

AUTHOR MEETS CRITICS

A Promising Program, with Challenges for Implementation

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Nomocratic Pluralism: Plural Values, Negative Liberty, and the Rule of Law

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Pluralism is at the forefront of everyone's mind. The American Political Science Association made "Promoting Pluralism" the theme of its 2021 conference. The reason for such attention is obvious. Empirical pluralism is undeniable. There are a plethora of values championed in the marketplace of ideas and a diversity of lifestyles representing themselves at all levels of our society. Of course, we are experiencing the inevitable friction, even violence, inherent in such a situation. Pluralism as a philosophical topic has been an important point of reflection for decades, but not without controversy. Many see the promotion of pluralism as nihilistic. If there is not a singular account of values, then is it not true that "anything goes"? Those who reject moral relativism see little alternative than to keep trying to provide the proper account of value monism, no matter how apparently fruitless all attempts hitherto have been.

It is in this fraught environment that Kenneth McIntyre enters the fray with his recent volley, *Nomocratic Pluralism: Plural Values, Negative Liberty, and the Rule of Law*. In short, the argument of the book is that value pluralism is more persuasive than any version of value monism all of which are destined in their nature to fail. Further, he argues that value pluralism requires a certain type of

state, one that values the rule of law, limited government, and negative liberty. McIntyre, following Michael Oakeshott (an author he knows well), uses the term “nomocratic” to describe this constitutional state. McIntyre’s system is similar to the classical liberalism of the late Gerald Gaus, who argued that a pluralist society required at its foundation a rebuttable presumption in favor of liberty.

The problem McIntyre confronts is this: we have what we might call “plural monisms.” Plenty of the moral accounts now circulating claim to be the definitive account of morality. But they all fail in philosophical analysis to do what they claim to do: provide a final account of morality that explains always and everywhere how human beings are to behave. The problem is not that these efforts fail but that as a result of their failure to provide a satisfactory account, there are so many of them circulating at any given time. At the core of McIntyre’s critique is that all moral monists claim to provide a single decision procedure (SDP), a single way in which all conflicts of values can be reconciled in a manner that should be satisfactory to all reasonable individuals. Either this means reducing all values to a single value or producing a “hierarchy of values which is used in considerations of moral conflicts.”¹ McIntyre’s takedown of the fundamental assumptions undergirding all attempts to establish an SDP is masterful and alone worth the price of admission. He points out that just because we fail to find an SDP that resolves all moral disagreements does not mean that we are stuck with a “moral . . . world of subjectivity, arbitrariness, and relativism.”² McIntyre holds that the choice between moral monism and moral relativism is a “false dichotomy.” Just because the human mind cannot account for all moral values within a closed moral system does not mean moral values do not exist or are not desirable on their own.

McIntyre’s account of value pluralism is not arbitrary. While it has an element of relativism (which I will address in a moment), it does not bear out to nihilistic moral relativism. He argues that every monist system will inevitably fail because moral values (and nonmoral values) are incompatible and incommensurable.

Thus, there is an inevitable conflict of values. To value one good thing means to reject not only bad things but also other good things. There are multiple versions of the good life, each of which leaves out many conceptions of the good. Take, for example, the life of a monk (of whatever religious tradition). While there is much good religiously, psychologically, and relationally in a life of contemplation, prayer, and community, such a life necessarily excludes a traditional family life with the goods of spouse and children. And traditional family life excludes the goods of the cloistered life. These two lives, both of which embody real goods, are incompatible. The goods they present are also incommensurable. How do we develop an SDP to tell us which one is more important? Which goods ought to be prioritized? There is no sure way to recognize which is the good life for every individual. We must instead recognize that each individual must pursue the good life for him- or herself, or rather, one of a variety of good lives. The very structure of disagreement between these ways of being precludes any one system that will decide for all which is most desirable. We can further recognize the appropriateness of a non-nihilistic moral relativism. Affirming that the good life as good is relative to the individual does not eradicate its goodness. For some, the cloistered life really carries the best good for that individual; for others, the family life. Individuals not only *can* choose between goods, but *must*.

My example here is recognizable to a number of religious traditions, but it still vastly oversimplifies the real moral choices confronting individuals. The value in McIntyre's critique of moral monism and his account of value pluralism is in recognizing this complexity as a feature of our moral lives as historically situated human beings, rather than seeing it as a barrier to moral fulfillment. The sooner we can accept this situation, the better we will be in making real progress in understanding our moral situation (or rather, moral situations) and how we ought to go about making moral choices. The incessant attempts by moral monists to create closed moral systems under the reign of an SDP fails to bring us any closer to really understanding the moral conundrums

confronting us. We must study the moral conflicts (between primary and other moral values, between religious values and moral values, between moral and nonmoral values, etc.) to better understand the tools individuals need to make moral and value-laden choices. As a prerequisite to helping individuals truly find the good life, we must recognize the fraught and inextricably complex nature of human existence, one that leaves us with choices irreducible to an SDP.

McIntyre's account bears some resemblance to various critiques of the ideal in politics. I already pointed out the comparison to Gaus's work. But the distinction between value monism and value pluralism could also be compared to Irving Babbitt's distinction between the "idyllic imagination" and the "moral imagination" personified in Jean-Jacques Rousseau and Edmund Burke, respectively. The idyllic imagination postulates an ideal in politics, which can never be reached. This leads, at best, to disillusion, frustration, and despair, but also to revolutionary fanaticism. It dangerously eliminates any legal limit to what political power can attempt to accomplish and any moral limit to what can be done to instantiate the idyllic vision. In contrast, the moral imagination seeks a moral order, but it takes into account historical context as well as the inherent limitations of human beings, deprived as we are of perfect reason or motivation.³ The pursuit of an SDP shares the pretensions of the idyllic imagination, a sense that we can solve the seemingly insoluble problem of living a good life and we can do so for everyone for all time. Value pluralism, as McIntyre means it, bears a resemblance to the moral imagination, taking into account the complexity of human existence across many vectors and, while refusing to abandon morality, insists that attention be paid to social and historical context as well as individual talent and inclination.

Along these lines, McIntyre develops an account of practical reason that recognizes the historical contingency of human existence. He writes, "[T]he minimum content of good lives will include a recognition of a response to the primary values concerning the biological, psychophysical, and psychological necessities of human lives."⁴ Central to this account of the good life is the social life of

individuals. McIntyre writes, “[T]here is also a thicker description of the generic minimal content of a good life which includes the recognition of the importance of intimacy and social life to individuals and groups.”⁵ This is a truth that ought to be more central to accounts of practical reason than it is. McIntyre gives more attention than many to this aspect. Although here I would have liked to read even more on what these associations look like and how a classical liberal state will not interfere with them in a way that will undermine their ability to fulfill this role. More on that below.

This understanding of morality leads McIntyre to posit that value pluralism will place a premium on negative liberty as the “rebuttable first priority of an authentically pluralist political community, and that positive liberty concerns with values like autonomy are best left to the individuals in the community themselves.”⁶ When value pluralism is translated into a political program, the result will be a nomocratic state, a political order where the rule of law is the prevailing authoritative ethos. McIntyre writes, “[H]uman beings in political communities are related to one another in a particular way which is defined more by law than by morality. Individuals are citizens understood as equals before the law.”⁷ This idea of persons as citizens interacting as equals before the law is not a full account of the person. This is only one way in which persons interact. This limitation on political identity is key to McIntyre’s claim on the limitation of political power. It also opens his understanding of value pluralism to a richer account of human beings and their institutional interactions than does any version of value monism. McIntyre writes, “For pluralists, who have their own purposes to pursue, the government is not properly understood as a cooperative enterprise, but a means of peaceful coexistence.”⁸ The monist conception of government providing a substantive basis or means of cooperation is something a pluralist conception will not permit.

McIntyre emphasizes that negative liberty includes a variety of freedoms, especially freedom of conscience, property rights, and freedom of association, the last defined as including “the right to associate with others, the right to exclude others, the right to

disassociate with others/right of exit, etc.”⁹ The nomocratic state’s priority of negative liberty also means that its primary political virtue will be “tolerance of what others choose to do with their liberty.”¹⁰ Different conceptions of the good life means disagreement over which should be prioritized. But as long as individuals can instantiate the good life for themselves, and help those they love do the same, they should tolerate the same for others.

This brings us back to freedom of association. McIntyre writes, “Association rights have not been given the attention that they deserve.”¹¹ He is right. As I have written elsewhere, we have tended to treat associational rights as subsidiary to other rights and liberties.¹² This is a dreadful mistake. McIntyre continues, “An appreciation of the central importance of the right of association is one of the most significant differences between the varieties of liberalism which accept the validity of value pluralism and ideological or monistic liberalism.”¹³ Like Chandran Kukathis, who McIntyre approvingly quotes, toleration must be the first virtue of a pluralist society with freedom of association at its core. We have to tolerate others who associate around values we think are not valuable and probably wrong and who would exclude us if we tried to join.¹⁴

Tolerance as a virtue means forbearance tolerance. Tolerance is not a euphemism for moral acceptance or approach. It means refraining from forcing people who disagree to support or approve of the activities of the persons and associations with which they disagree. Many Christians and Muslims disagree with homosexual conduct; they cannot be made to approve of it or support it while also being unable to forbid it. This implicates recent controversies over baking cakes for weddings.¹⁵ Overtly racist or sexist groups—McIntyre’s examples are the Black Panthers and the Ku Klux Klan—will be tolerated unless they are inciting to violence (a well-established First Amendment principle)¹⁶ or “advocating changes to the law designed to secure special privileges for their favored race or sex.”¹⁷ This latter point is rather odd. Surely, they can advocate changes, but the nomocratic pluralist state is structured in such a way that it is simply bereft of the means to institute such

changes without violating its rule of law-based and pluralist nature, thus becoming a different political order entirely, one that substantively instantiates a particular understanding of morality. The nomocratic state, as McIntyre describes it, is governed by the “rule of law,” a series of procedural rules that require little if anything of substance by the citizens. This is why “democracy remains a strange bedfellow with nomocratic pluralism.”¹⁸ Democracy is generally about establishing the people’s understanding of substantial values into law, generally by majority vote. Rarely, if ever, is democratic decision-making merely about proper rules.

