

SEARCHING FOR THE PEACEABLE KINGDOM

**EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES
AND THE STATE.** By Carol Weisbrod.¹ Princeton University
Press. 2002. Pp. ix, 222. \$45.00.

*Mark D. Rosen*²

The Amish community disciplines its members through the *meidung* (shunning), under which community members are required to avoid business and social contact with the ostracized individual unless and until she is restored to the church fellowship (p. 65). If the shunned person brings a lawsuit for alienation of affections, defamation, or tortious interference with contract, what if anything should the court do (pp. 65-68)?

Polygamy was integral to early Mormon religious life. The United States prosecuted Brigham Young's secretary, George Reynolds, for violating an Act of Congress that banned polygamy in federal territories.³ The Supreme Court famously upheld the conviction against Reynolds's claim that the First Amendment's free exercise clause guaranteed him the right to practice his religion in accordance with his church's beliefs.⁴ Was this appropriate?

In *Emblems of Pluralism: Cultural Differences and the State*, Carol Weisbrod suggests that such questions are best approached structurally by taking account of the relationships among three entities: the individual, the group, and government. Weisbrod invokes visual metaphors to describe two possible relationships: verticality, which suggests hierarchy (p. 13), and horizontalness, which she associates with coequality and "plural-

1. Ellen Ash Peters Professor of Law, University of Connecticut.

2. Associate Professor, Chicago-Kent College of Law, Illinois Institute of Technology. Thanks to Brian Bix, Sarah H. Harding, and Dina Warner for comments. All errors are mine.

3. See *United States v. Reynolds*, 98 U.S. 145, 146 (1878).

4. *Id.* at 161-67.

ism" (p. 97). Her main thesis is that there is no single or a priori relationship among the three (pp. 204-05). For example, the state could be viewed as just one group among many that provides rules and sanctions to guide people (a horizontal relationship between groups and the state) or, alternatively, the state could be the entity that authoritatively determines the powers enjoyed by all other groups. There is no fixed relationship, Weisbrod suggests, because, among other reasons, none of these three entities has a fixed character that is independent of the other two (p. 3). For instance, "[w]e can perhaps say both" that "individuals create groups and groups create individuals" (p. 202). Similarly, sovereignty can be said to inhere in the state, groups, or individuals (pp. 30-31).

Weisbrod's stated concern is not to describe the doctrinal status quo, or to argue for a change. Instead, the book more modestly intends to show the "complexities of the problems" (p. 202) and to "illuminate certain interactions to the end of complicating a political conversation of pluralism" (p. 209).⁵ Consistent with these stated aims, the book studiously avoids taking positions.⁶ Methodologically, it collects many interesting historical examples, legal cases, theoreticians, as well as literary and art works, which it then uses to illustrate competing approaches that can be taken to the relations among individuals, groups, and the state.⁷

Open-endedness is the book's *sine qua non*, and Weisbrod is mercilessly noncommittal even with respect to herself. Consider, for instance, the aforementioned visual metaphors that Weisbrod uses to both title and structure the book. *Emblems* is divided into two parts, one which is represented by the "emblem" of Erastus Field's painting *Historical Monument of the American Republic*, the "hierarchical understanding of American federalism" (p. 13), and the second which is represented by Edward Hicks's painting *The Peaceable Kingdom*, which represents for Weisbrod a "horizontal, pluralist" vision of federalism (p. 97).⁸

5. "The book has not attempted to propose a solution to the questions it has raised. The attempt rather has been to join the conversation on pluralism by reviewing the complexities of the problems" (p. 202).

6. One of the few exceptions is discussed later in this essay.

7. Even the theorists are utilized to illustrate potential approaches rather than to build an argument that could bring about closure. See, e.g., pp. 30-43, discussed *infra*.

8. It might be difficult for some readers to appreciate in what respect Hicks's painting can be used to represent pluralism because, in a startling editorial oversight, the edition of the book I reviewed did not include a reproduction of the *Peaceable Kingdom*. (Field's painting appears on the cover.) This fact, along with the conclusion stated in this

Emblems also dedicates five pages to discussing the two paintings and the ideas they conjure (pp. 13-15, 97-98). Notwithstanding these metaphors' centrality, Weisbrod states that "[i]t is possible that the division of the book into part 1 and part 2 suggests a false dichotomy" (p. 100). Similarly, the concluding chapter submits that "[i]t is possible that the visual images used in this book, the emblems, are inadequate for the future we want, in part because they are too static" and that "[m]usical metaphors may go deeper" (p. 208). Acknowledging that the emblems that provide the book's title and structure are possibly so misleading and inadequate⁹ well represents the book's uncompromising commitment to open-endedness.

Although *Emblems* does "not attempt[] to propose a solution to the questions it has raised" (p. 202), Weisbrod clearly has strong views on many of them. Most importantly, she is an enthusiastic proponent of pluralism, and writes as if the reader is also.¹⁰ The book's final paragraph advances an epistemological claim that could validate the absence of a justification for pluralism: "The feeling for pluralism reduces itself more to a stance, or a mind-set, than it does to an agenda or an answer. It becomes a preoccupation more than a thesis, relating to horizontal rather than vertical relations" (p. 209). This is an intriguing idea, but surely more is needed than such *ipse dixit* to answer the sustained philosophical justifications for pluralism that have been formulated by such contemporary thinkers as Charles Taylor, Will Kymlicka, and Jeremy Waldron.¹¹

review's final paragraph account for the review's title.

