

## Are Cities Illiberal? Municipal Jurisdictions and the Scope of Liberal Neutrality

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Article abstract

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## ARE CITIES ILLIBERAL? MUNICIPAL JURISDICTIONS AND THE SCOPE OF LIBERAL NEUTRALITY<sup>1</sup>

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### ABSTRACT

One of the main characteristics of today's democratic societies is their pluralism. As a result, liberal political philosophers often claim that the state should remain neutral with respect to different conceptions of the good. Legal and social policies should be acceptable to everyone regardless of their culture, their religion or their comprehensive moral views. One might think that this commitment to neutrality should be especially pronounced in urban centres, with their culturally diverse populations. However, there are a large number of laws and policies adopted at the municipal level that contradict the liberal principle of neutrality. In this paper, I want to suggest that these *perfectionist* laws and policies are legitimate at the urban level. Specifically, I will argue that the principle of neutrality applies only indirectly to social institutions within the broader framework of the nation-state. This is clear in the case of voluntary associations, but to a certain extent this rationale applies also to cities. In a liberal regime, private associations are allowed to hold and defend perfectionist views, focused on a particular conception of the good life. One problem is to determine the limits of this perfectionism at the urban level, since cities, unlike *private* associations, are *public* institutions. My aim here is therefore to give a liberal justification to a limited form of perfectionism of municipal laws and policies.

### RÉSUMÉ

Une caractéristique centrale des sociétés libérales démocratiques contemporaines est leur pluralisme. Conséquemment, les philosophes politiques libéraux affirment souvent que l'État devrait demeurer neutre face aux différentes conceptions du bien. Les lois et politiques sociales devraient être acceptables aux yeux de tous, peu importe leur culture, leur religion ou leurs valeurs morales. On pourrait croire que ce principe de neutralité devrait s'appliquer à plus fortes raisons dans les centres urbains, caractérisés par une population culturellement très diversifiée. Il existe pourtant un nombre important de règlements et de politiques à l'échelle municipale qui contredisent ce principe libéral. Dans cet article, nous défendrons l'idée selon laquelle ces lois et politiques *perfectionnistes*, fondées sur des raisons qui font appel à une vision particulière du bien, trouvent une légitimité libérale à l'échelle urbaine. Nous nous appuyerons sur l'idée que le principe de neutralité ne s'applique qu'indirectement aux institutions sociales à l'intérieur du cadre plus large de l'État-nation. Cela est clair dans le cas des associations *libres*, desquelles l'individu peut en principe sortir à tout moment. Sous un régime libéral, nous présumons en effet qu'au contraire de l'État, les associations libres sont en droit d'afficher et de défendre des idéaux perfectionnistes, fondés sur une conception particulière du bien. Un problème est toutefois de déterminer les limites de ce perfectionnisme à l'échelle urbaine, puisque les juridictions municipales, au contraire des associations *privées*, demeurent des institutions *publiques*. L'objectif de cet article est donc d'offrir une justification libérale à une forme limitée de perfectionnisme pour les lois et politiques municipales.

“The Zoning Law is not only a legal document;  
it is also a design project”

Rem Koolhaas, *Delirious New York*

One of the main characteristics of today's democratic societies is their pluralism. This includes not just the more obvious forms, such as religious, linguistic, or cultural pluralism. Even within these different groups, there is significant disagreement among individuals concerning values, worldviews, or questions of the good life. As a result, numerous political philosophers have claimed that the state should remain neutral with respect to different conceptions of the good. Legal and social policies should be acceptable to everyone regardless of their culture, their religion or their comprehensive moral views.

One might think that this commitment to neutrality should be especially pronounced in urban centres, with their culturally diverse populations. However, there are a large number of laws and policies adopted at the municipal level that contradict the liberal principle of neutrality. One has only to think of the various bylaws governing private property - concerning building materials and architectural design for example - which are based solely on aesthetic criteria. By enforcing a certain cultural standard or a particular vision of the good, these kinds of rules - which are ubiquitous in the city - appear to contradict the liberal ideal.

In this paper, I want to suggest that these *perfectionist* laws and policies are legitimate at the urban level. Specifically, I will argue that the principle of neutrality applies only indirectly to social institutions within the broader framework of the nation-state. This is clear in the case of voluntary associations, but to a certain extent this rationale applies also to cities. In a liberal regime, private associations are allowed to hold and defend perfectionist views, focused on a particular conception of the good life. One problem is to determine the limits of this perfectionism at the urban level, since cities, unlike *private* associations, are *public* institutions. My aim here is therefore to give a liberal justification to a limited form of perfectionism of urban laws and policies.

My starting point will be John Rawls' assumption that a political society is a closed system. An important idea behind this claim is that, when it comes to the nation-state, the cost of exit for the individual is so high that it is not possible for individuals simply to leave if they are not satisfied with the social arrangements (nor is it reasonable for others to expect them to do so). The implication for Rawls is that only

*neutral* principles of justice can secure cooperation over time between free and equal persons who do not share the same conception of the good. In comparison, the cost of exit from associations is relatively low. This is part of the reason such associations can, in turn, be organized around the pursuit of more controversial values - those who do not like it can simply leave.

Municipalities, however, seem to be located somewhere in the middle on this continuum between associations and the state. This argument works best in the context of polycentric cities, composed of numerous formally independent municipal jurisdictions. Only polycentric cities are organized in such a way as to allow individuals to vote with their feet, i.e. to move to a neighbourhood or a municipality that best fit their preferences. It should be noted, however, that I take “polycentricity” to be an attribute of what I call here cities, which are essentially urban regions, including their suburbs and exurbs.