The goal of the nomocratic state is that “a variety of monistic moralities might have the chance to flourish alongside each other.”¹⁹ In an important sense, then, McIntyre’s account does not reject moral monism *per se*. Moral monists may abound. He rejects building the *political* order upon the grounds of moral monism. Moral monists may be perfectly happy in McIntyre’s nomocratic regime because they can live out their moral monism in community with other moral monists. They simply cannot do so through the use of political power. They must live out the good life through their associations, which will be necessarily teleocratic. McIntyre provides an account of how rules function in associations as manners of behavior, guiding the association toward its goals. But these associations do not function in terms of the “rule of law” because unlike the nomocratic state, these associations have a substantive goal, a conception of the good life (or at least of goods) with which one could disagree. Important to McIntyre’s description is that there is a significant difference between a political state and the associations of individuals that make it up.

One small nuance that might expand the constituents for McIntyre’s account of the nomocratic state is to look to some accounts of moral monism that tend toward a pluralist account of politics, their monism notwithstanding. They can do so in two ways. First, value monists who see their values (even moral values) as instantiated in institutions other than the political state will find McIntyre’s account appealing. One could have a monistic value system, at least in one sphere, but hold that the authoritative

institution that embodies or enforces those values is not the state and cannot be the state by virtue of the moral monist account itself. Second, a moral monist account also may deny a plurality of good lives (as I pointed out above) but accept (by virtue of teachings central to its monist account) the ineradicable fact of value pluralism and its political ramifications. Let me explain.

Some accounts of moral values claim to be definitive. They hold their values the most important thing in the world, objectively, but also hold that their instantiation simply is not to be found in the political state. The history of Christianity and political power is complex, but one theme that emerges is that the central values of Christianity are primarily realized in institutions that are not the political state. Furthermore, the political state can be as much the enemy as the friend of such values. The history of the wall of separation metaphor demonstrates that many Christians have feared that a political defense of moral and religious values is a ready means for their co-option by those in political power.²⁰ This was true in the eleventh-century struggles between church and king as well as in the seventeenth-century concerns over the Westphalian compromise.²¹ Such moral monisms *require* a political pluralism.

In addition, a religious group might insist on the moral monism of, say, the Christian faith, while accepting on the basis of that faith that a good many people will pursue contrary values. This is not because these contrary values are prioritized in a different way to different people in a value-neutral manner but because some people have disordered loves. There is no doubt that these people are wrong, but their existence is inevitable. God wills some for eternal salvation and others for eternal destruction. The exercise of coercive political power will not change this calculation one iota. Even to attempt to use political power to such ends demonstrates lack of belief in certain core tenets, such as God's sovereignty, of this particular monist account. Some will pursue the love of God and some the love self. There is simply no way around this. We must structure political power so as to maintain the peace between these two general groups of people, and even among them. We must also make possible the preservation of the purity of their own

religious organizations, which requires a thick account of associational freedom. The nomocratic state is surely an attractive account for this particular brand of moral monist.

To put it another way, the constituency for a nomocratic state might come not only from value pluralists but from some moral monists as well. Such people might be political pluralists precisely on account of their own moral monism. An appeal for the nomocratic state to these people can depend not on assuring them they can pursue their moral monism in association with others absent political power but in connecting their own moral monist commitments to the pluralism of the nomocratic state.

Trouble Where the Pluralist Rubber Meets the Empirical Road

I suspect that trouble will emerge for those who accept much of McIntyre's account when the rubber meets the road and not over his description *per se*. What will be the application in particular circumstances? Here I suggest four not entirely separate concerns for the nomocratic state in practice.

First, the definition of persons. A value pluralist will support the nomocratic state and its central role in peacekeeping, especially forbidding murder. The protection of the individual life of every person is, of course, central to such an account. But what is a person? The definitions of this word are contested and its history fraught. Substance is inevitable in the definition before we can even get to procedure. It is inadequate to say simply that we will leave the definition of the person to various associations. So did antebellum America. That did not work out. The most obvious contemporary issue is abortion rights. John Finnis has argued for the personhood and accompanying legal protection of the unborn.²² What is the value pluralist and the nomocratic state to do with such an argument? Will this be one of a few narrow places where democracy fits in with a nomocratic constitution? Will we be able to rely on a consensus view that gets us at least to answer certain basic questions of substantial definition like this in the law and then leave the rest to procedures of the nomocratic state and the purposes of associations?

Associations and the Freedom of Association

Second, McIntyre's description of associations casts them as "manifestations of the freedom of individual citizens to make and keep commitments and obligations, and to pursue their own particular conception of a decent human life."²³ This definition is true as far as it goes, but it reflects the perspective of the individual member. It does not account for the association's side of things. That is, it emphasizes what individual members get out of associations, but not the way in which associations interact with individuals. Individuals in their social lives (as distinct from their political lives) form social structures that exert authority over themselves and other individuals. An individual who pursues a good in a group is constrained by that group, in ways official and unofficial, that limit the individual member. To say that the individual still has the right of exit perhaps justifies this exercise of authority in a liberal nomocratic regime, but it does not eradicate the reality or nature of the real limitations this poses. This question matters because much of the liberal unease with associations emerges precisely from this account of authority, which I have defended as the central feature of freedom of association.²⁴ If individuals are free to associate, they must be free to form structures of authority that will then exercise said authority over them. This exercise of authority (as virtually everyone knows) can be unpleasant for individuals under its sway. But it is essential to the social bond of these groups if they are to have substantial influence in the lives of their members.²⁵

To put it another way, the rules that condition our interaction with others might be such that associations cannot exercise the authority they need to exercise in order to maintain internal order toward their teleocratic goal. The Supreme Court has refused to require associational protection to some groups to exclude members who differ with the goals, the telos, of the group.²⁶ We need a thicker account of what groups are in order to be able to understand how rules can be structured so that they will not interfere with the internal authority of groups except insofar as they secure a minimum right of exit and so forth.

Does McIntyre have a “thicker” account of these associations such that they can provide the social context individuals require for true community? Such an account, I believe, is necessary to a complete account of limited political power (with which I am highly sympathetic). We have to know how the claims of associations and the claims of individuals will be reconciled. It would augment rather than undermine the nomocratic state by demonstrating the role of nonstate institutions in shaping individuals and in doing so exercising authority over them in ways forbidden to the state. This tension in the liberal account will become even more clear regarding tax exemptions.

A Localist Objection

Third, related to freedom of association is a localist objection. McIntyre is adamant about the classical liberal nature of his account of the nomocratic state and the separation of any substantive content from political power. However, as I emphasized above in my account of the necessity of the thickness of associations to give substance to the freedom of association, some accounts of the good require a great deal of associational authority. What if this authority is territorialized on a small scale and thus political in some sense? I have in mind here small townships (perhaps the size of a Greek polis) rather than large or even small metropolitan areas. Might there be a place for a teleocratic substance in political power, or political power exercised at least partially for teleocratic purposes at some level as necessary to true freedom for various value monisms?

In order to live out a particular idea of the good life, some people might need to be able to be cloistered in some sense. Some moral monisms require separation from different moral monisms or value pluralisms. Perhaps such moral monisms can flourish in the same constitutional regime but cannot “flourish” *literally* “alongside each other.”²⁷ To be truly plural, a geographical component may be necessary to a substantive freedom of association, which implicates a quasi-political manifestation of associational authority in order for some people to live out their version of the

good life.²⁸ Think of the Amish or some similar community, but one even less open to communing with outsiders. It is not enough for such people to join a voluntary association for some part of their life; they need to work with, live by, and send their children to school with people similar to themselves. Furthermore, they may need to refrain from working with, living by, and sending their children to school with people dissimilar to themselves. Voluntary associations, private schools, small businesses, and even housing covenants may get one only so far. There might be a need for local regulations that enforce certain restrictions on a teleocratic basis in order for these people to truly have their moral community. Could there be a place for the application of freedom of association at the local level in such a way that rules will be more substantive than might be permitted at the state and federal levels (or their equivalent in the non-American nomocratic regime)? Can the nomocratic state still exist and thrive, but permit diversity in local political orders? This question is important for the toleration of robust moral monisms within the nomocratic state.

Tax Exemptions for Associations

Finally, we might have self-described value pluralists take very different positions on how to treat, say, nonprofits in a tax exemption scheme. The claim by one side might be that associations are permitted to be exclusive, but that they are in no way entitled to public subsidy of their exclusion. Since the Supreme Court has described tax exemptions as “subsidies” (a mischaracterization, in my view), then those organizations ought not to receive the benefit of tax exemptions.²⁹ All organizations with any values at their center will be inherently exclusive around those values. Even an organization that claims “inclusion” as one of its values will have to reject members who want to exclude. The powers that be will have to decide which values receive tax exemption and which do not.

