

SUBSIDIARITY AS A PRINCIPLE OF GOVERNANCE: BEYOND DEVOLUTION

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INTRODUCTION

With the ascension of George W. Bush to the presidency comes the public emergence of the subsidiarity principle, a doctrine previously familiar primarily to Catholic social theorists and observers of the European Union. Fundamentally and explicitly intertwined with Bush's "compassionate conservative" vision, subsidiarity calls for social problems to be addressed from the bottom up, rather than from the top down. Literally meaning "to 'seat' ('sid') a service down ('sub') as close to the need for that service as is feasible,"¹ subsidiarity holds that where families, neighborhoods, churches, or community groups can effectively address a given problem, they should. Where they cannot, municipal or state governments should intervene. Only when the lower bodies prove ineffective should the federal government become involved.

Subsidiarity has assumed a decidedly conservative gloss in today's public policy debates. Clung to by those seeking to shrink federal government programs and largely ignored by those who oppose them, subsidiarity appears to have become the exclusive property of one side of the political spectrum. This Article contends that the strictly conservative portrayal of subsidiarity misconstrues the nature of the Catholic social theory from which the principle arises. The conservative perspective also overlooks the affirmative government functions essential to subsidiarity's faithful implementation. Part I of the Article provides an overview of subsidiarity's expanding influence on debates over the role of government and its increasingly frequent equation with the concept of devolution. Part II traces the Catholic roots of subsidiarity and shows how the principle's origins transcend today's conservative and liberal dichotomy. Part III addresses subsidiarity's applicability to real-world governance, first looking to its role in the European Union and then to its more subtle but pervasive function as a principle of American federalism. In Part IV, the Article outlines several conceptual limitations on subsidiarity's devolutionary impetus, as seen in particular areas of law where an active federal role is essential to furthering the principle's objectives. That these areas are not federal priorities under current notions of compassionate conservatism underscores the fundamental misconceptions surrounding subsidiarity as a principle of governance.

I. SUBSIDIARITY AND DEVOLUTION

The link between compassionate conservatism and subsidiarity has been

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1. J. Bryan Hehir, *Catholic Social Teaching and the Challenge of the Future*, WOODSTOCK REP., June 1998, <http://www.georgetown.edu/centers/woodstock/report/rfea54a.htm>.

drawn repeatedly and explicitly by proponents of the former. John J. DiIulio Jr., appointed by President Bush to head the new White House Office of Faith-Based and Community Initiatives, has gone so far as to assert that "[m]orally, compassionate conservatism is 'subsidiarity conservatism.'"² Longtime Bush adviser Marvin Olasky, whom Bush calls "compassionate conservatism's leading thinker,"³ contends that "we should emphasize what's called 'subsidiarity.' That means always looking first to families to help their own, then to churches and other community organizations. If it is necessary to turn to government, go first to city, then to county, then to state and only then to federal offices. . . ."⁴ Further, the principle is a centerpiece of Bush's embrace of the work of Catholic neoconservatives like Richard John Neuhaus and Michael Novak,⁵ and Bush supporters invoked subsidiarity explicitly during the campaign in urging Catholics to vote for him.⁶ Even where unspoken, subsidiarity underlies many of Bush's policy proposals. In his "Duty of Hope" campaign speech outlining the compassionate conservative vision, "the word 'subsidiarity' never passed Bush's lips, [but the] speech reads like a blueprint for applied subsidiarity."⁷

Subsidiarity's influence on modern governance runs well beyond the 2000 American presidential campaign. It is a founding principle of the European Union and has been cited as a factor in the Eastern European freedom movements of the 1980s.⁸ In the United States, subsidiarity underlies a wide variety of current legislative actions. "Subsidiarity conservatism" has been invoked by members of Congress who "have worked to codify such [an] approach into legislative policy, specifically as a means to end poverty,"⁹ and has been relied

2. John J. DiIulio Jr., *Compassionate Conservatism—The Right Course, the Right Time*, ORLANDO SENTINEL, Sept. 26, 1999, at G5 (emphasis added); see also Richard Morin, *Leading with His Right: John DiIulio, Ready to Go to the Mat with a Faith-Based Approach to Crime*, WASH. POST, Feb. 26, 2001, at C1 (reporting that for DiIulio, "subsidiarity is 'the meat on the bones of compassionate conservatism'"). DiIulio's tenure was short-lived, as he resigned in August 2001. Dana Milbank, *DiIulio Resigns from Top "Faith-Based" Post*, WASH. POST, Aug. 18, 2001, at A4.

3. Robert Westbrook, *Dubya-ism*, 117 CHRISTIAN CENTURY 912, 912 (2000) (book review).

4. Marvin Olasky, *Let Them Eat Beans*, AUSTIN AM.-STATESMAN, Sept. 29, 2000, at A15.

5. See Franklin Foer, *Spin Doctrine*, NEW REPUBLIC, June 5, 2000, at 18; Andrew Sullivan, *Bush Woos Catholic Conservatives*, SUNDAY TIMES (London), June 25, 2000, at 4.

6. See William J. Bennett & Vin Weber, *The Catholic Case for George W. Bush: His Views on Society, Government and the Poor Are Fully in Accord with the Church's Values*, PITTSBURGH POST-GAZETTE, Nov. 2, 2000, at A29.

7. DiIulio, *supra* note 2, at G1; see also Ryan Lizza, *Write Hand*, NEW REPUBLIC, May 21, 2001, at 14 (reporting that Michael Gerson, Bush's chief speechwriter, "sees compassionate conservatism as a way to reconcile what he considers the two most vital conservative intellectual traditions: libertarianism and Catholic social thought").

8. The ideal of subsidiarity, "being that the state is there to serve civil society, not to dominate over it," has also been cited as lying at the heart of the freedom movement in Poland. Jean Bethke Elshtain, *Will the Real Civil Society Advocates Please Stand Up?*, 75 CHI.-KENT L. REV. 583 (2000).

9. Rick Santorum, *A Compassionate Conservative Agenda: Addressing Poverty for the Next*

on to justify the decentralization of environmental law,¹⁰ opposition to campaign finance reform,¹¹ the privatization of urban land use regulations,¹² and even an initiative to provide broadcast licenses to low-power radio stations.¹³ Subsidiarity is reflected, albeit implicitly, in the myriad federal statutes that "allow states to enact their own regulatory programs, provided they meet" minimum standards.¹⁴ The principle has also been looked to as the model for interpreting Supreme Court jurisprudence, including decisions upholding parents' authority over their children's education¹⁵ and limiting the Commerce Clause's scope.¹⁶

Millennium, 26 J. LEGIS. 93, 94 (2000) (discussing welfare reform and increased reliance on churches and charities).

10. See James L. Huffman, *The Past and Future of Environmental Law*, 30 ENVTL. L. 23, 31 (2000) (observing that in environmental matters, "[p]erhaps Americans are moving toward the regulatory philosophy of subsidiarity—the principle that the best government is that which is the least centralized yet still adequate to accomplish the task at hand"); Wallace E. Oates, *On Environmental Federalism*, 83 VA. L. REV. 1321, 1322 (1997) (arguing that opposition to decentralized environmental regulation "represents a fundamental inconsistency with the basic principle of subsidiarity to which the European Community has subscribed").

11. See Jack B. Sarno, Note, *A Natural Law Defense of Buckley v. Valeo*, 66 FORDHAM L. REV. 2693, 2767 (1998) ("McCain-Feingold, with its flat prohibition of even modest contributions by PACs and its harsh restrictions on independent expenditures and issue advocacy, detracts from, rather than promotes, the principle of subsidiarity by diminishing the role that these (instrumental) associations play.").

12. See Steven J. Eagle, *Privatizing Urban Land Use Regulation: The Problem of Consent*, 7 GEO. MASON L. REV. 905, 913-14 (1999) (discussing devolution of regulatory powers from planning boards and municipal legislatures to neighborhood groups).

13. See Kevin Clarke, *A Public Disservice Message*, U.S. CATHOLIC, Mar. 1, 2001, at 35 (calling congressional defeat of Federal Communications Commission initiative "an example of the principle of subsidiarity turned precisely inside out").

14. George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 414 (1994) (citing, inter alia, the Clean Water Act, the Occupational Safety and Health Act, and the Resource Conservation and Recovery Act).

15. In his article, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109 (2000), Richard Garnett argues:

Perhaps *Pierce* [*v. Society of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925),] and the cluster of values and maxims for which it is thought to stand are best defended not in terms of parents' individual "rights" against government, and certainly not in terms of ownership and property, but instead in terms of subsidiarity. Maybe we should think of the family, as it appears in *Pierce* and in contemporary debates about civic education, parental authority, and religious freedom, as the original "mediating institution."

Id. at 144-45 (footnote omitted).

16. David P. Currie, *Subsidiarity*, 1 GREENBAG 2D 359, 363 (1998) (discussing *United States v. Lopez*, 514 U.S. 549 (1995)).

In all of this, subsidiarity is treated as a strictly devolutionary principle compelling the reallocation of social functions from higher to lower government bodies, or from government to non-government entities. Rarely, if ever, is subsidiarity looked to as warranting a greater role for the federal government in combating a given social problem. Frequently, subsidiarity is expressly equated with devolution.¹⁷ Even where a broader definition is given, it invariably tracks devolutionary dogma.¹⁸ Given the unrelenting portrayal of subsidiarity as a doctrine of privatization and decentralization, it is no wonder that the principle is now identified almost exclusively with the tenets of the Republican Party.¹⁹

In addition to the popular rhetoric, more scholarly efforts have also lent credibility to the notion that subsidiarity warrants broad decentralization of government authority. Douglas Kmiec portrays subsidiarity as a component of the Tenth Amendment, whereby the centralization or federalization of government functions is disfavored.²⁰ Stephen Gardbaum proposes a model of

17. See, e.g., Marshall J. Breger, *Government Accountability in the Twenty-First Century*, 57 U. PITT. L. REV. 423, 430 (1996) ("The principle of devolution, often called subsidiarity in the European Union context, is based on the notion that decisions made closest to those affected are likely to be the best informed and certainly the most democratically based." (footnote omitted)); A. Michael Froomkin, *Of Governments and Governance*, 14 BERKELEY TECH. L. J. 617, 621 n.8 (1999) ("Subsidiarity is the devolution of responsibility to smaller political units in the context of a federal system.").

18. See, e.g., Robert A. Sirico, *Restoring Charity: Ethical Principles for a New Welfare Policy*, in TRANSFORMING WELFARE: THE REVIVAL OF AMERICAN CHARITY (Jeffrey J. Sikkenga ed., 1997), <http://wee.acton.org/publicat/books/transformwelfare/sirico.html> (invoking subsidiarity as the foundation for privatizing welfare, arguing that "[t]he only way out of this [welfare] mess is to return much of the responsibility for dealing with these problems [of poverty] back to its proper place: the private sector"); Foer, *supra* note 5, at 18 ("To reconcile their capitalist faith in self-interest with Catholicism's abnegation of self-interest, Neuhaus and Novak have not only highlighted subsidiarity, they have redefined Pius's concept of it—removing any statist inflection and making it a devolutionary doctrine."); Arthur F. McGovern, S.J., *Entitlements and Catholic Social Teachings*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 445, 450 (1997) (noting that while portions of 1931 papal encyclical *Quadragesimo anno* "suggest papal support of government assistance programs, the 'principle of subsidiarity' first promulgated in this encyclical has often served as an argument for severely limiting or even trying to avoid such programs"); Jean Schere, *Subsidiarity and Federalism in the European Union*, 24 FLETCHER F. WORLD AFF. 175, 181 (2000) ("Decentralization and competition are thus categorical imperatives for any federal arrangement if subsidiarity is to be preserved and extended as a guiding principle for the EU's *modus operandi*.").

19. See Joe Carroll, *Bush Campaign Targets Vital Catholic Votes to Succeed in Presidential Race*, IRISH TIMES, Oct. 21, 2000, at 13 ("Mr. Bush's insistence on taking power away from Washington and leaving the states to make more decisions also ties in with the Catholic concept of 'subsidiarity' whereby social problems are best dealt with at local or regional level rather than by a central bureaucracy."); Santorum, *supra* note 9, at 93 (portraying subsidiarity and compassionate conservatism as "manifest, in part, in the Republican Party tradition").

