

IMFG

Institute on Municipal
Finance & Governance

munk school

OF GLOBAL AFFAIRS & PUBLIC POLICY

IMFG PAPERS ON MUNICIPAL FINANCE AND GOVERNANCE

No. 46 • 2019

The Fallacy of the “Creatures of the Provinces” Doctrine: Recognizing and Protecting Municipalities’ Constitutional Status

Kristin R. Good



UNIVERSITY OF
TORONTO

IMFG Papers on Municipal Finance and Governance

The Fallacy of the “Creatures
of the Provinces” Doctrine:
Recognizing and Protecting
Municipalities’ Constitutional Status

By
Kristin R. Good

Institute on Municipal Finance and Governance
Munk School of Global Affairs and Public Policy
University of Toronto
1 Devonshire Place
Toronto, Ontario, Canada M5S 3K7
e-mail contact: info.imfg@utoronto.ca
<http://www.munkschool.utoronto.ca/imfg>

Series editors: Tomas Hachard and Philippa Campsie

© Copyright held by author

ISBN 978-0-7727-1025-3
ISSN 1927-1921

About IMFG

The Institute on Municipal Finance and Governance (IMFG) is an academic research hub and non-partisan think tank based in the Munk School of Global Affairs and Public Policy at the University of Toronto.

IMFG focuses on the fiscal health and governance challenges facing large cities and city-regions. Its objective is to spark and inform public debate, and to engage the academic and policy communities around important issues of municipal finance and governance. The Institute conducts original research on issues facing cities in Canada and around the world; promotes high-level discussion among Canada's government, academic, corporate, and community leaders through conferences and roundtables; and supports graduate and post-graduate students to build Canada's cadre of municipal finance and governance experts. It is the only institute in Canada that focuses solely on municipal finance issues in large cities and city-regions.

IMFG is funded by the Province of Ontario, the City of Toronto, the Regional Municipality of York, the Regional Municipality of Halton, Avana Capital Corporation, and Maytree..

Author

Kristin R. Good is an Associate Professor in the Department of Political Science at Dalhousie University. She is best known for her research on local immigration and diversity policies, particularly her book *Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (2009), which won the Canadian Political Science Association's Donald Smiley Prize in 2010. Her current research on local immigration policies and forms of governance focuses on the way in which they vary in Canadian cities with different demographic configurations of Francophone minorities and Indigenous populations. She is the co-editor (with Dr. Martin Horak) of the McGill-Queen's Studies in Urban Governance book series.

Acknowledgements

The author would like to acknowledge Enid Slack and Tomas Hachard's invaluable feedback and skilful management of the multiple rounds of editing to produce the paper in its current form. The author would also like to thank Alex Flynn and Nelson Wiseman, whose analytically incisive reviews were crucial to strengthening and clarifying the paper's arguments. Together, Tomas Hachard's and Philippa Campsie's editorial suggestions made the paper's arguments, organization, and writing much clearer and more readable. Finally, I would like to thank Richard Stren, Warren Magnusson, and Kate Graham for their encouraging words about the paper's first draft, which was presented at the Canadian Political Science Association's Annual meeting in June 2019.

The Fallacy of the “Creatures of the Provinces” Doctrine: Recognizing and Protecting Municipalities’ Constitutional Status

Kristin R. Good

Abstract

This paper explores the place of municipalities in Canada’s democratic system and constitution, arguing that their status in Canada’s constitutional order ought to be recognized and secured. The constitutional doctrine of “creatures of the provinces” is a legal fiction. The fact that municipalities are included under provincial jurisdiction in Section 92 of the *Constitution Act*, 1867, need not imply a subordinate status. Municipal systems are fundamentally constitutional insofar as they establish and design democratically elected governments and divide power on councils and between levels of government in a way that furthers constitutional values. Nevertheless, municipalities’ current status is insecure because their boundaries, institutions, and division of power can be altered by ordinary provincial legislation. Moreover, court interpretations of their status do not recognize how municipal systems interact with other elements of the constitution including its underlying principles of federalism and democracy, which have been recognized and articulated by the Supreme Court of Canada. The paper suggests ways to secure municipalities’ place in the constitutional order either through recognition in the federal constitution or by legal recognition in provincial constitutions. The latter option is preferable because it is feasible and flexible and respects provincial autonomy. More specifically, the paper argues for the inclusion of “manner and form” provisions in provincial laws establishing municipal systems (including city charters) to protect municipal autonomy and democracy; these provisions must be sufficiently flexible to allow provinces to implement changes if a strong consensus develops that provincial intervention in municipal affairs is warranted to achieve important legislative objectives.

Keywords: Municipal governance, municipal autonomy, federalism, constitution, Canada

JEL codes: H77, H11

The Fallacy of the “Creatures of the Provinces” Doctrine: Recognizing and Protecting Municipalities’ Constitutional Status

I. Introduction

The unilateral decision by the Ontario provincial government in 2018 to reduce the size of Toronto’s City Council to 25 seats has highlighted, among other things, municipalities’ lack of power within Canada’s constitutional order.

In the aftermath of the decision, and throughout the ongoing legal and political battle over it, many have reiterated the notion that municipalities are “creatures of the provinces,” a doctrine that downplays the democratic importance of municipalities and implies that they are accountable to provinces, not citizens (Tindal and Tindal 2000: 8–9). Constitutionally speaking, goes the common refrain, municipalities are simply one more area of legislative authority granted to provinces by the constitution, similar to health care and education.

It is time to do away with the legal fiction that municipalities are “creatures of the provinces.” The concept is neither historically accurate, since some communities had a long history of municipal incorporation before Confederation (and the establishment of provinces), nor an objective assessment of their democratic importance. Rather, it is an ideological construct that downplays the crucial role that municipalities play in giving effect to citizens’ right to local self-government in liberal democracies (Magnusson 2005) and that fails to acknowledge municipalities’ fundamental constitutionality.

This paper explores the proper place of municipalities in Canada’s democratic system and constitution, arguing that their status in Canada’s constitutional order ought to be recognized and secured. It revisits and expands upon an argument that David Cameron (1980) made nearly 40 years ago, which is that municipalities and municipal systems are fundamentally constitutional in nature and that their proper place is in provincial constitutions. It also offers a constitutionally valid way to address an element that Cameron left unresolved – how to legally recognize and protect municipalities’ constitutionality, particularly the thorny question of “entrenchment,” a term for laws that have constitutional status and cannot be amended through ordinary legislation.

The paper begins by arguing that the constitutionality of municipalities and municipal systems is evident insofar as they organize and divide power, advancing important constitutional values in individual communities. Municipalities allow for responsive local decision-making through the territorial division of power and advance the principle of liberty by providing an accountable local decision-making process and by serving as a local check on provincial power (Cameron 1980).

Once one accepts municipalities’ constitutional nature, the question becomes how to secure and formalize municipalities’ place in Canada’s constitutional order.

This paper argues that doing so through a change to Canada's federal constitution is both unfeasible and undesirable. Rather, the proper place for municipalities is within provincial constitutions.

This task is challenging because the concept of provincial constitutions is not well established and provincial legislatures can alter their constitutions by simple majority. Section 4 of this paper argues that municipalities and municipal systems could be “entrenched” in provincial constitutions in a flexible way through “manner and form” provisions – self-imposed procedural restraints on legislative power that can include conditions (such as a two-thirds majority vote or a referendum) for amending certain types of legislation (Hogg 2016: 12-11).

The paper concludes by noting that acknowledging and formalizing municipalities' fundamentally constitutional nature is particularly pressing today, given the growth in provincial power and the extent of executive dominance in provincial democracies.

2. Uncovering Municipalities' Constitutionality

2.1 The “creatures of the province” doctrine

A constitution is “a set of rules that authoritatively establishes both the *structure* and the *fundamental principles* of ... [a] political regime” (Malcolmson, Myers, Baier, and Bateman 2016: 13 [emphasis added]). Much of what Canadians commonly conceive of as the constitution is established in the *Constitution Act, 1867*, and the *Constitution Act, 1982*.

The *Constitution Act, 1867*, establishes Canada as a federal system with a constitutionally protected division of power between the provincial and federal levels of government. It does not recognize local government and municipalities as a separate order of government. This act establishes which powers are allocated to one or the other of these two levels of government and which are shared. Section 92 of the *Constitution Act, 1867*, lists the areas of exclusive provincial jurisdiction; subsection 8 lists “Municipal Institutions in the Province” following a subsection that establishes provincial pre-eminence in health care.¹ Thus “municipal institutions” are an exclusive area of provincial jurisdiction in the Canadian constitution, not shared with the federal government. Furthermore, municipal structures, legislative powers, and taxation powers are neither listed separately nor entrenched constitutionally. Rather, the incorporation of municipalities and the design of municipal systems are left to the provinces to establish through legislation.

Municipalities' lack of independent constitutional status and their location in Section 92 of the Act, along with other areas of provincial authority, have contributed to the development of the constitutional doctrine of municipalities as “creatures of the provinces.” This doctrine, which persists to this day, downplays

1. Municipalities are also mentioned in 92(9), which allows the province to make laws with respect to licences for local purposes.

the democratic importance of municipalities (Magnusson 2005). In a decision supporting the Province of Ontario in the late 1990s, when its authority to impose amalgamation on the constituent units of the former Metro Toronto was challenged in court, the Ontario Superior Court articulated this doctrine in a simple, direct way:

- (i) municipal institutions lack constitutional status;
- (ii) municipal institutions are creatures of the legislature and exist only if provincial legislation so provides;
- (iii) municipal institutions have no independent autonomy and their powers are subject to abolition or repeal by provincial legislation;
- (iv) municipal institutions may exercise only those powers which are conferred upon them by statute (*East York [Borough] v Ontario [Attorney General]* 1997).

Citing local government expert Andrew Sancton, the decision summarizes municipalities' constitutional standing as such: "[T]here are no Canadian local governments that are *politically autonomous in any meaningful sense*. They have *no constitutional protection whatever* against provincial laws that change their structures, functions and financial resources without their consent" (*East York [Borough] v Ontario [Attorney General]* 1997 [emphasis added]).

2.2 *The constitutional status of municipalities: Part of Canadian federalism*

Are Canadian municipalities merely "creatures of the provinces" that can be established and abolished at the provinces' discretion? Is their political autonomy insignificant? Although the "creatures of the provinces" doctrine prevails, there are strong arguments against this interpretation that give greater weight to municipalities' democratic nature. Such arguments downplay the constitutional differences between *federalism*, a constitutional system of government that entrenches the division of power between provinces and the federal government in a constitutional law that can be changed only through a constitutional amendment process, and *provincial-municipal divisions of power*, contained in provincial statutes that are not constitutionally entrenched and are subject to change through the ordinary provincial legislative process. Instead, they acknowledge that constitutionalism is dynamic and that the constitution is a "living document" animated not only by constitutional principles such as democracy, federalism, and subsidiarity, but also by evolving notions of what is legitimate in the current constitutional era.