One way of dealing with this is to assert a distinction between exclusion on the basis of viewpoint and conduct on one side and status on the other.³⁰ Groups that exclude on the basis of viewpoint or conduct are acceptable (since people can choose to change their

viewpoint and conduct) but not those that exclude on the basis of immutable characteristic such as race or sex. Given recent controversies of transgendered persons, this distinction implicates values and viewpoints on the relative importance of viewpoint and status. The distinction is by no means as helpful as its advocates allege.³¹

Another view is to give out no tax exemptions to nonprofits to avoid this dispute altogether, denying the subsidy not just to exclusive organizations but to all. This might require repealing 501(c)3 and 501(c)4 and other parts of the tax code. This runs into its own problems. As Philip Hamburger has ably argued, the subsidy view of tax exemptions developed long after tax exemptions were established. Legislative tax exemptions were, in turn, a recognition of an earlier principle that organizations that didn't turn a profit didn't pay taxes. The traditional view of tax exemptions was that nonprofits, especially churches, ought not to pay property or income taxes at all. The laws providing tax exemptions simply reflected what was thought to be common sense.³² Unproductive property and activity simply could not be taxed.³³

The subsidy view of tax exemptions emerges from nativist liberal fears of “oppressive speech.”³⁴ Hamburger writes, “In the liberal understanding . . . group speech opinion can be viewed as oppressive to individuals and their democracy—thus allowing the suppression of speech to be justified on a theory of individual and political freedom.”³⁵ Tax exemptions were recast as a government subsidy of speech and exclusive associations.

I do not think this question is tangential to the nomocratic state. As Hamburger demonstrates, aspects of the current tax code, which forbids some political speech for religious organizations, actually developed to suppress the political speech of churches and other idealistic organizations, but it finds wide support among liberals of all sorts. Many go further and argue for the stripping of tax exemptions from those out of step with liberal commitments.³⁶ However, as Hamburger argues, “[C]hurches have played an essential role in maintaining the independence of public opinion from government. Being devoted to ideals that stood apart from government, they could lead the nation along paths that did much

to limit its oppression.”³⁷ This would surely be but the beginning of a protection for freedom of association in the nomocratic state, given its core obligation to preserving substantive commitments to the private realm. The preservation of this associational arena wherein substantive philosophical commitments have a place depends on hard questions over the tax code. McIntyre has clear sympathy with a liberal individualism that, as Hamburger argues, has been cast as the opposition to tax exemption for the very organizations that instantiate substantive commitments outside of the state. How might the nomocratic pluralist conceptual apparatus deal with this?

Conclusion

McIntyre’s defense of nomocratic pluralism is masterful. He ably demonstrates the dangers of connecting political power to value monism of any sort and in so doing joins a cadre of profound political thinkers from Aristotle to Edmund Burke to Robert Nisbet. But turning this sophisticated philosophical vision into reforms in our laws and institutions will meet with some challenges from within the classical liberal perspective. What ought value pluralists to do with them?

McIntyre and Oakeshott on Nomocracy

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Nomocratic Pluralism: Plural Values, Negative Liberty, and the Rule of Law

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This well-written, scholarly, and thoroughly researched book offers so many instances of plausible argument for this reviewer, that my brief remarks on it for this symposium will be confined to two themes that could arguably be made clearer or would benefit from amplification or modification in the interest of both lucidity and defensibility.

The author says that he hopes “to have avoided the difficulties associated with attempts to defend classical liberal institutions by reference to concepts which are inherently questionable, such as ‘natural/human rights.’”³⁸ We might say that this book would fall broadly within the tradition defending liberal institutions of limited government on skeptical rather than Lockean assumptions or starting points. Here is more plain speaking from the tradition that argues for limited government on the grounds that government authority and purview should be limited because (beyond certain basic needs) no one really knows what is good for other individuals, each of whom is presumed to have an ineffable destiny of some sort, transcendental or mundane and is best accommodated by loose arrangements of civility, as opposed to claims of thinkers such as Marx and John Dewey that everything one is as a person is what one is as related to others.

Although the author discusses scores of thinkers in defending his claims for “nomocratic” or rule-based pluralism, arguably (and perhaps he might agree) the book owes most in its positive claims to the views of Michael Oakeshott (though the author does say that the novelty in his own account is the logical linkage *between* what he calls “value pluralism” *and* the rule of law properly understood). So, my first point is that the book is arguably soundest and most lucid where Oakeshott is also, and more “murky” where Oakeshott is also, in particular on the difference between *substantive* and *general* purposes, and between instrumental and noninstrumental purposes.

Both Oakeshott and the author share the idea that since civil association is rarely voluntary, the freedom of civil associates arises in the *generality* and *silence* of the fundamental laws of association (intellectual moves, we might note in passing, of Jean-Jacques Rousseau and Thomas Hobbes, respectively). Oakeshott, for example, on occasion distinguishes between general purposes such as civic virtue and “*tranquillitas*” and substantive purposes such as getting in the harvest, and on other occasions he lapses back into saying that civil association has no purpose (or bakes no bread), when he clearly means it has no *substantive* purpose, carefully speaking. And in Oakeshott’s usage, civil association founded on general purposes is also moral or noninstrumental association, and it is distinguished from enterprise association to accomplish some substantive purpose such as eliminating poverty or saving souls. Unfortunately for clarity’s sake, Oakeshott’s characteristic expositional method of delineating two opposing ideal types—a method the author has adopted—obscures the fact that the difference between the two is often a matter of degree, or rising generality, which can lead to unnecessary and irreconcilable conflicts of opinion over principles.

In this case, it can lead to the claim that civil association has no purpose (beyond recognition of itself as authoritative) arising from the rigid distinction between instrumental and noninstrumental, which is clearly a matter of degree based on rising generality of purpose. Let us take a moment to explore this point, and let us take it up, not in the abstract, but as the author approaches it.

McIntyre argues soundly that order and stability are responsibilities of all states, yet he also argues, following Oakeshott, that questions of efficacy, efficiency, and success are *not* characteristics of “the rule of law,” which is concerned with noninstrumental rules such as the rules of a game, which, for the most part, do not prescribe particular actions but tell us *how* to do things, not *what* to do, and can never be “used up” in single performances.³⁹ Now, in this instance, it defies common sense, in my view, to say that states can be responsible for order and stability without at the same time being concerned in their founding general principles with questions of efficacy, efficiency, and success (or constitutional longevity). As Aristotle observed long ago, different constitutional forms such as a democracy, oligarchy, and constitutional government make different claims about what is a just ordering of the state and about what kinds of potential conflicts among citizens can be peacefully resolved within the established arrangements of the particular constitution or regime. So, in this view even Oakeshottian and McIntyrian “rule of law” systems make some rules that are instrumental to furthering some political values over other (e.g., liberty over equality). In my view, the issue here is simply about how directly they do so. So my general points here are (1) that by focusing on differences over the proper purview of government in terms of rigid categories, such as civil versus enterprise association, one narrows unnecessarily the range of possible accommodation of conflicting interests; and (2) that by contrast, viewing the issue from the standpoint of rising generality of enabling associational rules, one expands the possibility of reconciling opposing interests, foundational as well as mundane, and avoids hyperbolic claims such as that the rule of law properly understood is not instrumental to furthering some set of values.

This latter approach also affords an avenue for resolution of the modern conceptual conflict *between* the all-encompassing ancient Greek purposive view of “the political,” *and* the more individualistic Roman view of pursuing various endeavors while observing the traditional ways of doing things (the *mos maiorum*). Said differently, “rising generality” of purpose affords a way of intelligently

combining Aristotle's claim that politics is the art of ordering all the other arts of the state or comprehensive association, *with* the important freedom of individuals to pursue their private purposes under *general* laws. That is, this approach affords a way to preserve the commonsensical Greek view that to reason politically is to weigh proposals for both policy and constitutional arrangements from the standpoint of their likely effects on the functioning of the political whole (to include order, stability, and longevity), rather than in some sort of Kantian or Rawlsian moral vacuum in which applied deductive ethics passes for genuine political reasoning. Cicero, we might observe in passing, could make his extravagant claims about the congruence of morality and utility only because his inherited Roman morality already incorporated requirements for the preservation of the Roman state, a situation not present in non-Aristotelian, Pauline Christian morality, nor in its various modern and contemporary secular moral and political Kantian and neo-Kantian offspring.

The other major theme to address here is the author's claim that his ideal of "nomocratic pluralism" is predicated on the idea of "value pluralism," an intellectual move Oakeshott does not make, given his greater skepticism and aversion to "isms" of any sort, as well as his avoidance of the term "values." I will leave on one side the Nietzschean and Weberian subjectivist implications of employing the contemporary vocabulary of values (though the author does try to distance himself from Carl Schmitt's views on values) and turn to a distinction within the realm of "values" the author does not make.

For this reviewer, the book's discussion of morality, particularly monistic versus pluralistic morality, would be clearer had the author defined what he means by "morality" and how it differs from psychological tendencies and political values, especially since he says that in his view there are no pre-political primary principles or values.⁴⁰ In particular, it would be helpful in deciding on the author's claims about value pluralism versus value monism were he to distinguish moral values from psychological and/or natural human tendencies. Presumably the author would view this as a

distinction within “moral monism,” but in my view to address it would deepen his case for the conditional incommensurability of human values.