9. There might be other problems with the book's chosen organizational scheme. See *infra* note 13.

10. For instance, "[i]t would also seem impossible to be committed to pluralist group life without seriously examining historical pluralist thought" (p. 114); "we speak sometimes of wanting a pluralism that will tolerate some who are themselves not tolerant of plural approaches" (p. 208); assuming that "if we are political liberals" that "we" would have a "commitment to the ideals of group autonomy and flourishing diversity in a pluralist order" (p. 91).

11. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25-74 (Amy Gutmann ed., 1994); WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 94 (1995). For a sharp critique of Taylor's and Kymlicka's approaches, see BRIAN M. BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* (2001). For a response, see Jeremy Waldron, *One Law for All? The Logic of Cultural Accommodation*, 59 *WASH. & LEE L. REV.* 3 (2002). For an effort at grounding pluralism in Rawlsian political theory, see Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 *VA. L. REV.* 1053 (1998) [hereinafter *Outer Limits*]. For a sharp critique of my approach, see Seth F. Kreimer, *Lines in the Sand The Importance of Borders in American Federalism*, 150 *U. PA. L. REV.* 973, 1010-1017 (2002). For a re-

For this reason alone Weisbrod's book could not be the last word on the subject. Fortuitously, this in no way undermines *Emblems'* ambition of only "join[ing]" and "complicating" the "conversation on pluralism" (pp. 202, 209). Such an argument is not readily summarized (though I tried to do so in the first pages of this review). In any event, the strength of the book lies in the very interesting and wide-ranging materials that it assembles. The first part of this review accordingly examines some of these enlightening materials so as to give the reader a sense of what the book offers. While *Emblems* readily succeeds in its declared aim of complicating the reader's understanding of pluralism, the seemingly unending progression of potential perspectives the book offers can be dizzying. To this reader, *Emblems* in this way underscores the need for some guiding theory to help resolve the very real questions regarding group autonomy that arise with some frequency in the United States.¹² Though *Emblems* does not purport to provide a theoretical framework for resolving the dilemmas that are raised by claims for group autonomy, the second part of this review builds on materials discussed in the book that hold out promise for developing an analytical framework for analyzing pluralism and group autonomy.

I

As mentioned above, *Emblems'* ten chapters are divided in two parts, "Monumental Federalism" (representing verticality) and "The Peaceable Kingdom" (representing horizontality). The first chapter tells the curious story of Robert Owen's trip to the United States in 1824-25. Today, Owen typically is remembered as a utopian thinker who established the small experimental community of New Harmony with the expectation that it would be the model that would be universally adopted in the future. His vision was that small communities were to be the basic unit of society, with each community voluntarily linking with others to create a decentralized federation. New Harmony died out after a few years, and today the appellation "utopian" that is attached to Owen ordinarily brings to mind images of naivety and failed social experiments.

sponse, see Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 967-68 & n. 455 (2002).

12. See, e.g., *Rice v. Cayetano*, 528 U.S. 495 (2000); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Reynolds v. United States*, 98 U.S. 145 (1878); *Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1208 (D. Or. 1984).

Weisbrod reminds the reader that Owen met with virtually all the top American officials when he first came to this country: he spoke to both Houses of Congress, addressed the Supreme Court, and personally met with Jefferson, Madison, Monroe, and John Quincy Adams (pp. 19, 23). Weisbrod then asks why someone like Owen received the audience he did. Her two related answers are illuminating. First, she suggests that there was less distance between the United States and Owen than it appears in our current historical moment; Owen was more mainstream, and the United States was more self-consciously experimental, than people today typically think (pp. 19-28). Second, there was important substantive overlap in their interests; both were interested in small political units that were linked through a federation (pp. 19-28).

Emblems' first chapter is an absorbing way to unsettle contemporary sensibilities some might have that a "monumental federalism" of a rigidly vertical hierarchy with the federal government at the apex is American federalism's intrinsic and necessary form. Such an image of American federalism may be a straw man, however, particularly in light of the Supreme Court's new federalism jurisprudence of the last decade. More fundamentally, one might ask: Of what contemporary relevance is it that foundational questions regarding the structure of American federalism were unanswered in the 1820s? It seems to me, though, that Weisbrod's point facilitates the imagination of alternatives to the status quo. Of course, the possibility of alternatives alone does not indict the status quo; normative analysis of the sort that *Emblems* does not provide is necessary to do that. The Owen narrative nonetheless is a useful first step to the argument for a greater accommodation of pluralism that *Emblems* implicitly champions.¹³

Chapter 2, "Indians and Individualists: A Multiplicity of Sovereignties," makes several noteworthy points. First and foremost is that a commitment to political decentralization is not necessarily a commitment to pluralism. For instance, though Owen thought that society was best organized on the basis of

13. Although it is understandable why Weisbrod would have wanted to start the book's project of expanding the reader's perspective with this chapter, it does not readily fit into Part One, which purports to address vertical federalism. After all, the chapter focuses on the interest in decentralized political power shared by Owen and early Americans. Chapters 2 and 5, summarized below, also do not appear to readily fit the under the rubric of "monumental federalism." Such lack of fit only sharpens the above-mentioned questions Weisbrod raises about the utility of the two emblems' efficacy as organizing principles.

small communities, he thought that there was one way that all such small political units should be structured (p. 31).¹⁴ By contrast, Native American aspirations of tribal sovereignty and John Calhoun's concept of "concurrent majorities" (more on this later)—a somewhat surprising grouping, to say the least—exemplify the commitment to enduring diversity across groups that qualifies as pluralism (pp. 31, 39).

