

Something to Talk About: Regulation and Justification in Canadian Municipal Law

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Although municipal law is a subset of administrative law, it has not received the same degree of theoretical attention. This article aims to contribute to the theoretical literature on municipal law in Canada by offering a civic republican account of regulation making in municipalities. This article's primary contribution lies in the theoretical claim it advances: that civic republicanism (1) explains Canadian municipal law and (2) provides a standpoint for evaluating existing law and policy. The article's arguments about civic republicanism in the local government context offer a detailed account of an area of law that others have suggested is a natural locus for civic republican arguments. In the course of advancing its claims, the article will stake out positions in contemporary debates about municipal law and offer some prescriptions that aim to make municipal regulation more consonant with civic republican ideals.

Même si le droit municipal constitue un sous-ensemble du droit administratif, il n'a pas fait l'objet du même degré d'attention théorique. L'ambition de cet article est de contribuer à la documentation théorique sur le droit municipal au Canada, en offrant une explication municipale républicaine de l'élaboration de règlements dans les municipalités. La principale contribution de cet article se trouve dans l'affirmation théorique qu'il avance : que le républicanisme municipal premièrement explique le droit municipal canadien, deuxièmement, offre un point de vue permettant d'évaluer le droit et la politique en vigueur. Les arguments de l'article au sujet du républicanisme municipal dans le contexte du gouvernement local expliquent en détail un domaine du droit que d'autres observateurs estiment être un lieu naturel des arguments républicains municipaux. À mesure que l'article avancera ses

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assertions, il va délimiter les positions des débats contemporains au sujet du droit municipal, et offrir quelques préceptes qui visent à mieux synchroniser la réglementation municipale avec les idéaux républicains municipaux.

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OVER THE PAST DECADE, Canadian administrative law scholars have argued that rule of law values are advanced by judicial decisions that require administrative agencies to provide reasons for their decisions.¹ Although municipal law is a subset of administrative law,² it has not received the same degree of theoretical attention.³

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1. See *e.g.* David Dyzenhaus, "Constituting the Rule of Law: Fundamental Values in Administrative Law" (2002) 27 *Queen's L.J.* 445; David Dyzenhaus & Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001) 51 *U.T.L.J.* 193; and Geneviève Cartier, "Administrative Discretion as Dialogue: A Response to John Willis (Or: From Theology to Secularization)" (2005) 55 *U.T.L.J.* 629 at 630. In addition, see citations in these articles. I do not intend to claim that it is only in the regulation-making context that deliberative burdens should be imposed on the state. Indeed, in other work, I shall argue for the extension of these burdens to other forms of regulation in the administrative state and local governance. Regulations are simply the focus of the present article's analysis. No inferences should be drawn about the appropriate scope of the deliberative theory enunciated here based on this focus.
 2. Some authors classify Canadian municipalities as administrative bodies, albeit with political functions. See *e.g.* René Dussault & Louis Borgeat, *Administrative Law: A Treatise*, 2d ed., vol. 1 (Toronto: Carswell, 1985) at 188-89; Pierre Issalys & Denis Lemieux, *L'Action gouvernementale: précis de droit des institutions administratives*, 3d ed. (Cowansville: Yvon Blais, 2009) at 294-98. A note on nomenclature: in this article, I will use the terms "municipal law" and "local government law" (and their variants) interchangeably.

This article aims to contribute to the theoretical literature on municipal law in Canada by offering a civic republican account of regulation making in municipalities. By examining how regulation-making processes at the municipal level can create what David Dyzenhaus has called “a relationship of reciprocity” between the state and its citizens,⁴ this article aims to add to that body of Canadian administrative law scholarship which focuses on how state actors are required to publicly justify their decisions. The primary contribution of this article lies in the theoretical claim it advances: that civic republicanism, and its particular imperative of public justification, (1) explain Canadian municipal law and (2) provide a standpoint for evaluating existing law and policy. The claims about municipal law advanced in this article derive in part from general arguments about what constitutes legitimate state action, and I will survey these arguments as I contrast civic republicanism with liberalism and interest group pluralism. More specifically, the article’s arguments about civic republicanism in the local government context provide a detailed account of an area of law that others have suggested is a natural locus for civic republican arguments.⁵ In the course of advancing my claims, I will stake out positions in contemporary debates about municipal law and will offer some prescriptions that aim to make municipal regulation more consonant with civic republican ideals.

The article is divided into three Parts. Part I sets out the version of civic republicanism for which I will argue and contrasts it with alternative theoretical approaches. Part II posits that civic republican theory explains and justifies regulation processes in the municipal law of Ontario. Part III argues that civic republicanism provides the best account of the regulatory relationship between

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3. The work of Ron Levi and Mariana Valverde marks an important exception. They have carefully examined the extent to which legal regulation enables municipalities to operate effectively in a range of policy domains. See Ron Levi & Mariana Valverde, “Freedom of the City: Canadian Cities and the Quest for Governmental Status” (2006) 44 *Osgoode Hall L.J.* 409.
 4. For the notion of the relationship of reciprocity, see Dyzenhaus, *supra* note 1 at 501-02. Cartier presents the claim that judicially imposed constraints on rulemaking should aim to yield this kind of relationship. See Geneviève Cartier, “Procedural Fairness in Legislative Functions: The End of Judicial Abstinence?” (2003) 53 *U.T.L.J.* 217 at 241. Cartier states that “[t]he best way to put a check on arbitrariness is through increased participation of the individuals affected by the decisions and a true responsiveness on the part of decision makers.”
 5. See *e.g.* Richard H. Fallon, Jr., “What Is Republicanism, and Is It Worth Reviving?” (1989) 102 *Harv. L. Rev.* 1695 at 1723-24, 1734.

the province of Ontario and its municipalities. Focusing on Ontario enables me to illustrate the argument with specific examples. Because municipal regimes vary significantly from one province to the next, I believe that an approach which focuses on one province is superior to one that seeks to generalize across the provinces. Moreover, I choose to focus on Ontario because I believe it provides a particularly strong illustration of my theoretical claims. Let us begin by considering what is meant in this article by civic republican theory and how this theory is distinct from liberalism and interest group pluralism, two theories that have significantly influenced the municipal law literature.

I. CIVIC REPUBLICANISM(S) AND THE VALUE OF NON-DOMINATION

Civic republicanism, like any intellectual tradition, is heterogeneous.⁶ In this Part, I will describe the version of civic republican theory upon which I rely and will contrast this version with liberal and pluralist theories. In this discussion, I draw on that version of civic republicanism which stresses the value of non-domination. I do so in part because this version of the theory enables one to distinguish civic republican theories of freedom from their liberal counterparts. Conversely, an alternative view of civic republicanism stresses the norm of non-interference, which, as we shall soon see, renders it similar to a significant stream of liberal theory. Before distinguishing the non-domination version of civic republicanism from liberalism, I will discuss the two main forms of contemporary civic republican theory and provide more detail about the concept of non-domination.

A. CIVIC REPUBLICANISMS

Iseult Honohan has distinguished between two versions of civic republican thought.⁷ The first, known as the instrumental version, views participation in civic life as a means of preserving a sphere in which individuals can engage in

6. For an analysis of various strands of civic republicanism and their historical sources, see Iseult Honohan, *Civic Republicanism* (New York: Routledge Press, 2002) [Honohan, *Civic Republicanism*]; Samantha Besson & José Luis Martí, "Law and Republicanism: Mapping the Issues" in Samantha Besson & José Luis Martí, eds., *Legal Republicanism: National and International Perspectives* (Oxford: Oxford University Press, 2009) 3 [Besson & Martí, "Law and Republicanism"].

7. *Civic Republicanism, ibid.*, c. 6 at 180ff.

self-directed activity. In this instrumental version of civic republicanism, such participation is necessary to fend off threats to one's personal liberty. The instrumental civic republican argues that in the absence of such participation the political order will degenerate, corruption will be endemic, and the sphere of individual liberty will be reduced.⁸ In this view, argues Honohan, "[f]reedom is not constituted by, but follows separately as the consequence of participation in political affairs."⁹ According to instrumental civic republicans, all forms of interference by the state, including regulation by law, undermine citizen autonomy, and citizen participation in the formulation of law is valuable only to the limited extent that it protects citizens from such interference. As will be discussed in later in this Part, the value of non-interference is central to some theories of liberalism. Authors have noted that this fact makes it difficult to distinguish this version of civic republicanism from liberalism.¹⁰

A second version of civic republicanism can be contrasted with theories of liberalism that focus on non-interference. This version of civic republicanism, which this article endorses, understands freedom in terms of non-domination, rather than non-interference, and for the remainder of this article, when I refer to civic republicanism I refer exclusively to the non-domination version. Civic republican theorists who argue for the norm of non-domination—among whom Philip Pettit is most prominent—prescribe institutional structures through which citizens can ensure that they will not be subject to the will of others.¹¹ The goal of regulation in this view is not to protect against interference by the state (although this may be an effect), but to reduce one's vulnerability to exercises of power which reflect mere preferences and which do not rest on reasons that appeal to some understanding of the public good. Theorists writing in this tradition argue that no individual acting in isolation can achieve this end and that it is only through institutions which promote accountability that domination can be prevented. According to Honohan, "On the non-domination view, freedom is not an external consequence of the laws, but is *constituted* by the institutions of rights and accountability."¹² These institutions

8. *Ibid.* at 182.

9. *Ibid.*

10. *Ibid.*

11. On this conception of autonomy, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997) c.1 [Pettit, *Republicanism*].

12. *Civic Republicanism*, *supra* note 6 at 184 [emphasis in original].

can be part of the state or external to it,¹³ but for present purposes, I will focus on institutions of the state.

It is important to note that even among scholars who endorse this non-domination-focused approach to civic republicanism, there is some disagreement and, in particular, there are disputes over the role of judicial review in a polity committed to the norm of non-domination. Some scholars argue that judicial review compromises civic republican regulation. For instance, Richard Bellamy argues that judicial review undermines the position of citizens in polities where public institutions facilitate the equal participation of citizens in political life.¹⁴ In his view, judicial review subjects citizens in a polity of this kind to the rule by a group of individuals—*i.e.*, judges—whose authority to issue binding decisions is not subject to deliberative processes which expose all claims to public scrutiny. Bellamy concludes that judicial review is therefore susceptible to sliding into a form of arbitrary rule and domination.¹⁵ By contrast, other civic republicans argue that judicial review can facilitate civic republican ends, and that the courts can function as one part of an institutional architecture that supports civic republican governance.¹⁶ I do not intend to enter deeply into this debate, but, as will be made clear in this article, I hold to the latter position. As the discussion in Part II will make clear, courts can play an important role in an

13. *Ibid.* at 185. See also John S. Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2002).

14. This paragraph draws upon Hoi Kong, “Towards a Civic Republican Theory of Canadian Constitutional Law” *Rev. Const. Stud.* [forthcoming] [Kong, “Civic Republican Theory”]; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, U.K.: Cambridge University Press, 2007) [Bellamy, *Political Constitutionalism*]. Bellamy argues (at 220-21):

So long as a system of equal votes, majority rule and party competition—however interpreted—offers a plausible system for giving citizens an equal say in the ways collective arrangements are organized—including those of the democratic process—then a self-constituting democratic constitution that avoids dominating through arbitrary rule will have been secured.

15. *Political Constitutionalism, ibid.* at 151.

16. For a defence of judicial review as an instrument of facilitating democratic deliberation, see Iseult Honohan, “Republicans, Rights and Constitutions: Is Judicial Review Compatible with Republican Self-Government?” in Besson & Martí, eds., *supra* note 6, 83. Honohan states that “freedom requires a strong institutional structure of accountability within which even democratic government exercises its power. This does not undermine the principle of collective self-government, but means that the way that self-government is assured is through the ensemble of government institutions” (at 89).

institutional architecture that gives effect to civic republican values. Before turning to consider how civic republican theory is given institutional form in Canadian municipal law, I will contrast it with the alternative approaches of liberalism and interest group pluralism.

