

# Constitutional Change in the 21st Century: A New Debate over the Spending Power

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*The author offers his views on the future of the federal spending power debate in Canada. First, he explores the original purposes of Canada's 19th century federal constitution and its evolution in the 20th century in response to a changed sense of what a modern state should be and Canada's place in the world. He contends that the debates over the federal spending power grow out of the friction between Canada's 19th century political constitution and its 20th century fiscal constitution. Turning to the 21st century, the author posits that demographic shifts will drive future debates about the federal spending power. These shifts will bring political representation to the fore and raise issues about the appropriate role of federal spending on economic and social policy.*

## Introduction

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## Introduction

The contemporary debate over the federal spending power fills me with both a sense of *déjà vu* and nostalgia — *déjà vu* because it has gone on for so long, and nostalgia because of my own involvement in it.

As a country, we have been debating the questions of whether there are justiciable limits on the federal spending power, and whether we should amend the constitution to include such limits, ever since the Privy Council announced the existence of that power in the *Unemployment Insurance Reference*.<sup>1</sup> Indeed, controversies over the

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federal spending power have been at the heart of the politics of social policy, which in turn have been at the very centre of federal-provincial relations since the rise of the Canadian social union after the Second World War. Throughout, debates about the federal role in social policy have not merely been debates over the design of social programs, or even about the appropriate division of labour between the federal and provincial governments. Rather, the politics of social policy have been a terrain for competing nationalisms. In the post-war period, the construction of the welfare state has been central to a pan-Canadian nationalism, centred on the federal government. Though the origin of modern Quebec nationalism is a complex story, to a considerable extent it was a defensive response to this federally-led nation-building project. Federal social policy activism meant an increase in the importance of federal institutions, especially the federal bureaucracy, which worked in English and in which francophone Quebecers were a small minority.

For over a decade, I have contributed to these debates myself. There are three strands to my work. First, I have devoted considerable attention to the legal framework governing shared-cost programs, in particular the design and enforcement of federal statutes authorizing transfers to the provinces and territories conditioned on compliance with national standards for medicare.<sup>2</sup> In short, I have argued that national standards have rarely been enforced by the federal government. In addition, I have suggested that they be fundamentally rethought. They should be converted into self-imposed provincial benchmarks, with provincial performance assessed and publicly reported on by an

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Government's Role in Social Policy: The Spending Power and Other Instruments" held in Ottawa in June 2008. I thank the organizers of both events — Marc-Antoine Adam, Tom Courchene, Mel Cappe, Hoi Kong, William Tholl and Leslie Seidle — for their invitations to speak. All remaining errors are mine.

1. *Reference Re Employment and Social Insurance Act (Can.)*, [1937] 1 D.L.R. 684 (P.C.), (*sub nom. Canada (A.G.) v. Ontario (A.G.)*) [1937] A.C. 326 [*Unemployment Insurance Reference*].

2. Sujit Choudhry, "The Enforcement of the *Canada Health Act*" (1996) 41 McGill L.J. 461; Sujit Choudhry, "Bill 11, The *Canada Health Act* and the Social Union: The Need for Institutions" (2000) 38 Osgoode Hall L.J. 39; Canada, Royal Commission on the Future of Health Care in Canada, *Strengthening the Foundations: Modernizing the Canada Health Act* by Colleen M. Flood & Sujit Choudhry, Discussion Paper No. 13 (Ottawa: Health Canada, 2002).

independent third party agency (such as the Health Council of Canada), and with enforcement being left to the provincial political process.

Second, I have turned my mind to the constitutional architecture within which these arrangements have developed.<sup>3</sup> Two constitutional assumptions underlie the development of the social union: the federal government lacks direct jurisdiction over the design and delivery of social programs, and intergovernmental agreements are judicially unenforceable. I have tried to suggest that these should now be reconsidered. In particular, I have argued that the strongest criticism of the federal spending power — the incoherence of granting the federal government fiscal jurisdiction in areas where it lacks regulatory jurisdiction — does not necessarily lead to the conclusion that it should not be able to make conditional transfers to underwrite provincial social programs. Rather, in light of the modern Supreme Court of Canada’s expansive conception of federal jurisdiction, an argument could be crafted under the Peace, Order and Good Government (POGG) power for federal jurisdiction over social policy.

