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The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory

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THE OUTER LIMITS OF COMMUNITY SELF
GOVERNANCE IN RESIDENTIAL ASSOCIATIONS,
MUNICIPALITIES, AND INDIAN COUNTRY: A LIBERAL
THEORY

Mark D. Rosen*

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INTRODUCTION

In 1874 the Mennonite religious community petitioned Congress for land from the public domain, so they could live exclusively among themselves. Their efforts culminated in a bill. Perhaps surprising to twentieth century sensibilities, congressional debate concerning the bill was not at all framed in terms of whether such a land set-aside would violate the Establishment Clause. The key issue instead was whether and to what extent communities should be permitted to dissociate themselves from general society and govern themselves. Leading the successful fight to defeat the bill, Senator George Edmunds argued that group separatism was antithetical to a well-functioning democracy: “[F]undamental to successful republicanism [is] homogeneous unity of the whole body of the citizens of a State,” with everyone “in the body of the community living as friends and neighbors.” According to Edmunds, the country could not survive “if distinctions prevailed such as this bill proposes to set up; of locating men of special religious or special political or social ideas exclusively in one place.”

1 See C. Henry Smith, The Coming of the Russian Mennonites: An Episode in the Settling of the Last Frontier 1874-1884, at 77 (1927) (quoting the Mennonites’ letter to Congress which states their determination to live “under their own control, free to enjoy, as a separate colony, our own religion, language, lands and customs”); 43 Cong. Rec. 3264 (1874) (statement of Sen. Pratt) (“They are naturally attached to their religion and customs and habits of life, and they want to live in compact bodies . . . .”).
3 In fact, the Establishment Clause was not mentioned even once in any of the four Senate debates concerning the bill. See 43 Cong. Rec. 3054-58, 3110-12, 3262-65, 3299-301 (1874).
5 Id. (statement of Sen. Edmunds); see also 43 Cong. Rec. 3264 (statement of Sen. Carpenter) (1874) (opposing the settling of “a town or a county” by people who are “in all things separate and distinct” from others); id. at 3300 (statement of Sen. Sargent) (opposing the creation of “a community isolated from the rest of the body-
The issues raised by the Mennonites’ request—which communities should be permitted to self-govern and to what extent—have recurred numerous times throughout American history and continue to play a determinant role in shaping the law governing homeowners associations, local governments, and Native Americans, as well as much of our First Amendment jurisprudence. Historical practice and the law in these fields reflect ambivalent and inconsistent responses to requests for community self-governance. Recent academic opinion inclines towards Senator Edmunds’s view, as diverse scholars converge on the proposition that community self-governance should be strictly circumscribed. This Article takes an opposing view, arguing that liberal political theory compels the conclusion that communities that meet certain criteria must be permitted to opt-out of the general culture and govern themselves subject to only minimal constraints.

Historical practice with regard to community self-governance, though more accommodating than Senator Edmunds’s analysis would suggest, has been ad hoc and unprincipled. The nineteenth century was perhaps the heyday of accommodation, during which time literally hundreds of largely self-governing communities existed throughout the United States. These communities—the Oneida, Shakers, Harmonists, Icaria, Hutterites, Amana, Zoar, to name just a few—were inhabited by as many as several hundreds of thousands of people. Many of these communities were incorporated entities. Not surprisingly, virtually all of these communities consisted of people whose values were at variance with then-prevaling societal norms. Within the borders of the United States during the last century there were functioning communities predicated on the rejection of such core “American” values as private property, the nuclear family, monogamy, and separation of
church and state. There were communities that aimed to achieve equality for women, to solve the problem of slavery, and to establish "holy cit[ies]" independent of general society's institutions, values, and practices within which people could purify themselves.

These communities did not secede from the country, nor were they empowered with the panoply of sovereign attributes (such as the power to make treaties with foreign nations) that an independent state would have. What they did have, however, were sufficient powers of self-governance to develop and sustain their members' idiosyncratic practices while remaining part of the larger body politic. In essence, they were sub-federal sovereigns, akin to states, that were part of this country's federalist structure.

Yet even amid this period of accommodation in the nineteenth century, numerous instances of legal intolerance of community self-governance appeared. For example, although the Mormon and Oneida communities were allowed to pursue their conceptions of the good relatively unfettered for some time, American law ultimately interfered with both communities' preferred ways of structuring family life. In the case of the Mormons, Congress's statutory prohibition of polygamy, upheld by the Supreme Court in *Reynolds v. United States*, did not destroy the community.

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13 See infra notes 91-100 and accompanying text (discussing "complex marriage" in the Oneida community).
14 See id.; infra text accompanying notes 82-84 (discussing polygamy in the Mormon community).
15 See Leonard J. Arrington & Davis Bitton, The Mormon Experience: A History of the Latter-day Saints 114 (1979) (explaining the "naturally interlocking religious and secular domains of the Mormons").
16 The Oneida community was particularly successful in this regard. See Spencer Klaw, *Without Sin: The Life and Death of the Oneida Community* 7 (1993); Ira L. Mandelker, Religion, Society, and Utopia in Nineteenth-Century America 18, 121-22 (1984).
17 In Tennessee, Frances Wright established a community whose purpose was to acquire slaves from their masters, educate these slaves, and then set them free. See Weisbrod, supra note 2, at 6.
18 This was the Mormon hope. See Arrington & Bitton, supra note 13, at 127-28.
19 See infra Section I.B.
21 98 U.S. 145 (1878).
22 See Arrington & Bitton, supra note 13, at 180-81 (explaining the Mormon response to *Reynolds*).
the case of the Oneida community, by contrast, New York's plan to prosecute the community's leader for practicing "complex marriage," a non-monogamous institution in which all men and women of Oneida participated and which was the core of their socialist community, led directly to Oneida's demise.²¹

In this century, communities' efforts to govern themselves have met with mixed success, reflecting the law's continued ambivalence concerning community self-rule. The law has flatly thwarted many attempts to establish self-governing communities. For example, members of a nonreligious organization called the Theosophical Society in America were disallowed from establishing a theosophist residential association.²² Similarly, the Rajneesh's efforts to incorporate a municipality pursuant to state law, as they believed was necessary under their religion, were defeated.²³ In other instances, communities have been permitted to constitute themselves as self-governing entities, but their long-term prospects under evolving law are increasingly unclear. For example, the constitutionality of the incorporation of Kiryas Joel, a village whose borders were drawn so that only members of the Satmar Chasidic community would comprise the political subdivision, has been thrown into question by Board of Education of Kiryas Joel Village School District v. Grumet.²⁴

Similarly, although it long has been established that the Constitution does not apply to tribal governments, Congress decided in 1968 to impose upon them obligations that largely track the language of the Bill of Rights.²⁵ The Indian Civil Rights Act's²⁶ statutory obligations can interfere with core aspects of tribal sovereignty, as evidenced by a recent Second Circuit decision, which held that under certain circumstances federal courts can review tribal governments' decisions concerning who is a tribe member.²⁷ But true to the spirit of American ambivalence about community self-rule, the bulk of the Act's provisions are enforceable only in tribal courts and

²¹ See infra Section 1.B.2.
²² See infra Section 1.C.3.
²³ See infra Section 1.C.2.
²⁴ 512 U.S. 687 (1994); see infra Section 1.C.2.
²⁵ See infra Section 1.C.1.
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authoritatively construed only by tribal courts, which are free to
give the provisions different applications than United States courts
have given their sister provisions in the Bill of Rights.28

While American law consistently has reflected ambivalence con-
cerning community self-governance, contemporary academics have
been less equivocal. Commentators discussing local government
law, the law of homeowners associations, and American Indian
law—that is, those fields of law whose doctrines are in large part
determined by the degree to which the law is willing to grant
autonomy to self-defining groups—recently have expressed deep
skepticism about granting communities significant autonomy.29 In
“The Constitutional Value of Assimilation,” which suggests that
the village of Kiryas Joel would be unconstitutional if it had been
established for the purpose of creating a separatist zone, Christo-
pher Eisgruber virtually echoes Senator Edmunds’s opposition to
the Mennonite bill. Eisgruber argues that “the Constitution’s suc-
cess has turned upon whether the numerous individuals of a vast
nation indeed form the singular ‘People of the United States’
named by the Constitution as its author” and that “assimilation, far
from being the enemy of diversity, is perhaps the only means for
reconciling this country’s commitment to pluralism with its com-
mitment to justice.”30 In a similar spirit, Richard Briffault, a leading
expert in local government law, has concluded that theories at-
tempting to justify strong grants of local autonomy have “fail[ed]
to provide a compelling normative basis for an ideological commit-
ment to localism.”31 Writing with respect to homeowners asso-
ciations, Clayton Gillette argues that restrictive covenants should not
be enforced when they reflect policies inconsistent with a “con-

28 See infra Section I.C.1.
29 At least one commentator, however, recently put forward an argument in support
of community self-governance. See Abner S. Greene, Kiryas Joel and Two Mistakes
30 Christopher L. Eisgruber, The Constitutional Value of Assimilation, 96 Colum. L.
Rev. 87, 102-03 (1996). Indeed, Eisgruber goes so far as to praise the fact that
“encounters [between dissident sub-communities and mainstream society] will tend
to assimilate most (but not all) contending sub-communities into a more general soci-
ety.” Id. at 103.
31 Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum.
sensus of the broader society." Another commentator similarly urges that the constitutional doctrines applicable to city, state, and nation ought to apply in equal force to homeowners associations. Finally, while group rights theorist Will Kymlicka believes that subgroups such as Native Americans should continue to be allowed measures of self-rule, he argues that the appropriate extent of self-rule is a function of negotiation rather than principle. In his view, allowing sub-communities to self-govern is a "compromise of, not the instantiation of, liberal principles." In short, American law is a patchwork of discordant practices regarding the accommodation of community self-governance, and scholarly opinion appears to be converging on the view that limiting community self-governance is a good thing.

This Article seeks to make sense of the law and assess the merits of the contemporary scholarly consensus concerning community self-governance. It does so by providing an analytical framework for assessing when and to what degree self-defining communities should be permitted to opt-out of the general culture and govern themselves. The answer to this question has broad doctrinal implications.

This Article's analysis departs from that of contemporary commentators in several respects. For one, the thrust of the Article's normative conclusions challenges the current distrust of community self-rule. Further, contrary to Kymlicka's view that affording groups room to self-govern compromises liberal values, this Article argues that liberalism actually requires community self-governance under certain conditions. The Article addresses the issue of communal self-governance by exploring the degree of self-rule that should be granted to those who believe that people's self-actualization requires government's active pursuit of the "good," however defined—people whom the Article identifies as "political perfectionists." It concludes that the ideals of liberalism as ex-

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32 Clayton P. Gillette, Courts, Covenants, and Communities, 61 U. Chi. L. Rev. 1375, 1435 (1994). Interestingly, Gillette argues that one way to ascertain the "majoritarian conception" to be imposed on homeowners associations is to look to "constitutional principles." See id.
34 See Will Kymlicka, Two Models of Pluralism and Tolerance, in Toleration 81, 96 (David Heyd ed., 1996).
35 Id.
pressed in John Rawls's *Political Liberalism* are best realized by a political structure that allows political perfectionists who satisfy specific criteria to govern themselves subject to only minimal constraints. A corollary to this conclusion is that the appropriate degree of self-governance varies according to the role that communal self-rule plays in the ideology of the community—an idea not yet recognized by commentators. Finally, by considering the law governing homeowners associations, local governments, and Native Americans together as constituting (in part, at least) the law of communal self-governance, this Article suggests that these three heretofore distinct fields of law are interrelated such that developments in one field have a direct bearing on how doctrinal questions in the other fields should be resolved.

This Article has five parts. Part I provides a historical overview of several communities that have sought to isolate and rule themselves and how American law accommodated their efforts. To highlight the commonalities shared by the communities, Part I also sketches an ideal typical conception of the ideology that propels the proponents of community self-rule, an ideology that I call "political perfectionism." Part II explains why *Political Liberalism*’s first principle of justice requires a federalist-type political structure that grants significant autonomy to self-rule to political perfectionists who meet specific criteria. In the process, Part II constructs a framework for determining which political perfectionists should be accommodated and to what extent. Part III anticipates objections that might be propounded to Part II’s framework based upon other aspects of *Political Liberalism* and shows why the only way to realize fully the work’s foundational liberal aspirations is to utilize the full potential inherent in a federal system of overlapping sovereigns. Part IV synthesizes the analytical framework developed in Parts II and III and applies the framework to several of the communities discussed in Part I. Part V provides a brief conclusion.

Before proceeding it is advisable to clarify why what Rawls has to say about community self-governance is important, or even relevant, to the legal community. The question breaks down into two: Does philosophers’ theorizing affect the law and, if so, is this particular philosopher’s theorizing relevant? I situate myself in the

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*John Rawls, Political Liberalism (1993).*
camp of scholars that answer the first question in the affirmative,” for although the Constitution enacted neither “Herbert Spencer’s Social Statics” nor John Rawls’s justice as fairness, it seems equally true that lawyers, scholars, judges and Justices construe the Constitution through the lens of contemporary social, political and philosophical thought. And insofar as philosophy matters, Rawls clearly is relevant to the legal community because Rawls’s thought, more so perhaps than any other modern philosopher’s, has helped to shape the contemporary sensibilities that inform legal interpretation.

That Rawls’s work expresses deeply held contemporary sensibilities in a coherent, sophisticated philosophical framework is but part of the reason for his profound influence. Another crucial element is that Rawls’s writings have been closely analyzed by an extraordinary number of scholars across numerous disciplines.


39 See sources cited supra note 37. Not only is this inevitable, but it may be a defining aspect of constitutionalism. For more on this point, see Morton J. Horwitz, The Constitution of Change: Legal Fundamentalism Without Fundamentalism, 107 Harv. L. Rev. 30 (1993). Not surprisingly, susceptibility to contemporary philosophy seems to be true of Holmes as well, Lochner notwithstanding. See, e.g., Sheldon M. Novick, Honorable Justice: The Life of Oliver Wendell Holmes 140-41, 202 (1989) (discussing the influence of Darwinian and Malthusian ideas on Holmes); David E. Bernstein, Philip Sober Controlling Philip Drunk: Buchanan v. Warley in Historical Perspective, 51 Vand. L. Rev. 797, 816 n.89 (1998) (noting that “Holmes’s writings during his time on the Supreme Court continued to show the influence of Darwinism” and citing to other scholars who similarly conclude).

40 For a persuasive documentation of Rawls’s “profound” impact on legal thinking, see Lawrence B. Solum, Situating Political Liberalism, 69 Chi.-Kent L. Rev. 549, 549-50 (1994).

41 This can be seen by examining Rawls’s list of acknowledgments at the front of Political Liberalism, see Rawls, supra note 36, at xxx-xxxiv, as well as the countless acknowledgments that appear in the book’s footnotes, see, e.g., id. at 249 n.37 (legal scholar Lawrence Solum). Rawls gives acknowledgments to numerous legal scholars, including Frank Michelman, see id. at xxxii, Kent Greenawalt, see id., Dennis Thompson, see id., Ronald Dworkin, see id. at xxxi, H.L.A. Hart, see id. at 5 n.3, Alexander Meiklejohn, see id. at 348 n.61, and Henry Kalven, see id., to name only a
The result has been not Rawls's canonization—scholars tend to be critics, not disciples—but the coordination of a scholarly discussion around a Rawlsian focal point. Such concentrated focus has created a scholarly conversation that helps to refine the convictions and sensibilities that constitute the American political community and that, most relevant to the task at hand, accordingly influence legal interpretation. It is for these reasons, and in this spirit, that this Article draws upon Rawls's recent work *Political Liberalism* as a guide to understand how, consistent with deeply held American commitments, communities’ requests for powers of self-governance should be answered.\(^4\)

I. COMMUNITIES THAT HAVE SOUGHT TO GOVERN THEMSELVES AND THEIR COMMON IDEOLOGY

There were hundreds of self-contained, largely self-governing communities in the United States during the nineteenth century.\(^5\) These communities viewed themselves as quasi-sovereign entities. For example, the Oneida Principles of Association stated that Oneida “embraces and provides for all interests of its members, religious, political, social and physical [and] is at once a church, a state, a family and a business association.”\(^6\) Similarly, the Hopewell community viewed itself as a political entity “existing within, peacefully subject to, and tolerated by the governments of Massachusetts and the United States, but otherwise a Commonwealth complete within itself,” as evidenced by the fact that it had its own

\(^2\) An important corollary is that although contemporary philosophical thought is important, it is only one of many determinants of constitutional and legal outcomes; others include the constitutional text we actually have, the rule of law (which takes account of precedent and stare decisis, among other things), and practical considerations. This Article shares the strengths and limitations of philosophy in respect of law and should not be understood as advocating that its argument alone should determine how particular legal issues should be decided. There are several relevant considerations. This Article's argument is one of them.

\(^3\) See Weisbrod, supra note 2, at 5.

\(^4\) Id. at 77 (citing William Alfred Hinds, American Communities and Co-operative Colonies 182 (1878)).
constitution, laws, regulations, and municipal police; its own legislators, judiciary and executive authorities; its own educational system of operations; its own method of aid and relief; its own moral and religious safeguards; its own fire insurance and savings institutions; its own internal arrangements for the holding of property, the management of industry and the raising of revenue; in fact, all the elements and organic constituents of a Christian republic, on a miniature scale.  

Why did these communities believe that such a separation from general society was necessary? And how did general society's laws respond to such attempts at self-imposed isolation? To help answer the first question, Section I.A provides an ideal typical conception of the ideology of community self-governance that I denominate "political perfectionism." Sections I.B and I.C present a series of community case studies to provide concrete answers to the two questions. Section I.D offers some general conclusions.

A. Political Perfectionism: An Ideal Typical Conception of the Ideology of Community Self-Governance

Political perfectionists are those who believe that people's self-actualization depends on a governing entity's active and self-conscious pursuit of the "good," however defined. Underlying the ideology of political perfectionism are two understandings of human nature, one that might be called "Government Socialization" and the other, "Interconnected Welfare." Understanding these two conceptual underpinnings of political perfectionism allows us to understand why some communities believe self-governance is

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"Id. at 94 (quoting a statement by the founder of the Hopedale community) (citing Hinds, supra note 44, at 234).
"In an effort to explain the notion of ideal types, I can do no better than Richard Fallon, who recently wrote:

In the usage introduced by Max Weber, ideal types are intellectual constructs developed by a synthesis of familiar arguments and views but exhibiting a "conceptual purity" that "cannot be found in reality." Although not perfectly reflected in reality, ideal types can be approached or approximated; "concrete phenomena can . . . be compared for the purpose of explicating some of their significant components."

necessary. Political perfectionism also offers a way of understanding what attributes of governance are important in the eyes of these separatist communities.

Government Socialization refers to the view that people are significantly socialized by their environments and that society's laws are an important contributor to and definer of the socializing environment. According to adherents of Government Socialization, the behaviors encouraged or even tolerated by a polity inevitably have an impact on the development of its citizens. The notions underwriting Government Socialization are that people are heavily socialized by their environments and that law is a significant aspect and shaper of that environment. Under this view, it is not enough to say that one is free to think differently than the other members of her society and to educate her children as she pleases, for the law's encouragement of or toleration for a certain type of education practice will inevitably shape her convictions, and the

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47 See, e.g., Ronald T. Takaki, Iron Cages: Race and Culture in Nineteenth Century America at xiv (1979) (noting that within a culture "one concept of reality is diffused throughout society... informing with its spirit all taste, morality, customs, religious and political principles, and all social relations"); Avishai Margalit & Joseph Raz, National Self-determination, 87 J. Phil. 439, 449 (1990) (arguing that culture provides "boundaries of the imaginable"); Lawrence Rosen, The Right to Be Different: Indigenous Peoples and the Quest for a Unified Theory, 107 Yale L.J. 227, 236 (1997) (arguing that culture is a "set of categories by which experience is rendered meaningful and made to seem immanent and indeed even natural, by its connections and replications in diverse domains of life"). See generally Clifford Geertz, The Interpretation of Cultures (1973) (exploring the impact of various social forces on the development of cultures).

convictions of others like her, and conform them. Thus, the ethic of "live and let live" is an oxymoron within the first conception of Government Socialization: How others live inevitably shapes one's ideas and, thus, how one herself lives.⁴⁹

According to some adherents of Government Socialization, the government's pursuit of the "good" is necessary for people to fully develop. Without the proactive assistance of government, according to this view, people will be unable fully to self-actualize. This perspective reflects the classical Aristotelian notions that the highest human good is activity that expresses virtue, that government must identify what is virtuous and help habituate people to virtue because virtues are primarily acquired through "habituation," and only government has the power to consistently motivate people to act virtuously.⁵⁰ Echoing this aspect of Government Socialization, the Amish, for example, have justified their desire to live apart on the basis that people can become habituated to acting virtuously only with the active support of the entire community.⁵¹

Interconnected Welfare, the other component of political perfectionism, refers to the view that an individual's prospects for self-actualization are inextricably connected to how other individuals in her community behave and believe. The individual's prospects for complete self-actualization consequently are stunted if her polity

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⁴⁹ See Sunstein, Social Norms, supra note 48, at 911 ("Human beings can live, and human liberty can exist, only within a system of norms, meanings, and roles; but in any particular form, these things can impose severe restrictions on well-being and autonomy."); see also Kahan, supra note 48, at 356-59 (discussing the impact of social influence on people's values and behaviors).

