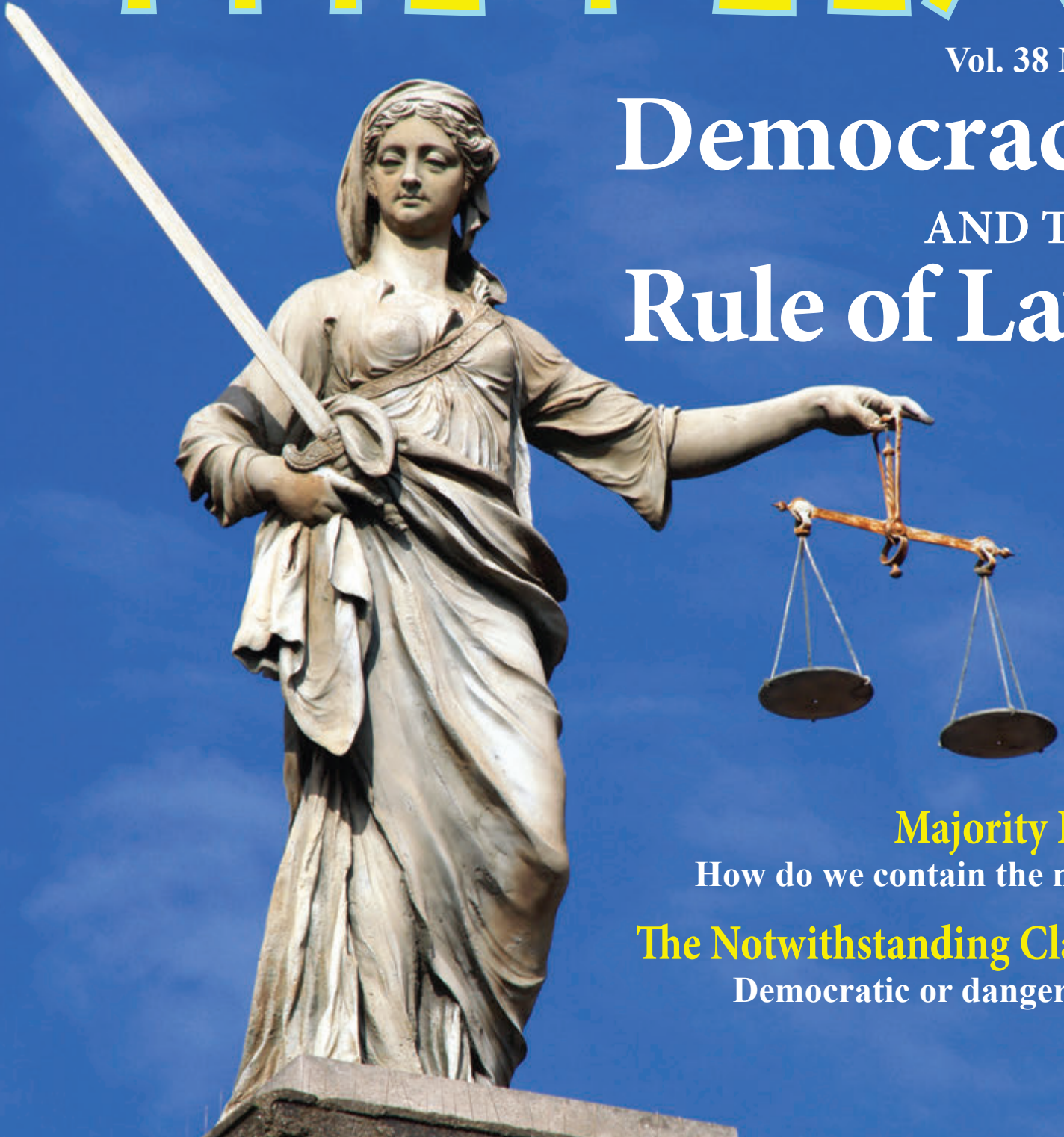


THE PLEA

Vol. 38 No. 2

Democracy AND THE Rule of Law



Majority Rule

How do we contain the mob?

The Notwithstanding Clause

Democratic or dangerous?

PLEA



Legal Information for Everyone

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Don't stop learning now!