These perspectives on constitutionalism, which have not been sufficiently considered by the courts in their interpretations of Section 92(8), are more in line with common-sense logic about how governments elected by citizens ought to be treated in law, current constitutional norms, and democratic practices, as well as the rising importance of municipal governments in important areas of public policy.

Before delving further into these arguments, it is worth pointing out, despite the wording of the Ontario Superior Court's decision, that municipalities do not

“lack a constitutional status.” Municipal institutions are listed in Section 92 as a legislative responsibility of provinces. Their subordinate status to provinces is read into this placement.

Restrictive notions of municipal autonomy in both Canada and the United States were no doubt part of the driving force behind the adoption and development of the “creatures of the provinces” doctrine at the turn of the 20th century (Levi and Valverde 2006: 413–426) and their placement in Section 92. Nevertheless, there are many reasons why one might argue that “municipal institutions” belong under provincial jurisdiction beyond simply denying their constitutional importance.

For instance, in 1867 this placement could have been intended to ensure that a powerful federal government would not interfere in municipal affairs (Magnusson 2005), and by extension, provincial affairs. (The highly centralized, even “quasi-federal” design put in place in 1867 has since been decentralized significantly.) Moreover, given the diversity of municipal needs, trying to clarify municipal responsibilities would have been premature. Furthermore, making changes to local government systems would have been difficult; the federal government (and, until 1982, Great Britain) would have been involved, creating unnecessary rigidity.

Whatever its framers’ intentions might have been, the constitution is a “living document” that has changed dramatically since its adoption in colonial times. A different reading of Section 92(8) is possible by reconsidering its placement in the broader constitutional framework and putting democracy and modern-day constitutional principles at the forefront instead of maintaining an outdated, narrow reading of the text. For example, Section 92 can be seen as not only entrenching a federal-provincial division of legislative authority, but also containing elements of *provincial constitutions*, a concept that is difficult to pin down in Canada, because they are not consolidated in distinct documents.

Amending formulas are fundamental elements of constitutions that establish the rules for constitutional change. Since the power to change provincial constitutions was contained in Section 92 until 1982, it is clear that Section 92 not only deals with the division of ordinary legislative powers between the federal and provincial governments, it also established the power of provinces to change their constitutions without federal consent, a power exercised when several provinces eliminated their provincial senates.² The location of the formula for amending provincial constitutions in Section 92 suggests that this section contains constitutional matters, not just legislative responsibilities.

The next step is to acknowledge that some matters of legislative jurisdiction in the *Constitution Act, 1867* – such as establishing democratically elected municipal governments – are qualitatively different from others: they are inherently

2. Five provinces abolished their appointed Legislative Councils using the Section 92(1) amendment process including Manitoba (1876), New Brunswick (1892), Prince Edward Island (1893), Nova Scotia (1928), and Quebec (1968) (Bosc and Gagnon 2017: Figure 1.1).

constitutional, even if this reality was not fully recognized in 1867.³ Provinces were given the authority to establish and adapt municipal systems and other parts of their constitutional structures as they saw fit. The use of this authority ought to be approached carefully, following a process that citizens consider legitimate.

The subsidiarity of municipalities could also indicate their place in provincial constitutions. In *Ontario (Attorney General) v OPSEU*, 1987, Supreme Court Justice Beetz articulated a broad conception of provincial constitutions that includes not only the relevant entrenched laws but also ordinary statutes of a constitutional nature (Warren Newman 2016: 114). The Supreme Court offered the following guidance in identifying constitutional laws when, as is the case with Canadian provinces, they are not written down in distinct and comprehensive forms:

If Ontario were a unitary state, like the United Kingdom, the question whether a given enactment forms part of its constitution or amends its constitution could be resolved in the affirmative by only one relatively simple test: is the enactment constitutional in nature? In other words, is the enactment in question, by its object, relative to a branch of the government of Ontario or, to use the language of this Court in *Attorney General of Quebec v Blaikie* [1979] 2 S.C.R. 1016, at p. 1024, does “it [bear] on the operation of an organ of the government of the Province”? Does it for instance determine the composition, powers, authority, privileges and duties of the legislative or of the executive branches or their members? Does it regulate the interrelationship between two or more branches? Or does it set out some principle of government? In a unitary state without a comprehensive written constitution, this test is the only one available (*Ontario [Attorney General] v OPSEU*, 1987, paragraph 86).

Municipalities certainly “bear upon” an “organ of government” in provinces, in that municipal systems divide power and establish legislative bodies with particular structures and powers, constituting systems of “checks and balances” on the exercise of governmental power in provinces. Furthermore, as will be elaborated below, they advance important democratic values, setting out *principles of government* including the value of bringing territorial diversity to bear on provincial decision-making. In this way, municipal systems are a reflection of the related constitutional principles of subsidiarity and federalism.

Indeed, when one examines the role of municipalities and municipal systems in Canadian democracy, their constitutional character becomes apparent. As Tindal and Tindal (2000) describe, municipalities are “corporations,” “a legal device that allows residents of a specific geographic area to provide services that are of common interest.” They are also democratic institutions “created historically in

3. In this respect, Warren Magnusson (2005) notes that Section 91, which lists the federal government’s areas of exclusive jurisdiction, also contains legislative authority over “Indians, and Lands reserved for the Indians,” which has led to oppressive, “top-down” imposition of authority on Indigenous peoples, and has long been discredited.

response to the desire of local communities to exercise self-government” (Tindal and Tindal 2000: 2).

Although municipalities perform many roles, most accounts of their purpose stress two primary functions: as a democratic expression of a community and as a service provider, roles that are related because community values and preferences should be reflected in the types of services offered as well as how they are administered. In fact, it is the intersection and “interaction” of the administrative and representation functions that make municipal government so appealing (Tindal and Tindal 2000: 4). Municipalities’ defining features are their corporate nature, territorial boundaries, elected council, and taxing power (Tindal and Tindal 2000: 2).

Establishing local governments and creating a municipal system in which they operate are also ways of *dividing power*, of authoritatively determining the structure and some of the principles of provincial democratic regimes. If provinces simply wanted to provide services to meet community needs and preferences, they could do so through decentralized provincial administration. However, all Canadian provinces have chosen to incorporate democratically elected governments, to delegate responsibilities to them, to divide decision-making power and create systems of accountability to local citizens.

Proponents of the “creatures of the provinces” doctrine believe that the laws that establish municipalities and those that govern health or education policy are of the same kind simply because they fall within the same section of the Canadian Constitution. It is time to overturn this outdated constitutional orthodoxy. Section 92 contains both elements of provincial constitutions as well as provincial areas of exclusive legislative authority. Provinces were indeed given the exclusive power to create municipal systems. But by passing laws in this area of jurisdiction, provinces constitute a subsystem of democratic governments whose fundamentally *constitutional nature* ought to be recognized by political elites, the courts, and citizens.

2.3 The constitutional status of municipalities: Reflecting constitutional values

The act of constituting municipalities reflects and advances important democratic and constitutional values. The territorial division of power between provinces and municipalities enhances fundamental democratic values including *liberty*, defined as “protection against arbitrary government and excessive concentrations of political and economic power”; *equality*, defined as “provision of opportunities for citizen participation in the formation of public policy”; and *welfare*, defined as “effective and efficient provision of services” (Maass [1959], quoted in Cameron 1980: 231).

Through the division of power, municipalities also help ensure that the local diversity of a province is not ignored in larger provincial policy-making. And, by delegating power to democratically elected municipalities, all provinces in Canada

have recognized that democratically elected municipal governments embody and give effect to the principle of subsidiarity.

Distinct political cultures exist within provinces, including urban-rural and urban-suburban differences and differences among cities of different sizes (Henderson 2004). In some contexts, such as Moncton, municipal systems empower constitutionally recognized Francophone minorities with degrees of self-government, leading to different language regimes within a metropolitan area (Bourgeois and Bourgeois 2005; Good 2014) that further Canada's and New Brunswick's constitutionally recognized bilingualism. Other municipalities have become innovators in policy fields such as access, equity, or immigrant integration, even without the express authority of provinces (Good 2009), furthering constitutional principles such as the enhancement of Canadians' multicultural heritage.

Municipal systems of dividing power are therefore similar to federations insofar as they are democratically elected, territorial governments that allow for the expression of regional diversity. In fact, federalism scholar W. S. Livingston (1952) argues that "the essence of federalism lies not in the institutional or constitutional structure but in the society itself. Federal government is a device by which the federal qualities of the society are articulated and protected" (Livingston 1952: 84).⁴ The defining feature of a federal society is that its population is diverse and that these patterns of diversity are "grouped territorially" (Livingston 1952: 84). Seen this way, municipal governments are institutional responses to the provinces' diversity, corporate devices to protect the federal qualities of Canadian society.

One might object that Livingston's conception of federalism is idealistic and that both federal and municipal boundaries do not correspond perfectly to provincial diversities. The literature on multinational federalism and electoral boundaries commissions shows that boundaries are sometimes drawn to empower (or disempower) ethnocultural minorities. For the most part, though, these and other boundaries are "arbitrary" and historically rigid and there is no clear theory on how best to draw them (Sancton 2008).

Andrew Sancton (2008) identifies the lack of a clear rationale for how to establish boundaries around cities and their contested nature as major impediments to the constitutional recognition of Canada's metropolitan areas. Furthermore, even if consensus on the boundaries of a metropolis such as Toronto were possible, the city could outgrow its boundaries, thereby compromising its ability to govern itself effectively. Nevertheless, the contested nature of political boundaries is problematic only if one seeks to establish perfectly rational or permanent boundaries around

4. Diversities can be of many types including economic, cultural, religious, "racial," or historical, since "any of these can produce in a certain group within the population a demand for such self-expression" (Livingston 1952: 85). David Cameron (1980) also uses W. S. Livingston's work to draw similarities between provincial-municipal divisions of power and federalism.

dynamic cities. The constitutional option advocated here would allow for municipal boundary changes, but only through a process that acknowledges municipalities' democratic and fundamentally constitutional nature.

For the most part, political boundaries are arbitrary, but that does not make them meaningless. When provinces establish municipal boundaries, they make assumptions about territorial diversity. Institutions matter and political boundaries may become meaningful over time as jurisdictions develop their own politics and begin to channel and express community interests within their boundaries (Cameron 1980; Dupré 1972).⁵ Over time, municipal institutions become manifestations of local self-government and more than “creatures of the provinces.” They have independent political autonomy and constitutional meaning to members of their communities.

To argue that municipalities are inherently constitutional in nature is not to close off the possibility of change. Municipal governments with boundaries that do not reflect how local communities conceive of themselves politically could be subject to provincial reorganization, not because they are unimportant legal creatures of the provinces, but because they fail to further local self-government and therefore their constitutional purposes. In these cases, citizens might not protest reorganization or constitutional change.