⁵⁰ Aristotle, Nicomachean Ethics 1103b1-1103b5, 1094a20, 1094b6, 1098a15 (Terence Irwin trans., 1985); see also id. at 1103b1-1103b5 ("[W]e become just by doing just actions, temperate by doing temperate actions, brave by doing brave actions."); id. at 1180a6 ("[S]omeone who is to be good must be finely brought up and habituated, and then must live in decent practices, doing nothing base either willingly or unwillingly."). Aristotle mentions that in addition to habituation virtue may also be obtained through natural endowment or intellect; natural endowment is out of a person's control, however, and only a few select people can be moved by intellect. See id. at 1179b9-10, 1179b19-21. By and large, therefore, society can become virtuous only by means of habituation under this view. See A.C. Bradley, Aristotle's Conception of the State, in A Companion to Aristotle's Politics 13, 28 (David Keyt & Fred D. Miller, Jr. eds., 1991).

⁵¹ See Thomas J. Meyers, Education and Schooling, in The Amish and the State 87, 105-06 (Donald B. Kraybill ed., 1993) (discussing the commitment of Amish schools to "producing good men" of "character, honesty, humility, and long suffering").
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does not concern itself with both her and other citizens' virtue. In a sense, the "individual" is not the appropriate unit of analysis for purposes of sculpting public policy. Rather, the community is the appropriate unit of consideration. The well-being of the government, moreover, which itself is necessary to inculcate citizens to virtue, turns on the welfare and virtue of its citizens.

52 The concept of Interconnected Welfare is not wholly unfamiliar to mainstream political theory. For example, communitarian critics of modern liberalism insist that "certain of our roles are partly constitutive of the persons we are—as citizens of a country, or members of a movement." Michael J. Sandel, Introduction, in Liberalism and its Critics 1, 5 (Michael J. Sandel ed., 1984) [hereinafter Sandel, Liberalism and its Critics]. Communitarian theorists argue that people conceive their identity—the subject and not just the object of their feelings and aspirations—as defined to some extent by the community of which they are a part. For them, community describes not just what they have as fellow citizens but also what they are, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.

53 Early in the United States' history public figures argued that a good society was good because its citizens were good and, conversely, that the proliferation of vice among citizens was the precursor of a republic's demise. See Wood, supra note 52, at 49-59. Wood has noted that eighteenth century leaders were convinced that a republican government "cannot be supported without Virtue." Id. at 68 (quoting Payson, Sermon Preached May 27, 1778 in Pulpit 334 (Thornton ed.)). These ideas naturally led to a politics of perfectionism. In the words of none other than John Adams, "it is the part of a great politician to make the character of his people, to extinguish among them the follies and vices that he sees, and to create in them the virtues and abilities which he sees wanting." See Michael J. Sandel, Democracy's Discontent 127 (1996) (quoting Letter from John Adams to Mercy Warren (Jan. 8, 1776), in 1 Warren-Adams Letters 202). Similarly, Madison, who considered "virtue among the people... indispensable
An example of the ideology of Interconnected Welfare can be found in the thought of the Satmar Chasidim of Kiryas Joel. An important aspect of Jewish thought that finds expression through much of Jewish law is that people "are as sureties for each other" in spiritual matters.\(^{44}\) In other words, just as a surety must pay for the insolvency of another, citizens are held accountable for the spiritual wrongdoings of others. This paragon of Interconnected Welfare leads to religious duties on individuals to rebuke others. It also naturally leads to a willingness to allow community leaders significant powers to ensure that people are habituated properly.\(^ {35}\)

The conceptions of Government Socialization and Interconnected Welfare that constitute political perfectionism naturally lead to a desire to pursue the "good" (however defined) through government. The level of government at which a perfectionist wishes the "good" to be pursued turns on her specific ideology. Some political perfectionists have what may be termed a "strong" view of Government Socialization. According to this view, only those who already possess virtue are willing to listen to, let alone are capable of comprehending, arguments as to what constitutes virtuous activity.\(^ {56}\) This view in conjunction with Government Socialization's other conceptions—that virtue is the highest human good and that government must socialize and habituate people to virtue because only government has the power to do so consistently—ineluctably leads to the conclusion that the largest possible

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\(^{44}\) To self-government," id. at 132, argued to the Virginia ratifying convention that "[i]f... there be [no virtue among us,] we are in a wretched situation. No theoretical checks, no form of government, can render us secure. To suppose that any form of government will secure liberty or happiness without any virtue in the people, is a chimerical idea." Id. (quoting 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 536-37 (Jonathan Elliot ed., New York, Burt Franklin 1888)).

\(^{45}\) Babylonian Talmud Tractate Shavu'oth 59a (Tel-Man Press, Vilna Ed. 1989) (author's translation).

\(^{35}\) To provide another example, the Amana Society was of the view that proper service of God necessitated the eradication of selfishness, which only could be achieved through the institution of communal property ownership. State v. Amana Soc'y, 109 N.W. 894, 897-98 (Iowa 1906). This centrality of communal property ownership expresses the conception of Interconnected Welfare insofar as one's ability to expunge her selfish desires turns on the behaviors of others, namely their willingness to communalize their property.

\(^{56}\) See Aristotle, supra note 50, at 1179b25-1179b30 ("[S]omeone whose life follows his feelings would not even listen to an argument turning him away, or comprehend it [if he did listen]; and in that state how could he be persuaded to change?... Hence we must already in some way have a character suitable for virtue... ").
government entity must be the one to advance the good, for if people are not enabled to achieve virtue by the government, they will be unable to achieve virtue at all. Indeed, under this perspective, absent compulsion, people who have been raised in nonvirtuous environments will never be able to recognize virtue. Thus, although these types of political perfectionists might be willing to accept an initial foothold in a small local polity, they ultimately will seek nothing less than control of the whole federal government, so as to be able politically to compel others to live "virtuously." I call this category of people "universalist political perfectionists," and as will be shown, universalist political perfectionists cannot be accommodated under liberal political theory.

Universalist political perfectionists are to be contrasted with "localist political perfectionists," who desire only that their local governing bodies advance the good. Localist political perfectionists can and must be accommodated under liberal political theory. Localist political perfectionists actually are comprised of two types of perfectionists. The first, what might be called "exemplary political perfectionists," hope to spur larger societal changes and alter people's behaviors through example, not physical or political compulsion. Such perfectionists are adherents of Government Socialization and believe that their local governments must actively advance the good for their members to act virtuously and for their perfectionist communities to be realized. But they believe that once their exemplary community is established, others outside the community will see the community's goodness and come around to their way of life. Exemplary political perfectionists thus have what

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97 Exemplary political perfectionism bears similarity to the notion of "norm seeding," the idea that norms adopted by a small group of people may produce a "norm cascade" such that the norm spreads throughout society and displaces old norms. See Randal C. Picker, Simple Games in a Complex World: A Generative Approach to the Adoption of Norms, 64 U. Chi. L. Rev. 1225, 1284-85 (1997) (reporting results of a computer model showing that, under certain conditions, a six person norm cluster within a population of 10,195 can shift a norm). Picker concludes that

[n]orm seeding is a low-risk strategy. If the government seeds an inefficient cluster, it will die, and little will be lost. If the new norm is superior to the old norm, however, the artificially created norm cluster will thrive and spread.

This analysis suggests that the government should embrace test policies or norms or take steps to foster social meanings in particular local contexts as a way of testing whether a superior approach can take root and spread.

Id. at 1285 (emphasis added).
might be termed a “weak” view of Government Socialization because they believe that people who are not socialized to virtue still can recognize virtue and its goodness when they see it being lived out in a virtuous community. Exemplary political perfectionists believe that Interconnected Welfare can be fully realized only when the larger society is led by their example to pursue proper living, but they reject political coercion as a possible method for leading others to virtue.\textsuperscript{58} Thus exemplary political perfectionists reject universalist perfectionists’ tactics but not their ultimate objectives. The difference in tactics, however, is of crucial significance to determining what groups liberal political theory can accommodate. As we will see, there have been many different exemplary political perfectionists in the United States.\textsuperscript{59}

The second subset of localist political perfectionists might be called “insular political perfectionists.” These people are adherents of Government Socialization and Interconnected Welfare, but they do not think that their community’s practices are universally binding on those outside their community. As a consequence, they do not seek to pursue their political agendas outside their immediate community, and certainly not at the national level. Native Americans are one example of insular political perfectionists on account of the fact that they do not seek to induce general American society to adopt their ways but only wish to preserve their communities and cultural heritage.

Localist political perfectionists will not demand that their polities be empowered with all attributes of sovereignty. For example,

\textsuperscript{58} A perfectionist’s adherence to Interconnected Welfare does not entail the conclusion that others should be forced to behave virtuously. Other commitments—such as a deontological respect for individuals qua individuals or a consequentialist perspective that only freely adopted choices are long-lasting and meaningful—may disqualify compulsion as a potential political option to adherents of Interconnected Welfare. Each of the exemplary political perfectionists examined below held commitments that disqualified compulsion as a political goal. In short, a perfectionist may be committed to proselytizing but still may reject the tactic of politically compelling others to adopt her ways. As shown below, as far as political liberalism is concerned, a community that proselytizes can be accommodated whereas a community that seeks politically to compel to virtue those outside the perfectionist zone cannot. See infra text accompanying notes 187-188.

\textsuperscript{59} For example, the Satmar Chasidim of Kiryas Joel, the Rajneeshim, Mormons, and the Oneida are all examples of exemplary political perfectionists. See infra Sections LB, LC2.
they need not have the power to declare war and send ambassadors. The governmental powers they view to be necessary mirror the ideology of political perfectionism. Reflecting the concerns of Government Socialization, such political perfectionists typically will desire the power to opt-out from general society’s laws and institutions so as to insulate their members from general society’s influences. Prompted by their views of Interconnected Welfare, political perfectionists also will seek to establish legal and social institutions within their zones that reflect their understandings of citizens’ interconnected well-being. The precise institutions will depend on the political perfectionist community’s specific commitments. As set forth below, Interconnected Welfare can lead to the establishment of socialist polities or of governments that seek to shape behaviors that mainstream society would view as violative of people’s rights to privacy.66

B. Two Nineteenth Century Communities That Sought to Govern Themselves

1. The Mormons

Beginning in the 1830s, the Church of the Latter-day Saints, also known as the Mormons, sought to create a political entity within the United States that would be “the Kingdom of God.”65 The need to establish a “New Jerusalem”—a holy and heavenly city that was to be a Mormon political community distinct from general society—grew out of the ideologies of Government Socialization and Interconnected Welfare. Reflecting the notion of Government Socialization, Mormon leaders believed that their political entity had to be distinct from general society so as to ensure that Mormons would be unsoiled by others’ practices and ideas.62 Separateness was deemed necessary not only to avoid general society’s acculturating influences also but also to permit innovation of new theologies and social institutions.63 Interconnected Welfare animated the desire to self-govern through the Mormon theological concept of “co-

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66See, e.g., infra Section I.B.2.
65See Arrington & Bitton, supra note 13, at 113, 127.
62See id. at 122, 128.
63See id. at 127-28; Thomas F. O’Dea, The Mormons 54 (1957).
operation” and the Law of Consecration. These religious conceptions were expressed by rules of property use and economic relations that by their nature required a self-governing community.

The Mormons sought to build a political entity that reflected their values with respect to the totality of life—the social, economic, political, as well as religious. Nonetheless, the Mormons did not intend for their political sovereign to be independent of the United States—a country that the Mormons believed was God-given land in its entirety—but rather for it be a largely independent zone under the sovereignty of the United States. The Mormons sought to establish a polity within which they could thrive, but not one that would compel those who did not adhere to Mormonism to adopt its tenets or practices. Through example and proselytizing, the Mormons hoped to spread their message. In short, the Mormons were an example of exemplary political perfectionists.

The Mormons initially enjoyed considerable success in securing opportunities to establish their heavenly kingdom. In 1836, the Missouri legislature granted Mormons the right to organize an entire county for themselves, Caldwell County. In 1840, the Illinois legislature granted the Mormons the Nauvoo Charter, which created a “City Council, to consist of a Mayor, four Aldermen, and nine Councilors.” Mormon leaders received the

powers and authority to make, ordain, establish and execute all such ordinances, not repugnant to the Constitution of the United States or of this State, as they may deem necessary for the peace, benefit, good order, regulation, convenience, and cleanliness of said city; for the protection of property therein

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64 See O'Dea, supra note 63, at 186-98.
65 See id.
66 See id. at 166.
67 See id. at 168-69; Arrington & Bitton, supra note 13, at 162.
68 Despite the fact that Mormons enjoyed significant political autonomy in several states (including Missouri, Illinois, and Utah), the Mormons at no point sought to use their political might to force others to convert. See O'Dea, supra note 63, at 44-138; Arrington & Bitton, supra note 13, at 41-96. Mormon theology conceptualizes Mormons as a new chosen people that are separate from the “gentiles,” i.e., non-Mormons, see O'Dea, supra note 63, at 134-55, 166, a belief that does not comport with forced conversions. Indeed, as a historical matter Mormons have sought converts not through compulsion but by means of missionary efforts. See id. at 153; Arrington & Bitton, supra note 13, at 301-02.
69 See O'Dea, supra note 63, at 45.
from destruction by fire, or otherwise, and for the health and happiness thereof.30

The Nauvoo Charter also authorized the establishment of the "University of the City of Nauvoo."31 Indeed, the Charter went so far as to permit the establishment of a body of "independent military men, to be called the 'Nauvoo Legion,' the Court Martial of which shall be composed of the commissioned officers of said Legion."32

Immediately after passage of the Nauvoo Charter, the Mormons built the city. As a result,

Mormon independence was a fact. While remaining within the territorial and constitutional limits of the United States, the Saints had achieved a kind of self-determination or "group liberty" that formalized their actual distinctiveness and cohesiveness and made their exclusive political institutions the law of the land within the limits of their own city.33

In short, the Mormons successfully established a strong sub-federal (more precisely, a sub-state) sovereign within the American system of multiple overlapping sovereigns.

But Mormon self-rule in the established parts of the United States was short-lived. Two years after receiving permission to establish Caldwell County, the Mormons were forced to leave Missouri.34 In 1845 Illinois withdrew the Nauvoo Charter, and the Mormons were forcibly evicted from the state.35 These experiences, and similar occurrences in New York, Ohio, and Iowa,36 led the Saints to migrate to the land that became Utah.37 Mormon leaders decided to settle the barren land of Utah, rather than go on to California, because they specifically sought to maximize the likelihood of being left alone to govern themselves by placing great physical distance between them and their gentile neighbors.38

30 Id. at 52.
31 Id. at 53.
32 Id. at 52.
33 Id. at 53.
34 See id. at 45-48. Historians have attributed non-Mormons' hostility to religious prejudice and fear of the Mormons' group loyalty and cohesiveness. See id. at 49.
35 See id. at 49, 73-74.
36 See Arrington & Bitton, supra note 13, at 44-61.
37 See O'Dea, supra note 63, at 83, 89.
38 See id.
This effort met with mixed success. Although the vast majority of Utah's settlers were Mormon, the United States government vacillated in the extent to which it was willing to permit Mormon self-government. The full historical account is too complex to receive full treatment here, but select examples well illustrate the point. On the side of accommodating self-governance, following creation of the Utah territory in 1850, President Fillmore selected as governor Brigham Young, who at the time was both the Mormons' secular and religious leader.

Weighing against accommodation was President Buchanan's 1857 replacement of Young with a non-Mormon governor and sending of 2,500 federal troops into the Utah Territory to keep order, leading to the so-called Utah War. In 1862 Congress passed the Morrill Act, which banned polygamy, an important part of Mormon theology and practice. Twenty-five years later Congress passed the Edmunds-Tucker Act of 1887, which dissolved the Corporation of the Church of Jesus Christ of Latter-day Saints. After 573 Mormons were convicted for plural marriage and the government had seized approximately one million dollars worth of property, the President of the Mormon Church in 1890 issued a manifesto in which he officially declared that Mormons would no longer practice polygamy.

2. The Oneida Community

The Oneida community was established in upstate New York by John Humphrey Noyes in 1848. Reflecting the notion of Interconnected Welfare, Noyes sought to establish a community of "perfectionists" separate from what he believed to be an immoral government (which, among other things, sanctioned slavery and

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79 For one such treatment, see Arrington & Bitton, supra note 13.
80 See id. at 163.
81 See O'Dea, supra note 63, at 101.
82 See 12 Stat. 501 (1862) (discussed in Reynolds v. United States, 98 U.S. 145, 168 (1878)); Glen O. Robinson, Communities, 83 Va. L. Rev. 269, 313 (1997); see also O'Dea, supra note 63, at 60 ("[A]ll Mormon doctrinal innovations were to fall into place around this new teaching on marriage. The new Mormon doctrine of marriage made of sexuality a means to celestial glory.").
83 See O'Dea, supra note 63, at 110.
84 See id. at 111.
85 See Weisbord, supra note 2, at 11.
oppressed Native Americans). By separating, the community would not be accountable for the country’s sins. Noyes also believed that establishing a community apart from general society within which individuals could seek to perfect themselves was the only way that nationwide reform could be accomplished. General society would come to recognize the Oneidan perfectionists’ superior life and join their ways, and in this manner “personal, moral reform... would gradually lead to the social, curative one.” In short, Oneidan perfectionism was a paradigmatic form of exemplary political perfectionism.

Noyes’s view reflected a conception of Government Socialization: He believed that his substantive perfectionist agenda could be pursued only in a zone apart from general society because Oneidan perfectionism required social institutions that were incompatible with contemporary American culture. An important component of Oneidan perfectionism was achieving a universal love of mankind. The first step was to create community-wide love. Noyes believed that to achieve this, the community must disassociate itself from the general marketplace, which encouraged individualism at the expense of community dedication. But disentangling oneself from the omnipresent market economy could be accomplished only by means of a community separate and apart from general culture that was economically self-sufficient to the maximum extent possible.

Attaining universal love also required abandoning exclusive rights in both things and persons, in Noyes’s view. Discarding exclusive property rights in things was accomplished through communal ownership of all goods and job rotation, practices also entailing a self-defined community distinct from general culture. Perhaps most radical of all, according to Noyes actualizing community-wide love required the discarding of conventional marriage, which in his view

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2 See Klaw, supra note 14, at 54, 80.
3 See, e.g., Weisbrod, supra note 2, at 4 (quoting a community member as stating “we believed we were living under a system which the whole world would sooner or later adopt”); Mandelker, supra note 14, at 128-29 (“Community concerts and entertainment were opened to [outsiders] with the hope that... [they] would catch salvation... [and the Oneida’s successful business ventures] would be a tool of evangelism.”); Klaw, supra note 14, at 193.
4 Thomas, supra note 86, at 152.
5 See Mandelker, supra note 14, at 37.
led to bounded and exclusive love. In its place Noyes substituted “complex marriage,” which replaced monogamy with an intricate institution that facilitated community-wide sexual relations. An integral aspect of complex marriage was that the children born into Oneida were raised communally, for the ideal of community-wide love required that “stickiness”—strong ties between biological parents and offspring—be avoided.

Contemporary scholars concur that complex marriage was crucial to Oneida’s success. One commentator has concluded that complex marriage made “possible that undivided loyalty to the Community... that was an indispensable condition of the total communism prevailing at Oneida.” Another commentator similarly has determined that “[u]niversal love and communism of property were made possible by the elimination of the exclusive nuclear family... The family brought about selfish concern for one’s own kin, the treatment of women and children as property, and selfishness over material goods and wealth.” The other important aspect of equality that complex marriage was designed to achieve was freeing women from lives of “household drudgery and sexual exploitation.” In short, “Noyes’s sexual theory,” which found its most important expression in complex marriage, “was at the core of his program for spiritual perfection and... reverberated in all spheres of the Oneida Community’s life.”

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9 See Klaw, supra note 14, at 1, 54; Mandelker, supra note 14, at 102-05. Other aspects of Noyes’s perfectionist ideology also necessitated a distinct community separate from general society. For example, perfectionism required submission to proper authority—God, as His will was communicated through His emissaries. The greatest liberty, according to Noyes, was to be “possessed by another’s will in such complete oneness as to make us act obediently without any double consciousness.” Thomas, supra note 86, at 161 (quoting Noyes). Because general democratic culture cultivated individualism, Noyes instituted “democratic theocracy” at Oneida, which was directed to obtaining people’s voluntary assent to the recognition of his role as the authoritative spokesperson for the will of God. See Mandelker, supra note 14, at 54-56.

9 The party interested in initiating a sexual liaison was required to submit his or her proposal to Noyes or his agent who would then communicate the offer to the offeree if the relationship was approved. The offeree, man or woman, had complete freedom to accept or refuse. See Mandelker, supra note 14, at 114-22.

9 See id. at 122-23.

9 Klaw, supra note 14, at 292.

9 Mandelker, supra note 14, at 150.

9 Id. at 18.

9 Id. at 57.
In 1879 Noyes learned that New York was planning to prosecute him for adultery and fornication in connection with his practice of complex marriage, and he fled to Canada to avoid indictment.\textsuperscript{59} From exile, Noyes recommended that the community abandon complex marriage for the sake of avoiding further confrontations with state officials.\textsuperscript{59} Historians of Oneida have concluded that the surrender of complex marriage was in large part responsible for the community’s ultimate dissolution two years later in 1881.\textsuperscript{100} The appropriateness of New York’s move to prosecute Noyes will be examined below in Part IV.

