual Nelson Mandela Lecture. Nelson Mandela was the South African who led the fight against that country's racist apartheid regime. Obama's lecture, "Renewing the Mandela Legacy and Promoting Active Citizenship in a Changing World," focussed on how we can bridge divides, work across ideological lines, and resist oppression and inequality.

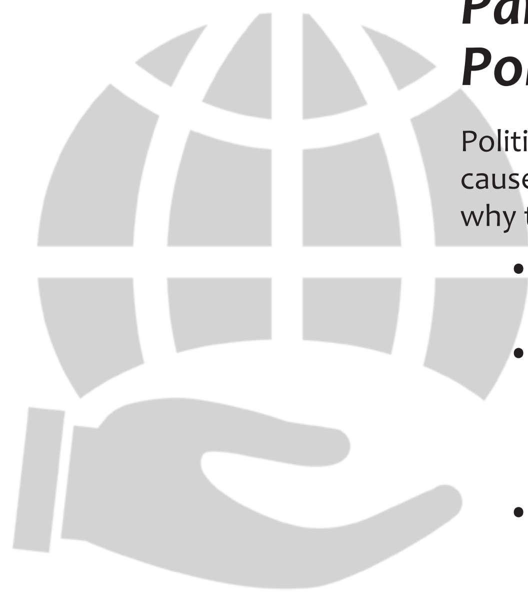
In his speech, Obama said:

> Most of us prefer to surround ourselves with opinions that validate what we already believe. You notice the people who you think are smart are the people who agree with you. Funny how that works.
>
> But democracy demands that we're able also to get inside the reality of people who are different than us so we can understand their point of view. Maybe we can change their minds, but maybe they'll change ours.
>
> And you can't do this if you just out of hand disregard what your opponents have to say from the start.

What Obama said is true. When people refuse to even listen to their opponents, society's ability to use reason is hurt. The concept Obama was critiquing in his speech was partisanship.

Partisanship, according to the Cambridge Dictionary, is "strongly supporting a person, principle, or political party, often without considering or judging the matter very carefully." Partisanship often leads people to focus on *who* is making the proposal, not *what* the proposal says.

Partisanship, Laws and Public Policies



Political scientists and psychologists have shown that partisanship causes people to throw aside reason. There are many explanations why this happens, including:

- People are tribal. They try to fit in with their own political group. Opponents are narrowly cast as "others."
- People believe that they come to their own views through careful, dispassionate, and thoughtful analysis. Opposing views are nothing more than the result of weak and partisan analysis.
- People generally do not have the knowledge needed to fully evaluate complex public policies. They often default to the judgment of leaders who they already agree with.

Of course, not all people are blind partisans. However, the more that we fall into partisan thinking, the more likely it is that good ideas will be opposed, regardless of merit.

Climate Change, Partisanship, and Political Psychology

Psychological science researchers Leaf Van Boven, Phillip J. Ehret, and David K. Sherman looked at the impact of partisanship on reason. Their study "Psychological Barriers to Bipartisan Public Support for Climate Policy" revealed problems with partisan approaches to climate change.

The study first looked at American attitudes towards climate change. They found that the vast majority of Americans of all political stripes believe that climate change is real. Across several surveys, roughly 90% of Democrats, 85% of people with no party affiliation, and 70% of Republicans believe that climate change is real.

The finding—the majority of people, regardless of political preference, believe in climate change—stands in contrast to what we see on newscasts and in social media. There, you could get the impression that everyone on the left believes that climate change is real, and everyone on the right is a climate change skeptic. This is not the case.

However, climate change skeptics receive proportionally more airtime and attention in the media than their numbers warrant. This creates a misperception about the climate change debate.

The Experiment

Knowing that the vast majority of people across the political spectrum believe that climate change is real, researchers wanted to know:

> What would happen if Democrats were asked to evaluate Republican proposals to fight climate change, and what would happen if Republicans were asked to evaluate Democrat proposals to fight climate change?

In other words, how would partisanship impact people's judgement about climate policies?

Democrats who were given a Republican proposal to fight climate change overwhelmingly rejected the idea. However, if they were told it was a Democrat proposal, they overwhelmingly approved of the idea. Partisanship guided Democrats' reasoning.

The same was true of Republicans. Republicans who were given a Democrat proposal to fight climate change overwhelmingly rejected the idea. However, if they were told it was a Republican proposal, they overwhelmingly approved of the idea. Partisanship guided Republicans' reasoning, too.

This finding led the researchers to say that "the problem, it appears, is not that Republicans are skeptical of climate change. The problem is that Republicans are skeptical of Democrats—and Democrats are skeptical of Republicans."

Overall, the study suggests that if people could look beyond their own tribes, and reasonably consider the drawbacks and merits of the solutions put forth by their political opponents, society would have a better chance of fighting climate change.

DISCUSS

1. Climate scientists overwhelmingly agree that climate change is real. However, the number of climate change skeptics is growing.
   a) Do you think the growth in skepticism is due to the minority viewpoint being given disproportionate voice?
   b) What are the benefits of giving disproportionate voice to a minority viewpoint?
   c) What are the drawbacks of giving disproportionate voice to a minority viewpoint?
   d) When should minority viewpoints be given a disproportionately large voice?

2. We rely on experts to help us understand issues we can never fully comprehend. How can we determine which experts are the most trustworthy?

3. Look into the influence that oil companies and lobby groups have on the climate change debate. By creating doubt, are they promoting reason? Or do they have other motives in mind?

4. Why do climate change skeptics receive a disproportionately large share of media coverage?

LESSON THREE: What is Liberal Democracy?

OBJECTIVE

Students will combine their understanding of democracy with their understanding of liberalism. This will establish the idea of liberal democracy.

PROCEDURE

1. Review the concept of reason, discussed in Lesson Two.
   - Do people always act with reason?

2. To establish the value of reason in democratic decision-making, distribute and read the handout *What is Liberal Democracy*.

   KEY QUESTION

   - **How do the principles of liberalism help ensure that in a democracy, the majority gets its way but the minority has its say?**

3. Discuss with or have students research major changes that have taken place in Canadian society. Ideas could include the introduction of universal health care, the legalisation of marijuana, women achieving the right to vote, or the legalisation of same-sex marriage. For each change, have students ask:

   > How did the values and processes of liberal democracy (ie: freedom of expression, freedom of worship, and freedom of the press, along with orderly processes to create laws) help make these changes happen?

4. In *Chapters on Socialism*, John Stuart Mill wrote:

   > *The future of mankind will be gravely imperiled, if great questions are left to be fought over between ignorant change and ignorant opposition to change.*

   Discuss this quote. How can we constructively participate in public discussions?

CASE STUDY

5. *Liberal Democracy and the Rise of Naziism* explores how the values of liberal democracy fell apart in 1930s Germany.

FURTHER EXPLORATION

6. Teachers wishing to explore the ways that Canadians can influence and change our laws and institutions should check out *Lesson 7: Speak Out!* in *Municipalities Matter*. Find it at **teachers.plea.org**.

7. Teachers wishing to explore radical change in societies should check out *The PLEA: Revolution*. Find it at **teachers.plea.org**.

HANDOUT:

Defining Liberal Democracy

The *Constitution Act* says that Canada shall be a country of peace, order and good government. This statement has a particular legal meaning, relating to federal authority over provincial governments.

Beyond its specific legal meaning, peace, order and good government has become something of a Canadian catch phrase. The words are used to explain Canada's political stability.

One reason why peace, order, and good government has prevailed in Canada is our embrace of liberal democracy.

What is Liberal Democracy

Liberal democracy combines the ideas of liberalism and democracy. Political scientist Yascha Mounk describes the combination of liberalism and democracy in his book *The People vs. Democracy*:

- A democracy is a set of binding electoral institutions that effectively translates popular views into public policy.
- Liberal institutions [such as Parliament and the Courts] effectively protect the rule of law and guarantee individual rights such as freedom of speech, worship, press, and association to all citizens, including ethnic and religious minorities.
- A liberal democracy is simply a political system that is both liberal and democratic—one that both protects individual rights and translates popular views into public policy.

In other words, liberal democracies such as Canada enact the popular will, but also protect minority and individual rights.

Liberal Democracy and the Charter of Rights and Freedoms

Canada's embrace of liberal democracy is reflected in the *Charter of Rights and Freedoms*. The Charter grants Canadians individual rights such as freedom of expression, freedom of worship, and freedom of the press.

The Charter also recognises that we are individuals as part of a larger society. This is why the Charter affirms our rights to freedom of association. We have the right to gather together in groups of common belief. From political parties to religious groups to environmental clubs, our rights to be part of a group are protected by the Charter.

Liberal Democracy and the Western World

Canada is not alone in subscribing to liberal democracy. Liberal democratic values have been embraced across the western world, from the United States to New Zealand. Even the so-called Nordic social democracies of northern Europe, such as Finland and Norway, generally follow the principles of liberal democracy. Nordic social democracies, however, often emphasise wider social goals over individual rights.

Liberal democracies emerged because citizens fought for liberal values. To meet the public's demand, liberal democratic constitutions and institutions were created. However, there is no guarantee that liberal democracy is here to stay. Laws and institutions are human constructs. Just as they have been built up, they can be torn down.