20. See Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 215 (1995).

constitutional federalism that, while textually based on the Necessary and Proper Clause, borrows from the subsidiarity principle in expressing "the idea that in areas of concurrent federal and state . . . competence, exercises of federal legislative power ought in some very general, but important, sense to be understood as exceptional or 'subsidiary' to regulation by the states and, therefore, to carry a special burden of justification."²¹ His model, along with the European Union's express adoption of the subsidiarity principle,²² "raise [the] presumption in favor of state regulatory competence to constitutional status in the sense that they deny to the federal entity complete and unreviewable legislative discretion to rebut it."²³ If Kirk Kennedy is correct, subsidiarity's devolutionary impetus may actually have gained constitutional standing through the jurisprudence of at least one Supreme Court justice.²⁴

The equation of subsidiarity with devolution, at least in this country, originates primarily with neoconservatives like Novak and Neuhaus, who made subsidiarity one of the founding principles of their movement. Novak contends that in a welfare state, "the administrative state steadily swallows up most of the functions that used to be exercised by civil society . . . [and] [t]hus, the principle of subsidiarity is continually violated, as the higher levels crush the lower."²⁵ Instead, according to Novak, "[w]hat the free world needs, rapidly, is a devolution of significant responsibilities from centralized bureaucracies to citizens, alone and in their multiple associations."²⁶

Given this background, one might conclude that subsidiarity was created as a component of the Republican or Libertarian party platforms, not as a Catholic principle of social justice. That is not to suggest that all conservative applications of subsidiarity are unfaithful to the principle's origins or intended purpose. Certainly the intervention and expansion of government authority in many contexts runs counter to any reasonable reading of subsidiarity. But the devolutionary elements of subsidiarity are only half of the story. To engage the principle in its truest and fullest sense, one must engage the Catholic social theory from which it arises.

21. Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 833 (1996).

22. See *infra* notes 88-90 and accompanying text.

23. Gardbaum, *supra* note 21, at 833.

24. See Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 82 (1997) ("In key cases addressing issues of federalism and the parameters of congressional power, [Justice] Thomas has consistently adhered to a position that mirrors the natural law doctrine of subsidiarity.").

25. MICHAEL NOVAK, *ON CULTIVATING LIBERTY* 97 (Brian C. Anderson ed., 1999).

26. *Id.* at 106. Note that Novak acknowledges that some role for the federal government is still needed and that some aspects of the welfare state have been positive (e.g., care for the elderly). See *id.* at 99-100, 107.

II. CATHOLIC SOCIAL THEORY AND SUBSIDIARITY

A. *The Catholic Roots of Subsidiarity*

Subsidiarity is a uniquely Catholic principle that underlies much of the Church's teaching on social justice issues.²⁷ The fact that subsidiarity is now the subject of debate among Brussels bureaucrats and American presidential advisors does not render its religious origins less relevant. One reason is that the current invocations of subsidiarity intend to mirror the word's Catholic meaning.²⁸ Of course, nothing precludes today's policymakers and scholars from disconnecting subsidiarity from its traditional meaning grounded in Catholic social theory. Doing so, however, should entail, at a minimum, an explicit recognition of such a step, as well as a clear demarcation of the distinctions between the traditional and proposed meanings of the word. Given that these elements are absent from the work to date of any subsidiarity proponent, this Article assumes that current invocations of subsidiarity are at least intended to be consistent with the word's original meaning.

Second, the fact that its roots are in Catholicism does not make subsidiarity inaccessible to arguments of logic and public policy. While the relevant Church documents "make frequent references both to the natural law and to Scripture . . . increasingly the argument relies on eliciting judgments in response to narratives about social change and the broad outline of historical developments."²⁹ This grounding in non-theological sources "leaves the argument open for questions and criticisms from those who stand outside the faith community but who share the concerns of what have often been called 'social Catholics' for the common good of the entire society and the condition of the poorest."³⁰

27. William F. Buckley wrote that "[t]o call us subsidiarists anti-Catholic is about as convincing as calling the Popes anti-Catholic." PATRICK ALLITT, *CATHOLIC INTELLECTUALS AND CONSERVATIVE POLITICS IN AMERICA, 1950-1985*, at 91 (1993) (quoting William F. Buckley, Jr., *A Very Personal Answer to My Critics*, CATHOLIC WORLD, Mar. 1961, at 360, 365).

28. This intent is most apparent in compassionate conservatism's invocation of subsidiarity, see, e.g., Bennett & Weber, *supra* note 6, at A29, but also underlies—albeit more subtly—the applications of the principle in the European Union. See, e.g., M. Spieker, *The Actuality of Catholic Social Doctrine*, in *PRINCIPLES OF CATHOLIC SOCIAL TEACHING* 27 (David A. Boileau ed., 1998) (1994) [hereinafter CATHOLIC SOCIAL TEACHING] (noting that the language of European Union discussions of subsidiarity reflects the 1931 encyclical *Quadragesimo anno*).

29. John Langan, *The Catholic Vision of World Affairs*, 42 ORBIS 24, 252 (1998).

30. *Id.*; see also M.D. Litonjua, *Global Capitalism: The New Context of Christian Social Ethics*, 56 THEOLOGY TODAY 210 (1999) ("Since the Second Vatican Council, there has been a significant shift in the approach of Catholic documents and theology to social issues. This methodological shift has been away from a deductive, natural law approach in dealing with questions of social ethics to an inductive approach of social analysis and scriptural-theological reflection."); Spieker, *supra* note 28, at 27 ("One could make the objection that the demand for the subsidiarity principle is not a demand yet for Catholic social doctrine. The subsidiarity principle

Third, and most fundamentally, Catholicism provides more than an academic explanation of the word's origins; it also provides the historical and theological context that gives the word meaning. To invoke subsidiarity in public policy debates without acknowledging and exploring its Catholic roots is to cut off the principle from the particular priorities it reflects and the broader values it embodies.

Subsidiarity was created to describe a certain approach to the problems of modern society—an approach reflecting a broad understanding of human nature, government, and social structures. In his 1931 encyclical *Quadragesimo anno*, Pope Pius XI cast the principle as a fundamental tenet of Catholic social teaching in the following passage:

[I]t is a fundamental principle of social philosophy, fixed and unchangeable, that one should not withdraw from individuals and commit to the community what they can accomplish by their own enterprise and industry. So, too, it is an injustice and at the same time a grave evil and a disturbance of right order, to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies. Inasmuch as every social activity should, by its very nature, prove a help to members of the body social, it should never destroy or absorb them.³¹

While *Quadragesimo anno* made subsidiarity explicit, its underlying message was by no means new to Catholic teachings. Traditionally,

[r]ather than drawing a sharp contrast between a private sphere of atomistic individuals and a public sphere controlled by the state, Catholic social theory cast society as a complex web of family, social, religious, and governmental ties with the ultimate goal of encouraging and empowering the individual exercise of responsibility.³²

Subsidiarity perfectly embodied this notion that a society's health is a function, in great part, of the vibrancy and empowerment of individuals acting together

is, of course, not an exclusive possession of Catholic social doctrine and is definitely not a doctrinal rule. It is an organization principle that is anthropologically founded and that can be made rationally insightful. This far, it is possible to be made understandably approachable also for non-Catholics and even for non-Christians and unbelievers."'). Further, that Catholic social theory does not rely exclusively on religious doctrine in its pursuit of the common good—especially in its vision of government, as reflected in concepts such as subsidiarity—precludes potential Establishment Clause objections to legislators' reliance on subsidiarity, even where explicit. See *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it was concluded that there was no question that the statute or activity was motivated wholly by religious considerations.").

31. Pius XI, *Quadragesimo anno* (1931), reprinted in SEVEN GREAT ENCYCLICALS 147, para. 79 (1963).

32. Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616, 619 (1994).

through social groupings and associations.

By the time of *Libertatis Conscientia*—issued by the Church's Congregation for the Doctrine of Faith in 1986—subsidiarity was referred to, along with solidarity, as the fundamental principle of the Church's social doctrine. Whereas solidarity "refers to the social responsibility of humans and implies a rejection of individualism; [subsidiarity] refers to the responsibility of people and intermediary communities, and implies a rejection of collectivism."³³ Today, even where subsidiarity is not the explicit foundation, its spirit underlies much of Catholic teaching. For example, the *Guidelines of the Congregation for the Catholic Education* suggest that "the demand for social justice is met through participation. The just, fitting, and responsible participation by all parts of the society in the development of social, political, economic, and cultural life is the most certain way to come to a new society."³⁴

There is no dispute that subsidiarity has been embraced—at least conceptually—by Catholic social theorists from both sides of the political spectrum. The grounds for dispute do not concern the principle's appeal, but its real-world implementation. Compassionate conservatives have politicized subsidiarity by circumscribing the breadth of its application and elevating devolution as its sole operating guideline. Catholic teachings do not provide a detailed blueprint of subsidiarity's applicability in every circumstance of modern governance. They do, however, show that compassionate conservatives have glossed over inescapable truths about subsidiarity that detract from their political agenda. While there are certainly devolutionary aspects to an honest interpretation of the principle, subsidiarity also stands for individual empowerment, and it compels the government to play a significant role in fostering the conditions necessary for its implementation.

B. Catholic Social Theory and Limited Government

Mining Catholic teachings for political truths is a risky business. While the Catholic Church has long embraced certain fixed truths about society, its problems, and paths of progress, no political regime, movement, or party can claim to be the Church's standard bearer on matters of public governance. As Pope John Paul II articulated in his 1987 encyclical *Sollicitudo rei socialis*, "[t]he church does not propose economic and political systems or programs nor does she show preference for one or the other, provided that human dignity is properly respected and promoted, and provided she herself is allowed the room she needs to exercise her ministry in the world."³⁵ In that regard, "[w]hen articulating a vision of justice and suggesting the means to that end, the Catholic

33. J. Verstraeten, *Solidarity and Subsidiarity*, in CATHOLIC SOCIAL TEACHING, *supra* note 28, at 133.

34. E. De Jonghe, *Participation in Historical Perspective*, in CATHOLIC SOCIAL TEACHING, *supra* note 28, at 149.

35. Lucia Ann Silecchia, *On Doing Justice & Walking Humbly with God: Catholic Social Thought on Law as a Tool for Building Justice*, 46 CATH. U. L. REV. 1163, 1173-74 (1997).

vision does not link itself with any political system or regime."³⁶

Of course, that has not stopped actors from both sides of the political spectrum from clothing themselves with Catholic doctrine and papal pronouncements in hopes of lending legitimacy to their agendas. The current advocates of subsidiarity generally seek out Catholic teachings echoing their own skepticism toward government authority. Although the strand of conservatism exalting the idea of market governance with no government intervention is plainly incompatible with Catholic teaching,³⁷ there are indeed plenty of sources in the Catholic tradition that appear to favor the free market over centralized government when it comes to solving society's problems.

The Catholic Church has traditionally valued a private sphere of individual sovereignty, albeit circumscribed by some level of government authority. For example, the value placed by the Church on private property was evident as far back as the Thirteenth Century, when St. Thomas Aquinas "establishe[d] that people work more diligently and treat economic goods more carefully, when these goods, as well as the means of production, belong to themselves and are their personal property."³⁸

Subsidiarity, however, is a relatively recent creation, and thus the last century of Catholic social theory is the most relevant to our inquiry. Before judging the political tenor of subsidiarity's origins, the wider historical context of those origins must be acknowledged. In this regard, much of the skepticism toward government expressed in Twentieth Century Catholic teachings can be best understood as a reaction against Marxism more than a reaction against the modern democratic state.³⁹ According to Richard De George, the papal encyclicals *Rerum novarum*, *Quadragesimo anno*, *Mater et magistra*, *Laborem exercens*, and *Centesimus annus* should all be viewed in this light.⁴⁰

36. *Id.* at 1173.

37. Litonjua, *supra* note 30, at 214 ("The unfettered market ideology is the new fundamentalism sweeping across the one world in the making, commodifying and commercializing human life and everything it touches—without moral moorings, without human values and considerations, without humane intentions and aspirations.").

38. Rauscher, *Institutions of Social Organization: Family, Private Property, State*, in CATHOLIC SOCIAL TEACHING, *supra* note 28, at 71, 80.

39. See Richard T. De George, *Neither the Hammer and Sickle nor the Eye of the Needle: One Hundred Years of Catholic Social Thought on Economic Systems*, in CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER 127, 127-28 (Oliver F. Williams & John W. Houck eds., 1993) [hereinafter NEW WORLD ORDER].

