

## TOWARD A SOCIAL PLURALIST THEORY OF INSTITUTIONAL RIGHTS

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### INTRODUCTION

The American dialect of rights talk deserves public deliberation not only through affirmatively promoting an image of the rights-bearer as a radically autonomous individual, but through its corresponding neglect of the social dimensions of personhood. . . . Just as our stark rights vocabulary receives subtle amplification from its encoded image of the lone rights-bearer, our weak vocabulary of responsibility is rendered fainter still by our undeveloped notion of human sociality.<sup>1</sup>

One of the principal deficiencies of the dominant liberal individualist understanding of rights is its inability to do justice to the rights of institutions.<sup>2</sup> This inability is a telling instance of what Mary Ann Glendon terms “The Missing Dimension of Sociality”<sup>3</sup> in contemporary liberal rights discourse. Because contemporary liberalism lacks an adequate notion of “sociality,” liberal legal, constitutional, and political theory have proved unable to generate a convincing account of the reality and character of the legal rights of

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1. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109 (1991).

2. I will not here detail the problems of liberal individualism. The articles by Kenneth Grasso, Kenneth Schmitz and William Wagner in this issue state these well. See Kenneth L. Grasso, *The Rights of Monads or of Intrinsically Social Beings? Social Ontology and Rights Talk*, 3 AVE MARIA L. REV. 233 (2005); Kenneth L. Schmitz, *The Ontology of Rights*, 3 AVE MARIA L. REV. 275 (2005); William J. Wagner, *Universal Human Rights, the United Nations, and the Telos of Human Dignity*, 3 AVE MARIA L. REV. 197 (2005). I stress, however, that the version of social pluralism I want to commend presupposes the high importance of individuality, individual freedom, and individual rights.

3. GLENDON, *supra* note 1, at 109.

institutions. Such rights are actually and legitimately possessed by many social institutions; I shall call them “institutional rights.”<sup>4</sup> Insofar as liberal theorists reflect on the phenomenon of institutional rights, they tend to be construed merely as derivative from the rights of associating individuals rather than as having some independent foundation and status not finally reducible to individual rights.<sup>5</sup> The empirical observation that many social institutions themselves do have positive legal rights is indisputable, yet liberal individualism seems unable to offer much beyond an implausible contractualist explanation of their origin and status.<sup>6</sup>

The aim of this article is programmatic: to point to the need for and the possibility of an account of institutional rights which grounds them in a plurality of social institutions widely experienced as vital to human flourishing. I shall call this a “social pluralist” account of institutional rights. I do so by retrieving some promising conceptual resources from two earlier thinkers and indicating some directions in which such resources require critical development. A social pluralist account affirms the indispensable social, political, and legal significance of the multiple institutions subsisting in the space between the state and the individual. Social pluralism, in the sense intended here, regards itself, if not as a comprehensive social theory,

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4. For brief standard surveys of the legal status of what I am calling institutions, see generally R. W. M. DIAS, JURISPRUDENCE 250-71 (5th ed. 1985) (on persons), and DENNIS LLOYD, THE IDEA OF LAW 262-70 (Macgibbon & Kee 1966) (1964). On nineteenth-century English law, see the classic statement by F. W. Maitland, *Trust and Corporation*, in GROUP RIGHTS: PERSPECTIVES SINCE 1900, at 1-37 (Julia Stapleton ed., 1995). See also F. W. Maitland, *Moral Personality and Legal Personality*, in DAVID NICHOLLS, THE PLURALIST STATE app. D, at 173 (St. Martin's Press, 2d. ed. 1994) (1975) [hereinafter Maitland, *Personality*].

5. For an account of this distortion in American legal history, see ROCKNE MCCARTHY ET AL., THE FELLOWS OF THE CALVIN CENTER FOR CHRISTIAN SCHOLARSHIP, SOCIETY, STATE, AND SCHOOLS: A CASE FOR STRUCTURAL AND CONFSSIONAL PLURALISM 51-78 (1981).

6. For the current standard view of the legal status of business corporations consider the following:

Those who argue that corporations have a social responsibility . . . assume that corporations are capable of having social or moral obligations. This is a fundamental error. A corporation . . . is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for their mutual benefit. Since it is a legal fiction, a corporation is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.

Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982). I am grateful to Christopher Topa from Ave Maria School of Law for supplying this citation.

at least as an essential corrective to the individualist theories—and their collectivist and statist alter-egos—which have exercised such a pervasive and damaging hold over modern social theorizing. It thrusts to the foreground of our attention those “intermediate bodies”—now often termed “civil society institutions”<sup>7</sup>—which these reductionist theories have typically left languishing on the margins of theoretical reflection.

The term “institutional rights” requires further preliminary clarification. By “rights” I have positive legal rights principally in mind, though I also consider the view that institutions possess “natural rights.” I intend the term “institution” as a broad category embracing most organized and relatively enduring social bodies, corporations, communities or associations—such as marriages, families, religious organizations, business corporations, trades unions, and voluntary associations.<sup>8</sup> Institutions so defined, I shall claim, possess “agency” and are thereby capable of what I call “legal subjectivity.”<sup>9</sup> By this I mean that they can exercise legal rights, discharge legal duties, and wield legal powers,<sup>10</sup> including the power

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7. These terms have their limitations as descriptors of the “institutions” I have in mind, but I will not pursue this point here.

8. In this paper, I exclude consideration of two types of social forms which lack “institutional” properties: first, amorphous or unorganized groups like informal social clubs (as distinct from those deemed in law to be “corporations” or “unincorporated societies”), neighborhoods or larger geographical communities (as distinct from municipal councils), ethnic or linguistic communities (as distinct from the organized interest groups representing them), social movements (as distinct from formal associations spawned by them), nations (as distinct from states), or virtual networks; second, complex webs of interaction which may wield substantial power but lack formal organization, notably markets (as distinct from stock exchanges).

9. I intend this term to be taken more widely than that of “legal personality,” which refers essentially to the capacity of an entity to be recognized by the state as a bearer of legal rights and duties. See DIAS, *supra* note 4, at 250-71; Maitland, *Personality*, *supra* note 4, at 173-79.

10. My threefold distinction between “rights,” “duties,” and “powers” (or “competencies”) may be compared to Wesley Hohfeld’s famous fourfold classification of distinct types of “jural relation” which, he observes, are often unhelpfully lumped together simply as “rights,” namely: claim-rights, liberty-rights, powers, and immunities. Hohfeld’s attempt to specify and relativize rights in relation to other types of jural relation to which they should not be assimilated—including, of course, “duties”—is salutary. See WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (Walter Wheeler Cook ed., 1919); PETER JONES, *RIGHTS 12-25* (1994) (discussing Hohfeld’s analysis of the four types of legal rights). My classification is drawn instead from the legal theory of the Dutch Protestant philosopher Herman Dooyeweerd. See 1-4 HERMAN DOOYEWEERD, *A NEW CRITIQUE OF THEORETICAL THOUGHT* (David H. Freeman & William S. Young trans., 1953-1958); HERMAN DOOYEWEERD, *ESSAYS IN LEGAL, SOCIAL, AND POLITICAL PHILOSOPHY* (1996); HERMAN DOOYEWEERD, *ENCYCLOPEDIA OF THE SCIENCE OF LAW: INTRODUCTION* (Alan M. Cameron ed.,

to establish valid legal norms within their own spheres. I shall call the spheres within which institutions can establish such norms their “jural spheres.” This claim can be seen as contributing to an insistence that rights be understood within a broader social and moral context than is often the case in legal and political theory. In the first place, an account of institutional rights will be one component of a wider account of institutional jural spheres: we need both to contextualize rights in relation to institutions, and also institutional rights in relation to institutional duties and powers. In the second place, an adequate theory of institutional jural spheres requires an account of the moral (or normative) purposes which institutions do and should pursue. It is these purposes, I shall suggest, which give legitimacy and point to the content of the jural spheres institutions possess.

