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## The Educational Autonomy of Perfectionist Religious Groups in a Liberal State

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### Abstract

This Article draws upon, but reworks, John Rawls' framework from *Political Liberalism* to determine the degree of educational autonomy that illiberal perfectionist religious groups ought to enjoy in a liberal state. I start by arguing that Rawls mistakenly concludes that political liberalism flatly cannot accommodate Perfectionists, and that his misstep is attributable to two errors: (1) Rawls utilizes an overly restrictive "political conception of the person" in determining who participates in the original position, and (2) Rawls overlooks the possibility of a "federalist" basic political structure that can afford significant political autonomy to different groups within a single country. With these insights, I argue that some, though not all, religious Perfectionists are consistent with a stable liberal polity, and explain why foundational Rawlsian premises require that Perfectionists be accommodated to the extent possible.

My ultimate conclusions are that liberal polities ought to grant significant autonomy to those illiberal groups that satisfy specified conditions, and that the autonomy of such "eligible" illiberal groups is subject to two further constraints, which I call "well-orderedness" and "opt-out." The autonomy to which eligible Perfections are entitled includes the authority to educate their children in a way that provides a fair opportunity for the groups to perpetuate themselves. The constraint of well-orderedness, however, permits the State to impose educational requirements that facilitate peace and political stability. Accommodating eligible illiberal groups, subject to these constraints, is an instantiation of liberal commitments, not a compromise of liberal values.

### Keywords

Rawls; Political Liberalism; political conception of the person; federalism; perfectionism; education; exit; Kymlicka; Sen; Waldron

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The scope of the educational autonomy of religious groups in a democratic state is one facet of the larger question of how liberal polities should deal with illiberal<sup>1</sup> communities in their midst. This is not to suggest that all religious communities are illiberal, but only that the most difficult questions in the field of education arise with respect to illiberal religious communities. I believe the answer is best approached as follows.<sup>2</sup> A cornerstone of liberal democracy is that governmental authority rests on citizen consent. But because it is unrealistic to expect that each generation should establish a new constitution that remakes government to reflect the consent of that generation, and for other reasons as well,<sup>3</sup> the most that can be expected is hypothetical consent. My approach to determining the governing structure to which citizens hypothetically consent builds upon John Rawls's framework in *Political Liberalism*, though it deviates from it in some important respects. It also draws on important contributions by Will Kymlicka, Jeremy Waldron, and Amartya Sen.

Briefly, I claim that (a) foundational commitments require that liberal polities grant significant autonomy to those illiberal groups that satisfy certain (relatively narrow criteria, but that (b) the autonomy of such "eligible" illiberal groups is subject to two constraints that I call "well-orderedness" and "opt-out." The autonomy to which they are entitled includes the authority to educate their children in a way that provides a fair opportunity for the groups to perpetuate themselves. Accommodating eligible illiberal groups, subject to the two constraints, is an instantiation of liberal commitments, not a compromise of liberal values.

The essay proceeds as follows. Part I identifies some insights from Amartya Sen's recent book that are particularly relevant to this essay's

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<sup>1</sup> I do not intend to provide a formal definition of "illiberal," but I am referring roughly to groups that are structured along patriarchal, theological, racist, classist, or homophobic lines. Such groups tend to reject core liberal commitments associated with such values as equality and the liberty of individuals to choose their role and station in life. It may be argued that what I refer to as "illiberal" groups can be characterized as embracing liberal values, albeit differently understood from the way contemporary secular regimes understand liberal values. The present paper does not consider such arguments, but assumes instead that some religious groups espouse values deeply antagonistic to liberalism, and considers the degree to which foundational liberal commitments impel liberal regimes to accommodate such "illiberal" religious groups.

<sup>2</sup> I began exploring many of the ideas that are developed here in two previous works: "The Outer Limits of Community Self-Governance: A Liberal Theory", 84 *Virginia Law Review* 1053–1144 (1998), and "'Illiberal' Societal Cultures, Liberalism, and American Constitutionalism", 12 *Journal of Contemporary Legal Issues* 803–842 (2002).

<sup>3</sup> See R. Barnett, *The Presumption of Liberty* (2004).

contractarian argument. Part II considers the implications for religious groups of Kymlicka's well-known defense of minority cultural rights. In so doing, Part II defends Kymlicka's argument against several trenchant criticisms by Jeremy Waldron, and also points out some respects in which Kymlicka's framework needs to be enriched.

Part III, the core of this essay, suggests that Rawls' *Political Liberalism*, properly understood, provides an appropriate framework for determining the degree of educational autonomy that illiberal religious groups ought to enjoy in a liberal state. But Part III is not a straightforward application of Rawls' framework, for it argues that Rawls mistakenly concludes that political liberalism cannot make room for Perfectionists. Rawls' mistake is attributable to two errors: his "political conception of the person" is too restrictive, and he overlooks the possibility of a "federalist" basic political structure that can afford significant political autonomy to different groups within a single country. With these insights, Part III argues that some, though not all religious Perfectionists are consistent with a stable liberal polity, and explains why foundational Rawlsian premises require that Perfectionists be accommodated to the extent possible. Part III then explains how these conclusions implicate the question at hand concerning the educational autonomy of religious groups. The essay closes with a short conclusion.

My framework does not purport to provide a comprehensive set of considerations that appropriately inform the scope of educational autonomy of religious communities in every liberal state. Longstanding compromises and practices, past historical injustices, and what is practically necessary to maintain political stability may be relevant factors in some circumstances. But the perspective provided by political theory is important, even if not determinative. Among other things, the understanding afforded by political theory allows an appreciation of what costs, if any, are entailed when a polity elects to give religious groups some measure of educational autonomy.

## **I. The Continuing Relevance of Social Contractarian Approaches to Choosing Institutions**

My approach in considering illiberal groups' educational autonomy in liberal polities is of the social contractarian type, in the tradition of Rousseau, Locke, and Kant. Before proceeding, I feel it is important to respond to an argument recently put forth by Amartya Sen in his new book *The Idea of Justice*. Sen rejects contractarianism and champions instead what he claims to be an alternative stream of non-contractarian enlightenment writers

that includes, according to Sen, Adam Smith, Condorcet, Wollstonecraft, Bentham, Mill, and Marx. Sen assimilates these writers into what he calls a social choice theory-inspired approach to justice.<sup>4</sup> A response to Sen's thoughtful critique is therefore appropriate for one such as myself who continues to rely on contractarianism.<sup>5</sup>

Sen makes many important points. He rightly critiques the contractarians' tendency to equate justice with the identification of a unique, "transcendentally" ideal set of governmental institutions.<sup>6</sup> Sen argues instead that any account of justice must take into consideration the actual "social realizations" of institutional arrangements, which turn not only on institutions but on how people in a given society behave.<sup>7</sup> Moreover, Sen persuasively argues that rather than focusing on perfect institutions to which citizens unanimously would assent, much can be gained through a more minimalist approach that aims to eliminate or minimize universally recognized injustices (such as famine and slavery). The argument I provide below draws on Sen's constructive criticisms at several junctures.

But Sen oversells the implications of his arguments vis-à-vis contractarianism. Rather than slaying contractarianism,<sup>8</sup> Sen's barrages highlight ways in which it should be reworked<sup>9</sup> and establish that contractarianism is an incomplete tool for determining what justice requires and that consequently requires supplementation.<sup>10</sup> But Sen's approach does not displace

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<sup>4</sup> See A. Sen, *The Idea of Justice* 86 (2009).