On this occasion, I want to extend arguments that I have developed in the third and most recent strand of my work.<sup>4</sup> Rather than diving into the familiar legal and political debates once again, I have suggested that how we think about the federal role in social policy, and about redistribution more generally, has started to shift in response to the profound demographic change that is beginning to put strain on a number of dimensions of our constitutional structure. I posit, for example, that the rise of the so-called “cities agenda” — especially as

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3. Sujit Choudhry, “Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy” (2002) 52 U.T.L.J. 163; Sujit Choudhry, “Beyond the Flight from Constitutional Legalism: Rethinking the Politics of Social Policy post-Charlottetown” (2003) 12 Const. Forum Const. 77.

4. Sujit Choudhry, Jean-François Gaudreault-DesBiens & Lorne Sossin, eds., *Dilemmas of Solidarity: Rethinking Redistribution in the Canadian Federation* (Toronto: University of Toronto Press, 2006) [*Dilemmas of Solidarity*]; Choudhry, Gaudreault-DesBiens & Sossin, “Introduction: Exploring the Dilemmas of Solidarity” in *Dilemmas of Solidarity, ibid.*, 3; Choudhry, “Redistribution in the Canadian Federation: The Impact of the Cities Agenda and the New Canada” in *Dilemmas of Solidarity, ibid.*, 45; Choudhry, Gaudreault-DesBiens & Sossin, “Afterword: Solidarity Between Modesty and Boldness” in *Dilemmas of Solidarity, ibid.*, 206.

advanced by the mayors of Canada's major urban centres — will strain the federal-provincial transfer system, as cities emerge as nascent sites of political identity and fuel demands to reduce financial transfers from urban to rural areas through the federal tax and transfer system, which are considerable. In this paper, I want to take this line of analysis one step further, and ask what other changes we can expect to see in the politics of the federal spending power in the 21st century.

## I. The 19th versus the 20th Century

To get at that question, I want to reflect on where the contemporary controversy over the federal spending power comes from. These debates arise from the manner in which Canada has managed constitutional change over the last century. The constitutional provisions governing the federal division of powers are found in the *Constitution Act, 1867*.<sup>5</sup> The key sections are sections 91 and 92, which contain lists of “exclusive” areas of jurisdiction. Some areas of jurisdiction — consider criminal law and procedure — remain central areas of public policy. Many of the grants of jurisdiction in these uninspiring lists now appear rather narrow (for example, weights and measures, beacons and buoys, saloons and taverns). But more importantly, they reflect a 19th century conception of what the state does, and what the Canadian state in particular was expected to do.

One of the principal goals of Confederation was to create and empower a federal government which could undertake the expansion of European settlement of the Western half of the northern half of the continent, and which could integrate that part of North America, economically and politically, with the rest of Canada. International relations were left to the Empire. This is reflected in section 132, on the implementation of Imperial treaties — the only reference to international treaties in the constitutional text.<sup>6</sup> To be sure, there have been important amendments to the provisions governing federalism since 1867. In the social policy field, for example, there have been

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5. *Constitution Act, 1867* (U.K.), 30 & 31, Vict., c. 3, ss. 91-92, reprinted in R.S.C. 1985, App. II, No. 5.

6. *Ibid.*, s. 132.

amendments conferring jurisdiction on the federal government over unemployment insurance (1940),<sup>7</sup> old age pensions (1951),<sup>8</sup> and supplementary benefits including survivors' and disability benefits irrespective of age (1964).<sup>9</sup> But sections 91 and 92 have survived largely intact.