The first instance of this kind of distinction (and long before Immanuel Kant) is arguably in the epistles of a founder of Christian doctrine, where St. Paul is keen on the difference *between* the “*psychikos*,” who lives in such a way as to preserve his psychic harmony and contentment, and the “spiritual man,” who simply obeys the divine (“deontological”) commandments irrespective of their effect on his personal contentment or psychic harmony. Now, McIntyre obliquely touches on this issue when he summarily rejects the views of the “virtue-ethics” of both Catholic and secular thinkers, as well as declining to distinguish between utilitarian and eudaimonian ethics, yet arguably the issue requires to be directly addressed because on it hinges a serious objection to the author’s privileging of negative liberty and toleration as the foremost political values. That is, the author rejects *ex cathedra* pre-political primary values and rights, but strong claims can be, and have been, made that psychological health is both universal and pre-political, whether in the writings of the Greek eudaimonian rationalists Plato and Aristotle and their view that by nature, intellect is the pinnacle of the human psychic hierarchy *or* in contemporary motivational, psychological accounts such as Abraham Maslow’s well-known hierarchy of human needs.

More explicitly, McIntyre’s case needs to address this distinction (between moral values and psychic health) more than does the view of a skeptic such as Oakeshott (who “would do better if he only knew how”), given the author’s rationalist defense of “value pluralism.” Oakeshott, by contrast, is more inclined to accept the unfathomable mystery of the diversity of human opinions than attempt a logical defense of a doctrine called “value pluralism” (“a plan to resist planning is still a plan”). His claims are also more limited. Even Oakeshott’s point in his magnum opus, *On Human Conduct*, that human conduct is to be distinguished from organic and scientific explanations of human motivation is only a step in the limited, epistemological goal of articulating a historical

methodology called “theorizing contingency” capable of explaining human actions without explaining them away, as in the case of scientific and “covering law” explanations.

A related and concluding observation where Oakeshott may be seen to differ from McIntyre (this time in a less skeptical direction!) and to border on what the latter calls a “single decision procedure” in moral matters is to be found in Oakeshott’s general account of experience. Oakeshott argues that there is an abiding and universal structure to human experiential reality and that it is “creative” or “poetic” with the *how* and *what* of all settled patterns of experience arising simultaneously and conditioning one another reciprocally, neither more essential than the other. More specifically, Oakeshott argues that healthy and balanced moral and political traditions are those in which, except in times of emergency, conscious intellect acts as critic rather than initiator of practical action. In a negative sense, then, Oakeshott does have something like a single ontological principle for deciding which moral and religious and political traditions are imbalanced and destructive of established skills, owing to an overestimation of the capacity of conscious human intellect in deciding on courses of collective moral and political action in response to various contingencies.

It would be interesting to learn how the author might classify this aspect of Oakeshott’s thought with regard to the author’s own claims about the rejection by “value pluralists” (such as himself) of “single decision procedures” in moral and political matters. For Oakeshott, philosophy cannot tell us *what to do*, but (like the Socratic *daimonion*) it can tell us *what not to do*, tell us when we are being irrelevant. Is this Oakeshottian claim at least a partial (negative) approximation of a “single decision procedure” in the realm of practical action, echoing the words of Confucius to Lao Tzu that he had learned not many things but only one thing that permeates everything? In the case of Oakeshott that the structure of all experiential reality is “creative” and that this insight has many implications for the realms of both theoretical and practical knowledge and action, especially for establishing the pragmatic limits of

all centralized human attempts at order and control based on abstract, deductive “isms” of any sort.

A concluding postscript. The author’s lengthy critique of John Gray’s “modus vivendi” pluralism and its strong claims for the incommensurability of human values is emblematic of the nuanced argumentation of the entire book.⁴¹ It also highlights well the book’s theme, to demonstrate “the theoretical validity of value pluralism as an adequate account of practical life.”⁴²

Politics and the Escape from Virtue

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Nomocratic Pluralism: Plural Values, Negative Liberty, and the Rule of Law

By Kenneth B. McIntyre. Palgrave Macmillan, 2021. Pp. 214. \$59.99

American and Western politics generally are in a state of intense polarization that calls into question the future of constitutional democracy. The deep divisiveness that has become common to politics and culture is extending partisan ideological divisions into nearly every aspect of life, including economic markets and consumer choice, education, reaction to the Covid pandemic, religion, race relations, family relationships, sports, and entertainment. Such partisanship is inspired by an underlying attitude that one's ideology, politics, and morality are right and that all others are inferior if not wrong, illegitimate, and unworthy of consideration. Moral monism, the belief that all moral questions can be answered by a universal, unchanging value system, is destroying the cultural foundations of constitutional politics. Law and policymaking in constitutional democracies, for example, rely on individuals with competing interests and values to accept that no group has a monopoly on truth and that the common good is found in consensus and compromise between competing interests. James Madison's *Federalist* No. 10 expects representatives to "refine and enlarge the public views" in ways that are consistent with the common good. Synthesizing seemingly disparate interests and views is at the heart of representative government.

Kenneth B. McIntyre's *Nomocratic Pluralism: Plural Values, Negative Liberty, and the Rule of Law* is a theoretical response to polarization and the depreciation of constitutional democracy.

The book, however, does not address constitutional politics directly, but it affirms one of its central components, the rule of law. His argument opposes moral monism with value pluralism, which he distinguishes from *modus vivendi* pluralism (represented by John Gray), and egalitarian pluralism (represented by Thomas Nagel). An entire chapter is devoted to a critique of moral monism that focuses on one central point: morally monistic theories such as utilitarianism and deontology fail to provide a workable “single decision procedure” that is capable of resolving “all moral conflicts.” Human beings are far too diverse in moral thinking and belief for moral monism to be a viable way of resolving moral conflict or conducting politics. In rejecting moral monism, McIntyre favors classical liberal pluralism (from which he derives nomocratic pluralism) over welfare liberal pluralism because the former promotes what he considers to be the foundations for peaceful coexistence, negative liberty (freedom from interference), and toleration. Nomocratic pluralism does not offer a solution to moral conflict but provides a way to avoid both political conflict about morality and collective moral decision-making by the state. In short, the nomocratic pluralist state promotes and protects negative liberty while rejecting a role in the promotion of positive liberty.

Negative liberty is both nonsubstantive and non-teleological. It is more akin to a method than a value because it requires that government remain neutral in the competition of ideas. Yet, negative liberty encompasses specific categories of rights—for example, rights of conscience, property, and association. It is unclear why such rights are not the consequence of moral claims—that is, the state promotes them because they are good for human beings; they contribute to human happiness and thriving. Why is it acceptable to promote these moral claims/goods and not others (e.g., equality, community, charity, family)? Welfare liberal pluralism, in contrast to negative liberty, is substantive and teleological because it promotes positive liberty that leads to government paternalism and state coercion that undermine negative liberty. Positive liberty, while important, should be left to the nongovernmental domain of society.

Value pluralism assumes that values, moral and nonmoral alike, are incompatible and incommensurable. Human beings hold competing and unequal values, commitments, plans, and projects. Consequently, political and social peace require competing groups and individuals to agree to disagree and government to avoid taking sides in ideological competition and moral disputes. The goal is peaceful coexistence engendered by the acceptance of ethical diversity within a nomocratic pluralist state based on the rule of law that promotes negative liberty, including rights to private property, conscience, and free association. Individuals should be free to make their own decisions as long as they do not harm others; they are not at liberty to violate the “minimum content of morality,” but they are obligated to “reciprocal noninterference in and tolerance of” opposing values and commitments. The virtue of negative liberty is that it provides individuals with the freedom to conceive and implement their particular projects, commitments, plans, and values as well as change their minds about them. McIntyre assumes that such liberty is limited by an obligation to uphold the minimum content of morality and that there is no one value system that is acceptable to everyone. He repeatedly emphasizes that government should remain neutral in the marketplace of moral values, projects, commitments, and plans. His project can be thought of as a philosophy of minding your own business.

In McIntyre’s view, government is limited to minimal responsibilities, including security, order, upholding a minimum level of morality, and enforcing the rules on which peaceful coexistence depend. The nomocratic pluralist state does not make efforts to unify citizens under a civil religion or public philosophy unless peaceful coexistence can be considered a common political value. Government does not rule based on truth or virtue. It creates laws that are akin to the rules of grammar that create conditions for expression but do not interfere with the content of expression. The state is a “means of peaceful coexistence,” not a “cooperative enterprise.” Value conflict between individuals is a permanent part of the human condition. Government serves to mitigate such conflicts not by privileging one side in the conflict but by impartially

enforcing the rule of law. This defining role of government does not require that government take specific form, although political liberalism is favored by most value pluralists. Certain forms of government are inconsistent with value pluralism—for example, communism, socialism, fascism, and monistic liberalism chief among them. These forms of government use a single decision procedure to resolve disputes; one ideological perspective is given an advantage or monopoly by the state over all others. Consequently, they are intolerant and use noncompliance with the favored ideology as the grounds for invasion or denial of positive liberty. Positive liberty is rejected by value pluralists as a political value, as is any “shared substantive purpose” like equality. In a statement that unmasks McIntyre’s radical individualism, he contends that human beings “do not share a single substantive purpose.” In his conception of the nomocratic state, the rule of law limits government and obligates individuals to “a formal condition or conditions while making substantive decisions and/or taking substantive actions.” In other words, individuals follow a legal method but they, and society as a whole, are not required to “take specific substantive actions.”