As Cameron argues, the purpose of recognizing the constitutional nature of municipal government is not to “freeze” the system, but rather to acknowledge that the way in which municipal systems divide power is a reflection of deeper values of the provincial community and therefore “deserving of special care and protection” (Cameron 1980: 234–35). As he argues: “The instrumentalities by which power is divided at the provincial-municipal level, as surely as at the federal-provincial level, are constitutional instrumentalities. They deserve to be recognized and treated as such” (Cameron 1980: 235). Simply because provinces were entrusted with the design and establishment of municipal institutions, their “creation” or “constitution,” does not imply that the institutions themselves are unimportant.

2.4 The constitutional status of municipalities: Organic constitutional statutes

Although in the provincial-municipal relationship, power is divided through legislation, not through an entrenched constitutional act, one should not exaggerate the differences (Cameron 1980). In the Canadian Constitution, federalism is not only a “structure,” it is also *an organizing principle underlying and animating the constitution*.

5. Cameron cites J. S. Dupré approvingly on this point: “Once a particular set of local boundaries has been staked out and a local government is placed over these boundaries, whatever interests exist within the boundaries will find their political expression through this government” (Dupré [1972] in Cameron 1980: 230).

As the Supreme Court argued in *Reference re Secession of Quebec* (1998):

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority... A superficial reading of selected provisions of the constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities (*Reference re Secession of Quebec* 1998, paragraph 148).

Reflecting Livingston's perspective on federalism, the Supreme Court characterizes the *principle* of federalism as a response to Canada's diversity, and Canada's "federal structure" as a device that "facilitated democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity" (*Reference re Secession of Quebec* 1998, paragraph 58).

The principles laid out in the Secession Reference had the effect not only of recognizing an obligation on the part of the federal government to negotiate secession if a strong democratic majority in Quebec voiced this preference, but also of delegitimizing unilateral action on the part of the Quebec government. In a constitutional system that embraces the federal principle, unilateral action by *any* level of government is illegitimate. Recognizing municipalities as democratic governments that operate within systems designed to ensure liberty, democratic participation, and citizen welfare in provincial societies underscores that changes to local government boundaries and the division of power should not be undertaken unilaterally.

The laws that divide power between the two levels of government and provide rules for the exercise of governmental power at the municipal level ought to be considered *organic statutes* that form part of the provinces' written constitutions. Similarly, in the British tradition – which does not entrench constitutional laws – the concept of organic laws is used to distinguish statutes that deal with constitutional matters from those that regulate non-constitutional matters like traffic and health care (Malcolmson et al. 2016: 18).

In Canada, organic statutes are part of a combined tradition of entrenched laws and elements of British constitutionalism⁶; they "are not formal amendments of the

6. Although municipal acts and city charters' legal status and authority ought to be recognized as organic statutes, in some ways, they have more in common with entrenched acts, which Malcolmson et al. (2016) note "tend to be more comprehensive than organic statutes ... [which] usually deal with one particular institution or situation." Entrenched constitutional acts are "comprehensive codifications of a wide variety of major constitutional rules" (Malcolmson et al. 2016: 19). Although, like other organic statutes, the authority of municipal acts may be found in the will of the legislative body of the day and their status is more precarious than entrenched laws, they are more like entrenched constitutional acts in their scope and subject matter.

[capital 'C'] Constitution but create or alter major institutions of government or regulate the way constitutional rules are used” (Russell 2004: 248).⁷ Statutes of this kind should be subject to change *if they no longer serve their constitutional purposes*, not because Section 92(8) lists municipal institutions as an area of provincial legislative responsibility.

In sum, municipalities, and the laws that establish them, are constitutional in nature. Municipalities fulfil functions similar to federalism by providing a check on provincial power, encouraging citizen participation through decentralization to local territorial communities, and providing a mechanism by which legislation and services can be tailored to local communities. They further the principles of “democracy” and “federalism” which underpin Canada’s constitutional architecture.

Nevertheless, even if municipalities and the laws establishing municipal systems are constitutional in *nature*, they are not constitutional in *status* because they do not have legal protections beyond the ordinary legislative process. The rest of the paper explores why municipalities’ constitutionality should be entrenched in provincial constitutions rather than in the federal constitution.

3. Entrenching Municipalities in the Federal Constitution

In the late 1990s and early 21st century, a debate about urban autonomy emerged. Many legal and constitutional options were considered. There was even talk of the creation of city-states or city provinces. For instance, Alan Broadbent, a philanthropist and founder of Toronto’s Maytree Foundation, published a book that argued for radical change to Canada’s constitution, including a new province of Toronto (Broadbent 2008).

Such radical changes are not only politically infeasible, they are hampered by the fact that Toronto’s boundaries would be contested (Sancton 2008). Furthermore, to fulfil the roles of local government in our constitutional system, a province the size of Toronto would necessitate a system of municipal government “beneath” it.

Municipalities could also be recognized in the federal constitution (the *Constitution Acts* of 1867 and 1982) by, for example, entrenching a right to local self-government. This provision would allow citizens to turn to the courts if they

7. Russell (2004) argues that despite Canada’s divergence from the British system by entrenching laws to establish the Canadian federation, our constitutional tradition is decidedly organic. When a constitution is understood as an “organic system,” it includes, along with organic statutes, the following elements: “the formal Constitution and amendments to it”; “political practices that have hardened into constitutional conventions and political agreements about the proper use of governmental powers”; “and judicial decisions interpreting the formal Constitution and the principles underlying the constitutional system as a whole” (Russell 2004: 248).

felt their right to local self-government had been violated, while allowing provinces the flexibility to make the case that their legislative objectives were sufficiently important to warrant a limitation on this right.

More specifically, Section 1 of the Charter of Rights and Freedoms allows limits on rights that are “reasonable” and “demonstrably justified in a free and democratic society.” In *R v Oakes* (1986),⁸ the courts established that a law that infringes on a Charter right must pass a certain test in order to be upheld (or “saved”) by the courts under Section 1; this is called the “Oakes Test” in legal and political science circles:

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective – the more severe the deleterious effects of a measure, the more important the objective must be (*R v Oakes* 1986).

Through Section 1, the courts could balance provincial goals for achieving fair, effective, and efficient governance of metropolitan areas with citizens’ right to local democracy. Provincial governments would be required to justify any infringement of citizens’ rights to local democracy in the legislature and in the courts if the balance struck is challenged.

8. In this case, David Edwin Oakes, who was found in possession of an illegal narcotic, challenged Section 8 of the *Narcotic Control Act*, which established that individuals found in possession of illegal narcotics would have to prove that they did not intend to traffic them. He argued that Section 8 violated his right to be “presumed innocent until proven guilty” in section 11 (d) of the Charter. The Courts agreed that Section 8 violated Oakes’s right to be “presumed innocent” and articulated what would become known as the “Oakes test” to address whether the offending part of legislation could be saved (under Section 1) as a “reasonable limit” on a right. In this case, the court found that the *Narcotic Control Act*’s purpose of curbing illegal drug trafficking was “pressing and substantial” but it failed to meet the standard of being rationally connected to its objective and non-arbitrary, since it is not rational to conclude that possessing any amount of drugs establishes an intent to traffic (*R v Oakes* 1986).

This type of legal framework would not necessarily preclude an imposed amalgamation which, for instance, a particular municipality opposed simply to avoid paying its share of the costs of municipal services in a metropolitan area while benefiting from its location – a “free rider” scenario. Instead, it would require the province to present a strong case along the lines of the “Oakes test” to justify a disruptive and potentially democratically damaging decision to eliminate a municipality’s corporate existence. Passing such a test would likely be straightforward if a municipality were simply “free-riding” on the resources of the metropolitan area as a whole or pursuing exclusionary policies of some sort.

In the case of Ontario’s *Better Local Government Act*, 2018, which reduced the size of Toronto City Council, such a test would have required a clear articulation of provincial goals as well as evidence to support that the approach was clearly connected to the policy goal, impaired the right to local self-government to the minimal extent possible, and that the costs of impairing the right were outweighed by its benefits. Under a regime with a constitutionally recognized right to local self-government, it is highly unlikely that the *Better Local Government Act*, 2018 would have been “saved” under Section 1 of the Charter.⁹

However, the rigidity of the federal constitutional amendment process makes such a constitutional change unlikely. Section V of the *Constitution Act*, 1982 entrenches multiple amending formulae for the Canadian constitution that apply to different kinds of constitutional change. Section 38 of the *Constitution Act*, 1982 sets out the “General procedure for amending the Constitution of Canada,” which would apply to changes to the Canadian Charter of Rights and Freedoms. In addition to restrictions with respect to timing, Section 38 requires resolutions supporting a proposed amendment in the House of Commons, the Senate and at least two-thirds of the provinces (seven in the current context) representing at least 50 percent of the population (“the 7/50 rule”).¹⁰ Furthermore, if the amendment were successful, opposing provinces could opt out, arguing that it impairs their legislative authority for municipal institutions (under Section 38(3) of the *Constitution Act*, 1982).

Moreover, a country-wide approach to protecting municipalities’ constitutionality could introduce unintended rigidities into systems of local government, depending on court interpretations. The many types of municipalities and different levels of urbanization across provinces has led to legal differentiation among municipalities in provinces’ municipal systems, including through the

9. Depending on how it were entrenched, a right to local self-government could be subject to Section 33, the “notwithstanding clause”, which allows provinces (and the federal government) to “save” a law that has been found to be an unreasonable limitation on a Charter right.

10. It would also need to follow *An Act Respecting Constitutional Amendments* (1996), which “lends” the federal government’s veto over constitutional change to regions. This law constitutes a “manner and form” limitation on the federal government’s authority to “propose a motion for a resolution to authorize an amendment to the Constitution of Canada” (*An Act Respecting Constitutional Amendments*, 1996).

passage of “city charters” – pieces of legislation that apply to specific cities. It is difficult to imagine how including the right to local self-government in the federal constitution could address this asymmetry. Leaving decisions about how to treat municipalities differently up to the courts, meanwhile, could prove problematic.

A more feasible approach to changing the federal constitution could be through the bilateral amendment process (established in Section 43 of the *Constitution Act*, 1982), whereby amendments that apply to “one or more, but not all provinces” can be pursued with the consent of the federal government and the affected province(s). Section 43’s scope is, to some, plagued by conceptual confusion. In fact, in its Reference on Senate Reform, the Supreme Court chose to limit its comments about Section 43, stating that “[t]he determination of its scope and of the effects of its interaction with other provisions of Part V...present significant conceptual difficulties” (*Reference re Senate Reform* 2014: paragraph 43).¹¹

Despite the court’s opinion in the Senate Reform Reference, some recent scholarship is more positive about Section 43, arguing that examining instances of its use and its textual wording lead to the conclusion that it could provide flexibility to Canada’s rigid constitutional amendment processes (Dwight Newman 2016). For instance, some argue that property rights could be entrenched this way in one or more provinces (Newman 2012) and that the recognition of the French language in Quebec could be secured through bilateral amendments to the Charter (Cameron and Krikorian 2008). These authors note how Section 43 was used to entrench New Brunswick’s official bilingualism in the “federal” constitution, essentially adding a new section to the Charter (Section 16.1). Nevertheless, to my knowledge, constitutional scholars have not suggested that changes to Section 92 would be possible through the bilateral procedure, and Patrick Monahan, Byron Shaw, and Padraic Ryan (2017) explicitly state that Section 92 would be beyond the bilateral procedure’s scope (Monahan, Shaw, and Ryan 2017: 212).

