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SUBSIDIARITY AND THE SAFEGUARDS OF FEDERALISM

A Dissertation
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Subsidiarity is a principle in Catholic social thought that informs the distribution of authority among levels of the political and social order. First expressly articulated by Pope Pius XI in his 1931 encyclical letter *Quadragesimo Anno*, the roots of the concept go back further to Pope Leo XIII and to Thomistic social theory. But subsidiarity is frequently subject to the criticism that it is vague and indeterminate and thereby an ineffective guide to politics and public policy. Much of the discussion of subsidiarity proceeds as though the principle were merely one of devolution of authority to the local level. Moreover, the principle is often taken to be a procedural norm, counseling “small is better” regardless of the underlying substantive question to which one is applying the principle of subsidiarity.

The thesis of this dissertation is that it is only through an adequate examination of concrete policy issues that subsidiarity’s import can be fully measured and appreciated and only by asking what the common good requires in particular instances through the exercise of political prudence that the proper distribution of authority can be determined. The account of subsidiarity advanced in the dissertation is one of “functional pluralism,” denoting that subsidiarity focuses upon the multiple ends of differentiated political
societies and thereby seeks to determine the goods they pursue and the means that are properly adapted to those ends. The dissertation argues that federalism and localism as informed by the principle of subsidiarity provide a safeguard for fundamental concerns of Catholic social thought, such as human rights and the common good.

After examining the concepts of subsidiarity in Catholic social thought and federalism in American constitutional law and considering their relation, the dissertation discusses three areas in which a richer and analytically sharper understanding of the principle of subsidiarity can make an important contribution to policy debates over the role of federalism and localism in law and public policy. The three policy questions addressed in the dissertation are physician-assisted suicide, FDA preemption, and school finance.
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INTRODUCTION

In bodies politic, the power of the representative is always limited; and that which prescribeth the limits thereof is the power sovereign. For power unlimited is absolute sovereignty. And the sovereign, in every commonwealth, is the absolute representative of all the subjects; and therefore no other can be representative of any part of them, but so far forth as he shall give leave.

–Thomas Hobbes, *Leviathan*

The theory of sovereignty, whether proclaimed by John Austin or Justinian, or shouted in conflict by Pope Innocent or Thomas Hobbes, is in reality no more than a venerable superstition. It is true to the facts only in a cosy, small and compact State, although by a certain amount of strained language and the use of the maxim, “whatever the sovereign permits he commands,” it can be made not logically untenable for any conditions of stable civilisation. As a fact it is as a series of groups that our social life presents itself, all having some of the qualities of public law and most of them showing clear signs of a life of their own, inherent and not derived from the concession of the State.

–John Neville Figgis, *Churches in the Modern State*

From physician-assisted suicide, federal preemption, education, and other controversial domestic political questions to the proper role of the United Nations in international affairs, debates about what level of political authority should appropriately bear responsibility provoke widespread public debate. At the same time as these practical matters command attention, theoretical disagreements persist over subsidiarity and federalism, twin concepts concerned precisely with the apportionment of power among levels of authority. The application of subsidiarity to contemporary legal and public policy debates remains confused and contested over seventy years after Pope Pius XI’s classic articulation of the principle of subsidiarity in *Quadragesimo Anno*.

Resolution of the practical political disagreements over the apportionment of authority is hampered by the limits of the available conceptual tools used to address such issues. Driven largely by concerns of economic efficiency and inter-jurisdictional
competition,\textsuperscript{1} most of the federalism debate pays scant attention to other, richer theoretical justifications for distributing power between the national government and the states. Similarly, some contend that federalism lacks a “persuasive normative theory” to explain and justify the apportionment of power between the national and state governments.\textsuperscript{2} Though “we Americans love federalism,” Edward Rubin and Malcolm Feeley write, it remains a “national neurosis” because it “conjures up images of Fourth of July parades down Main Street, drugstore soda fountains, and family farms with tire swings in the front yard” even though, in their view, “there is no normative principle involved that is worthy of protection.”\textsuperscript{3} This renders debate over such issues as physician-assisted suicide, preemption, and education seemingly intractable, as competitive federalism alone is frequently unable to express many of the concerns at play in deciding whether such issues should be resolved at the national, state, or local level.