The bulk of Chapter 2 comprises a discussion of several loosely connected ideas concerning sovereignty and groups. One is that "sovereignty" can be said to inhere in the state, groups, or even individuals (pp. 30-31). In support of the latter, Weisbrod quotes Lysander Spooner's argument that government has no right to infringe on the sovereignty of the individual (p. 37). Though the chapter does not clearly explain what it means by group sovereignty, it surveys in two pages what Weisbrod takes to be three normative approaches to group life in the United States: the views that (1) the very existence of groups is bad because the national community is actually an organic whole (p. 42); (2) groups are a mixed bag because, while factions might invade the right of minorities, a multiplicity of groups might lower the risk that a majority can invade the interests of a minority (pp. 42-43); and (3) groups "are on the whole valuable and necessary" (p. 43). Consistent with the book's methodology, Weisbrod presents these varying approaches without attempting to assess their strengths and weaknesses.

Weisbrod concludes the chapter by arguing against the notion "that there was, there must have been, a clear and universal sense of the official state as the final arbiter, setter of the limits, creator and keeper of boundaries" of the sovereignty of the various entities (p. 44). Her argument rests wholly on an 1837 Mississippi case in which a court held that a slave whom an Indian woman had gifted to her daughter pursuant to tribal law could not be seized to satisfy the debts of the donor's husband, notwithstanding the state's abolition of tribal law a year after the gift had been made (p. 44). Weisbrod concludes that this "is not a clear story either of the triumph of group interest or of state hierarchy" (p. 45).¹⁵ Though even a single case proves the postu-

14. Weisbrod suggests that anarchist thinkers such as Lysander Spooner held a similarly monist conception that proper reasoning leads to a singular set of laws that should govern society (pp. 35-39).

15. Weisbrod is unquestionably correct that the case is amenable to contradictory interpretations. On the one hand, the state court deferred to tribal law. On the other hand, the Mississippi case could be understood as a paradigm of state hierarchy insofar as

late that there was not a “universal” understanding that the state was supreme (p. 44), how important would it be if the thesis were vindicated by only one obscure judicial opinion? Because the proposition Weisbrod advances here is likely to be counter-intuitive to many, the force of her argument would seem to be dependent on other such evidence, which the book unfortunately does not provide.

Chapter 3 “explores the idea that groups are a threat” to the state (p. 8). Focusing on the relationship between religious groups and the state,¹⁶ it makes many important points. It astutely observes that “religions tend to function in ways that are quite statelike” insofar as they prescribe conduct and issue sanctions (pp. 46-47). This seems to be the predicate for Weisbrod’s larger thesis that there are not “separate boxes” of church and state, but “that these boxes are better conceived as interpenetrating units” (p. 46). Although interpenetration may well characterize American doctrine¹⁷—a point the book illustrates well by providing an extensive discussion of Mormon history—the reader might wonder whether this invariably is so. After all, it is *conceivable* that a government could provide a religious community with a geographical enclave in which it has full autonomy over its members, and the book seems to be a meditation on the range of possible relationships between government and groups generally rather than a U.S.-focused exposition.¹⁸ On the other hand, to the extent *Emblems* is understood to discuss pluralism in twenty-first century America rather than what is theoretically possible, it is undeniably true that “a church attempting today to create its own world as to family and education will necessarily involve itself in the structuring of the state environment” because “a religious group cannot control its environment in the

tribal law applied only because the *state* determined that *state law* could not “be construed to extend so far as to interfere with the rights to property previously acquired.” *Fisher v. Allen*, 3 Miss. (2 Howard) 611, 616 (1837).

16. Chapter 3 makes the critical observation that religious persons may be subject to “two powerful claims to priority,” the church and the state (p. 46). Jeremy Waldron recently argued that it is this that properly sets religion apart from non-religious commitments (and accordingly justifies broad swaths of religious-based exemptions from civil law). See Waldron, *supra* note 11. If this is so, *Emblems*’ discussion with regard to religious groups might not generalize to groups that define themselves on bases apart from religion. If a particular group is relied upon as being representative of others—the chapter, after all, is supposed to make generic points about groups and the state (p. 8)—it is important to forthrightly consider to what extent the chosen group is representative.

17. I have argued that this is the case. See Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 674-80 (2003).

18. For instance, Weisbrod surveys many European theorists (*e.g.*, pp. 101-12) and dedicates a full chapter to the League of Nations (pp. 119-37).

way that was possible in the nineteenth century” (p. 62). Interpenetration thus appears to be an inescapable concomitant of the deep and broad regulation that characterizes contemporary American government, even if it is not a universal imperative.