It is beyond dispute that if the division of powers were drafted today, it would look rather different. By way of comparison, consider the 1996 South African constitution, one of the leading examples of a contemporary federal constitution. It refers explicitly, and at length, to the welfare state.<sup>10</sup> It allocates jurisdiction over health care, social assistance and housing.<sup>11</sup> In addition, it assigns responsibility for the environment, consumer protection, labour relations, competition policy, economic development, telecommunication and broadcasting, among other areas.<sup>12</sup> It also speaks to international relations, including the power to make and implement treaties.<sup>13</sup>

This comparison between a constitution negotiated in the mid-19th century and one negotiated at the end of the 20th century highlights the enormous gap between what we need our constitution to do and what its written text says. One of the central themes of Canadian constitutional development over the 20th century is found in our attempts to deal with the encounter of our 19th century constitution with a dramatically changed sense of what a modern state should be and of Canada's place in the world. In a nutshell, the constitution had to adapt to the demands of the regulatory, redistributive state, as well as to the fact of Canadian independence. None of this was foreseen in 1867.

Constitutional change in the federal division of powers occurred only rarely through constitutional amendment, and even then, never through large-scale, comprehensive constitutional change. For the most part, it occurred through two other mechanisms — *ad hoc*, incremental

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7. *Constitution Act, 1940* (U.K.), 3-4 George VI, c. 36.

8. *British North America Act, 1951* (U.K.), 4-15 George VI, c. 32, as rep. by *Constitution Act, 1982*, Sch., being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11.

9. *Constitution Act, 1964* (U.K.), 12-13 Eliz. II, c. 73.

10. *Constitution of the Republic of South Africa 1996*, No. 108 of 1996, Sch. 4.

11. *Ibid.*

12. *Ibid.*

13. *Ibid.*, ss. 231-233.

constitutional interpretation in the litigation process and executive and legislative action.

Constitutional litigation on the division of powers has been driven in part by the gap between the 19th century text and the public functions needed in a modern, independent Canada. In many cases, the courts have engaged in a process of *constitutional translation*, re-reading provisions drafted against the backdrop of 19th century legal categories in a 20th century policy context. Far from being flatly counter-majoritarian, this has often occurred at the invitation of one level of government, and has therefore been about the allocation of power between different political majorities. The interpretive metaphor of the “living tree” offers the doctrinal basis for this court-driven approach to constitutional development.<sup>14</sup> An excellent example is provided by the fairly recent decision in *Reference Re Employment Insurance Act (Can.), ss. 22 and 23*,<sup>15</sup> where the Court invoked the living tree doctrine to reject a constitutional challenge to the maternity and parental leave benefits provided under the *Employment Insurance Act*, notwithstanding their weak connection to the original rationale for the employment insurance system.

This mechanism of *ad hoc* incremental change remains an important, if underappreciated, form of judicial interpretation, which is likely to be deployed in the service of the ongoing project of constitutional adaptation. In challenges now pending against the *Assisted Human Reproduction Act*<sup>16</sup> and the *Personal Information Protection and Electronic Documents Act*,<sup>17</sup> as well as in the looming constitutional battle over the

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14. *Reference Re British North America Act, 1867 s. 24* (1929), [1930] 1 D.L.R. 98 (P.C.), (*sub nom. Edwards v. Canada (A.G.)*) [1930] A.C. 124.

15. 2005 SCC 56, [2005] 2 S.C.R. 669.

16. S.C. 2004, c. 2. Portions of this act were found to be unconstitutional by the Quebec Court of Appeal in *L’Affaire du Renvoi fait par le gouvernement du Québec en vertu de la Loi sur les renvois à la Cour d’appel, L.R.Q. ch. R-23, relativement à la constitutionnalité des articles 8 à 19, 40 à 53, 60, 61 et 68 de la Loi sur la procréation assistée, L.C. 2004, ch. 2*, 2008 QCCA 1167.

