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Rockne McCarthy
Dordt College

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Associate Professor

Rockne McCarthy is a member of the Dordt Lectureship Center of Dordt College. He received his Ph.D. degree from St. Louis University in 1971. Before coming to Dordt he taught at Trinity Christian College and was a member of the 1978-79 Calvin Center for Christian Scholarship. McCarthy serves as the Executive Secretary of the Association for Public Justice.

Introduction: The Challenge to Institutional Rights

The thesis of this essay is that Liberalism, a major political ideology since the Enlightenment in the eighteenth century, has failed to account for and uphold adequately the rights of groups or institutions.[1] While Liberalism has championed the rights of individuals, it has neglected the rightful sphere of authority, the unique structural identity, and the special task of such nonpolitical institutions in society as the family, church, and school. This is the case in both the "right-wing" conservative and the "left-wing" liberal manifestations of Liberal Democracy.

The observation that Liberalism fails to adequately account for the authority, identity, and task of some of the basic institutions in society is not new. In the nineteenth century Alexis de Tocqueville pointed out that in France one of the principal outcomes of an Enlightenment-atomistic political ideology was the concentration of power in an absolute state and the corresponding weakening of the power of the many intermediary groups that stood between the individual and the state. He contended that the only way to check the growing power of the centralized state was to strengthen the separate, autonomous, and, therefore, competitive centers of *political* power in society.

Although Tocqueville recognized the danger of an individualist view of society, his response to the loss of institutional and associational rights was reactionary. He envisioned a society in which *political* power was still in the hands of *private* individuals or corporations. He did not recognize that in such a society the state is denied the legitimate, *public*, political power it needs to protect the rights of individuals and the nonpolitical institutions in society.

The American Situation

On Tocqueville's travels in America he observed a democratic society which he believed had the potential for maintaining political freedom. In his mind the American federal system of government, independent judiciary and press, and the many voluntary associations performed the same function of checking the concentration of political power that the aristocracy had played in France during the *ancien régime*. Tocqueville believed the best hope for the survival of political liberty in America was the continued vitality of free institutions and associations in society.

In the light of Tocqueville's observations about America, it is ironic that an increasing number of commentators are contending that the institutional and associational life of the United States is being undermined by the same Enlightenment ideology that democratized French society in the nineteenth century. Well-known sociologist Peter Berger and *Worldview* magazine senior editor Richard Neuhaus argue in their booklet, *To Empower People: The Role of Mediating Structures*, that American society is weakened by public policy and court decisions that undercut the position of nonpolitical institutions in society.[2] Their thesis is that American Liberalism, what one scholar refers to as "*the* American ideology," has tended to be blind to the public (as distinct from private) functions of such mediating structures as the neighborhood, family, church, and voluntary associations.[3] Berger and Neuhaus contend that this blindness can be traced to the Enlightenment roots of Liberalism:

> Enlightenment thought is abstract, universalistic, addicted to what Burke called "geometry" in social policy. The concrete particularities of mediating structures find an inhospitable soil in the liberal garden. There the great concern is for the individual ("the rights of man") and for a just public order, but anything "in between" is viewed as irrelevant, or even an obstacle, to the rational ordering of society. What lies in between is dismissed, to the extent it can be, as superstition, bigotry, or (more recently) cultural lag.[4]

To the credit of American Liberalism, it has been vigorous in the defense of the *private* civil rights of individuals. But, according to Berger and Neuhaus, Liberalism has tended to dismiss the *public* rights of such institutions as the church. "Supported by a narrow understanding of the separation of church and state," they argue, "liberals are typically hostile to the claim that institutional religion might have public rights and public functions."[5] As a consequence the liberty that liberals defend is that of the "privatized" religion of the individual and not the public religion of institutions.

The failure of Liberal Democracy to recognize the rights of institutions along with the rights of individuals is the Achilles heel of Liberalism and the political order that has emerged from this ideology. The failure is not simply

an oversight or the inability of Liberalism to live up to its high ideals. Rather, the failure is intrinsic to the individualist tradition of Liberalism. The "inhospitable soil in the liberal garden" has made it an almost impossible task to clarify the legal rights of such institutions as the family, school, and church.