Democracy isn't doing so well. The Economist Intelligence Unit 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 the rules of a democracy keep power in check. This issue of *The PLEA* explores these questions. It considers:

- how liberal democracies balance majority rule with minority rights,
- how the rule of law establishes ground rules for a democracy,
- the harm caused when a democracy's rules are stretched, and
- where power ultimately resides in Canada.

Ideal for most any reader, *Democracy and the Rule of Law* is specifically designed to fulfill several requirements across Saskatchewan's social science curricula. It will also be of particular interest to people curious about how the rule of law supports democracy, and how democracy supports the rule of law.

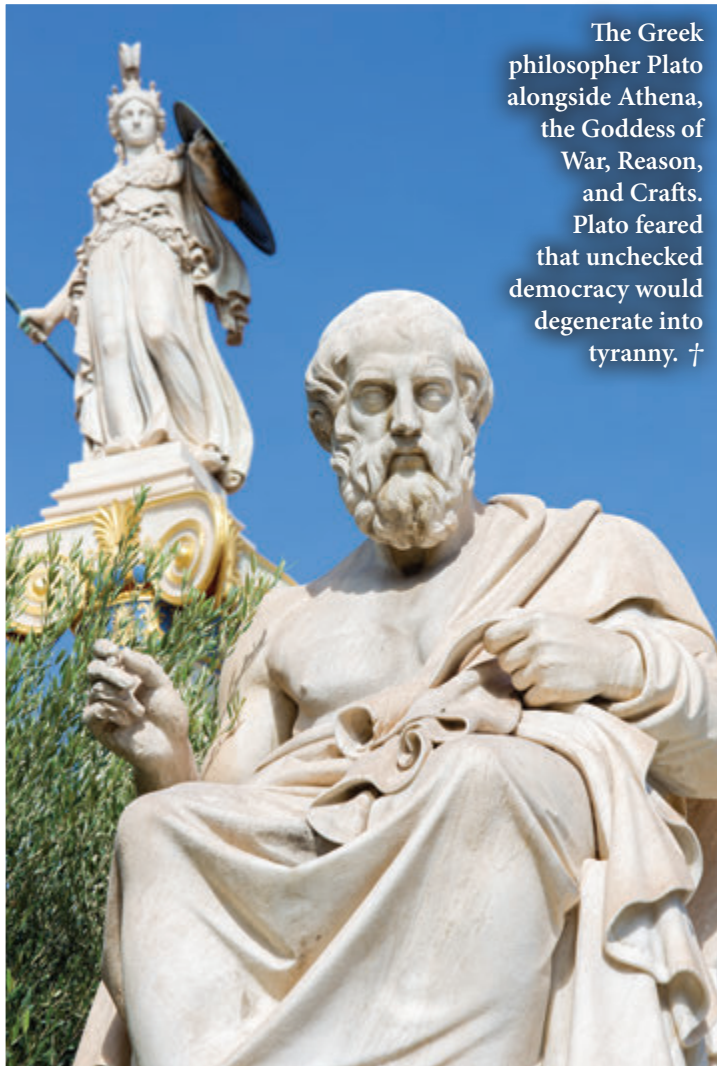


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ON THE COVER Statue of Lady Justice at Dublin Castle, erected by the British in 1751. Unlike many Lady Justice statues, Dublin's is not blindfolded and faces the castle instead of the citizens. Until a recent restoration, rain water would often tilt her scales towards the revenue office. *Photo by Shutterstock.*

What is Democracy?



The Greek philosopher Plato alongside Athena, the Goddess of War, Reason, and Crafts. Plato feared that unchecked democracy would degenerate into tyranny. †

When we think of democracy, we often think of the majority getting its way. However, modern democracies are more than just majority rule.

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

At first glance, the idea that the people rule seems simple. However, the more we think about democracy, 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 at its origin and its current state.

Direct Democracy and Representative Democracy

The original western democracy was Athens of 5th century BC. In ancient Athens, citizens assembled 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, only free males 20 or older—an estimated 10-20% of the population—had the right to participate in Athenian political rule.

Around the same time that direct democracy appeared in Athens, representative democracy appeared in Rome. In ancient Rome, citizens elected representatives to govern on their behalf. These elected representatives assembled to consider and vote on laws and public policies.