17. S.C. 2000, c. 5 [PIPEDA]. The Quebec government issued an order-in-council posing a reference question to the Quebec Court of Appeal on the constitutionality of PIPEDA under the division of powers on December 17, 2003. This proceeding does not appear to have moved forward. See *Concerning a reference to the Court of Appeal to the Personal*

implementation of the *Kyoto Protocol*<sup>18</sup> and its successor agreement, the Court will have to translate the 1867 constitutional text to allocate jurisdiction over reproductive technologies, privacy and international environmental protection.

In other cases, the Court has fashioned new constitutional powers to meet pressing social and political needs by literally filling constitutional gaps. Perhaps the most vivid examples are found in judicial attempts to adapt the constitution to the reality of Canadian independence. The early cases on the implementation of international treaties (the *Aeronautics Reference*<sup>19</sup> and the *Radio Reference*<sup>20</sup>) suggested that the Court would respond to the *Balfour Declaration*<sup>21</sup> and the *Statute of Westminster*<sup>22</sup> by vesting treaty implementation in the federal jurisdiction. Although the Court stepped back from this conclusion in *Labour Conventions*,<sup>23</sup> the intuition that Canada's international legal personality had domestic constitutional implications was carried forward, through the "gap" branch of POGG in cases on jurisdiction over the continental shelf.<sup>24</sup>

But it would be a mistake to conclude that the courts, and the litigation process, have been the principal agents of constitutional change outside the formal procedures of constitutional amendment. Another mechanism of adaptation has rested with political actors, acting through the executive and legislative branches of government. As Richard Simeon and Ian Robinson have argued, governments, confronted with the mismatch between 20th century policy

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*Information Protection and Electronic Documents Act* (S.C. 2000, c. 5), O.I.C. 1368-2003, G.O.Q. 2003.

18. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, U.N. Doc FCCC/CP/1997/7/Add.1, (1998) 37 I.L.M. 22.

19. *Re Regulation and Control of Aeronautics in Canada*, [1932] 1 D.L.R. 58 (P.C.).

20. *Re Regulation and Control of Radio Communication*, [1932] 2 D.L.R. 81 (P.C.).

21. Letter from Arthur James Balfour to Lord Walter Rothschild (2 November 1917), online: Yale Law School, *Avalon Project* <[http://avalon.law.yale.edu/20th\\_century/balfour.asp](http://avalon.law.yale.edu/20th_century/balfour.asp)>.

22. *Statute of Westminster, 1931* (U.K.), 22 & 23 Geo. V, c. 4.

23. *Reference Re Weekly Rest in Industrial Undertakings Act, Minimum Wages Act and Limitation of Hours of Work Act*, [1937] 1 D.L.R. 673 (P.C.), (*sub nom. Canada (A.G.) v. Ontario (A.G.)*), [1937] A.C. 326 [*Labour Conventions*].

24. *Reference Re Offshore Mineral Rights*, [1967] S.C.R. 792; *Reference Re Newfoundland Continental Shelf*, [1984] 1 S.C.R. 86.

responsibilities and 19th century constitutional text, have engaged in a complex mix of competition and collaboration.<sup>25</sup> Political competition has often culminated in epochal constitutional battles before the Supreme Court — for example, over natural resources<sup>26</sup> and broadcasting.<sup>27</sup> Yet political cooperation has been equally important. The principal constitutional devices that have facilitated federal-provincial policy cooperation are executive federalism and intergovernmental agreements. Neither is referred to in the constitutional text, yet both have evolved to enable governments to work the gears of a 19th century constitution in a modern context of overlapping jurisdiction and policy interdependence. Nor is either one legally required or legally enforceable, so that policy unilateralism is subject to few hard constitutional restraints. However, both devices are well-established political practices that are clearly of *constitutional* significance, in that they constrain the exercise of public power and fuel public expectations of appropriate political behaviour.