The state is not exempted from the Liberal hostility toward the rights of institutions. A consistent Liberal speaks of the "rights" of individuals and the "duties" of the state. This distinction between rights and duties is important. In the Liberal tradition only individuals have rights, because only individuals are real—only individuals have ontological status. Every institution, including the state, is but the *artificial* creation of sovereign individuals. The individualist assumptions of Democratism thus undercut the ontological status of the many institutions in society that are basic to human life and a healthy community.

Although the individualist believes man to be self-sufficient, it is apparent that he is forced by necessity to turn to institutions to provide many of the basic needs of human existence. Thus, for example, while the state remains theoretically an artificial creation, it inevitably emerges from the artificial status it shares with every other institution to become pragmatically one of the most powerful institutions in society. What ontologically has no status is, therefore, given a pragmatic primacy. In Liberalism the state increasingly becomes the primary agent for meeting the needs of man and insuring unity and order in society.

The concept of Liberalism as the political ideology of the United States stems from the American Revolution. Bernard Bailyn contends that the colonists developed a new political ideology in their struggle with England.[6] The radicalism of the political conclusions regarding the meaning of representation and consent, constitutions and rights, and sovereignty and authority, was, according to Bailyn, a transformed as well as a transforming force.[7]

The transformed and transforming political ideology of Liberalism elevated the rights of sovereign individuals to the central article of faith in American political thought. The consequence of absolutizing individual rights was that the rights of institutions, both theoretically and legally, increasingly became obscure. This is highlighted by the fact that an older Puritan tradition in America did recognize the rights of both individuals and institutions. The General Court of Massachusetts Bay in 1641, for example, established a "Body of Liberties" which recognized "the Rites, liberties and priveledges" of both individuals and such institutions as the family, church and state."[8] The legal order in Puritan New England protected the rightful sphere of authority, structural identity, and task of these institutions. But the Puritan constitutional understanding of the institutional character of political rights did not withstand the forces of secularization. It was replaced by an atomistic social philosophy and the legal assumptions of Liberalism. The state constitutions that emerged after 1776 and the Federal Constitution of 1789 reflected this development.

The failure of Liberalism to account adequately for the rights of institutions is apparent in the development of American law. One of the early acts of the United States Congress was to establish a national bank to handle the financial affairs of the Republic. From the outset the Bank of the United States was involved in legal controversy. In 1809 the issue was whether or not it could sue and be sued. The matter went

before the Supreme Court and Chief Justice John Marshall wrote the Court's opinion. It reflected the widely held assumption that only individuals had ontological status. Marshall declared:

> That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name.[9]

Thus while the Chief Justice theoretically remained true to the individualist assumptions of Liberalism, he pragmatically concluded that a corporation could be sued in the name of those individuals who held stock in the corporation. For the purposes of law a corporation was to be treated as an "artificial being."

This is a clear example of how basic theoretical assumptions guide judicial reasoning. As an individualist Marshall was unable to recognize the legitimacy of institutions having ontic rights. His only alternative, therefore, was to forge ahead pragmatically by legally defining an institution to be an "artificial being." Scholastic juggling of this kind reminds one of the widely publicized incident in the 1979 ceremonial tour of Queen Elizabeth through the strict Moslem countries bordering the Persian Gulf. Moslem law prohibits women from socializing with men in public. Its stricture was honored on the Queen's visit to Saudi Arabia by declaring her "an honorary man." This legal fiction announced, it is reported that the duties of King Khalid, who was the Queen's host, no longer clashed with those of King Khalid the devout Moslem. In retrospect, John Marshall had as little difficulty defining an economic corporation to be an individual as King Khalid had in defining Queen Elizabeth to be a man.

One must not, however, be too critical of John Marshall. He was a product of a Liberal ideology which, as we will see when we turn to the English legal tradition, encouraged this type of mental gymnastics. Liberalism also fostered the growth and development of banks and other business corporations. The corporation, often in symbiosis with the state, emerged from its artificial status to become pragmatically a powerful institution in society. The study of Berger and Neuhaus demonstrates that the modern *megastructures* of society, the state, and the business corporation, for example, have done well in the "liberal garden." Their concern is that such *mediating* structures as the family, school, and church are being undermined by contemporary public policy and legal decisions.