Given New Brunswick’s amendment using this procedure, it is possible that amendments to the Charter of Rights and Freedoms could be used to secure an individual right to local self-government that applies only to one or more provinces. Nevertheless, since such a right would impair provincial legislative authority over municipal institutions (in Section 92(8)) in a significant way, it is likely that the general amendment procedure, the “7/50 rule,” would apply in this case.

In any case, regardless of its political and legal feasibility, the bilateral amendment option is undesirable, as it would give the federal government extraordinary power to control an essential part of provincial constitutions and essentially “freeze” municipal systems. This outcome would impair provincial autonomy and, in my view, impair the federal principle that underpins divisions of power in federalism and municipal systems. Municipalities deserve protection

11. Citing Scott’s (1982) more than three-decades-old article and using his metaphor, the Supreme Court describes the Section 43 amending formula as the “Rubik’s Cube” of Part V of the *Constitution Act*, 1982, which contains Canada’s entrenched amending formulae.

because they divide power territorially in a way that furthers the same principles of federalism and subsidiarity that underpin Canada's federal system.

Furthermore, municipal systems need to be flexible and changes to them should be debated and determined by provincial democratic bodies that can balance respect for local democracy and diversity with other policy goals such as equity and effectiveness in service delivery across metropolitan areas. Many big cities, including Toronto, have recently secured city "charters" – legislation allowing a single city to govern in a way that is more flexible and empowering than previous municipal legislation.¹² One of the primary benefits of charters is that they can be changed in response to requests from the city itself without requiring the agreement of all municipalities across the province.

Requiring the federal government's consent to amend provincial legislation could introduce significant rigidities, unless the resolution contains a procedure allowing the province to make further changes to municipal laws following a procedure similar to the manner and form procedures discussed below (see Morton 2018).¹³ However, if the provincial amending procedure had to be adjusted, the federal government's consent would be required, violating the principle that provinces should be able to amend their own constitutions.

Although the bilateral amending procedure could be used to entrench elements of constitutional uniqueness across provinces, a provincial government should not be able to lock a future government into a particular municipal system through a simple majority vote simply because it is able to secure the consent of a like-minded federal government. Doing so would violate Section 92(8) in the sense that provinces are expected to behave as stewards of municipal constitutionalism. It is the province's role to adapt local forms of self-government as embodied in municipal institutions through a process that Canadians consider legitimate for fundamental changes to their democratic institutions.

4. Entrenching Municipalities in Provincial Constitutions

The federal constitution is not the only place in which municipalities could be recognized. In fact, because they are constituted through provincial laws, municipalities are more appropriately part of provincial constitutions.

12. To date, the extent to which city charters have empowered municipalities is limited because of provinces' failure to include broader access to their tax base (Kitchen 2016). However, a separate piece of legislation could set a municipality on the path to greater autonomy.

13. More specifically, F. L. Morton proposes the following to protect what he calls a "positive fiscal legacy" in Alberta: "Under Sections 43 of the Constitution Act, 1982, Alberta could proceed bilaterally by negotiating with the Federal government to 'patriate' the Alberta Act from Ottawa to Alberta; and to include in this act a new super-majority amending formula such as a two-thirds approval vote in the Legislature and/or approval by way of referendum. Once the Alberta Act were 'back home,' Alberta could then make further changes per its new amending formula – such as adding a BBL [balanced budget law], a tax and-expenditure limitation (TEL) or rules to protect the Heritage Fund" (Morton 2018: 1).

The first step in recognizing this status is to acknowledge the idea that provinces actually *have* constitutions, a not entirely obvious point.¹⁴ Justice Malcolm Rowe and J. Michael Collins begin their chapter on provincial constitutions in a popular provincial politics textbook with a simple statement – “Each province has a constitution, a set of rules as to what decisions can be made by whom” (Rowe and Collins 2016: 297). Yet as Nelson Wiseman observes, “The idea of a provincial constitution has poor circulation because of its obscure, imprecise boundaries” (Wiseman 2010: 62). In his study of Canada, American comparative constitutional law expert Alan Tarr made the mistake of thinking that Canadian provinces do not have constitutions (Tarr 2009: 770). Even one of Canada’s most eminent scholars of local government, Andrew Sancton, dismisses provincial constitutions’ relevance to local government, claiming that “Unlike American states, Canadian provinces do not have their own written constitutions” (Sancton 2015: 29).

It is true that provinces do not have distinct and consolidated constitutions unrelated to the federal constitution (Wiseman 2010: 62). However, provincial constitutions do include written elements found in many places in Canadian constitutional documents and in provincial statutes (Tarr 2009). As Tarr describes the process of discovering Canadian provincial constitutions:

After a diligent but fruitless search for the texts of these [provincial] constitutions, I concluded that Canada did not have subnational constitutions. This conclusion was not altogether accurate; Canadian provinces are not literally “constitution-less.” There are elements of provincial constitutions in Part V, in Section 133, and in other provisions of the Constitution Act of 1867. Other elements are found in the Canadian Charter of Rights and Freedoms, adopted in 1982. For example, section 5 of the Charter mandates that provincial legislatures must sit at least once every twelve months. Still other elements can be found in ordinary provincial statutes, such as electoral laws, bills of rights, etc. Indeed, some provincial laws are even denominated by the term “Constitution”—for example, the British Columbia Constitution Act (Tarr 2009: 770–771).

Indeed, the *Constitution Act*, 1867, entrenches Sections 58–90 under the heading “Provincial Constitutions” just before Section VI, which is titled “Distribution of Legislation Powers” and in which Section 92(8) is found. Furthermore, Section 52(2) of the *Constitution Act*, 1982, which entrenches a definition of the Constitution, lists not only the *Constitution Acts*, 1867 and 1982, but also 29 other statutes and orders, including the federal statutes that created Manitoba,

14. As Wiseman puts it: “Provincial constitutions barely dwell in the world of the subconscious” (Wiseman 1996: 270).

Alberta, and Saskatchewan after Confederation. Thus there is a firm basis for provincial constitutions. Furthermore, provincial constitutions are no different in their unconsolidated nature from the federal constitution; one is also unable to pin down the country-wide Canadian constitution in a single document, as the definition in Section 52(2) makes clear.¹⁵

For Sancton and other local government experts, the relevant difference between American states and provinces is not whether the constitutions are written, but rather concerns their amending processes, which have different implications. Sancton notes that Canada does not have a means of entrenching municipalities' status because provinces can amend provincial laws as they see fit, as long as they do not violate entrenched constitutional laws. As Sancton describes the standard thinking on this matter, in Canada:

provincial legislatures are free to enact any kind of law they want, as long as it does not violate the Charter of Rights and Freedoms, impinge on federal jurisdiction or on the protected rights of religious minorities concerning education, or affect the office of the Lieutenant-Governor. This means that no form of constitutional protection exists for municipalities in Canada, a situation contrasting with that of many American states where state constitutions provide for various kinds of municipal protection, often known generically as home rule (Sancton 2015: 30).

Even in provinces with “city charters,” Sancton notes, these “charters” are not entrenched and are “nothing more” than “ordinary statutes” (Sancton 2015: 30).

But as this paper has shown, although municipal acts and city charters are created by laws that can be amended through the ordinary legislative process, because of their fundamental constitutional nature, they should be considered organic constitutional laws. Although they are statutes rather than entrenched laws, provinces across the country have adopted legislation that acknowledges municipalities' importance. These examples of organic constitutional change call into question the relevance of a constitutional doctrine of “creatures of the provinces” that emphasizes municipal subordination. Although a recognition of municipalities' constitutionality does not give municipalities any additional power when a province is willing to go against the spirit of organic constitutional statutes, the way we discuss elements of our political system matters, serving either to solidify or challenge the “creature of the provinces” doctrine.

Thus, even though city charters are not ordinary statutes but are organic constitutional laws, the question of entrenchment is still fundamental. And even though municipalities are part of provincial constitutions, it is still necessary

15.This constitutional messiness further reflects the fact that Canada's constitution has evolved organically (Russell 2004).

to limit a provincial government's ability to amend laws establishing municipal powers and responsibilities.¹⁶

4.1 *Constitutional conventions and constitutional principles*

What kinds of constitutional constraints on provincial lawmaking are possible within the Canadian constitutional order, in which the constitutional principle that a parliament cannot bind a future parliament with legislation is fundamental? Could constitutional conventions and principles help protect municipalities' constitutionality? A convention is "a constitutional rule based on implicit political agreement and enforced in the political arena rather than by the courts" (Malcolmson et al. 2016: 17). In their discussion of provincial constitutions, Rowe and Collins (2016) identify conventions as a limitation on parliamentary supremacy. Drawing on Geoffrey Marshall, the leading British authority on constitutional conventions, they point out the following:

Though it is rarely formulated as a conventional rule the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an *oppressive* or *tyrannical* way. This is a vague but clearly accepted conventional rule resting on the *principle of constitutionalism* and the *rule of law* (Marshall [1984] in Rowe and Collins 2016: 302 [emphasis added]).

Since conventions are enforced politically, not legally, this convention simply suggests that if a parliament acts oppressively, its members will be held accountable by the people at election time. However, connecting this fundamental convention to principles that the Supreme Court has articulated raises the possibility of judicial intervention and enforcement. Thus, the principles of "constitutionalism" and the "rule of law," recognized as underlying constitutional principles by the Supreme Court in its Secession Reference,¹⁷ are potential constraints on provincial constitutionalism.

Furthermore, in Canada (unlike the United Kingdom), the sovereignty of any one Parliament is limited by not only federalism but also the *federal principle* (*Reference re Secession of Quebec* 1998). As provincial constitutionalism becomes more firmly established in Canadian politics, court interpretations of provincial

16. David Cameron (1980) recognized the vital importance of the amendment process, making the following observations: "The [amendment] process ought to be special in at least two respects. First, it should be more difficult to change the provincial-municipal division of power than to enact provincial laws. Secondly, there should be provision for the direct expression of preferences by residents of local communities when it comes to decisions about how they are to be governed... Nothing could be more destructive of responsible government at the provincial level, not to mention constitutional government at the provincial-municipal level, than the present travesty of administrative panels and tribunals rendering decisions on the structure of municipalities" (Cameron 1980: 234).

17. "Federalism," "democracy," and "minority rights" were the other underlying constitutional principles articulated by the Supreme Court in *Reference re Secession of Quebec* (1998).

constitutions could result in limitations to unilateral provincial action that would further empower municipalities.