Chapter 3 identifies two dangers that religious groups pose to states. First, the groups might seek to “co-opt [the state] to enforce religious norms universally” (p. 47). Second, even if the group tries to “separate [itself] from the state so that [it] can operate (quasi) autonomously” (p. 47), the group’s activities within its enclave may have spillover effects on general society (pp. 53-56). The latter is one of the commonly understood justifications for the Supreme Court’s decision upholding the prohibition against bigamy in *Reynolds v. United States*:¹⁹ bigamy was seen as containing the “seed of destruction of a democratic society” (p. 55).²⁰ Weisbrod insightfully observes that opposition to bigamy was part of a more general nineteenth century defense of marriage that included resistance to laws that permitted easy divorce and remarriage, what was dubbed “serial polygamy” (p. 53). This leads to one of the book’s few firm conclusions: “[u]nder the impact of current events in the area of divorce and nonmarital living arrangements, it is relatively simple to say that nineteenth-century Mormon marriage was not given a fair hearing” (p. 175). This is a wisely nuanced position that points out an inconsistency without taking sides on the ultimately empirical questions of whether polygamy and divorce undermine marriage and whether monogamous marriage is a prerequisite to a well-functioning democracy.

Chapter 4 extends the analysis to take account of individuals. A group’s actions may aggrieve individual members, who might solicit assistance from the state. A governmental policy to grant groups considerable autonomy accordingly might come at the expense of some individuals. For example, polygamy might harm co-wives (p. 55), and the Amish *meidung* imposes emotional and financial costs on the shunned individual (pp. 67-70).

Weisbrod soberly identifies the pros and cons of state intervention in such situations. On the side of intervention, the individual might be said to be imbued with the rights of a larger group to which she belongs (the state, for instance) that cannot be infringed, the intermediate group might be overstepping its bounds, and the interests of the state might require that the indi-

19. 98 U.S. 145 (1878).

20. *Quoting People v. Woody*, 61 Cal. 2d 716, 724-25 (1964).

vidual be protected (p. 74). In opposition to state intervention, the individual might be said to have consented to being regulated by the group, intervention might undermine the intermediate group, and state intervention frequently will not be effective when the complainant desires to remain part of a thick community (pp. 74-76). The book does a nice job of illustrating why state remedies might be ineffective, though it does not give sufficient attention to the problems of determining whether there has been true consent and, relatedly, whether there is a real exit option.²¹ Even so, the book's concise summary of the arguments for and against intervention in aid of aggrieved individuals is valuable.

Less helpful is the chapter's treatment of the Constitution's position on the conflict between groups and individuals. Weisbrod asks: "[W]hat do we mean by the Constitution? And, what understanding of the relations between groups and the state does our Constitution assume at any point in time? A position on the question of group autonomy would seem to be part of the social-political reality that underlies a constitution" (pp. 78-79).

This is all Weisbrod has to say on the subject. It is intriguing, but regrettably incomplete.²² Even a brief discussion of some of the many constitutional doctrines that mediate the tension between individuals and groups (such as the First Amendment right of association, constitutional limits on preemptory challenges, equal protection doctrines concerning affirmative action and voting rights)²³ could have helped the author explain how the Court's conception of group autonomy has shifted over time and show why she believes such conceptions are pre-constitutional views that underlie constitutional doctrine.²⁴

21. For an excellent discussion of the problems of consent, see Seth Kreimer, "But Whoever Treasures Freedom . . ." *The Right to Travel and Extraterritorial Abortions*, 91 MICH. L. REV. 907, 926-928 (1993). On exit, see Barbara H. Fried, "If You Don't Like It, Leave It": *The Problem of Exit in Social Contractarian Arguments*, 31 PHIL. & PUB. AFF. 40 (2003).

22. This passage of the book calls to mind an earlier chapter's unfulfilled promise of "involv[ing] a different version of constitutionalism from the one conventionally used. Whereas some discussion focuses on the 'words on parchment' definition of constitutionalism, the present section uses constitutionalism as a framework, a way of being, or a set of folkways, rather than emphasizing language or the interpretation of language" (p. 61).

23. See Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725 (1998).

24. Weisbrod's formulation suggests that at any point in time there is a single understanding with regard to group autonomy. It might be thought that the constitutional doctrines that touch on group autonomy referenced above in the text cast doubt on any such coherence. For example, today there is a relatively strong association right, yet constitutional doctrine does not permit lawyers to strike potential jurors on the basis of race

Though *Emblems* is a cross-disciplinary book, such a discussion would have been appropriate and welcome in a book written by a law professor.

Chapter 5 “attempts a wide-angle presentation of various ways in which group-state encounters can be structured” (p. 81). It sketches three basic approaches. Under “corporatism,” an individual’s political rights are a function of the social group to which she belongs (p. 81). Examples include the millet system of the Ottoman empire and the Mennonites in pre-1789 Germany (pp. 81-82). Weisbrod notes that although such group-sensitive rights can be used to benefit minority groups (for instance, Mennonite exemption from military service in Germany due to their creed of nonresistance), it frequently has been deployed to harm minority groups (for instance, the Jews in czarist Russia) (pp. 81-85). An alternative is the modern liberal approach of unitary citizenship, which focuses on individuals and eliminates group privileges (pp. 86-87).²⁵ Weisbrod seems to be attracted to a third, hybrid approach that “think[s] of groups as formed by individuals—so that individuals retain[] their primary place—while still possessing a group identity” (p. 90). Though she is concerned that group membership can lead to “denigration and stigmatization,” and for that reason she is “conflicted” about “the problem of identifying groups, about seeing individuals as members of groups, and about raising issues of group characteristics,” Weisbrod simultaneously embraces a “commitment to the ideals of group autonomy and flourishing diversity in a pluralist order” (p. 91).²⁶ How these inharmonious concerns and

or gender on the view that inferences can be made about an individual’s likely biases based on the race or gender group to which he or she belongs. Compare *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) with *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146-51 (1994) (O’Connor, J., concurring). However, the fact that constitutional doctrine does not single-mindedly vindicate or disregard group interests does not necessarily signal an incoherent position *vis-à-vis* groups. Rather, each case may implicate a different array of competing constitutional interests, such that group interests of equal moment might prevail in one instance and yield to competing concerns in another.