B. CIVIC REPUBLICANISM AND LIBERALISM

Some authors have argued that municipal law is or should be essentially liberal in orientation,¹⁷ and an initial challenge for this article is to distinguish civic republicanism from liberalism. We can begin to do so by building on Pettit's distinction between the idea of freedom as non-interference and freedom as non-domination. According to Pettit, the former conception of freedom has been central to liberalism and fails to capture the interests at stake in the idea of freedom as non-domination. He writes that

liberalism has been associated over the two hundred years of its development, and in most of its influential varieties, with the negative conception of freedom as the absence of interference, and with the assumption that there is nothing inherently oppressive about some people having dominating power over others, provided they do not exercise that power and are not likely to exercise it.¹⁸

Two criticisms can be made of Pettit's claim: first, his distinction between non-domination and non-interference is overdrawn and second, the idea of non-domination expresses a concern about individual autonomy that is a central feature of an important strand of liberalism. Both criticisms challenge the idea that civic republicanism is meaningfully distinct from liberalism.

Consider first the argument that civic republicans who have argued for the norm of non-domination have incorrectly characterized the liberal norm of

17. For a classical liberal approach, see Richard A. Epstein, *Takings: Private Property and Power of Eminent Domain* (Cambridge: Harvard University Press, 1985). For a Rawlsian approach, see Thomas L. Harper & Stanley M. Stein, *Dialogical Planning in a Fragmented Society* (New Brunswick: Centre for Urban Policy Research Press, 2006) c. 6.

18. Pettit, *Republicanism*, *supra* note 11 at 8-9. Of course, any attempt to find essential aspects of traditions as broad and inclusive as liberalism and republicanism is fraught with difficulties. In this article, I focus on a particular debate and accept the characterizations of the traditions offered by the participants in that debate. This strategy has the benefit of focusing the inquiry and relieving me from constantly qualifying my claims when I speak of civic republicanism and liberalism. I emphatically do not intend to capture all strands of the two traditions in this article.

negative freedom.¹⁹ Ian Carter has claimed that liberal theories emphasize a conception of negative freedom as “absence of prevention.”²⁰ Carter argues that, in this conception, negative freedom is broader than cases in which an individual is directly coerced, and that it is these latter kinds of cases that civic republicans mistakenly and exclusively associate with the idea of negative freedom.²¹ Moreover, Carter argues that although civic republicans claim that one is unfree in cases where one is merely vulnerable to the exercise of another’s power, the better conception of freedom is that one is unfree, in the sense of having options foreclosed, only to the extent that it is probable that the holder of the power will exercise it to interfere with one’s choices.²²

In response to this criticism, Quentin Skinner argues that even if the idea of negative freedom and the related concept of interference is formulated (as it has been by Carter and others) to include courses of action that individuals feel constrained to pursue or compelled to avoid, it does not capture the situation of being “condemned to living wholly at the mercy of [another’s] arbitrary power.”²³ Pettit similarly argues that the concept of interference, even if defined broadly to involve the removal of options from an individual, does not capture the republican idea of domination. According to this idea, an individual’s choice can be controlled when another person has the ability to increase the probability that the individual will follow the course of action preferred by that other person.²⁴ In such circumstances, according to Pettit, there is invigilation, not interference, and for a civic republican invigilation is a form of control that undermines freedom.²⁵ What both Skinner and Pettit capture in their responses to their liberal critics is the insight that civic republicanism does not primarily aim to safeguard individual interests by providing bulwarks against interference from others. Rather, civic republicanism targets a particular kind of interpersonal harm, namely being subject to another’s will.

19. The following three paragraphs draw from Kong, “Civic Republican Theory,” *supra* note 14.

20. “How are Power and Unfreedom Related?” in Cécile Laborde & John Maynor, eds., *Republicanism and Political Theory* (Oxford: Blackwell, 2008) 58 at 67.

21. *Ibid.* at 68.

22. *Ibid.* at 70.

23. “Freedom as the Absence of Arbitrary Power” in Laborde & Maynor, eds., *ibid.* 83 at 99.

24. “Republican Freedom: Three Axioms, Four Theorems” in Laborde & Maynor, eds., *ibid.* 102 at 112.

25. For the various ways in which an agent can be controlled without interference, see *ibid.* at 113.

Pettit illustrates the distinctiveness of this form of harm by distinguishing the case in which one is subject to potential arbitrary interference from another person from the case in which one is subject to similar interference from a natural cause. If the probability of interference is identical, and one is only concerned with interference, these two cases are indistinguishable. It is only if one understands the interpersonal significance of being under the control of another that one appreciates the significance of domination. Consider the situation where the probability of interference decreases in the hypothetical involving the natural cause. In such a situation, the threat of interference, which is the only threat of harm on the scene, also decreases. By contrast, simply decreasing the probability of arbitrary interference by another person (but not eliminating its possibility) will not affect the fact that that other person exerts control over one's choices and that one is therefore subject to that person's will.²⁶ Civic republicans committed to legal institutional design aim to respond to the threat of this kind of interpersonal harm by "establishing an institutional framework of governing that promotes deliberation, [and] prevents domination by faction."²⁷ As will be made clear in Part II, Canadian municipal law provides such an institutional framework.

Let us consider one final argument which claims that civic republicanism and liberalism are indistinguishable. According to this argument, even if one were to accept that non-domination can be distinguished from liberal theories that emphasize non-interference, such theories do not exhaust the content of liberalism. Charles Larmore has argued that one non-Benthamite strand of the liberal tradition, running from John Locke to John Rawls, evinces a view of freedom that approximates the civic republican view of non-domination. Larmore notes that Pettit addresses Locke's argument, from the *Second Treatise of Government*, that law's function "is not to abolish or restrain, but to preserve and enlarge freedom" by incorporating Locke into the civic republican tradition.²⁸ According to Larmore, any attempt to describe the liberal tradition in a way that excludes Locke is necessarily unconvincing.²⁹ In addition, Larmore finds continuity

26. *Ibid.* at 124.

27. See Martin Loughlin, "Towards a Republican Revival?" (2006) 26 *Oxford J. Legal Stud.* 425 at 428.

28. Charles Larmore, "A Critique of Philip Pettit's Republicanism" (2001) 11 *Phil. Issues* 229 at 236, quoting John Locke, *Second Treatise of Government* at §57.

29. Larmore, *ibid.*

between the concern which motivates Pettit's arguments and Rawls' arguments about political legitimacy. Larmore claims that at the core of Pettit's arguments in favor of non-domination is a concern that citizens be treated as "ends in themselves, in the sense that the exercise of their reason counts as having an intrinsic value, which the terms of political life ought to acknowledge."³⁰ This motivating concern, argues Larmore, is shared by the Rawlsian requirement that political power can only be exercised in ways consistent "with a constitution, whose essentials citizens can endorse in the light of principles and ideals which they can regard as reasonable."³¹

One might respond to this claim about the overlap between civic republicanism and liberalism by simply acknowledging it. Richard Dagger, for instance, has argued that a concern for autonomy is common to both traditions. He claims that citizens want to be free from domination because they want to be able to govern themselves, and this capacity is also threatened when freedom is threatened by interference.³² A second, stronger response would be that although civic republicans and liberals may share common concerns about the autonomy of citizens, the civic republican uniquely focuses on the *constitutive function* of citizens' participation in political life, and that this understanding of participation distinguishes civic republicanism from Rawlsian liberalism. To understand this distinction, we should recall Rawls's famous description of courts as "exemplar[s] of public reason."³³ This understanding of the role of courts is consistent with the Rawlsian theory of autonomy, which aims to ensure that state action evinces principles that can be regarded as reasonable, and which requires an arbiter to determine, in cases of doubt, whether state action reflects such principles. If, however, one accepts the idea of civic republican citizenship, a very different understanding of courts and of political institutions emerges.

Honohan has argued that, for civic republican theorists concerned with non-domination, participation in governance is an intrinsic element of citizen autonomy. In order to understand why this is the case, we need to understand more clearly civic republicanism's discursive conception of the public good. We

30. *Ibid.* at 241.

31. *Ibid.*

32. "Republican Virtue, Liberal Freedom and the Problem of Civic Service" (Paper presented to the annual conference of the American Political Science Association, Boston, 2001) [unpublished].

33. *Political Liberalism* (New York: Columbia University Press, 1996) c. 6, s. 6.

have seen above that state action is justified, in civic republican theory, only if it is framed in terms of the public good. According to civic republicans, this condition can only be satisfied if citizens deliberate together about whether and how particular instances of state action advance the public good.³⁴ This kind of deliberation requires facilitating institutions and practices,³⁵ and for civic republicans concerned about non-domination it is not sufficient for a neutral arbitrator to define the terms of the public good under which citizens will be governed. Instead, the ideal of non-domination requires that citizens actively participate in the project of defining the public good and that obstacles to such deliberation be eliminated. In this view, courts function not as “exemplars of public reason” but as institutions that facilitate reasoned deliberation and overcome defects in the political process that impede such deliberation.³⁶ In civic republican theory, courts are one forum within a constellation of institutions that are directed at facilitating citizen deliberation about the public good and about what it requires in particular instances of state action.

C. INTEREST GROUP PLURALISM, MUNICIPAL LAW, AND CIVIC REPUBLICANISM

While careful and nuanced arguments have been necessary to distinguish civic republicanism from liberalism, the contrast between civic republican and pluralist theories, in comparison, is more evident and can be drawn with greater ease. This contrast is particularly important in the municipal law context because prominent scholars working in the interest group pluralist tradition have argued that the primary role of local governments is to respond to the consumer preferences of residents. These scholars argue that residents are autonomous to the extent that they can satisfy such preferences.³⁷ The starting point for the pluralist argument

34. Honohan, *Civic Republicanism*, *supra* note 6 at 152.

35. According to Honohan, “The common good towards which members are oriented is the flourishing of those practices, and this depends on the quality of participation by members.” *Ibid.* at 154.

36. For an overview of the kinds of deliberative failure, see Charles F. Sabel & William H. Simon, “Destablization Rights: How Public Litigation Succeeds” (2004) 117 Harv. L. Rev. 1016 at 1064-65.

37. The literature on such theories is voluminous. For the contrast between civic republicanism and pluralism drawn in the main text, see Frank I. Michelman, “Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy” (1977-78) 53 Ind. L.J. 145 at 148. For a prominent contemporary articulation

is Charles Tiebout's seminal 1956 article, "A Pure Theory of Local Expenditures,"³⁸ which was a response to Paul A. Samuelson's claim that there is no rational, market-driven means of allocating public goods.³⁹ According to Samuelson, because public goods are non-rival and non-exclusive, there is no way to allocate them to match consumer preferences.⁴⁰

Tiebout countered that, through the mechanisms of exit and voice, individuals can express their preferences for certain configurations of public goods, and local governments can respond to those preferences. This allocative system requires a plurality of governments that offer competing sets of goods. Individuals will gravitate towards those local governments that reflect their preferences and exit those that do not. In turn, individuals will voice their preferences through voting and through participatory political ideals that reflect and reinforce these preferences.⁴¹ The net result is a set of local governments that are internally

of the pluralist position, see William A. Fischel, *The Homevoter Hypothesis: How Home Values Influence Local Government Taxation, School Finance, and Land-Use Policies* (Cambridge: Harvard University Press, 2001) [Fischel, *Homevoter*]. For a critical survey of writing on the model, see Wallace E. Oates, "The Many Faces of the Tiebout Model" in William A. Fischel, ed., *The Tiebout Model at Fifty: Essays in Public Economics in Honour of William Oates* (Cambridge, MA: Lincoln Institute of Land Policy, 2006) 21. For Canadian contributions to the literature, see Andrew Sancton, *Merger Mania: The Assault on Local Government* (Kingston: McGill-Queen's University Press, 2000) at 74-75, 91-92, 167; Robert L. Bish, "Local Government Amalgamations: Discredited Nineteenth-Century Ideals Alive in the Twenty-First" (2001)150 *CD Howe Institute Commentary* 1, online: <<http://www.cdhowe.org/pdf/bish.pdf>>.