In the early 2000s, the Supreme Court appeared to be moving in this direction and away from the “creatures of the provinces” doctrine (Levi and Valverde 2006: 428).¹⁸ Advocates of municipal autonomy were encouraged by the Supreme Court’s recognition of the principle of subsidiarity in relation to municipalities, which it defines as “the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity” (*114957 Canada Ltée [Spraytech/Société d’arrosage] v Hudson [Town]* 2003). Furthermore, Justice Deschamps (dissenting) describes the principle of “subsidiarity” (along with “co-operative federalism”) as an “underlying principle” of the “principle of federalism” (*Quebec [Attorney General] v Lacombe*, in Brouillet 2011: 627).

In other decisions, however, the “creatures of the provinces” doctrine has been upheld. In these cases, Canadian judges have not seemed to recognize the constitutional convention that parliaments should never act in an oppressive way. These judicial decisions upholding provincial authority to change municipal institutions unilaterally have noted that the Province of Ontario acted with imperiousness or “megachutzpah” (*East York [Borough] v Ontario [Attorney General]* 1997) and have argued that “the Province can pass a law that is wrong-headed, unfair or even ‘draconian’ ” (*City of Toronto et al. v Ontario [Attorney General]* 2018).

This type of language confirms Warren Magnusson’s provocative description of the constitutional and democratic consequences of the “creatures of the provinces” doctrine: “The result is *totalitarian* provincial control over local political institutions: control that is at odds with the ‘the principles of a free and democratic society’ ” (Magnusson 2005: 6). Clearly, the courts have not acknowledged the principle that parliaments should not use their sovereign power to legislate in an oppressive or tyrannical way, a principle which is “rarely formulated as a conventional rule” (Marshall [1984] in Rowe and Collins 2016: 302) because it ought to be common sense in a democratic society.

Constitutional conventions and underlying constitutional principles could provide some protection for municipalities in provincial constitutions, but their effectiveness is uncertain. The former rely on political enforcement through an election, a poor way to ensure accountability for constitutional violations, given the many different considerations that come into play when voters cast their ballots. Over time, however, if courts were to recognize their applicability to municipalities and municipal systems, constitutional principles could influence what are deemed

18. Ron Levi and Mariana Valverde cite three cases to support this assertion: *United Taxi Drivers’ Fellowship of Southern Alberta v Calgary (City)*, 2004; *114957 Canada Ltée (Spraytech/Société d’arrosage) v Hudson (Town)*, 2001; and *Croplife Canada v Toronto (City)*, 2003 (Levi and Valverde 2006: 428).

legitimate and constitutionally valid municipal reform processes. Nevertheless, this form of constitutional protection depends on whether courts acknowledge how municipal systems further these values and apply these constitutional principles to municipal systems.

4.2 *Manner and form provisions*

If constitutional conventions and principles alone do not secure the constitutional status of municipalities, can other limits be placed on a provincial government's ability to encroach on that status? Currently, provincial laws that establish municipal systems are subject to amendment through the ordinary legislative process. Would that change if provinces were simply to recognize the constitutionality of these laws? In other words, if provincial legislators were to declare that municipal acts and city charters were part of their provincial constitutions, would that provide protection against unilateral, province-initiated change in the future?

Section 45 of the Constitution gives provinces the power to amend their own constitutions. It does not specify the type of majority required to pass an amendment to a provincial constitution, but the implicit assumption among some experts has been that, given the absence of an entrenched formula that diverges from the ordinary legislative process, the ordinary legislative process applies (Richez 2016: 170). This perspective is underpinned by a foundational principle of Westminster-style government – that of parliamentary supremacy. That is, a parliament (and therefore the people's) voice in the present cannot bind a parliament in the future. It means that all provincial (and federal) laws can be passed, repealed, or amended with the support of a majority vote in the legislature and that laws that purport to bind a future parliament would be considered invalid by the courts based on the principle of parliamentary supremacy.

A different and more nuanced perspective, however, is gaining ground in Canada and internationally. This new line of thinking hinges on a distinction between the *substance* of legislation and the *procedures* by which laws are passed, in that legislatures *can* bind future ones in the procedures they employ to pass new laws but not the policy substance of the legislation. These self-imposed limitations on a legislature's legislative authority are called "*manner and form*" provisions, using the language of a colonial law in the United Kingdom (Hogg 2016: 12-11). Examples of "*manner and form*" requirements include requirements that legislatures pass amendments to a particular law with a two-thirds majority vote or a requirement that a referendum be held before introducing certain changes to legislation (Hogg 2016: 12-12).

Although contested, this view is in no way marginal. Peter W. Hogg, arguably Canada's leading constitutional law expert, supports this view. As he writes in his authoritative edition of *Constitutional Law of Canada* (2016): "While a legislative body is not bound by self-imposed restraints as to the *content, substance or policy of its enactments*, it is reasonably clear that a legislative body *may be bound by self-*

imposed procedural (or manner and form) restraints on its enactments” (Hogg 2016: 12-11 [emphasis added]). He elaborates upon this power as one of legislatures’ power to “re-define” themselves as long as they do not violate other parts of the written constitution:

To be sure, the Parliament could not unilaterally abolish the Senate or the requirement of the royal assent, and the provincial Legislatures could not affect the office of Lieutenant Governor; but this is because “the office of the Queen, the Governor General and the Lieutenant Governor of a province” and “the power of the Senate” are expressly included, by Part V of the Constitution Act, 1982...among the topics that can only be altered by special amending procedure. But five provinces have abolished their upper houses by ordinary legislation, and a province without an upper house could establish one. The Parliament or a Legislature could add other elements to the legislative process, either for all statutes or just for particular kinds of statutes. For example, the federal Parliament could provide that a law to abolish the office of Auditor General must first be approved by a referendum of voters, or a provincial Legislature could provide that a law altering the constituencies for elections must be passed by a two-thirds majority in the legislative assembly. *These “manner and form” laws, which purport to re-define the legislative body, either generally or for particular purposes, are binding for the future. A law which purported to disregard these hypothetical examples of manner and form laws...would be held to be invalid by the courts* (Hogg 2016: 12-11 and 12-12 [emphasis added]).”

Although controversial to some, the constitutional validity of “manner and form” laws is a logical extension of the power of the provinces (and the federal government) to amend their constitutions. The power to change a province’s political institutions is essentially the power to change the *legislative process* for future governments in fundamental ways. For instance, if a province could add a Senate composed of members of its choice (including, for instance, a group of mayors of municipalities of different sizes to provide “sober second thought” and represent sub-provincial territorial communities) to its political institutions and legislative process, it could surely require a supermajority vote on changes to a municipal act or city charter. Both adding a Senate and introducing specific legislative rules that must be followed to amend a law are procedural rather than substantive changes to laws.

Canadian political scientist F. L. Morton concurs that the entrenchment of provincial constitutions is possible in this way. Although he does not provide examples, he notes, “reasonable ‘manner and form’ limitations have always been permitted” (Morton 2004: 3), even before the 1982 Charter placed limits on parliamentary supremacy. Furthermore, in his view, with limitations like the Charter, “there is no longer a principled reason why they [manner and form

restrictions on parliamentary sovereignty] cannot be included in provincial constitutions” (Morton 2004: 3).¹⁹

At least one province has considered a bill that would have legislated such a provision in a provincial law that is explicitly constitutional in nature. Quebec’s failed Bill 196 included an amending formula in article 13 in a section entitled “Amendments to the Québec Constitution” (Bill 196 2007). The article states that amendments to the act must be introduced either by the Quebec Prime Minister or jointly by “at least 25 percent of the Members of the National Assembly” and, in order to become law, the amending bill would require the support of two-thirds of the Members of the National Assembly. This part of the law contradicts orthodox views of parliamentary supremacy. In his study of provincial constitutionalism in light of this failed bill, Nelson Wiseman (2010) also offers cautious support for a more nuanced understanding of parliamentary supremacy:

Bill 196’s constitutional amendment formula – requiring a two-thirds majority of the National Assembly – contradicts the old convention that a legislature cannot bind itself or a future legislature. Does this mean that a simple majority in the National Assembly, current or future, could revise or revoke such a constitution despite the two-thirds requirement? Not necessarily; an evolving consensus among constitutional authorities is that special majority and other rules, particularly concerning human and minority rights, may indeed be legally binding. This is still, however, a disputable notion and not free from doubt (Wiseman 2010: 145).

The distinction between process and substance would break down, however, if the process were so onerous as to prevent any reasonable possibility of change (Hogg 2016: 12-18, footnote 71). When designing municipal constitutional systems, provincial legislators would need to consider the importance of flexibility. The courts could also play a role in striking down manner and form provisions that present too great a legislative hurdle for provincial legislatures that are “sovereign” in their areas of jurisdiction.

Designing manner and form provisions: The challenge of double entrenchment

Provincial legislatures could, however, face difficulties designing *effective* manner and form mechanisms. As Peter Hogg argues, one such fundamental question is the issue of how to ensure that the “manner and form” mechanism is not circumvented. In his view, to be truly effective, manner and form mechanisms must be “doubly entrenched,” which essentially means that a “manner and form” procedure must be followed to change a “manner and form” procedure and that this requirement must be clearly stated in the law – what he calls “self-referencing” (Hogg 2016: 12-18). Otherwise the law containing the “manner and form” procedure could be altered to avoid its own requirements.

19. See also Richez (2016: 170).

Hogg's opinion is based on the *Ontario Taxpayer Protection Act* (1999), which introduced a "manner and form" requirement that a referendum be held before the introduction of new taxes. In 2004, the Province decided to levy a new health tax without following the manner and form requirement in the act by following a two-step process of first, amending the act to create an exception for the proposed tax, and then passing a law that levied the tax. When the Canadian Taxpayers' Federation challenged the law in court, the court ruled that the manner and form mechanism was "not effective" (*Canadian Taxpayers' Federation v Ontario* [2004] in Hogg 2016: 12-13).

Hogg notes in a footnote that the legislative debate on the *Ontario Taxpayer Protection Act* (1999) indicated that legislators knew that it would be ineffective, offering two explanations for their failure to "doubly entrench" the provision. Either the government assumed that the political costs of a two-step legislative process would be enough of a deterrent to side-stepping the act or they wanted to avoid raising a constitutional question about the validity of such manner and form mechanisms (Hogg 2016: 12-13, footnote 54e).

Regardless of the constitutionality of manner and form provisions, the desirability of introducing rigidity into the legislative process is a valid concern. One of the primary virtues of Westminster-style parliamentary systems is their ability to deliver decisive government, clear lines of accountability, and flexibility over time, virtues that could be undermined by rigid manner and form mechanisms. However, "manner and form" provisions can be as flexible or as rigid as the community wishes, which is why they are an attractive legal option.