Representative democracy has a major advantage over direct democracy: it allows citizens to have a say in governing, without being directly involved in *every* issue. As society became more complex, representative democracy became a more practical way for citizens to have a role in government and law-making while also retaining their freedom to pursue interests outside of governance.

THE CHARTER OF RIGHTS AND FREEDOMS GRANTS CANADIANS INDIVIDUAL RIGHTS SUCH AS FREEDOM OF EXPRESSION, FREEDOM OF WORSHIP, AND FREEDOM OF THE PRESS.

Most democracies today, including Canada, use representative systems of government.

Regardless of whether it is direct democracy or representative democracy, “the people rule” does not mean that every single person will get their way. Democracy means that each individual’s vote should count

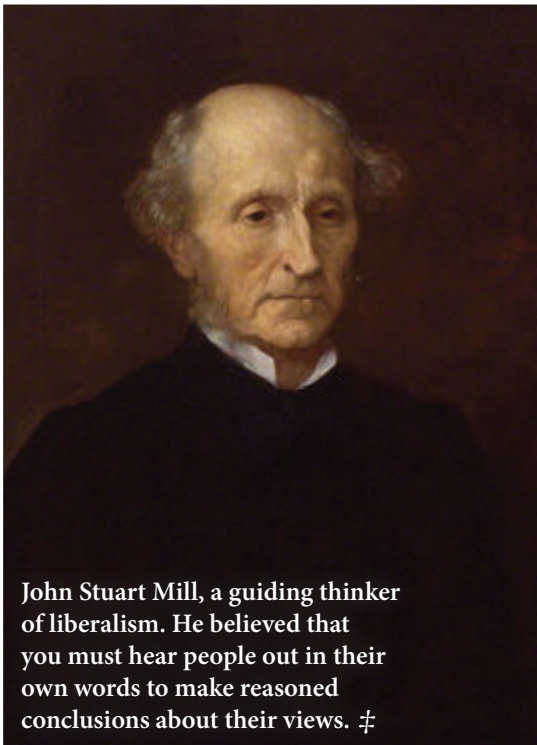
equally. When all the votes are counted, the will of the majority should be enacted.

However, 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 if they do not trample the rights of minorities.

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 have institutions and processes in place to protect minority and individual rights.



John Stuart Mill, a guiding thinker of liberalism. He believed that you must hear people out in their own words to make reasoned conclusions about their views. ‡

Canada and Liberal Democracy

To ensure that the majority gets its way while minorities have their rights protected, Canada has embraced something called liberal democracy.

Liberal democracy combines the ideas of liberalism and democracy. Political scientist Yascha Mounk describes the combination of liberalism

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.

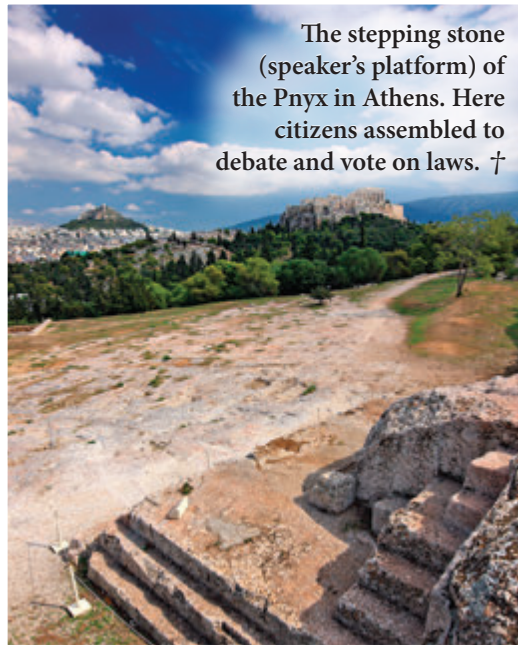
The Charter also recognises that we are individuals as part of a larger society. This is why the Charter affirms our rights to freedom of association. We have the right to gather together in groups of common

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, sometimes emphasise wider social goals over individual rights.