This feature of cities has been widely noted, but the consequences for political philosophy have not been correctly drawn. For instance, principles of justice tailored for a closed system might not apply to the institutions of a polycentric city with the same force. In particular, one can doubt that the requirement of neutrality will apply directly at the municipal level. Yet, from the point of view of justice, I will argue, it seems that a certain degree of perfectionism should be allowed to municipal institutions in the context of polycentric cities. Liberal principles of justice must be modified in recognition of this fact.

## 1.

A liberal democratic society is committed to the idea that all citizens are in principle free and equal. This does not only mean that laws should reject the idea that some citizens might be naturally inferior to others; it also implies that social cooperation should not benefit a particular group of people at the expense of another. Many liberal thinkers have claimed that in order genuinely to respect this ideal, the state should be neutral in regard to various reasonable yet incompatible conceptions of the good. People should be free to pursue their activities as they see fit, and the fact that they can be mistaken about their own good is not a sufficient reason to intervene paternalistically in the management of their lives. John Rawls's political liberalism is certainly the most influential account of this view.<sup>1</sup>

It is not immediately clear however why the state should not be organized around a shared conception of the good. After all, the idea

that it might be the duty of the state to promote worthwhile ways of life is an attractive one, and it has been taken by many thinkers to be a natural view. As Joseph Chan explains, “people care about the quality of their lives and have an interest in leading a good life. If the state’s existence is to help citizens pursue their interests, it seems natural that the state should assist citizens by promoting valuable conceptions of the good life, just as it should assist the lives of citizens by promoting the economy, offering education and health services, and protecting their rights and justice.”<sup>2</sup> Or, as Simon Clarke asks, if we assume that people should be guided by worthwhile conceptions of the good, then “what could be more reasonable than government being guided by the same reasons which should guide people generally?”<sup>3</sup> This “natural” view defines the doctrine of perfectionism, which has dominated most of the history of Western political thought.<sup>4</sup>

In order to show the superiority of their position, contemporary perfectionists usually claim that the neutral, liberal project has to be perfectionist to succeed. The inhibition of some people’s choice of life required to force them to respect others independence is coercive through and through, but the coercion limiting a person’s free choice from one’s life project, say coercing others to join a religion, is justified by neutrality among life projects. It is no good to say that this is not a limit of a person’s choice of the good, or to define that type of choice as if it is not a choice among views of the good: it is just a choice incompatible with neutrality among views of the good.<sup>5</sup>

Most importantly, perfectionists point to the fact that there are a number of desirable laws and policies in the liberal state that are grounded in the kind of evaluation that seems to be forbidden by the liberal commitment to neutrality. The state favours certain types of knowledge and abilities through the public education system; it encourages citizens to participate in sports and other physical activity; it bans recreational use of certain drugs; it also subsidizes arts and other cultural activities.<sup>6</sup> These are all practices through which the state promotes certain ways of life that are deemed worthier than others. Consequently, taking the principle of neutrality seriously might prevent those practices and lead directly to state inaction.

This would be a good point if neutrality were in fact a constraint on the *effects* of social and political institutions on people’s ways of life. But this is clearly not the argument of liberal neutrality. There is no question that any particular set of social institutions will effectively favour some conceptions of the good over other. For instance,

liberal ideals such as respect for individual rights and fairness in the distribution of the benefits of social cooperation will not have neutral consequences. So, in order to make sense of this apparent contradiction, the best statement of liberal neutrality distinguishes between two kinds of neutrality.<sup>7</sup> People who claim that neutrality leads to state inaction understand this notion as a first-order principle of justice, according to which laws or policies should never favour any conception of the good over others. In other words, their effect should be the same for all reasonable people, regardless of their way of life.

Needless to say, if the consequences of our laws and policies had to be neutral in regard to the various reasonable conceptions of the good held by the citizens, neutrality would be both an impracticable and an unattractive goal. Not only is it impossible to determine exactly how our policies affect different permissible ways of life, it would also be impossible to compensate any individual harmed by those effects. For instance, any type of health-care provision or taxation scheme would necessarily be non neutral in effect, but liberals don’t count those examples as arguments against neutrality. So, the correct way to understand neutrality is not in terms of the effects of government policies, but, rather, in terms of their justification. Neutrality is a procedural ideal; it applies to the way state action and government policies should be justified. Basic social and political institutions should not appeal to or be grounded in any particular conception of the good life nor should they aim to favour or to promote any moral or political values that certain citizens might reasonably reject. This does not imply that individuals should not ground their judgments in their particular conception of the good life, only that when it comes to the justification of public policies, their appeal to comprehensive doctrines or values should be constrained by the norms of public reason.<sup>8</sup>

This is at least how the story of liberal neutrality is usually told. But it is important to distinguish between two different steps in the argument, that are at work here; one normative, another epistemological. The first step, which I will call the *normative argument*, is grounded in the liberal commitment to the ideals of freedom and equality presented above (i.e. that society should be a fair system of cooperation for mutual advantage between free and equal persons). The principles of justice that regulate basic social and political institutions should be justifiable to all reasonable citizens that are subject

to them, or, at least, should be some that no one can reasonably reject. Of course, an institution that would benefit an individual or a group at the expense of another would be rejected.