<sup>5</sup> Although Sen's 400-plus page book is far too deep and wide for me to provide anything approaching an adequate treatment here, I feel it necessary to address several arguments he propounds that have direct relevance to the questions addressed in this paper.

<sup>6</sup> See Sen, *supra* note 4, at 68, 84–85.

<sup>7</sup> *Ibid.*

<sup>8</sup> See Sen, *supra* note 4, at 69–71. Moreover, virtually all of Sen's firepower is directed at Rawls' second principle of justice, which concerns distributive justice. Sen and others convincingly disprove Rawls' claim that reasonable people would unanimously adopt the difference principle by identifying a set of plausible alternative principles. The analysis I undertake concerns Rawls' first principle of justice – the priority of liberty – with which Sen is largely in agreement.

<sup>9</sup> For example, there is no reason why contractarianism cannot take account of people's actual behavior and the actual consequences of governmental institutions. See Sen, at 68. Indeed, it seems that doing so would only strengthen contractarianism. Similarly, Sen inveighs against the contractarians' tendency to neglect the wisdom that can come from looking at the experiences of people outside the political community that is the subject of the social contract. See Sen, *supra* note 4, at 70. But there is nothing inherent in contractarianism that demands such ethnocentrism, and again, expanding the range of considerations can only be expected to improve contractarianism.

<sup>10</sup> For example, Sen convincingly argues that justice can impose obligations in matters that do not fall within the jurisdiction of any governmental institutions. For example, one

the need for contractarianism. Sen acknowledges the enduring significance of governmental institutions,<sup>11</sup> but his approach neither explains how governmental institutions should be chosen nor why their exercise of power is legitimate. Although Sen rightly inveighs against the contractarians' exclusive focus on institutions, a full theory of justice must guide the choice of institutions and justify their exercise of power. Contractarianism performs these important functions, and performs them well: the cornerstone of contractarianism is that citizens' consent legitimizes the choice of institutions and their exercise of power, and I suspect that this idea reflects a broad consensus in liberal states.

Indeed, it is not at all clear that Sen himself abandons contractarianism, although I cannot fully demonstrate this here. After all, the vehicle that transports readers to all Sen's conclusions about what justice demands is public reasoning.<sup>12</sup> But *why* does public reasoning impose duties? Sen does not directly answer this question.<sup>13</sup> One possibility is that the demands of justice are somehow self-animating. This sounds quite natural law-like, and at the very least requires a justification that Sen does not supply. Another possibility is that Sen relies on unstated contractarian assumptions, equating the conclusions of public reasoning with what people would agree to.

However Sen answers the question of why the conclusion of public reason imposes (or identifies) the duties of justice, in the end there may not be much gap between Sen's reliance on public reason and the hypothetical consent that Rawls and I invoke.

## II. Kymlicka, Waldron's Critique, and the Need for a Richer Framework

### A. Kymlicka

Before coming to the Rawlsian framework that comprises my main argument, I briefly examine Will Kymlicka's powerful and elegant argument in defense of protecting minority cultures because it has ready implications for religious communities.<sup>14</sup> Kymlicka's argument turns on his

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can speak of the requirements of justice in connection with transnational and global phenomena without necessarily requiring the creation of transnational or global institutions.

<sup>11</sup> Sen, *supra* note 4, at 82.

<sup>12</sup> See, e.g., Sen, *supra* note 4, at 324 ("From earlier chapters of this book, it should be clear how central the role of public reasoning is for the understanding of justice").

<sup>13</sup> Sen comes closest to doing so in pages 31–51, yet even there a response to the question identified above in the text is more assumed than provided.

<sup>14</sup> W. Kymlicka, *Multicultural Citizenship* 70–169 (1995).

understanding of the role that “societal culture” plays in an individual’s life. Kymlicka claims that societal culture “provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres.”<sup>15</sup> Cultures are “embodied in social life” by being “institutionally embodied” in schools, the media, the economy, and government.<sup>16</sup> This type of embodiment accounts for the critical role that societal culture plays in shaping its members.<sup>17</sup>

According to Kymlicka, access to a societal culture is a precondition to freedom. “[F]reedom involves making choices amongst various options, and our societal culture not only provides these options, but also makes them meaningful to us.”<sup>18</sup> As a result, “[f]or meaningful individual choice to be possible, individuals need... access to a societal culture.”<sup>19</sup> This is because “[p]eople make choices about the social practices around them, based on their beliefs about the values of these practices... [a]nd to have a belief about the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture.”<sup>20</sup>

On the basis of this understanding of societal culture, Kymlicka argues that denying persons access to their societal culture is unjust because it violates the fundamental liberal values of liberty and equality.<sup>21</sup> That is to say, whereas people in the majority culture have access to their own societal culture and the freedom to make meaningful choices among options that the dominant societal culture provides, people in minority cultures, who are not afforded access to their societal cultures, lack this freedom of choice. That the majority culture permits those from minority cultures to adopt the majority’s societal culture is not sufficient to counter this inequality because most people are strongly attached to *their* particular societal culture.<sup>22</sup> The fact that they *can* adopt another culture is too costly a precondition to the exercise of freedom to make it just to deny them access to their own societal cultures.<sup>23</sup>

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<sup>15</sup> Kymlicka, *supra* note 14 *Ibid.*, at 76.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*, at 83.

<sup>19</sup> *Ibid.*, at 84 (emphasis added).

<sup>20</sup> *Ibid.*, at 83.

<sup>21</sup> *Ibid.*, at 108–15.

<sup>22</sup> *Ibid.*, at 85–86.

<sup>23</sup> *Ibid.*, at 86. Kymlicka correctly notes that this conclusion, which is based on generalizations about human needs, is unaffected by the fact that some individuals might elect to abandon the culture into which they were born and adopt another. *Ibid.*

### B. Waldron's Critique

Jeremy Waldron has sharply criticized Kymlicka's argument as "guilty of something like the fallacy of composition."<sup>24</sup> Waldron believes that "Kymlicka's argument shows that people need cultural materials," but does not establish that people need a single cultural framework that serves the purposes Kymlicka's claims. According to Waldron, Kymlicka's argument fails because cultures are not pristinely distinctive, but instead are *mélanges* drawn from disparate cultural sources. From this, Waldron argues, it follows that

the ethical importance of cultural wholes or integrated cultural frameworks is thrown into question. With it goes the idea that it is important for each person to be related to a secure and integrated framework via her membership in some community in particular... A person needs cultural meanings; but she does not need a homogeneous cultural framework.<sup>25</sup>

Put more bluntly, Waldron thinks he has demonstrated that "*membership in a particular community, defined by its identification with a single cultural frame or matrix, has none of the importance that Kymlicka claims it does.*"<sup>26</sup>

But Waldron's argument hardly undermines Kymlicka's claim. Even if Waldron is correct that most cultures contain elements that originated in other cultures, his argument falls short of establishing his conclusion because it neglects the fact that the receiving culture may have *adapted* the foreign elements. Indeed, there is strong empirical evidence that this phenomenon of "adapted adoption" (as I dubbed it elsewhere) is widespread.<sup>27</sup> The process of adapted adoption has several components. The receiving culture may literally rework the meaning of the foreign element.<sup>28</sup> The receiving culture must also necessarily determine what weight or importance is to be ascribed to the foreign element, particularly when it

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<sup>24</sup> J. Waldron, "Multiculturalism and Melange", in R.K. Fullinwider (ed.), *Public Education in a Multicultural Society* 102 (1996).

<sup>25</sup> *Ibid.*, at 104.