25. Weisbrod notes, however, that “group life had its own history, even in liberal settings” (p. 87), and describes several respects in which group identity has played a role in public life in the United States. For instance, she describes the example of a trial judge in New York who in the early twentieth century dismissed all Catholics from a jury in a trial where the complainant sought an absolute divorce (pp. 87-88).

26. At the chapter’s close Weisbrod invokes an illuminating metaphor. Against the “solution to state-group problems” known as the melting pot, which aims to eliminate group differences through assimilation, Weisbrod quotes the metaphor provided by an early twentieth century clergyman who spoke of America as a “refining pot” where the “dross” of old-world hatreds would be lost but individuals would retain their group identities (p. 94).

principles are to be reconciled is not explained. Thus closes the part of the book identified as “monumental federalism.”

Part 2 of the book commences with a chapter that surveys theoreticians of pluralism. Weisbrod begins by “set[ting] out as background some of the general theoretical material on sovereignty” before proceeding to pluralism (p. 101). This is wise because pluralism’s premise of non-state sources of state-like regulation is based on an antecedent understanding of what state sovereignty is and is not. The book’s discussion of sovereignty is very difficult to follow, however, because there is a veritable landslide of theorists—most of whom are not likely to be known to the book’s audience—whose ideas and critiques of fellow theorists are not adequately captured in the few sentences that *Emblems* provides.²⁷

Most of chapter 6’s discussion of pluralism is spent on a surprising selection of three theoreticians: the Russian anarchist prince Peter Kropotkin; Abraham Kuyper, a leader of the Dutch Anti-Revolutionary Party in the early twentieth century; and Alexander Pekelis, a Russian-born Jew who studied law at Columbia and worked in nonprofit agencies for the six years that he lived in the United States (p. 106, 115). Why these three? Weisbrod says that the first two thinkers’ political ideas “might have been important in fact, to a population that included substantial elements that were not English” and suggests that “their ideas could easily have been available to Americans thinking about political structures” (p. 106). Weisbrod makes no effort to document their influence, however, and she acknowledges in a footnote that the publications of one of them “are largely available only in Dutch” and that commentary on it “often is written from within the Reformed Church and is published in religiously focused journals” (p. 106 & n. 28). The selection of these theore-

27. One representative section of the chapter reads as follows:

Carl Schmidt offered what has been called a modernized version of Hobbes and Bodin that sees the sovereign as the source not of the rule but of the exception. It is a version of absolutism “Schmidt’s jurisprudence puts sovereignty—in the exception rather than the norm—at the center. The sovereign as uncommanded commander.” Carl Schmidt’s discussion of pluralism (in *The Concept of the Political* and also in an essay called “Ethic of State and Pluralistic State”) examines the theories of English pluralism particularly. It finds them inadequate because they fail to locate a specific sense of the political. Schmitt’s critique of Laski and Cole accepts many of their descriptions of the social universe. It finally rejects their vision, however. Schmidt’s sentence is that the sovereign decides on the exception. Agamben, quoting Schmidt, adds Walter Benjamin: The Modern world is one of permanent exception.

Pp. 101-02 (quoting MICHAEL FOUCAULT, *POWER/KNOWLEDGE* (Colin Gordon ed., 1980)).

ticians, it would seem, more likely reflects the author's sense that their ideas are important and paradigmatic, even if these writers themselves are not broadly known. The secondary material Weisbrod provides to explain Kuyper's political thought reveals, however, that Kuyper's approach is deeply grounded in theology.²⁸ One wonders how useful Kuyper is as a representative, particularly since Weisbrod states that the approach he describes is "strikingly parallel to that presented by other nontheological schools of political thought" (p. 107). One of those other (unnamed) thinkers perhaps would have been a more suitable candidate.

Be that as it may, the array of approaches to pluralism that Weisbrod provides is, as usual, illuminating. All attribute strength and importance to non-state groups in ways that differ markedly from the conception held by many Americans that such groups are naturally and properly subordinated to the state. Kuyper advocates "sphere sovereignty," which posits that social groups (such as family, town, church, school) "are prior" to the state and are sovereign in their own right (p. 107). The state must "uphold and strengthen the sovereignty of the social spheres" (p. 107). A single paragraph recites several critiques of Kuyper's approach found in secondary literature, including the difficulty in defining the appropriate scope of each sphere (pp. 108-09).