C. Some Twentieth Century Communities That Have Sought to Govern Themselves

Twentieth century efforts at community self-governance have elicited varying levels of legal tolerance.

1. Native Americans

The ideologies of Government Socialization and Interconnected Welfare provide much of the animating forces behind Native American desires for self-governance. Self-governance is deemed to be important to preserve Native Americans’ cultural heritage against the assimilating pressures of American culture.\textsuperscript{101} Self-

\textsuperscript{59} See id. at 145; Klaw, supra note 14, at 2-3; Thomas, supra note 86, at 175-76. Although Noyes himself always maintained that he left Oneida due to fear of prosecution, one scholar of the Oneida community has concluded that other factors led Noyes to flee. See Klaw, supra note 14, at 245. While it is impossible to assess the precise role played by the threat of prosecution, even the sources quoted by Klaw appear to acknowledge that fear of legal action played a role in Noyes’s decision to leave. See Id. at 246.

\textsuperscript{60} See Mandelker, supra note 14, at 146-47 (quoting letter from Noyes stating that the Oneida community should “conform[] to worldly custom for the sake of avoiding offense”).

\textsuperscript{100} See id. at 149-50 (“The abandonment of complex marriage was the first step in the dissolution of the utopian community as a whole.”); see also Klaw, supra note 14, at 292 (noting the “indispensable” nature of complex marriage to the Oneida community); Weisbrod, supra note 2, at 11, 53 (noting the role of the end of complex marriage in the dissolution of the Oneida community).

\textsuperscript{101} See, e.g., Duro v. Reina, 495 U.S. 676, 685-86 (1990) (“[T]he retained sovereignty of the tribes is that needed to . . . preserve their own unique customs and social order.”); Robert N. Clinton, Redressing the Legacy of Conquest: A Vision Quest for Decolonized Federal Indian Law, 46 Ark. L. Rev. 77, 121-23 (1993) (noting that federal policies limiting tribal sovereignty “often had deleterious cultural and political
governance also is necessary to sustain the communal institutions that provide identity and meaning to individuals.\textsuperscript{102}

As a historical matter, American law and policy have sharply seenawed over the question of whether Native American self-rule should be respected or undermined.\textsuperscript{103} At the end of the nineteenth century, federal Native American policy was formulated by so-called “assimilationists,” who associated tribal autonomy with “savagery” and sought to absorb Indians into the mainstream of society.\textsuperscript{104} In his annual report for the year 1889, for example, the Commissioner of Indian Affairs wrote that “tribal relations should be broken up, socialism destroyed, and the family and the autonomy of the individual substituted.”\textsuperscript{105}

effects on Indian tribes,” “inflicted substantial damage on Indian communities,” and “caused or contributed greatly to the extinction of many Indian languages”). This is not to suggest that the need to preserve Indian culture is the sole justification for self-governance. See, e.g., Clinton, supra, at 120-22 (pointing to many other reasons in support of Indian self-governance, including history and the reality of the “Indian sense of peoplehood”).\textsuperscript{106}

For example, village membership for many in the Hopi tribe is “virtually inseparable” from their religion. See Kavena v. Hamilton, 16 Indian L. Rep. 6061, 6061 (Hopi Tribal Ct. 1988). Village membership is a “much deeper meaning than mere physical presence or residence” and “involves the maintenance of religious and cultural ties and relationships with the village and its ceremonies.” Kavena v. Hopi Indian Tribal Ct., 16 Indian L. Rep. 6063, 6065 (Hopi Tribal App. Ct. 1989). Without the high degree of self-governance afforded to Native Americans, the Hopis would not be permitted to have political subdivisions of this sort that are so central to their religious and personal identities.

See Philip P. Frickey, Adjudication and Its Discontents: Coherence and Conciliation in Federal Indian Law, 110 Harv. L. Rev. 1754, 1776 (1997) (“[T]he story of federal Indian law is one of vacillation between an approach rooted in respecting the uniqueness and worthiness of tribal institutions and one bent on assimilating tribes and their members into the larger society.”).\textsuperscript{107}

See Felix S. Cohen, Handbook of Federal Indian Law 128-31 (1982 ed.).\textsuperscript{108} H.R. Exec. Doc. No. 1, pt. 5, at 4 (1890). Assimilationists pursued several tactics to achieve their goals. One was to apply general laws to Indians. See Cohen, supra note 104, at 128-29. For example, in 1885 Congress passed the Major Crimes Act, ch. 341, 23 Stat. 362, 385 (1885), which interfered with purely internal Indian affairs by granting federal courts jurisdiction over enumerated crimes committed by Indians in Indian country. See Cohen, supra note 104, at 129; Frickey, supra note 103, at 1760. Assimilationists also sought to undermine the integrity of Indian land holdings by means of the Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-34, 339, 341-42, 348-49, 354 (1994)), under which land previously held communally by tribes was broken up into small farm-sized tracts and allocated to individuals who, after a period of time, were permitted to alienate the property. See Cohen, supra note 104, at 130-36. As a result, the total amount of Indian-held land dropped from 138 million acres in 1887 to 48 million in 1934. William C. Canby, Jr., American Indian Law in a Nutshell 21 (2d ed. 1988). This destruction
In 1934 Congress reversed official government policy toward the Indians by enacting the Indian Reorganization Act. The Act was premised on the notion that Indians should rule themselves. The Act gave "[a]ny Indian tribe . . . the right to organize for its common welfare," the right to adopt an appropriate constitution and bylaws," and the right to acquire a charter of incorporation for the purpose of conducting business. As a practical matter, however, tribal autonomy was significantly hampered by the fact that tribal constitutions and corporate charters required approval by the Commissioner of Indian Affairs, and the Commissioner subjected submitted constitutions and charters to severe scrutiny. As a result, "[a]lthough some constitutions were individualized, many were standard 'boilerplate' constitutions prepared by the Bureau of Indian Affairs and based on federal constitutional and common law notions rather than on tribal custom."

In the 1940s federal policy began to shift again as Congress considered several proposals that were reminiscent of the Assimilationist era, such as legislation that would promote voluntary migration off the reservation, individual ownership of family-sized...
farms, and assimilation of Indians into mainstream society.\textsuperscript{111} In 1953, Congress formally adopted a new policy toward Native Americans denominated “termination,” which referred to the goal of terminating the special relationship between Indian tribes and the federal government.\textsuperscript{112} The policy aimed “as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States.”\textsuperscript{113} Legislation terminated the special relationship between the federal government and numerous select tribes and transferred responsibility for the tribes to the states.\textsuperscript{114} After termination, states exercised legislative authority over such areas as education, adoption, and land use, all of which were matters core to Indian cultural identity.\textsuperscript{115} States also asserted judicial jurisdiction over these tribes and, as a result, tribal law was no longer applicable.\textsuperscript{116} The practical effect of termination, therefore, was to limit tribal sovereignty.\textsuperscript{117}

In 1958 Congress officially abandoned the policy of “termination” and adopted a policy that commentators have dubbed “self-determination.”\textsuperscript{118} Although Indian self-rule was once again embraced under this approach, Native American self-governance suffered yet another layer of federal limitations in the form of the Indian Civil Rights Act of 1968.\textsuperscript{119} It long had been established that tribal governments are not state or federal actors for purposes of constitutional law, meaning that the Constitution’s constraints are not applicable to tribal governments.\textsuperscript{120} The Indian Civil Rights

\textsuperscript{111} See Cohen, supra note 104, at 155.
\textsuperscript{112} See Canby, supra note 105, at 25.
\textsuperscript{113} Canby, supra note 105, at 25 (quoting H.R. Con. Res. 108, 83d Cong. (1953)).
\textsuperscript{114} See Cohen, supra note 104, at 173-74.
\textsuperscript{115} See id. at 175.
\textsuperscript{116} See id.
\textsuperscript{117} See id.
\textsuperscript{118} See id. at 180.
\textsuperscript{120} See Talton v. Mayes, 163 U.S. 376 (1896); Native Am. Church of N. Am. v. Navajo Tribal Council, 272 F.2d 131, 134-35 (10th Cir. 1959); see generally Canby, supra note 105, at 28-29, 241-44 (detailing traditional inapplicability of Constitution to tribal government).
Act, however, imposed on tribes statutory obligations that virtually tracked the language of the Bill of Rights.\footnote{The Indian Civil Rights Act of 1968 statutorily imposed provisions of the Bill of Rights against tribal governments, with the exceptions most notably of the prohibition concerning the establishment of religion, the requirements of jury trials in civil cases, and the appointment of counsel for indigents in criminal cases. See 25 U.S.C. § 1302(1); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 63 (1978). For example, the Act provides that “[n]o Indian tribe in exercising powers of self-government shall . . . make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances.” 25 U.S.C. § 1302(1).}

Illustrative of Congress’s ambivalence with regard to community autonomy, however, is the fact that the Act’s only remedy is a habeas corpus provision allowing for federal court review of tribal orders that result in a petitioner’s “detention.”\footnote{25 U.S.C. § 1303.} The Supreme Court held in Santa Clara Pueblo v. Martinez\footnote{436 U.S. 49 (1978).} that habeas corpus review is the exclusive path for federal court review of allegations of tribal violations of the Act.\footnote{Id. at 72.} As a result, most challenges to tribal governments under the Indian Civil Rights Act—that is, all challenges to the tribal government activities that do not involve the plaintiff’s “detention”—must be litigated in tribal courts.\footnote{See Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874, 884 (2d Cir.) (noting that under Santa Clara Pueblo the only cases permitting federal interpretation of the Act are proper habeas corpus actions), cert. denied, 117 S. Ct. 610 (1996).} Further, it is well-established that the Act’s statutory terms need not be construed in the same manner as their constitutional counterparts have been interpreted against the federal, state, and local governments.\footnote{See, e.g., Wounded Head v. Tribal Council of Oglala Sioux Tribe, 507 F.2d 1079, 1082 (8th Cir. 1975).} Consequently, tribal courts develop the meaning of the bulk of the Act’s terms, even terms like “due process” and “free exercise.” Tribal courts have given these terms markedly different interpretations than the United States courts have ascribed to their sister terms in the Bill of Rights.\footnote{See, e.g., Election Bd. v. Snake, 1 Okla. Trib. 209, 230 (Ponca Ct. Indian App., 1988) (“When analyzing due process claims under the Indian Civil Rights Act, it is important to note that the Indian nations have formulated their own notions of due process and equal protection.”); Mark D. Rosen, Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community, 77}
Thus under *Santa Clara Pueblo*, the Indian Civil Rights Act has not significantly interfered with Native American powers of self-governance. The security of continued Indian self-rule under the Act, however, turns on how the Act is construed over time. Given the pendular nature of United States respect for Native American self-governance surveyed above, future judicial cutbacks of Native American powers of self-government would not be surprising. Indeed, the Second Circuit recently attacked Native American self-governance by construing the Act’s habeas provision to permit federal court review of what is perhaps the most essential attribute of Indian self-governance—a tribe’s determination as to who is a member.\textsuperscript{126} This case will receive more complete consideration below in Part IV.

2. *The Rajneesh, the Church of Scientology, and Kiryas Joel: Community Efforts to Establish Municipalities*

The recent experiences of three religious communities to establish municipalities within which they could largely self-govern—the Rajneesh, the Church of Scientology, and the Satmar Chasidim—continue the narrative of inconsistent American legal responses to self-governance efforts.\textsuperscript{127} These three communities all desired to locate themselves within discrete political units—cities—in which they could govern themselves.

The desire to situate their communities within cities under their control is an outgrowth of the ideologies of Government Socialization and Interconnected Welfare. The Rajneesh, for example, believed that “incorporation as a city [was] necessary to provide essential services to members of their religion so that they [could]...
practice the tenets of Rajneeshim." Reflecting the notion of Interconnected Welfare, the Rajneesh’s beliefs included the idea that all aspects of work in their city, including its governance, constituted a form of worship such that the joining together to run their own political zone permitted a richer, more integrated spiritual life than was otherwise possible. Similarly, although the Rajneesh did not believe that all their religious members were required to live in their religious city, they believed that their religion’s well-being required that there be some central place of worship—akin to the Vatican, Jerusalem, or Mecca—where all Rajneesh could make a pilgrimage. Consistent with Government Socialization, the Rajneesh also thought it necessary for there to be a zone apart from general society where the stalwarts of Rajneeshim could reach maximal heights of spiritual perfection without interference from the outside world. Reflecting an ideology of exemplary political perfectionists, the Rajneesh’s aim was to establish a model community that would lead others voluntarily to follow their path.

To these ends, the Rajneesh community purchased a 64,229 acre parcel of land in rural Wasco County, Oregon, and took the steps required under Oregon law to incorporate as a municipality about 2000 acres of the parcel. The community’s corporate charter stated that its purpose was “to be a religious community whose life is, in every respect, guided by the religious teachings of Bhagwan Shree Rajneesh and whose members live a communal life with a common treasury.” All members of the city government—the City Council members, the mayor, the treasurer, the “Peace Force”—were Rajneeshees. The Rajneesh Neo-Sannyas Interna-

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139 Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208, 1211 (D. Or. 1984); Sperow, supra note 130, at 932.
140 See Sperow, supra note 130, at 944.
141 See Rajneeshpuram, 598 F. Supp. at 1211 (noting that the city “was designed and functions as a spiritual mecca for followers of the Bhagwan worldwide”).
142 See Fitzgerald, supra note 129, at 278 (quoting Rajneesh member who said that their city “will be a model for humankind’s social potential” and that their “concern is to create an alternative model of society for mankind”).
143 See Sperow, supra note 130, at 926-27.
144 Id. at 930.
145 See id. at 931 (citing Rajneeshpuram Charter of 1982, ch. II, § 7).
tional Commune held the lease to all the city's lands, and only Rajneeshites or invitees of the commune were permitted to reside in the city. Indeed, the commune even "exercised substantial and direct control over visitor access to Rajneeshpuram" because most of the city was accessible only by private roads controlled by the commune. In short, the city of Rajneeshpuram was set up in such a way as to "create[] and maintain[] a religious community guided by the teachings of [their religious leader]."

After Rajneeshpuram's incorporation, however, the state of Oregon sued the new city in federal court, claiming that the act of recognizing the existence and operation of the city following the city's incorporation—a non-discretionary act under Oregon law where, as was the case with Rajneeshpuram, the incorporators had obeyed all the law's formalities—would violate the Establishment Clause. Ruling on a motion to dismiss, the district court held that the incorporation of a city inhabited solely by, communally owned by, and controlled by members of a particular religion would violate the Establishment Clause. The city's incorporation was voided shortly thereafter.

The Church of Scientology, by contrast, sought to acquire a political subdivision within which it could establish its mecca by surreptitiously buying large pieces of land in a preexisting city in Florida and then engaging in underhanded efforts to take political control of the city. Like the Rajneesh, the Church of Scientology's efforts failed. It is particularly interesting, however, to ask why the Scientologists engaged in the tactics they did. A plausible explanation is that the Scientologists believed that ordinary legal

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138 See id. at 931.
140 Id. at 1211.
141 See id. at 1210.
142 See id. at 1216-17.
143 See Connecticut Gen. Life Ins. Co. v. Department of Revenue, 12 Or. Tax 461, 463-64 (Or. T.C. 1993) (noting that the Rajneesh municipality was voided).
144 See Douglas Frantz, Religion's Search for a Home Base, N.Y. Times, Dec. 1, 1997, at A16. The newspaper article reports that Scientologists created a "dummy corporation" to purchase property in Clearwater, that "[g]overnment and community organizations were infiltrated by Scientology members," that "[p]lans were undertaken to discredit and silence critics," and that "[a] fake hit-and-run accident was staged in 1976 to try to ruin the political career of the Mayor." Id.
145 See id.
and political channels did not provide them the opportunity to self-govern politically. Indeed, one commentator who concluded that Rajneeshpuram was unconstitutional has suggested that it would have been constitutionally permissible for the Rajnees to obtain a city of their own by “tak[ing] over” a preexisting city by getting their slate of candidates elected—an approach virtually identical to that of the Church of Scientology.

Not all communities’ efforts to incorporate themselves have been rebuffed. Consider the example of Kiryas Joel, the village of Satmar Chasidim that was at the center of Board of Education of Kiryas Joel School District v. Grumet. Pursuant to a state law that permitted almost any group of residents to form a village within a town, in 1977 the Satmar Chasidim, another example of exemplary political perfectionists, created a village whose boundaries were drawn for the express purpose of establishing a political subdivision comprised entirely of members of the Satmar Chasidic community. The village is still in existence.

Although the propriety of this act of incorporation was not the subject of the Kiryas Joel litigation, the Court’s opinion threw into question the village’s future legal viability. At issue was the constitutionality of a special statute, by its terms applicable only to Kiryas Joel, that constituted the village as a special school dis-

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146 See Sperow, supra note 130, at 962.
148 See id. at 691. In particular, under New York law a territory with at least 500 residents and not more than five square miles may be incorporated upon the petition of at least 20% of the voting residents of the territory or by the owners of more than 50% of the territory’s real property. See N.Y. Village Law §§ 2-200(1)(a), 2-202(a)(1)-(2) (McKinney 1996).
149 The Satmar Chasidim are adherents of Interconnected Welfare. See supra text accompanying notes 52-55. Furthermore, their desire to cloister themselves from general society is an expression of Government Socialization insofar as they both defensively wish to avoid being influenced by general society’s values and affirmatively desire to establish those difficult-to-cultivate virtues that, they believe, can only be realized through the active assistance of the polity. See generally William M. Kephart & William W. Zellner, Extraordinary Groups 161-82 (4th ed. 1991) (discussing the Chasidim’s concern with negative urban influences and their desire to perpetuate the norms and values of their community) (cited in Kiryas Joel, 512 U.S. at 691); I. Rubin, Satmar: An Island in the City (1972) (similar) (cited in Kiryas Joel, 512 U.S. at 691).
150 See Kiryas Joel, 512 U.S. at 691.
strict.\textsuperscript{151} In deciding that question, however, four members of the Court read past Establishment Clause jurisprudence as standing for the proposition that “a State may not delegate its civic authority to a group chosen according to a religious criterion” and further held that this rule could be violated even where delegation is made not to a religious “group” but to religious individuals such as “the qualified voters of the village of Kiryas Joel.”\textsuperscript{152}

As far as the constitutionality of the village’s incorporation is concerned, the legal question is whether a court would deem the state’s act of recognizing a city’s civic powers following self-incorporation to be an unlawful “delegation” similar to the Oregon v. City of Rajneeshepuram\textsuperscript{153} court’s holding that Oregon’s non-discretionary recognition of Rajneeshepuram was a state act that implicated the Establishment Clause.\textsuperscript{154} No court has yet provided a definitive answer, but an influential commentator has argued that the village’s constitutionality should be determined according to criteria that would preclude a religious community from establishing a municipal zone for the purpose of living separately from others for perfectionist reasons.\textsuperscript{155} The constitutionality of Kiryas Joel as well as Rajneeshepuram will be examined below in Part IV.

3. The Theosophists: Recent Efforts to Constitute Communities by Means of Residential Associations

Communities’ efforts to exercise strong autonomy through governance by means of legal forms apart from municipal corporations—in the form of associations, for example—have been rebuffed by courts on various grounds.\textsuperscript{156} For example, an association

\textsuperscript{152} Kiryas Joel, 512 U.S. at 698. The plurality applied this reasoning to strike down the special statute that concerned only the village of Kiryas Joel and that, by its unique and specially tailored nature, strongly suggested that there had been deliberate delegation to the Satmars by the state. See id.
\textsuperscript{153} 598 F. Supp. 1208 (D. Or. 1984).
\textsuperscript{154} See id. at 1216-17.
\textsuperscript{155} See Christopher L. Eisgruber, The Constitutional Value of Assimilation, 96 Colum. L. Rev. 87, 92-93 (1996) (implying the village would be unconstitutional if it were drawn for the purpose of establishing a separatist homogenous zone); Christopher L. Eisgruber, Madison’s Wager: Religious Liberty in the Constitutional Order, 89 Nw. U. L. Rev. 347, 407 n.208 (1995) (same).
\textsuperscript{156} See, e.g., Taormina Theosophical Community v. Silver, 190 Cal. Rptr. 38, 44-45 (App. 1983) (holding that covenants limiting ownership and occupancy in a subdivision
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comprised of members of the Theosophical Society in America—a nonreligious association without “dogma or creed” composed of persons desiring to “work towards the universal brotherhood of man; to study and to compare religions, sciences and philosophies, and finally to explore the psychical powers latent in man”157—acquired two tracts of land in California to build a residential association exclusively for Theosophists.158 Toward that end, the association included restrictive covenants running with the land within the development that, by their terms, limited ownership and occupation only to Theosophists.159 Despite the fact that, as commentators and courts in the context of Native American law have recognized, controlling membership is the sine qua non of creating community,160 a California appeals court concluded that the restrictive covenants were based on irrelevant criteria and constituted “arbitrary discrimination” under California law and accordingly voided the covenants.161 The court’s treatment of the Theosophists receives critical attention below in Part IV.