Clearly, this argument is not a sufficient condition for neutrality.<sup>9</sup> By itself, this normative argument leaves room for a reasonable agreement on at least some conceptions of the good. It can be pointed out, for instance, that the claim that society is a cooperative venture for mutual advantage does not rule out the possibility that a certain type of perfectionism could be accepted by all. Indeed, the basic framework of the contractarian procedure leaves room for a reasonable agreement on the value of excellence and on human perfections. Thus, in order to make their case for neutrality, liberal thinkers further need an *epistemological argument*, according to which even reasonable people may differ in their conception of the good. Liberals have to explain why, under conditions secured by free and equal institutions, disagreements on values and conceptions of the good arise and persist.<sup>10</sup> They have to show, as Clarke argues, that “there is something about the epistemological status of conceptions of the good that rules out any possibility of them being agreed to by all.”<sup>11</sup> There is, of course, the empirical observation that so far no one has come to such an agreement. This is not entirely irrelevant, even if it’s not decisive.

In Rawls’s words, this epistemological argument is based upon what he calls the “burdens of judgement.” These can be understood as obstacles to human judgment of values that arise in a context of freedom of thought and expression. The various judgments we make as human beings are determined by those obstacles: the empirical and scientific evidences are “often conflicting and complex, and thus hard to assess and evaluate; even when we agree fully about the kinds of considerations that are relevant, we may disagree about their weight, and so arrive at different judgments. To some extent all our concepts [...] are vague and subject to hard cases [...]; the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. [...] Often there are different kinds of normative considerations of different force on both sides of an issue and it is difficult to make an overall assessment. [Finally], any system of social institutions is limited in the values it can admit so that some selection must be made from the full range of moral and political values that can be realized.”<sup>12</sup> All in all, these different obstacles, or *burdens*, render reasonable disagreements about values or questions

of the good life inevitable in a context of freedom of thought and expression. And those disagreements are deemed reasonable because they result from sincere and rational deliberation about those issues.

<sup>13</sup> Taken together, the normative and the epistemological arguments ground the requirement of neutrality, according to which our laws and policies should be justified independently of any conception of the good.

An important point of this paper, then, is not that laws and policies at the municipal level might favour or hinder certain reasonable ways of life. Of course, in constraining people’s actions, municipal institutions affect differently their various conceptions of the good, but so does the basic institutional structure of society. But while the state should never *justify* its laws and policies by reference to some particular values or comprehensive views of the good, municipal jurisdictions should be allowed greater latitude in this regard. This represents, from the point of view of justice, one of the main differences between the city and the state. Liberalism requires that the latter must provide fair conditions for people to pursue their conceptions of the good, but this requirement should not be applied directly to the former.

## 2.

Most North American cities regulate the use of private homes and land in myriad ways. The case for most of those rules is easy to make; they are concerned with sanitary and safety conditions. They require, for instance, clear and unobstructed exits, adequate interior lighting and ventilation, and the absence of any condition that can create health concerns, fire hazards or other nuisances. But a sub-set of those rules stand solely on aesthetic grounds, such as those governing the height, width or depth of buildings, regulating the maintenance of front-yard gardens, imposing architectural styles or particular landscaping visions. The problem with rules concerning design and appearance is that they seem to impose a controversial (or at least less-than-unanimously-shared) vision of the good, thus preventing people from expressing themselves in certain reasonable ways. In philosophical terms, those rules seem to violate the liberal requirement of neutrality.

This claim was made a few years ago before the Ontario Court of Justice by Sandra Bell, a citizen of Toronto who felt that the City’s property standards bylaw, regulating private spaces, was infringing on her right to freedom of expression. In 1993, she was fined 50\$ by a



municipal officer under a by-law prohibiting “wild” or “naturalized” gardens. The provision in question was the section of the City of Toronto by-law 73-68 under the heading “Rubbish”, that could be read as follow: “All parts of a dwelling, including the yards appurtenant thereto, shall be kept clean and free from... (c) excessive growths of weeds and grass.”<sup>14</sup> The weeds and grass of her front-yard were alleged to be “excessive”. In her defence, she described her front-yard as “an environmentally sound wild garden.” She claimed that she created “this wild garden to reflect her environmental beliefs [and that] her garden encouraged a diverse eco-system.”<sup>15</sup> She made the claim that a law preventing her from having a naturalized garden was not respectful of her deep convictions and environmentalist values. She therefore appealed the decision on the grounds that it was a violation of the Canadian Charter of Rights to freedom of expression and conscience.<sup>16</sup>

She was certainly right in at least one regard. Her garden was violating the by-law “simply because of its appearance, and not on the grounds of any health concern, fire hazard or other nuisance.”<sup>17</sup> So, from the perspective of the court, her task was to make a convincing case according to which the state of her garden was a reflection of sincere environmental beliefs, not mere laziness, and, therefore, that the by-law was infringing on her rights.