In 2004, the Ontario government faced an "intense storm of criticism" (Hogg 2016: 12-14) because of the public attention the two-step process brought to the matter. Ultimately, if a majority government is determined to circumvent a non-self-referencing manner and form provision, it will. Nevertheless, even these so-called "ineffective" mechanisms raise the political cost of doing so and force legislators to devote more time to the issue, offering some protection to changes in the law.

In sum, although manner and form provisions could provide some protection for municipalities' constitutionality, only "double entrenchment" would truly commit a provincial legislature to additional legislative requirements for reforming municipal acts and city charters. Ineffective manner and form provisions would suffer from a similar weakness as a reliance on constitutional conventions, which is that political leaders may violate them knowingly and take their chances with the public at the next election, by which time the public may have forgotten about the violation. Thus, to be truly effective, manner and form provisions must be entrenched in a way that courts would uphold.

Manner and form provisions in the municipal context

A "manner and form" mechanism that protects municipalities could be as flexible as requiring a province to consult with a city before introducing changes to a city

charter, but such a commitment would still leave municipalities vulnerable to unilateral moves by a provincial government.

The legal status of commitments to consultation in municipal acts has received attention due to an ongoing dispute between the City of Toronto and the Government of Ontario over a law that reflects the consequences of the “creatures of the provinces” doctrine. Despite the legislated commitment in the *City of Toronto Act*, 2006, to a provincial-municipal relationship based on mutual respect and consultation, the *Better Local Government Act*, 2018, reduced the city’s number of wards unilaterally and took the unprecedented step of doing so in the middle of an election campaign. Specifically, the *City of Toronto Act*, 2006, does not establish a manner and form requirement for consultation but instead contains a legislated provincial “endorsement” of a relationship based on “mutual respect, consultation and co-operation” as well as an acknowledgment that “ongoing consultations” with municipalities to maintain such a relationship are in the province’s “best interests.”²⁰

In *Toronto (City) v Ontario (Attorney General)*, the City of Toronto notes that the *Better Local Government Act*, 2018, violates the province’s legislated commitment to a relationship based on cooperation and consultation as set out in Article 1(3) of the *City of Toronto Act*, 2006 (*Toronto (City) v Ontario (Attorney General) 2018*, Factum of Respondent, paragraphs 34 and 35). Nevertheless, it is unlikely that the courts would decide that such a broad commitment to consultation carried legal obligations.

British Columbia’s general municipal legislation, the *Community Charter*, 2003, contains what appears to be a clear manner and form requirement.²¹ A section called “Principles of municipal-provincial relations” states:

consultation is needed on matters of mutual interest, including consultation by the Provincial government on

- (i) proposed changes to government legislation,
- (ii) proposed changes to revenue transfers to municipalities, and
- (iii) proposed changes to Provincial programs that will have a significant impact in relation to matters that are within municipal authority (*Community Charter 2003*: 2(2))

The act also includes a dispute resolution process with the possibility of arbitration. Ultimately, if a provincial government wished to circumvent this

20. Article 1 states: “The Province of Ontario endorses the principle that it is in the best interests of the Province and the City to work together in a relationship based on mutual respect, consultation and co-operation” (*City of Toronto Act*, 2006: Article 1(2)) and “For the purposes of maintaining such a relationship, it is in the best interests of the Province and the City to engage in ongoing consultations with each other about matters of mutual interest and to do so in accordance with an agreement between the Province and the City” (*City of Toronto Act*, 2006: Article 1(3)).

21. The title of this legislation is misleading, since a “charter” applies to a single city.

process, it could do so through unilateral change.²² In Ontario, the court did not enforce the clear manner and form provision in the *Ontario Taxpayer Protection Act*, 1999, deeming it ultimately “ineffective.” Nevertheless, this case suggests that in order to be legally effective, a commitment to consult (or any other type of manner and form requirement) must be legislated with a clear constraint on the future legislative process, and the process would need to be “doubly entrenched.” In the case of the British Columbia *Community Charter*, the legislation would need to state that Article 2(2) of its “Principles of municipal-provincial relations” section could not itself be amended without consulting the city.

Although in *Toronto (City) v Ontario (Attorney General)*, the city did not use the language of “manner and form” to argue its case, the Province’s response raised the question of manner and form limitations on its legislative authority, albeit in a qualified manner. More specifically, after rejecting the notion that the province’s failure to consult the city invalidates the *Better Local Government Act*, 2018, and invoking the principle of parliamentary supremacy, the province argued: “In any event, a subsequent enactment inconsistent with an earlier one is deemed to impliedly repeal the earlier enactment to the extent of inconsistency” (*Toronto (City) v Ontario (Attorney General)* 2018, Factum of Appellants: paragraph 83). The Province continues with a conception of parliamentary sovereignty that is, of course, contested: “Parliament is not capable of binding itself (*except as to manner and form requirements it expressly prescribes for itself and which it can amend*). Otherwise, a past parliament could bind a newly elected or a future parliament, thereby undermining representative democracy” (*Toronto (City) v Ontario (Attorney General)* 2018, Factum of Appellants: paragraph 84 [emphasis added]).

The province makes two seemingly contradictory arguments, namely, that any law that is inconsistent with a previous law is repealed by implication, *and* that manner and form mechanisms would be legally binding (and, therefore, would need to be amended before legislative action could be taken). The province’s position reflects the tensions between an orthodox conception of parliamentary supremacy and an evolving, more nuanced conception of this foundational principle as reflected in the current legal reality that legislatures in Westminster-style parliaments impose legally binding manner and form limitations upon themselves.

22. British Columbia’s *Community Charter*, 2003, also includes a protection for municipalities against forced amalgamations. Section 279 entitled “No forced amalgamations” reads as follows: “If a new municipality would include 2 or more existing municipalities, letters patent incorporating the new municipality may not be issued unless (a) a vote has been taken in accordance with section 4 of the Local Government Act separately in each of the existing municipalities, and (b) for each of those municipalities, more than 50% of the votes counted as valid favour the proposed incorporation” (*Community Charter* 2003: 279 (a and b)). This provision imposes a clear, self-imposed rule on the provincial executive in the issuance of letters patent. As the Government of British Columbia website describes: “The Legislature has delegated the authority to create local governments to the Lieutenant Governor in Council (that is, the Lieutenant Governor acting on the advice of Cabinet). Letters patent, which are defined in the Interpretation Act as a type of regulation, are issued by the Lieutenant Governor in Council under an Order in Council (OIC)” (Government of British Columbia n.d.).

Although inconsistent in its argumentation, the province ultimately acknowledges that manner and form provisions are legitimate legal requirements, attempting to resolve the inconsistency by stating that the legislature can repeal such provisions. However, an “implied repeal” and a two-step legislative process – amending a law to repeal a manner and form requirement before introducing a new law that contradicts elements of the previous one – have very different political implications, as the discussion of the Province of Ontario’s decision to circumvent the *Ontario Taxpayer Protection Act*, 1999’s manner and form requirement illustrates.

Thus, according to the province’s logic with respect to manner and form requirements, had they existed in the *City of Toronto Act*, 2006, a two-step process would have been required, which would have increased the legislative and political scrutiny of Bill 5, now the *Better Local Government Act*, 2018. It is significant that the Province of Ontario accepts that some form of “manner and form” mechanisms are compatible with the principle of parliamentary sovereignty and would be binding in city charters and municipal acts unless repealed.

The argument here is that manner and form requirements could recognize municipal autonomy through what Peter Hogg calls “double entrenchment” – a requirement that a “manner and form” process be followed to alter or repeal the “manner and form” provisions themselves. In the case of an entrenched requirement to consult, the province would be required to consult the city in question before making changes to this requirement. One could even envision a more onerous process to change the requirement to consult, given that it is a relatively flexible requirement and that consultation does not guarantee that the city’s input would alter the policy decision.

One benefit of “entrenching” municipalities and municipal systems in provincial constitutions through “manner and form” provisions is that constitutional protection for municipalities could be balanced with the need for flexibility and adaptation. For instance, human settlement patterns within provinces are dynamic, particularly in provinces with fast-growing cities. Similarly, areas of local concern change over time; immigration, climate change, and homelessness, for instance, have become “new” concerns of many local communities and municipalities in the last few decades, particularly in Canada’s largest cities (Lucas and Smith 2019). The constitutional-legal framework within which municipalities operate must allow for addressing both the changing needs of municipalities and the shared interests of the province as a whole.

The option of entrenching municipal laws in provincial constitutions using “manner and form” mechanisms is preferable to other constitutional options for three reasons. First, it is consistent with section 92(8), which establishes the provinces’ legislative authority for municipal institutions. Second, it places decision-making in the hands of the government whose democratic community is affected by the decisions. And third, it is consistent with section 45, which states that provincial legislatures have exclusive responsibility for amending their constitutions.

Manner and form processes also allow for legal asymmetry in municipal systems. For instance, large cities with “charters” could have a different amendment process in their governing act.

Furthermore, rather than introducing a right to local self-government through judicial interpretation (Magnusson 2005), manner and form processes achieve this goal *politically*, which lends greater popular legitimacy to the constitutional change.

Finally, a word of caution. In entrenching manner and form provisions into provincial law, it would be important to consider the democratic implications of placing limits on majority rule, especially strong limits. For this reason, these procedures should be employed only to protect statutes of a *constitutional nature*.²³

In Chander's (1991) view, not all manner and form procedures are created equal. He identifies a logical flaw in the idea of binding a future parliament to a process that is more onerous than the one used to pass the law in the first place. His way out of this conundrum is to advocate for a referendum both to pass the law and to “undo” it in the future.²⁴ Although a provincial referendum could be unnecessarily rigid and possibly inappropriate for changes that may apply only to one municipality, incorporating citizen participation into manner and form provisions could be accomplished in different ways. Whatever the chosen amendment process, it should be followed to entrench the procedures.

5. Conclusion

In a mature democracy and constitutional system such as Canada's, it is not legitimate for provinces to change municipal systems unilaterally by citing an outdated “creatures of the province” doctrine. Municipalities democratically elect councils, raise taxes, and have territorial boundaries. The structure of their political institutions and legal authority are based in statutes whose subject matter is clearly constitutional. As David Cameron argued in 1980, municipal systems express and advance the constitutional values of liberty, equality, and welfare in Canada. They are extensions of the federal principle that underpins Canada's constitution insofar as they bring provincial territorial diversity to bear on local decision-making.

Since 1867, the constitution has evolved as Canada became independent and the federal principle overrode written provisions permitting imposition of one

23. The widespread use of “manner and form” provisions in ordinary legislation could undermine the clear lines of accountability in Canada's Westminster-style provincial legislatures.