<sup>26</sup> J. Waldron, "Minority Cultures and the Cosmopolitan Alternative", 25 *U. Mich. J. L. Reform* 751, 786 (1991–1992) (emphasis added).

<sup>27</sup> M.D. Rosen, "Multiple Authoritative Interpreters of Quasi-Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act", 69 *Fordham Law Review* 479 (2000). Similarly, it is well established that Catholicism differs greatly between (for instance) Africa, the Scandinavian countries, and France.

<sup>28</sup> For example, biblical scholars have long explained that the Hebrew Bible reworked ancient near-Eastern myths so that they reflected Israelite conceptions of the Divine. See, e.g., J.L. Kugel, *How to Read the Bible*, 69–80 (2007).



stands in tension, or conflicts with other parts of the recipient culture. In these respects, adapted adoption is a process of integrating the foreign element so that it coheres with the rest of the receiving culture, even if in doing so it alters the receiving culture.

The process of adapted adoption helps explain why the mere fact that there are shared elements among cultures does not undermine Kymlicka's claim that cultures are meaningfully distinctive in the sense that persons (many, at least) would feel harmed if they did not have access to *their* culture. To give some concrete examples, Jewish culture remains meaningfully distinctive even if (a) the Passover Seder was modeled on Greek and Roman festive banquets and (b) the biblical author(s) borrowed from the Epic of Gilgamesh when composing the story of Noah and the flood. Similarly, Islamic culture is meaningfully distinctive even if both Islamic and Jewish law have similar dietary restrictions, and even if both religious traditions define the start of day as the time when a person is able to distinguish between two differently colored threads. In short, cultures can be meaningfully distinctive even if they share some common elements.

Consider Waldron's further critique of Kymlicka. Waldron argues that

[n]one of us *needs* to be immersed in one of the small-scale communities which, according to Kymlicka and others, are *alone* capable of securing this integrity and homogeneity. Some, of course, still may prefer such immersion, and welcome the social subsidization of their preference. But it is not, as Kymlicka maintained, a necessary presupposition of rational and meaningful choice.<sup>29</sup>

This critique rests on a misapprehension of Kymlicka's argument. Kymlicka does not claim that everyone needs to be raised in the culture of a small-scale community. Indeed, Kymlicka's equality argument implicitly acknowledges that there can be a societal culture at the level of a large country. Kymlicka's argument is that people who belong to a sub-culture must be given access to their particular (sub) cultures if they are to have liberty equal to that of members of the larger societal culture. For Kymlicka, belonging to *some* culture is a presupposition of rational and meaningful choice, not necessarily belonging to a *small* culture.

Although Waldron fails to show that Kymlicka's approach is premised on a logical fallacy, his arguments are illuminating for our purposes. First, they show that he and Kymlicka share some important common ground:

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<sup>29</sup> J. Waldron, *supra* note 26.

Waldron accepts Kymlicka's claim that culture is very important for people at least insofar as "choice takes place in a cultural context, among options that have culturally-defined meanings."<sup>30</sup> Second, both Kymlicka and Waldron recognize that their political theories rest on non-axiomatic (and therefore contestable) theories of personhood.<sup>31</sup> In Waldron's well-chosen words, even "a theory of toleration or liberal neutrality" requires a "thin theory of choice, agency, and responsibility."<sup>32</sup> Juxtaposing Kymlicka's and Waldron's theories concretely demonstrates how even a "thin" theory of personhood is invariably "controversial."<sup>33</sup> The extent to which there can be controversy even with regard to such a "thin" theory is shown in Part III(B), which contrasts Kymlicka's and Waldron's understandings with Rawls's rather different theory of personhood.

### C. *The Need for a Richer Framework*

Kymlicka makes a powerful argument for affording significant autonomy to minority cultures. Less well worked out and less convincing are two exercises of group power that he believes to be illegitimate under liberal premises. The first of these is what Kymlicka calls "internal restrictions," that is, the "demand by a minority culture to restrict the basic civil or political liberties of its own members."<sup>34</sup> Kymlicka is unfortunately vague about the contents of "civil and political liberties," although he seems to equate them with the "freedom and capacity to question and possibly revise the traditional practices of their community."<sup>35</sup> He backtracks somewhat, however, concluding that internal restrictions sometimes may be "justified, on a temporary basis, where they are required to protect the society from literal disintegration."<sup>36</sup> The second type of activity that Kymlicka claims is

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<sup>30</sup> *Ibid.*, at 102.

<sup>31</sup> See Waldron, *supra* note 26, at 759 ("Any political theory . . . must be predicated on some view of what human life is like."); Kymlicka, *supra* note 14, at 87, 90 (the reasons for people's strong bonds to their culture "lie deep in the human condition [and are] tied up with the way humans as cultural creatures need to make sense of their world, and [ ] a full explanation would involve aspects of psychology, sociology, linguistics, the philosophy of mind, and even neurology").

<sup>32</sup> Waldron, *supra* note 26, at 760.

<sup>33</sup> *Ibid.*, at n.30.

<sup>34</sup> Kymlicka, *supra* note 14, at 152.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, at 230 n.i ("Some restrictions on individual freedom within the minority community may be justified, on a temporary basis, where they are required to protect the society from literal disintegration.").

inconsistent with liberal theory is “external restrictions” that “oppress or exploit other groups.”<sup>37</sup>

Not only is there uncertainty as to the precise contents of Kymlicka’s “internal” and “external” restrictions, but Kymlicka’s framework neither offers a principled reason why minority cultures should be subject to these constraints nor why they should not be subject to additional limitations. Rawls is a much more systematic thinker, and his richer framework provides a more principled method for identifying the appropriate limits to the autonomy of minority cultures. (Interestingly, as we soon shall see, the appropriate limitations that flow from a Rawlsian framework track Kymlicka’s “internal” and “external” restrictions. The Rawlsian framework, though, provides considerably more guidance in specifying their content).

There is another respect in which Kymlicka’s framework is inadequate. Even if a minority culture desires to impose what Kymlicka deems to be impermissible internal or external restrictions, Kymlicka concludes that the majority liberal culture does not have the power to “coercively impo[se] liberalism.” Rather, the liberal state can only “offer[] various incentives for liberal reforms” to “self-governing national minorities” within the liberal state.<sup>38</sup> Kymlicka concludes that liberal states ought to relate to illiberal groups in the way that liberal states relate to illiberal *countries* or to illiberal groups located in other countries.<sup>39</sup> Kymlicka is less committal regarding other minority cultures, concluding that “[a] more complicated case involves long-standing ethnic or religious sects who have been allowed to maintain certain illiberal institutions for many years, even many generations.”<sup>40</sup> These conclusions strike me as overly accommodating of illiberal minority groups insofar as there may be *some* practices that liberal polities may legitimately elect not to accommodate. Again, Rawls’s more systematic framework facilitates a fleshing out of these types of limitations, and I address them below in Part III(E)–(F).

### III. The Original Position and the Just State

We are now in a position to proceed to Rawls’s analytical framework in *Political Liberalism*. In so doing, I shall refer back to Kymlicka’s and

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<sup>37</sup> *Ibid.*, at 152.

<sup>38</sup> *Ibid.*, at 168.

<sup>39</sup> *Ibid.*, at 164–65.

<sup>40</sup> *Ibid.*, at 170.

Waldron's understandings of culture, as well as to Sen's informative critiques of contractarianism.