What are the weaknesses of a political theory that favors “no particular substantive notion of justice or the good life” and that promotes a politics that makes no efforts to cultivate virtue or conditions that foster the good life? To begin with, it idealistically assumes that individuals are rational and will use liberty in ways that contribute to peaceful coexistence and toleration. Human beings have the capacity to reason, but they are often unreasonable. Value pluralism treats liberty abstractly as if the prudent degree of freedom can be determined a priori and as a metaphysical proposition. Edmund Burke provides an alternative view of liberty when he argues that individuals are fit for liberty in proportion to their ability to put moral chains on their passions. Their responsibility and lack thereof determine the extent of their liberty. Politics requires adjustment to the changing conditions of cultural life. If private associations like churches are largely successful in shaping self-governing individuals, then less government coercion is necessary. As these associations lose their vitality, it is reasonable

to assume that government will need to address growing irresponsibility. Moreover, McIntyre is convinced that neutrality by government in culture wars is possible and desirable. Even if desirable, the onus is on advocates of value pluralism to provide historical evidence that political regimes that maintain moral and ideological neutrality are possible. Moreover, how can government remain neutral on matters such as abortion, marriage, equality, and climate change?

There are unintended consequences to assuming that moral claims, with few exceptions, should be governed solely by a free marketplace of ideas. If the cultural conditions are ideal, as John Stuart Mill assumed, it may be possible that the best ideas will prevail. There is little historical evidence that ideal conditions are common or even possible. McIntyre is not closing the public square to truth claims, but he is building a wall of separation between these claims and the development of public policy and law. Classical questions about the Good or justice are not within the parameters of his analysis or the work of statesmen. The highest aspiration of his conception of political life is negative liberty.

There are certain preconditions to open societies, toleration, and peaceful coexistence, including the prevalence of individuals who are capable of empathy and respect for others. The character that makes toleration possible, for example, must be cultivated. McIntyre, however, has little to say about the cultivation of such virtues except that government neutrality in moral matters will somehow foster toleration in nongovernmental institutions. His silence on such matters raises several unanswered questions. Why is it necessarily the case that government neutrality on moral questions leads to a more tolerant society? Is it possible that neutrality gives pernicious ideologies a fighting chance to succeed and overwhelm the minimal state that libertarians like McIntyre favor? Might moral neutrality create a void in the public square that is eventually filled by the very types of moral monism that McIntyre wishes most to avoid? How does moral neutrality shape foreign affairs? Does a nomocratic state remain neutral in regard to the moral atrocities of other nations? McIntyre might respond that

nomocratic pluralism recognizes that pernicious ideologies exist. He lists a few: socialism, communism, fascism, and monistic liberalism. An argument can be made that socialism, monistic liberalism, and monistic conservatism make up the better part of American political ideologies today. If so, then suggesting that the current American political reality that is characterized by the welfare state and war state and widespread polarization can be replaced by something like nomocratic pluralism is a mere abstraction. McIntyre conceives of his ideal regime without considering the current state of American politics and culture. The likelihood of implementing nomocratic pluralism in concrete historical conditions does not interest him. Would nomocratic pluralism have been a viable option on the eve of the American Civil War? Would it have led to better political outcomes if implemented at the time of the American constitutional formation, the Great Depression, or the civil rights era? Dreaming of a minimalist state that governs a society of tolerant, peacefully coexisting individuals as the United States takes increasing steps toward socialism and American culture becomes increasingly polarized smacks of picnicking on the battlefield.

Eric Voegelin noted in the twentieth century that an open society and rational debate require certain spiritual conditions. McIntyre has little to say about the preconditions for rational debate because he assumes that if relegated to the private domain, tolerance and peaceful coexistence will result. Totalitarians, moral monists, and others are intent on destroying any system that denies them monopoly control of government and culture. Political theorists have an obligation to examine the cultural and existential roots of political and social order in order to explain why something like nomocratic pluralism makes sense. Does it comport with the human condition and the current historical conditions? Voegelin states that “[q]uestions of social order can be discussed rationally only when the order of being, to which the social order belongs, is viewed in its entirety and all the way back to its transcendent origin.”⁴³ He also suggests that liberalism reacted to revolution by attempting to slow down the rate of change or to simply delay

decisions about revolutionary matters.⁴⁴ McIntyre's analysis avoids confronting these issues related to the moral dimension of politics. Once he declares, like Thomas Hobbes, that there is no *summum bonum* and that matters of morality are best relegated to private life, it seems inappropriate to discuss what will lead only to disagreement. Yet, as McIntyre's analysis of competing varieties of pluralism proves, disagreement is part of political life. It is not a reason to banish moral questions and claims from public policy debates. It would help his argument to provide historical examples of societies that created something like a nomocratic pluralist state so that its viability could be considered. Without such historical ground, it is little more than an abstraction.

Real Affections vs. Geometry: Moral Monism and Telling America's Story

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**Nomocratic Pluralism: Plural Values, Negative Liberty, and
the Rule of Law**

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Firing salvo after salvo against Richard Price's sermon marking the centenary of the Glorious Revolution, Edmund Burke warned his fellow Englishmen not to imitate the upheaval in France in their misplaced zeal for remaking Britain according to the dictates of a rationalist ideal. Among Burke's indictments of radicals in his *Reflections on the Revolution in France*, he charged that they sought to impose a political and moral order as if these things were matters of geometrical calculation about abstract human beings rather than the product of prudential wisdom purchased by long experience with the complexities of historically situated, particular individuals embedded in families, communities, places, and private associations. When it came to redrawing the map of France and the city of Paris, Burke asked, "Is every land-mark of the country to be done away in favour of a geometrical and arithmetical constitution?" Much later in the *Reflections*, he elaborated further on the danger of a rationally transformed France. What the reformers considered their greatest strength—the application of pure reason to the messiness of life—would prove to be their greatest weakness, Burke warned. "It is boasted," he wrote, "that the geometrical policy has been adopted, that all local ideas should be sunk, and that

the people should no longer be Gascons, Picards, Bretons, Normans, but Frenchmen, with one country, one heart, and one assembly. But instead of being all Frenchmen, the greater likelihood is, that the inhabitants of that region will shortly have no country. No man ever was attached by a sense of pride, partiality, or real affection, to a description of a square measurement.”⁴⁵

The unraveling of “real affections” has become an urgent concern in the modern world. To what do we belong? How are we tied to one another? And what scale of associations is best suited to the pursuit of a good life? Answering these questions as if morality, political order, and reasoning itself were simply matters of geometrical calculation leads to coldly rational, ideological, and monistic solutions, which are not solutions at all but the source of even greater conflict. These concerns lie at the heart of Kenneth McIntyre’s *Nomocratic Pluralism*, a witty, engaging, tightly reasoned, and provocative book accessible even to the nonspecialist.

While McIntyre does not draw directly from Burke, in a way similar to the Parliamentarian he rejects the kind of moral reasoning that collapses the distinction between reasoning about things that do not change and things that do and treating all reasoning and human values as if they were dependent on abstract universals that provide settled rules and procedures for resolving every moral question and managing our differences. Regarding these important distinctions, McIntyre writes, “Proponents of monistic conceptions of practical reason tend to model these conceptions of reason on the kind of reasoning associated with the natural sciences and mathematics. Such conceptions posit that reasoning is a unity, so practical reasoning, like all reasoning is abstract, universal, objective, and impersonal.” “This kind of scientific rationalism,” he continues, “conflates practical reason and theoretical/scientific reason, thus, misconstruing the moral and nonmoral values of human beings, since these values are not abstractions, but are instead complex and often particular to specific individuals.”⁴⁶

I am not a political theorist. I am a historian of American thought and religion with a particular interest in America’s fruitful encounter with English, Scottish, and Continental thought,

especially French and German in the nineteenth century, with excursions before and after. My approach to the craft of history has been shaped largely by Herbert Butterfield, whose historical reasoning, Christian faith, and “skeptical liberalism” McIntyre illuminated in his helpful introduction to the Cambridge historian published in 2011.⁴⁷ Butterfield exposed the “psychology” or habits of mind, conscious or unconscious, of the Whig historians. These Whigs advanced what we might call a “teleocratic” narrative of history that judges the past by the standards of the present or even by an imagined future. They were moral monists who, as Butterfield wrote, attributed all conflict to ignorance or perversity, penalized the sinners of the past, and elevated the historian to the role of prosecuting attorney, jury, and judge all rolled into one.

Whether McIntyre would welcome the direction my thinking took while I grappled with *Nomocratic Pluralism*, I found myself inevitably turning over and over the implications for the study and practice of history of his rejection of moral monism, his highlighting of the dangers of “plural monisms” competing to impose themselves on societies, and his defense of “a self-conscious value pluralist approach to politics.”⁴⁸ My reflections grouped themselves into two questions: (1) whether and to what degree moral monism, “teleocratic” agendas, and projects of “enterprise associations” have appeared in American history; and (2) if and how these habits of thought appear in the ways historians write about the American past.