Weisbrod then turns to Kropotkin's view of society as a "multitude of associations" that is "federated for all the purposes which require federation . . . by means of free agreements between them" (p. 109). Kropotkin writes that "no need of government will be felt, because free agreement and federation take its place in all those functions which governments consider as theirs at the present time" (p. 110). Somewhat mysteriously, Weisbrod writes that although "Kropotkin's ideas, and those of anarchism generally, always have been associated with a no-government position . . . , Kropotkin was led quite naturally to emphasize not only no government, but also limited government" (p. 110). The summary of Kropotkin's thought that *Emblems* provides does not permit the reader to resolve the para-

28. "Society is made up of social groups, related organically, rather than of individuals related impersonally. These groups, or spheres, received their sovereignty from God, not from the state. They are prior to the state. The state is necessary because of sin, and is due to God's *gratia universalis*" (p. 107, quoting Dirk Jellema, *Abraham Kuyper's Attack on Liberalism*, 19 REV. POL. 472, 485 (1957)).

dox of his support for both no-government and limited government.

Emblems then considers “English pluralism,” whose thinkers believed that “group life was real, independent of, and often competing with, the state” (p. 112). According to the secondary materials Weisbrod quotes, pluralists “proposed dissolution of the state” or, at least, to “devolve responsibilities, to reinforce horizontal relationships, and to dispense with or at least divide up vertical ones” (p. 113). Weisbrod then notes several critiques that have been made of English pluralism: To what extent is the state justified in interfering with groups? What if anything should the state do if a group applies economic or social pressures to keep members from leaving it, or if a group “cripples the character of [its] members” (p. 114)? These are critical questions. Without any proposed solutions—and, consistent with the book’s methodology, none are provided—it may be difficult for the reader to see much contemporary value in English pluralism.

The last pluralist thinker surveyed in chapter 6 is Alexander Pekelis. Weisbrod tells us that “Pekelis elaborated his positions carefully” and that he “insisted on the right of minority groups to self-determination at critical points,” though she does not specify in what respects (p. 118). Much of the book’s discussion of Pekelis concerns the serious attention he gave to the power of non-state groups. Pekelis dubbed them “private governments” and argued that constitutional guarantees should apply to them (p. 117). Pekelis interestingly anticipated the development of the state action doctrine, under which constitutional limitations are applied to certain nongovernmental actors,²⁹ but *Emblems’* discussion does not make clear why Pekelis is a sufficient paradigm of pluralist thought to merit the attention he is given.

The last chapters of the book make a set of points that seek to complicate the reader’s understanding of groups and individuals. It is argued that while a person’s identity is partly a function of the groups with which she identifies, the groups themselves are not constants of nature but instead are social artifacts that are subject to change. The mutability of groups is the predicate for Weisbrod’s critique of the so-called “minority treaties” of the League of Nations, the main subject of chapter 7. The treaties aimed to protect ethnic minorities in Turkey, Austria, Bulgaria, and Hungary (p. 120). These countries were required

29. See generally Mark D. Rosen, *Exporting the Constitution*, 53 EMORY L.J. 172, 186-88 (2004).

to fund the groups' social, cultural, and educational institutions, and to allow the groups to manage such institutions on their own (p. 121). Though the treaties at first glance might appear to be paragons of pluralism, Weisbrod criticizes them insofar as they "defined which particular group affiliations were important—as in fact they were—tending to make those affiliations important into the future" (p. 128).³⁰

This is very interesting and true, but it is not clear what follows. One possible implication is that states should avoid identifying groups, but is this practicable? Probably not; it is difficult to understand how a group-respecting, pluralism-encouraging polity could avoid identifying the groups whose autonomy it wished to respect unless it had a flat policy of recognizing all self-identified groups.³¹ Such an approach, however, would create well-known problems. Allowing significant autonomy to large numbers of groups could threaten the stability of the larger national polity (pp. 154-55) and likely would create jurisdictional conflicts among groups, particularly to the extent individuals belong to more than one group. Later in the book Weisbrod alludes to a more modest solution, that the state support a large number of groups, far beyond the most obvious group categories (p. 153).³² In addition to the difficulties discussed above of destabilizing the national polity and multiplying jurisdictional conflicts, however, expanding the groups supported by the state still runs the risk of "freezing" those supported affiliations. Perhaps Weisbrod is of the view that this approach nonetheless is a reasonable middle position to adopt.

Another complexity Weisbrod explores in the book's final chapters is the various relationships between individuals and groups. Without citing to any particular political theorists, Weisbrod criticizes contemporary liberal political thought for having "very little to say about groups generally" such that even "[w]here it does consider groups, it does so within the context of

30. Weisbrod nicely illustrates the changeability of what groups count by noting that "[i]n the United States, diversity (viewed as desirable) is measured by ethnicity, gender, and race, more perhaps than by region of residence or birth or by religion, all of which were once prominent differentials" (pp. 136-37).

31. One caveat is in order: Perhaps a central government with minimal powers that bordered on anarchy could respect sub-state groups without having to identify them on account of the fact that the central government would not do very much.