*A. The Original Position and the Presumptive Need to Accommodate Religious Communities*

John Rawls's project in *Political Liberalism* is to describe 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 doctrines."<sup>41</sup> Rawls famously elucidates the basic structure of political society using the heuristic device of the "original position." Under the original position, people are to identify the fair political structure by conceiving themselves as being under a "veil of ignorance" under which they "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."<sup>42</sup> Because

the parties do not know whether the beliefs espoused by the persons they represent is a majority or a minority view... [t]hey 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.<sup>43</sup>

The veil of ignorance is therefore a heuristic for enabling people to transcend their self-interests in order to identify a just and fair political structure. Stated differently, the veil of ignorance transforms personal self-interest into society-wide interest: People in the original position choose a political structure that maximally accommodates others because they do not know whom they actually represent, and accordingly do not want to risk creating a polity that did not accommodate whomever it is *they* happened to be.

It follows that people in the original position would not "gamble"<sup>44</sup> by selecting a political structure that might preclude them from living in

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<sup>41</sup> J. Rawls, "The Idea of Public Reason Revisited", 64 *U. Chi. L. Rev.* 765, 784 (1997).

<sup>42</sup> J. Rawls, *Political Liberalism*, 305 (1996).

<sup>43</sup> *Ibid.*, at 311 (emphasis supplied).

<sup>44</sup> *Ibid.*

accordance with their religious convictions. In Rawls's words, allowing autonomy for only select persons' conceptions of the good would constitute a "gamble [that would] show that [the person in the original position] 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."<sup>45</sup> A rational person would not do such a thing.

All this has implications for the question at hand. For many, the freedom to live in accordance with one's religious convictions presupposes the existence of a religious community of which they are a part, and derivatively, an educational system that can sustain the community. The political structure chosen under the original position would accordingly be one that afforded religious communities the autonomy to educate their children so that their community can be perpetuated.

This conclusion, however, is subject to several caveats that are best organized under two categories. First, the members of some religious traditions may not be permitted to "sit at the table" and participate in the original position, and therefore the chosen basic political structure may not accommodate them. I discuss the criteria for drawing the line between participating and excluded religious traditions in Parts III(B) to III(D). Second, even regarding the participating religious traditions, the original position suggests that people would not conclude that participating religious traditions would have *unlimited* autonomy. Rather, the participants in the original position, not knowing whether they represented (participating) religious persons or non-religious persons, would opt for what Rawls calls the "first principle of justice," which constitutes a generous but non-absolute grant of liberty to self-actualize in accordance with what a person believes self-actualization requires. I examine these caveats in Parts III(E) –III(F).

#### *B. Participants in the Original Position: Rawls's "Political Conception of the Person"*

Rawls carefully defines who it is that is imagined to be a participant in the original position: it is the "the political conception of the person" that is "drawn on in setting up the original position."<sup>46</sup> That is to say, when "we" imagine ourselves in the original position, laboring to identify the structure of the just society, the "we's that we have in mind are those who conform to the political conception of the person."<sup>47</sup> Defining the political

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<sup>45</sup> Rawls, *supra* note 43.

<sup>46</sup> *Ibid.*, at 29.

<sup>47</sup> *Ibid.*

conception of the person (PCP) is therefore critical to the Rawlsian enterprise, for it is only people who satisfy the conditions of the PCP whose interests must be taken into account when setting up the basic structure of the just state. Persons who fall outside the PCP are not guaranteed that their interests will be protected; nobody in the original position will necessarily aim to protect their interests because people in the original position need not consider that they may be representing such persons.<sup>48</sup>

Rawls's PCP is importantly different from the understanding of personhood found in Kymlicka's account, and to the extent that Waldron shares Kymlicka's understanding of the importance of culture, from Waldron's as well. The PCP "begins from our everyday conception of persons as the basic units of thought, deliberation, and responsibility."<sup>49</sup> Under it, people 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."<sup>50</sup> Rawls's PCP hence does not appear to take account of the role played by societal culture in shaping people's perceptions and deliberative processes. To fully understand the different theories of personhood held by Kymlicka and Rawls, consider that, in Kymlicka's account, culture goes so far as to bound the scope of plausible options among which most individuals make choices. For Kymlicka,

[t]he freedom which liberals demand for individuals is not primarily the freedom to go beyond one's language and history, but rather the freedom to move around within one's societal culture, to distance oneself from particular cultural roles, to choose which features of the culture are most worth developing, and which are without value.<sup>51</sup>

The mere fact that Rawls's PCP incorporates a contested theory of personhood does not disqualify his theory; as Waldron convincingly argues, all political theories are premised on contestable theories of personhood.<sup>52</sup> The important question is whether the particular theory of personhood that Rawls chooses, and the people with different theories of personhood whom Rawls thereby excludes from participation in designing the just state, is wise and justifiable.

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<sup>48</sup> *Ibid.*, at 103.

<sup>49</sup> *Ibid.*, at 18 n.20.

<sup>50</sup> *Ibid.*, at 30; see also *Ibid.*, at 31–32.

<sup>51</sup> Kymlicka, *supra* note 14, at 90–91.

<sup>52</sup> Waldron, *supra* note 26, at 759.

### C. Should (Some) Illiberal Religious Groups Participate in the Original Position?

As discussed above, the PCP “begins from our everyday conception of persons as the basic units of thought, deliberation, and responsibility.”<sup>53</sup> Under it, people 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.”<sup>54</sup> Though it may appear that the PCP makes only minimalist assumptions, some religious traditions, and maybe many, do not share its understanding of personhood. Whereas the PCP assumes that individuals are the “basic units of thought,” some religious traditions take the view that people’s ideas, values, and very identities are deeply shaped by the polities in which they live.<sup>55</sup> Call this “Government Socialization.” Some religious traditions also appear to reject Rawls’s assumption that individuals are the “basic units of . . . responsibility,” and instead adopt what may be called an understanding of “Interconnected Welfare,” which maintains that an individual’s prospects for self-actualization are inextricably connected to how other individuals in the community behave and (perhaps even) believe.<sup>56</sup> The theory of personhood that gives rise to Government Socialization and Interconnected Welfare often, but not necessarily, leads to the view that government must play an extensive role in its citizens’ lives, in other words, it leads to “Perfectionism.” Perfectionists believe that society, including government, must actively promote a thick understanding of the “good” if its citizens are to be in a position to fully self-actualize.

Whether a traditional Rawlsian would exclude members of a particular religious tradition from participating in the original position ultimately turns on the definition of “basic units of thought... and responsibility.” My argument in this paper is that members of many (perhaps most) religious traditions should be included in the original position. It matters not for present purposes whether this is accomplished by construing “basic units of thought... and responsibility” sufficiently broadly to include those

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<sup>53</sup> Rawls, *supra* note 42, at 20.

<sup>54</sup> *Ibid.*, at 30; see also *Ibid.*, at 31–32 and 302.

<sup>55</sup> Similar ideas have been put forward by Will Kymlicka, Michael Sandel, Michael Walzer, and Charles Taylor.

<sup>56</sup> This notion is well captured in the Talmudic dictum of “*cal yisrael arevim zeh la’zeh*.” Babylonian Talmud Tractate Shavu’oth 39a. This means that all coreligionists “are as sureties for one another” in spiritual matters. In other words, just as a surety must pay for the insolvency of another, one co-religionist is accountable for the spiritual wrongdoing of another.

who hold some version of Government Socialization and Interconnected Welfare, or by broadening the PCP on the ground that Rawls's definition is unnecessarily restrictive. But because I believe that Rawls's definition of PCP is most readily understood as excluding theories of personhood that give rise to Government Socialization and Interconnected Welfare, I think it more accurate to say that Rawls's definition is unnecessarily restrictive and ought to be modified to include many perfectionist religious groups.