Those inclined to see America as a “project” typically start with the Puritans of Massachusetts Bay and John Winthrop’s invocation of the “city on a hill,” badly misreading it as the origin of American exceptionalism and even a proto-Wilsonian messianic consciousness. From there, they offer a highly ideological reading of the American Revolution and then position Abraham Lincoln and his propositional nation as the definitive, most authoritative interpreter of the American mission, the new Founder who finally got America right. The Puritans did indeed plant an “enterprise association” in North America, but it is important to keep in mind that that association was entirely voluntary, composed of like-minded individuals

intent on establishing a church and civil polity in conformity with God's will. That identity changed into a more "secularized" version while retaining all the biblical language of calling, redemption, and transformation. Ripped from its setting in a small, tight-knit community of Christians, it became restless and ambitious. By 1852, there were sons of New England proclaiming California a "colony" of New England Pilgrims and summoning these pioneers "to make California the Massachusetts of the Pacific."⁴⁹

Well before the nineteenth-century reinvention of the Puritans lay the constitutional order instantiated in 1787. We hear about the 1619 Project, the 1776 Project, and even the 1863 Project, but perhaps we ought to revisit the 1787 Project. The difficulty is that the 1787 Project gets read through the lenses of all these other projects. In McIntyre's sense, did the federal Constitution of 1787 create a nomocratic or teleocratic union? Did the Constitution establish the procedural rules for how the states would manage their common business in peace and tolerance and adequate accommodation? If teleological, was that telos primarily peace, prosperity, and liberty rather than the means to implement an abstract, rationalist, geometric ideal? Was it designed to guarantee the promises of the Declaration of Independence and really only a highly selective reading of that document as a statement of abstract propositions? In historian Susan-Mary Grant's helpful distinction, was the Declaration of Independence, going forward into the nineteenth century, a mission statement or an insurance policy?⁵⁰ It was not only the slaveholding South that handled it as an insurance policy against the centralization of power.

In the debate over ratification, the Anti-Federalists explicitly warned against political monism. Brutus appealed to America's diversity as an argument for a continuing confederation of limited, defined powers. The peoples of the various states and regions were simply too different in "manners, sentiments, and interests." The United States was composed of "a variety of climates," of diverse economic production and of habits, manners, sentiments, laws, and customs. It was simply too heterogeneous for a unitary government to survive or to be safe.⁵¹

By the 1830s Americans steeped in French and German idealism began referring to the “American Idea.” The first to do so, as far as I am aware, was Orestes Brownson in 1838 when he wrote that John Greenleaf Whittier was truly an American poet “because his soul is filled and enlarged with the American Idea.” What was that Idea? Nothing less than “the Idea which God has appointed the American people to bring out and embody; the Idea of universal freedom to universal man; the great doctrine that man equals man the world over, and that he who wrongs a man wrongs his equal, his brother, himself, a child of God. This is the American Idea. The mission of the American people is to realize this Idea, and to realize it for the world.”⁵²

McIntyre’s work makes certain things stand out in statements like these, and examples could be multiplied almost indefinitely. Brownson’s reason at this stage of his intellectual wanderings was abstract, universalist, teleocratic, and monistic. I am suggesting not that historians adopt a nomocratic versus teleocratic paradigm and use it to force America’s complex history into a convenient and simple mold but rather that they use these tools to help them notice language, tendencies, consistencies, and inconsistencies across American history that they might otherwise have missed. McIntyre’s insights should be used to add further texture to history and not to make it formulaic.

As for historians themselves, I will consider only the problem of moral monism that is coming to dominate the practice of history. The mantra of “white supremacy” is not the only one of these reductionist ways of writing. From Pulitzer Prize-winning historians to academics fighting for tenure to graduate students eager to play the game and please the boss, the moral monism of the profession is everywhere. It produces a numbing predictability of conference themes and panels.

Ideological historians across the spectrum write history according to abstract, universal, totalizing principles, and as I said above of the old Whigs, they attribute all conflict to ignorance and sin rather than to “the incompatibility of duties and incommensurability of values” in so many of life’s circumstances.⁵³ They cannot

accept the messiness of moral judgment in mundane life. Some are subtle and sophisticated; others are heavy-handed and clumsy. But all impose the one timeless standard by which America is to be judged a success or failure, innocent or sin-soaked. And these monisms compete with each other to control the narrative and to control public policy and even foreign policy, and not for the first time in our history.

Unsurprisingly, then, there are implications in McIntyre for the current debate over national identity and cohesiveness. *Nomocratic Pluralism* pairs nicely with Samuel Goldman's recent *After Nationalism*.⁵⁴ Both books help to moderate claims for how unified the United States is, can be, and ever was. They help us at least consider the possibility that the demand for a single national story might be not only misguided but also dangerous to liberty, tolerance, forbearance, and modesty. And perhaps more importantly, they both reaffirm the durable virtues of an older political liberalism, the rule of law, and limited government. For neither author has liberalism failed. Neither one looks to the nation-state as the last, best hope for genuine community and belonging. Like the dating service parodied on *MADtv* in the 1990s, they offer "lower expectations," and that is refreshing. The extremes of competing monisms will tear us apart. To give Burke the last word, "The pretended rights of these theorists are all extremes; and in proportion as they are metaphysically true, they are morally and politically false. The rights of men are in a sort of *middle*, incapable of definition, but not impossible to be discerned."⁵⁵

Response to Critics

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Nomocratic Pluralism: Plural Values, Negative Liberty, and the Rule of Law

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I want to thank the reviewers for taking the time to read the book carefully, and for the perspicuous and insightful comments, criticisms, and questions. I am honored to have had such a distinguished group of scholars expend their time and effort reviewing my recent book, *Nomocratic Pluralism*, and I am pleased to have the occasion to reply to their comments. When I am fortunate enough to have the opportunity to receive multiple reviews of my work, I am always fascinated by the wide variety of responses that I receive. For example, among the current reviewers, two (Luke Sheahan and Richard Gamble) found my book to be rather Burkean in style and/or content and approved of it, in part, for that reason. Conversely, another reviewer (Michael Federici) used Burke as a cudgel with which to batter it. While reading Federici's essay, I could hear the voice of Lloyd Bentsen scolding Dan Quayle, only in my case he was saying, "I've read Edmund Burke, I've studied Edmund Burke, and you (McIntyre) are no Edmund Burke." Since I am not a scholar of Burke and have never considered myself to be much of a Burkean sort of thinker, I'll leave that question for them to decide.

In any case, in each essay, the reviewers offered a précis of the book. Nonetheless, before I begin to address their comments,

I want to offer my own summary. In doing so, I hope to clarify a few things that I perhaps did not make as explicit as I should have in the book itself. First, I'd like to speak about why I wrote the book. It is generally reasonable for readers and reviewers of scholarly monographs in political philosophy/theory to assume that the author has, at least in part, some practical political problem or set of problems in mind while writing. So, for example, Federici writes that the book "is a theoretical response to polarization and the depreciation of constitutional democracy," while Sheahan, more accurately, suggests that the book is concerned with "confront[ing] plural monisms." In fact, however, neither of these things was on my mind when I decided to write the book, though in the process of writing it I did eventually offer *obiter dicta* on a variety of contemporary political issues, including current events like the Black Lives Matter riots and more general questions like the problem of plural monisms. In fact, I agree with Sheahan's contention that the primary problem in Western liberal democracies these days (and it is this that is behind both polarization and the deterioration of constitutional government) is not that self-conscious value pluralists cannot decide on what is a proper political-social institutional settlement but instead that Western liberal democracies comprise citizens who are adherents of a plural set of monistic ideologies. These plural monisms reject each other as immoral or abhorrent because such monistic/ideological commitments lead to a Manichean form of politics as conflict. So, pluralism itself isn't the problem. The lack of self-conscious pluralists is the problem.

Nonetheless, my purpose in writing the book was not a practical but a theoretical one. What I wanted most was to clarify in my own mind a rational justification for and an elaboration of a relatively free and decent political society that was not dependent on moral and/or practical notions I found theoretically untenable (e.g., natural rights arguments or utilitarian or consequentialist arguments). I found what I took to be a possible justification in an exploration of value pluralism, which is a moral and practical

philosophy more compelling than the variety of morally monistic explanations of practical life that occupied and continue to occupy the primary places in the history of moral philosophy. Thus, in the first half of the book, I offer a critique of moral monism in its deontological and utilitarian forms, along with an elaboration and defense of a specific kind of value pluralism. The argument, which is fairly straightforward, is that values (i.e., things that are valued and valuable) are multiple and inevitably conflict with each other. They conflict because they are both incompatible (i.e., there are multiple things that humans value and that are objectively valuable, and these things do not form a coherent whole but conflict with each other) and incommensurable (i.e., values are not completely comparable according to a single metric, such as pleasure or preference satisfaction). Because of this, no monistic moral system and no single decision procedure can be found to resolve moral and/or practical conflicts.