38. (1956) 64 J. Pol. Econ. 416.

39. For an excellent summary of the Tiebout-Samuelson debate and subsequent localist developments, see William A. Fischel, "Public Goods and Property Rights: Of Coase, Tiebout and Just Compensation" in Terry L. Anderson & Fred S. McChesney, eds., *Property Rights: Cooperation, Conflict, and Law* (Princeton: Princeton University Press, 2003) 343. For a particularly influential development of the initial Tiebout insight, see Vincent Ostrom, Charles M. Tiebout & Robert Warren, "The Organization of Government in Metropolitan Regions: A Theoretical Inquiry" (1961) 55 Am. Pol. Sci. Rev. 831.

40. "The Pure Theory of Public Expenditure" (1954) 36 Rev. Econ. & Stats. 387. For an introduction to the idea of public goods and their two defining features, see Robert Cooter & Thomas Ulen, *Law and Economics* (London: Scott, Foresman and Company, 1988) at 46.

41. For a clear exposition of how Tiebout's ideas of exit and voice work together in the local government context, see Carole M. Rose, "Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy" (1983) 71 Cal. L. Rev. 837 at 894-903 [Rose, "Planning"]; Ronald J. Oakerson & Roger B. Parks, "Citizen Voice and Public Entrepreneurship: The Organizational Dynamic of a Complex Metropolitan County"

homogeneous, but that collectively express a diverse set of preferences. Tiebout-influenced localists argue that competition among local governments maximizes efficiency as it permits the widest number of preferences to be expressed and satisfied. In the United States, this efficiency argument has sometimes been joined by normative claims about the inherent democratic value of local government. Such claims flow from a political tradition that values local control over and participation in government institutions.⁴²

William Fischel has offered perhaps the most influential contemporary application of this position to local government regulation. According to Fischel, American homeowners are passionately engaged in local government because they seek, through zoning regulations, what is essentially insurance for their homes. Home values are dependent on their surroundings, and it is difficult, if not impossible, to purchase private insurance to protect against neighborhood change. As a consequence, argues Fischel, local government becomes the vehicle through which homeowners control their surroundings in order to protect home value.⁴³ Under Fischel's account, citizen participation in local government regulation is an efficient market mechanism, and he assesses the extent to which US land use regulation and, in particular, takings jurisprudence, enhances efficiency.⁴⁴ Other scholars have made the efficiency rationale central to their analyses of takings regulation while focusing specifically on the extent to which

(1988) 18 Pub. J. Fed. 91 at 91-96; Gary J. Miller, *Cities by Contract: The Politics of Municipal Incorporation* (Cambridge, MA: MIT Press, 1981) at 2-5; and Lee Anne Fennell, "Beyond Exit and Voice: User Participation in the Production of Local Public Goods" (2001) 80 Tex. L. Rev. 1.

42. Alexis de Tocqueville, *Democracy in America* (New York: Harper & Row, 1966). This position has been consistently reflected in US Supreme Court case law. See e.g. *Garcia v. San Antonio Metropolitan Transit Authority et al.*, 469 U.S. 528 (1985); *Belle Terre (Village of) et al. v. Boraas et al.*, 416 U.S. 1 (1974); *Michigan (Governor of) et al. v. Bradley et al.*, 418 U.S. 717 (1974); *San Antonio Independent School District et al. v. Rodriguez et al.*, 411 U.S. 1 (1973); and *Euclid (Village of) et al. v. Amber Realty Co.*, 272 U.S. 365 (1926). For a critical analysis of US Supreme Court case law that, under the guise of affirming local autonomy, validates the status quo, see David J. Barron, "A Localist Critique of the New Federalism" (2001) 51 Duke L.J. 377.

43. *Homevoter*, *supra* note 37.

44. For an account of how considerations of efficiency and political community should be considered together in the design of local governmental institutions, see *ibid.*, c. 2. See also Ostrom, Tiebout & Warren, *supra* note 39 at 836.

such regulation incentivizes governments to accurately price the cost of regulation.⁴⁵ Still other scholars have examined the extent to which compensation in takings jurisprudence can respond to the capture of municipal regulation processes by interest groups.⁴⁶

A civic republican approach to municipal law may share features with the pluralist approach. However, the approaches diverge significantly when we examine their normative underpinnings. Consider first the similarities. As does Fischel, a civic republican theorist may value citizen participation in municipal regulation, and—as are some pluralists—a civic republican may be concerned about the possibility of interest group domination of regulatory processes. Yet it is important to stress the theories' divergent normative goals. The pluralist aims to limit market distortions and to ensure that aggregate preferences are satisfied. By contrast, the civic republican offers prescriptions that (1) aim to reduce the state's capacity to act in arbitrary ways,⁴⁷ (2) provide for effective processes of democratic deliberation that call upon the capacity of citizens to “determine the political decisions that bind them,”⁴⁸ and (3) eliminate barriers to equal deliberation.⁴⁹ The main objective of these proposals is to counter domination by ensuring that state action does not merely express the preferences of citizens or interest groups. Broadly speaking, the proposals do so either by facilitating deliberative citizen input into government decisions or by ensuring that those decisions are justified in terms of public reasons and not of private preferences. Whereas the pluralist seeks to ensure that private preferences are satisfied through local government action, the civic republican aims to pre-empt this kind of government action and to subject all state action to the disciplining force of deliberated-upon public reasons.

45. For this “fiscal illusion” approach to takings law, see Michael A. Heller & James E. Krier, “Deterrence and Distribution in the Law of Takings” (1999) 112 Harv. L. Rev. 997.

46. See Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (Chicago: University of Chicago Press, 1991).

47. Pettit, *Republicanism*, *supra* note 11.

48. Besson & Martí, “Law and Republicanism,” *supra* note 6 at 20.

49. James Bohman frames this demand of equality in terms of the rule of law. He writes that “[t]he rule of law demands ... that each person can bind others and be bound by them; that is, each must possess not just one-way but two-way normative powers, powers to create and accept obligations second-personally.” James Bohman, “Cosmopolitan Republicanism and the Rule of Law” in Besson & Martí, eds., *supra* note 6, 60 at 64.

In Part I, I have specified the version of civic republican theory upon which I rely, outlined the idea of non-domination which is central to that version, and contrasted that version of civic republicanism with liberal and interest group pluralist theories. In the municipal law context, this contrast is significant because prominent authors have advanced liberal and pluralist theories of local government regulation. The main objective of this article, to which I now turn, is to offer an alternative, civic republican account. I will argue that processes for making regulations at the municipal level have been and can be designed in ways that reduce the risk of domination. This civic republican objective can be achieved through a variety of judicial doctrines and a range of institutional design choices. In the next two Parts, I will survey both means of achieving the end of local government regulation that evinces the norm of non-domination.

II. CIVIC REPUBLICANISM IN CANADIAN MUNICIPAL LAW

This Part examines how civic republican principles fit and justify the municipal law of Ontario.⁵⁰ In undertaking this examination, I do not intend to argue that the various elements of municipal law that I will examine—by-laws, judicial decisions, statutes, and ministerial orders—cannot fall short of the aspirations expressed in the relevant principles. Indeed, in the next sections we shall see that existing municipal materials do not perfectly reflect civic republican principles. However, existing legal materials must *in general* be consistent with those principles for the interpretive exercise to get off the ground. There are limits to this interpretive approach. When existing legal materials do not give rise to disagreements that fall within the reasonable bounds of controversy but rather occasion violations of fundamental principles, an interpreter will reject those materials out of hand rather than attempt to justify them.⁵¹ Such a rejection flows from the civic republican theory of autonomy. Violations of fundamental principles will subject citizens to the arbitrary power of the state. By contrast, where legal materials give rise to normative disagreement but fall short of such a fundamental violation, interpreters should read those materials in the best light, in a way that

50. For a general approach to interpretation that focuses on these features of fit and justification, see Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986) at 90, 176-224.

51. For this implication of the limits of Dworkin's interpretive approach, see T.R.S. Allan, "Law, Justice and Integrity: The Paradox of Wicked Laws" (2009) 29 *Oxford J. Legal Stud.* 705.

renders them intelligible to those who are subject to their requirements.⁵² We will soon see that civic republican materials can be read in this way. Before I move to the substance of the civic republican case for local governments, I will address one general objection to local government civic republicanism.

A. CIVIC REPUBLICANISM AND THE DEFINITION OF COMMUNITY

Richard Thompson Ford has offered perhaps the strongest criticism of civic republicanism as it applies to the local government context. According to Ford, civic republicanism, when applied to the local government level, presupposes the existence of normative commitments that are shared among members of a metropolitan region. Such a presupposition is, he argues, problematic because deep moral fissures typically divide groups living within a metropolitan region.⁵³ This argument finds support in Richard Schragger's claim that any argument which relies upon the existence of a metropolitan community runs up against the fact that there are many forms of community within a metropolitan region, drawn along different lines. He argues that the metropolitan boundary may serve as only one possible configuration of community.⁵⁴ Schragger charges that any such argument attempts to eliminate moral pluralism by merely asserting the existence of shared normative commitments.⁵⁵

A civic republican can concede the critic's claims about diversity in metropolitan regions, but argue nonetheless that civic republican deliberation is the best means of making decisions within existing local government institutions. Even if it is true that territorial boundaries do not fully demarcate communities of shared interest, one can claim that civic republican deliberation is the best way to make decisions within institutions whose jurisdictions *are* determined by territorial boundaries. Institutions charged with generating municipal law are

52. Ronald Dworkin, *Justice in Robes* (Cambridge, MA: Belknap Press, 2006) at 176.

53. Richard Thompson Ford, "The Boundaries of Race: Political Geography in Legal Analysis" (1994) 107 Harv. L. Rev. 1841 at 1887-93.

54. Richard C. Schragger, "The Limits of Localism" (2001) 100 Mich. L. Rev. 371 [Schragger, "The Limits"].

55. *Ibid.* at 393-97. See also Vicki Been, "Comment on Professor Jerry Frug's *The Geography of Community*" (1996) 48 Stan. L. Rev. 1109. There is also a more general critique that charges communitarian theories with assuming, rather than arguing for, community boundaries. See *e.g.* Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative" in Will Kymlicka, ed., *The Rights of Minority Cultures* (New York: Oxford University Press, 1995) 93.

required to make decisions on those matters which fall within their jurisdiction. I will argue that when they make such decisions, they appeal to public-regarding reasons and that this kind of reason-giving offers a more normatively satisfying view of lawmaking than any alternative that privileges simple representation of citizen preferences.⁵⁶ I do not suggest that when engaging in civic republican lawmaking, local government institutions can represent the views of every sub-community within their borders; such representation is likely impossible. Nor do I claim that concerns about ineffective or unequal regulation in metropolitan regions can be ignored. Indeed, I accept that, where possible, those concerns should be addressed by political bodies whose jurisdictions extend to cover the relevant communities of interest.⁵⁷ Finally, the fact of local government lawmaking does not preclude the existence of other kinds of norm generation. Communities whose boundaries are smaller than, larger than, or co-extensive with a local government's boundaries can thrive and generate their own norms and commitments.⁵⁸ However, for those matters that fall within a local government's jurisdiction, decisions that are motivated by a commitment to public-regarding reasons have greater justification than decisions which lack such reasons.