A social pluralist theory of institutional rights will, perforce, need to proceed by way of three important negations. First, it will need to challenge the pervasive individualist premise that institutions are merely contingent creations of the contracting wills or pooled rights of morally autonomous and self-constituting individuals, lacking any inherent properties of their own.<sup>11</sup> It will also need to challenge two influential legal positivist assumptions: that institutions possess no original competence to make valid jural norms; and that institutional rights are ultimately legal “fictions” merely delegated or “conceded” by the state.<sup>12</sup> The individualist and legal positivist propositions against which such a pluralist theory pits itself are rarely defended with much philosophical vigor today, at least not in the bald form in which I have just summarized them. Yet their cumulative influence still shapes much contemporary social, political, and legal thinking and decision-making, and continues to shore up substantial barriers to the reception—even the comprehension—of a social pluralist account of institutional rights.

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Robert N. Knudsen trans., 2002); HERMAN DOOYEWEERD, *POLITICAL PHILOSOPHY* (Daniel Strauss ed., 2004).

11. See Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 3 (1990) (“Contractarians view the corporation as a set of private contractual relationships among providers of capital and services.”); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989) (“The corporation is a complex set of explicit and implicit contracts . . .”).

12. Maitland states the link bluntly: “If the personality of the corporation is a legal fiction, it is the gift of the prince.” Maitland, *Personality*, *supra* note 4, at 175.

In the next two sections, I revisit the work of two theorists whose insights merit critical retrieval and elaboration by those committed to the project of “rethinking rights” first, the distinctive theory of associational law and legal pluralism<sup>13</sup> proposed by the influential nineteenth-century German legal historian, Otto von Gierke; second, the conception of a natural teleology of plural social bodies formulated by the twentieth-century Thomist, Heinrich Rommen (which, I shall venture, provides a better theoretical grounding for legal pluralism than that offered by Gierke).<sup>14</sup> In the final section, I suggest some of the ways in which these insights need to be refined and elaborated.

### I. OTTO VON GIERKE: ASSOCIATIONAL LAW

Gierke’s writings contain a forceful affirmation of the reality and ubiquity of plural human associations and of their possession of distinct jural spheres. His account is grounded in a broad account of association, the fruit of his immense scholarly excavations in German legal history.<sup>15</sup> Modern individualist and contractualist legal and political theory, he judges, is inadequate to the task of coming to terms with the myriad associations that have come to populate and animate Western—especially “Germanic”—history.<sup>16</sup> These continually proliferating associations testify to a deep human impulse towards organic interaction. Such associations had proved themselves leading historical actors but were routinely neglected in the standard legal history and legal theory of his day.<sup>17</sup> To attempt to

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13. The term “legal pluralism” often refers to a constitutional arrangement in which different ethnic or religious communities within a state are governed, in limited areas of civil law such as family and property, by distinct legal norms adjudicated by special courts or tribunals. I am using it instead to refer to a theory which affirms that many non-governmental institutions (in the sense I have defined that term) possess original jural spheres.

14. There are, of course, many other schools of social pluralist theorizing being utilized in contemporary debates (such as the Tocquevillian or the Hegelian). I choose these two thinkers both because they have proved influential in important twentieth-century schools of pluralist thought and because they address more explicitly than many other pluralists the notion of institutional jural spheres.

15. Gierke’s *magnum opus* is *Das deutsche Genossenschaftsrecht* (Berlin, Weidmann 1868). Substantial parts of this multi-volume work have been translated into English, as cited in subsequent notes.

16. The Germanic Fellowship (*Genossenschaft*) is, he claims, the most adequate example of human association.

17. See Otto von Gierke, *The Basic Concepts of State Law and the Most Recent State-Law Theories*, in JOHN D. LEWIS, *THE GENOSSENSCHAFT-THEORY OF OTTO VON GIERKE* D, at 158,

think away organic association leaves human existence miserably impoverished: "What man is, he owes to the association of man with man."<sup>18</sup>

An association is formed by the transfer of a part of the essence and will of each individual member to the social whole.<sup>19</sup> It is not simply an aggregate of externally related individual wills, but a real organic unity constituting an independent communal whole.<sup>20</sup> Such a whole possesses a reality distinct from and transcending the separate wills of its individual members, and capable of willing and acting on its own account.<sup>21</sup> It possesses personality; it is a "group-person."<sup>22</sup> I note straight away that this notion was roundly (and rightly) criticized by many commentators.<sup>23</sup> Yet that theory, and the theory of legal pluralism built on it, can survive quite well without such a notion. In any case, it was not intended to imply the absorption of the individual into an association. Only part of a member's will is transferred in joining any group. Members still retain a sphere of private will independent of any group; and since will always establishes legal right, a sphere of individual rights is guaranteed.<sup>24</sup> A distinctive theory of law flows from this theory of association. In

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169-70 (1932) (an abridged translation by Lewis of "Die Grundbegriffe des Staatsrechts und die neuesten staatsrechts-theorien," in *Zeitschrift für die gesamte Staatswissenschaft* (1874)) [hereinafter Gierke, *Basic Concepts*]. Gierke's robust associationism leads him to reject two principal rival social theories: "universalism," according to which the individual lacks full reality and exists only for the political community; and "individualism," which recognizes only individuals as real, denies the reality of group-life and holds that the state exists merely to allow individuals to pursue their own ends. *Id.* at 166-68, 179.

18. Otto von Gierke, *Introduction to Volume I of Das deutsche Genossenschaftsrecht*, in JOHN D. LEWIS, *THE GENOSSENSCHAFT-THEORY OF OTTO VON GIERKE* app. A, at 113, 113 (1932) (an abridged translation by Lewis of *Das deutsche Genossenschaftsrecht, I, Rechtsgeschichte der deutschen Genossenschaft* (1868)).

19. See Gierke, *Basic Concepts*, *supra* note 17, at 171.

20. *Id.* at 169.

21. *Id.* at 169-70.

22. The idea that human collectivities possess a "group-personality" derives from Romantic thinkers, who initially applied it to the nation, and, in some cases to the state. But, as Antony Black points out, Gierke was the first to extend the idea to human groups in general, including the wide variety of associations arising in modern industrial society, such as trade unions, credit and insurance societies, and producer and consumer cooperatives. ANTONY BLACK, *GUILDS AND CIVIL SOCIETY IN EUROPEAN POLITICAL THOUGHT FROM THE TWELFTH CENTURY TO THE PRESENT* 211-12 (1984).