40. *Id.* at 130. This historical context also influenced many of American Catholicism's expressions regarding capitalism. In terms more explicit than those used in the papal encyclicals, American Catholic leaders publicly defended capitalism in the wake of Marxism's rise. Whether the defenses were driven more by the market's merits or by Marxism's dangers may be a matter of dispute. In any event, the most prominent Church leaders in this country—including Cardinal Joseph Mundelein of Chicago and Cardinal Francis Spellman of New York—went on the record touting capitalism's virtues. See ALLITT, *supra* note 27, at 71. It was against this background that William F. Buckley, Jr. made capitalism a public cause of Catholic intellectuals in his 1950s books

The anti-Marxist writings of Pope John Paul II have provided by far the most fertile ground for those looking to conclude that the Church has become skeptical of centralized government. Some have gone so far as to connect his teachings with compassionate conservatism.⁴¹ John Paul II is generally viewed as espousing a more conservative social theory than that of his predecessors, especially in his encyclical *Centesimus annus*, in which he argues that

[b]y intervening directly and depriving society of its responsibility, the Social Assistance State leads to a loss of human energies and an inordinate increase of public agencies, which are dominated more by bureaucratic ways of thinking than by concern for serving their clients, and which are accompanied by an enormous increase in spending.⁴²

The significance of such statements was not lost on Vatican observers, for "although heretofore economic self-interest was equated largely with greed in church teaching, *Centesimus Annus* explicitly recognizes the virtues of a market economy in harnessing self-interest for the material betterment of society."⁴³

The conservative interpretation of John Paul II's teachings must be tempered by the significant qualifications with which he affirms the value of a market economy. In the same encyclical that serves as the linchpin of the devolutionary view of government ascribed to him, John Paul II clearly contemplates a vital and active government. In answering whether he endorses capitalism, he includes a warning:

If by "capitalism" is meant an economic system which recognizes the fundamental and positive role of business, the market, private property, and the resulting responsibility for the means of production, as well as free human creativity in the economic sector, then the answer is certainly in the affirmative, even though it would perhaps be more appropriate to speak of a "business economy," "market economy," or simply "free economy." But if by "capitalism" is meant a system in which freedom in the economic sector is not circumscribed within a strong juridical

GOD AND MAN AT YALE (1951), and UP FROM LIBERALISM (1959). See *id.* at 73. "Buckley . . . wrote in favor of the free-market economy not in the abstract but as part of a protest against the increasing reach of the state and what he perceived as the overbearing power of trade unions." *Id.*

41. See, e.g., Damon Linker, *John Paul II, Intellectual*, POL'Y REV., Oct./Nov. 2000, at 3 ("On closer inspection, then, John Paul's political proposals arguably place him closer to the 'compassionate conservatism' of Marvin Olasky than to the bureaucratic paternalism of Eurosoci-alism.").

42. John Paul II, *Centesimus annus* para. 48 (1991).

43. Oliver F. Williams, *Catholic Social Teaching: A Communitarian Democratic Capitalism for the New World Order*, in NEW WORLD ORDER, *supra* note 39, at 5, 11; see also Langan, *supra* note 29, at 250 ("[C]ontemporary Catholic social teaching, especially in the teaching of John Paul II, now offers a more vigorous and explicit endorsement of the market economy and of capitalist institutions and a greater stress on the importance of economic initiative as contrasted with wider eligibility for the provision by the government of economic benefits.").

framework which places it at the service of human freedom in its totality, and which sees it as a particular aspect of that freedom, the core of which is ethical and religious, then the reply is certainly negative.⁴⁴

In urging their own devolutionary glosses onto papal teachings, conservative critics downplay the import of passages to the extent that they stray from conservative principles. For example, Michael Novak objects to *Quadragesimo anno*'s mention of the need for a "directing principle" in economic life, based, in part, on his contention that "even [market] interventions made with the best of intentions defeat their own purposes, and there is no guarantee that actual interventions will even be well intended."⁴⁵ More confrontationally, Novak dismisses *Quadragesimo anno* because although it "speaks well of capitalism, and quite strongly of the importance of private property, it is plain that [Pope Pius XI] has not thoroughly considered the ways in which liberty, particularly in economic matters, is necessary to social justice and the best available servant of the common good."⁴⁶ Even John Paul II's recognition that government bureaucracies can have a detrimental effect on human conduct draws conservative fire. Damon Linker objects that the Pope "nonetheless hesitates to draw the right public policy implications from his insight: that the best of intentions can produce social pathologies in the poor that can only be remedied by refusing to coddle them."⁴⁷

Despite detractors' criticism, there is an unmistakable call for government intervention throughout Catholic social theory. While the Church's teachings admittedly place limits on such intervention, those limits in no way eviscerate the core government functions contemplated. To focus exclusively on the Church's pro-market statements tells only half of the story and precludes a full and accurate debate on the public policy implications of many Catholic social teachings, including subsidiarity.

C. Catholic Social Theory and Active Government

The role of government is so strong in traditional Catholic teachings that, in some circles, even a straightforward endorsement of capitalism is not without controversy.⁴⁸ This may be explained, at least in part, by the fact that Catholic social theory developed its theses in response to the liberalism of John Locke, by which "society is understood as a collection of individuals who have come

44. John Paul II, *supra* note 42, para. 42.

45. Michael Novak, *Liberty and Social Justice: Rescuing a Virtue*, in *NEW WORLD ORDER*, *supra* note 39, at 269, 276.

46. *Id.* at 273-74.

47. Linker, *supra* note 41, at 3.

48. Paul E. Sigmund, *Catholicism and Liberal Democracy*, in *NEW WORLD ORDER*, *supra* note 39, at 51, 69 ("Michael Novak and others have tried to make a stronger religious argument for the virtues of capitalism, but there remains in the Catholic tradition a belief that capitalism is based on greed and exploitation, and suspect from a moral point of view so that it requires state action to limit its excesses.").

together to promote and protect their private rights and interests."⁴⁹ Catholic social theory, by contrast, emphasizes the good of the community, not just the rights of individuals. For example, Catholicism has

always insisted that private property has a social dimension which requires that owners consider the common good in the use of property. This vision of society assumes that some persons will have more material goods than others but that the affluent will provide for the less fortunate, either through the channels of public policy or other appropriate groups of society.⁵⁰

Given the nature of the common good espoused by the Church, some type of government role in pursuit of that good is inevitable. According to the 1992 *Catechism of the Catholic Church*, the common good has three essential elements: 1) "respect for the person"; 2) "the social well-being and the development of the group itself"; and 3) "peace[—]the security and permanence of a just order."⁵¹ Pursuant to the second element, "[t]he authoritative bodies must make it possible that everyone gets access to everything that they need to lead a humane existence: food, clothes, health, work, education and culture, sufficient information, the right and the possibility to start a family, etc."⁵²

An emphasis on the common good underlies all modern papal teachings, and government is at the front and center of the Church's real-world strategies for realizing the common good. Pope Leo XIII's 1891 *Rerum novarum*—the first modern papal pronouncement of Catholic social theory—taught "that the government of a political community had both the authority and the responsibility to promote the common good, the good of the community."⁵³ This "meant that the government had the right and the duty to intervene in the economic sphere in order to foster justice between capital and labor."⁵⁴ The government role contemplated in many of the teachings went far beyond anything reflected in the political reality of the time. Leo XIII gave "speeches about just wages, property, the freedom of unionization among workers, the role of the state, and the necessary simultaneity of changes in structure and mentality."⁵⁵ These speeches "were in part revolutionary and have not amounted to anything of actuality in many regions of the world."⁵⁶

Even the primary sources of today's "conservative" Catholic social theory are far from dismissive of a government role when it comes to securing the common good. As noted above, John Paul II, in *Centesimus annus*, called "for

49. Williams, *supra* note 43, at 5-6.

50. *Id.* at 11 (endnote omitted).

51. See De Jonghe, *supra* note 34, at 126-27 (emphasis omitted).

52. *Id.* at 126.

53. Fred Crosson, *Catholic Social Teaching and American Society*, in CATHOLIC SOCIAL TEACHING, *supra* note 28, at 165, 169.

54. *Id.*

55. Spieker, *supra* note 28, at 29.

56. *Id.*

a market economy protected by the state and flanked by a system of social obligations.”⁵⁷ In light of his teachings, “[i]t is clear . . . that John Paul II would not contemplate with approval any massive dismantling of the guarantees of the welfare state in Europe or elsewhere.”⁵⁸ And Novak acknowledges that the market is a “limited instrument,” that those who cannot fend for themselves need special care, and that other “social purposes [are] better met by other social mechanisms than the free market.”⁵⁹ He goes so far as to recognize that “[s]ome version of the welfare state (no doubt much reformed) is necessary for the stability and legitimacy of the free society, but also for its moral self-respect.”⁶⁰

Catholic social theory cannot reasonably be read to suggest that the common good can be furthered only through government action, or even that government action has a direct correlation with the common good. Catholic social theory—at least in its more responsible forms—reflects a clear preference for capitalism over its primary Twentieth Century competitor, Communism. However, the public policy lessons to be drawn for established capitalist systems lie not so much in this general preference, but in the qualifications accompanying it. The key insight of modern Catholic social theory “is that capitalism without a context in a humane community seems inevitably to shape people into greedy and insensitive human beings.”⁶¹ As a consequence, “the church teaching accepts the market economy but with a key qualification, that the state intervene where essential to promote and protect the human dignity.”⁶² The crux of the debate is not determining whether state intervention is ever permissible, but determining when it is necessary. While reasonable minds differ as to the precise contours of the line between government and market-based solutions to social problems, any resolution based on Catholic social theory will necessarily be informed by the subsidiarity principle.

57. *Id.* at 34. Some observers have noted the seemingly conflicting strands in *Centesimus annus*, as John Paul II expresses skepticism toward centralized government while embracing it as a check on the market. See, e.g., Williams, *supra* note 43, at 7 (“In one sense, *Centesimus Annus* wants to have it both ways: economic efficiency with all the advances it enables in the moral, social and political worlds, as well as a humane community insulated by government and private-sector intervention from the suffering entailed with a free economy’s creative destruction.”); *id.* at 15 (contending that in reading *Centesimus annus* both Democrats and Republicans “can find statements that seem to support their ideology”). In the end, however, “[t]he pope’s use of antithetical affirmations may be defensible,” as “[u]ltimately it may be better for the leader of a global church to highlight general themes, instead of prematurely closing debate or employing a cultural framework that is too narrow.” Daniel R. Finn, *John Paul II and the Moral Ecology of Markets*, 59 THEOLOGICAL STUD. 662, 664 (1998).

58. Langan, *supra* note 29, at 251.

59. Novak, *supra* note 45, at 279-80.

60. *Id.* at 282.

61. Williams, *supra* note 43, at 18.

62. *Id.*

D. Subsidiarity and Mediating Structures

Subsidiarity is not a knee-jerk shunning of government authority and embrace of any non-government entity, nor does it stand for the blanket devolution of government functions from the federal to the state level. Rather, subsidiarity is a principled tendency toward solving problems at the local level and empowering individuals, families and voluntary associations to act more efficaciously in their own lives. In this regard, the focus is on fostering the vitality of mediating structures in society.

Richard John Neuhaus and Peter Berger, who coined the term in the 1970s, define mediating structures as "*those institutions standing between the individual in his private life and the large institutions of public life.*"⁶³ The large institutions, or "megastructures," include the state, as well as "the large economic conglomerates of capitalist enterprise, big labor, and the growing bureaucracies that administer wide sectors of the society, such as in education and the organized professions."⁶⁴ What Neuhaus and Berger refer to as "private life" is the "curious kind of preserve left over by the large institutions and in which individuals carry on a bewildering variety of activities with only fragile institutional support."⁶⁵

The dilemma of modern life stems from the interplay between the public sphere—in which megastructures hold sway—and the private sphere—in which individuals conduct themselves freely. The dichotomy between the two spheres is stark, as "megastructures are typically alienating, that is, they are not helpful in providing meaning and identity for individual existence," while "[m]eaning, fulfillment, and personal identity are to be realized in the private sphere."⁶⁶ According to Neuhaus and Berger, this private/public split

poses a double crisis. It is a crisis for the individual who must carry on a balancing act between the demands of the two spheres. It is a political crisis because the megastructures (notably the state) come to be devoid of personal meaning and are therefore viewed as unreal or even malignant. Not everyone experiences crisis in the same way. Many who handle it more successfully than most have access to institutions that *mediate* between the two spheres. Such institutions have a private face, giving private life a measure of stability, and they have a public face, transferring meaning and value to the megastructures. Thus, mediating structures alleviate each facet of the double crisis of modern society.

63. Richard John Neuhaus & Peter Berger, from *To Empower People: The Role of Mediating Structures in Public Policy* [hereinafter Neuhaus & Berger, *Mediating Structures*], in THE ESSENTIAL NEOCONSERVATIVE READER 213, 214 (Mark Gerson ed., 1996); see also Peter L. Berger & Richard John Neuhaus, *Peter Berger and Richard John Neuhaus Respond* [hereinafter Berger & Neuhaus, *Respond*], in TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY 145, 148-49 (Michael Novak ed., 2d. ed., 1996) [hereinafter TO EMPOWER PEOPLE].

64. Neuhaus & Berger, *Mediating Structures*, *supra* note 63, at 214.

65. *Id.*

66. *Id.* at 214-15.

Their strategic position derives from their reducing both the anomic precariousness of individual existence in isolation from society and the threat of alienation to the public order.⁶⁷

The mediating status of a group or institution stems not from any particular organizational identity, but from their tendency to facilitate self-empowerment and foster a sense of belonging and civic purpose. Neuhaus and Berger's call for mediating structures—a call that has since been echoed by many scholars⁶⁸—focused on neighborhoods, families, churches, and voluntary associations.⁶⁹ When properly functioning, these institutions connect individuals to the wider society in ways that heighten their social awareness and maximize the impact of their actions, yet preserve their own unique sphere of operation and identity. From a subsidiarity perspective, these attributes are invaluable because they instill a sense of responsibility for one's self and one's surroundings, along with the tools needed to act in betterment of both.