In order to do that, she called in court two expert witnesses. James Hodgins, editor of Wildflower Magazine, testified that “one can readily distinguish naturalized gardens, with their planned choice and diversity of native species, from the neglected or derelict yard.”<sup>18</sup> But, more importantly, geography professor Harry Merrens explained that “landscaping has an identifiable historical and social dimension, and he described the evolving styles of the designed landscape in Western Europe and North America over the last three or four hundred years”, moving from the “rigid geometry of large French gardens in the late 17<sup>th</sup> century to the ‘unstructured, romantic, natural’ gardens of 18<sup>th</sup> century England, which were followed by more orderly symmetrical Victorian garden designs. This series of styles, according to Merrens, represented the imposition of certain values on the landscape.”<sup>19</sup>

Merrens went on to explain that our current residential landscaping practices in North America, characterized by “clipped hedges”, “ornamental flower beds” and “closely cropped grass” were all reflecting a value system which carries “a commitment to the achievement of certain static effects that are considered attractive, by manipulating,

dominating or manicuring the environment”, expressing an urge to manipulate or control nature.<sup>20</sup> In opposition to this dominant practice, he testified that the “the naturalistic gardening movement” reflected other distinctive philosophical views. He stated that the wild gardens “involve a commitment to living in greater harmony with nature, not stunting or altering nature, but allowing it to express itself in a more spontaneous way. [...] People who are part of the naturalistic gardening movement are generally motivated by a philosophy with ecological, economic and spiritual goals that seek a more harmonious and restorative relationship with nature.”<sup>21</sup>

In the end, Bell did win her case on the grounds that the by-law violated her right to freedom of expression as guaranteed by the Charter. The decision relied on an interpretation of this right by the Supreme Court of Canada, according to which its purpose “is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and, in some cases, a higher or different order of being.”<sup>22</sup> On this basis, the court concluded that the principal aim of the by-law was “to impose on all property owners the conventional landscaping practices considered by most people to be desirable”<sup>23</sup> and, as such, was infringing on Bell’s rights. Indeed, “as an environmentalist, Ms. Bell implemented a landscaping form intended to convey her sincerely held beliefs concerning the relationship between man and nature. It also implicitly conveyed a critique of the prevailing values reflected in conventional landscaping practices.”<sup>24</sup>

The decision of the court is quite unusual. Even if Bell won her case against the Property Standards bylaw, the court did not rule out the right of cities to pass bylaws regulating the appearance of privately owned spaces, and, in particular, to avoid “aesthetically offensive yards.” According to the court, those rules do not exceed the delegated legislative authority of the City, *even* if their primary purpose is to contribute to “an appearance of well-maintained residential neighbourhoods” and, more importantly, to avoid “eyesores or visual blight.” Furthermore, in regard to the rule in question, the fact “that the anti-weed by-law has an incidental effect of enforcing aesthetic standards which accord with conventional landscaping tastes is no reason ... to regard it as exceeding the City’s power.”<sup>25</sup> Cities are therefore justified in regulating the appearance of private spaces as long as in so doing they don’t unduly interfere with people’s deep and sincere convictions.

The problem is not merely that this by-law could only be justified by aesthetic reasons, and not on the grounds of any health or safety concerns, but that it applies only to those who share the values upon which it is based. So, according to the court, cities can impose certain aesthetic standards and enforce certain value-laden practices, but only on those who believe in them. In other words, they can resort to certain non-neutral comprehensive vision of the good, but remain bounded by the requirement of liberal neutrality to the extent that this comprehensive vision should not affect those who don't share it. In the case at hand, it means that you are not allowed to behave in an unneighbourly fashion and have excessive grass out of laziness, but that you are allowed to do so if it reflects your deep convictions.

Of course, if someone had a wild garden simply through laziness and didn't believe there was anything good about a tidy garden, the law would still apply to him even though he does not share the comprehensive vision. He would be made to tidy his garden. So, to be more precise, the decision of the court was not based on a wide conception of neutrality, requiring neutrality between all views of garden aesthetics even laziness, but on a narrow conception of neutrality, requiring neutrality between garden aesthetics, so long as they reflect deep and sincere beliefs. This remains a form of perfectionism. It protects the conception of the good according to which it is good to have a garden that reflects your deep and sincere beliefs whether they are for tidy or wild gardens; but not having any beliefs and just being lazy does not justify anything.<sup>26</sup>

This case raises very interesting issues. On the one hand, the court felt compelled to respect the principle of liberal neutrality mirrored, in the Canadian context, by the principle according to which Charter rights trump the legislative power of our diverse political assemblies. Thus, laws and policies should not uniformly impose controversial values. On the other hand, the court also understood that coherence and consistency in planning is important and, therefore, that cities should retain their power to pass by-laws justified on the ground of particular visions of the good (design). So, in order to be liveable places, cities need constraints on their built-form and their environment.

I believe that the court's intuition is correct. First, there is no such thing as a neutral design. Dutch architect Rem Koolhaas shows a clear understanding of the nature of these controversies in writing that "the Zoning Law is not only a legal document; it is also a design

project."<sup>10</sup> By its very nature, a design project, or an aesthetic proposition more generally, can hardly generate unanimity. Furthermore, the vision of the good carried by municipal by-laws and the built environment is a sign of the kind of place a particular municipal jurisdiction is, and of the kind of life its people live as opposed to other peoples. Finally, and most importantly, the intuition of the court, which I take to be right, is that a livable city *requires* certain comprehensive laws and policies that might be grounded in certain aesthetic preferences or visions of the good life.

The argument of this paper implies that the court was wrong to favour this fragile equilibrium between this intuition and the Charter's ideal of neutrality. I will argue that the latter does not apply directly to municipal institutions. This is one of the main differences between cities and the state from the point of view of justice. Liberalism requires that the latter must provide fair conditions for people to pursue their conceptions of the good, but this requirement should not be applied directly to the former.