There are two reasons why perfectionist religious traditions should not be excluded *per se* from the original position. First, including them, to the extent possible, is demanded by foundational liberal commitments. Consistent with the views of most liberals, Rawls agrees that a liberal polity should be as neutral as possible, that is to say, as inclusive as possible of “comprehensive doctrines.”<sup>57</sup> The theory of personhood that gives rise to Government Socialization and Interconnected Welfare grows out of a comprehensive doctrine quite different from that which underwrites the PCP.<sup>58</sup> Political liberalism would not be true to its core commitments if its polity afforded liberty only to “others who think just as we do.” If *possible*, people holding both comprehensive doctrines should be included in the original position.

Second, there are powerful pragmatic reasons<sup>59</sup> why people holding both comprehensive doctrines should be included, if possible. In many

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<sup>57</sup> Rawls, *supra* note 42, at 198 (acknowledging that one could justly object if “the well-ordered society of political liberalism fails to establish, in ways that circumstances allow . . . a just basic structure within which permissible forms of life have a fair opportunity to maintain themselves and to gain adherents over generations”).

<sup>58</sup> I recognize that Rawls claims that his project is premised on a *political* doctrine rather than a *comprehensive* philosophical or moral doctrine (see, e.g., Rawls, *supra* note 42, at xv), but this distinction is difficult to maintain if, as others have recognized (see, e.g., J. Waldron, *supra* note 26, at 759), Rawls's political doctrine proceeds on the basis of a contestable, non-axiomatic theory of personhood.

<sup>59</sup> Do pragmatic reasons “count” from an internal Rawlsian perspective? If not, I am content to throw my lot with Sen and advocate that what *we* should do is aim for *incremental* improvements in justice rather than *perfect* justice, see A. Sen, *supra* note 4, at 106, and that an incremental improvement can be obtained by maximizing the number of participants in the original position (with the qualifications discussed above in the text). But it seems to me that such pragmatic considerations *are* agreeable to a Rawlsian. After all, many aspects of the Rawlsian framework accept contemporary realities as a given rather than look to a transcendently utopian but pragmatically unreachable state of affairs. A good example is the assumption that animates Rawls's entire project, namely, that the existence of a “diversity of reasonable religious, philosophical, and moral doctrines found in democratic societies is a permanent feature of the public culture and not a mere historical condition



countries today significant populations of people hold theories of personhood more in line with Government Socialization and/or Interconnected Welfare. It makes sense, therefore, to design a basic political structure that accommodates them, which is best done by allowing them to participate in the original position,<sup>60</sup> if it is possible to do so.

But then why should *anybody* be excluded from participation in the original position? Would it not be better if it were *wholly* inclusive?

There are two reasons for excluding some people from participation in the original position: one is legitimate, the other is not. The legitimate reason is that deciding who is included in the original position is another way of determining who is to be part of a country's political community.<sup>61</sup> It is not unreasonable to conclude that *some* people have views and values that make it *impossible* to share political community with them. This reason suggests, however, that exclusions from participation in the original position ought to be made only rarely, and that there should be a strong presumption of inclusion, particularly regarding persons who already dwell in the midst of a given country.<sup>62</sup>

Rawls's political conception of the person excludes a broader range of people than those with whom it would be impossible to share a political community. Why does he take such an approach? It seems akin to reverse

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soon to pass away." This takes as a given the borders that define existing states and that join heterogeneous populations under the banner of a single country, and aims to devise the best polity under these (not necessarily ideal) circumstances. Indeed, as best as I can tell, Rawls makes no effort to determine an ideal size of a polity, or to suggest criteria that ideally inform how membership in a political community should be determined (tasks that did not elude other political theorists with whom Rawls had intimate familiarity, such as Plato). Accordingly, Rawls's project accepts important "facts on the ground" as a given and aims to create the best possible political structure given these facts, but not necessarily the most perfect political structure imaginable. There is no reason, therefore, to assume that the pragmatic considerations adduced above fall outside a Rawlsian framework.

<sup>60</sup> Although it is theoretically possible for people to be accommodated without participating in the original position (insofar as participants could plausibly conclude to design a political structure that accommodates non-participants), any such accommodation-notwithstanding-exclusion is a second-best for two reasons. First, participation in the original position is what grounds the legitimacy of governmental authority insofar as the participants, and only they, can be said to have given their consent. Second, the underlying logic that motivates the heuristic device of the original position is that the basic political structure is better chosen by the transformation, under the veil of ignorance, of narrow self-interest into society-wide interest than by relying on others to look out for one's interests.

<sup>61</sup> See Rawls, *supra* note 42, at 300–302.

<sup>62</sup> Such a presumption of inclusivity is an aspect of Rawlsian political liberalism, but not necessarily of *all* liberal polities. I do not here pursue further this important point.

engineering: Rawls wants to conclude that his two principles of justice would be *unanimously* agreed upon by participants in the original position,<sup>63</sup> but he can obtain unanimity only by limiting those who can participate in the original position. It seems to me that this is not a legitimate justification for exclusion, for three reasons.

First, the claim of unanimity is sophistry if unanimity is achievable only by limiting who participates. Second, exclusion in order to achieve (an illusion of) unanimity masks an important problem: since unanimity is *not* actually possible, what should be done with those who never agree to society's baseline rules? This concern is particularly acute in respect to people already living within a country, especially if they are citizens.<sup>64</sup>

Third and most important for present purposes, the PCP excludes more than is necessary. A stable liberal polity can be achieved without excluding all persons who fall outside of the PCP. This can best be seen by eschewing Rawls's attempt to achieve unanimity through reverse-engineering, and instead proceeding as follows. Let us assume that the first principle of justice is fair and extraordinarily well thought-out (even if it does not command unanimous assent), and let us consider what groups can be accommodated consistently with the first principle. In other words, rather than stacking the deck, by exclusion, to achieve unanimity among participants in the original position, let us be more inclusive about who can participate in the original position, and let us exclude from accommodation only those who cannot satisfy the requirements of the first principle. As I show in the next subsection, proceeding this way demonstrates that some people falling outside the PCP *can* be, and therefore *should be*, accommodated in a stable liberal polity.

Two objections to this proposal can be anticipated. First, broadening the PCP in the manner I suggest would make it impossible to derive the first principle of justice because one must start with certain assumptions about people before one can determine what political principles they would assent to. To answer this objection, I agree that one must start with *some* assumptions concerning personhood, but the assumptions held by some Perfectionists are not necessarily inconsistent with the first principle of justice. That is to say, people in the original position, understanding that they

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<sup>63</sup> Rawls, *supra* note 42, at 299. Sen observes this point concerning unanimity as well. See Sen, *supra* note 4, at 59.

<sup>64</sup> Nevertheless, I do not explore it further here because it extends beyond the limited subject of this essay.

may be representing Perfectionists or non-Perfectionists,<sup>65</sup> would think it fair to create a basic political structure consistent with Rawls's first principle of justice.

Second, an objection may be raised that my proposal undermines the logic of the original position in particular, and social contrarian approaches in general, insofar as it posits that participants understand that it would be impossible to accommodate some of the people they potentially represent in the resulting liberal state.<sup>66</sup> But this objection is tautological; there is no good reason, apart from sheer definition, why participants in the original position would not be satisfied to create a *maximally* accommodating polity. This is particularly true because Rawls's approach cannot be said to be wholly inclusive; Rawls *also* excludes people, albeit at the front-end (by means of his PCP) rather than the back-end (by virtue of what is agreed upon in the original position). Finally, this second objection is unavailing because, as it is made clear in the next section, my proposal excludes *fewer* people than does Rawls's. Accordingly, the logic behind the second objection actually *supports* my proposal, and serves as an objection to Rawls's.