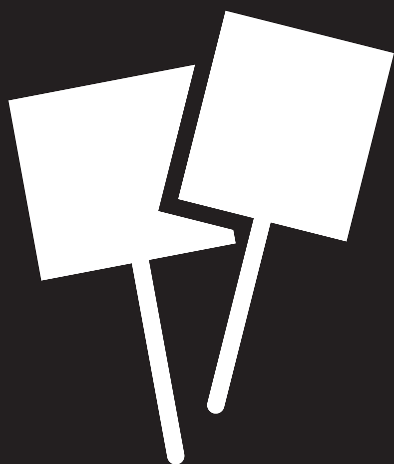
ORDERLY CHANGE IN LIBERAL DEMOCRACY

Canada's liberal democratic laws and institutions are not perfect. While society has been generally progressing, we do not have to look far to see unnecessary poverty, suffering, environmental degradation, and discrimination in all its forms. This is not right.

Liberal democracies have mechanisms to help alleviate these problems. Laws and institutions can be changed to better serve the public. However, we often have to push hard to get the change we want.

If we believe that there is something wrong with society, ways to lobby for change include:

- voting
- sharing opinions with our friends, neighbours, and elected representatives
- forming or joining public interest groups (also known as civil society groups) that lobby for change
- forming or joining political parties
- peacefully protesting
- running for public office



Studies have shown that the general public is far more likely to support a movement for change if the movement follows accepted methods, and uses peaceful means.

When citizens lobby for change, it sends a signal to several different groups in society:

- like-minded people, who may be reluctant to voice their opinion, learn that others share their beliefs
- average citizens become aware of important issues
- people in power learn about the desire for change

THINK

1. In 1920, Canadian author Stephen Leacock made this statement about liberal democracy:

   > *A man has just as much right to declare himself a socialist as he has to call himself a Seventh Day Adventist or a prohibitionist, or a perpetual motionist. It is, or should be, open to him to convert others to his way of thinking. It is only time to restrain him when he proposes to convert others by means of a shotgun or by dynamite, and by forcible interference with their own rights.*

   a) Why must individuals, groups, and the press be free to express their viewpoints?

   b) Where is the point when freedom to express an idea should be constrained?

2. Liberal democracies are open to criticism, and open to change.

   a) What flaws do you seen in our current society?

   b) What improvements would you make to fix these flaws?

   c) What methods do you have at your disposal to make this change happen?

3. What happens to a society if change is dictated from above, rather than being the result of the demands of people below?

4. Are there times when political change must be dictated from above, disregarding the will of the majority?

5. According to the Canadian Encyclopedia, "peace, order and good government" has come to be seen as the Canadian counterpart to the American "life, liberty and the pursuit of happiness." Discuss the similarities and differences between these two phrases.

6. Do you think Canada is a country of peace, order and good government? Explain.

CASE STUDY:

The Rise of Naziism and the Destruction of Liberal Democracy

Democracies across the western world are in decline. According to a study in the journal *Democratization*, democracy is on the decline in 24 countries, home to 2.6 billion people. From India to the United States to Poland and beyond, the rule of law, freedom of the press, and freedom of expression are in decline. And recent events suggest that liberal democracy in Canada is not immune to the creeping power of authoritarian, anti-democratic forces.

Liberal democracy's recent decline is not unprecedented. Democracies have fallen in the past: perhaps the most dramatic breakdown of a liberal democracy in modern history was the breakdown of the German Weimar Republic, in the period between World War I and World War II. The Weimar Republic was replaced by the Nazi regime.

How the Nazis Came to Power

There are many theories about how the Nazis came to rule Germany. Some historians point to the Treaty of Versailles, Germany's peace agreement with the Allies following World War I. The treaty's compromises battered national morale, and are said to have weakened the German economy. Others point to Black Friday, the 1929 stock market crash that triggered the Great Depression. Germany was hit particularly hard due to its economic ties with the United States. And others point to street violence between battling political factions. Some German political parties created paramilitaries who engaged in widespread street fighting.

Like almost all things in life, there is no single explanation for how the Nazis came to power. All of these factors—and many more—had a role in facilitating the rise of Naziism in Germany.

One factor in Naziism's rise was a lack of political consensus in Germany. Following World War I, Germans never came to a consensus on the big ideas about how their democracy should operate. The country, informally known as the Weimar Republic, had its post-war constitution largely imposed upon it by the Allies.

The Weimar constitution attempted to shape Germany as a liberal democracy, similar to France or the United States. Germany's liberal post-war constitution imposed many changes on Germany, such as allowing for freedom of expression.

Because the constitution was imposed on Germany, many people viewed the expansion of liberal rights as not an organic development, but rather the imposition of foreign values. This led many people to resent the liberal changes that they were seeing in German society.

Further frustrating German citizens was that economic power largely remained in the hands of a few monopolistic capitalists.

Even though the Weimar Republic guaranteed individual rights, people felt the elite had too much control of society.

Germany's morale, unity, and economic problems spawned radical criticism. Like most liberal democracies—such as Canada or the United States today—Germany's post-war constitution allowed radical criticism to take place in the public sphere. Many small political parties and fringe groups emerged, all competing for power.

In theory, radical criticism is not necessarily a bad thing: it often helps to actualise needed social change. However, in Germany, the leading criticism on the far right came from a particularly dangerous group, the Nazis.

Who Were the Nazis?

The Nazis were a political party formally called the *Nationalsozialistische Deutsche Arbeiterpartei*. In English, this means the National Socialist German Workers' Party. It formed in 1920. Even though they called themselves socialist, there was very little that was socialist about the party. Nazi leader Adolph Hitler appropriated the word socialist as a matter of fashion to take advantage of the ideology's popularity at the time.

The term Nazi was used by opponents of the party, due to the word's informal link to foolishness and clumsiness. The Nazis promised to restore Germany to its former greatness. Underpinning this promise was a racist and anti-democratic worldview. According to historian Jeremy Noakes, Nazis believed that Germany's problems were:

> fostered and exploited by the Jews through the doctrines of Liberalism with its emphasis on the priority of the individual over the community, [and the result of] democracy with its subordination of the 'creative' and 'heroic' individual to the mass, and of Marxism with its advocacy of class war.

Put more simply, Nazis contended that the well-being of regular German citizens was being harmed by forces out of their immediate control, and liberal democracy was enabling it.

This critique first appeared destined for failure. The Nazis captured only 3% of the vote in Germany's 1928 federal election. However, as German instability grew—especially economically with the onset of the Great Depression—so too did the Nazi vote. A series of elections between September 1930 and March 1933 saw Nazi support increase dramatically.

Nazis in Power

In July 1932, the Nazis became the largest party in the Reichstag, Germany's proportionally-representative parliament. They took 37% of the popular vote. By January 1933, Hitler was appointed Chancellor of Germany, and began to use the power of office to undermine the Weimar Republic's liberal institutions.

One of Hitler's early moves as Chancellor was to give the Nazi Brownshirts (the paramilitary arm of the Nazi party) the same powers as the police. Brownshirts engaged in anti-liberal activities: breaking up opposition party meetings, physically beating opposition party members, and seizing the assets of their enemies.

Hitler also started to replace key government bureaucrats with Nazi party members. This ensured that the government bureaucracy's first loyalty was to him. Meanwhile, many businesspeople rallied to the Nazi cause, partially out of a fear of the rising power of the Communist party.

Hitler Takes Absolute Control

A fire in the German Reichstag, in February 1933, set the stage for Hitler to take absolute control of Germany. The fire, on the eve of an election, appeared to be a case of arson. Historians are still unsure whether the fire was set by Communists, or whether it was set by the Nazis to manufacture a crisis. Regardless of who started the fire, it created a sense of a national emergency.

Hitler used the Reichstag fire as an excuse to issue the *Decree for the Protection of the People and the State*. The decree stripped Germans of most of their liberal constitutional rights, such as freedom of the press, freedom of association, freedom of expression, and rights to privacy. The Decree remained in force throughout Hitler's reign. The first people to be targeted by this Decree were the Communists, who were blamed for the fire. Over 1,000 were immediately arrested, right before the March 5th election.

In the March election, Nazis were denied an outright majority. They took 43% of the vote and 45% of the seats in the Reichstag. Lacking an outright majority to pass their laws, the Nazis partnered with smaller right-wing parties and physically forced Socialist and Communist representatives out of the Reichstag. This gave them majority control of the legislature.

With majority control of the legislature, Hitler was able to pass the anti-democratic *Enabling Act*. This law ended the requirement that laws be debated and voted on in the Reichstag. Instead, Hitler and his cabinet could simply proclaim laws.

Once the *Enabling Act* effectively disempowered the Reichstag, it only met 19 times. In that time, only seven laws were adopted by it. Hitler's 986 other laws were almost all passed through cabinet proclamations. Amongst these proclamations was the law that banned all political parties except the Nazis. There were a few other laws that were affirmed by national referendums. For example, Germany's withdrawal from the League of Nations was approved by a national vote.

With the *Fire Decree* and the *Enabling Act* in place, civil society and parliament lost their constitutionally-protected powers. There was no more freedom of speech or freedom of assembly in Germany, and legislators no longer voted on proposed laws. The only checks left on Hitler were the courts, and the office of the President.

To bring the courts to his favour, Hitler set up the People's Court. This court had jurisdiction over anything deemed a political offence. The People's Court was established after Germany's Supreme Court acquitted four of the five accused Reichstag arsonists, because there was a lack of evidence. The decision enraged Hitler, so he created a court that would be under Nazi control.