In the second half of the book, I claim that self-conscious value pluralists (like yours truly), because of their acceptance of the plurality of values and their inevitably conflictual character, would reject the notion that there could exist such a thing as a substantive common good in a political community composed of value/moral pluralists. There is a common concern (i.e., that the common rules constituting the relation between citizens be conditional, general, and adverbial and reflect, not impose, the moral considerations of the community), but there is no common substantive good. There are exceptions on occasion (e.g., when the community is engaged in a necessary defense of its own sovereignty against an outside aggressor, or when the community is suffering from some sort of natural disaster or hardship). None of this precludes the provision of a safety net or welfare system for the deserving poor, the elderly, the disabled, et al. And, as I mentioned in the book, certain minimum conditions of morality must be met before one can accept that any political community, including a nomocratic pluralist one, is morally acceptable. So, my argument is that it would be reasonable for self-conscious pluralists to place a rebuttable priority on

negative liberty, and that negative liberty is best protected in a regime in which the rule of law, understood as I understand it, is the most prominent institution of government. Thus, my primary audience comprises those readers who are value pluralists or who are at least sympathetic to value pluralism as the most adequate account of the practical lives of human beings. I am not at all proposing that this would be an ideal form of government for anyone and everyone who has ever lived or ever will live. My argument is that self-conscious value pluralists would reasonably prefer this form of government.

Finally, because the book is a piece of political philosophy, I did not feel the need to get into the specifics of the connection between my version of value pluralism and Western civilization, but I thought that the connection would be obvious. Concerning whether such a society exists now or whether it is an extant possibility, I, like Federici, am not particularly sanguine. I also did not and do not have any expectations that the book will have any practical effect. It is more a case of me saying "*hier stehe Ich, Ich kann nicht anders.*"

Comments on Reviews

The four scholars who reviewed the book came to some common conclusions, and two of them (Luke Sheahan and Richard Gamble) agreed more or less with the theoretical content of the work. W. J. Coats accepted it with a theoretical misgiving or two, whereas Michael Federici rejected it, if not *in toto*, at least quite vigorously.

Richard Gamble

Richard Gamble's essay was a pleasure to read, and not just because he was complimentary about the book. Gamble took the opportunity of the review to explore some possible implications of the work for his own academic field, which is American history and historiography. He has the least to say about the theoretical content of the book, but his sympathetic appropriation of some of the primary distinctions made in the book and his application of those distinctions to both a reading of American history and the

history of American historiography is something of which I wholeheartedly approve.

Gamble is certainly correct in observing that *Nomocratic Pluralism* is consistent with my earlier work on both Butterfield's and Oakeshott's understanding of academic history.⁵⁶ In those works, my primary purpose is to distinguish between making the past intelligible, which is the work of the historian, and making the past relevant or present, which is the work of the moralist or the partisan activist. There is a connection between interpreting the past in a monistic and ideological way and attempting to make the past relevant, and I have generally maintained that the monistic, ideological, and practical past is not, strictly speaking, historical at all, whether it is Whiggish/Progressive or anti-Whiggish/decadent. Whether it involves attempting to make a remote event from 1619 the central theme of the entirety of American history or whether it involves discovering the obscure intentions of a bunch of eighteenth-century American colonists in order to answer contemporary policy issues (i.e., playing the "What Would the Founders Do?" game), making the past present is not a historical activity but a practical and moral one.⁵⁷

Gamble also raises a different but equally interesting question about the historical actors in the American past. Did they consider the American political community to be a monistic teleocracy or a pluralist nomocracy? Of course, they did not use these terms, but Gamble's suggestion that asking historical questions about this distinction would lead to a new and fruitful way of conceiving one aspect of the American political tradition in an authentically historical way is certainly correct.⁵⁸

Luke Sheahan

Luke Sheahan's essay is both the longest and the most explicitly and comprehensively sympathetic to my theoretical arguments and conclusions. Because he agrees with the substance of my arguments, for the most part at least, I have little in the way of comment to offer on his essay. I will say, however, that one of my primary regrets in writing the book is that I did not have access to his

excellent work on freedom of association titled *Why Associations Matter*.⁵⁹ I also want to thank him for suggesting that certain sorts of moral monists might be comfortable or even quite satisfied with the nomocratic pluralist state for reasons other than purely strategic ones. He observes that those who believe their values are “instantiated in institutions other than the political state,” like Augustinian Christians, might prefer a pluralist political community. He also notes that some, like orthodox Calvinists, who would deny the truth of the notion that there can be a plurality of different sorts of good lives, might still accept the empirical inevitability of pluralism and, thus, of a pluralist state.

Sheahan’s questions concerning the book are primarily of a practical nature, and my instinctive response to them is to reiterate a claim that I made in the book—namely, that if there is no possible single decision procedure for moral questions, it shouldn’t be expected that there will be one for political questions, either. Policy concerns are obviously important, but the answers to policy questions will necessarily come from within the particular political or moral traditions of specific nomocratic communities. So, the answer to the various questions Sheahan raises (e.g., What counts as life? What should be the tax exempt status of nonprofits? What is the extent of the authority of voluntary associations over their members?) is that my account doesn’t necessarily authorize me to give final answers to those questions. I do, of course, have opinions on some of these matters, but they are not algorithmically derived from moral or political first principles. However, regarding freedom of association specifically, the arguments I put forth in the book support a very strong or thick version of freedom of association, which includes the right not only to form private groups but also to exclude or expel those with whom the group decides not to associate. This freedom of association extends to all privately owned institutions (e.g., not only private clubs but also hotels and restaurants). So, just as I have the right to choose which restaurant I want to frequent and which I want to avoid, restaurant owners have the right to choose which customers they wish to serve and which they do not. I also argue

that freedom of association considerations do not arise in public institutions.

Nonetheless, the notion that the theory of nomocratic pluralism fails because it does not provide ready-made answers to all political conflicts (which is not the claim Sheahan makes) presents a false because unattainable criterion.

W. J. Coats

John Coats's essay, like Sheahan's and Gamble's, offers a sympathetic reading of my theoretical claims, though unlike their essays, he does have some misgivings about certain hard distinctions I make in the book. One of the most notable observations Coats makes about the book is that because of my own intellectual debt to the work of Michael Oakeshott, my work is "most lucid where Oakeshott is . . . , and more 'murky' where Oakeshott is." I think Coats is possibly correct here, but this leads to a different sort of commentary than is required by the format of this symposium. That is, I will address his critique of the hard distinctions that I make (following Oakeshott) between substantive purposes and nonpurposive institutions, on the one hand, and between instrumental and noninstrumental rules, on the other, but I will not address what I understand to be a disagreement between us concerning the best interpretation of Oakeshott.

Coats claims that I make too rigid a distinction between instrumental rules and noninstrumental rules and between purposive institutions and nonpurposive institutions. I do not disagree with him that at the margins, these distinctions become matters of degree rather than of kind. I also do not disagree that noninstrumental rules, for example, have substantive effects. So, when the National Football League (NFL) prohibited defensive players from contacting eligible receivers after they had moved five yards beyond the line of scrimmage, the NFL passed a new general noninstrumental rule (i.e., it applied to all under its jurisdiction, it was not retroactive, and it was clear), but the rule also had the substantive effect of increasing scoring in professional football games. Nonetheless, I believe that most of the confusion animating

discussions about both the rule of law and the character of a modern pluralist state centers on confusing purposive institutions, like the military, with substantively nonpurposive institutions like the rule of law. Thus, my insistence is as much a pragmatic or rhetorical strategy as a theoretical one.

Finally, I also understand, as I stated in the book, that there will inevitably be situations in which the government of such a nomocratic regime acts as if it were the manager of an enterprise and not the guardian of the noninstrumental rules of coexistence. For example, when the survival of the community itself is endangered, the government becomes the *de facto* manager of a collective enterprise to ensure its survival. And, the maintenance of the government itself, the maintenance of welfare provisions for the deserving poor, the cost of enforcing the law, the cost of maintaining secure borders, the cost of collection of revenues/taxes, and so on— all will be occasions in which the government rules by policy and not by law. Nonetheless, in a nomocratic pluralist state, these situations would also be understood to be exceptions to the normal run of practical life, and self-conscious value pluralists would maintain a general suspicion of government activity that appears managerial.⁶⁰

Michael Federici

Michael Federici's essay presents the most explicitly critical examination of my theoretical arguments among those of the four interlocutors participating in this symposium. He offers critical remarks on several different aspects and from several different perspectives. Because of space limitations, I will focus on only two areas in which he is dissatisfied.

The first area, which I consider to be more of an omission on Federici's part than a criticism, manifests itself in his use of the term "assuming" when discussing aspects of my argument about moral theories. Like many adolescent boys, I learned about the dangers of "assuming" from a demonstration on a chalkboard conducted by a physical education coach; but in this case, and in the others where Federici uses the term "assumes" or one of its cognate forms, I did not assume anything. Federici claims that

“value pluralism [meaning “McIntyre”] assumes that values . . . are incompatible and incommensurable.” I spend an entire chapter arguing that values are incompatible and incommensurable, and thus although my argument might be wrong-headed, contradictory, or fallacious in many ways, it is an argument, not an assumption. It is also a central argument to my claim that value pluralism is the most adequate way to understand human moral, social, and practical life. Federici might reject the argument, and if he does so it’s plausible he would also reject the political and legal philosophy that develop as a consequence of the acceptance of value pluralism. However, as I noted in the introduction above, the second half of the book is written primarily for those who more or less accept the first half, and Federici’s critique ignores the first half of the book almost completely.