B. CIVIC REPUBLICANISM'S FIT AND JUSTIFICATION

Having answered a preliminary objection to civic republicanism in the local government context, I turn now to the task of defending a civic republican theory of local government law. A close examination of local government law will reveal that it is best understood as manifesting a commitment to civic republican values. We can discern this civic republican motivation in the criteria for determining a local government's jurisdiction, in principles that guide local government lawmaking, and in the law that regulates which matters fall within the jurisdiction of municipalities and provinces respectively. Let us begin by considering the threshold question of local government jurisdiction.

56. For this contrast between aggregative and deliberative democracy, see Amy Guttmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004) at 13-21.

57. For a classic treatment of this issue, see Richard Briffault, "The Local Government Boundary Problem in Metropolitan Areas" (1996) 48 *Stan. L. Rev.* 1115.

58. For an overview of deliberative institutions that are designed for a variety of scales, see Archon Fung, "Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences" (2003) 11 *J. Pol. Phil.* 338.

1. JURISDICTION MATTERS

In Canada, local governments do not have independent constitutional status and provincial legislation defines the extent of their jurisdiction. The threshold test for whether local government regulations are valid involves an inquiry into the extent of the power delegated to municipalities by provinces. The Supreme Court of Canada has reasoned that this inquiry requires a court to determine whether a given exercise of municipal powers falls within the purposes of the governing statute.⁵⁹ In general, municipalities only have authority to act for municipal purposes, and the challenge in difficult cases lies in determining whether a municipal regulation fits this characterization.⁶⁰ The relevant purposes, the Court reasoned in *Shell Canada Products Ltd. v. Vancouver (City of)*, include promoting “the health, welfare, safety or good government of the municipality.”⁶¹ Where a court cannot determine that regulation serves these public-regarding purposes or others specifically provided for by the governing statute, the regulation is *ultra vires*. This point is supported by the majority in *Shell’s* additional interpretive rule that any ambiguity or doubt is to be resolved in favor of the citizen.⁶² This rule is consistent with the civic republican understanding of state action, as it proscribes any state action that prejudices the interests of a citizen and that lacks a clearly articulated supporting public purpose.⁶³

One might object that I have mischaracterized the dispute in *Shell*. According to this objection, the disagreement between the majority and dissenting judgments hinges on whether the legitimate public interest of the municipality extends to regulating extra-territorial matters. The dissenting judgment, notes the objector, adopted a more expansive reading of the statute than did the majority, but both judgments understood that the municipal action required a supporting public purpose.⁶⁴ The disagreement, according to the objector, is over the content of that public purpose, and a rule that gives greater leeway to municipalities to govern their affairs is more consistent with deliberative ideals than one that

59. *Shell Canada Products Ltd. v. Vancouver (City of)*, [1994] 1 S.C.R. 231 at para. 97 [*Shell*].

60. *Ibid.*

61. *Ibid.* at para. 100.

62. *Ibid.* at para. 30.

63. See Pettit, *Republicanism*, *supra* note 11.

64. The dissent charged the majority with taking a narrow interpretative approach to municipal powers. *Shell*, *supra* note 59 at para. 5.

requires a municipality to justify its actions in local terms and to find express statutory authority for its actions. In order to respond to this objection, we must examine the deliberative effects of adopting a clear statement rule, such as the one articulated by the majority in *Shell*.

Generally speaking, clear statement rules safeguard the settlement function of law.⁶⁵ They ensure that reasons that are not authorized or incorporated by a statute are excluded from consideration.⁶⁶ This exclusion of reasons that cannot obviously find their anchor in the text of a statute separates those reasons which are public (in the sense of being publicly identifiable) from those which are not and that are thus particularly susceptible to reflecting the private preferences of officials or interest groups.⁶⁷ Moreover, this exclusion provides citizens with meaningful guidance about what kinds of reasons will and will not be taken into consideration when a state actor relies on a statute. Citizens can order their affairs

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65. For a discussion of the settlement function of law in the context of debates about the legitimacy of judicial review, see Larry Alexander & Fredrick Schauer, "On Extrajudicial Constitutional Interpretation" (1997) 110 Harv. L. Rev. 1359. On law's settlement function more generally, see Larry Alexander & Frederick Schauer, "Law's Limited Domain Confronts Morality's Universal Empire" (Legal Studies Research Paper Series, Research Paper No. 07-44, 2006), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900254>. For an argument in favor of this settlement function in the context of Canadian debates over the content of unwritten constitutional principles, see Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002) 27 Queen's L.J. 389 at 429. Leclair writes that "[t]he legitimacy of judicial review depends on a production of meaning which is as open as possible."
66. I do not intend to enter here into the debate between inclusive and exclusive legal positivism. It is immaterial for the purposes of my discussion whether the consideration of extra-legal reasons is valid because such reasons are incorporated into positive law or because such consideration is authorized by positive law. For an example of an exclusive legal positivist argument on this point, see Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 46. For an inclusive legal positivist argument, see Jules L. Coleman, *The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory* (New York: Oxford University Press, 2001) at 108, 116-19. For the concept of pre-emptive reasons in law, see Joseph Raz, "Authority and Justification" (1985) 14 Phil. & Pub. Aff. 3 at 24 [Raz, "Authority and Justification"].
67. The civic republican functions of these publicity-enhancing features of the rule of law have been noted by Henry S. Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Public Policy* (Oxford: Oxford University Press, 2002) at 217. He argues:
- The ideal of the rule of law bears an obvious connection with the ideal of freedom and the way it puts all lawmaking under a burden of legitimation. Governments purport to put citizens under new duties. A basic respect for their freedom demands that citizens be able to discern these new duties, that they be able to take them into account in planning their activities, and that they not be imposed arbitrarily.

accordingly and can more easily contest state action than they can when the source of authorization is unclear.⁶⁸ A clear statement rule fulfills the settlement function of law by facilitating the exercise of citizen agency and by delimiting the scope of what counts as a public justification for state action. A clear statement rule, such as the one articulated in *Shell*, therefore serves civic republican ends as it reduces the risk of domination. A more expansive interpretative approach, such as the one adopted by the dissent in *Shell*, exacerbates that risk.

Subsequent case law might cause one to doubt whether my claim about the civic republican implications of the *ultra vires* doctrine has any weight. The Court has taken a generally deferential view of municipalities' interpretations of their own powers. For instance, in *Nanaimo (City) v. Rascal Trucking Ltd.*⁶⁹ and *Pacific National Investments Ltd. v. Victoria (City)*,⁷⁰ the Court favored a broad and purposive approach to interpreting municipal powers, thus according substantial deference to municipal governments' determinations about whether actions are *intra vires*. Given this deference, one might argue municipalities are only nominally required to act in accordance with the public good, as it has been articulated by the empowering statute. One might note that municipalities that are subject to this level of review have significant leeway to ignore the constraints on their actions that are imposed by statute and that a municipality that is not subject to statutory constraint is relatively free to regulate in ways that satisfy private preferences.⁷¹ Of course, the rationale for deference to municipalities' interpretations is that they are, in general, in a better position to make local decisions than are courts. The concern about the effects of a deferential approach is therefore best understood as expressing doubt about whether municipalities, under this approach, are sufficiently constrained by an empowering statute, or at the very least, whether they are precluded from acting for improper purposes.

68. For this effect of pre-emptive reasons, see Raz, "Authority and Justification," *supra* note 66 at 23.

69. [2000] 1 S.C.R. 342.

70. [2000] 2 S.C.R. 919 at para. 90. Indeed, according to Justice Bastarache, "the principal holding in *Shell* was that the municipality was not acting for a municipal purpose, and not that a municipality's implied powers should be narrowly construed."

71. Of course, it is not a necessary consequence of being freed from this statutory constraint that municipalities will act in ways to satisfy the private preferences. My point is only that eliminating the statutory constraint increases the risks of municipal action that satisfy private preferences. For consequentialist arguments of this kind in favor of formalist approaches to statutory interpretation, see Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge: Harvard University Press, 2006) at 72-79.

One can respond to this concern by noting that the Court in *114957 Canada Ltée (Spraytech, Société D'arrosage) v. Hudson (Ville)*⁷² has expressly held that even broad statutory provisions that empower municipalities to regulate for “the general welfare” proscribe “ulterior objectives” and therefore impose real limits on municipal action.⁷³ According to the majority in *Spraytech*, courts analyzing by-laws are required to scrutinize the “true purposes” of by-laws to ensure that they conform with “general welfare” purposes.⁷⁴ The reasoning makes it clear that broad statutory delegations do not confer unlimited powers on municipalities, nor does a generally deferential approach to by-law interpretation. A critic may concede that this is the legal doctrine but press the objection by stating that there are limits to what a court can uncover. Since inquiring into the intentions of legislative bodies is always fraught with difficulties,⁷⁵ the critic continues, local governments can offer pretextual reasons for actions that are, in fact, not motivated by public purposes. Whatever the stated objectives, argues the critic, the effects of local government regulation can dominate citizens by giving the force of law to private preferences. There are two possible responses to this reformulated objection.

According to one response, we should distinguish between intentions and objectives, and once this is done, we can see that the law is concerned with publicly available objectives and it is only these objectives that are relevant to citizens in the civic republican model. Let us begin by analyzing the treatment of intentions and motivations in Canadian public law. In Canadian constitutional law, courts routinely examine the purposes of legislation⁷⁶ and, in some respects,

72. [2001] 2 S.C.R. 241 [*Spraytech*].

73. *Ibid.* at para. 20.

74. *Ibid.*

75. Legislation is the result of divergent interests coming together. The compromises arrived at are not, in any meaningful sense, intended by the participants; they are simply the result of their actions. See Paul Brest, “The Misconceived Quest for the Original Understanding” (1980) 60 B.U.L. Rev. 204 at 209-22; Farber & Frickey, *supra* note 46 at 41-42. For an acknowledgment of the various motivations at play in a municipal council, see *Re H.G. Winton Ltd. and Borough of North York* (1978), 88 D.L.R. (3d) 733 at 740 (Ont. Div. Ct.) [*Winton*]. Justice Robins notes that “[w]hile it is perhaps obvious, I should make note of the fact that council comprises many members and the reasons actuating them to vote for a resolution may differ.”

76. For the federalism analysis of legislative purpose, see *R. v. Morgentaler*, [1993] 3 S.C.R. 463 [*Morgentaler*].

this analysis amounts to an inquiry into intentions. Courts will examine legislative debates and reject arguments that propose “shifting purposes,”⁷⁷ insisting that only the original legislative purpose is relevant for the purposes of constitutional scrutiny. This language of original purposes, coupled with the focus on legislative debates, resembles an inquiry into legislative intentions.⁷⁸ However, the general motivation behind judicial inquiries into legislative purposes is to examine objectives that are not tied to original legislative intentions. For instance, in constitutional rights jurisprudence, courts generally adopt a highly deferential posture towards the objectives that governments propose for legislation, accepting most proposed objectives as legitimate.⁷⁹ In the federalism context, the inquiry into legislative purposes engages factors such as “the mischief” the legislation overcame, the plausibility of a proposed objective, when “facts on the ground” are considered, and the legislative text taken as a whole.⁸⁰ These factors suggest an understanding of legislative purposes that stresses a reasonable interpretation of such purposes⁸¹ and not an inquiry into legislative intentions. The colourability doctrine, which discounts the stated aims of legislation when its effects diverge from those aims, similarly expresses this interpretive approach.⁸² This conception of purposes is consistent with the civic republican approach to local government law whereby the harm of domination arises when actions cannot be publicly justified. It is this conception of legislative purposes that drives *ultra vires* doctrine, and, contrary to the objection, not a conception that is focused tightly on legislative intentions.⁸³

77. For this rejection of shifting purposes, see *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [*Big M*].

78. For a recent consideration of shifting purposes, see *R. v. Labaye*, [2005] 3 S.C.R. 728.

79. For the exceptions, see *Big M*, *supra* note 77; *Vriend v. Alberta*, [1998] 1 S.C.R. 493.

80. *Morgentaler*, *supra* note 76.