The point I want to make is that the constitutional politics of social policy are part of this much larger story of constitutional change. From the standpoint of the 20th century, the failure to provide for the welfare state was one of the most conspicuous gaps in our 19th century constitution. To be sure, section 92(7) grants the provinces jurisdiction over hospitals, asylums, charities and “eleemosynary institutions.” But these are arguably references to private forms of social provision, and they fall far short of giving clear jurisdiction over the welfare state which, as the Rowell-Sirois Commission accurately observed, was no doubt beyond the contemplation of the framers of the 1867 constitution. Notwithstanding the lack of clear constitutional guidance on jurisdiction over social policy, Canadians have managed, by a variety of means, to change the constitution to create a uniquely Canadian

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25. Richard Simeon & Ian Robinson, *State, Society and the Development of Canadian Federalism* (Toronto: University of Toronto Press, 1990).

26. See e.g. *Canadian Industrial Gas & Oil Ltd. v. Saskatchewan*, [1978] 2 S.C.R. 545; *Central Canada Potash Co. v. Government of Saskatchewan* (1978), [1979] 1 S.C.R. 42; *Reference Re Proposed Federal Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004.

27. See e.g. *Capital Cities Communications v. CRTC*, [1978] 2 S.C.R. 141; *Public Service Board v. Dionne*, [1978] 2 S.C.R. 191; *Quebec (A.G.) v. Kellogg's Co.*, [1978] 2 S.C.R. 211.

version of the welfare state, and one which was adapted to the reality of federalism.

The courts have played an unusual role in this constitutional story. On the one hand, their place in it has been central. It was the courts that created the constitutional space for the social union, through the Privy Council's pivotal judgment in the *Reference Re The Employment and Social Insurance Act*.<sup>28</sup> While finding that the federal scheme of mandatory, contributory unemployment insurance was unconstitutional, the Privy Council affirmed the constitutionality of conditional federal grants to individuals, institutions and other levels of government — a power that is nowhere referred to in the constitutional text. This judgment raised a number of important questions about the contours of the spending power, such as when a federal condition shades into a colourable intrusion into provincial jurisdiction, questions one would have expected to give rise to subsequent litigation. But although these contours have been the subject of intense political dispute, the spending power has never been brought back to the courts by governments, largely because governments have found that the risks of constitutional litigation would outweigh its potential benefits.

Political institutions have taken the lead in crafting the constitutional instruments that constitute and regulate the social union. Intergovernmental agreements, such as those entered into under the former Canada Assistance Plan, were one way to codify the results of federal-provincial negotiations. The Social Union Framework Agreement, although of questionable practical importance, is also in this tradition. But of far greater importance are the various statutes creating shared cost programs. In their current form, these statutes have a complicated genealogy, deriving from those creating Medicare,<sup>29</sup> creating shared cost programs in the social assistance area<sup>30</sup> and providing for financial transfers.<sup>31</sup> The genealogy is tied not only to health insurance

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28. *Labour Conventions*, *supra* note 23.

29. *Hospital and Diagnostic Insurance Act*, R.S.C. 1970, c. H-8; *Medical Care Act*, R.S.C. 1970, c. M-8; *Canada Health Act*, R.S.C. 1985, c. C-6.

30. *Canada Assistance Plan Act*, R.S.C. 1985, c. C-1.

31. *Federal-Provincial Fiscal Arrangements Act*, R.S.C. 1985, c. F-8.

and social assistance, but also to the unconditional transfers that are part of equalization.