24. In his view, such a manner and form requirement is consistent not only with the “new” constitutional perspectives on parliamentary sovereignty but also with A. V. Dicey's (1893) contention that Parliament's legal supremacy rests on the “higher law” of the people's political sovereignty. In Dicey's words: “Parliament is, from a merely legal point of view, the absolute sovereign of the British Empire, since every Act of Parliament is binding on every court throughout the British dominions, and no rule, whether of morality or of law, which contravenes an Act of Parliament, binds any court throughout the realm. But if Parliament be in the eye of the law a supreme legislature, the essence of representative government is, that the legislature should represent or give effect to the will of the political sovereign, i.e., of the electoral body, or of the nation” (Dicey [1893] in Chander 1991: 470).

order of government on another (*Reference re Secession of Quebec* 1998: paragraph 55). The reasons are complex, but it is clear that the unilateral imposition of the legislative will of one level of government on another is illegitimate in a contemporary federal democracy.

Although our federal constitution has evolved from a centralized quasi-federation to a decentralized one, the trends in our system of responsible government are currently toward increased concentration of power, even executive dominance. In the fifth edition of their *Constitutional Law* text, Monahan, Shaw, and Ryan identify the “excessive power that the executive branch wields over the [federal and provincial] legislatures” as the “greatest shortcoming of the existing Canada constitution” (Monahan, Shaw, and Ryan 2017: 524–525).

The concentration of power has increased since the 1970s as cabinets lost ground to first ministers in reaction to various forces, including the media’s focus on leaders (Savoie 2016). Donald Savoie (1999: 635) coined the term “court government” to describe a situation in which “effective power rests with the prime minister and a small group of carefully selected courtiers”²⁵ bypassing not only Parliament, but also cabinet as decision-making bodies.

Provincial democracy is arguably even more vulnerable to this trend than is the federal government. Provinces lack many of the institutional checks on executive power that exist at the federal level, including bicameral legislatures (legislatures with two chambers). Even more significantly, provinces do not have strong subgovernments to contend with as the federal government does with the provinces. Given the level of executive dominance in Canada’s constitutional system, federalism is arguably the strongest limitation on the federal government’s power.

In a federal system that values divided power, provinces have an extraordinary ability to amend their constitutions by a simple majority vote with few restrictions. Several have abolished their Senates through ordinary legislation, a fact of constitutional history that highlights the nature of provincial power, especially in light of failed attempts at Senate reform at the federal level. Unilateral changes to municipal systems of the type implemented recently by the Ontario provincial government are essentially a result of two flaws in provincial constitutions – excessive executive dominance and the failure of provincial laws to protect local democratic institutions.

In light of these flaws, this paper argues for the recognition of municipalities’ constitutional nature and their statutory “entrenchment” in provincial constitutions through manner and form mechanisms. This option has the benefit of flexibility –

25. These decision-makers include: “key advisors in his office, two or three senior cabinet ministers (notably the minister of finance), carefully selected lobbyists, pollsters and other friends in court, and a handful of senior public servants” (Savoie, 1999: 635).

manner and form mechanisms can be adapted to the wide variety of provincial laws establishing aspects of provincial municipal systems (including city charters). Flexibility is an important constitutional virtue given the dynamic nature of urbanization. Therefore, provinces should entrench manner and form mechanisms with the view that changes ought to be possible when the objectives of provincial laws are sufficiently important.

Advocates of increased municipal autonomy would be wise to ensure that legislative commitments to a process that involves municipal input (such as the commitment to consultation in the *City of Toronto Act*) are included as procedural constraints on the legislative process and, ultimately, “doubly entrenched.” Although provinces may be wary of onerous manner and form procedures such as referenda, a requirement such as consultation with a municipality or municipalities could be a good place to start. If provinces and municipalities are concerned about the effectiveness and constitutionality of a particular manner and form provision, the province could refer the matter to its highest court for an authoritative opinion.

In this era of executive dominance, the fate of provincial democracy could hinge on provincial constitutions that balance the virtues of a strong executive with democratic checks. This paper has identified the constitutional project of securing municipalities' place in provincial constitutional orders as one way to democratize provincial constitutions. It is time to abandon the constitutional doctrine of “creatures of the provinces,” since it distorts Canada's constitutional reality. By fetishizing a single element of Canada's constitution, it fails to acknowledge municipalities as an essential element of Canada's democratic system, and thwarts citizens' ability to realize true local self-government.

Works cited

114957 *Canada Ltée (Spraytech/Société d'arrosage) v Hudson (Town)*. 2001. 2 SCR 241, 2001 SCC 40.

An Act respecting Constitutional Amendments. 1996. SC 1996, c 1. Retrieved from <http://canlii.ca/t/52f13> on August 23, 2019.

Attorney General of Quebec v Blaikie. 1979. 2 SCR 1016.

Bill 196. 2007. *Québec Constitution*, National Assembly, Thirty-Eighth Legislature, First Session. Québec Official Publisher. Retrieved from <http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-196-38-1.html> on May 16, 2019.

Bosc, Marc, and André Gagnon. 2017. *House of Commons Procedure and Practice*, third edition. Ottawa: House of Commons. Retrieved from: <https://www.ourcommons.ca/About/ProcedureAndPractice3rdEdition/index-e.html> on October 29, 2019.

Bourgeois, Daniel, and Yves Bourgeois. 2005. “Territory, institutions and national identity: The case of Acadians in Greater Moncton, Canada.” *Urban Studies* 42(7): 1123–1138.

Broadbent, Alan. 2008. *Urban Nation: Why We Need to Give Power Back to the Cities to Make Canada Strong*. Toronto: Harper Collins.

Brouillet, Eugénie. 2011. "Canadian federalism and the principle of subsidiarity: Should we open Pandora's box?" *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 54, article 21: 601–632.

Cameron, David. 1980. "Provincial responsibilities for municipal government." *Canadian Public Administration* 23(2): 222–235.

Cameron, David R., and Jacqueline D. Krikorian. 2008. "Recognizing Quebec in the Constitution of Canada: Using the bilateral constitutional amendment process." *University of Toronto Law Journal* 58: 389–420.

Chander, Anupam. 1991. "Sovereignty, referenda, and the entrenchment of a United Kingdom Bill of Rights." *Yale Law Journal* 101: 457–480.

City of Toronto Act, 2006, SO 2006, c 11, Sch A. Retrieved from <http://canlii.ca/t/53jtn> on September 22, 2019.

City of Toronto et al. v Ontario (Attorney General). 2018. Ontario Superior Court, ONSC 5151.

Community Charter. 2003. British Columbia. SBC 2003, c 26. Retrieved from http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/03026_00 on October 29, 2019.

Constitution Act, 1867 (UK), 30 & 31 Victoria, c 3 Retrieved from <https://www.canlii.org/en/ca/laws/stat/30---31-vict-c-3/latest/30---31-vict-c-3.html> on October 29, 2019.

Constitution Act, 1982, Schedule B to the *Canada Act* 1982 (U.K.), 1982, c 11. Retrieved from <http://canlii.ca/t/ldsx> on October 29, 2019.

Croplife Canada v Toronto (City), 2003, 68 O.R. (3d) 521 (Sup. Ct.), aff'd (2005), 75 O.R. (3d) 357 (C.A.) [Croplife C.A.], leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 329 (QL).

Dicey, A.V. 1893. *Introduction to the Study of the Law of the Constitution*, fourth edition. London: Macmillan.

Dupré, J. S. 1972. "The political dimensions of regional government," in L.D. Feldman and M.D. Goldrick, (eds.), *Politics and Government of Urban Canada: Selected Readings*, second edition. Toronto: Methuen.

East York (Borough) v Ontario (Attorney General). 1997. CanLII 12263 (ON SC). Retrieved from <http://canlii.ca/t/1w4v2> on May 8, 2019.

Good, Kristin. 2009. *Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver*. Toronto: University of Toronto Press.

Good, Kristin R. 2014. "Governing immigrant attraction and retention in Halifax and Moncton: Do linguistic divisions impede cooperation?" In Luc Turgeon, Martin Papillon, Jenn Walner, and Steve White (eds.), *Canada Compared: Citizens, Government and Policy*, chapter 13. Vancouver: UBC Press.

- Government of British Columbia. n.d. "Letters Patent," Retrieved from <https://www2.gov.bc.ca/gov/content/governments/local-governments/facts-framework/legislative-framework/letters-patent> on October 22, 2019.
- Henderson, Ailsa. 2004. "Regional political cultures in Canada." *Canadian Journal of Political Science* 37(3): 595–615.
- Hogg, Peter W. 2016. *Constitutional Law of Canada (2016 Student Edition)*. Toronto: Thomson Reuters.
- Kitchen, Harry. 2016. "Is 'charter-city' a solution for financing city services in Canada – or is that a myth?" School of Public Policy, SPP Research Papers, volume 9, issue 2.
- Livingston, William S. 1952. "A note on the nature of federalism." *Political Science Quarterly*. 67(1): 81–95.
- Levi, Ron, and Mariana Valverde. 2006. "Freedom of the city: Canadian cities and the quest for governmental status," *Osgoode Hall Journal* 44(3): 409–459.
- Lucas, Jack, and Alison Smith. 2019. "Which policy issues matter in Canadian municipalities? A survey of municipal politicians." School of Public Policy, SPP Research Papers, volume 12, issue 8.
- Maass, Arthur (ed.). 1959. *Area and Power: A Theory of Local Government*. Glencoe, Illinois: The Free Press.
- Magnusson, Warren. 2005. "Are municipalities creatures of the provinces?" *Journal of Canadian Studies* 39(2): 5–29.
- Malcolmson, Patrick, Richard Myers, Gerald Baier, and Thomas M. J. Bateman. 2016. *The Canadian Regime: An Introduction to Parliamentary Government in Canada*. Toronto: University of Toronto Press.
- Marshall, Geoffrey. 1984. *Constitutional Conventions: The Rules and Forms of Political Accountability*. Oxford: Clarendon Press.
- Monahan, Patrick J., Byron Shaw, and Padraic Ryan. 2017. *Constitutional Law*, fifth edition. Toronto: Irwin Law Inc.
- Morton, F. L. 2004. "Provincial Constitutions in Canada." Paper presented at the conference "Federalism and sub-national Constitutions, design and reform," Centre for the Study of State Constitutions, Rockefeller Center, Bellagio, Italy March 22–26.
- Morton, F. L. 2018. "Why Alberta needs a fiscal constitution." School of Public Policy, SPP Research Papers, volume 11, issue 25.
- Newman, Dwight. 2012. "The bilateral amending formula as a mechanism for the entrenchment of property rights," *Constitutional Forum* 21 (2): 17–22.
- Newman, Dwight. 2016. "Understanding the Section 43 bilateral amending formula." In Emmett Macfarlane (ed.), *Constitutional Amendment in Canada*, 147–163. Toronto: University of Toronto Press.

Newman, Warren J. 2016. "Constitutional amendment by legislation." In Emmett Macfarlane (ed.), *Constitutional Amendment in Canada*, 105–125. Toronto: University of Toronto Press.

Ontario (Attorney General) v OPSEU, 1987, 2 SCR 2.

Quebec (Attorney General) v Lacombe, 2010, SCC 38, 2 SCR 453.