Underlying the current portrayal of subsidiarity in public policy debates is a fundamental misunderstanding of the nature of mediating structures. Neuhaus and Berger acknowledged as much in reflecting on the widespread use of the term years after they originated it:

On the Left, the concept was understood in terms of grass-roots mobilization and, more recently, in communitarian terms. To be sure, some grass-roots organizations and local communities might indeed be mediating structures. But they might not be, either being invasions of people's life worlds by agents from the outside, in which case they are simply branches of mega-institutions, or being enclaves of private meanings and lifestyles with no relation to the larger society. On the Right, the concept was understood as including all institutions outside government, which, of course, stretches the concept beyond any usefulness. Neither General Motors nor the United Methodist Church is a mediating structure, though a workshop within a GM plant might be, as might a local Methodist congregation. As a matter of fact, even a local government agency might have a meaningful relationship with the values of the people it serves. Not every nongovernmental organization is a mediating structure.⁷⁰

67. *Id.* at 215.

68. See, e.g., Timothy L. Fort, *The First Man and the Company Man: The Common Good, Transcendence, and Mediating Institutions*, 36 AM. BUS. L.J. 391, 395 (1999) (contending that mediating institutions "teach moral norms because they socialize individuals to see that their self-interest is connected with the welfare of others"); W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimensions of Religious Institutions*, 1993 BYU L. REV. 421, 463 (calling for society to "grant space and relevance to religious mediating structures" in order to facilitate citizens moving between highly secular and highly religious environments).

69. See Neuhaus & Berger, *Mediating Structures*, *supra* note 63, at 215.

70. Berger & Neuhaus, *Respond*, *supra* note 63, at 149.

To qualify as a true mediating structure, an entity needs more than the absence of government influence. While mediating structures do function as bulwarks against government encroachment, they are also facilitators of individual empowerment and efficacy. The latter aspect stems from the frequently overlooked second half of subsidiarity's meaning. The principle first "refers, in a negative sense, to the restriction of intervention by the state."⁷¹ As such, it expresses "a principle of non-interference of the state in the rights of the individual or of the higher or more encompassing communities in the activities in the smaller communities, namely where the individual or the small community is capable to fulfill its tasks itself."⁷² The second component of subsidiarity refers "to the help which the individual of the small community may expect from the larger community, but only when it is no longer capable of fulfilling its tasks itself."⁷³ Under a slightly different reading, this positive aspect of subsidiarity expresses "a duty of the community to be helpful to its members in the fullest sense of the word, namely to give them the possibility to develop themselves to the fullest as people."⁷⁴

This dual negative/positive meaning—imposing both limitations and affirmative duties on the government—is apparent in the Church's teachings on subsidiarity. Although *Quadragesimo anno* emphasizes subsidiarity's negative aspect, its portrayal shows that "[t]he narrow interweaving of the subsidiarity principle with justice must give free room for the state to act, as well as for smaller social units to actualize justice."⁷⁵ Pope John XXIII emphasizes the positive aspect in *Mater et magistra* as "[h]e pleads for a state intervention in different concrete areas," including "the obtaining of state property, the receiving of taxes, the granting of credit facilities, the supporting of social security, [and] price regulation."⁷⁶ Pope John Paul II returns to the negative aspect in *Sollicitudo rei socialis* and *Centesimus annus*, as his own encounters with socialism underscored the danger of "a slavish dependence of the (state) bureaucracy that is as faulty as the traditional dependence of the workers-proletarians on the nineteenth-century capitalism."⁷⁷ A more integrative tact was taken by United States bishops in their 1986 pastoral letter, *Economic Justice For All*, which is referred to by Dennis McCann as "[t]he most illuminating commentary on the operative meaning of the principle of subsidiarity."⁷⁸ In discussing the principle, the bishops' focus "shifts from limiting government intervention to identifying

71. Verstraeten, *supra* note 33, at 135.

72. *Id.*

73. *Id.*

74. *Id.*

75. B. Kettern, *Social Justice: The Development of the Concept "iustitia" from St. Thomas Aquinas through the Social Encyclicals*, in CATHOLIC SOCIAL TEACHING, *supra* note 28, at 85, 93.

76. Verstraeten, *supra* note 33, at 136.

77. *Id.* at 145.

78. Dennis P. McCann, *Toward a Theology of the Corporation*, in NEW WORLD ORDER, *supra* note 39, at 329, 343.

and nurturing the range of private, professional, and quasi-governmental associations capable of entering into non-adversarial patterns of collaboration with government."⁷⁹

Under the positive aspect of subsidiarity, the government has an obligation to ensure the efficacy of mediating structures and the ability of individuals to take responsibility for themselves and their surroundings. It is this aspect that needs to be rejuvenated in today's public policy debates. Subsidiarity not only calls for social institutions to act as bulwarks against government erosion of the private sphere, but also for the government itself to guard against the free market's own tendency to erode those social institutions,⁸⁰ as well as to empower individuals and groups that have been marginalized by the market's operation.⁸¹ Fred Crosson's formulation of subsidiarity reflects a balanced view of its dual aspects; it places proper emphasis on the need for government intervention without eviscerating the real limitations on such intervention:

The principle underlying subsidiarity thus stated is that a society is more just and more functional if the work that *can* be done by the parts is done by the parts, rather than being taken over by the whole. The responsibility of the state in this sphere is to assist the subsidiary groups in achieving their proper ends, and to implement those ends itself only temporarily in circumstances where the subsidiary group is, perhaps because of particular socio-economic conditions, incapable of functioning normally. This second aspect of subsidiarity involves the state intervening—but temporarily and in limited fashion—to secure the goods of the partial community, but only so long as the partial community is incapable of achieving its ends. Hence the state's intervention should aim at helping the subsidiary group regain the capacity to function for itself.⁸²

Given the central role of mediating structures under Crosson's interpretation of subsidiarity, determining whether a particular policy will further subsidiarity's objectives must include a recognition of the policy's impact on those structures. Devolution for the sake of devolution cannot be justified as furthering subsidiarity. For example, while the devolution of federal welfare

79. *Id.*

80. See Williams, *supra* note 43, at 19-20 ("Institutions such as the family, the church, the neighborhood and school are eroded when the market dominates life in society."); cf. McCann, *supra* note 78, at 340 ("[L]eft to their own devices, markets generate as much economic chaos as order. One might as well rely on a tornado to usher in the warm, gentle breezes of springtime as trust markets of themselves to create a tolerably just distribution of the economic resources they help generate.").

81. See Silecchia, *supra* note 35, at 1183 (noting that subsidiarity "is a view that lesser communities are often the ones best able to fill the needs of justice—and fill them quickly," but "[n]aturally, if these small communities are themselves unjust or in need, then more extensive legal intervention may be needed").

82. Crosson, *supra* note 53, at 170-71.

responsibilities to state governments may be advantageous for a variety of other reasons, there is no indication that it expands or enhances the role of mediating structures in the provision of welfare:

Some have argued, in the context of welfare reform, that the deficiencies associated with government support can be dealt with by devolving government decisions to the states, through block grants. The idea is to move decision making to levels of government that are closer to the people. But while there are many good reasons to move social programs to the states, it is by no means clear that this reform alone would foster the growth of mediating structures—it may even impede it. States, in fact, are just as subject as the federal government to pressure from special interests who feel threatened by mediating structures—and more so in some places. This susceptibility to pressure at the state level is why so many of the regulations and legal barriers frustrating mediating structures emanate from state governments. State welfare bureaucracies also tend to be even more hostile to innovative community-based institutions than federal officials.⁸³

Notwithstanding a particular policy's impact on mediating structures, it must be remembered that subsidiarity is not simply an abstract principle of governance, but rather a practical framework for solving real problems. While government action should be undertaken with a view toward fostering the efficacy of mediating structures, the absence of such structures does not preclude attempts to solve pressing problems. And where localized problem-solving is not feasible or effective, subsidiarity contemplates direct intervention by the federal government.⁸⁴ Once it is understood that federal government intervention is possible under subsidiarity, the prudence of a proposed intervention remains to be determined. As modern governments' real-world reliance on subsidiarity

83. Stuart M. Butler, *Practical Principles*, in TO EMPOWER PEOPLE, *supra* note 63, at 116, 117-18.

84. See Langan, *supra* note 29, at 251 (arguing that subsidiarity's "preference for local and regional solutions over national ones, for national approaches over international, for private rather than public sources of action for the common good . . . can always be overturned in light of experience, and the operation of the principle presupposes the coordinating and rectifying functions of the state"); McGovern, *supra* note 18, at 450 ("Subsidiarity thus means seeking first and wherever possible to address social problems at more local levels, but it suggests that government action may be necessary when, because of the magnitude of the social needs (or failures to address them), the problems and needs are not being dealt with effectively."); cf. J. Bryan Hehir, *The Social Role of the Church: Leo XIII, Vatican II and John Paul II*, in NEW WORLD ORDER, *supra* note 39, at 29, 32 (acknowledging that while "subsidiarity seeks to preserve a sphere of freedom and initiative in society," it "is balanced by the demands of socialization which require a positive conception of the state's socioeconomic responsibilities toward the poor"); Hehir, *supra* note 1 ("It is a manifestation of an ignorance of the [Catholic social] tradition for one to take this [subsidiarity] principle and argue that the state and other public institutions do not have responsibilities to the poor.").

shows, the answer is far from obvious.

III. SUBSIDIARITY AS A MODEL OF GOVERNANCE

A. *Subsidiarity and the European Union*

Subsidiarity's European roots run deep. The word itself comes from the German translation of *Quadragesimo anno*, an encyclical "heavily influenced by the German church."⁸⁵ Germany also was where "[s]ubsidiarity made the transition from a principle of social organization to an explicitly political rule of institutional design."⁸⁶ It was central to Germany's reconstruction after World War II "and was a natural antithesis to the extreme centralizing tendencies of the Nazi regime."⁸⁷

The European Union (EU) looked to subsidiarity as an organizing principle early on, as the term "appears in debates on EC reform as early as 1975."⁸⁸ This culminated with the 1992 Treaty of Maastricht, in which "the subsidiarity principle was proclaimed a guideline for further European integration."⁸⁹ The Maastricht Treaty expresses the principle as follows:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member-States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.⁹⁰

The EU's reliance on subsidiarity is certainly not without criticism. Paul Marquardt argues that the use of subsidiarity to solve "the tension between the EU and the survival of national polities and societies" is animated by the "spirit of the institutional quick fix."⁹¹ While recognizing other commentators' assertions that subsidiarity is "weak, subjective, and open-ended," Marquardt contends that

even if subsidiarity works exactly as intended, its principles are fundamentally corrosive to rather than supportive of the sovereignty of the nation-state [because] the underlying logic of subsidiarity reduces the claim of rightful governance to a technocratic question of functional efficiency that will eventually undercut the nation-state's claims to

85. Marquardt, *supra* note 32, at 619.

86. *Id.*

87. *Id.* at 620.

88. *Id.*

89. Spieker, *supra* note 28, at 26.

90. Treaty Establishing the European Community, Feb. 7, 1992, art. 3b, 63 COMMON MARKET L. REP. 573, 590 (1992).

91. Marquardt, *supra* note 32, at 617.

loyalty.⁹²

Marquardt's fear that subsidiarity may ultimately undermine member states' sovereignty is less of a concern in the United States, where expansion of federal power is limited by constitutional constraints, not just functional considerations.

Other criticisms of subsidiarity in the EU context, however, are more broadly applicable. As Paul Marquardt explained, conducting a subsidiarity analysis of a proposed EU action is easier said than done:

Subsidiarity requires an analysis of the comparative utility of EU action, Member State action, and no action at all. Predicting the outcome of a known policy is difficult enough, but trying to predict what action the Member States or the market would take in the absence of EU action adds a virtually insurmountable layer of difficulty to the task.⁹³

This contributes to the related problem of non-justiciability, as

[t]he imprecision of [subsidiarity's] meaning, together with the difficulty of producing a definitive objective analysis of such a complex policy question as the "best" level of national action, means that it is highly unlikely the principle can be meaningfully applied to stop expansionist exercises of power. The judgments involved are inherently political and uncertain, and the European Court of Justice is ill-equipped to second-guess the policy analyses of the other Community organs.⁹⁴

Subsidiarity's multiple meanings, "its incomplete application to EU institutions," the difficulty of analyzing the proposed action in light of subsidiarity's objectives, and the lack of an effective mechanism by which it can be enforced have created formidable obstacles to its effective implementation in the EU.⁹⁵ At least in part because of these shortcomings, subsidiarity is an ideal "often extolled but seldom adhered to by the rapidly centralizing European Union."⁹⁶ The criticisms are given a new slant in the American context, in which subsidiarity provides an unstated but very real framework for government action.⁹⁷

B. Subsidiarity and American Federalism

Although subsidiarity has until recently remained largely anonymous among the American public, its impact in the United States is readily discernible. The

92. *Id.* at 618 (footnote omitted).