Liberal democracies emerged because citizens fought for liberal values. Liberal democratic constitutions and institutions were created to meet the public's demand. 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. 🗑️



The stepping stone (speaker's platform) of the Pnyx in Athens. Here citizens assembled to debate and vote on laws. †

THINK

1. Canada's *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. However, it also has become a Canadian catch phrase, used to explain Canada's political stability.
 - a) Is Canada a country of peace, order, and good government?
 - b) How can the values of liberalism promote peace, order, and good government?
2. What are the benefits and drawbacks of Canada's way of government? What things would you change? What things would you keep the same?
3. Liberal institutions can sometimes be frustratingly slow to change. What means do we have available to create change in Canada's liberal democracy?

DEFINING LIBERALISM

The word liberal can describe everything from a generous spirit to questionable morals. Its many meanings complicate knowing what is meant when the word liberal is used.

In a philosophical context, liberal is easier to define. Liberal is rooted in the Latin word *liber*, which means free. Being free is the basis of liberal philosophy. As such, liberalism embraces 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 as a path to freedom.

Freedom in liberal philosophy is constrained by the harm principle: people should be free to do what they wish, so long as their freedom does not harm others.

Canadians widely accept liberal values. In fact, every major Canadian political party falls under liberalism's philosophical umbrella. Broadly, the Conservative Party, the Green Party, and the New Democratic Party are just as liberal as the Liberal Party.

To be sure, Canada's political parties have differences—sometimes profound—but none are foundationally committed to overturning the liberal norms of reason and individual rights.

What is the Rule of Law?

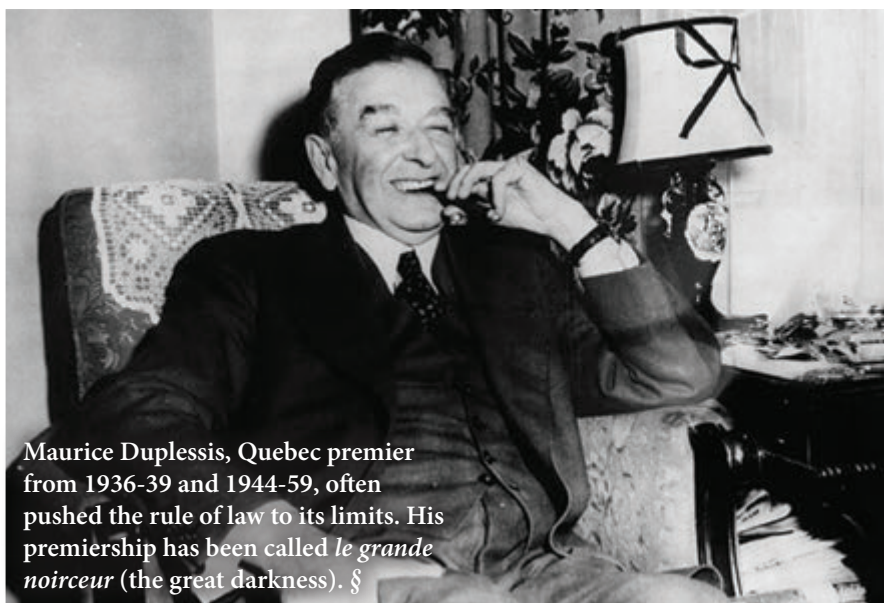
The rules of a sport cannot be made up as players go along. The same is true for democracy. Rules must be in place, and they must apply to everyone.

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 pre-determined, and must be followed by everyone. Canada, as a liberal democracy, has these processes in place. Our laws are democratically constructed, and formally reviewed several times before being voted on. These laws 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.



Maurice Duplessis, Quebec premier from 1936-39 and 1944-59, often pushed the rule of law to its limits. His premiership has been called *le grande noirceur* (the great darkness). §

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?

The rule of law establishes the ground rules for a democracy. The rule of law equally applies to common citizens and people in positions of authority. We can know what the rules are, and we have democratic ways to change the rules if we do not agree with them.

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. ⚠️

THE RONCARELLI AFFAIR

Roncarelli v. Duplessis is a landmark case regarding the rule of law in Canada. In 1940s Quebec, tensions were high between the Roman Catholics and Jehovah's Witnesses. Nearly 1,000 Jehovah's Witnesses were arrested for distributing religious magazines, by claiming that they were violating peddling bylaws. The bylaws were later struck down by the Supreme Court.