D. Some Conclusions about Community Self-Governance

The diverse communities surveyed above did not seek to secede from the United States. They instead sought to establish political zones that were part of the American political structure, but within which they could have considerable autonomy to govern themselves. In essence, these communities were seeking to establish new examples of “overlapping sovereigns” akin to the federalist framework of overlapping federal and state sovereigns. The communities, like the states in the federalist system, had select attributes of sovereignty but still were part of the larger body politic. Importantly, the communities had sufficient space to exercise the attributes of governance that were important to adherents of Government Socialization and Interconnected Welfare: They were able

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to members of a theosophical, nonreligious association violate numerous provisions of the California Civil Code); State v. Celmer, 404 A.2d 1, 5-6 (N.J.) (declaring unconstitutional on Establishment Clause grounds a New Jersey statute that granted various municipal powers to a religious organization), cert. denied, 444 U.S. 951 (1979).
157 Taormina, 190 Cal. Rptr. at 45.
158 See id. at 40.
159 See id.
160 See, e.g., Santa Clara Pueblo, 436 U.S. at 54.
161 See Taormina, 190 Cal. Rptr. at 44-45.
to buffer themselves from general society’s influences and to establish idiosyncratic social institutions that reflected their ethics.

As this survey shows, American law has often sharply limited communities’ powers to govern themselves in a manner distinct from majoritarian culture: Consider the examples of Oneida, the Mormons, and Native Americans. Moreover, there is evidence to suggest that the extent to which American law has been willing to accommodate community self-governance has been steadily diminishing over time. During the nineteenth century communities were generally allowed to constitute themselves as separate enclaves—consider, for example, the multiple opportunities enjoyed by the Mormons—and it was only afterward, when general society took a distaste to the communities’ practices, that the law interfered with community self-governance. In this century, by contrast, much of the thwarting of community self-governance has occurred at the threshold level of disallowing the constituting of the communities in the first instance—consider the Rajneesh and the Theosophists.

A pattern of nonaccommodation is consistent with other trends in American law and society, such as the diminishing amount of free land to which idiosyncratic communities can relocate for the purposes of isolating themselves from general society; the growth of federal constitutional doctrines that have been applied against states and localities under the Fourteenth Amendment that have the effect of diminishing variations of the legal landscape across jurisdictions, and the expansion of both state and federal regulation generally, thereby increasing the extent to which general society’s norms are thrust on citizens. Sociologists have observed that legal

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162 See Rosabeth Moss Kanter, Commitment and Community: Communes and Utopias in Sociological Perspective 171, 173 (1972) (noting the dependence of a successful group on “constitutional, psychological or spatial” boundaries and the relative ease with which a nineteenth century commune could establish a boundary through physical isolation).

163 See Laurence H. Tribe, American Constitutional Law 772-74 (2d ed. 1988) (enumerating Bill of Rights guaranties that have been applied against state and local governments); William J. Novak, The Peoples Welfare: Law and Regulation in Nineteenth Century America 170-71 (1996) (noting ways that incorporation and other modern constitutional doctrines have limited the extent to which state and local governments can pursue public morality).

164 See Donald B. Kraybill, Preface to The Amish and the State, supra note 51, at ix (noting how significantly the tension between the state and the Amish increased in
factors have placed twentieth century communities at a disadvan-
tage in terms of self-governance vis-a-vis their nineteenth century
counterparts.\textsuperscript{165}

Notwithstanding twentieth century trends of nonaccommodation,
many communities still are seeking the opportunity to largely self-
rule. It is also the case that American law has not fully closed the
door on community self-governance. Thus the issue of how much
communities ought to be allowed to self-govern remains very much
alive. This Article now turns towards constructing an analytic
framework for determining which political perfectionists should be
accommodated and to what extent.

II. CONSTRUCTING THE FRAMEWORK FOR DETERMINING
WHETHER AND TO WHAT EXTENT COMMUNITIES SHOULD BE
PERMITTED TO SELF-GOVERN

This Part argues that achieving the foundational liberal objectives
expressed in John Rawls's recent work \textit{Political Liberalism}
requires a federalist-type political structure that grants political
perfectionists who meet certain criteria extensive rights to govern
their own affairs in discrete geographical zones. In other words,
fully utilizing the potential inherent in the federal system of over-
lapping sovereigns—and a willingness to treat select political per-
fectionists as sub-federal sovereigns—is the only way to realize
fully \textit{Political Liberalism}'s foundational liberal aspirations.\textsuperscript{166}

\textsuperscript{165} For example, Rosabeth Moss Kanter argues that
[i]n the boundary problems [that hinder development of community] of today's
communes are exacerbated by the fact that communes as a unique social ar-
rangement lack definition and legitimacy in American society. For legal and
official purposes, they must define themselves in terms of some other form such
as a nonprofit corporation, a business, a church, an educational institution, or a
family . . . .

Thus, it is more difficult today to develop strong boundaries than it was in
the nineteenth century . . . .

Kanter, supra note 162, at 173.

\textsuperscript{166} One important point of clarification is in order before proceeding. The term
"sub-federal sovereigns" includes not only states but such sovereign entities as mu-
nicipalities, tribal governments, and, potentially, sufficiently empowered residential
associations. The sub-federal sovereigns to which this Article is addressed, however,
are not states but are the other smaller sub-federal sovereigns, for reasons that will be-
come apparent as the analysis proceeds. See infra note 181 and accompanying text.
A. Overview of Political Liberalism and the Original Position

Political Liberalism is primarily concerned with describing the basic structure of a stable and enduring democratic constitutional regime that can win the wholehearted support of a citizenry having a plurality of irreconcilable "comprehensive philosophical and moral doctrines." The work also seeks to identify the rules of politics, that is, the rules by which political decisions within such a democratic constitutional regime are made (as, for instance, by identifying what types of arguments are legitimate predicates for enacting law).

Rawls attempts to elucidate the basic structure of political society and the rules of politics by use of the heuristic device of the "original position" developed in his earlier work, A Theory of Justice. Under the original position, people are to identify the basic structure and the rules of law-generation by conceiving themselves as being under a "veil of ignorance" under which "the parties do not know the social position, or the conception of the good (its particular aims and attachments), or the realized abilities and psychological propensities, and much else, of the persons they represent." The parties do not know whether the beliefs espoused by the persons they represent is a majority or a minority view. They cannot take chances by permitting a lesser liberty of conscience to minority religions, say, on the possibility that those they represent espouse a majority or dominant religion and will therefore have an even greater liberty. For it may also happen that these persons belong to a minority faith and may suffer accordingly. If the parties were to gamble in this way, they would show that they did not take the religious, philosophical, or moral convictions of persons seriously, and, in effect, did not know what a religious, philosophical, or moral conviction was.

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169 Rawls, supra note 36, at 305.

170 Id. at 311 (emphasis added).
Applying these understandings, Rawls develops two principles of justice that he claims should structure constitutional democracies and guide their operation.\footnote{171 See id. at 291-99. The first principle of justice is discussed extensively below. The second principle of justice, which concerns economic rights, has no direct application to political perfectionism.}

**B. The First Principle of Justice Requires a Basic Political Structure That Allows Political Perfectionists Significant Powers of Self-Governance**

The “first principle of justice” requires that selected political perfectionists be permitted to self-govern subject to only minimal constraints. Under the first principle of justice, “[e]ach person has an equal right to a [1] fully adequate scheme of [2] equal basic liberties which is [3] compatible with a similar scheme of liberties for all.”\footnote{172 Id. at 291.} My argument in this Part and in Part III is that to best realize the objectives of Political Liberalism, the first principle of justice must be understood to mandate a basic structure that, with only minimal limitations, grants political space within which political perfectionists who meet certain criteria can associate as they believe necessary for their self-development. For ease of reference, I will refer to this type of political empowerment interchangeably as the creation of “robust sub-federal sovereigns” and “perfectionist zones.”

We now turn to an analysis of each of the three components of the first principle of justice.

1. “*Equal Basic Liberties*” Include the Conditions Necessary for Self-Actualization in Accordance with One’s Views of What Self-Actualization Requires

Taking the second component first, by “equal basic liberties” Rawls clearly includes the conditions that are necessary for people to self-actualize in accordance with their views of what self-actualization requires. Rawls expressly states that “[t]he basic liberties (freedom of thought and liberty of conscience, and so on) . . . are the background institutional conditions necessary for the development and the full and informed exercise of the two moral
powers."\textsuperscript{173} One of the moral powers is the capacity to formulate a conception of the good.\textsuperscript{174} Similarly, Rawls writes that liberties are identified by "asking which things are generally necessary as social conditions and all-purpose means to enable persons to pursue their determinate conceptions of the good and to develop and exercise their two moral powers."\textsuperscript{175}

But which conception of the conditions necessary for development and self-actualization is to be utilized to determine the content of the basic liberties? The answer, according to Rawls, is broad rather than narrow: those conceptions that would be selected by persons under the original position. The set of conditions therefore presumptively would include those conditions understood by political perfectionists as being necessary for self-development. This is so because a person in the original position, not knowing whether he represents a political perfectionist,\textsuperscript{176} would not be willing to create a political society that, in his view, precluded himself from self-developing (which, as seen above, is the case for political perfectionists with respect to a state that does not advance their conception of the "good"). To posit otherwise would be to "not take the religious, philosophical, or moral convictions of persons seriously, and, in effect, [to] not know what a religious, philosophical, or moral conviction [is]."\textsuperscript{177}

To put it another way, we can use the original position as a hermeneutic for clarifying the content of the principles of justice to which people under the conditions of the original position would have agreed. Application of the original position in this manner shows that the "basic liberties" that are part of the first principle of justice include the liberty to self-actualize in accordance with one's view of what self-actualization requires.

\textsuperscript{173} Id. at 308.
\textsuperscript{174} See id. at 19.
\textsuperscript{175} Id. at 307. According to Rawls, the aim of the parties is to agree on principles of justice that enable the citizens they represent to become full persons, that is, adequately to develop and exercise fully their moral powers and to pursue the determinate conceptions of the good they come to form. The principles of justice must lead to a scheme of basic institutions—a social world—congenial to this end.
\textsuperscript{176} See id. at 24-25 n.27 (noting that "people's comprehensive doctrines [are put] behind the veil of ignorance").
\textsuperscript{177} Id. at 311.
2. "Fully Adequate Scheme" and the Requirement of Well-Orderedness

The next question is: What limitations on this liberty—the liberty to self-actualize in accordance with one’s views of what self-actualization requires—are created by other aspects of Political Liberalism? The first place to look for an answer is the rest of Rawls’s formulation of the first principle of justice (namely, the first and third components). To recapitulate, under the first principle of justice, each person has an equal right to a “[1] fully adequate scheme of [2] equal basic liberties which is [3] compatible with a similar scheme of liberties for all.”

Let us turn now to the first component—the requirement of a “fully adequate scheme.” Rawls states that “fully adequate scheme” refers to the “criterion . . . to specify and adjust the basic liberties so as to [a] allow the adequate development and the full and informed exercise of both moral powers in the social circumstances under which the two fundamental cases arise in the [b] well-ordered society in question.” We then must ask: Does this limitation—the requirement of a “fully adequate scheme”—preclude the exercise of a political perfectionist’s liberty to self-actualize in select zones in accordance with her view of what self-actualization requires?

The answer is that the requirement that there be a “fully adequate scheme” both imposes some limitations on which perfectionists should be accommodated and confirms the need for permitting those perfectionists that meet the criteria space within which they can largely self-govern. With respect to the need to accommodate perfectionists, subcomponent [a] requires a fully adequate scheme to contain the criterion for adjusting liberty so as to allow for the development as well as the full and informed exercise of “both moral powers,” one of which is the capacity to form and pursue a conception of the good. The definition of fully-adequate scheme thus underscores what we observed earlier: The first principle of justice assures citizens that society’s basic structure and laws will

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176 Id. at 291.
177 Id. at 333.
178 Id. at 19. The two “fundamental cases” are defined by Rawls. See id. at 332.
not preclude them from formulating a conception of the good. And, as discussed above, operation of the original position teaches us that the conceptions of the good whose development the fully adequate scheme protects includes both nonperfectionist conceptions, in which persons can self-actualize irrespective of the policies pursued by the State, and perfectionist conceptions. Thus subcomponent [a]'s requirement is fully consistent with—and, indeed, requires—robust sub-federal sovereigns within which perfectionists can self-govern.\footnote{States would likely not be suitable candidates due to the unlikelihood that there would be a sufficiently large number of political perfectionists of a particular variety to populate a state.}

The second "moral power" whose development and exercise is protected by subcomponent [a] is the "capacity for a sense of justice."\footnote{Rawls, supra note 36, at 19.} But is accommodating political perfectionists consistent with this requirement? The answer to this question is clearly in the affirmative. A sense of justice "expresses a willingness, if not the desire, to act in relation to others on terms that they also can publicly endorse."\footnote{Id.} As such, a "sense of justice" is connected to willing "compliance with society's basic institutions."\footnote{Id. at 35.} Accordingly, allowing robust sub-federal sovereigns is consistent with development of a sense of justice because citizens are apt to comply willingly with the basic structure of society if that structure allows them to construct their social lives so that, in their views, self-actualization is possible.

Permitting such robust sub-federal sovereigns, moreover, would not undermine nonperfectionists' capacity for a sense of justice. Well-orderedness requires in part that the liberal state educate all citizens on the political theory that undergirds it. Such education would foster in nonperfectionists an understanding of and appreciation for the original position, which mandates that select perfectionists be permitted the liberty to self-actualize in accordance with their view of what self-actualization requires.\footnote{Thus, with the exception of the caveat discussed infra note 191, there is no force to the contention that development of a sense of justice and achieving a well-ordered society would be inhibited by a basic structure that permitted activities in a neighboring polity that were abhorrent to others. Allowing perfectionists to practice}
A fully adequate scheme protecting and developing a sense of justice, therefore, is more likely realized in a basic structure that permits perfectionists autonomy for self-governance than in a basic structure that does not grant perfectionists such space. For if perfectionists are not given autonomy, they would be precluded from living in accordance with what they believe to be necessary to self-actualize, and therefore, they would not develop a willingness to abide by society’s basic institutions. For the same reasons, a basic structure that permits like-minded individuals space for political autonomy is also more likely to achieve a “well-ordered society,” subcomponent [b] of the fully adequate scheme.106

The “well-ordered society” requirement, however, most certainly does impose several limitations on sub-federal sovereigns. For one, well-orderedness requires that the sub-federal sovereigns adopt a peaceful disposition toward their neighbors. All the communities surveyed in Part I satisfy this criterion of well-orderedness. Although the communities were far from indifferent as to how those outside their communities lived, all but one (the only exception being Native Americans) were exemplary political perfectionists who aspired to change others’ behaviors through example, not force.107 Native Americans also satisfy the criterion of well-orderedness, for they are insular political perfectionists who seek only to sustain their distinctive cultural heritage and are indifferent to the outside culture.108 Universalist perfectionist communities, which likely could not co-exist peacefully with those outside their community, by contrast, would not satisfy the criterion of well-orderedness and consequently would not be accommodated under political liberalism. And this makes perfect sense: A person in the

within their zones what others deem to be “despicable acts”—such as polygamy or complex marriage—should not undermine respect for law, development of a sense of justice, and the creation of a well-ordered society insofar as citizens are educated to understand that the liberal polity must tolerate within its midst those behaviors that are consistent with any of the set of reasonable comprehensive doctrines. See discussion infra Section III.B. Acceptance of the “burdens of judgment” and dedication to the liberal principle of minimizing the extent to which the state advances a particular conception of the good mandate toleration of a wide array of practices outside one’s immediate polity. See infra Section III.B.

106 The well-ordered society is a society in which “citizens have a normally effective sense of justice and so they generally comply with society’s basic institutions, which they regard as just.” Rawls, supra note 36, at 35.


108 See supra Section I.C.1.
original position, not knowing whether the person she represented
was a persecuted minority of one sort or another, would not agree
to a basic structure that permitted her persecutors to establish zones
that could serve as launching pads for violent actions against her.

Beyond limiting which political perfectionists need be accom-
modated by political liberalism, the requirement of well-
orderedness also entails substantive limitations on the activities
that qualifying political perfectionists can undertake within their
zones. These limitations reflect the fact that the zones are not
fully sovereign polities but instead are subordinate sovereigns
within a federalist system of multiple overlapping sovereigns. For
example, the sub-federal sovereigns should not have the powers to
stockpile armaments, wage war, appoint and receive foreign emis-
saries, make treaties with foreign nations, and the like. Thus, for
example, Illinois’s Nauvoo Charter grant to the Mormons, which
permitted the Saints to establish an independent militia, ran afoul
of the requirement of well-orderedness. Well-orderedness also jus-
tifies the imposition of other substantive limitations with respect to
activities within the perfectionist zone that have significant exter-
nalities on those outside the community.

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This Article’s argument does not address the status of nonmembers living within
a political perfectionist zone. This is not an impractical simplifying assumption be-
cause it is possible to create homogeneous perfectionist zones, as virtually all the po-
litical perfectionists examined in Part I did (or sought to do). Furthermore, perfection-
ist governments likely would have to be given power to control membership and
entry insofar as these are vital aspects of controlling the local environment in ac-
cordance with what the concept of Government Socialization indicates is necessary. Fi-
nally, it is unlikely that nonmembers would elect to situate themselves in a perfec-
tionist zone, and in the event they did it seems fair to require that they abide by the
community’s rules, at the very least. In any event, I leave it to another day to address
appropriate limitations on perfectionist governments vis-a-vis nonmembers residing
in the zone, an issue that would be sharply presented if, for example, extant munici-
palities were permitted to transform themselves into perfectionist polities upon the
vote of a supermajority. As a corollary, I take no position here as to whether such a
supermajority mechanism for creating perfectionist polities is appropriate.

See supra Section I.B.1.

Among the set of such externalities might be societal anguish of sufficient magni-
tude on account of the activities undertaken in the sub-federal sovereign; it might be
the case that to ask general society to forbear the occurrence of certain activities in
sub-federal sovereigns would be to push general society to a breaking point. Under
such circumstances the requirement of well-orderedness would justify disallowing
such activities within the sub-federal sovereign. The burden of proof to establish this
need, however, should be very high and such limitations should be the exception. No
Further, the requirement of well-orderedness also implies a limitation as to the absolute number of sub-federal sovereignties that general society could tolerate. An overly large number of self-governing communities could undermine the degree of social cohesion necessary to sustain an “enduring and secure democratic regime.”192 While it is impossible to specify in advance what number of robust sub-federal sovereigns could be accommodated, policymakers would have to be attentive to the possibility of numerically limiting them.

Finally, the requirement of well-orderedness imposes some educational obligations on the sub-federal sovereigns.193 These obligations are comprised of that which is necessary to ensure well-orderedness. Citizens in the sub-federal sovereigns would have to be taught about the political theory that justifies society’s basic structure, that is, the essentials of the argument developed in this Article.194

3. “Compatible with a Similar Scheme of Liberties for All” and the Requirement of Opt-Out

Having shown that the requirement of a fully adequate scheme does not preclude, but in fact requires, a basic structure that allows

doubt, there is a danger that such exceptions entailed by well-orderedness could swallow the rule of permitting community self-governance. It is only good-faith development and implementation of the well-orderedness requirement, informed by considerations of what substantive content people in the original position would give to the requirement, that will prevent this from occurring. See discussion supra note 189.

192 Rawls, supra note 36, at 38. My analysis, like Rawls’s, assumes that people in the original position would desire to create one very large country rather than a number of smaller countries. The rationale is that there are efficiencies and other advantages enjoyed by large countries and that these benefits need not be sacrificed by localist political perfectionists, who do not need the full panoply of attributes of sovereignty to be able to fully self-actualize. To the extent that well-orderedness mandates numerical limitations with respect to which political perfectionists can be allowed to self-rule, however, the rationale underwriting national unity is undercut, and people in the original position, aware of the possibility of numerical limitations, would opt for a right to secede in the event a localist political perfectionism were not allowed to self-govern for this reason.

193 This is not to suggest that these are the only educational requirements. The requirement of opt-out may impose others. See infra Section II.B.3.

194 This type of education should not be unwelcome among either insular or exemplary political perfectionists for there is no reason to believe that such an education, in their view, would endanger the creation of their perfectionist communities. No part of this educational requirement should have the effect of inducing their children to leave the enclave; this obligation, instead, merely reinforces these perfectionists’ commitment to coexisting peacefully with outsiders.
for robust sub-federal sovereigns within which select political perfectionists can largely self-govern, I turn next to the third component of the first principle of justice, that the basic structure be "compatible with a similar scheme of liberties for all." The question is: Could a basic structure that permitted perfectionist sub-federal sovereigns satisfy this requirement?

Once again, the answer to this question is clear: Compatibility is better satisfied by a basic structure that allows people the option to live in either perfectionist or nonperfectionist polities than a basic structure that permits only nonperfectionist governments. Indeed, not only can the compatibility requirement be met by allowing robust sub-federal sovereigns, but the compatibility requirement can only be met by such accommodation. This is because not allowing robust sub-federal sovereigns deprives political perfectionists of the liberty to self-actualize in accordance with their views of what self-actualization requires, a liberty enjoyed by nonperfectionists. By not allowing robust sub-federal sovereigns, therefore, the state fails to grant basic liberties "compatible with a similar scheme of liberties for all." Accordingly, a basic structure that does not allow robust sub-federal sovereigns fails to satisfy the compatibility requirement.