23. See Maitland, *Personality*, *supra* note 4, at 173-79; *THE PLURALIST THEORY OF THE STATE: SELECTED WRITINGS OF G. D. H. COLE, J. N. FIGGIS, AND H. J. LASKI* 1-47 (Paul Q. Hirst ed., 1989) [hereinafter *THE PLURALIST THEORY*].

24. JOHN D. LEWIS, *THE GENOSSENSCHAFT-THEORY OF OTTO VON GIERKE* 71-72 (1932).

developing it, Gierke aligns himself with the “Germanist” wing of the nineteenth-century Historical School of law against its “Romanist” rivals.<sup>25</sup> Just as law unproblematically recognizes the legal personality of individual human beings, so it must acknowledge the legal personality of groups.

The reality, unity, and agency of the group are prior to any positive legal ordering. For Gierke, as George Heiman puts it, “Law arranges and penetrates this inner unity, and hence the inner structure of the group, but it does not serve as its source.”<sup>26</sup> Rather law must “accept the existence of a force, an urge, a stream of consciousness that has to be placed into a legal context.”<sup>27</sup> Groups of any kind, possessing a unified and living will, ought to be recognized as independent agents capable of possessing legal rights, and this legal capacity does not depend on recognition by the state, even though the state supplies the legal *form* for group-rights.<sup>28</sup>

This argument was deployed against the influential “Romanist” corporationist theory of F. C. von Savigny. Savigny did not deny that groups could be recognized as “legal persons,” but, following a certain interpretation of Roman law, he held that this personality was “fictitious” rather than real.<sup>29</sup> According to the “fiction theory” of corporations, as Gierke characterizes it, “the personality of an association comes into existence only by a juristic artificiality, by virtue of which the association assumes in law an attribute which it

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25. *Id.* at 44-48.

26. George Heiman, *Introduction* to OTTO GIERKE, *ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES 7* (George Heiman ed. & trans., 1977) (footnote omitted) (a translation of sections 3-5 of *Das deutsche Genossenschaftsrecht* Vol. 3 (Berlin, 1881)).

27. *Id.* at 10.

28. Otto von Gierke, *The Nature of Human Associations*, in JOHN D. LEWIS, *THE GENOSSENSCHAFT-THEORY OF OTTO VON GIERKE* app. C, at 143 (1932) (an abridged translation by Lewis of *Das Wesen der menschlichen Verbände* (Leipzig, 1902)) [hereinafter Gierke, *Nature of Human Associations*].

29. Savigny's theory of the fictitious personality of groups depended on his acceptance of the fundamental Roman law distinction between private and public law and its assumption that the individual was sovereign in the former while the state was sovereign in the latter. Since individuals are sovereign in their private spheres, their personality was regarded as indivisible. Transferring part of one's personality into a group—a process at the heart of Gierke's conception of the reality of group life—was therefore impossible given the terms of Roman law. It was not possible, Savigny thought, to make the process of concession depend on the will of private individuals because such wills were arbitrary, and legal uncertainty would thereby be created. Only the state could concede legal personality to groups. Gierke holds that this theory amounted to the denial of the natural right of individuals freely to associate. Heiman, *supra* note 26, at 30-32, 35, 41; LEWIS, *supra* note 24, at 45-47.

lacks in reality."<sup>30</sup> A legal person was simply an artificially conceived subject, lacking any independent life or will, and therefore having no independent standing from which to claim legal recognition by the state.<sup>31</sup> Such recognition was a grant or "concession" from the state, not an acknowledgement of a previously existing right.<sup>32</sup> But the fiction theory founders on the rock of social reality: "For to achieve it is historically impossible . . . corporative persons will not yield."<sup>33</sup>

Against this conception, Gierke proposes a "Germanic" understanding of group personality, according to which groups are accorded legal recognition as real personalities.<sup>34</sup> Germanic law had not been encumbered with the stark Roman-law separation between private and public law.<sup>35</sup> A sphere of individual will is always recognized but seen as being balanced by the requirements of communal life.<sup>36</sup> Once a group is organized as a collective person with a unified will, there exists a presumption that it be recognized in law as possessing legal personality.<sup>37</sup>

Law is in essence "an ordering . . . of spheres of will"<sup>38</sup> and must take account of will wherever it manifests itself in society. Since there exist two distinct kinds of will, that of the individual and that of the group, there are therefore two quite different kinds of law,

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30. Gierke, *Nature of Human Associations*, *supra* note 28, at 141.

31. *Id.*

32. Gierke judges that the ultimate logical conclusion of the fiction theory was that the state itself was no more than a legal fiction, so that the subject of state authority was deemed to be simply the ruler (or ruling organ) alone rather than the political community as a whole, a development in which he discerns the seeds of absolutism.

33. Gierke, *Nature of Human Associations*, *supra* note 28, at 142-43.

34. Heiman, *supra* note 26, at 36-37, 40.

35. *Id.*

36. *Id.* at 38-39.

37. Gierke, *Nature of Human Associations*, *supra* note 28, at 151. Not all social unities possess such a unified will. Gierke distinguishes between those which, although real unities, have not yet constituted themselves as organized bodies, and those which are so organized and have thereby become collective persons with their own will. (This distinction does not correspond exactly to the one I drew earlier between institutions and other social groupings.) Gierke held that any of the following can exist in the first, pre-organized condition before acquiring the second: *Volk*, religious community, class, profession, interest group, and political party. His inclusion of the nation is noteworthy. In his view the nation only becomes a collective person when it is organized as a state; a nation which lacks a state or which spans more than one state thus has no claim to legal recognition.

38. Gierke, *Basic Concepts*, *supra* note 17, at 180.

“individual law” and “social law.”<sup>39</sup> The first operates externally upon people or associations and treats them in their separate individuality, apart from any incorporation into a higher association. Social law, by contrast, engages with the associative side of personality and includes all the law which orders the internal life of associations, whether that of the state or of other associations.<sup>40</sup> It does not *create* the organic unity of such associations, but only declares and so publicly verifies it. Social law governs the relations between individual wills insofar as these are organic, associational relations.<sup>41</sup> It is not concerned with the rights of individual members against the group, for these fall within individual law, but rather with the role of the individual within the group, as a part to a whole.

Social law, therefore, contains concepts which are entirely absent in individual law and which the individualistic contract theory of associations is incapable of generating; for example, the concept of the constitution, i.e., the legal determination of the internal structure of a social whole and the various relationships among its members; and related concepts of membership, organ, election and so on.<sup>42</sup> The content of an association’s legal sphere will therefore include such things as associational purpose, criteria for membership, office-holding, decision-procedures, rules for the administration of property, and so on. None of these are derivable from the content of individual rights. While all such elements will display some common features arising from the principle of organic association,<sup>43</sup> each will take on a different character according to the specific nature of the association in which they are found. There is within every organic group a “special law corresponding to its concrete individuality.”<sup>44</sup> Thus, for example, office-holding within a workers’ cooperative will

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39. Gierke, *Nature of Human Associations*, *supra* note 28, at 152. In *Basic Concepts* he distinguishes between “private law” and “public law.” Gierke, *Basic Concepts*, *supra* note 17, at 179-81. The term “public law” appears elsewhere and is used in a more restricted sense. Heiman, *supra* note 26, at 10-14, 46-47; LEWIS, *supra* note 24, at 71-72. I confine myself to the distinction between individual and social law.