Hitler's last hurdle in his path to absolute power was dismantling the Office of the President of Germany. The President of Germany was an elected position, independent of the cabinet and legislature. The President of Germany had several constitutional powers:

- they could appoint and dismiss the Chancellor and cabinet,
- they were the head of the armed forces, and
- they could rule by special decrees.

When President Hindenburg died in 1934, Hitler declared himself Germany's President, Chancellor, and Head of the Military. He held a national plebiscite looking for public approval of his move. 88% approved, though voter intimidation took place across the country. Nevertheless, some historians believe that even when accounting for voter intimidation, Hitler still had the support of the majority of the country.

Hitler, over the course of a few short years, was able to destroy liberal democracy in Germany. There would be no more individual or minority rights in Germany, and no institutions could act as a check on Hitler's power.

Germany under Nazi Control

Under Nazi control, liberal democracy was replaced by a Nazi view of democracy:

> Every actual democracy rests on the principle that not only are equals equal but unequals will not be treated equally. Democracy requires therefore first homogeneity and second—if the need arises—elimination or eradication of heterogeneity.

In other words, far-right thinkers in Germany believed democracy would only work if everyone was the same. Because everybody was not the same, diversity had to be destroyed.

In the place of a diverse society, the Nazis set to work to create a singular, racially-unified German society called the *Volksgemeinschaft*. To build public support for Hitler's new society, Nazi propaganda minister Joseph Goebbels crafted a new narrative about Germany's greatness, and what it meant to be German. People who were not part of the *Volksgemeinschaft*, such as Jews, Communists, and homosexuals, were cast as "others," not to be tolerated. As well, fears were stoked about threats to Germany's security. These threats helped to psychologically prepare the German population for war.

DISCUSS

1. To gain power, Nazis were particularly effective in motivating non-politically conscious citizens to vote for them. What does the election of the Nazis tell us about the importance of being well-informed before casting a ballot?

2. After the March 1933 election, the Nazi party was flooded with applications for membership. What does this tell us about the nature of ambition and power?

3. Hitler did not destroy Germany's liberal democracy overnight. The removal of rights and freedoms and the dismantling of liberal democratic institutions and constitution happened in steps.
    a) What steps did Hitler take to dismantle liberal democracy?
    b) What does Hitler's rise tell us about the importance of being vigilant observers of our democracy?

LESSON FOUR: What is the Rule of Law?

OBJECTIVE

Students will learn what the rule of law is, and how the rule of law helps to prevent dictatorships, abuses of power, and the tyranny of the majority.

PROCEDURE

1. Ask students to imagine a board game without rules. How would the game unfold? Next, ask students to imagine a society without rules. How would it unfold?

2. Review the definition of democracy (Lesson One) and the definition of liberalism (Lesson Two), then review how these terms come together in a liberal democracy (Lesson Three). Next, draw attention to the rule of law in Lesson Three's definition of liberal democracy. Explain that laws spell out the rules of a society.

3. Distribute and read the handout *Defining the Rule of Law*.

   KEY QUESTIONS:

   - **Why must the rules of a sport or a game be known in advance?**
   - **Laws form the rules of a democracy. Who ultimately makes the laws in a democracy? The people or the government?**

4. Ian Bassin, a former Whitehouse lawyer, said on the podcast *The Good Fight*:

   > *We have seen in the 21st century this new form of autocrat. People think back to the 20th century autocrats and those were people with fascist, totalitarian governments [like] in early 20th century Germany. Those were non-democracies. Those were people who basically destroyed democracies to the point they just became dictatorships.*
   >
   > *In the 21st century it's something that looks very different. It's these autocrats in places like Poland and Hungary, Thailand, Venezuela, Russia, where the autocrat tries to maintain at least the appearance and semblance of democracy on the outside: multiple political parties, regular elections, there's media outlets that are not owned by the state. But they pull at the threads of the fabric of the democracy in such a way that at the end of the day they render it a democracy in name only.*

   What Ian Bassin is getting at is that leaders in several countries today stretch the rules to their favour. Discuss this phenomenon with the class.

   a) Is having a strict set of rules—as the rule of law requires—enough to protect democracy from abuse?

   b) Do people tend to try to work their way around rules?

   c) What happens if citizens say nothing when leaders disrespect the rules?

CASE STUDY

5. *Judges and the Rule of Law* explores how Canada's judges are expected to ensure that the law is followed and the rule of law remains intact.

FURTHER EXPLORATION

6. Teachers wishing to further explore how the police must follow the rule of law should check out *Section Two: Youth, The Police, and Arrest* in *Teaching Youth Justice*. Find it at **teachers.plea.org**.

7. Making laws public for all to know is vital to the rule of law. For an understanding of how the publication of laws came to be a cornerstone of western legal systems, check out *The PLEA: Hammurabi's Code*. Find it at **teachers.plea.org**.

8. The case of *Roncarelli v. Duplessis* affirmed the rule of law in Canada. However, the affair involved many complex facts. For more perspective on the Roncarelli Affair, check out:
    - CBC Digital Archives: The Roncarelli Affair and Maurice Duplessis **https://www.cbc.ca/archives/entry/the-roncarelli-affair-and-maurice-duplessis**
    - Law Now: Whatever Happened to... Roncarelli v. Duplessis
    - **http://www.lawnow.org/whatever-happened-to-roncarelli-v-duplessis/**
    - McGill Law Journal: The Legacy of *Roncarelli v. Duplessis* 1959-2009
    - **http://lawjournal.mcgill.ca/userfiles/other/902154-Cartier.pdf**

HANDOUT:

Defining the Rule of Law

The law applies to everyone. No person is exempt from the law because they hold a position of power.

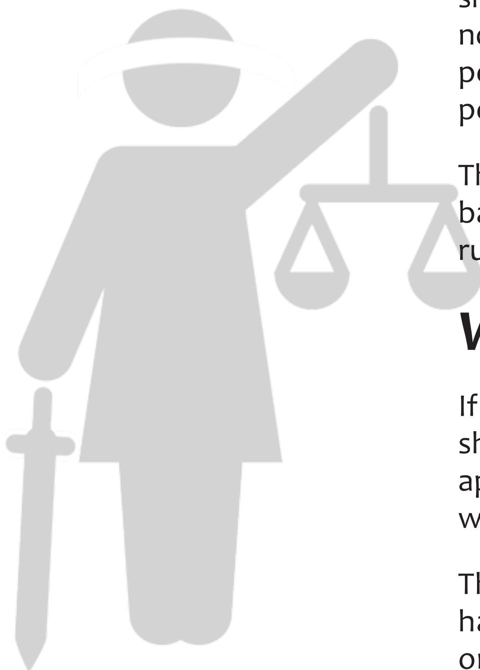
This is the basis for the rule of law. It is the belief that it is better to be ruled by laws than ruled by leaders who can act any way they like. For example, dictators often exercise absolute power without restrictions. If the law rules us, leaders cannot use their powers any way they like. Politicians, police, and judges are subject to the same rules as everyone else. By having everyone follow the same rules, laws cannot be unfairly used to advantage one person over another.

The rule of law also requires that there be peaceful and orderly ways to create, administer, and change laws. These processes must be predetermined, and must be followed by everyone. Canada, as a liberal democracy, has these processes in place. Our laws are democratically constructed, and must respect the rights of minorities.

The concept of the rule of law—that the law applies to everyone and that legal processes must be respected—are reflected in how Canada is governed. In fact, the rule of law is written into the preamble to the *Charter of Rights and Freedoms*, declaring that Canada is founded upon the principle of the rule of law.

Who Decides if the Law is Being Followed?

When a question arises as to whether or not a law has been broken—by a citizen or by the government—courts ultimately find an answer. To ensure that the answer is based on the law and the facts of the situation, courts operate independently of government. Courts are not subject to political pressures from the government of the day: political leaders cannot tell the courts how to decide cases, nor can political leaders be exempt from the rulings of courts.



The independence of the courts allows them to act as a check and balance on government. This independence helps to preserve the rule of law in Canada.

Why Care about the Rule of Law?

If we see leaders and governments not following the rule of law, we should be very concerned. If our leaders believe that the rules do not apply to them—and if they get away with breaking the rules—the whole structure of our society could collapse.

There are countless examples of countries where the rule of law has been ignored, with devastating consequences. Invariably, ordinary people suffer when these countries fall apart. Hitler's

Nazi rule of Germany in the 1930s and 1940s, and General Pinochet's military dictatorship of Chile in the 1970s and 1980s are just two examples in recent history.

Unfortunately, history sometimes repeats itself. Today, the rule of law is at risk in countries around the world. From Italy to Hungary to Brazil and beyond, political leaders are disrespecting long-established legal processes and acting as though they are above the law. Just a few of many, many recent examples include:

- Hungary's government arranged for tax inspections of businesses whose owners refused to sell their operations to government friends.
- Poland enacted laws that forced Supreme Court judges into retirement, so the government could fill the court with their preferred judges.
- Russian-Canadian political activist Pyotr Verzilov was allegedly poisoned after a court hearing in Moscow, joining a growing list of Russian government critics who have been harmed or died under mysterious circumstances.

Even the United States—long considered the world's leading liberal democracy—is witnessing events that suggest the rule of law is under threat.

These examples demonstrate just a few of the ways that society descends into chaos when the rule of law is disrespected.