Frank Roncarelli, a Montreal restaurateur and Jehovah's Witness, posted bail for almost 400 of the arrested Jehovah's Witnesses. Quebec's Premier, Maurice Duplessis retaliated by revoking the liquor license for Roncarelli's restaurant, and banned him from obtaining another one.

Roncarelli believed that Duplessis had no right to revoke the license. There were rules and processes to obtain and keep a liquor license, and rules governing how a license could be revoked. Roncarelli had followed all the rules. So he went to court.

The Supreme Court ruled in favour of Roncarelli. It said 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." The case affirmed that Canada's political leaders cannot act any way they like: they must follow the rule of law.

THINK

1. When an election is held, laws spell out who is eligible to vote, how much money candidates can spend, and the rules for nominating candidates, among other things.
 - a) How do 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. Governments cannot simply declare laws. Instead, laws are proposed to 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 legislative debate?
 - b) What could happen if laws were passed without public scrutiny?
3. When a law is broken, the police may investigate. The investigation must follow strict rules. If the rules are not followed, then the police's evidence will not be admissible in court.
 - a) How do rules and limits on the power of the police protect the rights of all citizens?
 - b) What could happen if the police investigated in any manner that they pleased?
4. When cases go to court, trials follow 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 rules help ensure fair trials?
 - b) What could happen if judges heard and decided cases any way they wished?
 - c) What could happen if elected officials interfered with court decisions?
5. If there is a disagreement about a court's decision, it often can be appealed to a higher court. The higher court will re-examine the case to determine if the lower court made an error.
 - a) Why must there be a process to review court decisions?
 - b) Why must the reasons for a court's decision be made public?

STRETCHING

Democracy and the rule of law are under pressure around the world...

Council Conundrum

In summer 2018, Ontario's provincial government legislated that Toronto's city council would be cut from 47 to 25 councillors. The move happened during the civic election nomination period. Put another way, the rules of an election were changed after it was already under way.

Ontario has the constitutional authority to determine the size of Toronto city council, meaning that the move was consistent with the rule of law. However, many observers believed that the cut was an act of vengeance. Ontario's premier, Doug Ford, was a former Toronto city councillor who had an acrimonious relationship with many Toronto city councillors. By reducing council, several councillors would be unable to be re-elected to city hall.

Does the rule of law necessarily prevent the abuse of power?



Court Crisis

Four out of five Polish people believe that their courts need reform. With the vast majority demanding change, Poland's government made sweeping court reforms in recent years. Some were needed improvements, however, critics charged that many reforms undermined the independence of the courts.

One controversial change was the lowering of the mandatory retirement age for judges. This forced many sitting judges into retirement, allowing the ruling party to appoint its political allies in their place. Worried that judicial independence was being undermined, tens of thousands of Poles took to the streets to decry the reforms.

When the masses demand a change, does it necessarily mean that change will be for the better?



THE LIMITS

The minaret on Wangen bei Olten's Islamic community centre sparked the debate, becoming the last minaret built in Switzerland. ‡



Minaret Mayhem

Minarets are towers on mosques, somewhat similar to church steeples. When Switzerland's highest court affirmed the right to construct minarets in that country, aggrieved citizens forced a nationwide referendum on whether or not to ban minarets. While the debate was ostensibly about architecture, critics charged that the referendum was meant to send a message about acceptable religions in Switzerland.

Citizens voted 57.5% in favour of the ban. Switzerland's government did not like the result, but was constitutionally required to change the constitution. The Swiss constitution now reads "Freedom of religion and conscience is guaranteed.... The construction of Minarets is prohibited." The contradiction between these two statements is obvious.

What are reasonable limits on religious freedom in a liberal democracy?



Press Problems

Hungarian law guarantees freedom of the press. However, the government uses financial pressure to silence critical media outlets. Government advertising contracts are selectively awarded to pro-government media: One study showed that 80% of state spending on online advertising went to a pro-government website. Meanwhile, many businesses close to the ruling party follow the government's lead, withholding advertising from critical media. Other businesses simply avoid advertising on critical media because they do not want to fall out of favour with the government.

By starving critical media of advertising revenue, several outlets have been forced to sell out to pro-government media companies. Other critical media have simply changed their editorial stance to a pro-government position, in order to stay in business.