93. *Id.* at 630.

94. *Id.*

95. *Id.* at 628.

96. James L. Huffman, *The Impact of Regulation on Small and Emerging Businesses*, 4 J. SMALL & EMERGING BUS. L. 307, 316 (2000).

97. Currie, *supra* note 16, at 363-64 ("In Germany the subsidiarity principle is stated expressly in the constitution, and it has been roundly ignored. In the United States the Constitution says nothing about subsidiarity, but it is widely followed in practice." (footnote omitted)).

principle is not formally enshrined as a constitutional check on federal power, but there is little dispute that subsidiarity plays a significant role in American governance. From executive orders requiring that a proposed federal action be weighed against the efficacy of state action,⁹⁸ to congressional restraint in areas of state regulatory competence, to judicial enforcement of state-federal boundaries, much of this country's political and legal landscape comports fully with subsidiarity's ideal. Lawmakers and judges do not necessarily subscribe to subsidiarity as a freestanding doctrine, but as "the guiding principle of federalism in the United States."⁹⁹ In that regard, subsidiarity represents "an aspect of the original theory of American federalism which held that state governments will be more responsive than the national government to the public will [and] better informed about local circumstances."¹⁰⁰

Subsidiarity acts as a check on congressional action not in any formal sense, but as a largely unspoken, self-imposed restraint. David Currie observes that "[h]owever broad its authority, Congress is ordinarily reluctant to supplant state action so long as the states are up to the task."¹⁰¹ It is this sense of restraint that underlies many instances of congressional inaction, as well as statutes that give states flexibility in meeting certain baseline federal standards.¹⁰² For some federal legislators, subsidiarity is more than an unspoken guideline. Judge James Buckley of the D.C. Circuit, for example, recalls that when he was a Senator, he "would consciously apply the rule of subsidiarity, which predates the Constitution, in deciding whether a particular responsibility was appropriate for the federal government."¹⁰³

George Bermann points out that congressional reliance on subsidiarity is difficult, if not impossible, to trace because

Congress' criteria for assessing the necessity for federal intervention do not in fact seem to be especially well-defined, and it is certainly far from clear that these criteria entail a prior assessment of the states' own ability, acting alone or in concert, to achieve the objectives that Congress has.¹⁰⁴

Further, given the dispersal of legislative power among committees and

98. Such executive orders have not been limited to Republican administrations, as they continued uninterrupted through the Clinton presidency. See Bermann, *supra* note 14, at 436-47.

99. Currie, *supra* note 16, at 359.

100. Huffman, *supra* note 96, at 316. But see Bermann, *supra* note 14, at 404 ("[A]lthough federalism conveys a general sense of a vertical distribution, or balance, of power, it is not generally understood as expressing a preference for any particular distribution of that power, much less dictating any particular inquiry into the implications of specific governmental action for that distribution. In this respect, federalism and subsidiarity, though of course closely related, are quite different.").

101. Currie, *supra* note 16, at 363.

102. See *supra* note 14 and accompanying text.

103. James L. Buckley, *Reflections on Law & Public Life*, 1 GREEN BAG 2D 391, 396 (1998).

104. Bermann, *supra* note 14, at 409.

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subcommittees, "an attachment to subsidiarity on the part of Congress . . . would be difficult to document even if it existed."¹⁰⁵ But even Bermann acknowledges that formally enshrining subsidiarity in the legislative process would be relatively simple, as Congress could require, through the House or Senate Rules, that "the committee report on a bill . . . assess the states' capacity to deal with the problem and . . . demonstrate the need for federal intervention."¹⁰⁶ Alternatively, a standing body within Congress could review bills from a subsidiarity perspective before a final vote.¹⁰⁷ In any event, formalizing subsidiarity's role is, to a great extent, beside the point. Whatever justification is offered by individual legislators or Congress collectively for their decisions—be it subsidiarity, federalism, efficiency, or general prudence—the bottom line is that those decisions frequently fall within subsidiarity's substantive mandate.

Subsidiarity is even less likely to be expressly referenced as the basis of decisions by American judges. Although it has been suggested by scholars, as noted above, that the subsidiarity principle is found within the Tenth Amendment¹⁰⁸ and the Necessary and Proper Clause,¹⁰⁹ at this time such views have not been expressly embraced by members of the federal judiciary. And though the common ground between subsidiarity and federalism has been noted by one member of the Supreme Court,¹¹⁰ the principle rarely surfaces in case law.

That is not to say, however, that subsidiarity does not influence the way judges approach the controversies before them. At one level, judges implicitly enforce subsidiarity to the extent it mirrors their views on the Tenth Amendment. More fundamentally, subsidiarity's elevation of function over doctrine is discernible in many court decisions bearing on federalism concerns. David Currie argues that subsidiarity's influence can be seen in the New Deal Supreme Court bowing under "the pressure of perceived necessity" in order "to find room in the miserly enumeration for pervasive regulation of the entire national economy and for federal subsidies to whatever was good for the country."¹¹¹ As a more recent example, Currie points to *United States v. Lopez*,¹¹² in which

105. *Id.* at 410.

106. *Id.*

107. *Id.* at 410-11.

108. See Kmiec, *supra* note 20, at 215 ("The principle of subsidiarity is an important, if judicially disregarded, portion of the American Constitution's Tenth Amendment that reserves to the state, or to the people, 'powers not delegated to the United States by the Constitution.'" (footnote omitted)).

109. See Gardbaum, *supra* note 21, at 836 ("[T]here is a more plausible constitutional basis in the American context than either the Commerce Clause or the Tenth Amendment for the type of consideration that subsidiarity might be held to require the constituent political entities to be given: the Necessary and Proper Clause." (footnote omitted)).

110. See *United States v. Morrison*, 529 U.S. 598, 663 (2000) (Breyer, J., dissenting) (citing law review articles linking subsidiarity and federalism).

111. Currie, *supra* note 16, at 363.

112. 514 U.S. 549 (1995).

Congress struck down the federal gun-free school law and suggested that "[t]he Court is less likely to strain to find congressional power in areas where there is no need for federal action. The true reason for the *Lopez* decision may be that the states were as capable as the federal government of punishing children who carried guns to school."¹¹³ As with the legislative branch, the judiciary's adherence to the subsidiarity principle is reflected not in their choice of words, but in the substance of their decisions.

Evidence of subsidiarity's influence in the United States traces back to the nation's origins. Alexis de Tocqueville observed that "at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association."¹¹⁴ Tocqueville applauded this uniquely American trait and he echoed subsidiarity's mandate as he warned of the "vicious circle of cause and effect" arising from the fact that "[t]he more government takes the place of associations, the more will individuals lose the idea of forming associations and need the government to come to their help."¹¹⁵ Michael Novak notes that Abraham Lincoln formulated his own vision of subsidiarity in pronouncing that

[t]he legitimate object of government is to do for a community of people whatever they need to have done but cannot do at all, or cannot so well do for themselves in their separate and individual capacities. In all that people can individually do as well for themselves, government ought not to interfere.¹¹⁶

Given the expansion of federal power in the last century, it can hardly be disputed that American lawmakers have often deviated from subsidiarity as their guiding principle. Nevertheless, the degree and permanence of the concern raised by such expansion is itself evidence that subsidiarity has maintained more than a foothold on the national psyche.¹¹⁷ Examples abound of Americans' belief that societal functions should be performed by local entities or individuals to the extent that they can perform them effectively.¹¹⁸ Even apart from political or sociological considerations, some commentators see greater potential for subsidiarity's application in the future because of increased technological

113. Currie, *supra* note 16, at 363.

114. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 513 (George Lawrence trans., J.P. Mayer ed., 1988).

115. *Id.* at 515.

116. Michael Novak, *Seven Tangled Questions*, in *TO EMPOWER PEOPLE*, *supra* note 63, at 132, 140. Interestingly, the papal encyclopedia *Sacramentum mundi* lists this statement of Lincoln's as the earliest formulation of the subsidiarity principle. *Id.* at 139-40.

117. See Crosson, *supra* note 53, at 171 ("Over the years, the extent of powers implicit in those explicitly delegated to the national government has grown, but no one familiar with our continuing political discourse can be ignorant of the fact that there is a constant concern about the expansion of federal jurisdiction.").

118. See *id.* at 171-72 (giving example of states exercising authority over education and allowing schools to be established by private groups and individuals as long as they meet certain minimal standards).

capabilities.¹¹⁹ Coupled with compassionate conservatism's incorporation of the principle, subsidiarity's influence on the shape of American government is likely to be even more pronounced in the coming century.

Subsidiarity's persistent visibility in the fabric of American governance calls into question the power and relevance of the criticisms leveled against it in the European context. Even though the grounds for applying subsidiarity in the United States are largely unstated and a mechanism for enforcing compliance is nonexistent,¹²⁰ the principle is deeply ingrained in the structure of our federal system. Indeed, "[i]t would be hard to think of a more American principle of social structure than subsidiarity."¹²¹ The lack of a viable means of enforcement and widespread unfamiliarity with its substance preclude full realization of subsidiarity's objectives in this country. The fact remains, however, that much of today's legislative and judicial decision-making reflects a pursuit of subsidiarity's objectives, whether explicitly acknowledged or not. Where the hodgepodge of judicial philosophies, canons of statutory interpretation, and legislative priorities preclude any comprehensive theory of government action, subsidiarity's basic framework comes surprisingly close to capturing the prevailing mindset.

Given subsidiarity's impact in the United States, debating its enforceability or level of institutional recognition seems a largely academic exercise. The more pressing problem is posed by subsidiarity's apparently elusive meaning. In both the United States and Europe, the principle is prone to manipulation by whoever enlists it in service of a particular political agenda. In one sense, that may be unavoidable, for if a societal function is to be performed by the lowest-level actor capable of performing it effectively, the judgment as to what constitutes effective performance may elicit an equally broad spectrum of opinions as if the decision were debated outside of subsidiarity's framework. Compassionate conservatism's reliance on subsidiarity tends toward the opposite extreme, as the effectiveness analysis is often subsumed by the tendency toward devolution. Under either extreme, subsidiarity appears to be little more than window dressing for preconceived political outcomes. Unless broader principles can be formulated to govern subsidiarity's real-world applications, it is of little value in public policy debates, and its current one-sided portrayal is of no practical import.

119. See, e.g., Breger, *supra* note 17, at 424 (arguing that "advances in computer and media technology increase the potential of government accountability and . . . increase implementation of the principle of subsidiarity, or, in the American context, devolution of political power to state and local governments").

120. "[T]he U.S. system offers few political or legal guarantees that the federal government will act only when persuaded that the states cannot or will not do so on their own." Bermann, *supra* note 14, at 403.

121. Crosson, *supra* note 53, at 171.

IV. SUBSIDIARITY AND GOVERNMENT ACTION: OPERATIVE PRINCIPLES

As subsidiarity emerges from anonymity and into President Bush's theory of governance, public perceptions of its meaning will be determined largely by the particular legislative proposals that it is invoked to support. Those who find value in subsidiarity but object to Bush's politics will be tempted to utilize the principle as a basis for objecting to his proposals on a case-by-case basis. Such a short-sighted approach, while perhaps politically expedient, would forego a valuable opportunity to make subsidiarity a meaningful component of public policy debates in this country. To remain faithful to the principle's origins, certain guidelines for its application must be extracted from Catholic social theory. Moreover, to avoid relegating subsidiarity to the status of partisan rhetoric, it must be given substance that does not rise or fall with the success of a particular legislative proposal or simply track a party's platform. At the same time, however, its substance cannot be elevated to mere abstraction; it must be applicable to real-world policymaking.

Despite the sense of certainty underlying the recent political invocations of subsidiarity, it must be readily acknowledged that "[s]ubsidiarity means different things to different people," with one commentator going "so far as to call it 'an empty shell devoid of concrete substance . . . a golden rule, a fashionable term, a concept with which anyone might agree in principle, because all can define for themselves what it means in any specific case.'"¹²² In one sense, subsidiarity's lack of substantive content renders it vulnerable to being captured by those with a preexisting agenda. By emphasizing aspects of subsidiarity's procedural framework that support devolution and disregarding those that do not, today's champions of subsidiarity have filled its "empty shell" with decidedly partisan substance. In another sense, however, the lack of substantive content seems to suggest that politically motivated interpretations of subsidiarity may not be so misguided after all. If the principle simply represents an ever-malleable procedural form, is there any use in attempting to show that certain substantive laws and priorities are more consistent with its objectives than others? Once the partisan substance is removed, is there anything left to subsidiarity?