81. For the idea of reasonable original understandings, in the constitutional context, see Vasan Kesavan & Michael Stokes Paulsen, “The Interpretive Force of the Constitution’s Secret Drafting History” (2003) 91 *Geo. L.J.* 1113 at 1132.

82. For a statement of the colourability doctrine, see *Reference Re Firearms Act (Can.)*, [2000] 1 S.C.R. 783 at para. 18.

83. For the application of this approach in the context of municipal by-law interpretation, see *Ottawa-Carleton (Regional Municipality) v. Marlborough (Township)* (1974), 2 O.R. (2d) 297 (S.C.); *Barrick Gold Corp. v. Ontario (Minister of Municipal Affairs & Housing)* (2000), 51 O.R. (3d) 194 (C.A.); and *Croplife Canada v. City of Toronto* (2005), 75 O.R. (3d) 357 (C.A.).

According to a second response to the objection about the capacity of courts to oversee municipal purposes, a range of doctrines in municipal law are aimed directly at prohibiting purposes that can reasonably be understood to serve private ends at the expense of public purposes. Far from such inquiries being beyond the scope of judicial capacity, they are the focus of much judicial attention, and doctrinal developments demonstrate how courts have undertaken effectively the analysis into objectionable purposes. I now turn to a consideration of these doctrines.

2. LIMITS ON ZONING POWERS

Perhaps the most significant legal doctrine constraining municipalities from enacting private preferences is the prohibition on bad faith in the zoning process. The Court, in *Entreprises Sibeca Inc. v. Frelighsburg (Municipality)*, defined bad faith as including not only “acts committed deliberately with intent to harm, which corresponds to the classical concept of bad faith, but also acts that are so markedly inconsistent with the relevant legislative context that a court cannot reasonably conclude that they were performed in good faith.”⁸⁴ As does the general *ultra vires* doctrine, this requirement precludes action that is manifestly not in accordance with public ends, as these ends are evidenced in the relevant legislation. The case law suggests that bad faith also captures municipal action that singles out a specific parcel of land without public justification and “without the degree of fairness, openness, and impartiality required of a municipal government.”⁸⁵ When a municipality attempts to shield such action from scrutiny by claiming a valid public purpose or by setting procedures that merely give the appearance of providing fairness and openness, courts can examine the legislative facts—and when these clearly show that the municipality’s measures are merely pretextual or that they provide no real notice, courts will find the impugned action to be in bad faith.⁸⁶

Indeed, some courts have relied on proxy indicators, such as departures from accepted practices and procedures and failures to provide notice to affected parties, to find that municipalities acted in bad faith.⁸⁷ Furthermore, as in *Congrégation*

84. [2004] 3 S.C.R. 304 at para. 26 [*Sibeca*].

85. *Winton*, *supra* note 75 at 741.

86. *Sibeca*, *supra* note 84 at para. 21.

87. *Winton*, *supra* note 75 at 736-38.

des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village), when a municipality can provide no justifications for zoning decisions that impact its citizens' interests, it will be found to have acted arbitrarily and therefore to have acted in bad faith and in violation of norms of procedural fairness.⁸⁸ In *Lafontaine*, the exercise of factional will was particularly egregious, given that the affected party belonged to a religious minority that has suffered a long history of persecution.⁸⁹ Municipal law, through the doctrine of bad faith, prohibits the power of the state from being exercised against citizens without public justification, and the doctrine empowers courts to scrutinize municipal action to determine whether such an exercise of power has occurred. The doctrine of bad faith enforces a civic republican norm of non-domination and expressly precludes unjustifiable private preferences from dictating the content of regulation. The doctrine serves as a prophylactic rule that aims to preclude such factional preferences from shaping regulation. It does not follow, however, that all regulation enacted in bad faith reflects these kinds of preferences. One can at least imagine a municipality acting in bad faith for reasons other than a desire to promote factional interests. Moreover, the prophylactic rule is not effective at screening out all factional influences, nor is it intended to do so.⁹⁰

Consider three other doctrinal constraints on the capacity of municipalities to act in ways that disregard the public interest—namely, the rule against regulating users (rather than uses), the rules concerning regulatory or de facto takings, and the rule against prohibiting all uses. Both jurisprudence⁹¹ and legislation⁹²

88. [2004] 2 S.C.R. 650 [*Lafontaine*].

89. For reasons that focused on this dimension, see Justice Lebel's dissenting judgment, *ibid.* at paras. 37-93.

90. For examples of where a municipality found to be acting in bad faith also seemed to be acting in response to factional interests, see *ibid.*; *839891 Ontario Inc. v. St. Catharines* (1992), 90 D.L.R. (4th) 354 (Ont. Ct. J. (Gen. Div.)). However, the simple fact that council members reflect the views of their constituents or supporters will not lead to a finding of bad faith. See *Sibeca*, *supra* note 84; *Equity Waste Management of Canada v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (C.A.).

91. See *Bell v. The Queen*, [1979] 2 S.C.R. 212; *Barrie (City) v. Brown Camps Residential & Day Schools* (1973), 2 O.R. (2d) 337 (C.A.). This distinction between uses and users finds its roots in private law regulation of restrictive covenants. See *Galbraith v. Madawaska Club Ltd.*, [1961] S.C.R. 639. Once the distinction is incorporated into public law regulation of the relationship between the state and citizens, it gains the civic republican significance that I accord it in the main text.

have proscribed municipalities from regulating by categories of users, rather than by uses. In so doing, municipal law shields citizens from being regulated on the basis of presumptively arbitrary considerations. This protective function is present in other public law contexts, perhaps most notably in anti-discrimination law. As is the case with the rule against regulating users, anti-discrimination law creates a presumption against distinctions drawn by the state on the basis of certain personal characteristics. This presumption exists, in part, because such distinctions are presumed to be at best irrelevant to any valid legislative purpose.⁹³ Commentators have criticized the rule against regulating users, noting that a formal distinction between users and uses obscures what is truly at stake in exercises of the zoning power: namely, regulation of the *effects* of uses on the surrounding environment.⁹⁴ The result, commentators have argued, is a rule that is both over- and under-inclusive. The rule is over-inclusive because it proscribes uses that would likely be consistent with the purposes of particular planning legislation insofar as they would produce impacts on the surrounding environment that do not fall within the scope of what the legislators aim to prohibit. The rule is under-inclusive because it allows municipalities to regulate with respect to personal characteristics as long as those characteristics are not evident on the face of the regulations. As we shall see, municipalities can achieve this end by regulating users on the basis of their membership in a socio-economic class, through regulations requiring minimum lot sizes.⁹⁵

The rule against regulating users may be both over- and under-inclusive, yet still conduce to civic republican ends. Take first the question of over-inclusiveness.

92. *Planning Act*, R.S.O. 1990, c. P-13, ss. 35(2)-(3).

93. The literature on anti-discrimination legislation is vast. For the claim that the constitutional anti-discrimination rules presumptively prohibit regulation on the basis of irrelevant personal characteristics, see *Lavoie v. Canada*, [2002] 1 S.C.R. 769 at para. 5; *Trociuk v. British Columbia (A.G.)*, [2003] 1 S.C.R. 835 at para. 24; and *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 at para. 13. For an analysis of invidious purposes in the US equal protection context, see Reva Siegel, "Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action" (1997) 49 *Stan. L. Rev.* 1111.

94. Stanley M. Makuch *et al.*, *Canadian Municipal and Planning Law*, 2d ed. (Toronto: Thomson-Carswell, 2004) at 198-200.

95. *Ibid.* See also Raphaël Fischler, "Health, Safety, and the General Welfare: Markets, Politics and Social Science in Early Land-Use Regulation and Community Design" (1998) 24 *J. Urb. Hist.* 675.

If courts and legislatures are concerned that regulating with respect to users will yield significant harms that are independent of any impacts of particular uses on surrounding environments, they may accept over-regulation with respect to those impacts in order to reduce the likelihood that municipalities will act in an arbitrary and dominating manner. This is particularly the case if courts and legislatures are concerned about their ability to engage in more fine-grained analyses.⁹⁶ As for the argument about under-inclusiveness, nothing prevents courts or legislatures from supplementing the rule against regulating users with other legal devices that aim to uncover invidious purposes or limit the effects of regulating users in cases where the regulation of users is not the express legislative purpose.⁹⁷ The rule against regulating users signals a clear legal intention to prohibit a particularly egregious form of regulation that violates the civic republican norm of freedom as non-domination. That there may be costs associated with that rule does not detract from the rule's force in core cases of domination.

Consider next the rules surrounding regulatory or de facto takings.⁹⁸ A municipality is prevented from extinguishing the property rights of owners and acquiring in the process a beneficial interest in the affected land, unless the municipality first commits to expropriating or acquiring the land within a reasonable time. This rule imposes on a municipality an obligation either to justify some

96. For an analysis of the circumstances under which courts will have recourse to these kinds of over-protective rules, see David A. Strauss, "The Ubiquity of Prophylactic Rules" (1988) 55 U. Chicago L. Rev. 190.

97. For an analysis of public law doctrines that aim to achieve these ends, see Richard Primus, "Equal Protection and Disparate Impact: Round Three" (2003) 117 Harv. L. Rev. 494; Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*" (2001) 46 McGill L.J. 533. On the possibility of challenging insincere reasons in public generally, see Glen Staszewski, "Reason-giving and Accountability" (2009) 93 Minn. L. Rev. 1253 at 1289.

98. See *Russell v. Toronto (City) Interim Control By-law 1995-0550 (Re)*, [1998] O.M.B.R. 362 [*Russell*]. For a discussion of *Russell*, see Makuch *et al.*, *supra* note 94 at 208-09. See also the discussion of de facto takings in *Canadian Pacific Railway Co. v. Vancouver (City)*, [2006] 1 S.C.R. 227. Russell Brown has argued that the latter case, by introducing the requirement that a municipality acquire a beneficial interest in the regulated land, collapses the distinction between a regulatory or de facto taking, on the one hand, and expropriation on the other. Russell Brown, "Legal Incoherence and the Extra-constitutional Law of Regulatory Takings" (2009) 1 Int'l J. L. in the Built Env't 179 at 192.

public actions that significantly affect the autonomy interests of landowners⁹⁹ or to enter into a transaction with the landowner in which the latter enters voluntarily. For present purposes, it is not important that this rule for de facto takings entails a requirement of a beneficial, as opposed to a notional, interest in the regulated land before the rule is triggered.¹⁰⁰ It is true that a rule incorporating the latter requirement would be more protective of landowners' interests. However, even under the rule for de facto takings that requires the state to acquire a beneficial interest in the land it is regulating, some exercises of state power affecting some citizens' interests are constrained in ways that require the state to justify its actions.¹⁰¹ As a result, at least in those circumstances, the state is placed under a civic republican burden of justification.

According to the rule against prohibitory zoning, a municipality can only completely deprive owners (and prospective owners) of the opportunity to pursue otherwise lawful ends with their lands if the municipality is authorized to do so by statute.¹⁰² As a result, the power to significantly constrain the autonomy of individuals must come from the provincial legislature, and for a civic republican explanation of this rule to make sense, there must be reason to think that the provincial legislature is in a good position to engage in giving public-regarding reasons, or at least that it is in a better position to do so than a municipality.¹⁰³

99. For the public notice, hearing, and reason-giving requirements of the Ontario regime, see *Expropriations Act*, R.S.O. 1990, c. E-26, ss. 2-10. For a statement of the common rule which introduces a presumption in favour of compensation when there has been an expropriation, see *Dell Holdings Limited v. Toronto Area Transit Operating Authority*, [1997] 1 S.C.R. 32.