Is the press really free if advertising dollars are required to stay in business?

Who Has the Final Say?

How do we keep the majority from trampling the rights of minorities?

In a democracy, the people rule. If the majority makes a demand, elected leaders have an obligation to seriously consider that demand. But sometimes the majority overlooks reason, and makes a demand that could trample the rights of minorities. This phenomena is known as ochlocracy, or mob rule.

To help keep ochlocracy at bay, liberal democracies spread power amongst several institutions. Each institution can act as a check on other ones. One of the most powerful checks, as discussed on pages six and seven, is the power of courts. They can determine whether or not the government is respecting the rule of law, the *Constitution Act*, and the *Charter of Rights and Freedoms*. So, for example, if a legislature passes a law that violates rights guaranteed in the Charter, the court can declare that the law must be changed.

The power of the courts to rule on whether or not laws are constitutional has led some people to suggest that there is a “tyranny” of the judiciary. They argue that it is unelected judges—not elected representatives—who ultimately determine Canada’s laws. This is not true.

If a court rules that a law violates the Charter, in many cases the government can invoke the Notwithstanding Clause. This clause permits a legislature to temporarily

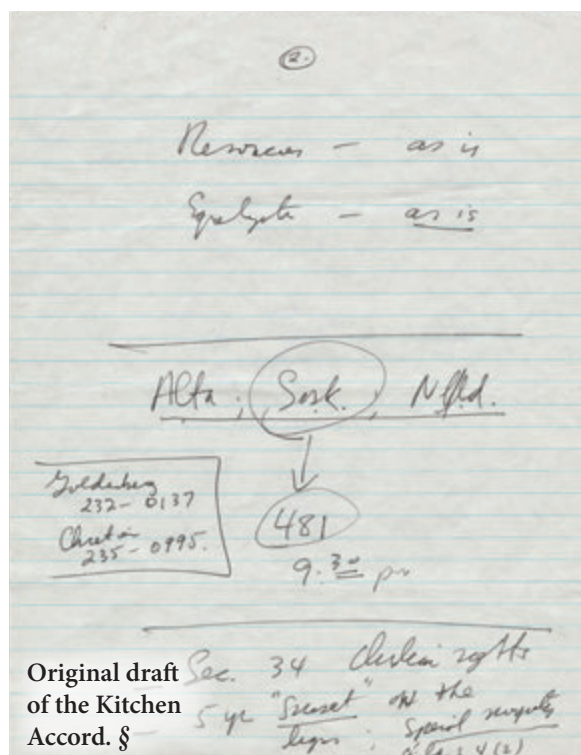
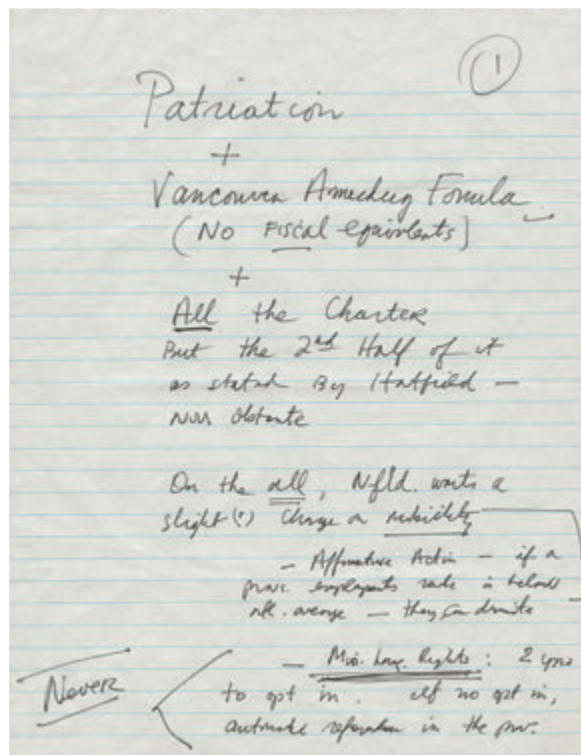
override the Charter. Thus, the Notwithstanding Clause gives legislatures higher authority than the courts.