While policy analyses conducted pursuant to subsidiarity may not always lead to obvious answers and may themselves be influenced by political considerations, broader conclusions may still be drawn when proposed government actions are weighed against subsidiarity's objectives. That there will be political aspects to subsidiarity's day-to-day application is inescapable given the nature of democratic lawmaking. Political actors will often disagree on the most effective level of action, with empirical and anecdotal evidence supporting

122. Marquardt, *supra* note 32, at 628 (quoting Guenther F. Shaefer, *Institutional Choices: The Rise and Fall of Subsidiarity*, 23 FUTURES 681, 688 (1991) (omission by Marquardt)); see also Schere, *supra* note 18, at 178 ("It is evident that the economic and organization sciences, in spite of their important contribution to the definition or understanding of the subsidiarity phenomenon, cannot define in a definitive manner what subsidiarity is since the meaning of that term is contingent upon a given situation." (footnote omitted)).

both sides.¹²³ Subsidiarity's value derives not from its ability to foster apolitical resolutions to debates over effectiveness, but from the framework it provides for those debates.¹²⁴ Contrary to the tone of current public policy arguments invoking subsidiarity, devolution is not the sole component of that framework. Other implementing guidelines are readily apparent from subsidiarity itself and the Catholic social theory from which it arises. Applying those guidelines to real-world issues reveals that, in many areas, the priorities reflected in compassionate conservatism are not consistent with those underlying subsidiarity. When conscientiously applied, subsidiarity will not always lead to the devolution of functions from the federal government to lower bodies.

Several basic principles emerge from even a cursory reading of subsidiarity and its Catholic social theory roots. First, a meaningful distinction must be drawn between mediating structures and megastructures under any policy that purports to apply subsidiarity. Second, subsidiarity does not call simply for the recognition of mediating structures, but for their empowerment. Third, the localization of societal problem-solving, mandated by subsidiarity, carries with it an obligation to ensure that individuals are equipped to participate fully in collective decision-making regarding issues that affect them and their communities. By applying these principles to particular areas of law, it becomes clear that although certain aspects of compassionate conservatism's decentralizing agenda are consistent with subsidiarity, that agenda falls short of subsidiarity's ideal to the extent that it omits the limited but active federal role that is essential to realizing subsidiarity's ultimate objectives.

A. Subsidiarity Values Mediating Structures over Megastructures

One attribute of the devolutionary invocation of subsidiarity is the tendency to focus on mediating structures exclusively as bulwarks against government authority, which tends to portray all nongovernment entities as equally laudable protectors of the civic interest. While subsidiarity does place limits on state

123. See Marquardt, *supra* note 32, at 628-29 ("[T]he analysis of the level at which a policy may best be implemented is bound to be highly subjective and can cut in favor of centralization as well as against it.").

124. See Bermann, *supra* note 14, at 386 ("The fact that subsidiarity calls for judgments that are invariably political and often immensely speculative is not, however, an argument against requiring the institutions to observe it. Neither is the fact that the analysis may rarely yield obvious results."); Francis Canavan, *The Popes and the Economy*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 429, 437 (1997) (contending that while subsidiarity "is a purely formal principle that does not answer substantive questions," it "is neither meaningless nor useless, because it inculcates a steady bias toward decentralization, freedom, and initiative"); McGovern, *supra* note 18, at 460 (arguing that subsidiarity serves "only as a guiding principle, a principle with two parts: problems are better solved at lower levels by smaller groups, but some require measures at a higher level by larger institutions. The principle itself does not tell us which legitimate social needs can be resolved at lower levels without recourse to government programs; only experience and empirical evidence can determine this (and analysts sharply disagree about both).").

intervention, the entities that fill the resulting power vacuum are not necessarily ideal simply because they arise from the operation of the market. Corporations do not always act as the mediating structures envisioned by subsidiarity. Especially as they increase in size and hierarchy, corporations can function as megastructures,¹²⁵ which reduce individuals' powers of self-betterment and alienate members of society from each other.

Also frequently missing from arguments favoring devolution is any discussion of the active societal role envisioned for mediating structures. In focusing on mediating structures, "we have tended to do so negatively by stressing very one-sidedly their obvious importance as bulwarks against statism and have yet to agree upon a positive and structured role for these organizations in the operation and planning of the economy."¹²⁶ Mediating structures cannot be judged solely by the barriers they present to the encroachment of megastructures, but also by the vehicles they provide for self-empowerment and efficacious group action. In this regard, the fact that a large corporation has the political and economic muscle to prevent government expansion into an area of interest to the corporation does not mean that the corporation is a mediating structure. Both corporate and government power share the capacity to alienate individuals:

The reliance on the state, simply because of its size, makes difficult the identification of the individual with the common good. It is difficult for anyone, unless unusually powerful, to see what differences their job, their vote, their honesty, or any number of other actions have to do with the "common good" of the country. The same problem holds true in a large corporation as well as in relation to the market itself. Personal responsibility is undermined by this mismatch between the lack of individual control over decisions affecting particular persons and the abstractness of government or markets responsible for solving social problems.¹²⁷

The corporation is a money-generating enterprise, not a means for furthering subsidiarity's objectives,¹²⁸ and any effort to enhance corporations' mediating

125. See Neuhaus & Berger, *Mediating Structures*, *supra* note 63, at 214.

126. George G. Higgins, *Trade Unions, Catholic Teaching and the New World Order*, in *NEW WORLD ORDER*, *supra* note 39, at 351, 357; cf. Elshtain, *supra* note 8, at 589 (calling for civil society advocates "to set forth the criteria under which some kinds of associations are found worthy of endorsement and affirmation as part of a well functioning civil society, and which groups, by contrast, run counter to that ideal").

127. Fort, *supra* note 68, at 428 (footnote omitted).

128. Dennis McCann explains:

The modern business corporation is not, nor could it ever be, a substitute for either the church or the state; its purpose in the unfolding of the history of the redemption is different from both. The corporation's purpose is to create wealth, that is, to produce the economic resources necessary for authentic social development. . . . Given the continually shifting pattern of needs expressed by those whom the corporation is meant

function must acknowledge as much. That said, corporate supremacy in the global economy gives corporations an unsurpassed role in shaping the way individuals relate to their environments.¹²⁹ Whether they are viewed "as a very public private institution or a very private public institution, corporations have a rich potential to create citizens," but not "if the lessons learned at work have nothing to do with a corporate common good that simultaneously empowers individuals."¹³⁰

While the essential nature of corporations cannot be reconfigured to better fulfill subsidiarity's vision of mediating structures, that does not render irrelevant all government policies toward corporations. The environment in which a corporation operates has a significant impact on its tendency to function as a mediating structure or megastructure. Specifically, corporations are more likely to function as mediating structures in a market environment in which it is reasonably easy for new corporations to gain entry and small corporations are able to thrive and prosper. Where market power is used to preclude new entries and force smaller entities out of existence, the landscape is more likely to be dominated by megastructures. Even if large corporations are still subject to competitive pressures, their sheer size and hierarchy make it much more difficult for individual employees to have a discernible influence over the priorities and values reflected in their employers' decisions. These same characteristics also limit megastructures' responsiveness to the input of individual consumers, thereby reducing consumers' influence over the goods and services making up their everyday existences.

Corporations' status as mediating structures or megastructures is determined in part by government enforcement of antitrust law. It is widely agreed that President Bush will enforce the antitrust laws less aggressively than his predecessor.¹³¹ Bush's preference for allowing the market to sort out anti-

to serve, this form of divine governance is likely to be far more tentative and improvisational than either the church or the state.

McCann, *supra* note 78, at 339-40.

129. See Litonjua, *supra* note 30, at 215 (arguing that the modern corporation "has taken the place of mediating institutions, such as political parties, labor unions, voluntary organizations, that constituted the vitality of American democracy, to form a more perverted form of corporate politics").

130. Fort, *supra* note 68, at 433.

131. See, e.g., William J. Holstein, *Business's Biggest Stake in a Bush Win: Giving the Bum's Rush to the Trustbusters*, U.S. NEWS & WORLD REP., Dec. 11, 2000, at 57 (reporting that experts suspect a "broad[] pullback" from the Clinton administration's "aggressive enforcement"); John B. Judis, *Trust Walk: Why the Bushies Love Monopoly*, NEW REPUBLIC, June 11, 2001, at 25 (arguing that Bush's nominees to run the Federal Trade Commission, Federal Communications Commission, and the Justice Department's antitrust division "herald a radical shift in the enforcement of America's antitrust laws: Under the Bush administration, there may not be any"); *Choice for FTC to Mean Antitrust Shift*, HOUST. CHRON., March, 22, 2001, at 9 ("Legal experts predicted today that [the nomination] is certain to lead to a significant easing of reviews of corporate mergers and a far less aggressive policy towards monopolization cases."); Donald

competitive behavior does not necessarily comport with subsidiarity simply because it eschews government action. Subsidiarity certainly favors non-government solutions in many contexts, but the principle also is "useful both for identifying various forms of marginalization, to the extent that these are a result of disorders in the routine exercise of institutional power, and for transforming these same institutions in the direction of the ideal of solidarity."¹³² Antitrust is one area where government action seeks to remedy seemingly routine exercises of corporate power that collectively have marginalized employees, consumers, and even those whose entrepreneurial hopes have been dashed by monopolistic barriers to market entry.

On a broad level, aggressive antitrust enforcement would seem to go hand-in-hand with subsidiarity, even under neoconservatives' formulation of subsidiarity's objectives. Novak insists that "[p]hilosophically and theologically, a regime emphasizing the broadest possible distribution of private property empowers citizens to act in the world of material things through material instruments of their own."¹³³ Because "[i]t is important for economic development to proceed universally, without leaving anybody out," he suggests that we "[m]aximize popular ownership, especially home ownership, the ownership of small businesses, workers' shares in commercial or agricultural corporations, and the like."¹³⁴

Recognizing the economic equality aspect of subsidiarity does not necessarily require the redistribution of wealth, but it suggests that at least some effort must be undertaken to prevent individuals from losing access to economic resources due to anticompetitive corporate action. Pope John Paul II recognized as much with his admonition that "[t]he State has the . . . right to intervene when particular monopolies create delays or obstacles to development."¹³⁵ One much-publicized example arises from the Microsoft litigation, where the software megastructure stands accused of tying its products to prevent Netscape from competing in the market. Using existing market power to prevent others from attaining a place in the market for themselves runs counter to subsidiarity because it both negates a potential competitor's efforts toward economic self-determination and limits consumer choice.¹³⁶

Lambro, *Bush Said Unlikely to Pursue Microsoft*, WASH. TIMES, Dec. 17, 2000, at C1.

132. McCann, *supra* note 78, at 347.

133. MICHAEL NOVAK, *THIS HEMISPHERE OF LIBERTY* 55 (1990).

134. *Id.* at 55-56.

135. John Paul II, *supra* note 42, para. 48.

136. Bush's desire to resolve the Microsoft litigation quickly has contributed to the impression that antitrust enforcement is not a top priority of the new administration. See, e.g., *A Risk Worth Taking*, WASH. POST, Nov. 4, 2001, at B6 ("A federal appeals court affirmed that Microsoft broke the law, yet Justice has settled the case in exchange for restrictions on the company's conduct that are less stringent than those discussed in settlement talks before the company's guilt was established."); Jonathan Krim, *Microsoft, U.S. Near Antitrust Settlement*, WASH. POST, Nov. 1, 2001, at A1 ("The gulf between federal and state prosecutors has widened since the Bush administration took office, and the states have been concerned for several months that the Justice

While the scope and speed of Microsoft's rise to dominance may be unusual, it reflects capitalism's inherent tendency toward the consolidation of market power. Smaller companies and start-ups are by no means a vanishing breed, "but there is also a natural countertendency toward larger combinations, the formation of temporary monopolies (as when a new invention allows a firm a few years' advantage over other firms), and the growth of small firms into ever-larger ones."¹³⁷ Antitrust law has, to a certain extent, come to embrace this market tendency:

In the 1960s, U.S. antitrust law was synergistic with civil rights law; it protected the underdog. It protected the freedom of independent traders to sell where and to whom they chose, and protected their right not to be fenced out of any significant market by the use of leverage. It valued market governance by impersonal forces, rather than by dominant firms.

This humanistic form of antitrust did not survive an economic recession, growing international competition, and inroads by foreign competitors into U.S. markets. The Reagan revolution of the early 1980s reversed the antitrust paradigm; since then the common wisdom has been: Competition is an economic modality for the purpose of producing efficient markets, and antitrust law is a tool to aid the process in the event of market failure.¹³⁸

In looking to the market itself as the primary guardian of competition, the Bush administration falls prey to the conservative tendency to exhibit "the weakness of the Left in reverse" by being "highly sensitive to the alienations of big government, but blind to the analogous effects of big business."¹³⁹ Bush avoids intervention by the government megastructure, but at the cost of giving free rein to corporate megastructures. The relevant distinction under subsidiarity is not between types of megastructures, but between megastructures and mediating structures. Absent a competitive and open market, it is unlikely that Microsoft or General Motors will effectively facilitate the localized decision-making and individual empowerment that lie at the core of subsidiarity. Antitrust necessitates a specific higher-body function to ensure that lower bodies are equipped to fulfill their more general functions. Allowing the federal government to play an active role in checking the power of large corporations is not an improper encroachment by a megastructure, but a necessary protection for mediating structures.