#### *D. Can Any Perfectionists Be Accommodated in the Liberal State?*

Limiting participation to a narrowly construed "political conception of the person," and excluding from the original position those religious groups that are committed to either Government Socialization or Interconnected Welfare, would be most readily justifiable (although still not necessarily justified<sup>67</sup>) if such exclusion were necessary to secure a stable liberal polity.

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<sup>65</sup> In the next section of this essay I distinguish two types of Perfectionists: Localist and Universalist. The first principle of justice would be chosen only by Localist Perfectionists. Therefore, the more precise way of phrasing the point above in text is that people in the original position, not knowing whether they were non-Perfectionists or Local Perfectionists, would agree upon the first principle of justice.

<sup>66</sup> For an illuminating discussion that explains why contrarianism is generally understood to demand that a veto power be granted to all participants, see D.M. Estlund, *Democratic Authority: A Philosophical Framework*, 57–237 (2008). Estlund rejects contrarianism on the ground that a veto is unworkable, whereas I maintain a contractarian model while jettisoning the veto (at least insofar as veto power is understood to mean that all participants must be accommodated in the just polity), for reasons provided above in the text.

<sup>67</sup> A full account of what justice demands would require a consideration of whether such groups ought to have a right to secede and to accordingly govern themselves independently. This observation highlights a possible real-world cost of Rawls's uncritical acceptance of the contemporary borders that define countries. See *supra* note 60.

The claim that people who believed in Government Socialization or Interconnected Welfare necessarily had to be excluded, which I aim to refute below, presumably runs as follows. The theory of personhood that gives rise to Government Socialization and Interconnected Welfare naturally leads to Perfectionism insofar as Perfectionists believe that government must actively promote a thick understanding of the “good” if its citizens are to be in a position to fully self-actualize. On the assumption that citizens in a country frequently have divergent and at the same time reasonable comprehensive views, a government that pursued perfectionist ends not shared by all citizens would seem to invite sectarianism and sharp fissures. Moreover, forcing some citizens to adopt comprehensive views they do not share would be the *antithesis* of liberalism.

It is on the basis of these very reasons that Rawls explicitly concludes that liberal polities cannot tolerate Perfectionism.<sup>68</sup> Rawls is mistaken, however, because political liberalism can and therefore should tolerate some Perfectionists, though not all. I explain why in two steps. Subsection 1 explains why, under Rawls’s first principle of justice, Religious Perfectionists should be accommodated if possible. Subsection 2 explains why some Religious Perfectionists can be accommodated. This analysis is relevant to the question at hand because the most difficult questions concerning the educational autonomy of religious groups arise in respect to perfectionist religious groups.

### 1. *The Affirmative Case for Accommodating Perfectionists to the Extent Possible*

The first principle of justice encompasses the liberty of citizens to self-actualize in accordance with their views of what self-actualization requires, to the extent that doing so is consistent with other citizens’ similar right to self-actualization – what may be called a reciprocal liberty to self-actualize. Creating a basic political structure that allows non-Perfectionists the opportunity to self-actualize in accordance with their views, but that does not afford the same opportunity to Perfectionists to the extent that this is possible, would violate the first principle of justice.

The first principle of justice is that “[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.”<sup>69</sup> The first principle of justice

<sup>68</sup> See Rawls, *supra* note 42, at 62; 196–197.

<sup>69</sup> *Ibid.*, at 291.

encompasses a presumptive need to accommodate Perfectionists for two reasons. First, as to subcomponent [3], Rawls 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 informed exercise of the two moral powers,”<sup>70</sup> one of which is the capacity to formulate a conception of the good.<sup>71</sup> The first principle of justice thus presumptively requires that Perfectionists have access to what they require to develop their conception of the good.

There is a second reason why Perfectionists should be presumptively accommodated under the first principle of justice. Rawls states that a “fully adequate scheme” refers to the “criterion... to specify and adjust the basic liberties so as to allow the adequate development and the full and informed exercise of... [the] capacity for a sense of justice.”<sup>72</sup> 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.”<sup>73</sup> As such, a “sense of justice” is connected to willing “compl[iance] with society’s basic institutions . . .”<sup>74</sup> Accommodating Perfectionists is consistent with the development of a sense of justice in Perfectionists because citizens are apt to willingly act in accordance with the basic structure of society if that structure allows them to live in accordance with their views of what self-actualization requires.

## 2. *Which Perfectionists Can Be Accommodated?*

Rawls mistakenly concludes that liberal polities cannot accommodate any Perfectionists because he overlooks the possibility of a federalist “basic structure” that would permit Perfectionists to dwell and maintain themselves in sub-federal polities. Rawls’s arguments against the possibility of accommodating Perfectionist communities make sense only on the assumption that there exists only a single 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

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<sup>70</sup> *Ibid.*, at 308.

<sup>71</sup> *Ibid.*, at 19.

<sup>72</sup> *Ibid.*, at 19, 333.

<sup>73</sup> *Ibid.*, at 19.

<sup>74</sup> *Ibid.*, at 35.

justice. It mistakes the kind of unity a constitutional regime is capable of without violating the most basic democratic principles.<sup>75</sup>

One may ask: Does the existence of so-called “Indian country” within the United States – where religious tribal governments are not subject to disestablishment requirements with the result that religious institutions can exercise political power over a community united by shared religious beliefs<sup>76</sup> – mean that the political structure of the United States violates “the most basic democratic principles?” 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 can self-develop in accordance with their views of what self-actualization requires.

The possibility of perfectionist carve-outs means that it is possible to accommodate some, though not all forms of Perfectionism within political liberalism. In particular, political liberalism can and therefore should accommodate “Localist” Perfectionists. The only Perfectionists for whom it cannot make room are “Universalist” Perfectionists. Localist Perfectionists desire only that their local governments be empowered to pursue perfectionist agendas, and are willing to allow other parts of society to be governed differently. There are two types of Localist Perfectionists. “Insular Perfectionists” do not think that the ideals and practices of their communities should be binding on those outside their community, but seek only to preserve themselves. This is true of many aboriginal communities. “Exemplary Perfectionists,” by contrast, hope to spur larger societal changes and alter the behavior of others outside their communities, but only by example, not by physical or political coercion. In sharp contrast to Localist Perfectionists, Universalist Perfectionists aim to achieve control of the machinery of the general (federal) government to compel others to live in

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<sup>75</sup> *Ibid.*, at 42 (emphasis supplied).

<sup>76</sup> W.C. Banby, Jr., *American Indian Law in a Nutshell*, 246 (2d ed., 1989) (noting that Pueblo tribal government and religious authorities are wholly intertwined); *Kavena v. Hamilton*, 16 Indian L. Rep. 6061, 6061 (Hopi Tr. Ct. 1988), *aff’d*, 16 Indian L. Rep. 6063 (Hopi Tr. App. Ct. 1989) (“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.”)

accordance with their views of the good. (The next section explains in greater detail why Universalist Perfectionists cannot be accommodated as a matter of liberal political theory.)<sup>77</sup>

Two other points deserve mentioning. First, the “federalist” structure that makes accommodating Localist Perfectionists possible does not necessarily require physically separate spaces within which Local Perfectionists can live and isolate themselves. Rather, a sufficient federalist structure would be a government willing to shift some regulatory authority to the Perfectionist community. Such regulatory authority need not be exercisable in a discrete physical space in which no other (non-Perfectionist) governmental entity had jurisdiction. To follow with the example of Indian country mentioned above, the state and federal governments exercise governmental power in Indian country. Furthermore, many non-Indians live in Indian country. This paper is not the place to elaborate the particulars of what a federalist structure may look like, but it *is* important to note that it does not necessarily entail geographical isolation from general society.