The focal point of Federici’s dismay with the book, however, lies in its general character as a work of classical liberalism, and this dissatisfaction manifests itself most obviously in his rejection of the notion that the state (or government) can or should be neutral concerning the activities of its citizens. This is a common criticism leveled at political theories classified as liberal in the most capacious sense of that term. My response is two-pronged. First, the reason that government neutrality (or indifference) is important is directly related to the nature of value pluralism. If value pluralism is an adequate way of understanding the practical world of human beings—and I have argued, not assumed, that it is—then there are multiple good ways of being human, and it should be up to individual citizens and groups of citizens to decide their own particular way of being good. So, though certain sorts of communities might not value neutrality as a virtue of the managing directors (e.g., a football team, a lab group, a monastery, or a military), neutrality would be highly desired by self-conscious value pluralists as a central characteristic of the government of their political community.

Second, I do not make an argument that the government must be neutral in the strongest sense of that term. Indeed, I consistently claim that the government is not neutral concerning all forms of human activity or to all conceptions of the good life for humans.⁶¹

For example, government ought to prohibit violations of negative liberty and to rule out versions of the good life that are incompatible with the minimum content of morality. Further, governments are rightly understood to have special and specific responsibilities to and for their own citizens, so it is reasonable for governments to promote the safety and welfare of its own citizens even if that harms the safety and welfare of both legal and illegal aliens within the country, and noncitizens abroad. Finally, the rule of law has its own inner morality and presupposes a certain understanding of the human individual that is also manifested in value pluralist moral theories like mine.

To conclude, and I'll quote myself here, "the impartiality of the government to its citizens is derived from its recognition that, outside of the prohibition of overtly and explicitly immoral projects and the maintenance of order and security, government has no special projects of its own and its primary responsibility is, through protection of negative liberty and the rule of law, being the custodian of the conditions of peaceful coexistence."⁶²

Notes

1. Kenneth B. McIntyre, *Nomocratic Pluralism: Plural Values, Negative Liberty, and the Rule of Law* (Cham, Switzerland: Palgrave Macmillan, 2021), 13.
2. *Ibid.*, 15.
3. See Irving Babbitt, *Democracy and Leadership* (Indianapolis: Liberty Fund, 1979).
4. McIntyre, *Nomocratic Pluralism*, 89.
5. *Ibid.*, 67.
6. *Ibid.*, 132–33.
7. *Ibid.*, 127.
8. *Ibid.*, 129.
9. *Ibid.*, 153.
10. *Ibid.*, 100.
11. *Ibid.*, 155.
12. See Luke C. Sheahan, *Why Associations Matter: The Case for First Amendment Pluralism* (Lawrence: University Press of Kansas, 2020), 81–130.
13. McIntyre, *Nomocratic Pluralism*, 155.
14. See Sheahan, *Associations*, 3, 181n9.

15. See *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 US __ (2018).
16. See *Brandenburg v. Ohio*, 395 US 444 (1969).
17. McIntyre, *Nomocratic Pluralism*, 162.
18. *Ibid.*, 179.
19. *Ibid.*, 164.
20. See *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church–State Relations in the American Founding*, ed. Daniel L. Dreisbach and Mark David Hall (Indianapolis: Liberty Fund, 2009), 520–28.
21. See Brian Tierney, *The Crisis of Church and State, 1050–1300* (Toronto: University of Toronto Press, 1988); and Steven D. Smith, *The Rise and Decline of American Religious Freedom* (Cambridge, MA: Harvard University Press, 2014), 31–36.
22. See most recently John Finnis, “Abortion Is Unconstitutional,” *First Things*, April 2021; and John Finnis, “Capacity, Harm and Experience in the Life of Persons as Equals,” *Journal of Medical Ethics* 39, no. 5 (2013): 281–83.
23. McIntyre, *Nomocratic Pluralism*, 172.
24. See Sheahan, *Associations*, 61–68, 79–80.
25. Robert Nisbet, *The Social Bond: An Introduction to the Study of Society* (New York: Knopf, 1970), chap. 6, “Social Authority.”
26. See *Christian Legal Society v. Martinez*, 561 US 661 (2010).
27. McIntyre, *Nomocratic Pluralism*, 164.
28. I suggest the possibility of a geographical component of the Assembly Clause with its protection of freedom of association applying on the local level. See Luke C. Sheahan, “Response to Critics,” *The Political Science Reviewer* 44, no. 2 (2020): 543–45.
29. See *Regan v. Taxation with Representation*, 461 US 540, 544 (1983). “Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income.”
30. Michael McConnell, Transcript of oral argument at 9, *Martinez*, 561 US 661 (2010).
31. John D. Inazu, *Justice Ginsburg and Religious Liberty*, 63 *Hastings L.J.* 1213 (2012), https://repository.uchastings.edu/hastings_law_journal/vol63/iss5/2; and John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 *N.C. L. Rev.* 787 (2014), <https://scholarship.law.unc.edu/nclr/vol92/iss3/3>.

32. Philip Hamburger, *Liberal Suppression: Section 501(c)3 and the Taxation of Speech* (Chicago: University of Chicago Press, 2018), 174–76.
33. *Ibid.*, 178.
34. *Ibid.*
35. *Ibid.*, 10.
36. See, e.g., Nelson Tebbe, *Religious Freedom in an Egalitarian Age* (Cambridge, MA: Harvard University Press, 2017), chap. 10, “Government Subsidy and Support.” Tebbe’s support for stripping exclusive organizations of tax exemptions is predicated on the subsidy idea, but his premises are wholly liberal.
37. Hamburger, *Liberal Suppression*, 44.
38. McIntyre, *Nomocratic Pluralism*, 197.
39. *Ibid.*, 133.
40. *Ibid.*, 148.
41. *Ibid.*, 101–14.
42. *Ibid.*, 113.
43. Eric Voegelin, *Anamnesis: On the Theory of History and Politics*, ed. David Walsh, vol. 6 of *The Collected Works of Eric Voegelin* (Columbia: University of Missouri Press, 2002), 306.
44. See Eric Voegelin, “Liberalism and Its History,” ed. Ellis Sandoz, vol. 11 of *The Collected Works of Eric Voegelin* (Columbia: University of Missouri Press, 2002), 83–99.
45. Edmund Burke, *Reflections on the Revolution in France*, ed. with an introduction and notes by L. G. Mitchell (Oxford: Oxford University Press, 1993), 54, 198.
46. McIntyre, *Nomocratic Pluralism*, 6.
47. Kenneth B. McIntyre, *Herbert Butterfield: History, Providence, and Skeptical Politics* (Wilmington, DE: ISI Books, 2011).
48. McIntyre, *Nomocratic Pluralism*, 1.
49. Timothy Dwight Hunt, “Address Delivered before the New England Society of San Francisco . . .” (San Francisco: Cooke, Kenny, 1853), 20.
50. Susan-Mary Grant, *North over South: Northern Nationalism and American Identity in the Antebellum Era* (Lawrence: University Press of Kansas, 2000), 32.
51. “Brutus,” Essay I, in Herbert Storing, ed., *The Anti-Federalist*, abridged by Martin Dry (Chicago: University of Chicago Press, 1985), 114–15.
52. Review of *History of the Colonization of the United States* by George Bancroft, *Boston Quarterly Review* 1, no. 4 (January 1838): 23.
53. McIntyre, *Nomocratic Pluralism*, 16.

54. Samuel Goldman, *After Nationalism: Being American in an Age of Division* (Philadelphia: University of Pennsylvania Press, 2021).
55. Burke, *Reflections*, 62.
56. See, among other works, Kenneth B. McIntyre, “What’s Gone and What’s Past Help...’: Oakeshott and Strauss on Historical Explanation,” *Journal of the Philosophy of History* 4, no. 1 (2010): 65–101; McIntyre, *Herbert Butterfield: History, Providence, and Skeptical Politics* (Wilmington, DE: ISI Books, 2011).
57. The temptation to substitute moral instruction for historical explanation crosses political lines. One of the best examples of a historian who doesn’t really write history is the self-described conservative Alan Guelzo. Guelzo does the sort of work that an academic historian does (e.g., studies the primary sources, does archival research), but his actual publications manifest the disposition, style, or epistemological status not of a historian but of a prosecuting attorney and moralist. Guelzo’s work on the history of the United States is a story of heroes and villains, a storehouse of cardboard characters meant to exemplify virtues and vices, and most importantly, a series of lessons directly related to the social and political concerns of contemporary American citizens. His is an exemplary case of a historian not doing history at all, but creating myths for contemporary practical consumption. See Richard Gamble’s review of Guelzo’s most recent book, “Lee’s Loyalty,” *Law and Liberty*, December 16, 2021, https://lawliberty.org/book-review/lees-loyalty/?utm_source=LAL+Updates&utm_campaign=465d94aa36-LAL+Updates&utm_medium=email&utm_term=0_53ee3e1605-465d94aa36-72444485.
58. I offered a preliminary attempt at using this sort of distinction as a way of understanding different conceptions of constitutionalism in the United States in Kenneth B. McIntyre, “Aspirations, Procedures, and Ideologies: Varieties of American Constitutionalism,” *Anamnesis: A Journal for the Study of Tradition, Place, and ‘Things Divine’* 5 (2016): 5–23.
59. Luke Sheahan, *Why Associations Matter: The Case for First Amendment Pluralism* (Lawrence: University of Kansas Press, 2020).
60. McIntyre, *Nomocratic Pluralism*, 177–78.
61. In both sections in which I use the term “neutral” to describe government’s disposition to the choices of citizens, I explicitly reject the notion that government is or ought to be completely neutral. See McIntyre, *Nomocratic Pluralism*, 151 and 161.
62. McIntyre, *Nomocratic Pluralism*, 153.