Department was seeking to conclude the case with a settlement that they and Microsoft competitors would view as inadequate.").

137. Novak, *supra* note 116, at 135.

138. Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1798 (2000) (footnote omitted).

139. Neuhaus & Berger, *Mediating Structures*, *supra* note 63, at 218.

B. Mediating Structures Must Be Empowered

Subsidiarity is not simply a market-based framework under which individuals have the theoretical freedom to conduct their lives and solve their problems as they see fit, but rather a call for individuals to be equipped with the real-world tools for bettering themselves and those around them. In this regard, the principle's origin in Catholic social theory reflects a tangible concern for the economic rights of workers as they sell their labor on the market. In recognizing a role for the government in ensuring workers' well-being, Catholic social theory departed from classical liberalism, which "was not in a position to perceive the power problem that exists between employee and employer."¹⁴⁰ The Church contends that the "human dignity of the worker and demands for a just wage . . . are integral parts of a work relation" and "precede[] all contractual agreements" between the worker and the employer.¹⁴¹

Through statements such as the 1961 encyclical *Mater et magistra*, which addresses economic participation by workers, and the 1965 pastoral constitution *Gaudium et spes*, which calls for worker participation in workplace decision-making, the popes have consistently focused on the ability of workers to have input in the conditions of their employment. Even John Paul II, who tends to emphasize the negative aspect of subsidiarity, defends the solidarity of workers and their right to organize in the 1981 encyclical *Laborem exercens*. In addition, his 1991 encyclical *Centesimus annus*

establishes that the rightfulness of workers' efforts to come to justice in their dignity as humans, through more room for participation in the life of the business among other things, so that, while they work together with others and under the direction of others, they can work for themselves in a certain sense through the efforts of their intelligence and freedom.¹⁴²

Other sources of church teaching echo the papal emphasis on the well-being of workers.¹⁴³

While Catholic social theory certainly recognizes the existence of economic laws, it does not concede that such laws are superior to the moral law. "For example, if it is economically unfeasible for employers to pay a living wage for

140. Rauscher, *supra* note 38, at 75.

141. *Id.*; see also Williams, *supra* note 43, at 8 (noting that Catholic social theory "always has understood that, although the right to private property is important, the worker's right to a 'just wage' takes precedence over an employer's right to bargain for the cheapest wages possible").

142. De Jonghe, *supra* note 34, at 154.

143. See, e.g., *id.* at 153-54 (noting that the Congregation for the Doctrine of the Faith's 1986 *Instruction About Christian Freedom and Liberation* "argues that human dignity is the criterion to judge the situation of the employees"); U.S. Catholic Bishops, *Economic Justice for All* (1986), <http://www.osjspm.org/cst/eja.htm> (calling for participatory structures to foster cooperation in economic life, including profit-sharing, worker shareholding, administrative participation, and labor unions).

labor because of the prevailing conditions of competition," Catholic teachings suggest that "we should change the conditions of competition . . . by setting a legal minimum wage, by making collective bargaining legally obligatory, by encouraging cooperation among associations of employers and employees, by labor participation in management or by still other means that are not beyond the reach of human intelligence."¹⁴⁴ In line with subsidiarity's insistence that individuals be equipped with tools of self-betterment, "[t]he connection between personal work and personal property of attained goods must be directly evident to members of a particular society."¹⁴⁵ When property proportions are not fairly divided, "[h]ere lies a challenge for the state."¹⁴⁶

Beside determining the proportion of property they are able to secure for their labor, workers' ability to organize themselves is central to their attainment of subsidiarity's objectives. The mediating function of voluntary associations is essential under subsidiarity, as it is in such groups that "individuals learn to compromise, persuade, and sublimate narrow self-interest for the greater good of the group."¹⁴⁷ Groups are especially necessary in the economic sphere—a sphere "frequently relegated to self-interests, prudent investors, and invisible hands"—in order to direct "productive and service activities to the common good."¹⁴⁸ In pursuing the common good, "subsidiarity provides an orientation for directing the group's activity."¹⁴⁹

Organizing furthers subsidiarity's objectives in two ways. First, it empowers individual workers to better themselves through their work. When serving its proper function, "[w]ork should enable the working person to become 'more a human being,' more capable of acting intelligently, freely, and in ways that lead to self-realization."¹⁵⁰ Second, it connects them with other workers in a way that allows them to overcome interpersonal barriers in the realization of common goals. Cynthia Estlund argues that the workplace is "a crucial site for the forging of personal ties across lines that often divide people," and that, by fostering such ties, "the workplace mediates between the individual citizen and the broader diverse citizenry."¹⁵¹ Jean Bethke Elshtain extols "trade unions as having the potential to play 'an important role in renewing civil society.'"¹⁵²

In these ways, unions are the most effective structures for mediating between individual workers and the largely impersonal and unforgiving marketplace. That is why the substantial decline in union membership is troubling not just for

144. Canavan, *supra* note 124, at 435-36.

145. Rauscher, *supra* note 38, at 81.

146. *Id.* at 82.

147. Fort, *supra* note 68, at 428.

148. Philip J. Chmielewski, *Workers' Participation in the United States: Catholic Social Teaching and Democratic Theory*, 55 REV. SOC. ECON. 487, 498 (1997).

149. *Id.*

150. *Id.* (footnote omitted).

151. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 30 (2000).

152. Elshtain, *supra* note 8, at 597.

purposes of economic equality, but also from a subsidiarity perspective. Today only 13.5% of the work force belongs to unions, the lowest percentage in sixty years and down from a peak of thirty-five percent in the 1950s.¹⁵³ Although "16 million jobs have been created since 1992," the number of union members has fallen by 200,000.¹⁵⁴ Far from expressing alarm at unions' demise, the Bush administration has exhibited, at best, a well-documented ambivalence toward the labor movement.¹⁵⁵ To many observers, this ambivalence has crossed into outright hostility. For example, soon after taking office, Bush issued executive orders opening government contracts to non-union bidding and effectively reducing unions' political expenditures.¹⁵⁶ He has also indicated a willingness to block strikes entirely in key industries.¹⁵⁷ Union backers predict that Bush's judicial appointees will not be at all sympathetic to their plight.¹⁵⁸

In light of Bush's proclaimed adherence to subsidiarity, his disregard for unions may be explained partly by his view of mediating structures as bulwarks against government encroachment, but not market encroachment. The narrow view is certainly not unique to Bush, as George Higgins contends that the "limited anti-statist understanding of the role of intermediate structures and organizations accounts, to some extent, for the massive and menacing lack of concern in conservative circles about the growing weakness of American unions."¹⁵⁹ However, even under Bush's anti-statist view of mediating structures, unions should merit attention. According to Thomas Kohler, "[c]ollective bargaining provides the only alternative to the pervasive state regulation of one of life's primary relationships—employment. Indeed, it is no coincidence that piecemeal regulation of employment through legislatures and common-law courts markedly has increased as the practice of collective bargaining has declined."¹⁶⁰ Unions encompass both the anti-statist and anti-market aspects of subsidiarity, as their mediating value stems from the fact that "[t]hey stand independently of

153. Steven Greenhouse, *New Political Field Challenges Labor Leaders*, N.Y. TIMES, Feb. 12, 2001, at A21.

154. Steven Greenhouse, *Labor Leader Sounds Do-or-Die Warning*, N.Y. TIMES, Feb. 19, 2001, at A10.

155. Steven Greenhouse, *Secretary Promises to Listen to Unions but Expects Differences*, N.Y. TIMES, Feb. 15, 2001, at A21; Greenhouse, *supra* note 153.

156. See Steven Greenhouse, *Bush Is Moving to Reduce Labor's Political Coffers*, N.Y. TIMES, Feb. 16, 2001, at A14.

157. See, e.g., Jeanne Cummings, *Bush Will Intervene to Head Off a Strike at American if Accord Isn't Set by Sunday*, WASH. ST. J., June 26, 2001, at A4.

158. See Thomas Geoghegan, *No Love Lost for Labor*, THE NATION, Oct. 9, 2000, at 35 ("If a more progressive administration succeeds him and pushes through new labor law that would give U.S. workers a real right to join unions, a Bush Supreme Court packed with Antonin Scalia and Clarence Thomas types would gut it.").

159. Higgins, *supra* note 126, at 358 (noting that "the silence of the conservative community in the United States on this issue has been thunderous in recent years").

160. Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 301 (1995).

the state and the organizations that employ their members."¹⁶¹

This is not to suggest that all unions serve a positive mediating function under all circumstances. To the extent that large and centralized unions minimize the decision-making role of individual members, they certainly could qualify as megastructures. For the purpose of subsidiarity, individuals are not necessarily better off simply because an alienating government power is replaced by an alienating union power. However, because unions "come into being as a result of employee self-organization, and their health and continuing existence depends upon the ability of the members to maintain solidarity,"¹⁶² unions are more likely to empower individual workers than either a distant government authority or a profit-oriented management would be. Kohler points out that "[i]f they are to succeed, the actions a union undertakes must reflect the consensus of its members," and that "a collective bargaining agreement represents the achievement of a consensus between employer and employed about the order of their relationship."¹⁶³ In this regard, "it is through their involvement in the collective bargaining process that average citizens can take part in deciding the law that most directly determines the details of their daily lives."¹⁶⁴

Just as the government cannot, consistent with subsidiarity, assume unions' responsibility for protecting workers' well-being, neither can employers govern the process by which workers' interests are represented. The rise of management-led participation plans may be more cost-effective or politically palatable than unions in certain contexts, but they do not provide the same degree of empowerment to individual workers. As Thomas Kohler points out,

[i]n contrast to the collective bargaining model . . . which is founded on the formation of autonomous employee groups and assumes that workers and management have mutual as well as divergent interests, the managerially sponsored schemes have little room for unions and are based on convincing employees to see corporate goals as being identical with their own.¹⁶⁵

Such plans are founded more on notions of persuasion and interest alignment, which, while valuable, cannot match collective bargaining's ability to allow workers direct influence over their employment conditions.

One objection to a subsidiarity-based embrace of unions as mediating structures may derive from the traditional vision of union decision-making, in which members with minority viewpoints are effectively shut out of the collective action. Molly McUsic and Michael Selmi have proposed a "community of difference" model for unions that addresses this problem:

161. *Id.*

162. *Id.* at 300.

163. *Id.* at 299.

164. *Id.* at 298-99.

165. Thomas C. Kohler, *Individualism and Communitarianism at Work*, 1993 B.Y.U.L. REV. 727, 738.

Unlike the pluralist model of legislation where each member votes his own exogenous best interest, and the union simply collects each vote and acts on behalf of the majority, in the community of difference model, unions would help develop worker interest in the face of a common opponent. In this respect, unions turn from being mini-legislatures to becoming mediating institutions with transformative aspirations much like the border cultures where changes occur through the clash of cultures. Unions would provide a forum to discuss different group interests, the presence and pervasiveness of difference within the workplace, and possible means for satisfying these various interests and perspectives.¹⁶⁶

Under this model, "groups of workers would come together in dialogue to derive the best strategy for all the members of the group rather than concentrating on finding a position that can obtain majority support."¹⁶⁷

Even where unions are governed by majority rule, the fact that they give a voice to workers' collective interests outweighs—from a subsidiarity perspective—their inability to provide specific representation of each worker's opinion. Given the power disparity between individual workers and management, a collective voice is needed for workers to have any meaningful say over the conditions of their employment. This disparity also casts doubt on the notion that the decline of unions gives power back to individual employees. Because workers are "[e]ver less constrained by collectively set determinations," they "are free to bargain and select the terms and conditions of their employment individually."¹⁶⁸ As it works out, however, "this means that individuals have become increasingly dependent on their employers and the state to regulate the order of the employment relationship. Few actually participate directly in making and administering the law that governs their lives in the workplace."¹⁶⁹

Regardless of the economic or political shifts underlying the shrinking labor movement, "[t]he decline of union representation is a major loss for the mediating function of the workplace, for unions actively cultivate solidarity, egalitarian values, and democratic practices, and they multiply opportunities for constructive interaction among coworkers through the vehicles of union governance and collective bargaining."¹⁷⁰ Unions' demise is a troubling prospect under any reasonable interpretation of subsidiarity, which, along with Catholic social theory in general, holds that "the role of each level of social organization [is] to facilitate independent action by the groups below it, in the end supporting the maximum personal and spiritual development of the individuals who are the

166. Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339, 1368-69 (1997).

167. *Id.* at 1369.