So, layered on top of our 19th century political constitution is a 20th century fiscal constitution consisting of constitutional doctrine, intergovernmental agreements, and federal statutes creating shared cost programs and equalization. But the fit between our 19th and 20th century constitutions is far from perfect. At its root, the problem is one of competing constitutional logics. The logic of the 19th century constitution is to align jurisdiction over policy areas with policy instruments. A powerful illustration is provided by the *Labour Conventions* case, which established the important point that jurisdiction over treaty implementation tracks ss. 91 and 92 — *i.e.*, the mere fact that a treaty was on the table did not serve to modify the division of powers.<sup>32</sup> Extended to the federal spending power, this reasoning would render unconstitutional *any* condition attached to federal monies in areas of provincial jurisdiction. However, that has not occurred because our 20th century fiscal constitution clearly divorces the federal government's regulatory jurisdiction from its fiscal jurisdiction. Similarly, the 20th century constitution distinguishes between treaty negotiation, which by constitutional practice vests with the federal crown, and treaty implementation, which tracks the division of powers. It is the friction between the 19th and 20th century constitutions, and more fundamentally, the clash between their underlying logics, which more than anything else has generated over five decades of conflict over the federal spending power.

## II. The 21st Century

Viewed in broader historical perspective, the constitutional politics of the spending power are the product of a larger process of constitutional adaptation. This raises the following question. Suppose our constitution comes under pressure to change again. What will the constitutional politics of the spending power look like in the 21st

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32. *Supra* note 23 at 682: “[N]o further legislative competence is obtained by the Dominion from its accession to international status, and the consequent increase in the scope of its executive functions.”

century? To answer this specific question, I want to identify an emerging set of pressures on our broader constitutional arrangements, and then come back to the issue of the spending power. In short, I want to suggest that our constitution is increasingly out of sync with some key demographic facts.

First, although Canada's population grew considerably over the 20th century, that growth is increasingly and disproportionately concentrated in certain provinces. For example, between 1981 and 2006, the country's population grew from 24.3 million to 31.6 million. Of this growth, 82 per cent occurred in Ontario, Alberta and British Columbia, whose share of total population continues to rise. Every other province has seen its relative share decline over the same period. In absolute terms, Saskatchewan experienced no growth, and Newfoundland and Labrador's population actually declined.<sup>33</sup> Moreover, a variety of scenarios project that population growth will continue to be concentrated in Ontario, Alberta and British Columbia, both in absolute and relative terms.

Second, Canada has become an urban nation. In 1901, 37 per cent of Canadians lived in urban regions. By 2006, that figure had risen to 80 per cent. Within urban Canada, population is increasingly concentrated in our largest urban centres, known as Census Metropolitan Areas (CMAs), which are now home to 68 per cent of Canadians. Even more dramatically, 10 million people now live in metropolitan Toronto, Montreal and Vancouver, although those cities account for only 0.1 per cent of Canada's total territory. The rise of urban Canada has been fuelled by two kinds of migration, international and internal. Over time, immigrants have increasingly tended to settle in Toronto, Montréal and Vancouver. Nearly three-quarters of the immigrants who arrived in Canada between 1991 and 2001 settled in those three cities, 43 per cent in Toronto alone. Migration of persons born *within* Canada has been an equally dramatic trend. This migration has mostly been to

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33. These calculations are based on figures in the 1981 and 2006 censuses. The projections are from Statistics Canada, *Population Projections for Canada, Provinces and Territories: 2005-2031* by Alain Bélanger, Laurent Martel & Éric Caron-Malenfant (Ottawa: Minister of Industry, 2005).

CMAAs around Toronto, Montreal and Vancouver, and away from rural Canada.<sup>34</sup>

Third, Canada's population is aging. In 1946, its median age was 28. By 2006, it had risen to 39. Even assuming immigration at present or higher levels, the median age is projected to continue to rise to between 45 and 50 by 2056. As a consequence, Canada's dependency ratio — the number of persons not of working age for every 100 of working age — will increase rapidly. In 2005, this was 44. In 2031, it is projected to be as high as 61. Moreover, the aging of Canada's population intersects with the other two demographic trends mentioned above. The youngest parts of Canada will overlap considerably with those where population is increasingly concentrated: urban Canada, Ontario and Alberta. Rural Canada and the Maritime provinces are, and will remain, the oldest. The fact that persons between 15 and 29 are the most likely to migrate from rural to urban areas has played a key role in the aging of rural Canada.