40. Gierke, *Nature of Human Associations*, *supra* note 28, at 152.

41. Gierke, *Basic Concepts*, *supra* note 17, at 180.

42. Gierke, *Nature of Human Associations*, *supra* note 28, at 152-53; Gierke, *Basic Concepts*, *supra* note 17, at 184-85.

43. Gierke, *Nature of Human Associations*, *supra* note 28, at 156.

44. *Id.* This seems to be a modern rendering of Althusius’s concept of the unique “symbiotic right” of each kind of association. Fredrick S. Carney, *Introduction to JOHANNES ALTHUSIUS, THE POLITICS OF JOHANNES ALTHUSIUS* 14 (Frederick S. Carney trans., 1964).

be governed by principles different from those applicable to office-holding within a church. The most inclusive group is the state, and thus a major part of social law will be concerned with ordering the relations between the state and its constituent members. This branch of social law is what Gierke calls "state law."<sup>45</sup>

The state is "only one among the associational organisms of mankind" and "it is only with part of his being that the single man belongs to the state as a member."<sup>46</sup> The state is incapable of satisfying all of our associational inclinations. Non-political aspects of associational life are expressed in specific "functional" associations such as social, religious, artistic, economic, and other groups.<sup>47</sup> These are in no sense created by the state and each of them can claim a certain independence against the state.<sup>48</sup>

Gierke's depiction of the state as simply *one among many* associations in society was taken up enthusiastically by the English pluralists writing at the beginning of this century, such as F. W. Maitland, J. N. Figgis and the early H. J. Laski.<sup>49</sup> They seized on Gierke to buttress their essentially constitutionalist argument against the doctrine of legally unlimited state sovereignty they saw being deployed to justify excessive state control over other associations.<sup>50</sup> It has to be admitted, however, that in doing so, they were reading Gierke selectively. For while this constitutional-pluralist argument certainly finds plenty of textual support in Gierke's work, a full account of his thought would need to recognize his view of the wide-ranging scope and tasks of the state. Some interpreters see potentially monistic tendencies in that view,<sup>51</sup> but only the briefest of sketches is necessary for my purposes.

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45. Like many other associations, the state has an "original, real essence," possessing a "unitary collective life distinct from the life of its members." Gierke, *Basic Concepts*, *supra* note 17, at 172. As Lewis puts it, the state is "but the last link in the chain of collective units developed into persons." LEWIS, *supra* note 24, at 63.

46. Gierke, *Basic Concepts*, *supra* note 17, at 173.

47. *Id.*

48. *Id.* at 173-74. Especially in the modern world, "the non-political sides of human associational life find expression in *special* institutions which are in no way to be confused with the state-organization." *Id.* at 173.

49. See Maitland, *Personality*, *supra* note 4, at 173-79; THE PLURALIST THEORY, *supra* note 23, at 10-14.

50. THE PLURALIST THEORY, *supra* note 23, at 17-18.

51. Such as is seen, for example, in his Hegelian-sounding view of "public establishments." Gierke, *Basic Concepts*, *supra* note 17, at 155-56, 181-85.

For Gierke the state is unique by virtue of its being a comprehensive, inclusive association.<sup>52</sup> It alone is the bearer of sovereignty, by which Gierke means both comprehensiveness and monopoly of coercive power. While subordinate political associations are “state-like,” the state’s authority stands above theirs.<sup>53</sup> Its authority is likewise higher than any of the *non-political* associations within its territory. While such associations retain their independent sphere of existence they nevertheless have a political aspect insofar as they require authoritative regulation by the state.<sup>54</sup>

Worries about Gierke’s monism are not unfounded; the fusion in his later writings of organicist with German nationalist notions certainly does nothing to allay them. Yet such worries should not be allowed to overshadow his achievement of formulating an original theory of legal pluralism. This emerges with particular clarity from his view of the contentious jurisprudential problem of the “sources of law.” Gierke insisted that, while in modern society the body normally responsible for promulgating social law is the state,<sup>55</sup> this emphatically does not mean that the state is the sole source of valid law. On the contrary, he held, “The final source of all law remains the social consciousness of *any social institution whatever*.”<sup>56</sup> This affirmation of sources of valid positive law other than the state is the core of his theory of legal pluralism and sets him firmly against the legal positivist dictum that the state alone can claim this prerogative by virtue of its unique capacity for coercive enforcement.<sup>57</sup>

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52. *Id.* at 172-73.

53. *Id.* at 171. While Gierke did not believe that his organic theory of associations necessarily implied political federalism—for this would entail the notion of divided sovereignty which he rejected—he did nevertheless recommend that the newly established German state be modeled on the organic idea. LEWIS, *supra* note 24, at 82-83. See generally RUPERT EMERSON, STATE AND SOVEREIGNTY IN MODERN GERMANY 146-48 (1928). He advocated not a federal state but a decentralized state in which the relative autonomy of subordinate political units would be preserved in recognition of the independent source of their rights. LEWIS, *supra* note 24, at 85; Gierke, *Basic Concepts*, *supra* note 17, at 173-74. Thus not only do non-political associations retain their independence by virtue of their intrinsic, non-derived rights, but subordinate political bodies do also, even though they are (decentralized) parts of the same state structure.

54. Gierke, *Basic Concepts*, *supra* note 17, at 174 (This political aspect of other associations “finds its final definition of purpose and definitive boundary in the state, which, as the sovereign organism of social authority, alone among all organisms has no institution above it to limit its power.”).

55. OTTO VON GIERKE, THE DEVELOPMENT OF POLITICAL THEORY 329-30 (Bernard Freyd trans., Howard Fertig 1966) (1880).

56. Gierke, *Basic Concepts*, *supra* note 17, at 176 (emphasis added).

57. *Id.*

Consequently, a centrally important duty of the state is recognizing associations as legal persons, specifying their rights and duties, safeguarding their independence, and regulating their activity. The protection of associational independence and the legal definition of its character and boundaries are essential not only for the associations themselves but also for the state itself, since its healthy functioning is inextricably bound to theirs. A strong state can only be sustained by a vigorous associational life in society.

In effect, Gierke attributes to associations other than the state something approximating a natural right to establish valid jural norms within their own sphere. Such norms derive their authority not from the will of the state but from the intrinsic associational right of self-government.<sup>58</sup> This right constitutes a substantial external barrier to state authority.<sup>59</sup>

I have already alluded to one significant problem in Gierke's account. This is the implausible notion of a "group-personality." The principal objection here is that attributing "personality" to associations implies that group-personality "transcends" the personalities of its members. Group-personality is thus made into an entity in its own right, or "reified." But there is a deeper objection: this reification seems to be the outcome of an illicit reductive move—an excessive *psychologizing* of associational bonds. The danger here is of reducing what holds an association together, and sustains its capacity for agency, to a supposed psychological fusion of the subjective "wills" of the associating individuals. Institutional agency clearly does include a social-psychological element: hence we may rightly speak, for instance, of a "corporate ethos." Nevertheless, such agency cannot be explained primarily in terms of that element alone.