Note, however, that the argument does not imply in any way that naturalized gardens should be banned. There are even good reasons why they should be encouraged. Wild gardens don't require chemical pesticides poisoning groundwater, they put less stress on our environmentally and economically costly water reserves, and they even help protect biodiversity in preserving local plant species. So, to be clear, the point is not that the rule prohibiting naturalized gardens is good, but that such a perfectionist bylaw can be legitimate, *even if it is not neutral*.

### 3.

Urban dwellers are certainly also free and equal reasonable persons who will come to disagree over questions of the good life, so what makes the city so different that the requirement of justificatory neutrality does not fully apply? As I explained in the first section of this paper, justificatory neutrality, defined as neutrality in the *justification* of government policy, stands on two main arguments, namely a normative argument, according to which society should be understood as a fair system of cooperation for mutual advantage between free and equal persons, and an epistemological argument, according to which reasonable people under free institutions tend to differ in their conception of the good. The reason why the requirement of justificatory neutrality does not fully apply to municipal institutions, I

argue, is that the ideal of liberal neutrality depends on a set of fundamental assumptions of liberal theory that are tailored for the state (and its basic structure), but that need to be modified in order to comply with the institutional characteristics of the city. I thus have to show why the requirement of neutrality does not apply with the same force when it comes to urban or municipal institutions.

I first assume that the principle of neutrality applies only indirectly to social institutions within the broader framework of the state. As I said in the introduction, this is clear in the case of voluntary associations. In a liberal regime, private associations are allowed to hold and defend perfectionist views, focused on a particular conception of the good life. Churches, for instance, can ask their members to comply with a particular set of values, and they can excommunicate heretics (although, thanks to the liberal state, they cannot burn them).

This idea is well captured by John Rawls's assumption that political society is a closed system. As he explains, we are to regard political society as "self-contained and as having no relations with other societies". We are also to assume that "its members enter it only by birth and leave it only by death."<sup>27</sup> It also follows that individuals are involuntary members of a particular society at a particular historical moment and that they cannot know what they could have been in a different context. Rawls does not suggest that emigration is undesirable or that it should not be allowed, but, rather, that the possibility of emigration should not influence the choice of principles regulating a just society. Therefore, principles of justice should not ban emigration, but they should reject any social arrangement that would be just *only if* the possibility to emigrate was allowed. As he explains, "the right to emigrate does not affect what counts as a just basic structure, for this structure is to be viewed as a scheme into which people are born and are expected to lead a complete life."

The important idea behind this assumption is that when it comes to the state, the cost of exit for individuals is so high that it is not possible for individuals simply to leave if they are not satisfied with the social arrangements (nor is it reasonable for others to expect them to do so). This assumption gives ground to the claim that principles of justice governing the State should be acceptable to all or, that only *neutral* principles of justice can secure cooperation over time between free and equal persons who do not share the same conception of the good. The normative argument of cooperation for mutual advantage and the epistemological argument of the burdens of judgment are in

fact not sufficient to give ground to the liberal principal of neutrality. It is *because* we assume that political society is a closed system, that we can conclude that every citizen should be able to realize his or her own rational plan of life in conformity with the social institutions of the State.

Political society is in this sense different from an association. Of course, its citizens remain free to associate in order to celebrate certain shared values or with the aim of reaching specific ends. In comparison with the state, however, the cost of exit from associations is relatively low. This is part of the reason why such associations can, in turn, be organized around the pursuit of more controversial values, as in the example of religious associations presented in the introduction – those who do not like it can simply leave. Furthermore, one can be born or at least grow up as a member of an association and decide never to leave, but, contrary to political society, an association should never limit an individual's life plan against their will in, among other things, removing the exit option. Thus, the principle of neutrality applies indirectly to associations, thus securing *freedom* of association. Individuals should be able to choose their affiliations. This is why there is no principled objection to perfectionism at the associative level.

#### 4.

Cities (or municipal jurisdictions) seem to be located somewhere in the middle on this continuum between associations and the state. Municipal jurisdictions within urban regions are not autarkic and it is much easier to exit them than to leave one's country, and this partly explains why the assumption of a closed system does not apply to municipalities. Indeed, the exit option, which explains why free associations have demands of justice that are different from the state, also partly characterizes the urban political world.

This feature of cities has been widely noted. For instance, many economists, following Charles Tiebout, have argued that the possibility for individuals to vote with their feet, to move from one municipality to another, is what defines the city and distinguishes it from the nation-state. Tiebout's idea, developed in his 1956 article's "A Pure Theory of Local Expenditures,"<sup>28</sup> is that a fragmented city with formally independent jurisdictions offering different kinds of goods and services can create a perfectly efficient allocation of these products, thus resolving the problem of public goods at this level. In the



Tiebout model, citizens voting with their feet, thus opting for a jurisdiction that best matches their desired way of life and their capacity to pay, reveal their preferences without cheating.

The originality of Tiebout's approach is due primarily to his theorisation of the concept of "local public good." A public good is usually defined as a commodity that is nonrival (the consumption of the good by one individual does not decrease anyone else's consumption) and nonexcludable (no one can be effectively excluded from consuming of the good). One implication is that no mechanism of decentralisation, such as the market, is available to produce an optimal distribution of these goods. The city, however, is not prone to the same problem of public goods. According to Tiebout, there is a class of public goods peculiar to the city – *local* public goods – for which a mechanism of decentralisation is available.