Second, the foregoing analysis has important implications for the stance of political liberalism towards religious communities that require less accommodation than perfectionists do. If the outer marker of what political liberalism can accommodate can extend to perfectionist religious communities, then political liberalism can accommodate religious groups that require less.<sup>78</sup>

#### *E. Limitation I: The Requirement of “Well-Orderedness”*

In addition to requiring that Perfectionists be accommodated to the extent possible, the first principle of justice also contains constraints that (1) determine which Perfectionists *cannot* be accommodated and that (2) impose discrete but important limitations and obligations upon those Perfectionists that *can* be accommodated.

The first principle of justice is that “[e]ach person has an equal right to a fully adequate scheme of equal basic liberties which is compatible with a

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<sup>77</sup> Considerations aside from principle may well lead people in a particular polity to conclude that even Universalist Perfectionists in their midst should be accommodated. Such accommodations, however, are properly understood to be violations, rather than vindications, of liberal commitments.

<sup>78</sup> The normative argument why non-perfectionist religious groups should be accommodated is different, however, than the argument regarding perfectionists, primarily because the needs for accommodations of non-perfectionists may be less pressing from their own perspectives than are the needs of perfectionists.

similar scheme of liberties for all.”<sup>79</sup> “Fully adequate scheme” refers to the “criterion... to specify and adjust the basic liberties so as to 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 well-ordered society in question.”<sup>80</sup>

The requirement of a “fully adequate scheme” imposes an important limitation on which Perfectionists can be accommodated and places constraints on those Perfectionists that can be accommodated. Rawls plausibly defines a “well-ordered society” to mean a polity 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.”<sup>81</sup> Well-orderedness thus is synonymous with conditions that permit and promote an “enduring and secure” political regime,<sup>82</sup> thereby preserving one of liberalism’s foremost accomplishments of bringing about peace and avoiding sectarian conflicts of the sort found in the centuries-long European wars of religion.<sup>83</sup> Well-orderedness means that Perfectionists can be accommodated only if they have a peaceful disposition toward their non-Perfectionist neighbors. This is why Universalist Perfectionists cannot be accommodated. There is no reason, however, to think that Localist Perfectionists are inconsistent with a well-ordered society. On the contrary, their “localist” ideologies are fully consistent with well-orderedness.

Well-orderedness also entails substantive limitations on the activities that qualifying Perfectionists can undertake. Among others, well-orderedness imposes important educational obligations. Those raised in religious perfectionist communities must be educated in a manner that encourages them to understand the justice of the polity in which they live, so that they willingly comply with the basic institutions of society.<sup>84</sup> It may be necessary to teach citizens about the political theory that justifies the basic structure of society (helping them to understand the essentials of the argument developed here).<sup>85</sup> It is also essential to equip them with the

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<sup>79</sup> Banby, *supra* note 76, at 291 (emphasis added).

<sup>80</sup> Rawls, *supra* note 42, at 333.

<sup>81</sup> *Ibid.*, at 35.

<sup>82</sup> *Ibid.*, at 38.

<sup>83</sup> *Ibid.*, at xxviii.

<sup>84</sup> Rawls’ theory imposes significant educational requirements on secular communities as well. For an illuminating discussion, see E. Callan, *Creating Citizens: Political Education and Liberal Democracy* (1997).

<sup>85</sup> Moreover, there is no reason to think that this type of education would undermine the ability of minority societal cultures to survive. Such an education is not inconsistent with



attitudes and habits required to achieve and secure a stable democratic polity. Such educational requirements do not seem to be inconsistent with the comprehensive doctrines that give rise to Localist Perfectionism.

Determining the precise contents of the “attitudes and habits” requisite for a stable democracy is a crucial task the details of which I cannot hope to flesh out here. But there is one important observation that can be made: the original position provides the appropriate framework for determining these details, suggesting that these requirements should be understood modestly rather than expansively because expansive “attitudes and habits” could lead to the unnecessary exclusion of some Perfectionists, which people in the original position would not want to do.<sup>86</sup>

In the end, the education required by well-orderedness must be settled empirically, and likely will be a function of such context-specific factors as the background attitudes of a particular illiberal religious group, the number of illiberal groups in a given state, the proportion of the state population that the illiberal group constitutes, and so forth. Sen’s argument that what matters is “actual social realizations”<sup>87</sup> has particular bite here.

#### *F. Limitation II: The Requirement of Opt-Out*

The third component of the first principle of justice is that the basic structure be “*compatible with a similar scheme of liberties for all*.” This “compatibility” requirement confirms the need to accommodate Perfectionists to

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the position advocated in this paper concerning the need to accommodate select minority societal cultures.

<sup>86</sup> Professor Walzer’s contribution to this conference makes much headway on the crucial issue of those attitudes and habits necessary for a stable liberal polity. Some of the specifics Professor Walzer identified in his public lecture, however, struck me as unnecessarily expansive. For example, Professor Walzer argued that democratic regimes require that their citizens reject “hierarchical arrangements” and freely decide political questions on their own. This appears to be an overly strict requirement insofar as many well-functioning democracies, including the United States, have had “voting blocs” in which citizens have taken their cues from religious or political leaders about whom they should support. This has been true, for instance, of the African-American community, the “Moral Majority,” and likely remains true for many mainstream Democrat and Republican voters in the United States. Although it is possible that a rejection of hierarchical arrangements may be necessary in some countries because of the number of illiberal groups present and because of other context-specific considerations, it seems difficult to maintain that it is universally necessary.

<sup>87</sup> See Sen, *supra* note 4, at 68, 84–85.

the extent possible,<sup>88</sup> but it also imposes some constraints on Localist Perfectionists. To satisfy the compatibility requirement, persons must have the right to choose in which community they can live. This entails both the option to “opt-out” of the environment in which they find themselves, and to “opt-in” to another.

To understand why, imagine a perfectionist community that sought to flatly prohibit its members from exiting. Persons living in a perfectionist community without sharing its commitments and who felt that remaining in the community impeded their ability to self-actualize would not enjoy the same liberty of exercising meaningful choice that is enjoyed by a person who lived in the majority societal culture and was satisfied by it. To make the liberty of members of perfectionist communities “compatible with a similar scheme of liberties” for those who do not identify with the perfectionist culture, people in perfectionist communities must have the ability to opt-out and leave the community into which they happened to be born and opt-in to a new culture.

Ensuring that members of a religious group have a meaningful right to opt-out has difficult educational implications and raises a host of other issues that are beyond the question at hand of educational autonomy.<sup>89</sup> The question is typically framed as follows: How much knowledge about life outside the minority culture, and how much training to support oneself and otherwise survive in the outside world, is necessary for the opt-out right to be real?<sup>90</sup> The problem for opt-out is that the education provided by the perfectionist community typically valorizes its own culture and ignores or degrades others, thereby undermining the likelihood that its members will opt for the other. The question then becomes what are the prerequisites for the decision to remain in the minority societal culture to

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<sup>88</sup> The compatibility requirement can be met only by allowing space for Perfectionists to self-actualize in accordance with their views of what self-actualization requires (to the extent possible). Not accommodating Perfectionists violates the compatibility requirement because such a non-accommodating polity would only allow non-Perfectionists the liberty of self-actualizing in accordance with their views of what self-actualization requires.