If this first problem reveals the adverse influence of idealism, a second arises from the ambiguities of historicism. In addition to affirming that law can be validly promulgated by the "social consciousness of any social institution whatever," Gierke also endorses the notion advanced by the Historical School that law is the outcome of a continuously evolving and organically founded national spirit (*Volksgeist*).<sup>60</sup> It appears that the national spirit is itself an example—the most capacious—of a "social consciousness" capable of

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58. *Id.* at 82.

59. *Id.*

60. GIERKE, *supra* note 55, at 328.

generating valid law (it doing so via the organ of the state). This raises the question whether, when the various non-state associations are creating law, they are formulating their own unique kind of law or simply serving as decentralized conduits for the formulation of an all-embracing national law which pervades them all. Gierke's "pluralist" proposition regarding the multiple sources of law appears facially at odds with his "historicist" assumption that law in general is ultimately the expression of the spirit of one particular community, the nation.

This historicist presupposition gives rise to a related problem. Gierke sometimes appears to imply that the Germanic law of associations is itself a unique historical product of the Germanic national spirit.<sup>61</sup> Its ultimate foundation, it seems, is not a transhistorical natural law; indeed Gierke specifically rejects this notion.<sup>62</sup> Yet equally he holds that the associational inclination and the reality of organic association are founded in *human nature*. The Historical School, he concluded, had shown that there could be no going back to a universality based in an "abstract" natural law; all law is positive law, and such law is the expression of a particular national spirit.<sup>63</sup> Yet he also affirms that the abiding insight of the natural law theory must be preserved, namely that law must reflect the *idea of justice*, which is innate in humanity and thus of universal significance and appeal.<sup>64</sup>

There is, then, a residual ambiguity in Gierke's theory of legal pluralism. He seems ambivalent over whether associational rights are grounded ultimately in the authority of a particular historical tradition or in universal features of human nature.<sup>65</sup> Heinrich Rommen's variant of legal pluralism, by contrast, avoids such ambiguity by proceeding on the assumption of a substantive conception of universal human nature rooted in Thomistic natural law theory.

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61. *Id.* at 338 n.29.

62. *Id.* at 328.

63. Insofar as Gierke's critique was directed at eighteenth-century rationalistic theories of natural law, then it certainly has merit. Such a charge of "abstractness" does not, I think, apply to pre-modern conceptions of natural law. See generally HEINRICH A. ROMMEN, *THE NATURAL LAW* 67-96 (Thomas R. Hanley trans., Liberty Fund 1998) (1947).

64. GIERKE, *supra* note 55, at 328-29.

65. Black suggests, perhaps generously, that this apparent tension can be reconciled by observing that Gierke regarded the German *Genossenschaft* tradition as but a pioneer in discovering what is in fact a universal truth. BLACK, *supra* note 22, at 18-21.

## II. HEINRICH ROMMEN: SOCIAL TELEOLOGY

Thomism and pluralism are not typically thought to belong together. I cannot explore here the question whether Thomas Aquinas's social thought might be seen as anticipating what I am calling "social pluralism."<sup>66</sup> It is clear, however, that official Catholic social teaching since Pope Leo XIII qualifies as a distinct variant of this approach.<sup>67</sup> In the writings of Rommen, this social pluralist theme is especially pronounced.<sup>68</sup>

Rommen's social and political theory is elaborated on the basis of Thomistic metaphysics. Central to that metaphysics is a conception of a teleological and hierarchical order of natural and supernatural ends. Social bodies, Rommen holds, can be understood as compounds of form and matter.<sup>69</sup> Their form or essence operates internally and is given with their ends, towards which they naturally tend and which secures their unity.<sup>70</sup> Such bodies do not form a "substantial unity" like the human body, but rather a "unity of order" (*unitas ordinis*).<sup>71</sup> A "unity of order" is not a thing, but rather an enduring coordination

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66. On this question, see Russell Hittinger, *The Plural Nature of Society in Leo XIII: Response to J.D. van der Vyver, Address before the Conference on the Legacy of Abraham Kuyper and Leo XIII, Calvin College (Oct. 31, 1998)* (transcript on file with the Ave Maria Law Review). Hittinger identifies in Aquinas's *Contra impugnantes* a "natural law" defense of the corporate rights of the Dominican order. For another thinker's view on Aquinas and Corporatism, see John E. Kelly, *The Influence of Aquinas's Natural Law Theory on the Principle of "Corporatism" in the Thought of Leo XIII and Pius XI*, in *THINGS OLD AND NEW: CATHOLIC SOCIAL TEACHING REVISITED* 104 (F. P. McHugh & S. M. Natale eds., 1993).

67. See Jonathan Chaplin, *Subsidiarity and Sphere Sovereignty: Catholic and Reformed Conceptions of the Role of the State*, in *THINGS OLD AND NEW: CATHOLIC SOCIAL TEACHING REVISITED*, *supra* note 66, at 175.

68. Given an indirect influence of Gierke on Rommen, this is not surprising. Rommen wrote after the appearance of the influential "pluralist" social encyclical of Pope Pius XI, *Quadragesimo Anno* (1931), *reprinted in* *TWO BASIC SOCIAL ENCYCLICALS* (Catholic Univ. Press 1943). Pius XI had commissioned the young social theorist Oswald von Nell-Breuning to prepare a first draft, and advised him to turn for guidance to the "solidarist" school of Catholic social thought associated with the German economist Heinrich Pesch, who had been influenced by Gierke. See Nell-Breuning's own account of the writing and (controversial) reception of the encyclical in Oswald von Nell-Breuning, S.J., *50 jaar 'Quadragesimo Anno'*, *CHRISTEN DEMOCRATISCHE VERKENNINGEN* 599 (The Hague 1981).

69. HEINRICH A. ROMMEN, *THE STATE IN CATHOLIC THOUGHT* 34 (1945).

70. *Id.* at 39-40, 43, 77-78.

71. *Id.* at 41.

of distinct substances.<sup>72</sup> Such a coordinated unity itself lacks “substantiality,” yet nevertheless exists as a real communal whole.<sup>73</sup>

Social bodies originate in “nature.” This term is not to be understood in a biological sense, but in the sense that each social body promotes purposes which are rooted in human social nature and necessary for human flourishing. A social body is “a teleological, intentional form of human existence morally necessary for the realization of the idea of man.”<sup>74</sup> Social bodies are brought into being by the intentional human realization of naturally given ends (and so are not merely the products of pooled subjective wills, as Gierke suggests). The concrete design of social bodies clearly bears the stamp of their particular historical context and, yet, is not wholly a product of historical contingency. That design is conditioned by ends arising from the recurring inclinations and imperatives of universal human nature. When established, such bodies do not acquire an independent existence over and above the existence of the persons who make them up. While Rommen can speak of social bodies as “moral” and sometimes “organic” communities, he does not construe them as reified “group-personalities.” Social being cannot be reduced to individual persons, but exists solely for and through persons.<sup>75</sup>

The order of ends is the basis for a hierarchy of communities, the spiritual ranking higher than the temporal, and the more inclusive temporal ends ranking above the less.<sup>76</sup> The temporal communities include family, vocational, professional, and educational organizations, neighborhood, town, and nation.<sup>77</sup> They come into existence through the course of history as expressions of particular, partial aspects of human social nature.<sup>78</sup> While man’s supernatural end is his highest end, he can only move towards it through this plurality of temporal, natural communities.<sup>79</sup> Each natural community is directed

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72. *Id.* at 40-41, 43, 252-55.