For the compatibility requirement to be satisfied, however, the option to choose where to live—what might be called the right of people to "opt-out" of the environment in which they find themselves and relocate to another—must be a real one. Without an opt-out right, we are back to a situation akin to permitting only nonperfectionist (or only perfectionist) governments. To understand this, consider the simple example of a perfectionist community that flatly prohibits its inhabitants from exiting. A person living in that community who wishes to relocate to a nonperfectionist zone would not enjoy the same liberty as a person who grew up under a nonperfectionist government and elects to relocate to a perfectionist zone. As such, a basic political structure that allowed a

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195 Rawls, supra note 36, at 291.

196 Cf. Albert Hirschman, Exit, Voice, and Loyalty (1970) (discussing people's option either to remain or exit from their communities).

197 This discussion highlights a tension that the compatibility requirement introduces: the tension between compatibility's requirement of permitting people to enter
perfectionist entity to prohibit exit would not be consistent with the compatibility requirement. Thus, the compatibility requirement suggests an important limitation on both perfectionist sub-federal sovereigns and nonperfectionist polities: their inhabitants must be free to opt-out and leave.\footnote{This requirement (among other reasons) explains why slavery is not a perfectionism (if slavery could even be described as a member of the family of political perfectionism) that constitutional democracies can accommodate. Slavery's notion of property-in-the-person—an integral and inseparable aspect of slavery—perforce extends beyond discrete zones (consider, for example, the fugitive slave laws early in this Nation's history) and thereby precludes the freedom to opt-out that the principle of compatibility mandates.}

The details of opt-out, an aspect of the first principle of justice’s compatibility requirement, can be worked out by asking: How would a person in the original position—one who did not know whether she represented a political perfectionist or nonperfectionist—choose to construct opt-out? In the end, the original position can help us to think about opt-out’s appropriate contours but it cannot on its own definitively identify them because the original position does not provide a mechanism for determining how risk averse its players are. The fact that liberal political theory under-determines the institutional details of opt-out is neither unique to opt-out nor problematic; such underdetermination occurs with respect to virtually all, if not entirely all, of political liberalism’s theoretical concepts.\footnote{See, e.g., Rawls, Public Reason Revisited, supra note 167, at 784 (noting that “details about how to satisfy this proviso must be worked out in practice and cannot feasibly be governed by a clear family of rules given in advance”). Such an inability to specify in advance all institutional details also is characteristic of constitutionalism.}

For the sake of aiding in opt-out’s elaborations, what follows is a sketch of some considerations and two possible solutions for what the protection of opt-out might look like.

One possible approach is to consider opt-out satisfied as long as the perfectionist entity does not improperly impede people from exiting. The prohibition against improperly detaining people has many implications. For one, it would preclude a community from undertaking physical actions against children whose irreversible effects would limit children's possibilities of opting-out, such as child sacrifice or the denial of medical care that would endanger a child's physical health. It also would bar perfectionist rules that de facto
It also likely would proscribe community rules that imposed extraordinary emotional costs on an exiter, such as forever precluding her from having contact with family members remaining within the perfectionist zone. The requirement of opt-out also would disallow a community from irregularly applying its laws so as to detain a person from exiting, though this would not preclude a community from regularly applying ordinary criminal laws that result in incarceration and have the effect of precluding exit. But a real right of opt-out requires no more under this approach. A sense of adventure and dissatisfaction with the status quo are sufficient incentive to prompt exit, as the history of immigration attests. Let us label this the Immigrant Model opt-out option. Whether people in the original position would agree to an opt-out that required this quantum of risk-taking, however, turns on one’s view of the degree of risk-taking to which the basic political structure should be calibrated.

A second model of opt-out seeks to calibrate opt-out to lower-risk individuals than immigrants. Call this the Median Model. The Median Model builds on the prohibition against illicit detention but goes further. It is premised on the view that for opt-out to be real and not merely a formality people must be exposed to the options outside the community and provided with some means for financially sustaining themselves there. What follows is a discussion

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200 Consider, for example, a system of family law that allowed childhood marriage but prohibited divorce. This type of rule clearly would violate the compatibility requirement if it were applied to a woman wishing to leave the zone whose spouse did not wish to go.

201 One possible way to ensure the fulfillment of this condition would be for federal courts to have habeas review (similar to that of the Indian Civil Rights Act) over claims of the to-be punished convicts to ensure that the convicts were subject to fair and consistent procedures and that they were consenting adults who made informed decisions to live in the perfectionist zones. See infra text accompanying notes 333-351. Such oversight is not an oxymoron, for sub-federal sovereigns by their very nature are not wholly sovereign.

202 Imprisoning or even corporally punishing adults pursuant to fair and consistently applied procedures is not violative of opt-out because the compatibility requirement should not preclude consenting adults who have the requisite abilities from making informed decisions that limit their going-forward options; such limitations of future options, after all, is what contractual obligations are all about and are upheld all the time. This Article does not express a view in respect of whether a criminal law specifically designed to preclude would-be exiters from exiting would violate the opt-out requirement.
of factors that likely would affect the exercise of opt-out and whether and to what degree the Median Model would accommodate them.

First, consider community rules that either directly or indirectly impose costs on the exercise of opt-out. With respect to nonfinancial costs, the Median Model likely would treat some, but not all, as violative of the compatibility requirement. For example, a community's practice of generally breaking the ties of friendship with those who have exited the community would impose an emotional cost on the exiter but likely would not violate the compatibility requirement. On the other hand, a community rule that strictly disallowed exitters from having any subsequent contact with family members remaining within the perfectionist zone likely would violate the compatibility requirement.

Actual financial costs of opt-out can take several forms. Many nineteenth century American communities, for example, imposed financial exit costs by requiring the exiter to give up some or all of his assets. Rules requiring disgorgement of particular economic benefits allocated to the community member on the assumption that he or she would be a lifetime member should be presumptively valid to the extent such provisions do not make exit an impossibility. Exit costs designed primarily to discourage exit, by contrast, are less consistent with opt-out and may well be deemed improper under the Median Model.

A second type of indirect financial cost of opt-out is the diminished earning potential outside the community due to the level of

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204 Cf. Donald B. Kraybill, Negotiating With Caesar, in The Amish and the State, supra note 51, at 1, 11 (describing the Amish practice of "shunning" those who have left the community).
205 See Weisbrod, supra note 2, at 126-27. For a modern parallel, see Hofer v. Hofer, [1970] 13 D.L.R.3d 1 (Can.) (upholding Hutterites' power to permit members to condition members' exit from the community on their leaving all private property with the community).
206 It appears that every nineteenth century case involving exit costs of this variety upheld such costs. See Weisbrod, supra note 2, at 126-27.
207 Rules designed to encourage a community member to "think twice" before exiting—a justifiable goal in light of Government Socialization's assumption that it is difficult to act virtuously and so many will try to take an easy way out—should be permissible. This can be accomplished by imposing a reasonable period of time (say, several months, as is done in the law of divorce in most jurisdictions) between articulation of the preference to exit and maturation of the right.
education received as a child while in the community. Concern over this cost animated Justice Douglas's partial dissent in *Wisconsin v. Yoder*, the case that exempted an Old Order Amish community from a state compulsory education law and permitted Amish children to be removed from school after the eighth grade. But in light of the concept of opt-out, this concern is misplaced. Consider, for example, an Amish boy with native intelligence that could have earned him admission to Harvard College had he been given a public high school education but who only received an eighth grade Amish education and consequently could only acquire a job as a carpenter if he elected to exit from the Old Order Amish. The fact that the boy's Amish education precluded him from obtaining a job as an investment banker upon graduation from Harvard is not relevant to ascertaining whether he has real or merely formal opt-out rights because the mere presence of such costs does not necessarily render opt-out a formality. What is relevant to this inquiry, rather, is whether his earning capacity as a carpenter outside his community would favorably compare with his standard of living if he were to remain within the Amish community. In the case of *Yoder*, the modest lifestyle of the Amish means that even an eighth grade education would make the opt-out rights real and not merely formal.

Not all community educational decisions, however, would be respected. For example, a community's decision not to educate their girls would violate the compatibility requirement. More generally, under the Median Model the amount of education necessary to enable a community member to earn a living outside the community for purposes of opt-out will vary from community to community, and it is dependent upon the community's standard of living.

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207 Justice Douglas argued:
   It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.
   Id. at 245-46 (Douglas, J., dissenting in part).
208 The compatibility requirement would not require, however, that the standards of living enjoyed by the community and former members be precisely the same. The maximal gap between the imputed income of community members and earning po-
The most difficult issues with respect to the Median Model arise in the context of community rules that bear on preference formation, such as the rules of education. It might be thought that subjecting children to a perfectionist environment where they are deprived of access to certain books and perspectives, and thereby socialized in a certain way, necessarily violates the compatibility requirement. This view of what compatibility requires is fatally undermined, however, upon the recognition that all environments, including nonperfectionist society, socialize children—a fact acknowledged by Rawls.210 The issue, at bottom, is: What conditions are necessary for the making of an autonomous choice when a member is in the process of deciding whether to remain in his community or exit from it? There is no consensus on this difficult question—contrast Aristotle’s view that only those habituated to virtue can be trusted to make rational determinations that are not self-serving211 with the contemporary “value-neutral” approaches to education and related efforts to limit the foisting of particular values on students due to the heterogeneity of American society.212
The question’s resolution turns on one’s theory of personhood, which itself is derived from a person’s larger moral and metaphysical commitments.

Fortunately, the implausibility of consensus as to what conditions are necessary for a choice to be autonomous does not foreclose the possibility of a workable solution. There may be sufficient common ground—an overlapping consensus—that can generate a workable answer. The way to identify the overlapping consensus is by asking what each group—political perfectionists and nonperfectionists—believes to be necessary for people to make informed lifestyle choices. Universalist political perfectionists are of the view that all people require significant maturation and habituation to virtue before they are capable of making rational choices among lifestyle options. Localist political perfectionists believe that their local governments must actively socialize and habituate citizens, but that all citizens nationwide do not need to be so shaped by government, either because their community’s values are not binding on others (insular political perfectionists) or because outsiders will be able to choose the correct path once they see the perfectionists’ model communities in action (exemplary political perfectionists). Nonperfectionists do not appear to be of one mind as to which preconditions the exercise of autonomous and rational decisions requires, but they tend to believe that enabling citizens to make informed lifestyle choices requires smaller amounts of education and habituation than do their perfectionist counterparts.

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213 Nor does it mean that the preferable solution is to imperialistically adopt one of these contending theories of personhood in an effort to give concrete form to the compatibility requirement. We know this to be true as a normative matter because, recall, we are seeking to elucidate the meaning of the first principle of justice (of which the compatibility requirement is a part) by means of the hermeneutical tool of the original position (since the first principle of justice itself is derived by means of the original position), and we know that people in the original position, uncertain of the metaphysical commitments held by the persons they represent, prefer to adopt a basic structure that accommodates a broad range of comprehensive views.

214 Rawls, supra note 36, at 150-54.

215 See supra text accompanying notes 55-57.

216 Some nonperfectionists believe that autonomy and rationality are the natural starting point and that people can revise their comprehensive views at virtually any time, as evidenced by Saul of Tarsus’s transformation to the Apostle Paul, see Rawls, supra note 36, at 29-31, and by the inability of totalitarian regimes to suppress dissent over time. Other nonperfectionists may believe that exemplary peoples’ abilities to see beyond their initial socializing environment should not be the basis of setting
Analysis of the common ground among these positions shows that an overlapping consensus concerning opt-out might exist between localist political perfectionists and nonperfectionists, but not between universalist political perfectionists and nonperfectionists.\footnote{This is additional evidence for the conclusion reached below that political liberalism cannot accommodate universalist political perfectionists. See infra text accompanying notes 237-240; supra text accompanying notes 187-188.} Perfectionist and nonperfectionist positions conjoin in this fashion: People are to be educated in accordance with perfectionist ideas while introducing them to just the amount of state-determined education necessary to enable them to make informed lifestyle choices according to nonperfectionist views of autonomous decision-making. This overlapping consensus, however, must determine the curriculum not only within perfectionist zones but also outside those zones in nonperfectionist society. Otherwise, the educational method would, in the view of some (perfectionists who adhere to Government Socialization, for example), foreclose people who grow up in nonperfectionist society from opting-out and selecting perfectionist communities, thereby violating the compatibility requirement. Thus, there is no overlapping consensus solution to opt-out for universalist political perfectionists because it would be impossible to implement a nationwide “socialization and habituation” curriculum.\footnote{The impossibility of implementing such a curriculum is due in part to the lack of consensus among universalist perfectionists as to the content of the virtue to which people are to be socialized and habituated.} By contrast, there is an opt-out solution as between localist political perfectionists and nonperfectionists since localist perfectionists do not demand that government socialize those outside their enclaves in the manner that they wish to socialize those within. Opt-out thus is satisfied when localist perfectionist societies are largely allowed a free hand at educating and habituating their inhabitants, subject to only the minimal educational requirements that nonperfectionists deem necessary to enable the making of informed lifestyle choices.

To conclude, the fact that the original position cannot uniquely determine whether the content of opt-out should be guided by the Immigrant or Median Models (or some alternative) does not mean that opt-out cannot be implemented, just as the impossibility of educational policy for the masses and instead may believe that some education is necessary to enable people to make informed lifestyle choices.
specifying the content of any number of constitutional provisions from the original position does not mean that American constitutionalism cannot be implemented. To be sure, the precise calibration of opt-out certainly will have real effects on the abilities of perfectionist communities to attract members and flourish. The crucial point, however, is that a basic political structure that allows for robust sub-federal sovereigns in conjunction with some opt-out requirement is the best way to realize the first principle of justice. Indeed, such a structure is an elaboration of the first principle of justice that is superior to a basic structure that does not accommodate robust sub-federal sovereigns.

III. DEFENDING THE FRAMEWORK AGAINST THE CLAIM THAT IT IS INCONSISTENT WITH OTHER ASPECTS OF POLITICAL LIBERALISM AND DEMONSTRATING THAT THE FRAMEWORK IS THE BEST INSTANTIATION OF POLITICAL LIBERALISM’S OBJECTIVES

To be sure, Rawls expressly states that he believes that political perfectionists cannot be accommodated under political liberalism. This Part argues that this view is incorrect and that Rawls comes to this conclusion, as well as several others, because his analysis focuses exclusively on the federal government and ignores sub-federal sovereigns. This analysis further underscores why accommodating political perfectionists by means of sub-federal sovereigns is the only way that political perfectionism’s foundational commitments can be realized.

A. Political Perfectionists Cannot Be Accommodated under Rawls’s Understanding of Political Liberalism

Rawls expressly states that political liberalism cannot accommodate a governmental entity’s pursuit of contested visions of the good:

There is no reason, then, why any citizen, or association of citizens, should have the right to use the state’s police power to decide constitutional essentials or basic questions of justice as that person’s, or that association’s, comprehensive doctrine directs. This can be expressed by saying that when equally represented in the original position, no citizen’s representative could grant to any other person, or association of persons, the political
authority to do that. . . . What would be proposed instead is a form of toleration.\textsuperscript{219}

Rawls also writes: “Suppose that a particular religion, and the conception of the good belonging to it, can survive only if it controls the machinery of state and is able to practice effective intolerance. This religion will cease to exist in the well-ordered society of political liberalism.”\textsuperscript{220} Thus, Rawls appears to conclude expressly that political liberalism cannot accommodate political perfectionists.\textsuperscript{221} Rawls’s belief that political liberalism cannot accommodate

\textsuperscript{219} Rawls, supra note 36, at 62.
\textsuperscript{220} Id. at 196-97 (emphasis added).
\textsuperscript{221} To this it might be countered that Rawls believes that non-governmental associations can serve the role that political perfectionists believe the state must play. However, this position cannot be sustained because, under Rawls’s understanding of political liberalism, associations cannot be empowered to the degree political perfectionism demands. Rawls contrasts political society with associations by stating that political society and the principles of justice are designed to form the social world in which our character and our conception of ourselves as persons, as well as our comprehensive views and their conceptions of the good, are first acquired, and in which our moral powers must be realized, if they are to be realized at all.

Rawls, supra note 36, at 41. According to Rawls, people are “born into society” whereas they choose to join associations. Id. at 40-41, 42 n.44. Yet it is the very power of constructing baseline sensibilities that perfectionists—particularly those who believe in Government Socialization—believe to be essential to the perfectionist governing entity. Perfectionists need the power to opt-out of society’s general laws since, in their view, general laws are significant socializing forces. Yet this is a power they would not have under Rawls’s account of associations.

Furthermore, associations under Rawls’s account are subject to the principles of political justice:

[The spheres of the political and the public, of the nonpublic and the private, fall out from the content and application of the conception of justice and its principles. If the so-called private sphere is alleged to be a space exempt from justice, then there is no such thing.

Rawls, Public Reason Revisited, supra note 167, at 791. While it is true that Rawls states that the principles of justice apply only “indirectly” to associations, Rawls states that such principles are to be applied in a case-by-case way as is “appropriate to the association in question.” Id. at 790-91. Although Rawls does not provide any further concrete guidance as to how the principles would be applied to associations, it is reasonable to infer that Rawls intends that these principles apply more directly and strictly the more government-like the association becomes. So merely putting the label of “association” on an entity that is the functional equivalent of a public entity is not a way to end-run the limitations imposed by the principles of justice that are discussed below in this Part (namely, reasonable comprehensive doctrines, reasonable people, public reason, the political conception of the person, and the priority of right). In short, within Rawls’s conceptual framework associations cannot do what
perfectionists also is manifested in the other aspects of *Political Liberalism* examined below.

**B. Rawls’s Conclusion That Political Liberalism Cannot Accommodate Political Perfectionists Is a Result of His Neglect of Sub-federal Sovereigns**

This Section argues that Rawls’s conclusion that political liberalism cannot accommodate political perfectionists is attributable to his neglect of sub-federal sovereigns. As a result of this oversight, Rawls makes numerous errors that manifest themselves at five discrete points in his system of political liberalism. First, Rawls mistakenly presumes that no form of political perfectionism can be a reasonable comprehensive doctrine. Second, Rawls adopts an unnecessarily strict conception of toleration. Third, Rawls develops a flawed account of public reason. Fourth, Rawls problematically incorporates contested assumptions concerning the nature of personhood in formulating his “political conception of the person” and the “priority of right.” Fifth, as shown below in Section III.C, Rawls mistakenly concludes that political liberalism is not capable of achieving a strong form of neutrality-in-effect.

The recognition of these points bolsters the conclusion that permitting robust sub-federal sovereigns—even religious groups that adopt a sub-federal sovereign’s “machinery of state” and that “practice effective intolerance” while still abiding by the opt-out option and the requirement of well-orderedness—is the best way to give shape to the first principle of justice.

**1. Some Clear Examples of Rawls’s Oversight of Sub-federal Sovereigns**

Rawls’s entire analysis ignores the United States polity’s sub-federal sovereigns. To illustrate, several of Rawls’s cardinal arguments against the possibility of political perfectionist communities make sense only on the assumption that there exists only a single perfectionists desire and, as such, are not a substitute for sub-federal sovereigns. Rawls’s conclusions that political liberalism cannot accommodate political perfectionists consequently cannot be understood as containing an implicit caveat that perfectionists can be accommodated by means of associations.

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\(^{222}\) Rawls, supra note 36, at 29, 176.