The Rule of Law and Canada's Roncarelli Affair

Roncarelli v. Duplessis is widely considered a landmark case regarding the rule of law in Canada. In 1940s Quebec, tensions were high between the Roman Catholic majority and the Jehovah's Witness minority. Nearly 1,000 Jehovah's Witnesses were arrested in the province for distributing *The Watchtower* and *Awake* magazines, by claiming that Jehovah's Witnesses were violating local peddling bylaws. The peddling bylaws were later struck down by the Supreme Court.

Frank Roncarelli, a Montreal restaurateur who was a Jehovah's Witness, posted bail for almost 400 of the arrested Jehovah's Witnesses. The Premier of Quebec, Maurice Duplessis, was enraged. In retaliation, he had the liquor license revoked at Roncarelli's restaurant, and said that he would be forever banned from obtaining another one.

Duplessis's revocation of Roncarelli's liquor licence made his restaurant unprofitable. He was forced to sell it at a loss.

Roncarelli believed that Duplessis had no right to revoke the license. There were rules and processes in place to obtain and keep a liquor license, and rules governing the reasons that a liquor license could be revoked. Roncarelli had obeyed all the rules, so he sued for $118,741 in damages.

The case eventually reached the Supreme Court of Canada. In a 6-3 decision, the court ruled in favour of Roncarelli. Justice Rand wrote in the majority judgment that allowing a public officer to act arbitrarily "would signalize the beginning of the disintegration of the rule of law as a fundamental postulate of our constitutional structure."

Roncarelli v. Duplessis is still pointed to today as a landmark legal ruling, affirming that political leaders in Canada cannot act any way they like. They must follow the rule of law.

THINK

1. Governments are elected. When an election is held, laws spell out who is eligible to vote, how much money candidates can spend, and the deadlines for nominating candidates, among other things.
   a) How does a clear set of rules make for better elections?
   b) Why must the rules apply equally to all candidates in an election?
   c) What could happen to democracy if citizens did not care whether politicians followed the rules of an election?

2. When governments are elected, they cannot simply declare laws. Instead, laws are proposed to parliament or the legislature. A multi-staged, public process of debate and examination of the proposed law ensues. After debate and scrutiny, the proposed laws are voted on.
   a) What could happen if laws were passed without parliamentary debate?
   b) What could happen if laws were passed without public scrutiny?

3. When a law is broken, the police may investigate. However, the police's power to investigate is limited. Their investigation must follow strict rules. If the police do not follow these rules, then the evidence they provide will most likely not be admissible in court.
   a) How do limits on the power of the police protect the rights of all citizens?
   b) What could happen if the police were allowed to investigate in any manner that they pleased?

4. When cases go to court, trials follow orderly rules to establish the facts of the case. Judges then make their decisions based on the facts of the case and what the law says.
   a) How do consistent rules help ensure that trials are fair?
   b) What would happen if judges decided cases any way they wished, instead of following what the law says?
   c) What would happen if elected officials could interfere with court decisions?

CASE STUDY:

Judges and the Rule of Law

Judges are highly-trained experts in the law. They decide all kinds of cases, including cases that ask whether or not the government is obeying the rule of law.

When judges make decisions, they must look beyond the politics of the moment. A case can only be decided based on what the law says and what the facts of the case are. This requires judges to be independent, impartial, and fair-minded. Cases cannot be decided on a whim, or in a way that simply pleases judges.

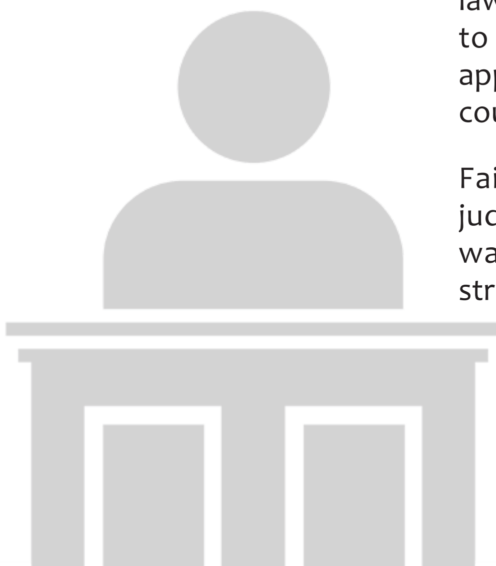
Even though judges must be independent, impartial, and fair-minded, judges have opinions and sympathies. After all, making a conclusion about a case requires that an opinion be rendered. How judges balance being impartial with having opinions was spelled out in the case *R.D.S. v. The Queen*:

> *True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. This is why judges must treat everyone who appears in their court fairly and even-handedly. This is also why judges will not be pressured into making particular decisions by the government, the police, or private citizens.*

Surveys show that Canadians believe our judges are doing a good job of rendering justice. Judges are independent, impartial, and objective because they do not act to fulfill a political agenda: instead, they act to ensure that the law is followed and the rule of law remains secure.

Nevertheless, judges are not perfect. When they make decisions, opinions about those decisions will vary. And occasionally, judges make mistakes. Because Canada is a country that follows the rule of law, court decisions can be criticised, and if the decision is believed to include an error in application of a law, the decision can be appealed to a higher court. This system of checks ensures that the court system as a whole makes fair decisions.

Fair decision-making is only one of the ways that Canada's judges maintain their high level of respect. Another important way that judges preserve their reputation is by adhering to strict ethical principles.



Ethical Principles for Judges

Federally-appointed judges in Canada follow a complex set of ethical principles. These principles, created by the Canadian Judicial Council, provide guidelines for how judges should behave in the courtroom and in the community.

The Canadian Judicial Council's *Ethical Principles for Judges* state that judges should not:

- engage in public debates about their decisions. Judges often spell out the reasons for their decisions in writing, or explain them in the courthouse. There is an expectation that these decisions will speak for themselves;
- participate in public discussions or hold membership in groups that address major social issues (with the exception of issues that directly affect the operation of Canada's courts). This is to help preserve the judiciary's reputation as being as non-biased as possible; and
- participate in partisan political activities. This is to ensure that judges remain above the political fray.

It is believed that when judges hold themselves to high ethical principles, their standing in the community will remain high. As well, holding themselves to ethical principles helps to maintain a common understanding that judges make their decisions impartially, based on what the law says and what the facts of the cases are.

If a judge is believed to have violated these ethical principles, members of the public can make formal complaints. If the complaint is warranted, the judge could be subjected to disciplinary action.

While instances of judges running afoul of ethical principles are infrequent, they do happen. For example, in late 2016 a judge in Hamilton wore a "Make America Great Again" Donald Trump hat in court. The incident sparked 81 complaints to the Ontario Judicial Council. The Women's Legal Education and Action Fund (LEAF)—one of the complainants—was concerned that the judge's "partisan display raises the appearance of, or apprehension of, a lack of impartiality, contrary to the principles of judicial ethics."

The Judicial Council largely agreed with the complainants. They ruled that the incident was a single aberrant and inexplicable act of judicial misconduct on behalf of the offending judge. He was suspended for 30 days.

Fortunately, cases such as the judge wearing the Trump hat are the rare exception in Canada. The overwhelming majority of judges consistently hold themselves to high standards, stay out of the day-to-day fray of community organisation and politics, and come to impartial decisions based on what the law says and what the facts of the case are. By acting as arbiters of the law, and not as political agents, judges help preserve the rule of law in Canada.

DISCUSS

1. Why would it be a concern if a judge wore a ball cap with a political slogan to court?
2. The 81 complaints lodged against the hat-wearing judge outnumbered all complaints the judicial council received against all judges in the previous three years. What does the uproar tell us about political sensitivities, and the notion that judges must remain outside of partisan politics?
3. What would happen to the legal system if judges began to show strong political bias? How would politicians react? How would the public react?
4. Look back at this statement about judicial impartiality:

   > True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. This is why judges must treat everyone who appears in their court fairly and even-handedly.

   How does this statement reflect the liberal ideal of reason?

LESSON FIVE: Freedom and Law

OBJECTIVE

Students will learn how liberal democracies use the law to both promote and restrict freedom.

PROCEDURE

1. Ask students if they believe they are free. If not, ask what restrictions exist in their life.
   - Are these restrictions reasonable?
   - Are these restrictions on the whole a positive or a negative?

2. Distribute and read the handout *Freedom and Law*.

   KEY QUESTION:
   - **Politicians are often concerned with pleasing the majority. Being re-elected depends upon it. But what would happen if politicians singularly decided minority rights based on what the majority wanted?**

3. Break students into groups to look up specific laws that interest them. Have them determine:
   a) how that law restricts freedom
   b) how that law promotes freedom

   Then have them determine, on the whole, if the restrictions on freedoms created by that law are reasonable.

4. For any of the laws researched above, ask students how they are free to lobby for changes to that law. Teachers may wish to look back to Lesson Three and especially its Further Exploration suggestions for guiding this discussion.

CASE STUDY

5. *Switzerland's Minaret Debate* explores the risks of leaving minority rights in the hands of the majority.

FURTHER EXPLORATION

6. Teachers interested in exploring how regulating waste disposal simultaneously restricts and promotes freedoms should check out *The Great Stink of London: A Case Study* in *The PLEA: The Bathroom Barrister*. Find it at **teachers.plea.org**.

7. Teachers interested in exploring how judges are selected in a liberal democracy should check out "Judges and Political Connections" in *Sunshine Sketches of a Little Town: The Learning Resource*. Find it at **teachers.plea.org**.