32. "The Minorities Treaties, for entirely understandable reasons, focused on groups limited to the familiar categories created by the historical conditions under which they were developed. But the possible groups that might be entitled to the positive support of the state are highly various" (p. 153).

individualism, so that the group is a product, for example, of the exercise of an individual's rights to association of free exercise" (p. 158). While this reader shares Weisbrod's view that any such systematic oversight would be problematic, it is not clear what the author believes to be the practical costs of such neglect. One might think a casualty is the absence of group rights, but Weisbrod elsewhere rejects the view that "legal recognition of a group right is necessary for group life" because "[g]roup rights can usually be easily understood in terms of individual rights" (p. 129).³³ In fact, Weisbrod's analysis at more than one point seems to question whether the distinction between individual and group can be sustained:

We often argue, following liberal political theory, that groups result from the choices of individuals We also feel, however, that the groups were there first, and that the roles we assume are somehow there first. Sometimes we feel that they are natural or innate. We can perhaps say both at the same time: individuals create groups and groups create individuals (p. 202).

The complexity of it all leads to near vertigo in the book's last chapter, where it is argued that "we are even plural in ourselves" (p. 202). People belong to multiple groups, each of which has its own set of norms, and these codes of conflict sometimes conflict (p. 202). Moreover, people change over time, such that "[w]e are sometimes as different from ourselves as from other people" (p. 200). According to Weisbrod, this more "complicate[d]" understanding of the individual as not being a "unit-self" renders the individual's relations to groups, and groups' relationships to the state, even more profoundly complex (p. 206).

But while it is true that people are not stagnant and that they simultaneously belong to multiple groups, most people probably experience a greater continuity of self than the book's last chapters suggest. Change frequently is incremental, and it often is the case that one group with which an individual identifies provides the primary normative framework into which commitments associated with the other groups are fitted, thereby bringing into harmony the competing values to which she is committed.³⁴ For these reasons, there may be only modest

33. See also p. 206 (considering that "one's interest in group life and in the diversity of group life and even its sovereignty has its roots in individual autonomy").

34. For an illuminating account that likens the process of commensurating values that are technically incommensurable to the definition of the self, see Elijah Millgram, *Incom-*

public policy implications of the various complications regarding individual and group identity that *Emblems* surveys in its last chapters. It may be best that law addresses individuals and groups at all points in time despite the fact that the identities of individuals and groups might be inconstant over the medium- or long-term. The book's reminder that individuals and groups are dynamic, nonetheless, is extremely important.³⁵

II

The wide range of materials Weisbrod collects enables the book to unquestionably succeed in its stated goal of displaying pluralism's complexity and seeming intractability. The book's conclusion that "there is no single sense of the state over time and in all countries, and that possibilities for individuals in relation to the state will be highly various" is important (p. 206). However, judges and politicians do not have the luxury of giddy intellectual excitement when confronted by concrete claims asserted by groups seeking autonomy or by individuals who have been aggrieved by groups. That such conflicts appear irresolvable under the book's atheoretical approach itself constitutes a recommendation for a sustained theoretical effort.

Though *Emblems* eschews any effort to formulate a definitive analytical framework, its eclectic materials provide suggestive glimpses into what the general contours of such a framework might look like. As a threshold matter, although there are benefits to *Emblems'* effort to examine the issues of group life generically, it is important to keep in mind that different groups raise very different issues. Four types of groups are discussed at various points in the book: (1) conquered aboriginal cultures such as Native Americans in the United States, (2) religious groups, (3) ethnic groups, and (4) newly formed "identity" groups based on shared characteristics such as physical disability or sexual orientation. Clearly, the normative justifications for respecting group autonomy are not identical across all these groups. For example, with regard to Native Americans, respecting group autonomy fulfills treaty obligations and redresses historical wrongs. These same justifications do not apply to the other three groups. Similarly, the risks of respecting group

mensurability and Practical Reasoning, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON* 151-69 (Ruth Chang ed., 1997).

35. For an important recent discussion of these ideas, see SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* (2002).

autonomy vary from group to group. For example, the risk of fragmenting the nation is less in respect of Native Americans than religious groups because (among other reasons) Native Americans are a small and discrete subset of the larger population. Consequently, for some purposes it might be beneficial to analyze by referring to specific groups rather than “groups” generically.

Among the most suggestive of the materials *Emblems* discusses is John Calhoun’s concept of “concurrent majority” (p. 32). While contemporary philosophical defenses of pluralism have relied primarily on the principle of equal protection,³⁶ the concept of concurrent majority suggests another promising approach: foundational democratic theory. Calhoun’s idea was that the majority vote of sub-federal polities could override federal policies adverse to the interests of the sub-federal polity (p. 32). One need not support the particulars of Calhoun’s proposal, nor the horrific institution of slavery that it was invoked to defend, to appreciate that the concept of concurrent majority raises a profound question that goes to the heart of democratic theory: Even if one grants the proposition that it is fair that numerical majorities can politically coerce numerical minorities—a proposition that is not at all self-evident³⁷—how is it to be determined what group constitutes the appropriate “we” of which there need be a majority to enact law? That is, who belongs to group “A,” with respect to which the majority of group “A” can politically coerce the minority, and who belongs to group “B,” over which a majority of group “A” has no political say?

The underlying issues are these: What is the appropriate size of the democratic polity, and what are the criteria for membership in the political community?³⁸ While many democratic theorists have asked the first question—including Plato, Rousseau, and Montesquieu³⁹—they were concerned not with accommodating diverse populations, but with securing the condi-

36. See Taylor, *supra* note 11; KYMLICKA, *supra* note 11. For a concise summary, see Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. (forthcoming).