\(^{196}\) Id. at 196-97.
centralized government. For example, Rawls argues that a well-ordered democratic society cannot be a community, by which he means a

society governed by a shared comprehensive religious, philosophical, or moral doctrine. . . . To think of a democracy as a community (so defined) overlooks the limited scope of its public reason founded on a political conception of justice. \textit{It mistakes the kind of unity a constitutional regime is capable of without violating the most basic democratic principles.}^{224}

To this assertion one must ask: Does the existence of Indian country within the United States—where the absence of disestablishment requirements for tribal governments allows religious institutions to exercise political power over a community united by shared religious beliefs—mean that the United States’ political structure violates “the most basic democratic principles”? The answer is no. Indeed, just the opposite is true: Granting Native Americans political space within which they can largely self-govern to perpetuate their distinctive culture notwithstanding the country’s alien majority culture enhances liberal values by expanding the set of reasonable comprehensive views that can flourish. This logic can be generalized beyond the case of Native Americans. Allowing islands of perfectionist communities within an ocean of liberal institutional and legal structures deepens the liberal character of society by increasing the chances that adherents of reasonable comprehensive doctrines will be able to self-develop in accordance with their views of what self-actualization requires.\textsuperscript{225}

Similar evidence that Rawls’s analysis focuses too much on the central federal government and ignores sub-federal sovereigns ap-

\begin{footnotes}
\item[224] Id. at 42 (emphasis added).
\item[225] See Canby, supra note 105, at 246 (noting that Pueblo tribal government and religious authorities are wholly intertwined); Kavena v. Hamilton, 16 Indian L. Rep. 6061, 6061 (Hopi Tribal Ct. 1988) (“Hopi religion and village organization in the traditional village organization is virtually inseparable. Membership in a village is in part religious as well as civil.”), aff’d, 16 Indian L. Rep. 6063 (Hopi Tribal App. Ct. 1989).
\item[226] See, e.g., Duro v. Reina, 495 U.S. 676, 685-86 (1990) (“[T]he retained sovereignty of the tribes is that needed to . . . preserve their own unique customs and social order.”).
\item[227] For a justification for broadening Rawls’s view of the reasonable comprehensive doctrine, see infra Section III.B.2.
\item[228] See infra Section III.B.3.
\end{footnotes}
pears in his argument that “a well-ordered democratic society is neither a community nor, more generally, an association” because a
democratic society, like any political society, is to be viewed as a complete and closed social system. It is complete in that it is self-sufficient and has a place for all the main purposes of human life. It is also closed . . . in that entry into it is only by birth and exit from it is only by death.229

Rawls’s observation that democratic society is “closed” may be true at the federal level but it is patently false at the sub-federal level if people can opt-out. In other words—as illustrated once again by the existence of Indian country—there is no reason why a well-ordered democracy, like the United States, cannot include political communities at some sub-federal levels. Similarly, while Rawls is probably correct with respect to the national political level when he writes that “[c]omprehensive philosophical and moral doctrines . . . cannot be endorsed by citizens generally, and they also no longer can, if they ever could, serve as the professed basis of society,”230 it once again is demonstrably false that these conditions cannot hold in some sub-federal levels.231

2. Rawls Adopts an Unnecessarily Narrow View of Reasonable Comprehensive Doctrines and a Problematically Broad Conception of Mutual Toleration

At most, Rawls gives only passing—and inadequate—consideration to the option of robust sub-federal sovereigns. When discussing the notion of a well-ordered society, Rawls remarks that “an enduring and secure democratic regime [is] one not divided into contending doctrinal confessions and hostile social classes.”232 This, however, is not an argument against robust sub-federal sovereigns. Rather, it is a conclusory remark begging the question of what degree of nationwide unity on substantive political convictions is necessary to achieve a stable democratic society.

229 Rawls, supra note 36, at 40-41 (emphasis added).
230 Id. at 10.
231 For additional examples of Rawls’s forgetfulness of sub-federal polities, see discussion infra Section III.B.2-4; Section III.C.
232 Rawls, supra note 36, at 38.
Elsewhere Rawls suggests an answer to this very important question when he states that political liberalism need not—and indeed cannot—accommodate unreasonable comprehensive doctrines.\(^{233}\) Rawls defines unreasonable doctrines as those that are “a threat to democratic institutions, since it is impossible for them to abide by a constitutional regime except as a *modus vivendi,*”\(^{234}\) because their adherents merely await the time they attain the political might that will enable them to foist their comprehensive doctrines on all others.\(^{235}\) Although universalist political perfectionists would appear to run afoul of this requirement, localist political perfectionist philosophies do not: Insular perfectionist communities strive for perfection within their communities and have no interest in influencing those outside their community, while exemplary perfectionist communities hope to lead people outside their community to change their ways solely by way of example.\(^{236}\) Thus, neither of these localist political perfectionisms is lying in wait for the opportunity to foist their comprehensive doctrines on others through politics.

Elsewhere, Rawls provides an alternative formulation of unreasonable comprehensive doctrines that is predicated on the notion of “mutual toleration”:

But if a comprehensive conception of the good is unable to endure in a society securing the familiar equal basic liberties and mutual toleration, there is no way to preserve it consistent with democratic values as expressed by the idea of society as a fair system of cooperation among citizens viewed as free and equal.\(^{237}\)

Similarly, Rawls states that “reasonable persons”—the only persons whose preferences need be accommodated by political liberalism—are those who “recognize and accept the consequences of the burdens of judgment, which leads to the idea of reasonable toleration in a democratic society.”\(^{238}\) The “burdens of judgment” are those factors that account for enduring disagreement despite conscientious attempts to reason with others.\(^{239}\)

\(^{233}\) See id. at 64; Rawls, Public Reason Revisited, supra note 167, at 806.

\(^{234}\) Rawls, Public Reason Revisited, supra note 167, at 806.

\(^{235}\) See id. at 781.

\(^{236}\) See supra text accompanying notes 57-60.

\(^{237}\) Rawls, supra note 36, at 198 (emphasis added).

\(^{238}\) Rawls, Public Reason Revisited, supra note 167, at 805 (emphasis added).

\(^{239}\) See Rawls, supra note 36, at 54-58.
Exemplary and insular political perfectionism satisfy the requisite degree of tolerance to qualify them as reasonable comprehensive doctrines under this approach as well. Such perfectionists are willing to allow other persons to live in accordance with their comprehensive views outside their perfectionist zones. This form of toleration is consistent with a well-ordered society and fits comfortably with the “reasonable society” where “all have their own rational ends they hope to advance, and all stand ready to propose fair terms that others may reasonably be expected to accept.”

Fair terms are those that permit all people the liberty to self-actualize in accordance with their views of what self-actualization requires, to the extent that the exercise of such liberty is consistent with others’ exercise of the same. Accordingly, the “reasonable society” includes perfectionist zones.

In formulating his definition of unreasonable comprehensive doctrines, however, Rawls insists on a stricter degree of toleration than is necessary to secure a reasonable and well-ordered society. He asserts that “reasonable persons will think it unreasonable to use political power, should they possess it, to repress comprehensive views that are not unreasonable, though different from their own.” In other words, Rawls claims that reasonable comprehensive doctrines must encompass a second form of toleration that demands that persons refrain from taking substantive political stands anywhere—even in their own zones—with respect to contentious issues. But why need this be true at sub-federal levels? The perfectionist’s toleration of those outside her zone satisfies Rawls’s definition of “reasonable” insofar as she is willing to propose and abide by fair terms of cooperation provided others do and she is willing to bear the consequences of the burdens of judgment.

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20 Id. at 54.
21 Id. at 60.
22 Cf. Kymlicka, supra note 34, at 82 (distinguishing between toleration of individuals and toleration of groups and arguing that although “diverse religions need to tolerate each other[,] it is less obvious why we must tolerate dissent within a religious (or ethnic) community”). Kymlicka also argues that “[t]he mere fact of social plurality, disconnected from any assumption of individual autonomy, cannot by itself defend the full range of liberal freedoms. If people’s private identity really is tied to certain ends, such that they have no interest or ability to question and revise them, then group rights might be a superior response to pluralism.

Id. at 93.
(namely, to allow others who think differently to live elsewhere in accordance with their comprehensive views). Rawls's failure even to contemplate the possibility of the first form of toleration is another example of his oversight of sub-federal sovereigns.

In short, there is no reason why reasonable comprehensive doctrines cannot include localist political perfectionist doctrines, under which people within a perfectionist zone must conform to certain strong norms but people outside can live as they wish. Rawls's argument assumes that his second form of toleration is the only possible conclusion that a "reasonable" person who accepted the "burdens of judgment" could reach and the only possible form of toleration that could support a well-ordered society. But neither of these assumptions is true. Perfectionist viewpoints are a plausible conclusion to which a person who accepted the "burdens of judgment" could come to, and perfectionist viewpoints, subject to the above-generated caveats of well-orderedness, can generate a well-ordered society.

243 See Rawls, supra note 36, at 54.
244 Some recently have questioned altogether the analytic integrity of the concept of toleration. See, e.g., Bernard Williams, Tolerance: An Impossible Virtue?, in Tolerance, supra note 34, at 18; T.M. Scanlon, The Difficulty of Tolerance, in Tolerance, supra note 34, at 226. To the extent such arguments are valid, they further undermine Rawls's position and support the view that communities should be permitted to pursue contested visions of the good within select political zones.
245 Even if the values and policies pursued by political perfectionists within their zones are deeply offensive to mainstream society—and if, conversely, mainstream society's values and policies are similarly anathema to political perfectionists—there is no reason why such deep differences in outlook are inconsistent with a well-ordered society. As Rawls himself argues, the burdens of judgment that reasonable people accept imply a toleration (in at least the first sense discussed above) of reasonable comprehensive doctrines (like political perfectionism) that are different from theirs. See Rawls, supra note 36, at 60. Furthermore, as argued above, such an arrangement of robust sub-federal sovereigns is more likely to generate a citizenry with an "effective sense of justice" and, accordingly, a well-ordered society. Many of the most generally detested beliefs—white supremacists and fascists, for example—would not have to be accommodated because they do not satisfy the requirement of well-orderedness. See supra text accompanying notes 187-188. As a practical matter, however, there may be some limits to the activities that can be permitted in perfectionist enclaves. See supra note 191.
3. "Public Reason" Does Not Preclude Political Perfectionism

As noted above, Rawls argues that a well-ordered democracy is not a "community" in the sense of a "society governed by a shared comprehensive religious, philosophical, or moral doctrine. . . . To think of a democracy as a community (so defined) overlooks the limited scope of its public reason founded on a political conception of justice."

I argue above that this argument is mistaken insofar as it ignores the possibility of political communities within robust sub-federal sovereigns. After defining Rawls's conception of "public reason," I will show here that Rawls's assertion that "to think of a democracy as a community overlooks the limited scope of its public reason" also is incorrect for three reasons. The first is that under Rawls's own definition of the concept, public reason can support the pursuit of virtue that is characteristic of perfectionist political communities. The second and third reasons relate, once again, to Rawls's neglect of sub-federal sovereigns. Specifically, Rawls does not account for the fact that the "public" to whom public reasons must be directed can be sub-federal communities for certain purposes and, in any event, that public reason's requirements need not apply to sub-federal levels of government.

a. Rawls's Definition of Public Reason

For Rawls, "public reason" is the set of reasons that judges, legislators, executives, candidates for public office, and, ideally, citizens can properly proffer to justify both the structure of government and the exercise of government's coercive powers of lawmaking and law application. Public reason encompasses only those justifications that one may "reasonably think that other citizens might also reasonably accept," assuming such reasonable acceptance is done freely, without pressure or manipulation. Rawls states that

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246 See supra note 224 and accompanying text.
247 Rawls, supra note 36, at 42 (emphasis added).
248 See supra Section III.B.2.
250 Id. at 770-71.
Public reasoning aims for public justification. We appeal to ... ascertainable evidence and facts open to public view, in order to reach conclusions about what we think are the most reasonable political institutions and policies. Public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept.231

Stated differently, "[p]olitical liberalism views [the] insistence on the whole truth in politics as incompatible with democratic citizenship and the idea of legitimate law,"232 Comprehensive doctrines, however, are not wholly disconnected from political considerations under Rawls's account. Under what he labels "the proviso," full comprehensive doctrines may be introduced into political discussion "provided that, in due course, we give properly public reasons to support the principles and policies our comprehensive doctrine is said to support."233

b. Rawls's Criteria of Public Reason Do Not Preclude Perfectionist Sub-federal Sovereigns

Rawls's criteria of public reason do not preclude robust sub-federal sovereign entities within which political perfectionists may govern themselves. Recall Interconnected Welfare's notion that the state's well-being depends upon the values and behaviors of its citizens.241 Rawls acknowledges that the "good and peaceable conduct of citizens" and "the institutions needed to reproduce political society over time" are proper concerns of public reason.245 As such, the government's promotion of virtuous behaviors that political perfectionists believe to be necessary to assure good and peaceable conduct and society's continuity can be justified in terms of public reasons. This is enough to render the encouragement of these virtuous behaviors appropriate under the limitations imposed by pub-

231 Id. at 786.
232 Id. at 771.
233 Id. at 776; see also id. at 783-86 (discussing the proviso). Furthermore, citizens may invoke nonpublic reasons in the "background" nonpolitical culture of their family and voluntary associations. See id. at 768, 800.
234 See supra text accompanying notes 52-55.
lic reason because, under Rawls's conception of public reason, it is not necessary that the proponent of a rule himself be solely impelled by the public reason he advances; his convictions may be informed by nonpublic reasons, as long as he can satisfy the "proviso" and formulate arguments in support of the policy that satisfy the requirements of public reason.\textsuperscript{256}

In fact, Rawls virtually acknowledges the legitimacy, for purposes of public reason, of Interconnected Welfare's view that the polity's well-being depends upon its citizens' virtues. He points out that Patrick Henry's argument for the establishment of the Anglican Church in Virginia referred almost entirely to political values.\textsuperscript{257} Rawls quotes Henry's position that "Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society."\textsuperscript{258} According to Rawls, Henry's position exemplifies public reason insofar as "Henry did not seem to argue for Christian knowledge as good in itself but rather as an effective way to achieve basic political values, namely, the good and peaceable conduct of citizens." Rawls understands that Henry viewed "restrain[ing men's] vices" as a necessary step toward attaining a peaceful society.\textsuperscript{259} If public policies to "restrain vices" and "correct morals" can be justified by public reason, what

\textsuperscript{256} See id. at 783-84.
\textsuperscript{257} See id. at 794.
\textsuperscript{258} Id. (quoting Preamble to the Proposed Bill Establishing a Provision for Teachers of the Christian Religion (1784)).
\textsuperscript{259} Id. (emphasis added).
\textsuperscript{260} See id. at 794 ("Thus, I take [Henry] to mean by 'vices,' at least in part, those actions contrary to the political virtues found in political liberalism . . . ."). Indeed, this view was not unusual, as many of Henry's contemporaries similarly understood that the well-being of the state depended upon its citizens' character and moral virtues. See, e.g., Wood, supra note 52, at 52-53 (showing that many at the time of the American Revolution believed that "[i]t was not the force of arms which made the ancient republics great or which ultimately destroyed them [but] rather the character and spirit of their people"); id. at 68-69 (noting the belief that "[a] republic was such a delicate polity precisely because it demanded an extraordinary moral character in the people" and that for "most Americans in 1776 vicious behavior by an individual could have only disastrous results for the community").

Rawls is silent about Henry's assertion concerning the "morals of men," but it is clear from context that Henry also believed this necessary for obtaining good and peaceable conduct among citizens. Furthermore, Rawls provides no reason why the policy of correcting morals that affect peaceable conduct cannot be justified in a manner consistent with the demands of public reason by reference to the goal of peaceful relations among citizens.
types of behaviors are excluded from the subject of politics? It would seem very few—if any. As such, public reason’s strictures are not inconsistent with perfectionist-governed robust sub-federal sovereigns.

c. That the “Public” to Whom Public Reason is Directed May Be Sub-federal Communities for Certain Purposes

There is no reason why the “public” to whom public reasons must be directed cannot be sub-federal communities for certain purposes. Although Rawls tells us that public reasoning is “public justification,” that it is “argument addressed to others” based on “ascertainable evidence and facts open to public view,” and that it “proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept,”261 he nowhere defines who constitutes the relevant “public” and “others.” There is no reason why the audience of public reason—“others” and the “public”—for at all times and purposes must be the entire country, and Rawls at no point confronts the possibility that the relevant audience, for select “local” political questions, might be a sub-federal community. Yet his analysis disregards the existence of sub-federal sovereigns in our federalist system and proceeds as if the relevant audience is national.262

With respect to issues of local law, however, there is no reason why public reason’s application in San Francisco must produce results identical to its application in Salt Lake City. This is true because public reason does not in and of itself entail any substantive limitations on what policies become law. Instead, public reason refers to a procedure for political decisionmaking that is designed to ensure that citizens will accept the procedure’s outcomes as “legitimate” law that is deserving of respect.263 As such, it makes perfect sense that public reason be considered satisfied as long as the reasons for a piece of local legislation that affects local citizens are reasons that they “could reasonably accept.”264

261 Rawls, Public Reason Revisited, supra note 167, at 786 (emphasis added).
262 See id. at 766-68.
263 See id. at 767-71.
264 Id. at 786.
If indeed sub-federal communities sometimes are the appropriate audience for purposes of public reason, the scope of public reason vis-a-vis local issues is even greater than discussed above.\textsuperscript{265} This is because while the requirement that public reason proceed "from premises we . . . think others could reasonably accept to conclusions we think they could also reasonably accept"\textsuperscript{266} certainly imposes some real limits on public reason as applied to the country as a whole, there are virtually no substantive limitations that this requirement would create as applied to homogeneous perfectionist communities due to the virtually infinite range of convictions potentially held by perfectionist communities. It might be objected that this very fact proves that application of public reason to sub-federal communities would undermine the very concept of public reason. But further consideration shows such an objection to be incorrect for the same reasons mentioned above: The concept of public reason does not in and of itself entail any substantive limitations on what policies might be enacted into law but refers to a procedure designed to ensure that citizens view promulgated laws to be legitimate and deserving of being followed.

\textit{d. That Public Reason's Requirements Need Not Apply to All Levels of Government}

As discussed above, aside from the two circumstances he specifies—in background associations and by operation of the proviso—Rawls concludes that nonpublic reasons have no place in politics. For example, according to Rawls, it is flatly improper for a legislator (or citizen, for that matter) to seek to advance a legal rule solely because she believes that it would promote human relations or behaviors that help to make people virtuous.\textsuperscript{267} Such a rule can properly be pursued in politics only if the legislator and citizen can provide public reasons—as defined above—for its adoption.

But why need this be so at all levels of government?

Rawls might well respond that this is because the role of public reason is "to specify the nature of the political relation in a consti-

\textsuperscript{265} See supra Section III.B.3.b.
\textsuperscript{266} Rawls, Public Reason Revisited, supra note 167, at 786.
\textsuperscript{267} See id. at 780.
tutional democratic regime as one of civic friendship. But, again, why need this be true at every sub-federal level? What if the members of one community in a sub-federal enclave desired a relationship not of "civic friendship" among themselves but one where their local government functioned as an Aristotelian educator and enforcer of virtue? Civic friendship is perhaps a necessary aspiration within a political "structure we enter only by birth and exit only by death," but this characteristic of irreversible and unending membership need not apply to sub-federal sovereigns that abide by the compatibility requirement.

The nonobviousness of banishing nonpublic reasons from all levels of political life is underscored by considering the bedrock theory of the "majority principle" that connects public reason to the legitimacy of law in Rawls's view. He writes,

the outcome of the [legislature's] vote...is to be seen as legitimate provided all government officials, supported by other reasonable citizens, of a reasonably just constitutional regime sincerely vote in accordance with the idea of public reason. This doesn't mean the outcome is true or correct, but that it is reasonable and legitimate law, binding on citizens by the majority principle.

Law's legitimacy thus results from a majority consensus that the law can be justified by public reasons. The key question here, however, is a majority of whom? After all, what makes the exercise of majority rule more justifiable when it is a majority of the nation, as opposed to a majority of a self-selecting subgroup, when the rule is to be applied only to the self-selecting subgroup? Rawls provides no answer because there is no answer.

The bottom line is that Rawls's description of public reason's task—that it answer "[b]y what ideals and principles...are citizens who share equally in ultimate political power to exercise that power so that each can reasonably justify his or her political decisions to everyone?"—is unnecessarily strict. To impose the requirements of public reason identified by Rawls not only to the

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268 Id. at 771.
269 See supra note 50 and accompanying text.
270 Rawls, Public Reason Revisited, supra note 167, at 769.
271 Id. at 798 (emphasis added).
272 Id. at 770.
basic national government structure and national legislation but also to every sub-federal level of government is to overly constrain the government's role. Rawls's conception of public reason may well be an appropriate constraint with regard to nationwide policies. But it is an unnecessary, nonaxiomatic, and inappropriate limit on the operation of politics at sub-federal levels.

4. The "Political Conception of the Person" and "Priority of Right" Problematically Incorporate Contested Theories of Personhood

There are two additional possible objections to the argument that robust sub-federal sovereigns are the best way to realize the foundational goals of political liberalism. Both objections founder on the same shoals: They are unnecessarily based on contested conceptions of personhood. This has the result of creating a basic structure of politics that unnecessarily excludes all political perfectionists.

a. The Political Conception of the Person Unnecessarily Incorporates a Contested Theory of Personhood

A possible objection to the argument that robust sub-federal sovereigns are the best means to realize the objectives of political liberalism is based on Rawls's notion of the "political conception of the person." The objection would be that political perfectionists are excluded from the original position by virtue of Rawls's notion of "the political conception of the person," which is what is "drawn on in setting up the original position." If political perfectionists fall outside the "political conception of the person," they accordingly cannot participate in the original position and, as such, a person in the original position need not consider that she might represent a political perfectionist.