168. Kohler, *supra* note 165, at 740.

169. *Id.*

170. Estlund, *supra* note 151, at 70.

ultimate base of all organizations.”¹⁷¹ This suggests that the government has a responsibility to protect the independence and vitality of unions so that they, in turn, may empower society’s workers. The response to unions’ decline, by leaving workers’ well-being up to their employers or the government, disregards the need for mediating structures between individuals and the world around them. To the extent that unions lack the numerical, economic, or political power to fulfill their mediating function, there is, contrary to the Bush administration’s interpretation of subsidiarity, cause for government action.

C. Individuals Must Be Able to Participate Fully in Societal Decision-Making

In emphasizing localized problem-solving, subsidiarity presumes that individuals will be equipped with the tools necessary to affect change in their own environment by participating fully in collective decision-making on the issues that impact them and their communities. Ensuring such participation requires more than protecting the abstract legal rights of citizenship; it requires a recognition of the practical and structural impediments to meaningful participation.¹⁷² For example, the widespread exclusion of African-Americans from collective decision-making in southern states required higher-body action under any reasonable interpretation of subsidiarity.¹⁷³ In two other areas—campaign finance reform and environmental regulation—the Bush administration has overlooked obstacles to participation that must be addressed if subsidiarity is to be implemented as an operative theory of governance.

The gap between subsidiarity’s mandate and American reality is most clearly reflected by the manner in which campaigns are conducted in this country. Judging by the Bush administration’s half-hearted embrace of campaign finance reform,¹⁷⁴ its conception of subsidiarity overlooks the impact that campaign

171. Marquardt, *supra* note 32, at 619.

172. See, e.g., McCann, *supra* note 78, at 347 (observing that “achieving social justice requires an assessment of institutions with respect to their success in empowering persons for participation,” and that “the principle of subsidiarity . . . seem[s] reflected specifically in the bishops’ concern for social justice and participation”).

173. Dan Millisor explains:

As the problem or challenge becomes larger or more universal, this [subsidiarity] principle calls upon larger and larger units of society to become engaged. Central to this principle are the words, “able” and “willing.” It might well be the case that a local community is able, yet unwilling, to be active with an issue. Thus, the Church recommended federal intervention in the case of racial desegregation in parts of the United States.

Dan Millisor, “*Crusaders for Justice, Pilgrims for Peace*”: *Global Human Rights and Catholic Social Teaching*, 25 OHIO N.U. L. REV. 315, 317-18 (1999); see also Silecchia, *supra* note 35, at 1179 (noting that John Paul II expressly urges in *Centesimus annus* that “the more that individuals are defenseless within a given society, the more they require the care and concern of others, and in particular the intervention of governmental authority” (footnote omitted)).

174. See, e.g., Dan Balz & Ruth Marcus, *Bush to Offer Campaign Finance Guidelines*, WASH.

finance has on the efficacy of political activity by individuals and the groups to which they belong. At first glance, subsidiarity may appear to favor the current regime under which groups and organizations may make unlimited "soft money" contributions to political parties or advocacy groups. As one critic argued, any restrictions on the amount and manner in which PACs and other political associations can fund campaigns "neglect or openly attack the basic human good of cooperation,"¹⁷⁵ the very underpinning of subsidiarity.

Such arguments ignore the reality of politics in America. Campaigns are dominated by corporations, political associations, and individuals wealthy enough to purchase candidates' attention. Most of the entities of any political relevance are megastructures—national labor unions, corporations, or huge nationwide associations such as the National Rifle Association. Individuals feel alienated, not engaged with the political system, by virtue of these groups' political largesse.¹⁷⁶ Individuals and voluntary associations without money have little influence on the political process. Even collective action in its simplest form—e.g., signing a petition—matters little if there is no money accompanying the message. Under subsidiarity, meaningful political participation cannot be limited to those with the financial resources to make their message heard.¹⁷⁷

"[T]he positive dimension of subsidiarity . . . centers on making it possible for persons to exercise their freedom and on the shaping of institutions that can result in social benefit."¹⁷⁸ Pursuant to this notion, government's responsibility goes beyond ensuring the right to vote. The right to vote matters little if the candidates, their agendas, and voters' decisions reflect only the views and

POST, Mar. 15, 2001, at A4 (reporting that Bush, faced with likely congressional action, will propose increasing "federal contribution limits for individuals[,] . . . requiring advance approval for use of union dues for political activities, and eliminating 'soft money' contributions from corporations and unions, but not from individuals").

175. Sarno, *supra* note 11, at 2766.

176. See, e.g., Archibald Cox, *The Case for Campaign Finance Reform*, 1 GREEN BAG 2D 289, 291 (1998) ("In many ways, the worst trouble is that people have lost their confidence in the process, lost their confidence in government, in their representatives. One study put it that people have become totally unbelieving in modern representative government, for two reasons: One, because of the flood of campaign contributions; and two, because they think the lobbyists really govern the country, and not Congress. That loss of sense of political power, and with it, and importantly, of individual political responsibility of a citizen as a citizen, is to me the most frightening thing for the country in the long run.").

177. See Edward B. Foley, *Equal-Dollars-Per-Voter: A Constitutional Principle of Campaign Finance*, 94 COLUM. L. REV. 1204, 1204 (1994) (arguing that "wealthy citizens should not be permitted to have a greater ability to participate in the electoral process simply on account of their greater wealth"); Alvin L. Goldman, *Potential Refinements of Employment Relations Law in the 21st Century*, 3 EMPLOYEE RTS. & EMP. POL'Y J. 269, 289 (1999) (lamenting "the fact that the survival of our representative democracy continues to be threatened by campaign finance practices which place inordinate power in the hands of the tiny segment of the population that controls most of our nation's wealth").

178. Chmielewski, *supra* note 148, at 500.

persuasive powers of groups and individuals with enough money to make significant campaign contributions.¹⁷⁹ Further, subsidiarity's core objectives are compromised to the extent that individuals' current skepticism toward the political system renders them less likely to look beyond themselves to the greater good.¹⁸⁰ While subsidiarity does not necessarily require publicly financed campaigns or the abolition of PACs, it does, at a minimum, suggest that some government action may be necessary to ensure that individuals and the mediating groups to which they belong have a voice in the political process that is independent of their purchasing power.¹⁸¹

A more subtle obstacle to individuals' participation in collective decision-making arises from the manner in which the government regulates environmental matters. Subsidiarity has significant implications for environmental law,¹⁸² and those implications do not fully comport with Bush's decentralizing tendencies in this area.¹⁸³ Two well-known implications derive from subsidiarity's requirement that the body assigned a particular function be able to carry it out effectively. First, federal action is often required because the effects of many environmentally significant activities—even if they take place entirely within a

179. Edward Foley argues:

Voting is only the final stage of the electoral process. It is preceded not only by the agenda-formation stage (in which matters to be voted upon are identified) but also by what might be called the "argumentative stage," in which competing factions of the electorate attempt to persuade the mass of undecided voters to agree with their positions. Even if we put aside the problem of agenda formation and thus define the electoral process as commencing once the items on the ballot have been determined, we must acknowledge that a citizen does not have equal input in the electoral process if she is denied an equal opportunity to participate in the argumentative stage of the process.

Foley, *supra* note 177, at 1226-27.

180. See Cox, *supra* note 176, at 291 (linking campaign finance problems with decreased membership in voluntary associations).

181. In this sense, subsidiarity's participatory emphasis overlaps significantly with other political theories. Under Cass Sunstein's view of liberal republicanism, for example, to realize the commitment to deliberative government, citizens must build a consensus as to what constitutes a common good. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1550-51 (1988). In order to realize the commitment to political equality, all people should have an equal opportunity to deliberate in the political process.

182. See Robert W. Lannan, *Catholic Tradition, and the New Catholic Theology and Social Teaching on the Environment*, 39 CATH. LAW. 353, 380 (2000) ("In addressing environmental justice issues, Catholic bishops and theologians have relied on well-established principles of Catholic social teaching, including the common good, solidarity, subsidiarity, and an option for the poor.").

183. See, e.g., Robert Braile, *Groups Fight Rollbacks by Bush on Environment*, BOSTON GLOBE, Apr. 8, 2001, at 1 (N.H. Weekly); William Drozdiak & Eric Pianin, *U.S. Angers Allies over Climate Pact*, WASH. POST, Mar. 29, 2001, at A1; Clay Robinson, *Tax Incentives at Top of Bush's Proposals to Boost Conservation*, HOUSTON CHRON., June 2, 2000, at 28 (noting Bush's emphasis on "giving local governments and private landowners a greater voice in conservation decisions").

single state—are not necessarily limited to that state's borders.¹⁸⁴ Second, under the "race-to-the-bottom" theory, businesses will tend to be drawn to states with the least stringent environmental standards, forcing other states to choose between environmental protection and economic development.¹⁸⁵ Under this view, in order to avoid such disincentives, the primary source of environmental regulation must be the federal government.

Of greater relevance to our inquiry is the path by which the devolution of environmental decision-making to the states can, contrary to subsidiarity's mandate, disempower individuals and groups from having a meaningful voice in the public resolution of issues that matter to them. This possibility arises not merely from the "spillover" effects of regulated activities, but from the inability of state-level actors to account for the values and priorities of those outside the state when making environmental decisions. If, for example, state residents—through their elected representatives—place greater value on local logging jobs than on the preservation of wilderness areas, decentralization effectively gives them a trump over the value placed by non-residents on unspoiled wilderness. Further, the value placed by non-residents may not be measurable simply in economic terms—the fact that a Florida resident has never invested tourist dollars in Wyoming's economy on a visit to Yellowstone does not mean that he places no value on the park's preservation. While subsidiarity certainly calls for local problems to be first addressed by the communities in which they arise, it is far from obvious that the disposition of natural resources can be considered a purely local problem. Because the importance placed on natural resources is not purely a function of the state in which they happen to be found, devolving responsibility for such decisions to the state places an artificially narrow scope on subsidiarity's message of citizen empowerment.

This is not to minimize the potentially alienating consequences that the federalization of environmental decision-making in general can have on the affected communities and individuals.¹⁸⁶ It is no stretch to concede that a Wyoming resident should be given a greater voice than a Florida resident in deciding whether to develop or protect wilderness lands in Wyoming. The Florida resident, however, should not be shut out of the decision-making process completely, just as the Wyoming resident should not be cut off from weighing in on the exploration of natural gas deposits along the Florida coast. The value of this country's natural resources goes beyond the tangible economic benefits for the residents of the state in which those resources are located. It is unclear at this

184. See, e.g., Oates, *supra* note 10, at 1329 (acknowledging that "where there are important spillover effects across state lines (as in the case of acid-rain deposition), there is a compelling case for central efforts to introduce policy measures that transcend the interests of the individual states"); cf. Silecchia, *supra* note 35, at 1183-84 ("With all due respect for subsidiarity . . . an international agreement may be the only way to tackle a complex environmental dilemma.")

185. See, e.g., Fox, *supra* note 138, at 1790 ("[E]nvironmental law . . . is often cited as the paradigm for the race-to-the-bottom phenomenon.")

186. See Huffman, *supra* note 10, at 31 (noting that "national regulations can be detrimental to the autonomy of local communities").

stage whether Bush intends to resolve these issues at the national level, and merely give marginally greater weight to the opinions of local communities, or whether he plans on a more stark departure from past practice. Devolving the decision-making authority to the state level should be resisted, for it effectively shuts out non-residents from the decision, misconstruing subsidiarity's mandate in the process.

CONCLUSION

The three principles discussed in Part IV are certainly not an exhaustive list of guidelines for subsidiarity's real-world application, nor will these principles invariably lead to a particular policy outcome when applied to a given set of facts. Antitrust, labor law, campaign finance, and environmental regulation provide examples of the distinction between subsidiarity and devolution, but even in those areas, good-faith adherents to subsidiarity will not necessarily agree on the contours of an appropriate government role. What good-faith adherents must acknowledge, however, is that subsidiarity is more complex than is suggested by its current use in today's public policy debates. Subsidiarity's devolutionary impetus, though unmistakable, must be tempered by an equal concern for the encroachment of non-government megastructures, the empowerment of mediating structures, and the facilitation of individuals' participation in societal decision-making.

Countering the one-dimensional devolutionary portrayal of subsidiarity need not render the principle meaningless, as though it could be invoked with equal legitimacy by proponents of government action and market deference in every dispute over public policy. Rather, subsidiarity stands to gain greater substance to the extent that the public can distinguish it from the preexisting agenda of either side of the political spectrum. This Article simply points out that subsidiarity, at its core, envisions a society in which problems are solved and decisions made from the bottom up. As a model of governance, subsidiarity offers no shelter to those who seek the unbridled expansion of centralized government, nor to those who disregard the need for a vital government role in making an empowered and connected citizenry a reality. Stripped of its partisan baggage, subsidiarity offers a model that—rooted in a social justice tradition that stresses both individual liberty and communitarian values—rejects the alienations of both the market and centralized government, embracing instead individuals and the mediating structures to which they belong.