100. For a discussion of this distinction, see Brown, *supra* note 98 at 189-91.

101. Section 6(3) of the *Expropriations Act*, *supra* note 99, does permit the Lieutenant Governor in Council to direct an order for expropriation to proceed without an inquiry, but only if the Lieutenant Governor in Council considers it "necessary or expedient in the public interest to do so." According to section 6(4), a copy of any such order must be laid before the Legislative Assembly. As a result, even in these circumstances, the motivation for action must be grounded in public reasons, and the action is made publicly available as it is reported to the Legislative Assembly.

102. See Marc-André LeChasseur, *Le Zonage en Droit Québécois* (Montréal: Wilson & Lafleur, 2006); *R. v. Konakov* (2004), 69 O.R. (3d) 97 (C.A.).

103. Note, however, that even the province's power to exclude seems to be limited by constitutional norms. See *Lafontaine*, *supra* note 88. It is worth noting that my argument about relative competences is contingent on the features of the statutory regime that I am analyzing. The civic republican ends of promoting deliberation may also be served by

There are good reasons to believe this is the case, and to explain this superior position I turn in the next Part to a consideration of the relationship between municipalities and provinces. We shall see that the logic of that relationship imposes on municipalities constraints that are grounded in a theory of public justification. It is important to note that I only claim that *in general* provinces are in a superior deliberative position. It may be that, in some instances, municipalities are in a better position to deliberate effectively about the impacts of regulatory decisions than are higher orders of government. This may be because local residents are best able and most motivated to assess those impacts. Fischel has argued that local governments are well-positioned to assess and price the impacts of environmental harms and that when higher orders of government limit the ability of local governments to make these kinds of assessments they ignore the superior decision-making position of local governments and their citizens.¹⁰⁴ I only make a general argument about the relative capacities of provinces and municipalities to deliberate about certain kinds of questions; I do not rule out the possibility that, under some conditions, municipalities can occupy the superior position.

In this Part, I have argued for a civic republican theory of municipal law doctrine. As I conclude this Part, it is worth highlighting the differences between my approach and the pluralist and liberal approaches. The civic republican differs from the pluralist approach most obviously in its aims. The civic republican approach argues for a version of municipal law that pre-empts the private preferences of legislators or interest groups, while the pluralist approach seeks to give effect to such preferences. Although a pluralist interpretation of the doctrines that we have just considered may be possible, the civic republican approach seems to fit more closely with that body of doctrine. The distinction between civic republican and liberal approaches to municipal law is less sharply defined, but is nonetheless significant.

Consider first the distinction between the civic republican norm of non-domination and the liberal norm of non-interference. One might view the doctrines that we have just surveyed as aiming primarily to prevent the state from interfering with the private choices of citizens. In this view, the *ultra vires*

common law rules that impose similar constraints. The point I make does not exclude this possibility but merely addresses the deliberative consequences that flow from features of the statutory regime that I am examining.

104. See Fischel, *Homevoter*, *supra* note 37 at 182.

doctrine, the doctrine relating to bad faith, the rule prohibiting regulation of users rather than uses, the rule concerning regulatory takings, and the rule against prohibiting lawful uses all aim to preserve a sphere of private liberty for citizens. I accept that all of these doctrinal rules have this effect but note that they have the additional aim of pre-empting state action that merely expresses private preferences—and therefore have an additional goal, namely the safeguarding of citizens against domination. Finally, one should consider these judicial doctrines in light of institutional features of land use regulation that encourage democratic deliberation. As I have argued elsewhere, the law concerning the making of Canadian land use regulations provides significant opportunities for citizens to participate in defining the terms of the municipal regulation that governs them.¹⁰⁵ Indeed, in *London (City) v. RSJ Holdings Inc.*¹⁰⁶ the Supreme Court expressly recognized that citizen participation in local government, through statutorily-mandated open, public processes, is essential to the legitimacy of municipal law in Ontario.¹⁰⁷ Understood in this light, the doctrinal rules examined in this Part have a *constitutive* function. They are one element of an institutional architecture that enables citizens to constitute the rules by which they are governed, and as we saw in Part I, this constitutive focus distinguishes civic republican theory from its close cousin, Rawlsian liberalism. The civic republican insists that courts that formulate Canadian municipal law doctrine are not, as Rawls would have it, exemplars of public reason. Rather, they are facilitators of democratic deliberation about what the public good requires in the municipal context. Having established that courts occupy this role, I turn now to consider other institutional features of the municipal law of Ontario that serve similar constitutive ends.

III. PROVINCIAL CONSTRAINTS ON ZONING POWERS

In this Part, I will consider the means by which Ontario can constrain the actions of municipalities and will argue that these constraints reflect civic republican norms. The legislature of Ontario can constrain municipal action by direct means. Section 2 of the *Planning Act* states that “[t]he Minister, the council

105. Hoi Kong, “The Deliberative City” Windsor Y.B. Access Just. [forthcoming].

106. [2007] 2 S.C.R. 588.

107. *Ibid.* According to Justice Charron, writing for the Court, “The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law” (at para. 38).

of a municipality, a local board, a planning board and the Municipal Board, in carrying out their responsibilities under this Act, shall have regard to, among other matters, matters of provincial interest,” and then enumerates a non-exhaustive set of such interests.¹⁰⁸ This section also requires municipalities to incorporate these interests into their deliberations and states that the Act is itself paramount in the event of any conflicts with special or general legislation. The Act sets out a mandatory deliberative agenda for municipalities, and the items on the agenda are matters concerning the public good.¹⁰⁹

The Act goes further. It imposes a substantive constraint on municipal action and provides for provincial powers of direct supervision. Subsection 3(1) of the Act empowers the Minister of Municipal Affairs and Housing to issue provincial policy statements on matters relating to municipal planning that, in the opinion of the minister, are of provincial interest. Subsection 3(5) imposes a substantive constraint on municipal action:

A decision of the council of a municipality, a local board, a planning board, a minister of the Crown and a ministry, board, commission or agency of the government, including the Municipal Board, in respect of the exercise of any authority that affects a planning matter, (a) shall be consistent with policy statements issued under subsection (1).¹¹⁰

The Act also provides the province with powers of direct supervision. Under subsection 23(1), if the minister is of the opinion that a municipal plan affects a matter of provincial concern, as set out in a policy statement, the minister can request the municipality to make specific amendments. If the municipal council fails to satisfy the request within a time specified by the minister, the latter can amend the plan. Moreover, under subsection 47(1), the minister can, by an order, exercise a municipal council’s planning powers and, according to subsection 47(3), such an order will prevail over any inconsistent by-law.

One other supervisory power worth noting is found under sections 2 and 3 of the *Ontario Planning and Development Act*.¹¹¹ The Minister of Municipal

108. *Planning Act*, *supra* note 92, s. 2.

109. One might question whether the purposes in section 2 and in policy statements are too broadly phrased to constitute genuine constraints. I suggest that, at the very least, they direct municipalities to consider matters that they otherwise might not and thus have the effect of framing policy deliberations within municipalities.

110. *Planning Act*, *supra* note 92, s. 3(5).

111. S.O. 1994, c. 23, Sch. A.

Affairs and Housing may, by order, establish a development plan area that extends beyond municipal and regional boundaries. Once a plan is approved by the Lieutenant Governor in Council and has passed through the relevant processes, it prohibits all local government agencies from engaging in any undertaking or passing any by-law that conflicts with the plan. In the event of conflict, the plan prevails over any municipal plan or zoning by-law.¹¹² These provincial development plans have been made to protect major infrastructure projects and environmental areas that are not bound by any one sub-provincial jurisdiction.

These provincial powers constrain municipalities from acting in ways that are inconsistent with publicly-stated and publicly-oriented provincial purposes, and, as such, directly limit the ability of municipalities to act in ways that aim simply to satisfy private preferences or that impose externalities on neighboring municipalities. In general, these instruments support the civic republican theory of local government that I have advanced thus far. However, the rule against prohibitory zoning, which permits a municipality to exclude absolutely a given use from its jurisdiction when authorized to do so by legislation, and, more markedly, the power of the minister by order to establish a development plan, seem to go beyond the civic republican ideal of non-domination. They enable the province to intervene directly in the affairs of local government, whether by setting the ground rules with respect to the land uses a municipality may exclude from its borders or by setting rules for development within municipal borders. The challenge lies in determining what purpose, if any, justifies these powers, from a civic republican perspective. The answer turns on an assessment of the relative capacities of large and small polities to sustain reasoned deliberation.

A. FEDERALISM, WRIT SMALL

The academic literature on the relationships between municipalities and provinces and between municipalities and states is extensive.¹¹³ This literature tends to express either concerns about how relatively unfettered municipal autonomy

112. *Ibid.*, ss. 13-14.

113. For recent contributions in the United States, see David J. Barron, "Reclaiming Home Rule" (2003) 116 Harv. L. Rev. 2255 [Barron, "Reclaiming Home Rule"]; Richard C. Schragger, "Mobile Capital, Local Economic Regulation, and the Democratic City" (2009) 123 Harv. L. Rev. 482; and David Schleicher, "The City as a Law and Economic Subject" (2010) U. Ill. L. Rev. 1507. For work in the Canadian context, see Levi & Valverde, *supra* note 3; Reid Cooper, "Municipal Law, Delegated Legislation and Democracy" (1996) 39 Can. Pub. Admin. 290.

yields negative consequences¹¹⁴ or worries that provincial (or state) powers stifle local democracy.¹¹⁵ Several recent articles have offered analyses that present the relationship in a more nuanced fashion. For instance, writing against arguments that decry the negative consequences of municipal autonomy, David Barron argues that state law often prevents municipal governments from pursuing measures that would counteract these kinds of consequences. He describes state laws and judicial interpretations of them which limit the ability of municipalities to pursue fair-share housing programs, as well as rules governing vetoes that frustrate municipalities' attempts to engage in productive inter-local cooperation.¹¹⁶

Similarly, rather than adopting a Manichean perspective on municipal autonomy, which either condemns or praises legislation that restricts or empowers municipalities, David Schleicher examines the extent to which restrictive or facilitative legislation responds to different kinds of economic conditions. Restrictive legislation is appropriate, Schleicher argues, if states are concerned about local governments engaging in inefficient sorting practices, but such legislation is inappropriate if states are primarily concerned about enabling cities to generate agglomeration effects.¹¹⁷

Finally, Schragger has argued that the assumption that municipal governments do not have sufficient scale to undertake redistributive measures simplifies a complex relationship between the public interest and private power. The governance challenge for municipalities negotiating this relationship cannot be reduced to a simple dichotomy between too much or too little municipal power. Rather, Schragger argues, analyses that are cognizant of the complexities of this relationship should consider the extent to which municipalities, subject to the vagaries of mobile capital, are pushed into either giveaways to mobile businesses or exploitation of immobile capital or immobile residents.¹¹⁸

114. The literature on this point is vast. For an examination of the historical roots of local government autonomy and its harmful effects in the specific context of exclusionary zoning, see Fischler, *supra* note 95.

115. For work in the United States, see Gerald E. Frug & David J. Barron, *City Bound: How States Stifle Urban Innovation* (Ithaca: Cornell University Press, 2008). For work in Canada, see Cooper, *supra* note 113.