Much of the literature in the federalism debate, furthermore, is couched at a high level of abstraction involving constitutional provisions such as the Commerce Clause and the

\textsuperscript{1} A view captured by Sheryll Cashin in the term “competitive federalism.” See Sheryll D. Cashin, \textit{Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities}, 99 \textit{COLUM. L. REV.} 552, 582 (1999) (describing “competitive federalism” as the theory according to which “[t]he preferences of all individuals in society are better met in a system of multiple governments offering different packages of services and costs than of a single monopoly government, even a democratic one, offering a single package reflecting the preferences of the majority”) (citations omitted).

The [Supreme] Court’s decisions setting forth jurisdictional limitations on national power have waffled famously. Taken as a whole, they flunk requirements of either good law or good policy: The decisions are inconsistent with constitutional text and with one another, and they lack a persuasive normative theory to justify the first inconsistency or to resolve the second.

Fourteenth Amendment, with relatively less attention paid to the practical policy issues affected by the outcome of the debate.

In American Catholic social thought, this problem is heightened by the uncertain relation between subsidiarity and American federalism and localism. Subsidiarity seems almost infinitely malleable, adopted by participants on every side from neo-conservatives to welfare state liberals to communitarians. A recurring theme in the literature on subsidiarity is that the principle of subsidiarity is indeterminate, vague, and ultimately unhelpful to the resolution of concrete legal and policy questions. As Justice Antonin Scalia once remarked with characteristic subtlety, subsidiarity “deserves a place alongside such other unquestionably true and indubitably unhelpful propositions as ‘do good and avoid evil’ and ‘buy low and sell high.’”

“In such a tractionleess environment,” writes Patrick Brennan, “subsidiarity is malleable and easily manipulated, and therefore unthreatening to all but the biggest consolidators of power.”

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4 See, e.g., Franklin Foer, The Catholic Teachings of George W., THE NEW REPUBLIC, June 5, 2000, at 18 (contending that then-candidate George W. Bush’s view of “compassionate conservatism” owes much to subsidiarity and that “[to] reconcile their capitalist faith in self-interest with Catholicism’s abnegation of self-interest, [neo-conservatives] have not only highlighted subsidiarity, they have redefined Pius [XI]’s concept of it–removing any statist inflection and making it a devolutionary doctrine”); David Hollenbach, S.J., Afterword: A Community of Freedom, in CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY 323, 330-32 (R. Bruce Douglass & David Hollenbach, S.J. eds., 1994) (“The principle of subsidiarity demands that government be limited, but it is neither a libertarian principle nor an endorsement of…neo-liberalism….Nor, despite efforts to maintain the opposite, is it a principle compatible with those forms of American neo-conservatism that supported Reaganite views of political economy.”).


The Church’s own teaching documents contribute to this apparent uncertainty by speaking of subsidiarity as counseling devolution of authority in some circumstances but centralization of authority in others. In *Quadragesimo Anno*, for example, Pius XI writes that “it is an injustice, a grave evil and a disturbance of right order for a larger and higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies.” By comparison, John XXIII in *Pacem in Terris* writes roughly forty years later that there are “problems which, because of their extreme gravity, vastness and urgency, must be considered too difficult for the rulers of individual States to solve with any degree of success” and require the intervention of “universal authority.” While this devolutionary interpretation of subsidiarity is an important and enduring expression of the principle, so also the root of the word itself—from the Latin *subsidiary* for “help” or “assistance”—evokes the responsibility of the higher authority to aid the lower, more local authority and to intervene where necessary.

In fact, recent work on the principle of subsidiarity has helpfully clarified that the entire enterprise of treating subsidiarity as a devolutionary principle is misguided. “[T]he point of subsidiarity,” writes Russell Hittinger, “is a normative structure of plural social forms, not necessarily a trickling down of power or aid.” Although “subsidiarity is often described or deployed in a defensive sense—as to what the state may not do or try to

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7 *POPE PIUS XI, QUADRAGESIMO ANNO* ¶ 79 (1931). The Catechism of the Catholic Church states the principle as “[a] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions . . . .” CATECHISM OF THE CATHOLIC CHURCH ¶ 1883 (1994).