73. *Id.*

74. *Id.* at 137.

75. *Id.* at 43, 124-27, 131-32; *see also id.* at 136 (noting a social body “enlarges, exalts, and perfects the individual person, and cures the shortcomings and wants that are connected with mere individuality and isolation”).

76. *Id.* at 302-03 (“The hierarchy of ends is mirrored in a hierarchy of functional associations designed, directed, and measured as to efficiency and goodness by their objective ends.”).

77. *Id.* at 301.

78. *Id.* at 301-02.

79. In this paper I confine myself mainly to natural associations.

to fulfilling one partial end.<sup>80</sup> Since these ends are rooted in human nature, humans have a responsibility and capacity to realize them through free, rational initiative by creating organizations appropriate to their fulfillment.<sup>81</sup> It is this responsibility and capacity to pursue objective moral ends which is the basis for a natural right to self-government through those associations necessary to pursue them.<sup>82</sup> Here Rommen follows Leo XIII's view that, because to join an association or "private society" is an individual natural right, the associations themselves have a natural right to exist which must be upheld by the state.<sup>83</sup>

Rommen thus presents a complex social landscape in which, as he puts it, a "plurality of social forms and of cooperative spheres that proceed from the person, serve independent particular ends in the order of the common good, and therefore have their own rights and duties."<sup>84</sup> Because the ends that such forms serve are not created by the legal enactments of the state, their rights and duties derive from a source independent of and prior to it. The state certainly affords them the necessary legal recognition, but, as Gierke also insisted, "it is their essence, their ends, that control the legal forms, not vice versa."<sup>85</sup>

Rommen's theory of plural social bodies is an innovative elaboration of Aquinas's account of natural communities. That account remains confined largely to family and state, while Rommen

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80. ROMMEN, *supra* note 69, at 269.

81. *Id.*

82. *Id.* at 303.

83. JEAN YVES CALVEZ & JACQUES PERRIN, *THE CHURCH AND SOCIAL JUSTICE* 316 (J. R. Kirwan trans., 1961). The authors observe that Pope Leo XIII looked to associations of many kinds, including workers' associations, vocational bodies, mutual aid societies or charitable trusts, etc., to "help to re-knit the connecting tissues of a society which individualism had reduced to isolated units," act as shields between individual and state, and contribute to the realization of social justice; "the principle of association lay at the centre of the pope's thought." *Id.* at 408. Leo XIII holds that such associations should be left free by the state to adopt their own internal rules. On the other hand these must be conducive to realizing their natural moral purpose. The freedom of association is more than the individual's right to join an association. It also carries with it the duty to see that the association fulfils its morally legitimate purpose, and so is limited by the requirements of the common good. *See id.* at 384.

84. ROMMEN, *supra* note 69, at 143.

85. *Id.* This essentially philosophical account of social bodies is reinforced by an empirical argument concerning the conditions for human liberty. Like many pluralists (including Gierke), Rommen holds that the protection of intermediate social bodies is necessary to safeguard the individual from the likely encroachments of a burgeoning centralized state. Successive popes expressed a similar concern about any threat to the vitality of intermediate bodies. *See also* CALVEZ & PERRIN, *supra* note 83, at 416.

extends Aquinas's Aristotelian argument for the organic evolution of state from household, to embrace the full range of non-political bodies typical of modern industrial, differentiated society, thereby achieving for Catholicism what Gierke had achieved for organicism.<sup>86</sup> The social process develops in different stages, from individual to family, lesser territorial groupings, professional, and vocational organizations, religious, national, cultural, and educational bodies, and finally the state and the community of states.<sup>87</sup> Each of these is rooted in a natural process, and each possesses a unique character and range of rights, duties and powers determined objectively by rational human nature.<sup>88</sup> That is, they have what I am calling an original "jural sphere."<sup>89</sup>

Rommen's vigorous assertion of social pluralism is, however, far from implying a minimal state. While non-political bodies are natural, essential, and bearers of original rights and powers, they nevertheless satisfy no more than a part of human social nature.<sup>90</sup> The limited goods each secures point to the necessity for a higher body to secure the comprehensive requirements of the whole community, one possessed of sufficient authority to realize this end.<sup>91</sup> The fullest development of human nature is attained in the state.<sup>92</sup> The state is the culmination of a natural social process proceeding "by inner moral necessity from the social nature of man for the sake of the more perfect life," and leading to "the fuller realization of personality for all

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86. Gierke, *Nature of Human Associations*, *supra* note 28, at 113.

87. ROMMEN, *supra* note 69, at 301. Developing a contrast found in Pius XI's writings, Rommen distinguishes between two kinds of natural association: those that contribute "directly and immediately" to the perfection of social life (family and state) and those that, while also classed as "natural," nevertheless have fewer fundamental purposes and thus only transient existence (unions, voluntary associations, and so on). *Id.* at 136, 227; *see also* CALVEZ & PERRIN, *supra* note 83, at 423, 431. The family has primary significance: it is "a genuine and necessary community with specific and non-transferable ends"; it has a certain self-sufficiency, appropriate for its particular ends, namely, propagation, cooperation, and education; and it has a specific kind of authority—paternal—which has a "kind of sovereignty." ROMMEN, *supra* note 69, at 249, 269. This means that while civil law rightly regulates the family in accordance with the requirements of the common good and in order to prevent the abuse of paternal authority, it must do so assuming and respecting this paternal authority, which it cannot replace. *Id.* at 269.

88. *Id.* at 249, 269.

89. Rommen, however, does not speak, as Gierke does, of lesser associations having genuine "law-making" capacity. They have rights, duties and powers; but the *rules* they formulate to govern their internal affairs are not, strictly, *laws*.

90. *Id.* at 269-70.

91. *Id.* at 270.

92. *Id.*

its members in a working sovereign order of mutual assistance and mutual cooperation."<sup>93</sup> The state is an "order of solidaristic responsibility,"<sup>94</sup> "a cooperative whole of mutually complementary functions" whose members, though *substantially* equal, are nevertheless *functionally* unequal.<sup>95</sup> It is a moral organism whose purpose includes both the provision of material conditions and also the fostering of social and political virtues.<sup>96</sup> Like all social bodies, it is a "unity of order" not a "substantial unity."

As a Thomist, Rommen holds that the state's purpose is, finally, religiously founded.<sup>97</sup> Proximately, however, the state belongs to the natural realm, within which it can be described as the "perfect" community by virtue of its possession of "self-sufficiency," and this in a threefold sense:<sup>98</sup> economically, in its capacity to meet all material needs; politically, in its creation and sustenance of a unified, ordered community of individuals, families and intermediate bodies; and legally, in its possession of sovereign authority.<sup>99</sup> It is in the third sense of self-sufficiency that generates the state's unique jural sphere. The state's possession of sovereignty is necessary and means that its law is common to all within its territory, and that no other state's law applies. Such law is "supreme and universal"; in relation to it the "laws" of other social bodies (such as a collegiate constitution or municipal charter) are "particular and subordinate."<sup>100</sup> But the jural sphere of the state can never be all-inclusive precisely because it is circumscribed by that of other social bodies. Sovereignty is essentially the supreme responsibility for pursuing a specific moral end, the common good of the whole society, and, in the case of the state as with all other social bodies, such an end simultaneously

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93. *Id.* at 137.