There are other ways that power is kept in check in Canada.

The federal government cannot simply declare a law, without a debate and without that law being subjected to a thorough review. The rule of law requires that there be open and established processes to guide law-creation.

All federal legislation must be passed by both the House of Commons and the Senate of Canada. Sir John A. Macdonald described the Senate as the chamber of “sober second thought,” meaning that it would be the place where proposed laws—called bills—were given careful consideration. Today, only the federal government has a Senate. Many provinces once had Senates, but abolished them years ago.

The final check on legislation is Royal Assent, the Queen’s approval. Without Royal Assent, a bill cannot become law. In Canada, Royal Assent is given by



the Queen's representative: the Governor General for federal legislation, each province's Lieutenant Governor for provincial legislation.

Refusal of Royal Assent is virtually unprecedented. The last time a British monarch refused Royal Assent in the United Kingdom was in 1707.

Canada's Governor General has never refused Royal Assent of parliamentary legislation. And only once has Royal Assent been refused provincially, in Prince Edward Island in 1945.

If history serves as a guide, it is very unlikely that Royal Assent would be refused today. Yet, Royal Assent gives the Monarchy the highest power in Canada. That said, it is difficult to know how Canadians would react if Royal Assent was refused.

Peace, Order, and Good Government

Canada has other safeguards throughout the legislative process, such as legislative committees and multiple readings of bills, that help ensure laws are thoroughly reviewed. As well, there are a

few archaic constitutional powers that the federal government could potentially use to halt runaway provincial legislation.

In the end, spreading power across several institutions makes Canada's law-creation more reasoned and less mob-like. Because every law in Canada—including the constitution and the Charter—is created by and can be amended by elected representatives, it is vital to have opportunities to consider positions, consult experts, and ask questions. This helps temper emotions, protect minority rights, and promote reason. 🗳️

THE RULE OF LAW REQUIRES THAT THERE BE OPEN AND ESTABLISHED PROCESSES TO GUIDE LAW-CREATION.

THINK

1. Legislatures are democratically elected by the people to create laws. Why is it important for the will of the people to be enacted?
2. Judges are highly-trained experts in the law. Why is it important that judges have the authority to overturn laws created by legislatures?
3. How does the diffusion of power in liberal democracies help keep mob rule at bay?
4. Where does power ultimately reside in a liberal democracy? In its institutions? In its elected representatives? Or in the people?

THE NOTWITHSTANDING CLAUSE

When the *Charter of Rights and Freedoms* was proposed, there was a fear that it gave too much power to the courts. As the Charter was originally written, if a court overturned a law, legislatures would be powerless to act unless they amended the constitution.

Aware of this concern, Roy Romanow, Jean Chrétien, and Roy McMurtry met in the kitchen of Ottawa's Government Conference Centre on the second-last day of the 1981 constitutional conference. They drafted the Kitchen Accord, which included the idea of adding a notwithstanding clause to the Charter. The Notwithstanding Clause allows legislatures to override the Charter's sections granting fundamental freedoms, legal rights, and equality rights, regardless of court rulings.

Any use of the Notwithstanding Clause can only stay in effect for five years. The time limit helps preserve the rule of law, the role of reason, and the protection of minorities. If a government wishes to continue overriding the Charter, legislators and the public must re-visit the decision.

Because the Notwithstanding Clause allows for rights to be suspended, its use is controversial. Any government that overrides Charter rights almost always will face a public backlash.

Further Resources



REVOLUTION

Learn how revolutions overturn laws and institutions.



OUR GOVERNMENT, OUR ELECTION

Learn about government, politics, and elections in Saskatchewan.



THE NAZI SATIRE PROJECT

Learn how Nazi Germany used satire to cast certain citizens as “others.”



HAMMURABI'S CODE

Learn about the origin of western legal systems and how they compare to Indigenous law.



70 YEARS OF THE BOMB

Learn about the most powerful weapon ever created.

DEMOCRACY AND THE RULE OF LAW

This full-length learning resource expands on the ideas of how the rule of law supports democracy, and how democracy supports the rule of law. Perfect for senior Law and Social Studies courses, its seven lessons include step-by-step instructions, student handouts, and case studies.



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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.

— Václav Havel, former President of the Czech Republic

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