R v Oakes, 1986, 1 SCR 103, 1986 CanLII 46 (SCC), Retrieved from <http://canlii.ca/t/1ftv6> on October 22, 2019.

Reference re Secession of Quebec, 1998, 2 SCR 217.

Reference re Senate Reform, 2014, SCC 32; 2014, 1 SCR 704.

Richez, Emmanuelle. 2016. "Provincial constitution-making power: The case of Quebec." In Emmett Macfarlane (ed.), *Constitutional Amendment in Canada*, 164–184. Toronto: University of Toronto Press.

Rowe, Justice Malcolm, and J. Michael Collins. 2016. "What is the constitution of a province?" In Christopher Dunn (ed.), *Provinces: Canadian Provincial Politics*, third edition, 297–314. Toronto: University of Toronto Press.

Russell, Peter H. 2004. *Constitutional Odyssey: Can Canadians Become a Sovereign People?* third edition. Toronto: University of Toronto Press.

Sancton, Andrew. 2008. *The Limits of Boundaries: Why City-regions Cannot be Self-Governing*. Montreal & Kingston: McGill-Queen's University Press.

Sancton, Andrew. 2015. *Canadian Local Government: An Urban Perspective*, second edition. Toronto: Oxford University Press.

Savoie, Donald. 1999. "The rise of court government in Canada." *Canadian Journal of Political Science* 32(4): 635–664.

Savoie, Donald. 2016. "Power at the apex: Executive dominance." In James Bickerton and Alain-G. Gagnon (eds.), *Canadian Politics*, 145–161. Peterborough, Ontario: Broadview Press.

Scott, S. A. 1982. "Pussycat, pussycat or patriation and new constitutional amendment processes." *University of Western Ontario Law Review* 20(2): 247–306.

Tarr, G. Alan. 2009. "Subnational constitutions and minority rights: A perspective on Canadian provincial constitutionalism." *Rutgers Law Journal* 40: 767–792.

Tindal, C. Richard, and Susan Nobes Tindal. 2000. *Local Government in Canada*, fifth edition. Toronto: Nelson Thomson Learning.

Toronto (City) v Ontario (Attorney General). 2018. Ontario Court of Appeal, ONCA 761.

Toronto (City) v Ontario (Attorney General). 2018. Factum of Appellants. Attorney General of Ontario, Court of Appeal File No: C65861. Retrieved from <http://www.ontariocourts.ca/coa/C65861/files/C65861.FAPOntario.pdf> on October 28, 2019.

Toronto (City) v Ontario (Attorney General). 2018. Factum of Respondent in Appeal. City of Toronto, Court of Appeal File No. C65861. <http://www.ontariocourts.ca/coa/C65861/files/C65861.FRE.Toronto.pdf> on October 28, 2019.

United Taxi Drivers' Fellowship of Southern Alberta v Calgary (City), 2004, 1 SCR 485; 2004 SCC 19.

Wiseman, Nelson. 1996. "Clarifying provincial constitutions." *National Journal of Constitutional Law* 6: 269–294.

Wiseman, Nelson. 2010. "The quest for a Quebec constitution." *American Review of Canadian Studies* 40(1): 56–70.

IMFG Papers on Municipal Finance and Governance

1. *Are There Trends in Local Finance? A Cautionary Note on Comparative Studies and Normative Models of Local Government Finance*, by Richard M. Bird, 2011.
ISBN 978-0-7727-0864-9
2. *The Property Tax – in Theory and Practice*, by Enid Slack, 2011.
ISBN 978-0-7727-0866-3
3. *Financing Large Cities and Metropolitan Areas*, by Enid Slack, 2011.
ISBN 978-0-7727-0868-7
4. *Coping with Change: The Need to Restructure Urban Governance and Finance in India*, by M. Govinda Rao and Richard M. Bird, 2011.
ISBN 978-0-7727-0870-0
5. *Revenue Diversification in Large U.S. Cities*, by Howard Chernick, Adam Langley, and Andrew Reschovsky, 2011.
ISBN 978-0-7727-0870-4
6. *Subnational Taxation in Large Emerging Countries: BRIC Plus One*, by Richard M. Bird, 2012.
ISBN 978-0-7727-0874-8
7. *You Get What You Pay For: How Nordic Cities are Financed*, by Jorgen Lotz, 2012.
ISBN 978-0-7727-0876-2
8. *Property Tax Reform in Vietnam: A Work in Progress*, by Hong-Loan Trinh and William J. McCluskey, 2012.
ISBN 978-0-7727-0878-6
9. IMFG Graduate Student Papers. *Development Charges across Canada: An Underutilized Growth Management Tool?* by Mia Baumeister; *Preparing for the Costs of Extreme Weather in Canadian Cities: Issues, Tools, Ideas*, by Cayley Burgess, 2012.
ISBN 978-0-7727-0880-9
10. *The Reform of Business Property Tax in Ontario: An Evaluation*, by Michael Smart, 2012.
ISBN 978-0-7727-0882-3
11. *Hungary: An Unfinished Decentralization?* by Izabella Barati-Stec, 2012.
ISBN 978-0-7727-0884-7
12. *Economies of Scale in Fire and Police Services*, by Adam Found, 2012.
ISBN 978-0-7727-0886-1
13. *Trading Density for Benefits: Toronto and Vancouver Compared*, by Aaron A. Moore, 2013.
ISBN 978-0-7727-0901-1
14. *Merging Municipalities: Is Bigger Better?* by Enid Slack and Richard M. Bird, 2013.
ISBN 978-0-7727-0903-5

15. *Public Finance and the Politics of Scale in Montréal: Will the Proposed Reforms Save the Megacity?* by Jean-Philippe Meloche and François Vaillancourt, 2013.
ISBN 978-0-7727-0915-8
16. *Decentralization and Infrastructure in Developing Countries: Reconciling Principles and Practice*, by Roy Bahl and Richard M. Bird, 2013.
ISBN 978-0-7727-0919-6
17. *Provincial-Municipal Relations in Ontario: Approaching an Inflection Point*, by André Côté and Michael Fenn, 2014.
ISBN 978-0-7727-0923-3
18. *A Better Local Business Tax: The BVT*, by Richard M. Bird, 2014.
ISBN 978-0-7727-0921-9
19. *Cooperation and Capacity: Inter-Municipal Agreements in Canada*, by Zachary Spicer, 2015.
ISBN 978-0-7727-0934-9
20. *Can GTA Municipalities Raise Property Taxes? An Analysis of Tax Competition and Revenue Hills*, by Almos Tassonyi, Richard Bird, and Enid Slack, 2015.
ISBN 978-0-7727-0938-7
21. *How to Reform the Property Tax: Lessons from around the World*, by Enid Slack and Richard M. Bird, 2015.
ISBN 978-0-7727-0943-1
22. *A Good Crisis: Canadian Municipal Credit Conditions After the Lehman Brothers Bankruptcy*, by Kyle Hanniman, 2015.
ISBN 978-0-7727-0945-5
23. *Municipal Employee Pension Plans in Canada: An Overview*, by Bob Baldwin, 2015.
ISBN 978-0-7727-0949-3
24. *Cities, Data, and Digital Innovation*, by Mark Kleinman, 2016.
ISBN 978-0-7727-0951-6
25. *Can Tax Increment Financing Support Transportation Infrastructure Investment?* by Murtaza Haider and Liam Donaldson, 2016.
ISBN 978-0-7727-0953-0
26. *Good Governance at the Local Level: Meaning and Measurement*, by Zack Taylor, 2016.
ISBN 978-0-7727-0956-1
27. *More Tax Sources for Canada's Largest Cities: Why, What, and How?* by Harry Kitchen and Enid Slack, 2016.
ISBN 978-0-7727-0959-2
28. *Did the Land Transfer Tax Reduce Housing Sales in Toronto?* by Murtaza Haider, Amar Anwar, and Cynthia Holmes, 2016.
ISBN 978-0-7727-0961-5

29. *Financing the Golden Age: Municipal Finance in Toronto 1950-1975*, by Richard White, 2016.
ISBN 978-0-7727-0971-4
30. *Climate Change, Floods, and Municipal Risk Sharing*, by Daniel Henstra and Jason Thistlethwaite, 2017.
ISBN 978-0-7727-0973-8
31. *The Evolving Role of City Managers and Chief Administrative Officers*, by Michael Fenn and David Siegel, 2017.
ISBN 978-0-7727-0977-6
32. *(Re)creating Boundary Lines: Assessing Toronto's Ward Boundary Review Process*, by Alexandra Flynn, 2017.
ISBN 978-0-7727-0979-0
33. *Land Value Capture and Social Benefits: Toronto and São Paulo Compared*, by Abigail Friendly, 2017.
ISBN 978-0-7727-0981-3
34. *Financing Urban Infrastructure in Canada: Who Should Pay?* by Enid Slack and Almos T. Tassonyi, 2017.
ISBN 978-0-7727-0989-9
35. *Paying for Water in Ontario's Cities: Past, Present, and Future*, by Harry Kitchen, 2017.
ISBN 978-0-7727-0991-2
36. *Re-imagining Community Councils in Canadian Local Government*, by Alexandra Flynn and Zachary Spicer, 2017.
ISBN 978-0-7727-0987-5
37. *Climate Finance for Canadian Cities: Is Debt Financing a Viable Alternative?* by Gustavo Carvalho, 2018.
ISBN 978-0-7727-0994-3
38. *The Public Finance Challenges of Fracking for Local Governments in the United States*, by Austin Zwick, 2018.
ISBN 978-0-7727-0996-7
39. *Returning to the Golden Rule of Balanced Budgets: The Institutional and Political Economy of Restricting Public Deficits and Debt*, by Bernard Dafflon, 2018.
ISBN 978-0-7727-0998-1
40. *The Platform Economy and Regulatory Disruption: Estimating the Impact on Municipal Revenue in Toronto*, by Zachary Spicer, 2018.
ISBN 978-0-7727-1005-5
41. *Development Charges in Ontario: Is Growth Paying for Growth?* by Adam Found, 2019.
ISBN 978-0-7727-1009-3
42. *Does Local Government Autonomy Promote Fiscal Sustainability? Lessons from Illinois's Home-Rule Municipalities*, by Matthew Walshe, 2019.
ISBN 978-0-7727-1011-6

43. *Mind the Funding Gap: Transit Financing in Los Angeles County and Metro Vancouver*, by Matthew Lesch, 2019.
ISBN 978-0-7727-1016-1
44. *The Practice of Municipal Cooperation: Australian Perspectives and Comparisons with Canada*, by Graham Sansom, 2019.
ISBN 978-0-7727-5502-5
45. *Filling the Gaps: The Role of Business Improvement Areas and Neighbourhood Associations in the City of Toronto*, by Alexandra Flynn, 2019.
ISBN 978-0-7727-1020-8



ISBN 978-0-7727-1025-3
ISSN 1927-1921