The English Situation

In America the concern for the legal rights of institutions is a recent development. In the case of France we have already seen that Tocqueville was writing in the first half of the nineteenth century about the increasing power of a centralized state. In England at the end of the eighteenth century Edmund Burke sounded a similar alarm. The warning was heard again in the early decades of the present century. F.W. Maitland (1850-1906) and John Neville Figgis (1866-1919) wrote in protest against the threatened loss of freedom for nonpolitical institutions in society.[10] It was the conclusion of these and other English Pluralists that an individualist political ideology was leading by stages into a collectivist state in England.

John Neville Figgis was an Anglican cleric and professor at Cam-

bridge.[11] He was convinced that there was a basic interrelationship between a Liberal ideology of political atomism and the undermining of some of the basic institutions of English society. He believed a political and legal battle was raging between those theorists and practitioners who demanded that there should be no intermediaries between the state and the citizen, and others who wanted to maintain the rights of institutions like the family, school, and church.

The notion of state sovereignty that Figgis rejected was that articulated by John Austin in the nineteenth century. Austin contended that the state's will is sovereign, and, therefore, subject to no limitation. Figgis denied this contention. He argued that the power of the state was not unconditionally binding upon every person and institution. The reason, for Figgis, was simple enough. Neither individuals nor institutions owed their existence to the state. In a free society their rights and liberties must be protected, rather than limited or denied, by the state.

Figgis was keenly aware that what was at stake was more than an academic issue. At issue was the conception of political sovereignty that was to guide the Law Courts and Parliament in England. This fact was made clear to him in the *Free Church of Scotland Case*. With the complex issues of this case this essay need not be concerned. Suffice it to say that the case clarified for Figgis the danger of an institution losing the right to control its own internal life.[12] A "Free Church in a Free State" became Figgis' motto; and it also became the title of the first chapter of his book *Churches in the Modern State*.[13]

It would be a mistake to conclude from the title of Figgis' book that he was primarily concerned with the problem of the relations of church and state. While church/state relations were an important issue, he believed that the matter raised an even deeper question that went to the heart of all political philosophy. "The question concerns," according to Figgis, "not merely ecclesiastical privilege, but the whole complex structure of any society and the nature of political union."[14]

Figgis believed that a normative understanding of the character of non-political institutions and their relation to the state meant the rejection of two widely held theories—the fiction and concession theories. The fiction theory, illustrated earlier in this essay in the thought of John Marshall, assumed that the individual was a real person in law, while an institution like a business corporation, family, or school was a fictitious (artificial) entity. This theory was complemented by the concession theory which argued that legal rights accorded such fictitious bodies were concessions from the state. In this view corporate bodies had "no right to exist, except on concession, expressed or implied, and no power of action beyond what the State (in theory) delegates to them."[15]

"The question concerns," according to Figgis, "not merely ecclesiastical privilege, but the whole complex structure of any society and the nature of political union."

Because of Figgis' training in legal theory and history, he was well aware that both the fiction and the concession theories were not of modern origin. He realized that the English "legal

prejudice" or "presupposition" against the rights of corporate bodies was not merely the product of the individualism of the French Revolution. Following the lead of the great German historian and legal theorist Otto von Gierke, Figgis traced the origin of the fiction and concession theories to the *damnosa hereditas* of Roman law and the claims of Imperial Rome.[16] And he was careful to point out that while the theories were the grandchildren of the pagan state, they were baptized by the Church in the person of Innocent IV.[17] Thus even though Roman law was never accepted in England, the fiction and concession theories were carried there through the influence of English chancellors trained partly as canonists, and through the general development of absolutism in the sixteenth century.[18]

In the eighteenth century the fiction and concession theories concerning the identity and origin of institutions was easily combined with the Enlightenment theory of human autonomy. As was suggested earlier, in an individualist political ideology the state easily emerges from its fictitious status to become pragmatically the primary repository of power and authority in society. While the individual theoretically remains sovereign, the state becomes pragmatically the "most real" and "most powerful" entity in society. Figgis believed that the growing centralization of the British state could be traced directly to the widespread influence of these different yet complementary political theories.

In Figgis' study of Western political thought he observed a repeated oscillation "between an unreal individualism and wildly impossible socialistic ideal."[19] Rejecting both individualism and collectivism, Figgis sought a "third way" to account for and secure the rights of groups or institutions in society.