37. For a good discussion of the problem of majority rule, see Christopher J. Peters, *Persuasion: A Model of Majoritarianism as Adjudication*, 96 NW. U. L. REV. 1, 1-7 (2001).

38. Weisbrod spends a paragraph on the idea that “underneath many of the historical discussions of federalism and republicanism was a question about the correct size of the political unit” (p. 41), though she does not connect that discussion to Calhoun.

39. See ROBERT A. DAHL & EDWARD R. TUFTE, *SIZE AND DEMOCRACY* 5-7 (1973).

tions necessary for the successful operation of democratic politics.⁴⁰ Both the appropriate size of polities and how membership in the political community is determined assume particular urgency, however, where the population is heterogeneous. If polities are too large—imagine, for instance, that there were only a national government and no sub-federal polities—the desires of numerical minorities will be systematically submerged to the wants of majorities.⁴¹ On the other hand, the existence of a deeply heterogeneous citizenry also might cut *against* the creation of multiple small polities insofar as granting group autonomy under such conditions might risk fragmenting the larger political community.

Insistence on large polities that systematically drown out the desires of numerical minorities, however, may lead to political instabilities in the medium to long term. Moreover, such insistence is normatively suspect. What, after all, makes majority rule legitimate but minority rule tyrannical? Both the political losers in democracy, who are unable to garner the support of a majority, and the political losers in despotic governments, who typically constitute the numerical majority, are subjected to laws they do not wish to be ruled by and in this sense are governed against their will. One response some of our best democratic theorists have offered to this beguilingly difficult question of what justifies majority rule is that legitimate democratic institutions permit people to understand themselves as the authors of

40. Under classical Greek political thought, for example:

A democratic polity must have so few citizens that all of them could meet frequently in the popular assembly to listen, to vote, perhaps even to speak. Smallness, it was thought, enhanced the opportunities for participation in and control of the government in many ways. For example, in a small polity every citizen stood a very good chance of being chosen by lot at least once in his lifetime to sit on one of the important administrative bodies. Smallness made it possible for every citizen to know every other, to estimate his qualities, to understand his problems, to develop friendly feelings toward him, to analyze and discuss with comprehension the problems facing the polity.

Id. at 5.

41. To illustrate, there were no more than a few thousand members of the Rajneesh religious group in the 1980s, and it is virtually inconceivable that many of their idiosyncratic political desires ever would have been shared by a majority of American citizens. By creating the municipality of Rajneeshpuram, where all citizens were adherents of the Rajneesh creed, the Rajneesh created a “we” that guaranteed that their particular zoning and other needs could become law in some polity. *See Outer Limits, supra* note 11, at 1082-86 (discussing *Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1208 (D. Or. 1984)).

To be sure, the complexity of political dynamics complicates the effort to assess the appropriate size of democratic polities. Smaller polities are not always the place where numerical minorities find political protection. And, as shown by the antidiscrimination laws in this country, sometimes numerical minorities are most successful at the national level.

the laws that bind them.⁴² Additionally, today's minority might be in the majority next time. These justifications are unavailing, however, to the extent there exists discrete subgroups in society that have interests that systematically diverge from the larger society's desires. Subjecting such groups to the will of the numerical majority may be more akin to despotism than to democracy's promise of self-rule, insofar as it is unlikely that such groups' preferences will be reflected in law unless such groups' preferences undergo significant change. Insisting on a large polity that implies the existence of a single political self, when in fact there are multiple groups and hence multiple selves, thus may corrupt democracy. Diverse populations might require "selves-rule"—democratic pluralism—rather than the pretense of "self-rule" in the form of a single large polity.

Critically, our country's federalist structure allows for the possibility of "selves-rule" pluralism, for federalism contemplates the existence of multiple governments comprising varying numbers of citizens. Because some of these polities may be very small—such as cities and villages—a group of persons that is only a fraction of the national population can constitute themselves as a governmental unit in which their preferences can be translated into law. Whether federalism's potential of selves-rule pluralism *can be* realized depends on several factors, including the powers possessed by the sub-federal polities and the extent that the geographical lines that divide meaningful groups coincide with state or city borders. Whether this possibility of selves-rule pluralism *should be* realized turns on contestable normative questions,⁴³ most notably: Is our country's core political culture characterized by common substantive commitments harmonized in a particular fashion, or by a shared commitment to allowing different people to order their lives as they deem to be appropriate?

This question goes to the heart of our national political identity, and it surely is not easy to answer. But the multiple political selves that federalism is capable of accommodating would seem to make avoidance of such deep theoretical questions impossible. While Weisbrod seems to be of the view that determining the appropriate bounds and extent of pluralism is not amenable to a principled resolution, *Emblems* does not provide an

42. It has been argued that this is true of Haberman, Raz, and Michelman. See Peters, *supra* note 37, at 3-7.

43. It also turns on the empirical question of the extent to which the activities of other groups impose spillover effects on outsiders.

argument as to why this is so. Indeed, if anything, the book's finely detailed portrayal of pluralism's seeming intractability only showcases the necessity of continuing the search for adequate theory. Perhaps the development of a theory of what democracy requires under conditions of deep heterogeneity—which would have to address the appropriate size of democratic polities, the extent of sub-federal polities' "selves-rule," and the nature of the overarching national political identity that could be expected—is the essential next step in the search for the peaceable kingdom.