A new issue for constitutional politics in the 21st century is how our institutions will respond to these profound demographic changes. At the most fundamental level, the question is this: will votes, political power and public expenditure follow people as they make choices about where to work and live, and in the process, fundamentally alter the geographic distribution of Canada's population? This basic question is already forcing itself onto the constitutional agenda, and will continue to play out in three interrelated arenas: political representation, economic policy and social policy.

The first arena is *political representation*. The allocation of House of Commons seats across provinces will be one flashpoint. As I have argued elsewhere, the rules governing the allocation of seats in the House of Commons, both across provinces and within provinces, have produced enormous disparities in riding sizes.<sup>35</sup> Ridings in Ontario, Alberta and British Columbia have significantly more people than ridings in other provinces. Moreover, within all provinces, urban ridings

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34. Data from Statistics Canada, *Demographic changes in Canada from 1971 to 2001 Across an Urban-to-Rural Gradient* by Éric Caron Malenfant *et al.* (Ottawa: Ministry of Industry, 2007).

35. Michael Pal & Sujit Choudhry, "Is Every Ballot Equal? Visible Minority Vote Dilution in Canada" (2007) 13 IRPP Choices 1.

are more populous than rural ridings. As a consequence, although all adult Canadians enjoy formal equality with respect to the right to vote, the weight of their votes varies widely. These variations are deliberate, and are arguably designed to protect the minority of voters who live in smaller provinces and urban areas. However, they are producing a House of Commons that is increasingly at odds with the principle of one person, one vote. By my count, in the current House of Commons of 308 seats, Alberta, British Columbia and Ontario are short by 18 seats. As population growth continues to be concentrated in these provinces, this gap will grow considerably. This is illustrated by the controversy over Bill C-22,<sup>36</sup> which proposed to address the problem, but only for Alberta and British Columbia. Not surprisingly, it was attacked by Ontario's provincial government, and has sparked a furious political controversy.

Another area of controversy is Senate reform, as reflected in Ontario and Quebec's opposition to Bill C-20.<sup>37</sup> Bill C-20 proposed to create a system of Senate "consultations" that would in practice function no differently than elections. Of the many objections to the Bill, one is that it would clothe the upper chamber with democratic legitimacy without addressing the other dimensions of Senate reform. One of the dimensions is regional representation, which was of central importance during both the Quebec and Canada rounds of constitutional negotiations in the 1980s and 1990s. It is well known that our Senate is demographically anachronistic, with the Maritime provinces enjoying greater relative representation than the larger provinces of Alberta and British Columbia because they once had a greater share of the national population. But another issue underlies Ontario's strenuous objections

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36. Bill C-22, *An Act to amend the Constitution Act, 1867 (Democratic representation)*, 2nd Sess., 39th Parl., 2007 (as given first reading in the House of Commons 14 November 2007). See also its predecessor Bill C-56, *An Act to amend the Constitution Act, 1867 (Democratic representation)*, 1st Sess., 39th Parl., 2007 (as given first reading in the House of Commons 11 May 2007).

37. Bill C-20, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 2nd Sess., 39th Parl., 2007 (as given first reading in the House of Commons 13 November 2007). See also its predecessor Bill C-43, *An Act to provide for consultations with electors on their preferences for appointments to the Senate*, 1st Sess., 39th Parl., 2006 (as given first reading in the House of Commons 13 December 2006).

to C-20: when our upper chamber was designed, no one contemplated that a single province would have 40 per cent of the country's population, a proportion that is projected to increase well into this century. In every federation, the upper chamber is structured on the basis of a principle of representation that departs to some extent from representation by population. We must turn our minds to crafting an upper chamber that will reflect Canada's great population asymmetry, especially if we democratize the process of selecting Senators.