8. Teachers interested in an overview of significant court cases involving the *Charter of Rights and Freedoms* should check out the Department of Justice's Examples of Charter-related cases. Find them at **https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/cases.html**.

HANDOUT:

Freedom and Law

When people live together, everyone needs to meet certain expectations. Some expectations are informal, such as the unwritten rules that govern a family. Some expectations are formal, such as the written laws that govern a community.

Laws and expectations can be seen as restricting the freedom of individuals to do as they want. However, they can also help provide freedom to all individuals.

Consider this extreme example that illustrates the complex relationship between rules and freedom. If every person was free to kill others as they so pleased, then nobody would be free to enjoy their life and security. Reasons such as these have led society to generally accept that the most freedom that an individual can enjoy is the freedom to do what they wish, so long as their actions do not impose upon the freedom of another individual. This is a basic tenet of liberalism.

The interplay between the restriction and promotion of freedom can be seen in many less extreme examples of the laws that govern us. As another example, think about the laws and regulations that govern public sanitation. Organized garbage collection and bans on littering dictate acceptable methods for waste disposal. Therefore, these laws restrict the freedom of citizens to do whatever they please with their garbage.

However, a universal framework to minimize pollution also helps free citizens from the burden of many pollution-borne diseases. As well, it increased citizens' freedom to use and enjoy clean public spaces. Further, a public system of garbage disposal gives citizens the freedom to spend their time and energy pursuing life choices, rather than each individual spending their time seeking out ways to dispose of their garbage. When seen this way, public sanitation laws can also be thought of as contributing to freedom.

Who Determines Reasonable Limits to Freedom?

In Canada, the *Charter of Rights and Freedoms* enshrines many civil and political rights and freedoms. However, these rights and freedoms are not absolute. Rights and freedoms set out in the Charter are subject to "reasonable limits as can be demonstrably justified in a free and democratic society." In other words, the government may pass a law that limits rights and freedoms, so long as they can prove that they acted in a reasonable and justified way.

When questions arise as to whether or not the government is acting in a reasonable and justified manner in limiting rights and freedoms, it is up to the courts to decide.

Take, for example, the rights of public-sector workers to strike. In 2008, the Government of Saskatchewan passed a law restricting the freedom of public sector workers. The law took away the right to strike for workers in positions deemed as "essential services." The Saskatchewan Federation of Labour challenged the constitutionality of the law. They pointed out that the law allowed the government to declare that almost every public servant was performing an "essential service," including such things as university workers and park employees. The Supreme Court found that the law unreasonably interfered with the freedom and ability of public sector workers to meaningfully negotiate labour contracts with the government. The Government of Saskatchewan was forced to change parts of the law that were deemed unconstitutional.

Rulings such as the one above illustrate why it is important that courts and judges operate independently of government. Independence means that judges are not subject to the whim of the government, or to popular trends of the day. By being independent, courts and judges can protect the rule of law and guarantee the government does not trample on rights such as freedom of speech, worship, press, and association.

THINK

1. How do reasonable limits on freedoms promote peace, order, and good government?

2. How does the court's ability to strike down oppressive laws promote peace, order, and good government?

CASE STUDY:

Switzerland's Minaret Debate

Liberal democracies are supposed to balance the will of the majority with the rights of minorities. At first blush, it would seem that the only thing needed to make this balance work is a sense of human decency. However, sometimes things don't work out this way, and the majority demands that the freedoms of minorities are unreasonably limited. Such is the case with the controversy over minarets that broke out in Switzerland in 2005.

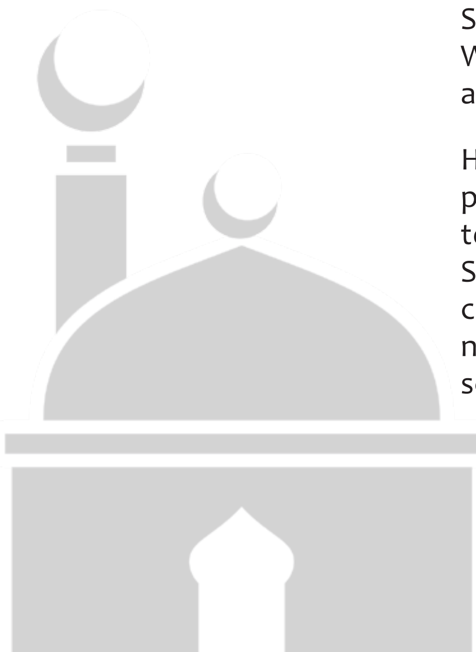
Minarets are towers on mosques, somewhat similar to church steeples. In Arabic, minaret means beacon. They point towards heaven, as a reminder of Allah. While minarets have had varied uses throughout history, from watchtowers to ventilation systems to signposts for travellers, today minarets are used to issue calls to prayer for Muslims. These calls are either directly issued by a muezzin (a person appointed by the mosque) who climbs the tower, or through a loudspeaker mounted on the tower. Morgan Freeman has described the Muslim call for prayer as "one of the most haunting and beautiful sounds in the world."

The Origin of the Swiss Minaret Dispute

A Turkish cultural association in Wangen bei Olten, a Swiss community of about 5,000 people, applied for a construction permit to add a minaret to their mosque. Some nearby residents objected, with 400 people signing a petition against the minaret. The municipality refused to grant the permit. The dispute ended up in Switzerland's Federal Supreme Court.

Switzerland's Federal Supreme Court ruled in favour of the mosque. With the go-ahead from the Supreme Court, the Turkish cultural association went ahead and built their minaret.

However, not everybody was happy with the court's decision. Several politicians and civic groups decided to use the tools of democracy to push for a nationwide referendum on minarets in general. In Switzerland, if 100,000 signatures are collected, a referendum can be held. Minaret opponents collected 115,000 signatures. A nationwide referendum on whether or not to ban minarets was scheduled for November 2009.



The Referendum Campaign

The campaign to ban minarets was largely led by right-leaning politicians. While the debate was ostensibly a dispute about architecture, in reality the proposed ban was meant to send a message about religion in Switzerland. According to the BBC, "supporters of a ban claimed that allowing minarets would represent the growth of an ideology and a legal system—Sharia law—which are incompatible with Swiss democracy."

Muslims and their supporters felt that the campaign against minarets was discriminating against religious beliefs. The Vatican agreed, stating that a ban would be an "infringement of religious freedom." Even the Swiss government was against a ban, pointing out that it was violating religious freedom, contradictory to the federal constitution, ineffective against extremism, and an obstacle to peace between religions and to Muslim integration.

For a referendum question to pass into law in Switzerland, the initiative must win a majority of votes, and win in a majority of Switzerland's 26 cantons (provinces). The result of the minaret referendum was 57.5% in favour of the ban, and 42.5% opposed to the ban. Voter turnout was 53.75%. As well, the initiative received the majority of votes in all but four cantons. Because the referendum cleared both hurdles, the Swiss government was required to accept the result of the vote. The constitution was changed. The Swiss constitution now reads "Freedom of religion and conscience is guaranteed.... The construction of Minarets is prohibited." The contradiction between these two clauses in the Swiss constitution is obvious.

At the time of the referendum, there were four minarets in Switzerland, including the minaret in Wangen bei Olten, which had been built by the time the vote came. Existing minarets were not affected by the constitutional change, and remain in place. However, no new minarets can be built.

Democracy in Action

In western liberal democracies, freedom of religion is guaranteed. Limits to freedom of religion usually only come into play if a religious belief conflicts with a criminal law. In the rare instance where a religious code oversteps a criminal law, the existing criminal law almost always takes precedent.

When viewed through the lens of liberal democracy, Switzerland's minaret ban is clearly in opposition to liberal principles. It infringes upon freedom of religion, and it ignores the protection of minority rights. In other words, the ban is illiberal.

However, even if Switzerland's ban on minarets was illiberal, the referendum itself was a legitimate democratic process. The majority said they did not want minarets in their country.

Switzerland's referendum illustrates that democracy alone cannot always protect minority rights. The rule of the majority can sometimes trample the rights of minorities.

Illiberal Constitutional Change Can't Happen Here?

Unlike Switzerland, Canada's *Constitution Act* and *Charter of Rights and Freedoms* cannot be changed through a referendum. Almost all changes to our constitution can only take place if the proposal is approved by the House of Commons, the Senate, and the legislatures of at least two thirds of the provinces, representing at least half of Canada's population. This high threshold for change makes constitutional change in Canada difficult.

However, legislatures have the power to temporarily override many sections of the *Charter of Rights and Freedoms*, by using a power called the Notwithstanding Clause. Governments can strip rights for five-year periods, with nothing more than a majority vote in the legislature. Because such power to strip rights is controversial, the Notwithstanding Clause is almost never used in Canada.

Sharia law is the religious law of the Islamic tradition. Its scripture guides many areas of Muslim life, including prayers, marriage and divorce, dietary restrictions, acts of kindness, and punishments for crimes.

Like every religion, the implementation of Islamic scripture varies. And like every religion, there are some harsher interpretations of its scripture. However, millions upon millions of Muslims—especially those living in places like Switzerland and Canada—follow moderate interpretations of Islam, interpretations that emphasise faith, human decency, and kindness.

Unfortunately, a handful of countries use hard-line interpretations of Islamic scripture to justify laws that would never gain acceptance in western liberal democracies. For example, it is possible in some countries to be lashed or stoned for morality offences, such as adultery, gay sex, gambling, drinking, wearing tight clothes, or skipping Friday prayers.