8 *POPE JOHN XXIII, PACEM IN TERRIS* ¶ 140 (1963).

accomplish,” continues Hittinger, “the principle is not so much a theory about state institutions, nor of checks and balances, as it is an account of the pluralism and sociality of society.”

Although the later chapters of this dissertation will treat topics in public policy and law, I follow Joshua Hochschild in noting that “[i]nsofar as it recommends a pattern of organizing social life in general, and not just that part of social life which touches the state, the principle has implications for the choices of families, neighborhoods, and commercial enterprises, indeed for all social agents, individual and corporate.”

Indeed, subsidiarity is the Catholic social tradition’s rejoinder to Hobbes’ theory of sovereignty expressed in the epigraph to this Introduction. For Hobbes, sovereignty is absolute, so subsidiary units of the social order—churches, groups, smaller units of government—exist merely at the sufferance of the sovereign. By contrast, for Catholic social theory (as for the Anglican political theorist John Neville Figgis who contributes the other half of the introductory epigraph), politics is essentially pluralistic. Subsidiarity is not merely a “formal principle,” as Johannes Messner notes in his classic work Social Ethics, but “because it is rooted in the order of being and ends, assigns quite different and concrete responsibilities, competencies, and rights to definite narrower social units.”

But the principle of subsidiarity is often taken to be a procedural norm, counseling “small is better” regardless of the underlying substantive question to which one would apply the

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10 Id. at 136.
principle of subsidiarity. The thesis of this dissertation is that it is only through an adequate examination of concrete policy issues that subsidiarity’s import can be fully measured and appreciated. It is only by asking what the common good requires in particular instances through the exercise of political prudence that the proper distribution of authority can be determined. Not surprisingly, the three policy issues taken up later in the dissertation will, upon careful examination, reveal that they are not susceptible to simplistic solutions of localism or nationalism.

This dissertation proposes to (1) examine the concepts of subsidiarity in Catholic social thought and federalism in American constitutional law, (2) consider their relation, and (3) discuss three areas in which a richer and analytically sharper understanding of the principle of subsidiarity could make a vital contribution to debates now occurring in the United States over the role of federalism and localism in law and public policy.

Subsidiarity, it will be argued, provides a normative principle beyond competitive efficiency whereby we can assess when a nationally-determined solution is to be preferred to a state-by-state or locally-determined solution (and vice-versa) to a policy matter. Seeking to play on the famous “political safeguards of federalism” debate inaugurated by Herbert Wechsler and Jesse Choper,13 the dissertation will argue that federalism and localism as informed by the principle of subsidiarity provide a safeguard

13 The quite different focus of Wechsler’s and Choper’s arguments was that the national political process would adequately protect federalism. See Herbert Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 175-93 (1980).
for fundamental concerns of Catholic social teaching such as human rights and the common good.\footnote{Though the title refers only to “federalism,” I mean to treat both federalism (understood as the relation between the national and state governments) and localism (understood as the relation among the federal, state, and local governments), as both are relevant to the issues addressed in the dissertation. The scope of what I term “localism” is set out by Richard Briffault: “[T]he legal powers of contemporary American local governments, the practical social and political ramifications of local legal power in a system characterized by wide divergences in local fiscal capabilities and needs and the ideological commitment to localism that sustains and legitimates local autonomy.” Richard Briffault, Our Localism: Part I–The Structure of Local Government Law, 90 Colum. L. Rev. 1, 2 (1990). \textit{See also} Richard Briffault, Our Localism: Part II–Localism and Legal Theory, 90 Colum. L. Rev. 346 (1990).}