What characterizes local public goods is that they are subject to congestion. Of course, many goods and services provided to the community are public – parks, police, etc – but Tiebout insists on the fact that the more people are enjoying them, the less available or useful they are for others. Local public goods are thus nonexcludable, but only *partially* nonrival. The solution to the problem of public goods at the urban level is thus to let jurisdictions compete with one another, and adjust to the demands of the citizens. The city can thus resort to an institutional mechanism in order to overcome an important weakness of governments, that is, absence of competition.<sup>29</sup>

This model is problematic in many regards. It depends on a series of highly problematic assumptions, and, most importantly, it has all sorts of undesirable normative implications. It implies notably that smaller and more homogeneous jurisdictions are better, but also that exit options can render politics unnecessary and maybe even undesirable at the local level. The force of this model, however, is that it sheds light on the reasons why exit option cannot be ignored in a theory of justice for the city: it provides a particular institutional feature that allows cities to capture *in principle* certain efficiency gains that are unavailable to the state; and it helps us better understand the nature of numerous problems of justice that are peculiar to the city (some mentioned in the next section). In others words, the polycentric model helps us understand why it is important, from the perspective of justice, to maintain a conceptual distinction between the city and the state (instead of treating the city on the model of the state, but on a smaller scale). It also seems that in order to justify a lim-

ited form of perfectionism at the municipal level, grounded in the possibility of exit, it is a fair assumption that the structure of cities should in principle be polycentric.

## 5.

Of course, one could claim that in focusing on this characteristic, I'm just missing Rawls' point. Strictly speaking, Rawls doesn't ignore that a nation-state is not a closed system. A nation-state maintains various relations that are more or less significant with other states. Emigration, under certain conditions, is also possible. For Rawls, however, issues like emigration or relations between nations should not inform the principles of justice for a political society understood as a fair system of cooperation between free and equal persons. Those issues are instances of what he calls *problems of extension*, and those problems stand outside the scope of justice as fairness.<sup>30</sup>

Why wouldn't it be the same for the city? Why not consider the exit option or the fact of mobility as a problem of extension, standing outside the boundaries of urban justice? An ideal normative theory should arguably leave aside certain facts about the world in order to imagine hypothetical principles of justice or social arrangements that would best fit either the state or the city. The correct answer, however, is that such a move would lead us to ignore the demands of justice peculiar to the city. Of course, this statement hides a more fundamental philosophical claim, according to which certain *facts* cannot be left out of the scope of a theory of justice. In other words, principles of justice should depend upon the institutional context in which they are applied. We cannot discuss issues of international justice, for instance, without the recognition that some states might simply refuse to abide by the rules in the absence of an international basic structure and of legal enforcement. In the same way, we would be missing the nature of the problems of justice in the city if we were to ignore the fact that people, and businesses, can easily move and escape their responsibilities. The structure of incentives of most cities even encourages them to do that. In fact, most problems of justice affecting the city seem to be related to the exit option, ranging from economic and social inequalities among neighbourhoods or municipalities, "white flight", economic and racist exclusionary practices, nimbyism and unfair structures of political influences, to congestion, sprawl and suburbanization, which are associated with pollution, inefficient use of arable lands, and huge costs imposed to all

by a few. All those problems seem to result in one way or another from the fact that people in cities are mobile.

There are all sorts of institutional mechanisms that we can resort to in order to tweak the structure of incentives in the city, but the solution is certainly not to try to eliminate the exit option. Tiebout is right to see it as a potential advantage for cities: eliminating the exit option means getting rid of a market mechanism which can help solve a series of collective action problems. But it is also important to recognize that many problems are the result of the impact that each municipality has on others in a given urban region and of the significant relation that urban dwellers maintain with the different municipalities and institutions of this region. For example, many people work in a municipal jurisdiction different from where they live and pay taxes. Those complex relations define the city and explain its problematic character. This is why a normative framework for the city should not ignore the central role played by the possibility of exit (either from a neighborhood, a municipality, or a city).

Another way to look at the issue is through a watered-down version of the choice/circumstances distinction. At the level of the nation-state, the cost of exit is too high to be considered within the framework of a theory of justice. Belonging to a particular state should therefore be treated as a circumstance, not as a choice. The implication is that if we assume that all citizens are free and equal the state should be organized around principles of justice that are acceptable to all – or that no one could reasonably reject. In other words, the State cannot be organized around a perfectionist doctrine. It is the opposite in the case of associations, which are defined *in principle* by the absence of significant exit cost. We assume that individuals choose freely to enter an association and can leave it as easily. This is why there is no principled objection to perfectionism at the associative level. Associations can be organized in order to promote certain values or to achieve certain ends, as long as their members remain free to leave whenever they wish to. I tried to show that the institutional structure of the city can also be described in terms of choices. In other words, living downtown or in the suburbs is not a circumstance in the same way that it is to be a Canadian citizen. And liberal principles of urban justice must be sensitive to this fact.

## 6.

I can think of four objections that can be raised. First, assuming that it really is a problem of perfectionism, on what ground should this perfectionism be limited? If perfectionism is justified at the municipal level, does it mean that a municipality could hold an official religion? Why wouldn't it be justified for a municipality to be officially Catholic or Pentecostal for instance? This would be a distortion of my view. The reason why a limited form of perfectionism is unavoidable is directly related to what cities are. The problem with rules concerning the built form of the city, for instance, is that they necessarily impose a controversial (or at least less-than-unanimously-shared) vision of the good. This is why a certain limited form of perfectionism should be accepted. But this does not in any way allow for more substantial or extended forms of perfectionism.