116. Barron, "Reclaiming Home Rule," *supra* note 113.

117. Schleicher, *supra* note 113.

118. Schragger, "The Limits," *supra* note 54.

I situate my own analysis in this body of literature and argue that the best way to understand the relationship between provincial and municipal governments is to view it through the lens of their relative competences to facilitate reasoned deliberation. To introduce this analysis, I first consider Carol Rose's suggestion that local government decisions will not satisfy the normative demands of Madisonian deliberation. In this kind of legislative deliberation, which can only occur in large publics, many different factions in society are compelled to collaborate and compromise with one another.¹¹⁹ Rose argues that most land use regulation is made in legislative settings that are small-scaled and dominated by a single faction that consistently disadvantages smaller rivals.¹²⁰ She notes that some authors have claimed that high-visibility, large-scale land use decisions approximate the conditions of Madisonian deliberation because they are highly public and give rise to a collision of a range of diverse interests. This diversity, the authors argue, precludes the domination of any one faction within a municipality because government policy is formulated through persuasion, constantly shifting coalitions, and trades.¹²¹ Rose rejects this claim, noting that even in high-visibility decisions, the populations in local government contexts are rarely large enough to overcome the problems of factional domination.¹²²

For present purposes, Rose's analysis is significant because it points to the relative deliberative capacities of provincial (or state) and municipal governments. Whereas municipal governments are prone to deliberative failures resulting from factional domination, provincial legislatures, by virtue of the size of the populations they represent, are less prone to these failures and more likely to possess Madisonian features. Writing in reference to the United States, Terrance Sandalow has argued that

majority excesses may pose a greater danger at the local level than at "higher" levels of government where the larger number of persons and hence the greater number of interests make it less likely that a group actuated by a single interest will be able to run roughshod over a minority. ... The risk of precipitate majority action is increased

119. Rose, "Planning," *supra* note 41.

120. "What Federalism Tells Us About Takings Jurisprudence" (2007) 54 UCLA L. Rev. 1681 at 1686 [Rose, "Federalism"].

121. Rose, "Planning," *supra* note 41 at 854, 871-73.

122. *Ibid.* This point has been made recently by Christopher Serkin, in the takings clause context. Christopher Serkin, "Big Differences for Small Governments: Local Governments and the Takings Clause" (2006) 81 N.Y.U.L. Rev. 1624.

by the existence of homogeneous population groupings, the likelihood of which is, of course, greater at the local level.¹²³

From this observation, Sandalow derives a variety of doctrinal recommendations that are cognizant of the relative institutional competences of courts and the political branches that allocate primary decision-making authority for a variety of subject matters to either states or municipalities. A similar set of considerations is relevant to an assessment of the various constraints that Ontario can impose upon municipalities. Since provinces are less likely to be subject to the defects of factionalism than are municipalities, and because they represent a broader range of interests than municipalities, there is good reason to expect provinces to be better able to give effect to provincial purposes and to remedy municipal failures to do so. There are two kinds of deliberative failures to which municipalities are especially prone and that provinces are well-positioned to remedy.

First, municipalities may not give sufficient consideration to the interests of those who do not reside within their boundaries. Since provincial governments encompass and represent all municipalities within their jurisdiction, they are in a superior position to consider the extra-territorial effects of any specific instance of municipal action. Second, because municipalities are particularly susceptible to homogeneity and majoritarian dominance, they may fail to give adequate consideration to the interests of minorities within their borders. Because provincial governments represent a wider range of interests than do municipal governments, it is more likely that they will consider the interests of minorities within a given municipality, particularly if those minorities can form coalitions with minorities in other municipalities to advance their interests within the provincial legislature, or if the minority interest overlaps with a matter expressly set out as an area of provincial interest.¹²⁴

123. "The Limits of Municipal Power Under Home Rule: A Role for the Courts" (1964) 48 *Minn. L. Rev.* 643 at 710.

124. Constitutions make these kinds of mechanisms available to federal governments, in relation to sub-federal governments. In the United States, section 5 of the Fourteenth Amendment plays this role. See Samuel Estreicher & Margaret H. Lemos, "The Section 5 Mystique, Morrison and the Future of Federal Antidiscrimination Law" (2000) *Sup. Ct. Rev.* 109 at 116-17. The federal government in Canada is empowered by the constitution to actively play the role of protector in minority interests. For a discussion of the Laurier government's failure to exercise its powers under section 93(3) in protecting the Catholic minority in Manitoba, see Robert Bothwell, *The Penguin History of Canada* (Toronto: Penguin Canada,

The provincial powers of direct supervision, coupled with broad delegations of authority to municipalities that are cabined by provincial policy objectives, capitalize on the capacity of provinces to consider effectively matters that municipalities are prone to fail to consider and on the ability of municipalities to initiate experiments in social policy and respond to the needs of their citizens. Municipalities, under the Ontario legislation, are empowered to innovate in order to give effect to provincial policy objectives; if they fail to do so, the province will intervene. Notice, too, that this structural arrangement responds to the problems of institutional competence that plague courts when they review decisions by representative bodies that have greater democratic warrant and a superior capacity to weigh the relevant information and interests.¹²⁵ The Ontario legislation enables one representative body (the provincial legislature) to review decisions by a second body (a municipality) that is less likely to weigh the relevant information and interests.¹²⁶ And, when the province claims to be engaging in this oversight for reasons related to provincial interests and is called to account for this claim, it must give an opinion as to why those interests are engaged. Such an opinion is subject to review by an administrative agency, *i.e.*, the Ontario Municipal Board (OMB).¹²⁷

2006) at 243. For an account of Laurier's speech to Parliament on the Manitoba Schools Question, in which he expressed concern about the limits of federal oversight and the costs of oversight to provincial autonomy, see Robert C. Vipond, *Liberty and Community: Canadian Federalism and Failure of the Constitution* (Albany: State University of New York Press, 1991) at 108-11.

125. For a recent argument that courts are not competent to engage in such analyses and that political actors are in a better position to engage in reasoning about the public good, see Richard Bellamy, "The Republic of Reasons: Public Reasoning, Depoliticization and Non-Domination" in Besson & Martí, eds., *supra* note 6, 102 at 102.
126. For the role of the province in approving municipalities' official plans, see *Planning Act*, *supra* note 92, s. 17(1). For their role in ensuring the plans' conformity with provincial policy statements, see ss. 23(1)-(3).
127. *Ibid.*, ss. 47(10), (13). OMB decisions are themselves subject to judicial review. See *Ontario Municipal Board Act*, R.S.O. 1990, c. O-28, s. 36. There are difficult questions, which go to the heart of the administrative state's legitimacy, about the potential for expert administrative agencies to circumvent or pre-empt decision making by elected representatives. For concerns about the OMB's ability to make decisions based on policies that it has created rather than those of the provincial government, see John G. Chipman, *A Law Unto Itself: How the Ontario Municipal Board Has Developed and Applied Land Use Planning Policy* (Toronto: University of Toronto Press, 2002) c. 5.

Let us consider an objection, which states that because the provincial government is removed from the on-the-ground facts of local zoning decisions, it is not competent to make such decisions, and because the province, when exercising its supervisory power, overrides the political will of the polity with the greatest claim to legitimacy (*i.e.*, the municipality), any such exercise is illegitimate. We can respond to this objection by noting that the exercises of provincial oversight considered above only arise when there is a provincial interest at stake. In such circumstances, the province is more competent to regulate, and its regulations are more legitimate than those of a municipality, precisely because the issue at stake exceeds municipal competence and authority. Moreover, this system of oversight places the primary decision-making authority in the municipality, with the province acting to overcome the institutional disadvantages of a municipality that render it less likely to engage in effective deliberation. There is always a risk that a province will exercise its supervisory power improperly, but any such exercise is subject to administrative oversight by the OMB, which can call upon the province to give reasons justifying its decision. The structural advantage of a provincial legislature renders it better able to engage in the relevant kind of reasoning than a municipality, and when there is a suspicion that it has failed to offer such reasons, administrative review imposes a requirement of public justification.

Let us now answer a second objection, which claims that the province will under-enforce provincial interests because it is distant from the concerns of municipal populations and therefore will have insufficient political incentives to address municipal affairs.¹²⁸ The response to this objection draws together the various strands of this Part's arguments. The minister's power to issue an order under the *Planning Act* has been used in one particularly high profile case, which provides an example of political incentives being sufficiently aligned for the minister to issue an order. In the midst of a dispute over an Aboriginal land claim in Ontario, the minister issued an order that precluded development on the disputed land.¹²⁹ The case involved an Aboriginal Band's occupation of building sites and generated significant news coverage. The province therefore had clear political incentives to act because the dispute was highly public and majoritarian impulses were turning ugly.¹³⁰ In addition to this highly visible

128. Frug & Barron, *supra* note 115.

129. *Planning Act: Zoning Area—Haldimand County*, O. Reg. 200/06.

130. For an overview of the underlying legal issues, see Michael Coyle, "Respect for Treaty Rights in Ontario: The Law of the Land?" (2007-2008) 39 *Ottawa L. Rev.* 405. For a timeline of

invocation to protect against a potential deliberative failure within a municipality, minister's zoning orders have been used most frequently in regions, such as northern Ontario, where there is no municipal organization,¹³¹ and where the province has created a greenbelt.¹³² Here again, there are clear provincial interests at stake and clear political incentives to act, either because there is no other governmental actor, or because the province is enforcing a policy that it has itself set out.

The response to this objection concerning political incentives, then, is in part factual: whatever obstacles may prevent a province from exercising its oversight powers can be overcome, particularly in those cases where municipalities will predictably and publicly fail to act. The response to the objection can be conceived more broadly than this; we can understand the provincial oversight powers in the context of the other institutions that were examined in this Part. As we have seen, the judiciary, through a range of doctrines, elicits from municipalities reasons for their actions. The minister's power to issue an order is one further example of a mechanism that polices the deliberative failures of municipalities, and the province, too, is held to a reason-giving requirement if exercises of this power are challenged. One might object that this constraint is very limited and that because the power is relatively unconstrained it permits the substitution of one set of political preferences for another. The answer to this final objection appeals to the structural differences between municipalities and provinces for which I have argued here. As we have seen, provincial governments represent large publics, and therefore it is unlikely that any single faction will dominate government decision making and more likely that decisions will reflect trades

the Caledonia land dispute, see "Caledonia Land Claim: Historical Timeline" *CBC News* (1 November 2006), online: <<http://www.cbc.ca/news/background/caledonia-landclaim/historical-timeline.html>>. For media coverage of the dispute, see James Rusk, "Caledonia Land Dispute is Spilling Over" *The Globe & Mail* (5 May 2006) A18; Anthony Reinhart, "Anger, Racism in Caledonia Surprises After Years of Peace" *The Globe & Mail* (29 May 2006) A11. For a comment on some of the litigation contemporaneous with the minister's order, see "Judge Marshall and the Rule of Law" *The Globe & Mail* (10 August 2006) A14.

131. For the use of the orders in northern Ontario, see Ontario Ministry of Municipal Affairs and Housing, "Applying to amend or revoke a Minister's Zoning Order?" online: <<http://www.mah.gov.on.ca/AssetFactory.aspx?did=5426>>; "Citizen's Guide: Northern Ontario" online: <<http://www.mah.gov.on.ca/AssetFactory.aspx?did=5926>>.

132. See Ontario Ministry of Municipal Affairs and Housing, "Parkway Belt West Plan" online: <<http://www.mah.gov.on.ca/Page5667.aspx>>.

and compromises among different segments of provincial populations. By contrast, municipalities are smaller and more susceptible to factional domination.¹³³ The ministerial power to issue orders recognizes this structural difference, and even if it does not incorporate significant deliberative safeguards, it does reflect the superior deliberative potential of large polities relative to small ones. Of course, in some instances, the majority will of a municipality might simply be reproduced at the provincial level. Nonetheless, the structural features of the system of institutional design that I have set out in this Part reduce the risk of majoritarian domination at the municipal level, even if that risk cannot be eliminated. In short, when understood in its institutional context, the minister's power to issue an order is one more illustration of the aptness of a civic republican theory of municipal law.