Western liberal democracies like Canada reject such harsh laws and harsh punishments. The courts have affirmed many times—concerning many different faiths—that liberal values take precedent over religious doctrine, when that doctrine is cruel, unusual, or unduly steps on rights and freedoms. In fact, Canada's liberal democratic system of laws and governance is one reason why so many immigrants view Canada as one of the most desirable places in the world to live. Differing groups are free to live their lives as they see fit, so long as they do not step on the rights of others.

Simply put, Canada is a liberal democracy. Sharia law—or any other form of theocratic rule—does not form the basis of Canada's legal system, and is not coming to Canada.

DISCUSS

1. The referendum in Switzerland was a form of direct democracy. However, voter turnout was only 53.75%.
    a) If only 53.75% of people turned out to vote, can we really know if a true majority of Swiss people supported banning minarets?
    b) What does the low voter turnout tell us about the importance of learning about issues and getting out to vote?

2. Liberalism asks that people tolerate the things they don't agree with, not just the things they do agree with.
    a) Was the construction of minarets a violation of liberal values?
    b) Is banning minarets a reasonable restriction of freedom in a liberal democracy?

3. Public opinion surveys leading up to Switzerland's referendum consistently suggested that the ban would not gain enough votes to win the referendum. The polls did not reflect the outcome.
    a) Were the pollsters wrong? Or do people sometimes say one thing in public then act differently in the privacy of a voting booth?
    b) Do you think people in general say one thing in public and another thing in private? If so, why do they act this way?

4. How would you react to this referendum if you were a member of a minority group who lived in Switzerland?

5. Can democracy alone protect individual rights? What does the Swiss referendum tell us about the importance of liberal institutions such as courts and human rights tribunals acting as a check on power?

LESSON SIX: Making Reasoned Laws, Part I

OBJECTIVE

Students will understand how proposed laws must be considered and reviewed numerous times. Such checks help ensure that reason guides law-making.

PROCEDURE

1. Lead a class discussion of the following question:
    - Is a first reaction necessarily the correct reaction? Is more detailed consideration necessary to form a full opinion?

    Teachers may wish to illustrate the nature of this question by presenting a controversial or complex current event, asking for first reactions, and then more deeply exploring the idea.

2. Distribute and read the handout *Preventing Mob Rule: Passing a Law* then assign Think questions.

    KEY QUESTIONS:
    - **Do mobs bring forward or set back public discourse?**
    - **How does mobbing happen on social media?**

3. Lead class discussion of the following question:

    Canada is said to be a country of peace, order, and good government. However, Canada's laws are not always perfect or ideal. There are many laws and policies that could be changed for the better. Because liberal democracies are made up of complex institutions—such as courts, Parliament, the Senate, and provincial legislatures—moving change forward can be a slow process.

    a) When should change be quick?

    b) When should change be slow and deliberative?

CASE STUDY

4. There are imperfections in Canada's system of law-making. Governments of all stripes have exploited these imperfections. *Imperfections in our Law-Making: Omnibus Bills* looks at the trend of governments to introduce legislation that is simply too big to be fully understood by every parliamentarian.

FURTHER EXPLORATION

5. Teachers interested in exploring the division of power in government should check out *Lesson 2.1: The Structure of Provincial Governance* in *Our Government, Our Election*. Find it at **teachers.plea.org**.

6. Teachers interested in exploring how rule by the mob can break down a society should check out *Lord of the Flies: The Novel Study*. Find it at **teachers.plea.org**.

HANDOUT:

Preventing Mob Rule: Passing a Law

In a democracy, the people rule. This means that if a majority of the public demands a law or public policy, elected leaders have an obligation to seriously consider that demand.

However, sometimes the majority demands a law or public policy that could trample the rights of minorities. The phenomena of the majority wanting to trample the rights of a minority is also known as ochlocracy, or mob rule.

To keep ochlocracy at bay, liberal democracies spread power amongst several institutions. The separate powers of the Senate, the House of Commons, and even the Queen illustrate how the power to create and enact laws is spread amongst different institutions in Canada. Each institution can act as a check on the power of the others.

By having power spread across institutions, the law-creation process can be more reasoned and less mob-like. There are more opportunities to consider positions, consult experts, and ask questions. This helps temper emotions, protect minority rights, and promote reason when creating laws.

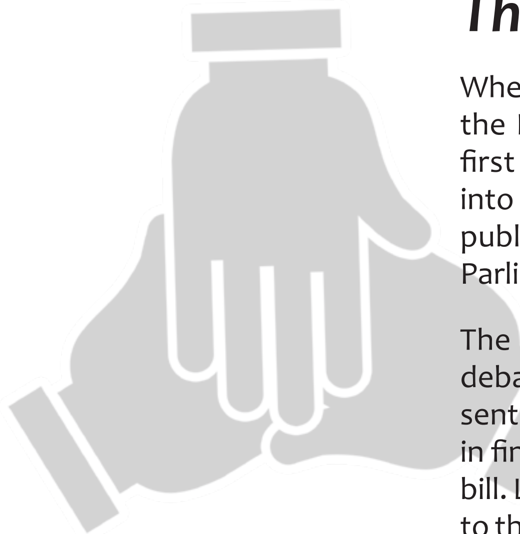
The Path to Creating a Law

In Canada, the federal government cannot simply declare a law, without a debate and without that law being subjected to reviews and consideration. The rule of law requires that there are open and established processes to guide the creation of laws.

The process below outlines the steps to creating most federal laws in Canada. The process for creating laws at the provincial level is similar, except that there is no Senate review of provincial laws.

Three Readings

When a proposed law—also known as a bill—is first introduced in the House of Commons, it must pass a series of three votes. The first vote, known as First Reading, is the introduction of the bill into the House. At this point, the bill is simply introduced into the public record and the legislative process: if it passes, Members of Parliament and the public in general may begin examining the bill.



The next vote is called Second Reading. At this point, legislators debate the principle and the object of the bill. If the bill passes, it is sent to a legislative committee. Legislative committees examine bills in fine detail, and often call in experts to get outside opinions on the bill. Legislative committees have the power to propose amendments to the bill. The committee will report back to the House of Commons, allowing all Members of Parliament to debate the bill and suggest further amendments before putting it to a final vote.

The final vote for a bill in the House of Commons is Third Reading. At third reading, Members of Parliament vote on whether or not they want the bill to become the law. Even if the bill passes, it does not yet become law. At this point, the law is sent to the Senate for further consideration.

The Senate

All federal legislation must be passed by both the House of Commons and the Senate of Canada.

The three-reading process for passing a bill in the House of Commons is repeated by the Senate.

Because the Senate is appointed, and not elected, senators can resist short-sighted political pressure, or the desires of a runaway mob. This means that at its best, the Senate is a place where proposed laws are given a careful, second consideration. Sir John A. Macdonald once described the Senate as the chamber of "sober second thought."

It is extremely rare that the Senate will outrightly refuse to pass a bill proposed by the House of Commons. It is more common for the Senate to take issue with aspects of a proposed law. When this is the case, the Senate will amend the bill. The House of Commons usually accepts the amendments.

Royal Assent

A final check on legislation is Royal Assent, the Queen's formal approval. The Queen is Canada's Head of State. Without Royal Assent, a bill cannot become law. Because the Queen resides in Britain, Royal Assent in Canada is given by the Queen's representative. For federal legislation, it is the Governor General. For provincial legislation, it is the Lieutenant Governor. If the Queen or her representative have grave concerns over a law, they could refuse to sign it into effect.

The refusal to grant Royal Assent to a bill is virtually unprecedented. The last instance of a British Monarch refusing Royal Assent was in 1707. The Governor General of Canada has never refused Royal Assent of parliamentary legislation. And only once was Royal Assent refused at the provincial level, in Prince Edward Island in 1945.

If history serves as a guide, it is highly unlikely that Royal Assent would be refused today. Yet, because Royal Assent could be refused, it could be said that the Monarchy is the ultimate check on power in Canada. Because the refusal of Royal Assent is virtually unprecedented, it is difficult to know what the reaction would be if Royal Assent was refused for a Canadian law today.

Peace, Order, and Good Government

Canada has other safeguards in its legislative process to avoid the rule of the mob. For example, there are a few last-ditch, archaic powers contained in the constitution that could potentially be used by the federal government to halt runaway provincial legislation.

Canada's reasoned and rational process for creating laws helps curtail mob rule, and ensure that Canada remains a country of peace, order, and good government.

THINK

1. The rule of law requires that orderly processes be in place to create and change laws. Do the processes discussed above guarantee that mob rule can never happen in Canada?

2. No single institution or person in Canada's system of government holds total power. How can the division of power promote peace, order, and good government?

3. Have you seen instances where a self-interested majority has overridden reason, harmed minorities, and set back the social advancement of society?

4. Today, only Canada's federal level of government has a senate. In the past, many provinces once had senates too. However, each province with a senate abolished it years ago.
   a) What would be lost if Canada's Senate was abolished?
   b) What would be gained if Canada's Senate was abolished?
   c) Look into recent reforms into Canada's Senate. Will these reforms help ensure that a runaway mob does not trample on the rights of minorities?

CASE STUDY:

Imperfections in our Law-Making: Omnibus Bills

A proposed law—also known as a bill—can only be passed after legislators (and the general public) have had the opportunity to consider the bill. But what happens if a bill is so large, and contains so many elements, it is impossible for any single person to fully consider and understand the bill. This is the quandary created by omnibus bills.