Now consider cities. They are creatures of provincial legislation, and traditionally have been viewed as being minor players in public policy. But for major metropolitan centres, that perception is changing. As Richard Florida has famously argued, global city regions have a central role in economic prosperity in the information age.<sup>38</sup> Should we begin to think of major urban areas as a third order of government? If so, should their juridical status, and regulatory and revenue-raising powers change to reflect their importance? Should they be formally regarded as actors in intergovernmental relations, able to engage in direct discussions with the federal government on matters of urban policy?

Political representation is linked to the second arena in which demographics will affect the constitutional agenda: the arena of *economic policy*. Consider major urban areas again. In the literature on the cities agenda, one of the most common assumptions is that the only appropriate response to the importance of cities is their jurisdictional and fiscal empowerment, with the ultimate goal of turning them into city-states. However, this would be a serious mistake. Even the most expansive vision of urban autonomy in Canada would leave many important policy areas in federal jurisdiction. Macroeconomic policy, innovation policy and immigration policy are core areas of federal jurisdiction. For the cities agenda to succeed, the federal government, in its areas of responsibility, must make the economic health of Canada's major urban centres a national priority.<sup>39</sup> However, our constitution imposes two obstacles to getting a federally-led urban agenda off the

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38. Richard Florida, *The Rise of the Creative Class: And How It's Transforming Work, Leisure, Community and Everyday Life* (New York: Basic Books, 2002).

39. See Thomas J. Courchene, "Global Futures for Canada's Cities" (2007) 8:2 IRPP Policy Matters 1.

ground — for example, on the matter of rapid transit, which is necessarily focused in metropolitan areas. First, cities lie within provincial jurisdiction, an argument raised by Quebec in opposing federal policy activism on urban issues. In addition, the possibility of getting traction on urban issues at the federal level is linked to another issue of political representation — the growing gap between the size of rural and urban ridings. The distorting effect of rural over-representation on federal public policy is perhaps best illustrated by the morphing of the Martin government’s cities agenda into a cities and communities agenda, in response to pressure from rural MPs.

Finally, political representation is also linked to the third arena: *social policy*. In the social policy arena, the size and shape of federal expenditures pursuant to the spending power is partly a function of underlying patterns of political representation. The over-representation of smaller provinces and rural areas in the House of Commons creates a set of political incentives that diminish the prospects of having social policies specifically directed at urban ills. Infusing the Senate with democratic legitimacy could compound this effect; Senators appointed on the basis of “consultations” could very well depart from the long-established convention of deferring to the legislative priorities and decisions of the House of Commons. Indeed, given that Senate consultations would be province-wide, Senators might even conclude that they had more legitimacy than MPs elected at riding level. This would enhance the political power of provinces that are in absolute and relative population decline, at the expense of those parts of Canada where people are choosing to live.

In the social policy arena, political conflict fuelled by this demographic gap could play out in the following way. The federal-provincial transfer system is sustained by narratives of solidarity with the “other Canada” — the idea that our fellow citizens in all parts of the country deserve of a basic level of services, no matter where they are born, or where they live. But increasingly, the other Canada is also to be found in the growing enclaves of poverty in urban areas that are taking on an increasingly racialized character. If narratives of social citizenship undergird the federal-provincial transfer system, then changes to those narratives that emphasize bonds of solidarity that are much more local could have dramatic implications for Canada’s fiscal constitution. There

may be a demand that the kind of energy and resources we have long invested in regional development projects in Northern and Atlantic Canada now be directed at our deprived inner cities and immigrant populations. The growing chasm between our institutions of representation and the emerging patterns of political identity would be manifest in a new type of debate over the spending power — a debate that would give voice to the larger, underlying pressures that are building for constitutional change. If we examine debates over the spending power in isolation, we will not fully understand what is at stake.

## **Conclusion**

Let me conclude with this point. Debates over the conditions to be attached to the exercise of the federal spending power — prior provincial consent, opt-outs with compensation, and so on — are debates of the 20th century. We are now in a new century, and new issues are already upon us. How we talk about the spending power will necessarily change as part of a larger reconfiguration of political and economic power.