But Figgis was not a systematic thinker. While he strove for a proper relationship between the state, the individual, and social institutions, he was never able to account adequately for the sphere of authority, structural identity, and task of the many institutions, including the state, in society. In fact, in order to guarantee the rights of the smaller societies, Figgis found it necessary to deny that the state had a positive role to play in society.

Figgis did this through a two-fold argument. In the first place he contended that groups in society, institutions like the family, church, school, and trade union, possessed real personalities. Groups, according to Figgis, should be considered as living and organic entities, having a mind and a will of their own.[20] Just as freedom demands that social room be given to individuals for their self-development, the development of the real personality of associations—that is, of their freedom—is necessary for true social liberty to exist. Figgis' first argument consisted of an equation between individual and group or institutional rights.

But in establishing the point that groups possess basic freedoms and privileges, Figgis also set forth the argument that the state did not have a personality or an identity of its own. The state, according to Figgis, was composed of groups; the state itself was not a group or an institution. The state was merely a synthesis of living wills.[21] It was this conception of the state that led Figgis to refer to it as a *communitas communitatum* (society of societies).[22]

Because Figgis was not a systematic thinker, it is not clear how the *communitas communitatum* was to function in society. While at times he spoke of the state merely as a collection of groups with no identity or task of its own, at other times he argued that the

essential purpose of the state was to "control and limit within the bounds of justice, the activities of all minor associations whatsoever."[23] The problem with this statement is that Figgis never developed a substantive view of what he meant by "the bounds of justice." Fearful of the growing power of a centralized state, the thrust of Figgis' thinking was to deny the state any substantive authority, unity, and task in society. He replaced state sovereignty with the sovereignty of nonpolitical institutions without ever clarifying how "the bounds of justice" were to be established if the state had no substantive role to perform in society. Figgis' view of the state was essentially negative. In the end it becomes clear that at best the state was, in his eyes, merely a necessary evil.

Lacking a comprehensive social philosophy which was capable of accounting directly for the God-given rights and privileges of *every* institution in society, Figgis was limited to arguing by analogy from the God-given rights of individuals to fundamental rights for groups or institutions. Figgis was not a philosopher; he did not see the importance of addressing the metaphysical basis for the rights of groups. The result was that he uncritically accepted an individualist conception of rights. This is evident from the fact that his basic argument was that institutions had rights because "they have all arisen out of the natural associative instincts of mankind."[24] The rights of groups or institutions rested, therefore, not on God's creational order for institutions, but rather on the fact that individuals were social beings.

Conclusion: An Evaluation

Figgis rejected both individualism and collectivism because he believed they were but two sides of a single coin. His concern was to find a "third way" that would recognize and protect the rights of individuals and groups. But in the end he failed to achieve his goal. His thinking reflected his Anglican roots, which were planted deep in the intellectual tradition of a Christian and an Aristotelian synthesis. Figgis' social philosophy embodied a sacred/secular dualism, a hierarchical view of social institutions, and a failure to differentiate adequately between state and society.

Figgis' conception of a *communitas communitatum* reflected his Anglican view of a fundamental oneness and coherence in a national society. While every group or institution was to have its own identity and its own rights, each was always conceived as being a part of a larger whole which Figgis identified as the *communitas communitatum*.

The problem with this view is that the specific sphere of authority, the structural identity, and the task of the state remain ambiguous. While Figgis mourned the leveling effects of an individualist political ideology, a perspective that led to the centralization of power in the state and the loss of freedom of nonpolitical institutions, he failed to develop a satisfactory alternative political philosophy. He therefore joins Tocqueville and a long list of writers who were able to see the social and political effects of individualism, but who were unable to develop a perspective which identified the place of institutions, including the state, in the social order, and their rights and duties toward one another.