94. *Id.*

95. *Id.* at 300.

96. *Id.* at 286.

97. *Id.* at 307.

98. *Id.* at 223-24.

99. *Id.* at 250-55.

100. *Id.* at 254, 258-59. The Church, by contrast, does possess "sovereignty" within the spiritual realm because it too is a perfect and self-sufficient community within that sphere. *Id.* at 262. The Church is subordinate to the state in matters affecting the temporal common good, while the state is subordinate to the Church in matters affecting the supernatural common good. Further, since the Church possesses sovereignty, it also wields genuine "law-making" power. Thus canon law is real law, whereas the jural norms of other institutions, e.g., a trade unions, remain "rules."

directs, empowers, and delimits the state because it transcends it.<sup>101</sup> The state is sovereign only “in its own order” (*in suo ordine*).<sup>102</sup> “The spheres of the individual, of the family, and of the cultural and economic organization (society), represent genuine limits to sovereignty.”<sup>103</sup>

The common good simply cannot be realized at the expense of the good of its parts but only through the attainment of their particular goods.<sup>104</sup> While the common good is morally prior to the partial goods of individuals or associations, if the parts are harmed, the common good is to that extent not attained.<sup>105</sup> Thus, integral to the common good is the provision of the security and peaceful functioning of non-political bodies and their protection from both internal disruption and external disturbance.<sup>106</sup> Moreover, the basic rights of non-political bodies constitute a major limit to the degree of sacrifice legitimately demanded of individuals.<sup>107</sup> While they may need to make sacrifices on behalf of the common good, and come under the overall regulation of the state, their realization of their own partial goods is a necessary part of the realization of the common good of the whole.

A crucial responsibility of the state is thus to ensure “that none of the endeavours of human social nature prevail hypertrophically over the others, but that all grow as balanced parts of a well-organized order in unity.”<sup>108</sup> The state supplies for other social bodies merely a “sovereign” “unity of order” maintaining conditions for balanced

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101. *Id.* at 404-05.

102. *Id.*

103. *Id.* at 400. Sovereignty is also limited externally by the rights of other sovereign states which collectively constitute a higher community of nations, and these rights are defined in international law. *Id.* at 256-57. The state’s law is in fact only one order of law among four irreducible types, each pertaining to their own sphere: the positive law of the state, the positive law of the Church, the positive international law, and, transcending and judging them all, the natural law. *Id.* at 262.

104. *Id.* at 307-08.

105. *Id.* at 317-18. The priority of the common good means that individuals may be obliged to make specific sacrifices on its behalf, perhaps of property but including the extreme case of losing their life in the event of a (just) war. Yet even such sacrifices, while harming the interests of individuals, is to their ultimate good, since in obeying a moral obligation deriving from God’s law, he contributes to the realization of his higher spiritual end. Thus, while the common good does not absorb the individual’s good, from the point of view of the individual’s final end, they ultimately coincide. *Id.* at 138-39, 326-27, 333.

106. *Id.* at 138.

107. *Id.* at 308-09.

108. *Id.* at 253.

public interaction among social bodies each with their own irreplaceable ends.<sup>109</sup> Yet, as Gierke also recognizes, preserving such order will require various kinds of intervention in the internal activities and structures of social bodies. While non-political bodies possess a protected jural sphere, they may, as a result of ignorance or self-interest, prove incapable of ordering their internal affairs rightly or act so as to harm the interests of other bodies. Such intervention as is called for must, however, conform to the principle of subsidiarity,<sup>110</sup> which Rommen summarizes thus: "Any task that free (private) cultural or economic or educational organizations and institutions can perform, in the framework of the public order of law, by their own initiative or by their own service to ideals which often transcend those of the state, should be left to their discretion and competency."<sup>111</sup>

### III. TOWARD A CRITICAL ELABORATION

I have shown how Gierke and Rommen provide valuable resources for rebutting the three assumptions that I suggested were still significant obstacles to the development of a social pluralist theory of institutional rights. First, both reject the individualist premise that institutions are merely contingent creations of the contracting wills or pooled rights of morally autonomous and self-constituting individuals. Against this premise Gierke advances the historically-grounded insight that participation in multiple organic associations is fundamental to human flourishing. Rommen proposes a metaphysically-grounded account of the plural social bodies arising from human nature and furnishing necessary contexts for the rational exercise of individual freedom and responsibility.<sup>112</sup> In my view, while Gierke's historical retrieval of an associationist legal pluralism is rightly regarded as a considerable achievement, it is inadequately grounded in a rudimentary and ambiguous synthesis of historical and psychological generalization. By contrast, Rommen's theoretical grounding of social pluralism in a rich notion of distinct and

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109. *Id.* at 253-54.

110. *Id.* at 303.

111. *Id.* at 280.

112. These, of course, are two variants of a now-familiar "communitarian" argument about the necessary social embeddedness of the self.

complementary institutional purposes arising from irreducible human inclinations seems more promising.<sup>113</sup>

Yet, even on these quite different grounds, both affirm that institutions possess inherent structural capacities not derived from those of the individuals who establish or compose them, including the capacity for institutional “agency.” Thus, for example, when the board of directors of a business corporation approves a resolution, that decision is not explicable as a mere aggregation or convergence of simultaneous and contiguous acts of the individual board members.<sup>114</sup> Upon the establishment of a corporation (family, university, state, etc.), a new locus of intentional action (“will,” for Gierke, “intentionality,” for Rommen) is generated which is more than the sum of successive individual acts (which, of course, continue to be necessary to sustain its existence). A new structural reality—an institution equipped with legal subjectivity and possessing its own jural sphere—has been brought into being.<sup>115</sup>

Both thinkers also pointedly reject the two related legal positivist doctrines I earlier placed in my sights: that only the state can generate valid jural norms; and that institutional rights are mere “concessions” from the state. Yet their accounts point to the need for a fuller articulation of the complex *contents* of the original jural spheres possessed by diverse institutions. They suggest the need to move beyond Gierke’s legal history to legal doctrine and beyond Rommen’s social philosophy to jurisprudence. Significant research programs for legal and political theorists are thereby implied. Such programs would seek to develop more sophisticated theoretical accounts of what is undeniable (if often very imperfectly encoded) in legal practice, namely that institutions do indeed possess legal rights, fulfill legal duties and exercise legal powers. The questions at stake are:

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113. I do not have space here to consider the possible shortcomings of the Thomistic metaphysics underlying Rommen’s social theory. For a brief reflection, see Chaplin, *supra* note 67, at 172-201.