B. PRESCRIPTIONS

In concluding this article, I will argue that a civic republican theory of municipal law does not only explain existing materials; it can also generate prescriptions that guide state action. One set of prescriptions acknowledges the limits of the theory and so provides counsel as to when civic republicanism should not be appealed to. Civic republicanism, as I have developed it here, constrains the power of the state when it acts in ways that affect citizens' choices. There may be contexts in which it is unwise for the state to act at all. Consider Lee Anne Fennell's recent arguments about the use of market mechanisms to regulate risks relating to price fluctuations in the land use context.¹³⁴ She argues that because local governments inefficiently regulate risk, such mechanisms are worth creating. If one were to accept Fennell's claim, a civic republican theory of the state would be inapplicable because state action is inappropriate.¹³⁵ One general prescription of the theory, then, is to limit its application to those cases in which state action is appropriate and will likely give rise to domination.¹³⁶

133. Rose, "Federalism," *supra* note 120.

134. *The Unbounded Home* (New Haven: Yale University Press, 2009) at 74-75.

135. One might argue that the autonomy-protecting norms that underwrite a civic republican theory of the state should apply equally to economic relationships that are outside of the direct control of the state. Some theorists of deliberative democracy have moved in this direction. See *e.g.* Dryzek, *supra* note 13.

136. Some have read Lon Fuller as arguing that a similar distinction can be drawn between governance by rules (which is subject to the norms of legality) and governance by managerial

A second general prescription of a civic republican theory of local government law would call upon state actors to generate the best information possible in order to facilitate reasoned deliberation. Consider the use of the minister's orders just surveyed. In some cases a province may be in a better position than a municipality to deliberate about the relevant interests than a municipality. Nonetheless, a province may have inadequate information to make the relevant determination. A civic republican theory would not only prescribe vesting the province with authority to make decisions in cases where deliberative failures in municipalities are predictable; it would also recommend creating information-gathering mechanisms that would enable it to make informed policy decisions. New governance theorists have argued for regulatory mechanisms that are directly responsive to contexts (such as municipal governance of issues that are of provincial concern, which require the input of affected parties and service providers) and for the coordination of diverse sites of governance.¹³⁷ Municipalities in Ontario have generated promising mechanisms for this kind of regulation. Fifteen Ontario municipalities have created the Ontario Municipal Benchmarking Initiative (OMBI). The chief administrative officers and city managers of participating municipalities have agreed to pool information and develop performance measures

direction (which is not). See Jeremy Waldron, "Why Law—Efficacy, Freedom, or Fidelity?" (1994) 13 *Law & Phil.* 259 at 275. In the land use context, Rose has similarly argued that land use regulation, such as minor variances and bonusing, which involve individual lots and do not have large-scale consequences, are properly guided by a logic of mediation, rather than of Madisonian legislation. Rose, "Planning," *supra* note 41. The same may be said of severances. There is no clear dividing line between the situations when governance by public law rules is an appropriate mechanism and those when it is not, but my point is that, at least in principle, such a distinction is possible.

137. See Charles Sabel & Rory O'Donnell, "Democratic Experimentalism: What to Do About Wicked Problems After Whitehall" in Jonathan Potter, ed., *Devolution and Globalisation: Implications for Local Decision-Makers* (Danvers, MA: Organisation for Economic Co-operation and Development, 2001) 67. The authors suggest reforms of schools and provision of treatment to drug users as examples and define wicked problems as those "that both draw on the local knowledge of service providers and service users *and* require co-ordination of service provision across a wide range of formal jurisdictions" (at 76) [emphasis in original]. For the general claim that metropolitan governance typically presents wicked problems, see Neil Bradford, "Place Matters and Multi-Level Governance: Perspectives on a New Urban Policy Paradigm" (Paper presented to the "Who is Responsible for Cities? The Role of Governments" Panel of the McGill Institute for the Study of Canada Annual Conference, "Challenging Cities in Canada," Montreal, 11-13 February 2004), online: <http://www.cprn.ca/documents/26856_en.pdf>.

with respect to a variety of city services in order (1) to set benchmarks and to develop best practices that will enable municipalities to improve service delivery, (2) to optimize resource use, and, (3) where necessary, to advocate to provincial agencies for any needed policy or legislative changes.¹³⁸

I suggest that in areas of provincial policy concern, a similar kind of initiative might assist the province as it decides whether to regulate municipal affairs directly. For instance, in order to assess whether municipal regulation meets the provincial policy objective of “avoiding development and land use patterns which may cause environmental or public health and safety concerns,”¹³⁹ municipalities might generate data to assess the extent to which their land use policies create the relevant kinds of harms. The relevant benchmarks would require complex assessments and weighing of interests, but such analyses do not seem to be different in kind from those that the OMBI currently undertakes. Only when a municipality engages in activity that, based on the data, would likely give rise to the relevant harms would a province have a clear mandate to intervene. Such data would not only assist the province in making decisions, but would provide any resulting decisions with a degree of legitimacy while simultaneously delegitimizing inaction.

Finally, consider some doctrinal prescriptions that follow from a civic republican approach to local government law. Some courts and authors have argued that municipal council decisions should be given substantial judicial deference because they are the results of choices made by democratically elected officials and because remedies for such choices are available at the polls. In this view, judicial review checks majoritarian domination at the margins.¹⁴⁰ The analysis undertaken in this article suggests a different approach which can be understood by considering the doctrine of discrimination. According to that doctrine, Canadian municipal regulations are permitted to draw distinctions between different categories of individuals or groups only if these distinctions

138. For a general statement of the OMBI's goals and purposes, and for its annual reports, see Ontario Municipal CAO's Benchmarking Initiative, online: <<http://www.ombi.ca/index.asp>>.

139. Ontario Ministry of Municipal Affairs and Housing, *Provincial Policy Statement* (Toronto: Queen's Printer for Ontario, 2005) at Part V, 1.1.1(c), online: <<http://www.mah.gov.on.ca/Page1485.aspx>>.

140. See *Shell*, *supra* note 59 at para. 22, citing Ann McDonald, “In the Public Interest: Judicial Review of Local Government” (1983) 9 Queen's L.J. 62 at 100.

are expressly authorized by the enabling statute.¹⁴¹ In principle, this should mean that even if a distinction can be defended as rational, courts will strike down the regulation if it has not been expressly authorized. Commentators have noted that this principle has seemingly been eroded by the Supreme Court of Canada, without the Court having expressly overruled the relevant precedents.¹⁴²

I suggest that one way to reconcile the apparent conflict in the case law would be for the Court to state that where municipal regulation discriminates in a matter that directly affects an individual entity (and no other), whether it be a legal person or a single parcel of land, the municipality should bear a high burden of showing that it was authorized to take such action by the relevant legislation and that it strictly followed any applicable deliberative requirements, including notice and hearing requirements.¹⁴³ There are good reasons for suspecting that, when regulating an individual entity, a municipal council will tend not to engage in sufficient deliberation, particularly when that entity is unpopular. This is because the effects of its decisions are highly localized and not likely to attract extensive political attention.¹⁴⁴ A requirement to demonstrate clear legislative authorization in these circumstances, and to adhere strictly to deliberative requirements, imposes an obligation on municipal governments to publicly justify their decisions where there are good reasons for doubting that they will adequately deliberate about the relevant interests.¹⁴⁵ Contrary to the argument advocating recourse at the ballot box, this civic republican proposal does not accept citizens' unconsidered preferences to be legitimate when they are aggregated sufficiently to enforce majority will within a municipality. Rather, a civic republican approach to local government law imposes on municipalities a requirement to provide reasons supporting their decisions, particularly when

141. *R. v. Sharma*, [1993] 1 S.C.R. 650.

142. This is how Makuch *et al.*, *supra* note 94 at 199, interpret the effect of the SCC's reasons in *Spraytech*, *supra* note 72 at 241.

143. Such a rule would require overruling *Scarborough (Township) v. Bondi*, [1959] S.C.R. 444 and *Re North York (Township)*, [1960] O.R. 374 (C.A.).

144. A similar logic drives the "internalization of costs" rationale for the takings clause. See Heller & Krier, *supra* note 45 at 999.

145. Arguably, this is what the Supreme Court of Canada did when it closely examined a claim by a municipality that it had provided the relevant forms of notice and engaged in the relevant kinds of deliberation in the course of making a lot-specific decision that affected a religious minority. See *Lafontaine*, *supra* note 88.

it is likely that they will fail to consider the interests of those whom they are regulating. In short, this civic republican proposal aims to prevent domination where it is likely to occur.

IV. CONCLUSION

In this article, I have argued that civic republican values animate regulation-making processes at the municipal level in Ontario. In particular, I have attempted to illustrate that the institutional designs and judicial doctrines which shape and govern those processes evince a concern for the civic republican value of non-domination. Furthermore, this article has offered a counterpoint to both pluralist and liberal theories of municipal law. In response to the pluralist, I have argued that, far from giving effect to private preferences, municipal regulation prioritizes the importance of public reasons and institutions that counteract mere expressions of preference. In response to the liberal theorist, I have argued that the judicial doctrines and institutional design choices surveyed above evidence a concern for non-domination, and not merely non-interference. Moreover, I have argued that municipal law institutions and doctrines express the distinctively civic republican conception of the role that citizen deliberation plays in constituting legitimate forms of governance. To conclude, I will answer a criticism that has been levied against civic republican public law theorists and I will offer a partial justification of this article's focus on land use law.

Richard Fallon has argued that contemporary civic republican theorists are vague about what deliberation entails and about how meaningful deliberation is possible in the modern nation state.¹⁴⁶ Fallon does concede that involvement in local governments, along the lines envisioned by civic republicans, is an attainable ideal.¹⁴⁷ Despite this concession, he argues that because civic republicans are unwilling to abandon judicially-protected rights, they lose their claim to theoretical distinctiveness and share key features with liberal theories that view individual rights as "limits on, rather than the outcomes of, democratic politics."¹⁴⁸ As we have seen above, this claim about the potential for judicially-protected rights to undermine civic republican ideals has been made recently by civic republicans

146. See *e.g.* Fallon, *supra* note 5 at 1733-34.

147. *Ibid.* at 1723-24, 1734.

148. *Ibid.* at 1724-25.

themselves.¹⁴⁹ I do not intend to engage that wider debate here, but only point out that, at least at the municipal level, we can conceive of judicial interventions as primarily directed towards correcting deliberative failures that yield domination. Moreover, if we consider judicial review in light of the deliberation-enhancing legislative processes at the municipal and provincial levels, we can see that it functions as part of a general regulatory regime that affirms civic republican values. Judicial review in the municipal context, then, affirms and does not compromise the core civic republican concern about non-domination by the state.

A final critic would state what is perhaps obvious: that land use law does not exhaust the content of municipal law. Such a critic would therefore argue that my attempt to articulate a civic republican theory of municipal law is compromised by my failure to consider aspects of municipal law other than land use planning. This criticism has some merit and I concede that there may be elements of municipal law, which I have not considered, that undermine the civic republican arguments advanced here. Nonetheless, I feel justified in limiting my attention to land use planning law for two reasons. First, as others writing in the civic republican tradition have argued, the effects of many land use decisions are particularly salient to citizens and as a consequence, when these effects result in domination, citizens can be severely affected.¹⁵⁰ One response to the critic, then, is that I have decided to focus my civic republican theory on land use regulation because it is here that threats to civic republican values are the most substantial. A second, related response is that a complete theoretical treatment of municipal law is beyond the scope of any law review article. It was therefore necessary to select some domains on which this initial attempt at a civic republican theory of Canadian municipal law could focus. Given the salience of land use decisions to citizens, the land use planning dimension of municipal law provides a good starting point for what I hope will be an ongoing project of theorizing Canadian municipal law. I welcome the prospect that future arguments, drawn from broader domains of municipal law, might be developed to disprove some of the claims advanced in this article, as such arguments will evidence a vigorous academic debate about the nature and purposes of Canadian municipal law.

149. See *e.g.* Bellamy, *Political Constitutionalism*, *supra* note 14.

150. For the classic statement, see Frank I. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv. L. Rev.* 1165.