What is an Omnibus Bill?

An omnibus bill is a single bill that introduces, repeals, or amends numerous laws. Omnibus bills can run into the hundreds of pages, containing dozens if not hundreds of provisions.

There are few rules that regulate omnibus bills. Canada's parliamentary traditions and guidelines simply require that bills deal with a single principle or purpose. This means that as long as the proposals are related, omnibus bills are generally allowed. There is no limit to how many changes to the law can be included in a bill, and no maximum length for a piece of proposed legislation.

Recent history provides countless examples of omnibus bills. For example, in the late 1960s the *Criminal Law Amendment Act* passed into law in Canada. This omnibus bill implemented sweeping reforms to Canada's criminal laws. Changes were made to how the law dealt with abortion, gun ownership, intimidating phone calls, cruelty to animals, and lotteries, just to name a few things. The bill was 126 pages long, and contained 120 clauses. The basic principle and purpose of the bill was to align Canada's criminal laws with the values of the day.

Recent omnibus bills have been even longer. Federal governments of all stripes have been transforming budget implementation acts—the law that puts the government's annual budget into effect—into massive omnibus bills. Between 1995 and 2000, the average length of a budget implementation act was 12 pages. During the early part of the 2000s, the average length grew to 139 pages. Since 2009, almost every budget implementation act has been several hundred pages in length.

2010's *Budget Implementation Act* (Bill C-9) is perhaps the best example of a runaway omnibus bill. It was 883 pages long. The government claimed that everything in the bill was related to implementing the federal budget. Parliamentary scholar

C.E.S. Franks disagreed. He wrote in the *Globe and Mail* that:

> In far too short a period, the House and Senate finance committees examining C-9 had to inform themselves and vote on changes and innovations to taxation and other financial measures. They had to consider amendments to the laws governing pensions and the *Federal-Provincial Arrangements Act*. They had to examine a Canada-Poland agreement on social security, a proposal to eliminate Canada Post's monopoly over mail to be delivered outside Canada, provisions to permit credit unions to act as banks, and legislation permitting to sell off much of AECL [Atomic Energy of Canada Limited]. Other provisions of C-9 permit fundamental changes to the environmental review process.
>
> This is only a few of the topics in C-9. Many of these sections have little if any relationship to the budget—they should have been presented to Parliament as stand-alone bills and examined by appropriate specialist committees.

The problems with Bill C-9 led C.E.S. Franks to conclude that "omnibus budget implementation bills subvert and evade the normal principles of parliamentary review of legislation." It is simply impossible for anyone to fully comprehend every legal change stuffed into such sweeping omnibus bills.

Omnibus Bills: All Bad?

To be sure, there are some benefits to omnibus legislation. They do save time and shorten the amount of days that legislators must spend in parliament. The House of Commons used to sit for about 175 days a year in the 1990s. By stuffing more changes into less legislative bills, Parliament can shorten its sessions. Today, Parliament sits for about 130-140 days a year.

Ideally, if parliamentarians spend less time in Ottawa, they will have more time to spend in their constituency. This opens up more opportunities to meet individuals and community groups, and more time to tend to the needs the constituency.

As well, some omnibus bills facilitate broad social and legal changes. For example, when the Supreme Court ruled on granting same-sex couples the same rights as opposite-sex couples, the Saskatchewan government passed omnibus legislation updating 24 laws to reflect this change.

However, omnibus bills also allow contentious legislation to be bundled in with popular ideas. For example, Bill C-9 contained controversial changes to environmental regulations. However, it also contained popular investments in public housing. Legislators had no choice but to vote for looser environmental regulations if they also wanted better public housing.

As a whole, thoughtful and reasoned debate leads to the creation of better laws. The sheer size and broad subject matter of omnibus bills restricts the ability of our elected representatives and the public in general to examine and debate proposed laws. This is detrimental to the democratic process as a whole.

DISCUSS

1. Bundling several unrelated issues into one omnibus bill forces law-makers to vote for things that they disagree with, in order to get the things they agree with. Is this fair?

2. Often, politicians will say that their opponent "voted against Policy X." Such statements are usually an attempt to paint the opponent in a bad light.
    a) How much value can we put in such statements, in light of the proliferation of omnibus bills that force politicians to cast a single vote for several barely-related laws?
    b) Do simple statements harm the liberal value of reason?

3. a) Why do you think omnibus bills have become more common?
    b) Does the growth of omnibus legislation concern you?

4. As a whole, are omnibus bills good or bad for democracy?

LESSON SEVEN: Making Reasoned Laws, Part II

OBJECTIVE

Students will understand how the Notwithstanding Clause can help balance the power of elected legislatures with the power of the courts.

PROCEDURE

1. Review with class the role judges play in upholding the rule of law, as discussed in Lesson Four. Then lead class discussion on the following question:

   Judges are not elected. However, they are appointed by democratically-elected governments.

   a) What are the benefits and drawbacks of an appointed judiciary?

   b) What are the benefits and drawbacks of an elected judiciary?

2. Distribute and read the handout *Preventing Mob Rule: The Courts and the Charter of Rights and Freedoms* then assign Think questions.

   KEY QUESTION:

   - **Why must citizens be granted fundamental freedoms, legal rights, and equality rights?**

3. Lead class discussion of the following question:

   When is it appropriate to push the accepted norms and rules of a liberal democracy?

CASE STUDY

4. There are imperfections in Canada's system of law-making. Governments of all stripes have exploited these imperfections. *Imperfections in our Law-Making: The Notwithstanding Clause as a "last resort"* looks at perhaps the most controversial check and balance on power in Canada's liberal democratic constitution, the Notwithstanding Clause, and how it can potentially be abused by politicians.

FURTHER EXPLORATION

5. Teachers wishing to more deeply explore the *Charter of Rights and Freedoms* should check out the Department of Justice's learning resources for the Charter. Find them at **https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/resources-ressources.html**.

6. Teachers wishing to better-understand Canada's court system should check out *Courts and Our Legal System*. Find it at **teachers.plea.org**.

HANDOUT:

Preventing Mob Rule: The Courts and the *Charter of Rights and Freedoms*

There are many ways that ochlocracy, or the rule of the mob, is curtailed in Canada. Requiring that legislation be approved by the House of Commons, the Senate, and even the Queen is one of the protections we have against mob rule. The review of proposed legislation by specialised committees of both the House of Commons and the Senate is another way that we try to ensure that our laws respect reason and uphold minority rights.

Yet another way that Canada's liberal democracy is designed to uphold the values of reason and protect minority rights is our constitution. The *Constitution Act* and the *Charter of Rights and Freedoms* are the highest laws in the country. They spell out what the government has the authority to do, and codify the rights and freedoms of all Canadians.

When questions arise as to whether or not the government is respecting the constitution or the Charter, the courts may be asked to decide. Courts are independent of government. They have the power to rule on whether or not legislation respects the constitution and the Charter.

If a court determines that some aspect of a law is contrary to the constitution or the Charter, the non-conforming parts of the law will be of no force or effect.

Tyranny of the Judiciary?

The power of the courts to rule on whether or not laws are constitutionally valid has led some people to suggest that there is a "tyranny" of the judiciary. They argue that it is unelected judges, and not elected representatives, who ultimately determine Canada's laws. This is not true.

If a court rules that a law is contrary to the *Charter of Rights and Freedoms*, federal and provincial governments have the option of invoking something called the Notwithstanding Clause. The Notwithstanding Clause is a special power written into the Charter. It permits the government to temporarily override parts of the Charter.

Specifically, the Notwithstanding Clause can be used to override the rights guaranteed in sections 2, and 7 through 15 of the Charter. These

sections grant citizens fundamental freedoms, legal rights, and equality rights, such as:

- freedom of expression
- freedom of conscience
- freedom of association
- freedom of assembly
- freedom from unreasonable search and seizure
- freedom from arbitrary arrest or detention
- the right to life, liberty and security

Why was the Notwithstanding Clause put in the Charter?

The Notwithstanding Clause's inclusion in the Charter was controversial. However, it was a needed compromise to get provinces such as Saskatchewan to support the Charter. There was a fear that courts may occasionally make rulings that are contrary to the public interest. If democratically-elected legislatures are powerless to act—save for the complex process of amending the constitution—courts would always have the final say over many of Canada's laws.

By including the Notwithstanding Clause in the Charter, parliament and legislatures have a "safety valve." They retain final control if a court rules that a law is in violation of the Charter.

Any bill that proposes to use the Notwithstanding Clause to override Charter rights must specifically declare which rights that the law will suspend. If the legislature passes the law, it only remains in effect for five years. After five years, the legislation must be re-introduced to the legislature, where it is considered and voted on again.

The five-year expiration date helps preserve the rule of law, the role of reason, and the protection of minorities. If a government wishes to continue overriding Charter rights, it must again seek the approval of the legislature. This means legislators and the public must re-visit the decision to override rights.

Checks and Balances

In the end, the Notwithstanding Clause gives legislatures higher authority than the courts, in specific regard to fundamental freedoms, legal rights, and equality rights.

That said, governments rarely use the Notwithstanding Clause. Surveys continually show that Canadians place a high importance on their Charter rights. Any government that overrides constitutionally-guaranteed rights almost always will face a public backlash.