A second objection to the claim that cities should be allowed a certain room for perfectionism in the design of its laws and policies concerns a potential confusion. We might not face a *problematic* conception of perfectionism at all, but a mere problem of externalities, that is, of actions whose private cost is different from their social cost. Bell v. Toronto is a case in point. The complaint of Bell's neighbour was that she was in a sense victim of the negative externalities produced by Bell's garden. Indeed, the appearance of her garden was affecting the value of her next door's neighbor property. From this perspective, the role of urban institutions is not to design perfectionist rules, but simply to internalize such externalities.

This is probably the most challenging objection, and I will not dismiss it completely here. In a sense, yes, it is just a problem of externalities. The problem, however, as I tried to show elsewhere, is that it is simply impossible to internalize all externalities in the city.<sup>31</sup> Indeed, externalities are an essential part of what a city is, and the impossibility of internalizing all externalities means that partiality is inevitable. So we're better off deciding how we want things, and then just letting people move if they don't like it, that is, letting them resort to their exit options. In certain regards, this is how cities actually work. People are free to choose a neighbourhood or a municipality that correspond to their preferences (and, leaving aside another problem of justice, their capacity to pay).

Of course, we cannot presume that there will be sufficient diversity among municipal norms to allow for anyone's preferences or vision of the good city life. Eventually, some people will be barred from their project everywhere. Again, people have the option not to live in cities at all. Normatively, the urban perfectionist project is a price one pays to live in the city, and all must pay it to have a stake in what the project is. But even if you don't care about that stake, you have to pay it to participate in whatever you find good about a particular municipal jurisdiction or, more generally, about city life.<sup>32</sup>

I will leave the third objection to others, especially since it raises a set of issues that would bring us far from our focus. The question is why should we stop at the polycentric city. Why not apply the same rationale to federalism? If the nation-state is a closed system, but exit options allow institutions within the state to exercise certain limited forms of perfectionism, this would mean that American states or Canadian provinces, for instance, could resort to a limited form of perfectionism in the justification of their laws on the grounds that their residents are free to move from one state or one province to another. This might be an implication of my position, but there remains an important difference in the cost of exit between moving from one neighborhood to the next, and moving from one urban region or from one province to another. One could imagine however that states or provinces are also taking place on the continuum between associations and the basic structure, but are much closer to the latter, while municipalities are closer to the former.

Finally, the most obvious, but also the most interesting objection is to know whether and how feasible exit is. A common reaction to this model is that it seems to assume that everyone can exit whenever they want. People are therefore quick to dismiss this model on the ground that not all people can exercise their exit option, which remains a privilege of the better off. It is clear that the cost of leaving is not the same for everybody, that the poor and even the elderly are not fully mobile. This is true, but as people will always make clear, it is also a problem. It seems to me that one of the most important tasks of a political philosopher interested in issues of justice regarding cities should be to point out to the institutional specificities of this subject that are at the roots of its most serious problems of justice. Thus, to understand the problem of urban mobility properly, it is essential to take into account the polycentric structure of the city and to ask what justice requires in this institutional context.

It is certainly difficult to imagine that residents of a ghetto (ie. an urban enclave affected by poverty and which offers very limited opportunities to its residents) live there by choice and that they could exit whenever they want if their living conditions do not fit their preferences. It is important to recognize that in many contemporary cities being born or living in this or that neighborhood can make a huge difference in an individual's life prospects and opportunities. The place where one lives affects not only one's quality of life, but it also has a profound and pervasive influence on the way one perceives oneself, on how deserving one believes to be, even on what one imagines one has a right to expect.<sup>33</sup> In principle, this is not a problem for the polycentric model, which assumes from the start that individuals will abandon any jurisdiction that frustrates their plans of life or goes against their preferences, and, therefore, that some jurisdictions will be forced to adjust or respond to these signals. For this model to work, however, it is necessary for all citizens to have real opportunities to exit. But, in order to come up with such a requirement – as a principle of urban justice – it is first important to shed light on this institutional specificity of the city, that is, on the fact that at least some people can move, at very little cost, from one area to another of an urban region (or from the city altogether), and that this should be seen as an asset for cities. What justice requires is therefore not to ignore this attribute of cities, but to secure exit options for everyone.

## 7.

The argument of this paper has been that the institutional structure of the polycentric city, characterized by the exit option, leaves room for a limited form of perfectionism in the justification of laws and policies at the municipal level. But in fact the argument transcends the mere question of neutrality. It shows why the city calls for principles of justice that are different from those developed in the context of the nation-state. Unfortunately, most contemporary philosophers who have taken a stance toward issues of urban social justice have ignored those fundamental differences between the city and the state. Instead, most of them have called for institutional changes that would make the city look more like the state, e.g. in requiring more autonomy for cities and in challenging the state monopoly on questions of immigration, exchange and even foreign policies.

I cannot go through a detailed analysis of these proposals in this conclusion. The point is that theorists of justice have made it too easy

for themselves when dealing with problems of urban justice. In fact, their solutions all represent the kind of problem this paper is dealing with. Instead of recognizing what distinguishes the city from the state, they try to reconfigure or reconceptualize the city in order to apply normative models that have been developed with the basic institutional structure of society in mind. It is difficult to imagine that we would not have to treat the city as a sovereign entity in order to institutionalize fully those proposals. For instance, if it is necessary for the political borders to adapt to the social reality of the city, we might have to impose strict and inflexible borders and to treat the city as a closed system. But this is a *déformation professionnelle*. Typically, philosophers develop abstract principles of justice that claim universal validity, or that can be applied to any institution or social interaction. This paper has attempted to challenge such a strategy, by showing that principles of justice are always derived from context-dependent assumptions. This means that philosophers will now need to take the city more seriously in order to develop principles of justice tailored specifically for this unit of analysis.