Rawls's definition of the "political conception of the person" would appear to exclude all political perfectionists. Rawls states that the political conception of a person "begins from our everyday conception of persons as the basic units of thought, deliberation, and responsibility." This conception of the person is inconsistent with the view of personhood underlying Interconnected Welfare and Government Socialization insofar as Interconnected Welfare

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22 Rawls, supra note 36, at 29.
23 Id. at 18 n.20.
community self-governance could be said to take issue with the notion that persons are the basic units of responsibility and government socialization could be said to contest the idea that persons are the basic units of thought and deliberation.\textsuperscript{275} Another component of Rawls's definition of the political conception of the person is that citizens "are seen as capable of revising and changing [their conception of the good] on reasonable and rational grounds, and they may do this if they so desire."\textsuperscript{276} These notions appear to be at odds with the strong view of government socialization's understanding that there are prerequisites to rational deliberation that only the government can reliably supply.\textsuperscript{277} These notions also are inconsistent with the weak view of government socialization that there are experiential prerequisites to rational deliberation that only the living examples of virtuous communities can provide.\textsuperscript{278} But it is problematic under Rawls's express terms to exclude exemplary and insular political perfectionists from participation in the original position by virtue of the political conception of the person. According to Rawls, political liberalism wrongly precludes a comprehensive doctrine from flourishing\textsuperscript{279} if the well-ordered society of political liberalism fails to establish, in ways that existing circumstances allow—circumstances that include the fact of reasonable pluralism—a just basic structure within which permissible forms of life have a fair opportunity to maintain themselves and to gain adherents over generations.\textsuperscript{280} Excluding political perfectionists from participating in the original position by virtue of the political conception of the person is

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\textsuperscript{275} See supra Section I.A.
\textsuperscript{276} Rawls, supra note 36, at 29 (emphasis added).
\textsuperscript{277} See supra text accompanying note 56.
\textsuperscript{278} See supra text accompanying notes 57-60.
\textsuperscript{279} Rawls acknowledges that the basic political structure and the liberal state's laws will have the effect of foreclosing certain types of lifestyles, observing that "it is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time." Rawls, supra note 36, at 193. Similarly, Rawls writes that "social influences favoring some [comprehensive] doctrines over others cannot be avoided by any view of political justice." Id. at 197. "[T]he basic institutions... inevitably encourage some ways of life and discourage others, or even exclude them altogether." Id. at 195.
\textsuperscript{280} Id. at 198.
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problematic under these criteria. As shown above, insular and exemplary political perfectionism are “permissible forms of life” because they qualify as reasonable comprehensive doctrines and are consistent with well-orderedness.281 Nor are there any reasons why these forms of localist political perfectionism are not “allow[ed]” by “existing circumstances.”282 As such, their exclusion by means of Rawls’s definition of the political conception of the person, which would lead to a basic structure that would not allow localist perfectionists space within which they can self-govern and which hence would preclude such comprehensive doctrines from continuing, is by Rawls’s own terms unfair.

Thus, *Political Liberalism*’s objectives are best realized by extending participation in the original position to exemplary and insular political perfectionists. As such, to the extent Rawls’s political conception of the person would exclude all political perfectionists from participation, the conception is problematic and requires reformulation. In particular, there is no need to build into the original position the assumption that persons are the basic units of responsibility.283 Similarly, it is unnecessary to assume that rationality is prior to and independent of experience.284 These two assumptions constitute contested theories of personhood; political perfectionism, for example, is bottomed on the inverse conception of personhood. Further, the two assumptions are unnecessary to political liberalism insofar as eliminating them does not supplant the rationality necessary for the original position to operate; the original position can generate a determinate outcome (a basic political structure that includes vigorous sub-federal sovereigns, as described in this Article) by employing a conception of rationality stripped of these two assumptions.285 For these reasons, to incorporate these assumptions,

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281 See supra text accompanying notes 187-188, 233-240.
282 In any event, even if “existing circumstances” disallowed localist political perfectionists from flourishing, that, in light of this Part’s argument, would be a reason for seeking to alter the “existing circumstances” and not a reason for accepting localist perfectionists’ demise. The task of political philosophy, after all, is to identify what must be changed in light of foundational commitments, not merely to justify the status quo.
283 As Rawls does. See Rawls, supra note 36, at 18 n.20.
284 See id. at 29-35.
285 It is possible that this is not the case with respect to universalist political perfectionists, who adopt a strong view of Government Socialization, see supra text accompanying note 56. But it is unnecessary to resolve this question because, in any event,
as Rawls does in his political conception of the person, is to adopt unnecessary contested theories of personhood and to thereby unnecessarily exclude all political perfectionists from participating in the original position.

b. The Priority of Right is Coherent Only within a Problematically Narrow Theory of Personhood

A related objection is that perfectionism in sub-federal sovereigns would run afoul of the so-called "priority of right." For Rawls, "admissible ideas of the good must respect the limits of, and serve a role within, the political conception of justice." Stated differently, "[t]he priority of liberty implies in practice that a basic liberty can be limited or denied solely for the sake of one or more other basic liberties, and never . . . for reasons of public good or of perfectionist values."

A conception of the priority of right that disallows limitations of liberty in pursuit of "perfectionist values" is internally consistent, however, only within a particular contested theory of personhood—one that rejects Government Socialization. After all, according to adherents of Government Socialization, the "basic liberty" of self-actualization requires that the government pursue perfectionist values. As argued above, the best realization of political liberalism's objectives entails inclusion rather than exclusion of exemplary and insular political perfectionists to avoid unnecessarily constructing the polity on a contested theory of personhood. Rawls's conception of the priority of right, internally consistent as it is within only one contested theory of personhood, accordingly, is not a valid objection to the claim that political liberalism's ideals are best realized by permitting robust sub-federal sovereigns. There is

universalist political perfectionists would not qualify as reasonable comprehensive doctrines and therefore cannot be accommodated under political liberalism. See supra text accompanying note 236.

26 Rawls, supra note 36, at 173-76.
26 Id. at 176 n.2.
26 Id. at 176.
27 Id. at 295.
28 See supra Section III.B.4.a.
no reason to believe that the particular theory of personhood that gives rise to the priority of right must be the basis for all governing entities for every political community.

C. Because Rawls Overlooks Sub-federal Sovereigns He Mistakenly Concludes That the Liberal State Cannot Achieve a Strong Form of Neutrality

Rawls's neglect of sub-federal sovereigns leads him to underestimate the extent to which liberalism can achieve neutrality-in-effect. Rawls correctly takes issue with those liberal theorists who argue that the liberal state can be neutral-in-effect vis-a-vis comprehensive doctrines when he argues that “[n]eutrality of effect or influence . . . [is] impracticable.” In seeking to establish the maximal extent of political liberalism’s neutrality, however, Rawls concludes that political liberalism cannot satisfy a strong form of neutrality under which “the state is not to do anything that makes it more likely that individuals accept any particular conception rather than another unless steps are taken to cancel, or to compensate for, the effects of policies that do this.”

But this undersells political liberalism’s capabilities. Because Rawls neglects sub-federal sovereigns, he mistakenly abandons a strong form of neutrality, for robust sub-federal sovereigns are the precise mechanism by which such a strong form of neutrality can be realized. Sub-federal sovereigns can correct the unalterable tendency of the liberal state to encourage citizens to adopt par-

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291 Rawls, supra note 36, at 194. Rawls notes that “[h]istorically one common theme of liberal thought is that the state must not favor any comprehensive doctrines and their associated conception of the good.” Id. at 190. Ronald Dworkin’s claim with regard to this point is illustrative and educative: He states that a liberal society is one where political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions of the good, the government does not treat them as equals if it prefers one conception to another . . . .

Ronald Dworkin, Liberalism, in Liberalism and its Critics, supra note 52, at 60, 64. Dworkin refers to this as the “conception of equality” that is liberalism’s “constitutive political morality.” Id. Rawls, however, acknowledges that “[n]eutrality of effect or influence . . . [is] impracticable” and aspires instead to create a polity in which “basic institutions and public policy are not to be designed to favor any particular comprehensive doctrine.” Rawls, supra note 36, at 194.

292 Rawls, supra note 36, at 193.
ticular conceptions of the good over others. Robust sub-federal sovereigns can function as corrections insofar as they provide the possibility for political space that is not subject to the non-neutral effects of general society's institutions and laws. People in the original position, not knowing the convictions of the persons they represent, therefore would opt for a basic structure that permitted achievement of the strong form of neutrality that robust sub-federal sovereigns can attain. Because it expands the set of reasonable comprehensive doctrines that can flourish, a basic structure accommodating robust sub-federal sovereigns consequently is the best way of actualizing Rawls's first principle of justice.293

In sum, Rawls mistakenly concludes that political liberalism cannot accommodate political perfectionists because he neglects to give consideration to the federalist system's division of powers among multiple overlapping sovereigns and instead directs his analysis only to the federal government. As a result of this oversight, Rawls adopts unnecessarily narrow conceptions of "reasonable" comprehensive doctrines and "reasonable" people, embraces a problematically broad conception of toleration, creates an inadequate conception of public reason, and imports unnecessary contested theories of personhood into his formulation of the political conception of the person and the priority of right. In the process, Rawls underestimates the extent to which political liberalism can achieve neutrality-in-effect.

IV. SYNTHESIZING AND APPLYING THE FRAMEWORK

This Part first unites the conclusions of Parts II and III by providing a finalized framework for analyzing, under liberal political theory, which political perfectionists should be accommodated and to what extent. Section IV.B applies this framework to several of the political perfectionists discussed in Part I to clarify how adoption of this Article's approach would alter how American law addresses issues concerning community self-governance.294

293 For these reasons, robust sub-federal sovereigns also can lead to a better well-ordered society than does Rawls's understanding of political liberalism.
294 See supra note 42.
A. Synthesis

Subject to several caveats, a constitutional democracy that reflects the values of Rawls's *Political Liberalism* should grant political perfectionists autonomy to self-govern. The first set of caveats concerns which political perfectionists ought to be accommodated. Only species of political perfectionism that are consistent with well-orderedness should be accommodated. This means that perfectionists unwilling to live peacefully with their neighbors cannot be given space to self-rule. Exemplary political perfectionists meet this criterion, as do insular perfectionists like Native Americans that do not seek to change general society but only wish to maintain their cultural heritage. Moreover, only perfectionisms that qualify as reasonable comprehensive doctrines should be accommodated. Perfectionist philosophies that are willing to tolerate practices at variance with theirs—in the sense of agreeing not to prevent non-community members, by anything apart from acceptable political means, from behaving as they wish outside the boundaries of their community—satisfy this criterion. Once again, both exemplary and insular perfectionists satisfy this requirement. Finally, the requirement of well-orderedness might entail numerical limitations on the absolute number of politically empowered sub-federal communities that can be allowed.

The second set of caveats concerns the limitations on self-governance placed on those perfectionist communities allowed the opportunity to largely self-govern. Well-orderedness precludes the sub-federal sovereigns from stockpiling armaments, waging war, appointing and receiving foreign emissaries, making treaties with foreign nations, and the like. Finally, well-orderedness requires education of both perfectionists and nonperfectionists concerning the theoretical underpinnings of the liberal political theory that mandates robust sub-federal sovereigns and the limitations upon them.

The second set's other caveats flow from the compatibility requirement's criterion of real opt-out rights. Liberal political theory does not generate a unique solution to the content of the opt-out right, but there are two possible approaches that help to highlight relevant considerations. The Immigrant Model is premised on the view that a sense of adventure and dissatisfaction with the status quo is sufficient to secure a real opt-out right as long as people are not improperly precluded from exiting. Under this approach, a
sub-federal polity is proscribed from irregularly applying its laws to block exit. Also excluded are rules that either de facto preclude exit or that attach unreasonably high emotional costs to the exercise of opt-out. When these conditions are met, a real opt-out option exists under the Immigrant Model.

The Median Model builds on the Immigrant Model’s criteria but imposes additional requirements intended to inform all citizens of competing lifestyles and equip them with the ability to earn a minimal living in general society. Under this approach, political perfectionists must allow the minimal amount of education deemed necessary by nonperfectionists to enable informed decisionmaking as between competing lifestyles. Financial exit costs imposed by a community for the purpose of discouraging opt-out may be unreasonable, whereas financial costs designed to recoup the community’s economic investments to some extent likely would be acceptable. The mere fact that individuals raised in the community might have diminished earning potential outside the community vis-a-vis what their earning potential would have been had they been educated outside a perfectionist community, however, is not a relevant cost for purposes of opt-out. The pertinent measure is the gap in standard of living, if any, between what the exiter enjoyed within the community and what he likely can earn outside.

Under both the Immigrant and Median models, the regular application of criminal laws that have the effect of precluding exit due to incarceration and the like are not violative of opt-out. Consenting informed adults may limit their going-forward options by agreeing to live in a perfectionist zone that exacts punishments (such as imprisonment) that, if meted out to an individual, would prevent her from exiting for some time. Courts of one of the overlapping sovereigns (such as the federal government), though, may well have a role through habeas review to ensure that fair procedures are followed before punishments are exacted.29

B. Application

As a preliminary matter, it bears noting that the framework developed in this Article says nothing as to what legal form—municipality, association, or otherwise—the robust sub-federal

29 See infra text accompanying notes 331-351.
sovereign should have. Labels matter little, if at all. What matters is whether there is some sub-federal sovereign to which the political perfectionist community has access that is sufficiently empowered to allow the perfectionists to self-govern in accordance with their views of what self-actualization requires. Consequently, this Article’s framework does not permit the identification of any particular legal decision—for example the California Appeals Court’s undermining of the Theosophists’ residential association—as being wrongly decided. The framework does permit the conclusion, however, that legal reform is appropriate to permit the Theosophists a significant measure of self-governance if (1) the Theosophists are political perfectionists that satisfy the framework’s first set of criteria and (2) they are unable, under current law, to self-govern in any legal form to the degree deemed necessary by them for their members to fully self-actualize. The framework also highlights relevant lines of inquiry that should have been pursued in past litigations and provides a principled way of critiquing the consistent animosity to community self-governance reflected in case law and much of the recent scholarly literature.

1. The General Neglect to Consider Whether the Communities Seeking Self-Governance Are Political Perfectionists

   Except with respect to Native Americans, courts and legislatures have failed to consider the threshold question of whether the group seeking to self-govern is a political perfectionist community, that is whether, in the view of the community, self-governance is necessary to enable community members to fully self-actualize. A preference for self-governance not derived from political perfectionism need not be accommodated as a matter of the first principle of justice because people in the original position would be content to have such preferences, as other mere preferences, to be worked out in the ordinary course of politics. Institutional structures that impinge on people’s abilities to self-actualize in accordance with their views of what self-actualization requires, on the other hand, are of sufficient moment that people in the original position would select a basic structure that provided opportunities for accommodation (subject to the numerous caveats developed above).

   Courts and legislatures generally have failed to give any real attention to the reasons why communities have sought to isolate
themselves and self-govern. In the case of the Rajneesh, for example, the district court and a commentator blithely ignored the community's claim that the self-governance sought was necessary for their community and its members to fully actualize. The appellate court that rejected the Theosophists' attempt to create a residential association similarly neglected to consider the role that the community claimed the residential association would play in its members' development. The Senate debates concerning the Mennonites also ignored this issue.

Failing to inquire into the community's view of the role of self-governance is a critical oversight. Courts and legislators should be encouraged to correct this mistake by examining the role self-governance plays in the view of the community.

2. Theosophists

As mentioned above, the first step in applying the framework is to assess the role the zone (in this case, a residential association) was deemed to play in the community's view so that we can ascertain whether we are dealing with political perfectionists who presumptively should be accommodated. It is not possible to tell from the record whether the Theosophists viewed the residential association as essential for their movement's and its members' flourishing or merely as a useful arrangement. One could well imagine the former. As stated in Taormina Theosophical Community v.

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2 The Rajneesh claimed that Rajneeshpuram was necessary to serve both as a mecca for pilgrims and as a holy place within which the most spiritual of its members could permanently dwell so as to maximally develop, untainted by the outside world. See supra text accompanying notes 130-134. The district court entirely ignored the Rajneeshees' allegations that "incorporation as a city is necessary to provide essential services to members of their religion so that they can practice the tenets of Rajneeshism," Sperow, supra note 130, at 932 (citing Complaint for Declaratory Relief at 16, State v. City of Rajneeshpuram, (D. Or. filed Mar. 28, 1984) (No. 84-359)), and Sperow, who noted this allegation, also did not pay it particular attention.


4 See supra notes 1-3 and accompanying text. Furthermore, Senator Edmunds's argument in those debates that the country could not survive if there were zones is a slippery slope. See 43 Cong. Rec. 3055 (1874). Surely the country can survive with some zones—consider, for example, Indian country—and the principle of well-orderedness provides a basis for limiting the number of zones without completely shutting the door to them the way that Senator Edmunds's argument does.
Silver. Theosophy is concerned with spiritual matters.... The Society has three basic objectives: to work towards the universal brotherhood of man; to study and to compare religions, sciences and philosophies, and finally to explore the psychical powers latent in man. The Theosophists who sought to establish the residential association, which was designed to "exclude those not sharing [such] attitude[s]," could well have held the view that their movement's and its members' development necessitated a mecca of sorts where some of its adherents could engage in the pursuits that constituted the society without interruption from the outside world.

If the Theosophists indeed qualify as political perfectionists, they would easily satisfy the framework's other criteria. Theosophists meet the first set of qualifications concerning which political perfectionists should be accommodated, as the movement does not espouse violence or other forms of forceful interference with nonmembers and otherwise appears to qualify as a reasonable comprehensive doctrine. The Theosophists also meet the second set of criteria concerning limitations on what the zone can do to its members. The zone did not seek to stockpile weapons or send out diplomatic emissaries. Further, there do not appear to have been any significant exit costs that would have contravened the compatibility requirement. By virtue of the deed restrictions limiting ownership and occupancy to Theosophists who were at least fifty years old, the most intractable opt-out issues under even the stricter Median Model—those concerning education of youth—do not even arise. The largest opt-out cost is the financial cost of having to sell the residential units subject to the restrictive covenants, which, by virtue of limiting the demand, most likely would reduce the price that could be commanded. There is no reason to believe, however, that this would amount to a cost that in effect would preclude exercise of opt-out.

3. The Oneida Community

Next consider the framework's application to the Oneida community. For the reasons discussed above, there is no question that
the Oneidas qualify as an insular perfectionist community that consequently satisfied the framework's first set of criteria. Furthermore, it would seem that the community also satisfied the second set of criteria, even under the Median Model. Children received a broad education, in which they studied such subjects as algebra, Greek, astronomy, arithmetic, grammar, Latin, French, physics, geometry, chemistry, musical theory, Hebrew, English composition, trigonometry, geography, elocution, rhetoric, and shorthand. The quality of the education was such that Oneida children went on to attend fine universities such as Yale. Further evidence that the compatibility requirement was met is that community members were free to leave, as many in fact did. Finally, complex marriage, the practice core to the community with which New York State interfered, leading to the community's demise, did not run afoul of any of the second criterion's other requirements. For these reasons, New York State's successful efforts to end the community were unjustified.

4. Rajneesh

Consider next the framework's application to the Rajneesh. As discussed above, there are reasons to believe that the Rajneesh qualify as political perfectionists, as the Rajneesh believed that all aspects of work in their holy city were forms of worship, that living in the city alone allowed the possibility of an integrated life, and that their religion required a central mecca where the most spiritually gifted could soar and to which nonresidents could make pilgrimages. Furthermore, their nonviolent disposition and effort to spread their message through example qualify them as exemplary political perfectionists who satisfy the framework's first set of criteria.

The second set of criteria are likewise satisfied, again, under even the stricter Median Model. The facts looked to by the district

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302 See supra Section I.B.2.
303 See Klaw, supra note 14, at 98.
304 See id. at 214.
305 See id. at 93, 214-15.
306 See supra notes 91-100 and accompanying text.
307 See supra Section I.C.2.
308 See id.
court in *Rajneeshpuram* to justify the denial of political community—including, for example, that the city officials determined both who resided in and visited the city\(^{309}\)—are not at all relevant to the framework’s second set of criteria, and those facts that do matter were not given consideration. Had the district court inquired, it would have discovered that the Rajneesh children were learning science, math, social studies, and comparative cultures and preparing for the SATs to gain admission to colleges. Further, Rajneeshpuram planned to join the public school system and set a formal curriculum in accordance with state guidelines.\(^{310}\) Moreover, there were a relatively large number of people who had joined and left Rajneeshpuram, suggesting that there were not other de facto barriers to exercise of the opt-out option.\(^{311}\) Because the Rajneesh appear to satisfy the framework’s two set of criteria, they should have been permitted to self-govern under some institutional form.\(^{312}\)

5. *The Framework’s Contribution to Understanding the Constitutionality of Rajneeshpuram and Kiryas Joel*

Although this is not the place to elaborate how this Article’s normative vision can be doctrinally implemented,\(^{313}\) one example of how the normative framework may guide doctrinal development may be helpful. The central case relied on by the district court in *Rajneeshpuram* was *Larkin v. Grendel’s Den*,\(^{314}\) in which the Supreme Court struck down as unconstitutional a Massachusetts


\(^{310}\) See FitzGerald, supra note 129, at 273.

\(^{311}\) See id. at 353-54.

\(^{312}\) To these observations and conclusions it might be objected that the district court understandably did not look to the framework’s criteria because it was bound to apply the applicable Establishment Clause jurisprudence. This is true, but irrelevant, for two reasons. First, the point of this Article’s framework is to provide a set of normative criteria, derived from generally accepted liberal premises, for determining which political perfectionists ought to be accommodated and to what extent. The fact that there is a disjunction between current and desired practices is not an argument against the framework. Second, clarity concerning what is desirable from the standpoint of our liberal political convictions can be expected to guide law’s evolutionary development. This second point will be elaborated in the next subsection.