THINK

1. The power of Canada's courts to rule on the constitutionality of legislation means that the courts can act as a check on elected legislatures, and keep the rule of the mob at bay. And the power of legislatures to use the Notwithstanding Clause means that elected legislatures can act as a check on the courts, if courts begin to issue runaway rulings.
    a) How does this particular diffusion of power help ensure that authority is balanced across several institutions in Canadian society?

2. Judges are highly-trained experts in the law. Why is it important that judges have the authority to overturn laws created by democratically-elected legislatures?

3. Is it a good idea to give democratically-elected legislatures the ability to override constitutional rights and freedoms?

CASE STUDY:

Imperfections in our Law Making: The Notwithstanding Clause as a "last resort"

The Notwithstanding Clause is part of Canada's *Charter of Rights and Freedoms*. It gives the government the right to override certain Charter rights. However, there is no written rule saying when it is appropriate for the government to use it. As the Charter is written, governments have the constitutional power to use the Notwithstanding Clause when they please.

Nevertheless, the existence of a constitutional power is not an invitation to use that power carelessly. Jean Chrétien, Roy McMurtry, and Roy Romanow, three architects of the *Charter of Rights and Freedoms*, wrote that the Notwithstanding Clause:

> was designed to be invoked by legislatures in exceptional situations, and only as a last resort after careful consideration. It was not designed to be used by governments as a convenience or as a means to circumvent proper process.

Because the Notwithstanding Clause is a power that allows governments to take away rights, it should be used carefully, and only after every other process has been exhausted. To use the clause frivolously would devalue the very rights the Charter is meant to protect.

Downsizing Toronto City Council and the Notwithstanding Clause

The idea that the Notwithstanding Clause should only be used in "exceptional situations, and only as a last resort" was tested in the summer of 2018.

In a surprise move, Ontario's newly-elected provincial government passed legislation that cut the size of Toronto's city council nearly in half, from 47 to 25 councillors. The move sparked an immediate backlash.

Some voters felt betrayed. The policy was not mentioned during the provincial election campaign. It simply appeared out of the blue, only weeks after the new provincial government was sworn in.

Other voters believed that the law was motivated by vengeance. Ontario's new premier, Doug Ford, was a former Toronto city councillor. He and his brother, former Toronto mayor Rob Ford, had an acrimonious relationship with many Toronto city councillors. Reducing the size of council would take away the possibility for several councillors to return to city hall.

However, what many observers found most disturbing was that the size of council was slashed during the nomination period for Toronto's

fall civic election. Put another way, the legislation changed the rules of an election that was already in progress.

The law was challenged in court. The court ruled that the council-cutting legislation violated the candidates' rights to freedom of expression. As such, it was ruled contrary to the *Charter of Rights and Freedoms*.

Many legal scholars believed that the court's ruling was on shaky ground. The Ontario government shared this view. Only a few hours after the judge delivered his decision, the government said it would appeal the decision to a higher court.

However, the Ontario government did not want to wait to see how the appeal court would rule. Instead, it announced it would use the Notwithstanding Clause to change Toronto city council. A special sitting of the legislature was called to rush through notwithstanding legislation.

Undermining the Rights and the Rule of Law?

Everything that the Government of Ontario did followed the *Constitution Act* and the *Charter of Rights and Freedoms*, as they are written. The government has the right to use the Notwithstanding Clause, and the government has the right to call a special sitting of the Legislature to pass its legislation.

However, there is a debate about whether or not the government was keeping with the spirit and the intent of the Charter. The Notwithstanding Clause was not being used as a last resort, after all other options had been exhausted.

Adding to the perception that the Government of Ontario was not worried about respecting Charter rights, Premier Ford said the government would continue to use the Notwithstanding Clause if "unelected judges" continued to overturn his government's laws.

In the End

In the end, there was no need to use the Notwithstanding Clause. The appeals court agreed that the lower-court decision appeared to be on shaky ground. The lower court decision was "stayed." This meant that the changes to Toronto city council could go ahead, while the appeal was being heard. Notwithstanding legislation did not need to be passed.

Nevertheless, the rush to use the Notwithstanding Clause demonstrated how easily and quickly a majority government could suspend Charter rights.

DISCUSS

1. The rule of law requires that society has orderly ways to create and change laws. A key part of this is having orderly elections.
   a) What is the danger to the rule of law if the rules of a civic election are changed while the election is already under way?
   b) Are there times when it may be necessary to change the rules of an election when it is already under way?
   c) Did the Ontario government have good reason to change the rules governing Toronto's civic election?

2. What happens to rights when governments habitually suspend them?

3. Some commentators have suggested that there was a double standard with the uproar over Ontario's attempted use of the Notwithstanding Clause. They pointed out that Saskatchewan used the Notwithstanding Clause in 2017, and the national media remained relatively quiet.

   However, there are differences between the Saskatchewan and Ontario situations.

   In Saskatchewan, a court ruled against a long-standing school funding practice. The court decision, if immediately implemented, could uproot 10,000 students from their schools. The province appealed the decision, and also invoked the Notwithstanding Clause. The use of the Notwithstanding Clause allowed thousands of students to stay at their current schools while the appeal was heard. As well, the government had general support for their actions from the opposition NDP.

   In Ontario, there was widespread opposition to the use of the clause. All opposition parties opposed the move, as did a very vocal segment of the public. Further, unlike Saskatchewan's attempt to preserve the status quo, Ontario used the clause to push through disruptive changes to Toronto's city council. The decision was so rushed, an emergency overnight sitting of the Ontario legislature was called to force the notwithstanding legislation through in time for the civic election.

   a) When is it appropriate for government to rush through legislation?
   b) When should legislation be created through slow, deliberative processes?

FINAL EXPLORATIONS: THE RULE OF LAW IN LIBERAL DEMOCRACIES TODAY

1. There are many semi-independent government organisations that contribute a functioning society. Examples include:
   - the CRTC oversees the regulation of Canada's telecommunications sector
   - the Bank of Canada helps regulate the Canadian economy
   - Elections Canada oversees federal elections in Canada
   - each province has a security regulator to help oversee banks and financial markets

   Look into these or other government agencies. What is the organisation's core function? How does it help keep Canada a country of peace, order, and good governance? In what ways could it be improved?

2. Political parties opposed to liberalism are on the rise across the world. Illiberal political movements have even taken hold of governments in countries such as Hungary, Poland, and the Philippines.

   Look into political movements opposed to liberal democracy. What is fuelling their popularity? Are any of their critiques of liberalism valid? As a whole, are these movements good for society or do they risk setting back social progress?

3. Liberal democracies continue to advance rights. For example, Ireland recently legalised same-sex marriage and expanded abortion rights. In Canada, the legalisation of cannabis can be seen as a liberal advance.

   Look into how rights have been advancing in liberal democracies. How do the country's institutions and citizens help bring forward rights? Have these changes come quickly enough? Too quickly? What other changes are needed?

4. Are you involved in a group pushing for social change? How does that group fight for change using accepted norms of liberal democracy? How does it use reason to help push forward change? Are there areas where it could do a better job?

5. Václav Havel, former President of the Czech Republic, said this about democracy and the rule of law:

   > I am convinced that we will never build a democratic state based on the rule of law if we do not at the same time build a state that is—regardless of how unscientific this may sound to the ears of a political scientist—humane, moral, intellectual and spiritual, and cultural. The best laws and best-conceived democratic mechanisms will not in themselves guarantee legality or freedom or human rights—anything, in short, for which they were intended—if they are not underpinned by certain human and social values.... The dormant goodwill in people needs to be stirred. People need to hear that it makes sense to behave decently or to help others, to place common interests above their own, to respect the elementary rules of human co-existence.

   How does individual decency and goodwill contribute to a functioning democracy?

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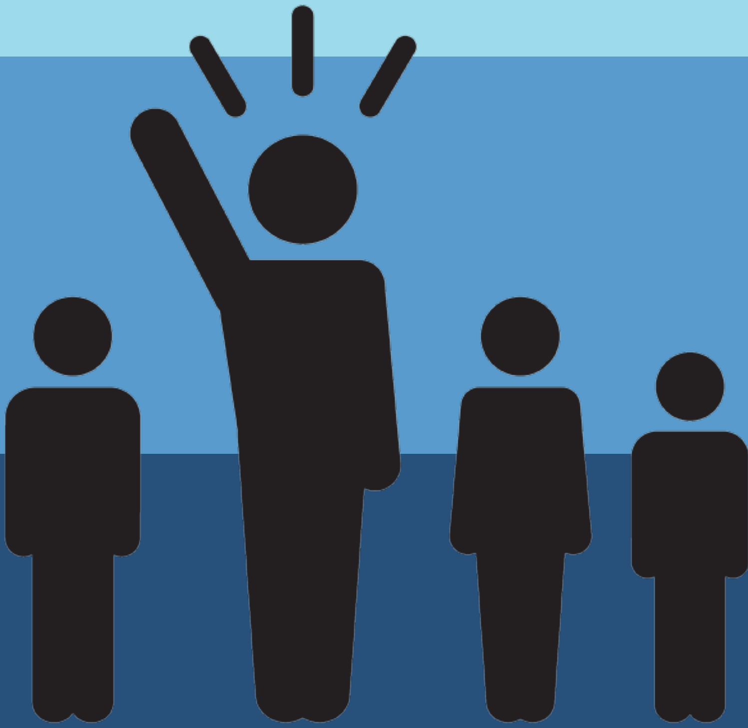

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