<sup>89</sup> I pay no further attention here to the scope of opt-in rights because it is not directly relevant to the question at hand concerning the educational autonomy of religious groups. I have explored this issue in some detail elsewhere. See Rosen, *supra* note 27, at 824–826.

<sup>90</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 241, 245–246 (1972) (Douglas, J., dissenting) (“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”).

be meaningful, so that the right to opt-out is meaningful and real, and not merely theoretical.

A useful way to begin to answer these questions is to refer back to the original position and ask what type of education is necessary for people to have meaningful opt-out rights. But first, we must acknowledge that such an approach cannot come close to fully answering these questions for several reasons. On one hand, the heuristic of the original position does not provide the means for determining how risk-averse its participants are. For example, there have always been innovators who have been able to opt-out of the societies into which they were born simply by virtue of their intellects, and many others for whom a sense of adventure and some degree of dissatisfaction with the status quo have sufficed to prompt them to leave their homes, as attested to by the vast history of immigration. For *these* people, the knowledge that there is an outside world, coupled with the absence of physical restraint, is sufficient to provide a meaningful opt-out right.

On the other hand, innovators and immigrants are the exception, not the norm. It might be suggested that persons in the original position should calibrate opt-out to more of a “median” risk-taking personality. This, however, invariably involves making contested psychological and sociological assumptions about the contents of such a median proclivity. Moreover, even assuming a consensus concerning the median personality, pegging opt-out to the median would be controversial because it would not provide adequate resources for persons below the median of risk-taking, who would be reluctant to leave the culture into which they have been born unless they were very well acquainted with the alternative culture and able to make a good living there.

This might lead one to suggest that opt-out should be calibrated to the most risk-averse, but this solution also comes at a cost. Educating children so that they can readily opt-out of the culture into which they were born would likely risk undermining the ability of that culture to perpetuate itself. This is particularly true for perfectionist cultures that believe that the proper road to self-actualization requires a long-term dedication to behaviors and practices that are difficult for most people at first. Such perfectionists might fear that too easy an opt-out option would entice community members away from the difficult but ultimately rewarding and correct path that community culture prescribes. For these reasons, educating children in a way that brings opt-out costs to zero would likely be rejected by people in the original position.

Although it is difficult to concretely identify the educational prerequisites of the opt-out requirement, it is possible to make some solid, useful observations. To begin, almost invariably there will be tension between the requirement of opt-out and the first-order educational preferences of a perfectionist community. The operative principle is that perfectionists can educate their children as they wish, subject to the caveat that people in the perfectionist communities be able to make informed life-style choices pursuant to non-perfectionists' understanding of what informed decision-making requires.

But what precisely *does* informed decision making require? Several things can be said. For one, meaningful opt-out does *not* mean that children raised in perfectionist communities must be educated so that they can earn what they would have earned had they been raised outside the perfectionist community. Such a concern for diminished earning potential animated Justice Douglas's partial dissent in *Wisconsin v. Yoder*, the well-known American case that exempted an Old Order Amish community from the state compulsory education law and permitted Amish children to be removed from school after the eighth grade.<sup>91</sup> But Justice Douglas's concern is misplaced, and it is the eight other Justices' understanding that is justifiable, because diminished earning power does not make opt-out a mere formality. 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 received only an eighth grade Amish education and consequently could only obtain a job as a carpenter if he elected to exit from the Old Amish order. 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. What *is* relevant is his earning capacity as a carpenter outside his community, compared with what his standard of living would be were he to remain within the Amish community. The modest lifestyle of the Amish means that even an eighth-grade education would make the opt-out rights real. More generally, the amount of education necessary to enable a community member to earn a

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<sup>91</sup> *Ibid.*, at 205, 245–46 (“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.”)

living outside the community for purposes of opt-out varies from community to community, and it depends on the community's standard of living.

It might be thought that subjecting children to a perfectionist environment in which they are deprived of access to certain books and perspectives, and thereby socialized in a certain way, necessarily deprives them of the ability to make a fully objective choice as to whether they should remain or exit the community. But this view of opt-out is unsatisfactory because *all* environments, including non-perfectionist society, socialize children.<sup>92</sup> Rawls himself reluctantly acknowledges this fact,<sup>93</sup> and this insight lies at the heart of Kymlicka's understanding of societal culture and of his assumption that people generally move around *within* their societal culture, not between or among cultures.<sup>94</sup>

Indeed, the view that cultures possess non-trivial socializing power that inclines their members to remain within them is not a deeply controversial proposition, and it has important implications for the requirements of opt-out. If the typical effect of (even liberal) culture and education is to largely ensure that members remain within their societal cultures for their lifetimes, and if people in the original position understand this to be the case, they would not think that opt-out is satisfied only when people can make fully autonomous choices to remain in their culture.<sup>95</sup> People in the original position may be satisfied with softer opt-out conditions, such as the absence of physical restraints and perhaps merely the knowledge that there exists a different world out there. Undoubtedly, more thought must be given to this important issue.

Proceeding to more controversial assumptions concerning personhood, if something like Kymlicka's understanding of culture is correct, then the heart of opt-out is not a person's ability to move from a perfectionist community to a non-perfectionist community or vice versa, but something else that is frequently overlooked. As noted above, Kymlicka argues that the

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<sup>92</sup> See, e.g., N.M. Stolzenberg, "He Drew a Circle That Shut Me Out: Assimilation, Indoctrination, and the Paradox of a Liberal Education", 106 *Harv. L. Rev.* 581 (1993); M. Halbertal, "Autonomy, Toleration, and Group Rights", in D. Heyd (ed.), *Toleration*, 111–112 (1996).

<sup>93</sup> Rawls, *supra* note 42, at 200 (acknowledging that the type of education necessary to sustain the polity he envisions "is in effect, though not in intention, to educate [children] to a comprehensive liberal conception").

<sup>94</sup> Kymlicka, *supra* note 14, at 90.

<sup>95</sup> The requirement of well-orderedness, however, may well place limits on the extent to which minority societal cultures can demonize other cultures in the process of educating their youth.

autonomy that liberalism presumes is the “freedom to move around *within* one’s societal culture, to distance oneself from particular cultural roles, to choose which features of the culture are most worth developing, and which are without value.”<sup>96</sup> If this is so, people in the original position would be deeply concerned about having the right to move from one point to another *within* their particular societal culture — what we might call an “intra-cultural opt-out right.” This would have important educational implications for religious groups, for it suggests that they cannot enforce orthodoxies in order to preclude internal criticisms and reforms of their cultures. To be sure, state enforcement of intra-cultural opt-out rights itself would risk entangling the state in supervision of the religious group and may even trigger concerns that the state was establishing religion in politics committed to non-establishment. I do not purport to definitively settle here the appropriate bounds of such an opt-out right, but only to flag the right and some issues it might implicate.

#### IV. Conclusion

The analysis in this essay suggests that people in the original position would think it fair to establish a basic political structure that allows many perfectionist groups, including many religious groups, to flourish, subject to the important but discrete limitations imposed by the requirements of well-orderedness and opt-out. A crucial implication of this analysis is that accommodating minority societal cultures is not simply something that is in the best interests of the perfectionist groups, but is in the best interest of general society. This is true because general society best lives up to its foundational liberal commitments when it allows such groups space to largely rule their lives, subject to the limitations discussed above.

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<sup>96</sup> *Ibid.*