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- 1 John Rawls, *Political Liberalism*, New York, Columbia University Press, 1993.
- 2 Joseph Chan, "Legitimacy, Unanimity, and Perfectionism," *Philosophy and Public Affairs*, Vol.29, No.1, 2000, p. 6.
- 3 Simon Clarke, "State Paternalism, Neutrality and Perfectionism," *The Journal of Political Philosophy*, Vol. 14, No. 1, 2006, p. 111.
- 4 Note that perfectionism is not merely an example of Western political thought. Joseph Chan mentions Confucianism as a clear example of perfectionism in Eastern political thought, "Legitimacy, Unanimity, and Perfectionism," p.5, note 1.
- 5 I'm grateful to one of the referees for this precision.
- 6 This point is raised, for instance, by Thomas Hurka in *Perfectionism*, Oxford, Oxford University Press, 1993, p. 159.
- 7 See, for example, Will Kymlicka, "Liberal Individualism and Liberal Neutrality," *Ethics*, Vol. 99, No. 4, 1989, pp. 883-884.
- 8 John Rawls, "The Idea of Public Reason Revisited," in *Collected Papers*, Cambridge, MA, Harvard University Press, 1999, pp. 573-615.
- 9 Despite Dworkin's claim that this "contractarian strategy builds neutrality in the start." Dworkin, "Foundations of Liberal Equality," quoted in Simon Clarke, "Contractualism, Liberal Neutrality, and Epistemology," *Political Studies*, Vol. 67, 1999, p. 629, note 8.
- 10 See John Rawls, *Justice as Fairness. A Restatement*, Edited by Erin Kelly, The Belknap Press of Harvard University Press, Cambridge MA., 2001, p.34.
- 11 Simon Clarke, "Contractualism, Liberal Neutrality, and Epistemology," p. 630.
- 12 John Rawls, *Political Liberalism*, pp. 56-57.
- 13 It is important to distinguish liberal neutrality from scepticism. As Rawls explains, "political liberalism does not question that many political and moral judgments of certain specified kinds are correct and it views many of them as reasonable. Nor does it question the possible truth of affirmations of faith. Above all, it does not argue that we should be hesitant and uncertain, much less sceptical, about our own beliefs. Rather, we are to recognize the practical impossibility of reaching reasonable and workable political agreement in judgment on the truth of comprehensive doctrines, especially an agreement that might serve the political purpose, say, of achieving peace and concord in a society characterized by religious and philosophical differences," John Rawls, *Political Liberalism*, p. 63.
- 14 Bell v. Toronto (City), between Sandra Elizabeth Bell, appellant, and City of

Toronto, respondent, [1996] O.J. No. 3146, Ontario Court of Justice (Provincial Division), Toronto, Ontario, Fairgrieve Prov. J., September 11, 1996, Par. 7. I am indebted toward Mariana Valverde for having brought this case to my attention.

- 15 Bell v. Toronto (City), Par. 14.
- 16 She also argued on traditional municipal law grounds that the bylaw was "void for vagueness and uncertainty", since neither the word "excessive" nor "weeds" was defined in the by-law. However, the parties "agreed prior to the appeal that the case should be decided on the Charter grounds being advanced. The reason given was that the by-law under which the appellant was convicted has now been supplemented by a new by-law which prohibits grass and weeds over 20 centimetres in height, but apparently has the same effect of prohibiting naturalistic gardens." Bell v. Toronto (City), Par. 3.
- 17 Bell v. Toronto (City), Headnote of the case.
- 18 Bell v. Toronto (City), Par. 28.
- 19 Bell v. Toronto (City), Par. 22.
- 20 Bell v. Toronto (City), Par. 23.
- 21 Bell v. Toronto (City), Par. 24.
- 22 Bell v. Toronto (City), Par. 51.
- 23 Bell v. Toronto (City), Par. 54.
- 24 Bell v. Toronto (City), Par. 52.
- 25 Bell v. Toronto (City), Par. 31.
- 26 I'm grateful to one of the referees for this formulation of the distinction.
- 27 John Rawls, *Political Liberalism*, p. 12. *Ibid*, p. 277.
- 28 Tiebout, Charles M., "A Pure Theory of Local Expenditures," *The Journal of Political Economy*, Vol. 64, Issue 5, 1956, pp. 416-424. For an overview of the extensive literature on the Tiebout model, see Ken Kollman, John H. Miller et Scott E. Page, "Political Institutions and Sorting in a Tiebout Model," *The American Economic Review*, Vol. 87, No. 5, 1997, pp. 978-979.
- 29 Albert Breton, *Competitive Governments. An Economic Theory of Politics and Public Finance*, Cambridge, Cambridge University Press, 1998.
- 30 John Rawls, *Political Liberalism*, pp. 20-21.
- 31 Patrick Turmel, "The City as Public Space," in Mark Kingwell and Patrick Turmel, *Rites of Way. The Politics and Poetics of Public Space*, Waterloo ON., Wilfrid Laurier University Press, 2009.
- 32 I'm grateful to one of the referees for this argument.
- 33 See Ian Shapiro, *The State of Democratic Theory*, Princeton, Princeton University Press, 2003, pp. 133-139.