\(^{313}\) For a discussion of several doctrinal approaches to politically empowering select communities, see Rosen, supra note 127.

statute that gave churches the discretionary power to veto liquor license applications of premises located within five hundred feet of them.\textsuperscript{35} Four members of the Supreme Court relied upon \textit{Grendel's Den} in \textit{Board of Education of Kiryas Joel Village School District v. Grumet}\textsuperscript{36} for the principle that “a State may not delegate its civic authority to a group chosen according to a religious criterion.”\textsuperscript{37} This proposition poses a threat to the constitutional viability of Kiryas Joel insofar as the four members of the Court also stated that for Establishment Clause purposes the “\textit{group} chosen according to a religious criterion” could refer to religious \textit{individuals} such as “the qualified voters of the village of Kiryas Joel.”\textsuperscript{38}

This Article’s framework—which is sympathetic to municipal perfectionist zones such as Rajneeshpuram and Kiryas Joel subject to the aforementioned caveats—suggests that \textit{Grendel’s Den} is distinguishable from \textit{Rajneeshpuram} and \textit{Kiryas Joel}. The key distinction is that the delegation in \textit{Grendel’s Den} was made to all churches in the state, not to religious bodies that were self-contained in separatist zones populated by people who voluntarily elected to be subject to a political perfectionist government empowered with extraordinary powers to pursue the good.

To elaborate more fully, delegations to religious authorities contained within confined perfectionist zones present a fundamentally different case than \textit{Grendel’s Den} in three potentially dispositive respects. The first concerns the sheer quantum of entanglement. Delegation to select sub-state entities entails less entanglement insofar as it would empower far fewer religious entities than all the state’s churches. Second, the effects of such delegation would not directly affect all of general society but would be largely, if not entirely, contained within the zone. Third, for the reasons articulated in this Article, there are principled liberal reasons for permitting extraordinary degrees of self-governance to political perfectionists within geographically circumscribed zones.

Support for the principle of upholding the delegation of powers to religious authorities within select zones while prohibiting \textit{Grendel’s Den}-esque delegation to all churches in a state also can be found

\textsuperscript{35} See \textit{Rajneeshpuram}, 598 F. Supp. at 1214.
\textsuperscript{36} 512 U.S. 687 (1994).
\textsuperscript{37} Id. at 698.
\textsuperscript{38} Id. (emphasis added).
by looking to the operation of military law in military zones.\textsuperscript{319} Constitutional principles—including the First Amendment—are given different application in military zones than in general society.\textsuperscript{320} For example, in contrast to the free speech protections afforded civilians, in the military context the Court has upheld the ban of political speeches by civilians,\textsuperscript{321} the imposition of prior restraints on petitions,\textsuperscript{322} and the punishment of speech that is merely "intemperate, . . . disloyal, contemptuous and disrespectful."\textsuperscript{323} The Constitution's application to the military provides two lessons. First, constitutional principles' applications may vary depending on the community to which they are applied. Second, the borders of geographically distinct zones are a suitable bright line to delineate where the nonstandard applications of constitutional principles should be applied.

In short, the Article's conclusions provide a principled reason for limiting \textit{Grendel Den}'s holding to delegations made to religious bodies in general society, which is consistent with constitutional precedent standing for the proposition that the application of constitutional principles may vary as between general society and discrete zones.

6. Native Americans

Consider finally the framework's application to Native Americans.\textsuperscript{334} Native Americans plainly qualify as insular political perfec-

\textsuperscript{319} For a more extended development of this argument, see Rosen, supra note 127, at 49-53.
\textsuperscript{320} See, e.g., Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."); see generally Rosen, supra note 127, at 21-25 (showing that the Constitution has been held to require and proscribe different activities in military enclaves than in general society).
\textsuperscript{322} See Brown v. Glines, 444 U.S. 348 (1980).
\textsuperscript{323} Parker, 417 U.S. at 739, 759; see also United States v. Zimmerman, 43 M.J. 782 (Army Ct. Crim. App. 1996) (holding that a military judge did not violate the First Amendment when instructing jury on the accused's affiliation with a white supremacist organization); United States v. Wilson, 33 M.J. 797 (A.C.M.R. 1991) (holding that a military policeman's blowing his nose on the American flag was not protected speech).
\textsuperscript{334} I do not mean to suggest that this Article's analytical framework is the only justification for Native American self-governance. Clearly there are powerful historical
tionists, as they seek to retain the autonomy to self-govern largely to sustain their distinctive cultural and religious heritages. As such, Native Americans clearly satisfy the framework's first set of criteria. Indian country likewise satisfies the second set of the framework's criteria under the Median Model, as Native Americans are free to opt-out of general culture to return to Indian country and from Indian country to relocate to general American culture.  

Application of the framework to the doctrinal landscape of American Indian law leads to the conclusion that much federal legislation interfering with Native American autonomy is unjustified. For example, apart from federal laws prohibiting infanticide or child murder, which could be justified on the basis of the compatibility requirement, there ought not to be a Major Crimes Act, which interferes with purely internal Indian affairs by granting federal courts jurisdiction over "major crimes" committed by Indians in Indian country. (The principle of well-orderedness, by contrast, justifies federal government regulation of Indian activities that directly affect non-Indians not living within Indian

and equitable bases as well. I only mean to suggest that, independent of these, there are general arguments deriving from liberal political theory that also support tribal autonomy.

Nor is application of the framework to Native Americans inconsistent with the suggestions of increasing numbers of scholars that the body of Native American law should be conceptualized as an ongoing negotiation among sovereigns rather than a subject fit for adjudication. See, e.g., Frickey, supra note 103, at 1777-84; P.S. Deloria & Robert Laurence, Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question, 28 Ga. L. Rev. 365, 373-74 (1994). Application of the framework is not inconsistent with a negotiation paradigm because the substance of the United States' negotiating position may well be informed by an understanding of the normative merit of Native Americans' claims for tribal autonomy. Finally, it should be clear that these commentators' suggestion, which concerns matters of tactics, is fundamentally different from Will Kymlicka's view discussed above, see supra note 34 and accompanying text, that, as a normative matter, the appropriate scope of Native American self-rule is whatever is achieved through negotiation (and not a function of principle) because tribal autonomy is "a compromise of, not the instantiation of, liberal principles." Kymlicka, supra note 34, at 96.

The author is unaware of any tribally imposed financial costs on those Native Americans who move out of Indian country. Nor are such costs imposed by the federal or by state governments on Native Americans who relocate from general society to Indian country.

This is not to suggest that there is any empirical evidence that there is a need for such laws.


See id.
country.) Nor is there justification for the vast majority of the Indian Civil Rights Act,328 which imposes obligations paralleling the Bill of Rights on tribal governments.329

The framework does provide a justification, however, for a limited portion of the Indian Civil Rights Act—its habeas corpus provision.331 As a general matter, there ought to be federal relief available for claims that tribal governments are interfering with opt-out rights. Indeed, to this extent, the habeas corpus provision is a paradigm of federal legislation that ought to be applicable to all political perfectionist zones. Such federal oversight, applied in the manner described below, is in no way inconsistent with the self-governance advocated in this Article, for (1) the zones are not wholly autonomous but are examples of multiple overlapping sov-

erigns and (2) opt-out is an essential component of a basic political structure that satisfies the first principle of justice.

Thus, for example, claims that a perfectionist government within a zone has not followed its own criminal procedures or substantive law by imprisoning a community member, thereby precluding him from exiting, are properly heard in a federal court pursuant to a habeas petition (though concerns of comity may well demand that the imprisoned person first exhaust the perfectionist community’s legal system’s remedies, assuming that such exhaustion would be relatively speedy). The appropriate substantive law baseline that the federal court should utilize in determining whether the detention is proper, however, is not American law but is the law of the zone. For, as discussed above,332 a community’s implementation of even harsh penalties against adults that are in accordance with the community’s procedures does not violate the compatibility requirement and consequently should not be interfered with by federal courts.

The recent decision of the United States Court of Appeals for the Second Circuit in Poodry v. Tonawanda Band of Seneca Indians333 demonstrates how the framework should guide legal analysis

329 Cf. Pommersheim, supra note 110, at 60 (discussing the viability of tribal courts to render justice fairly and reliably).
331 See supra Section II.B.3.
332 85 F.3d 874 (2d Cir. 1996).
pertaining to habeas review of zones. Application of the framework reveals that much of the Second Circuit’s reasoning was flawed.

Plaintiffs in *Poodry* were members of the Tonawanda Council of Chiefs who had accused other members of the Council, including its Chairman, of misusing tribal funds, suspending tribal elections, excluding members of the Council from the tribe’s business affairs, and burning tribal records.334 After lodging their accusations, plaintiffs formed a competing government that they denominated the Interim General Council of the Tonawanda Band.335 Without receiving any prior notice, plaintiffs later were informed by letter that the original Council of Chiefs had stripped them of their Indian citizenship and ordered them immediately to leave the tribe’s territory.336 The plaintiffs brought suit in federal district court, claiming that the tribal council’s actions violated their rights under the Indian Civil Rights Act (“ICRA”).337 The district court dismissed for lack of jurisdiction.338

Because the Supreme Court had ruled that federal courts only have jurisdiction to hear ICRA violations under ICRA’s habeas provision, 25 U.S.C. § 1303,339 the sole question before the Second Circuit concerned the applicability of section 1303. That section provides that “[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.”340 Subject matter jurisdiction thus turned on whether the tribe’s banishment order constituted a “detention by order of an Indian tribe.”341 Despite the fact that ICRA’s habeas provision employs different statutory language than other habeas statutes—ICRA speaks of “detention” whereas the other statutes utilize the term “custody”—the court concluded that it had to “conduct the same inquiry under [section] 1303 as required by other habeas statutes.”342 The court

334 See id. at 877.
335 See id.
336 See id. at 878.
337 See id. at 879.
338 See id. at 876.
341 25 U.S.C. § 1303; *Poodry*, 85 F.3d at 889 (“We must ascertain whether the petitioners are being ‘detained’ within the meaning of § 1303.”).
342 *Poodry*, 85 F.3d at 890.
then looked to the case law under the general habeas statutes that concern federal and state "custody"\textsuperscript{345} to define "detention" for purposes of ICRA's habeas provision.\textsuperscript{344} The court concluded that the general habeas statutes' "custody" requirement is met by either physical imprisonment or "sever[e]... actual or potential 'restraint[s] on liberty.'"\textsuperscript{346} Pursuant to its view that this same test applied to ICRA's "detention" requirement, the Second Circuit determined that the banishment orders constituted severe restraints on liberty and concluded that the orders consequently created federal subject matter jurisdiction under section 1303.\textsuperscript{346}

\textit{Poodry's} reasoning, though not its ultimate conclusion, is flawed. The different words "detention" and "custody" ought to be given different constructions. Habeas review is derivative of a federalist relationship of overlapping sovereignty. Just as the overlapping sovereignty relationship of the federal government and the states differs from that of the federal government and tribal governments, the substance of the federal government's habeas review also should vary as between federal review of state and tribal governments. The Court has given weight to this distinction in past decisions, as in \textit{Iowa Mutual Insurance Co. v. LaPlante},\textsuperscript{347} where, although federal courts generally are free to exercise jurisdiction without first exhausting state remedies in cases where states have concurrent jurisdiction, eight Justices held that federal courts should allow tribal courts to exhaust tribal judicial remedies in cases where there is concurrent diversity and tribal jurisdiction.\textsuperscript{348} Federal habeas relief should be calibrated to the nature of the relationship between the particular overlapping sovereigns, and federal habeas corpus review of tribal governments ought to be limited to ensuring that the framework's second set of criteria—those relating to the compatibility requirement and opt-out—are met.

\textsuperscript{343} 28 U.S.C. §§ 2241(c)(3), 2254(a) (1994).
\textsuperscript{344} \textit{See} \textit{Poodry}, 85 F.3d at 893-95.
\textsuperscript{345} Id. at 894 (quotation omitted).
\textsuperscript{346} See id. at 895.
\textsuperscript{347} 480 U.S. 9 (1987).
\textsuperscript{348} See id. at 14-20; see also id. at 22 (Stevens, J., concurring in part and dissenting in part) ("[A]s between state and federal courts, the general rule is that the 'pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'") (quoting \textit{McClellan v. Carland}, 217 U.S. 268, 282 (1910)).
This interpretation works well with the statutory language. The term chosen by Congress in the ICRA’s habeas provision—“detention”—reflects the usual type of tribal order that interferes with the exercise of opt-out (i.e., imprisonment and other physical restraints that preclude a member from leaving). “Detention” also should be construed, however, to cover those tribal orders that otherwise implicate the compatibility requirement. Banishment is such an order. Banishment can implicate the compatibility requirement insofar as an aspect of the right to opt-out (which is derived from the compatibility requirement) is the right to stay within.389

Yet only select aspects of banishment orders should be subject to federal habeas review. More particularly, the tribe should be free to define the criteria for banishment (as for membership more generally, of which banishment is a subset), because determining who is and is not a member lies at the core of community and in this respect is the threshold right that must exist if community self-governance is to be possible. Stated differently, people in the original position would not agree to a form of central government oversight that had the effect of eviscerating the sub-federal sovereigns that (for the reasons discussed above) they would deem to be a necessary part of the basic political structure.

But ensuring that the banishment criteria are fairly implemented is an aspect of securing the compatibility requirement that accordingly is appropriately reviewed by the federal government. The correctness of this position can be checked by asking “what would people in the original position say?” The answer is that people in the original position likely would opt for a basic political structure in which the general government exercised oversight to ensure that the compatibility requirement is respected, so long as such over-

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389This does not suggest that compatibility also demands an unqualified right to opt-in (i.e., the absence of membership requirements, or membership criteria that are determined by the central federal government). To understand this point, recall that the compatibility requirement is derived from the first principle of justice by people in the original position. For the reasons discussed above, see supra Part II, the first principle of justice requires that select political perfectionists have extensive rights to self-governance. It follows from this that people in the original position would not make demands in the name of compatibility that eviscerate creation of the political community by stripping away the community’s power to define itself through membership.
sight was exercised in a manner that would not undo the sub-federal sovereign.

To conclude, application of this Article’s analytical framework suggests that, as the Second Circuit held, the federal district court properly had subject matter jurisdiction pursuant to section 1303 to review the Tonawanda Council of Chiefs’ banishment order. That conclusion is not reached, however, by importing into ICRA the general habeas case law that is applicable to the unique overlapping sovereigns relationship between the federal government and the states. Instead, the appropriate analysis under ICRA’s habeas provision should be driven by the unique characteristics of the very different overlapping sovereigns relationship between the federal government and political perfectionist communities. More precisely, habeas is appropriate to ensure that compatibility’s requirements are met. Further, contrary to the Second Circuit’s strong implications otherwise, federal law should not govern banishment’s substantive criteria. Rather, federal court review only should concern whether the tribal council had faithfully followed its own customary banishment procedures, as the tribal council in fact had claimed in their banishment letters.\textsuperscript{331}

V. CONCLUSION

Political perfectionism, which is comprised of perspectives that I have labeled Government Socialization and Interconnected Welfare, is the ideology that propels communities to seek to cordon themselves off from general society and govern themselves. There have been many such political perfectionist communities in the United States—Mormons, the Oneida community, the Rajneesh, Native Americans, to name but a few. Liberalism requires the

\textsuperscript{330} Although the Second Circuit stated that it did “not reach the question” of whether ICRA “imposes limitations on a tribe’s power to summarily banish its members,” Poody, 85 F.3d at 898, it went on to state in dicta that “there is simply no room in our constitutional order for the definition of basic rights on the basis of cultural affiliations, even with respect to those communities whose distinctive ‘sovereignty’ our country has long recognized and sustained.” Id. at 900-01. This observation appears to overlook the fact that under ICRA the tribal courts are empowered to—and have—generated statutory doctrines of “due process” and “equal protection” that vary significantly from the way federal courts have construed these constitutional terms. See supra note 127 and accompanying text.

\textsuperscript{331} See Poody, 85 F.3d at 878.
accommodation of political perfectionist communities that wish to largely opt-out of general society and govern themselves, subject to only a small set of caveats. It is the operation of the original position that teaches us that liberalism should accommodate political perfectionists. People in the original position, not knowing the ideological commitments of the people they represent, would opt for the first principle of justice. The first principle of justice demands a basic political structure that, subject to only a few caveats, allows people the opportunity to self-actualize in accordance with their views of what self-actualization requires. Thus, subject to these caveats, political perfectionists should be allowed the opportunity to govern themselves in some sub-federal sovereigns so they can self-actualize in accordance with their views of what self-actualization requires.

The caveats, themselves part of the first principle of justice, impose limitations both with respect to which political perfectionists should be accommodated and to what extent they should be free to self-govern. One caveat is that the basic political structure must create a well-ordered society. This caveat means that only certain political perfectionists can be accommodated—those political perfectionists who are willing to live peacefully with those living outside the zone. Exemplary and insular perfectionists meet this requirement. Well-orderedness also places some substantive limitations on what actions can be undertaken by political perfectionists within their zones; for example, they cannot stock weapons or conduct diplomacy with foreign countries. Well-orderedness also prescribes certain educational requirements and may impose some numerical limitations with respect to the number of sub-federal sovereigns that the country can accommodate.

Another caveat is the compatibility requirement. This caveat demands that citizens in perfectionist communities have the right to exit and relocate to nonperfectionist polities (and vice versa). This “opt-out right” generates several substantive limitations on what political perfectionists may do within their zones. At a minimum, although liberal political theory alone cannot uniquely determine the opt-out right’s contents, political perfectionist communities may prevent their members from leaving under only highly circumscribed conditions, and the communities cannot impose emotional costs that effectively preclude exit. Furthermore,
opt-out may require that the zones provide an education to community members that would enable exiters to earn reasonable livelihoods outside the zone and that enable community members to make informed choices as to whether they should remain or leave the zone. The concrete substance of these limitations are determined by considering what people in the original position, not knowing the convictions of the persons they represent, would accept. The result is a set of real limitations on political perfectionists that still provides considerable room for self-governance.

It is notable that Rawls himself in Political Liberalism expressly states that he does not believe that liberalism can accommodate political perfectionists. This is a part of Rawls’s more general conclusion that political liberalism cannot satisfy a strong form of government neutrality: “[T]he state is not to do anything that makes it more likely that individuals accept any particular conception rather than another unless steps are taken to cancel, or to compensate for, the effects of policies that do this.”

These two conclusions of Rawls’s are incorrect. Rawls concludes as he does because his analysis neglects sub-federal sovereigns and focuses exclusively on the federal government. Robust sub-federal sovereigns—which include municipalities, tribal governments, and residential associations—can help achieve a strong form of neutrality because they can function as correctives for the inevitable tendency of the liberal state’s policies to encourage citizens to accept some particular conceptions of the good over others. In fact, a basic political structure that accommodates robust sub-federal sovereigns in the form of self-governing perfectionist communities is the best realization of Political Liberalism because it is the only mechanism for giving full effect to the first principle of justice by allowing adherents of all reasonable comprehensive views the opportunity to self-actualize in accordance with their views of what self-actualization requires. Rawls’s neglect of sub-federal sovereigns leads him to adopt unnecessarily narrow conceptions of “reasonable” comprehensive doctrines and “reasonable” people, to embrace a problematical broadly conception of toleration, to create an inadequate conception of public reason, and to import contested theories of personhood into his formulation of the politi-

352 Rawls, supra note 36, at 193.
cal conception of the person and the priority of right. The neglect of sub-federal sovereigns also leads Rawls to undersell liberalism by mistakenly concluding that it cannot achieve a strong form of neutrality-in-effect.

We can now see that liberalism’s duties to political perfectionists provide a response to Richard Briffault’s belief that there is no “compelling normative basis for an ideological commitment to localism.” That is, liberalism itself provides a compelling normative basis for a commitment to the political empowerment of select political perfectionists. The liberal argument developed here also highlights the incongruity of Christopher Eisgruber’s argument in service of his critique of the Kiryas Joel case that “assimilation, far from being the enemy of diversity, is perhaps the only means for reconciling this country’s commitment to pluralism with its commitment to justice.” At least with respect to political perfectionists, imposing assimilation by refusing them the opportunity to self-govern violates rather than vindicates the first principle of justice. For the same reason, Will Kymlicka is mistaken in his conclusion that accommodating political perfectionist sub-groups like Native Americans is a “compromise of, not the instantiation of, liberal principles.” Finally, Clayton Gillette’s argument that residential associations should not be permitted to pursue policies inconsistent with a “consensus of the broader society,” which he equates with what the Supreme Court says the Constitution means, suggests too broad a limitation on permissible activity within perfectionist zones. Well-orderedness and the compatibility requirement together provide the appropriate substantive limitations on perfectionist self-governance.

More generally, the Article’s proposed solution rests on the federalist political structure of overlapping sovereignty. The framework, after all, in its essence is a method first for determining which groups should be permitted to constitute themselves as sub-

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353 Briffault, supra note 31, at 393.
354 Eisgruber, supra note 30, at 102-03.
355 Kymlicka, supra note 34, at 96.
356 Gillette, supra note 32, at 1435.
357 This Article’s analysis does not necessarily contradict Gillette’s position since the argument developed here does not require that empowerment occur at the level of residential associations.
federal sovereigns and then for identifying the appropriate relationship between the perfectionist and the general sovereigns. The structure of overlapping multiple sovereigns permits the necessary coordination of all United States citizens, including members of perfectionist communities, while retaining the potential for significant institutional and legal variations across sub-federal polities. In fact, full utilization of the potential that inheres in the federal system of overlapping sovereigns is the only way to fully realize the foundational liberal aspirations that are expressed in Political Liberalism's first principle of justice.