114. Maitland, *Personality*, *supra* note 4, at 178. To employ Maitland’s hypothetical example, if we find ourselves owed money by a state—“Nusquamia”—we know this does not mean we are owed money by a collection of individual citizens of that state. *Id.* at 178-79. You may not “convert the proposition that Nusquamia owes you money into a series of propositions imposing duties on certain human beings that are now in existence.” *Id.* at 178.

115. *Id.* at 173-74. Even a legal positivist like A. V. Dicey had to recognize that “[w]hen . . . a body of . . . men bind themselves together to act in a particular way for some common purpose, they create a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted.” *Id.* (footnote omitted).

Why do these institutions display the jural spheres that they do, and are these spheres adequately constituted internally and protected externally, given the normative purposes such institutions legitimately pursue?

Let me list some examples currently in fierce debate. Do parents currently possess too many or too few powers over their children? Can any two (or more) individuals enter the institution historically known as “marriage”? Do business corporations wield rights over their property which undermine state’s capacity to advance the common good? Why should the institutions of health care, education and social services be subject to such extensive legal control or even ownership by public authorities? The claim to jural “originality” is central here. This is a claim regarding the distinctiveness of the contents of the jural spheres of diverse types of social institutions. To sustain it, even perhaps to make it intelligible, would require an argument from the assertion of institutional agency (that institutions can act pursuant to some normative purpose) to that of institutional legal subjectivity (that institutions can act *jurally* on account of an inherent capacity to pursue that purpose). Equally contested, of course, is the question of how one identifies the “normative institutional purposes” in which claims to institutional agency and legal subjectivity are grounded, or even whether one can do so at all.<sup>116</sup>

Yet, if at least some clarity on the question of jural originality can be obtained, we will be in a position to approach another crucial question which surfaced in both Gierke’s and Rommen’s accounts of legal pluralism. This is the question of how to identify the boundaries between the distinctive rights, duties, and powers of diverse social institutions, on the one hand, and, on the other, those necessarily inhering in the state pursuant to its discharge of its responsibility towards the public good. Both thinkers claim that state law does not itself create the legal subjectivity of associations, or the numerous interlinkages between them (and individuals), but only recognizes

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116. For an attempt to lay out a possible approach rooted in natural law thinking, see Michael Pakaluk, *Natural Law and Civil Society*, in *ALTERNATIVE CONCEPTIONS OF CIVIL SOCIETY* (Simone Chambers & Will Kymlicka eds., 2002). An application of Jacques Maritain’s social pluralism to American legal practice is LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM AND CORPORATE RIGHTS* (1987). For a comparison of Catholic social pluralism with parallel Calvinist and Historicist traditions, see *POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY* (James W. Skillen & Rockne M. McCarthy eds., 1991).

them in law and coordinates them in policy. But these processes of legal recognition and political coordination have come to be both extensive and intensive, penetrating deep into the core of what formerly were thought to be the exclusive internal affairs of an institution.

One only needs to note the fact that what counts as a “marriage” for public policy purposes has come over the centuries to be defined by the state and not by the parties to the marriage or their (religious or other) communities.<sup>117</sup> Or, think of the way that the “law of contract,” originally emerging out of private interlinkages between free economic agents, is now so extensive that it is widely believed that contracts themselves are really the creation and province of the state.<sup>118</sup> Or, consider the extent to which the content of corporate law has come to be determined by statute rather than by private agreements between businesses and employees or other businesses.<sup>119</sup> Indeed, even the institutions seemingly most independent of the state—charities and religious bodies—are increasingly being brought under detailed statutory regulations which seem to hem them in at

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117. Concern that the longstanding political consensus over what counts as marriage is no longer sustainable in secularized liberal democracies has led some to argue for a universal “civil unions” regime in which the definition of “marriage” is left to non-governmental institutions like churches. Marriage would thereby acquire a standing similar to baptism. See Iain T. Benson, *The Future of Marriage in Canada: Is it Time to Consider “Civil Unions”?*, CENTREPOINTS (Centre for Cultural Renewal, Ottawa, Ontario), Winter/Spring 2003/04, at 5, <http://www.culturalrenewal.ca/news/nws11.pdf> (on file with the Ave Maria Law Review).

118. “Although the Enlightenment concept of natural law was the natural law concept that had the most direct impact upon Anglo-American courts, it was preceded by canon law and rabbinical thinking about the sanctity of a promise.” JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* 8 (4th ed. 1998). Eventually this natural law theory of contract gave way to the theory of private autonomy: “[T]he theory sees the foundation of contract law as a sort of delegation of power by the State to its inhabitants.” *Id.*

119. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 262 (“Ideas about what corporations are, and the normative implications that follow from those ideas, have changed radically over time. Likewise, basic assumptions about the purposes and appropriate content of corporate law have differed in the past.”). Compare this to the view espoused by Kent Greenfield:

There is little question that the dominant view of corporate law for at least the past century has been that it is private law. The early twentieth century view of the corporation was that it was defined by agency relationships and that the obligations of the management were dictated by fiduciary duties akin to those present in private principal/agent relationships such as those of trustee and beneficiary.

Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 591-92 (2002).

every turn.<sup>120</sup> In brief, legal pluralists need to develop an argument whereby plausible criteria can be identified for distinguishing *in a non-arbitrary fashion* between the jural spheres of the state and those of non-state institutions.

I will not attempt to sketch such arguments here; however, let me conclude by recording an observation about the character of such arguments, which may perhaps guide those tempted to construct them. It appears that legal practice has often recognized the reality of legal pluralism much better than has (modern liberal) legal philosophy, sometimes even in the face of overt hostility from that quarter. Maitland, for example, famously showed how, for much of the nineteenth century, the English law of trusts served to protect unincorporated societies (i.e., those lacking the formal status of a “corporation”) tolerably well in spite of its ramshackle and theoretically incoherent nature. If legal practice sometimes does better than legal theory (it does not always), it will thus be necessary to seek to elicit our philosophical concepts from critical reflection on legal practice, as well as to work deductively from a series of abstract, putatively “universal” concepts which we then attempt to “apply” to legal reality.

In fact, both Gierke and Rommen, in their different ways, seem to proceed in something like this manner. Gierke seeks to discern the “universal” reality of plural jural institutional spheres primarily from critical reflection on legal and political history. By contrast, Rommen proceeds in the first instance from universal metaphysical concepts. Yet even these are selected in virtue of their supposedly superior capacity to shed light on those historically developed social and political forms that best accord with the empirical realities of human nature. If this methodological observation is correct, then we are indeed well-advised to attend simultaneously to “historical, political and theological” perspectives as we engage in “rethinking rights.”

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120. Leslie G. Espinoza, *The Quality of Mercy: Abandoning the Quest for Informed Charitable Giving*, 64 S. CAL. L. REV. 605, 642 (1991) (“Public charities formed as corporations were not directly subject to the courts’ supervisory powers. The only means available to the states to supervise charitable corporations were the states’ incorporation statutes.”); see also Charles Nave, *Charitable State Registration and the Dormant Commerce Clause*, 31 WM. MITCHELL L. REV. 227, 227 (2004) (“The states retain the general police power to regulate the solicitation of charitable contributions from their residents and within their jurisdictions. Forty-three states and the District of Columbia have exercised this power by enacting statutes regulating charitable solicitations.”).