If one were to follow Figgis' perspective, individuals and nonpolitical institutions would be *empowered*, but the state would lose any substantive power in society. This is no solution, for, as Robert Nisbet pointed out several years ago, "The heart of our problem with the state and its governing

agencies does not lie in the state, much less in the type of individuals who make their way to the top in politics, but instead in *the relation of the state to other, nonpolitical institutions*."[25]

We must, therefore, take political sovereignty seriously. This means a rejection of a Liberal Democratic ideology which fails, in both its right- and left-wing manifestations, to clarify the rightful sphere of authority, the unique structural identity, and the special task of the many institutions, including the state, in society. If the tide is going to be turned against what Berger and Neuhaus refer to as a Liberal bias against the rights of so-called mediating structures, a more pluralistic social philosophy must begin to guide public policy and court decisions. A principled pluralism is one that accounts for the Lord's constitutional order for creation, a normative order in which the entire creation, with its plurality of institutions, authorities, and associations, is *empowered* by the Word of God for the good of humanity.

Notes

[1]Throughout this essay the terms "group" and "institution" are used as synonyms. This reflects a European and in some cases an English use of the terms. It should also be noted that Liberalism is capitalized throughout the essay. Capitalizing the term makes it clear that "right-wing" conservatism and "left-wing" liberalism are just two species of Liberalism.

[2]Peter L. Berger and Richard John Neuhaus, *To Empower People: The Role of Mediating Structures in Public Policy* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1977).

[3]Berger and Neuhaus, p. 4.

[4]Berger and Neuhaus, pp. 4-5.

[5]Berger and Neuhaus, p. 5.

[6]Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, Massachusetts: Harvard University Press, 1967), p. 161.

[7]Bailyn; see especially Chapter V, "Transformation."

[8]"A Coppie of the Liberties of the Massachusetts Colonie in New England," printed in Edmund S. Morgan, ed., *Puritan Political Ideas* (New York: Bobbs-Merrill & Company, 1965), pp. 178-179.

[9]*Bank of United States v Deveaux* 9 U.S. 61 (1809).

[10]While the English political pluralists all rejected the doctrine of an omnipotent state, they did not share a commonly agreed upon theory of the state. For a discussion of English political pluralism see H.M. Magid, *English Political Pluralism: The Problem of Freedom and Organization* (New York: AMS Press, 1966), and two works by David Nicholls: *Three Varieties of Pluralism* (New York: St. Martin's Press, 1974); *The Pluralist State* (New York: St. Martin's Press, 1975).

[11]G.R. Elton's introduction to *The Divine Right of Kings* contains a brief overview of Figgis' life. John Neville Figgis, *The Divine Right of Kings* (1st edition, 1896), ed. by G.R. Elton (New York: Harper & Row, 1960).

[12]For a discussion of the *Free Church of Scotland Case* see Nicholls, *The Pluralist State*, pp. 66-67.

[13]John Neville Figgis, *Churches in the Modern State* (New York: Russell & Russell, 1973). The first edition was published in 1913. Figgis is remembered primarily for his two studies in the history of political thought, *The Divine Right of Kings* (1896), and *Political Thought From Gerson to Grotius*, 1st edition 1907 (New York: Harper Torchbooks, 1960).

[14]Figgis, *Churches*, p. 40.

[15]Figgis, *Churches*, p. 249.

[16]Figgis, *Churches*, p. 25, note 1; p. 226. Otto von Gierke set forth the argument that medieval German law recognized the rights and privileges of numerous groups or institutions in society. This legal tradition, according to Gierke, was radically changed after Roman law was introduced into Germany. Figgis helped F.W. Maitland to translate part of Gierke's *Das deutsche Genossenschaftsrecht*. The book was published under the title *Political Theories of the Middle Age* in 1900 with a lengthy introduction by Maitland. Another section of Gierke's work has recently been translated into English by George Heiman and titled *Associations and Law: The Classical and Early Christian Stage* (Toronto: University of Toronto Press, 1977).

[17]Figgis, *Churches*, pp. 47 and 61.

[18]Figgis, *Churches*, pp. 62-63.

[19]Figgis, *Churches*, p. 225.

[20]Figgis, *Churches*, pp. 33 and 41-42.

[21]Figgis, *Churches*, p. 92.

[22]Figgis, *Churches*, pp. 8 and 49.

[23]Figgis, *Churches*, p. 251.

[24]Figgis, *Churches*, pp. 47 and 160.

[25]Robert Nisbet, *Twilight of Authority* (New York: Oxford University Press, 1975), p. 74 (Emphasis in the original).