The three areas to which subsidiarity and federalism can contribute, on this account, are physician-assisted suicide, federal preemption, and school finance. These issues were chosen because of their relevance to the federalism/subsidiarity issue insofar as one of the central questions in these policy debates concerns the level of government most appropriately responsible for each. The urgency of these issues and the insufficiency of the current framework within which they are discussed—despite their obvious pertinence to subsidiarity and federalism—will give rise to the theoretical treatment in Chapters One and Two of the dissertation. The first two chapters will examine and reconstruct subsidiarity in general and as incarnated in American federalism in particular. In these chapters—the theoretical backbone of the dissertation—I will attempt to offer an alternate framework for debates over what level of government is most appropriately responsible for setting law or policy on an issue.\footnote{One aspect of subsidiarity that will not be addressed is its use as a governing norm in the constitutional order of the European Union as required by Article 5 of the 1993 Maastricht Treaty, though some sources on subsidiarity in the E.U. will be relevant to the discussion. \textit{See Making Sense of Subsidiarity: How Much Centralization for Europe?} (David Begg, Jacques Cremer, Vittorio Grilli, & Jeremy Edwards eds. 1993); Ernest A. Young, Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism, 77 N.Y.U. L. Rev. 1612 (2002); Jean Schere,
Five turn to the aforementioned practical issues, not merely as an application of the theory of subsidiarity and federalism developed in Chapters One and Two but as an argument that mutually illuminates the theory of subsidiarity and federalism and the specific policy issues themselves. In the discussion, much will turn on the substantive moral judgments made in the specific context of these legal and policy debates and not merely on adherence to an abstract commitment that “small (or big) is always beautiful.” “As with other natural law principles,” Johannes Messner writes, “the application of the principle of subsidiary function is also dependent on the situation.”16 Because “natural law principles possesses a general character,” “[t]he application of all natural law principles depends on circumstances,” Messner argues, which does not imply that they are “devoid of content...because of their supposedly formal character.”17

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16 MESSNER, supra note 12, at 214.
17 Id. at 211.
CHAPTER ONE: SUBSIDIARITY IN CATHOLIC SOCIAL THOUGHT

Introduction

This opening chapter examines the principle of subsidiarity as articulated in modern Catholic social teaching. Statements of the principle have historically been terse and straightforward even if the application of subsidiarity to concrete policy issues has not. For example, the Compendium of the Social Doctrine of the Church, released in 2004 by the Pontifical Council for Justice and Peace, devotes only two pages to the principle of subsidiarity.1 The historical origins of subsidiarity are rooted in the Church’s opposition to totalitarianism and various forms of collectivism2 and a concomitant affirmation of human dignity.3 The task of this introductory chapter is to provide some focus to the discussion of subsidiarity by surveying the history of the principle in papal social teachings and its roots in Catholic political theory. The conclusions of this chapter, in turn, will inform the application of subsidiarity to American federalism in Chapter Two and to three contemporary policy debates in Chapters Three through Five.

Before turning to the treatment of subsidiarity in papal social teaching, though, it is helpful to consider certain pitfalls posed by the current debate over subsidiarity. One

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1 Compendium of the Social Doctrine of the Church (2004), 81-82. The Catechism of the Catholic Church states the principle as “[a] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions…” CATECHISM OF THE CATHOLIC CHURCH ¶ 1883 (1994).
obstacle in arriving at a precise understanding of subsidiarity is the tendency, as suggested earlier, to view the principle as one of limited government alone. As summarized by Robert Sirico of the libertarian-leaning Acton Institute, this view holds that “[t]he clear meaning of the subsidiarity principle is to limit the powers and responsibilities assumed by the higher orders of society. In nearly every occasion in which the principle has been invoked in the last one hundred years of Catholic social teaching, it is in the context of limiting the uses of power.”

The U.S. Catholic bishops’ 1986 letter on the economy, Economic Justice for All, expresses a similar view in some paragraphs of the document: “This principle [of subsidiarity] states that, in order to protect basic justice, government should undertake only those initiatives which exceed the capacities of individuals or private groups acting independently. Government should not replace or destroy smaller communities and individual initiative.”

While this “liberal” interpretation of subsidiarity is an important and enduring expression of the principle in the literature, other sources suggest a less “libertarian” aspect to subsidiarity. In the words of Quadragesimo Anno, “every social activity ought

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7 I use the terms “liberal” and “libertarian” here cautiously, for there are important differences in the conception of personhood underlying classical liberalism—with its emphasis on individual autonomy—and subsidiarity. See Jean Bethke Elshtain, Catholic Social Thought and Liberal America, in Catholicism and Liberalism, supra note 2, at 151, 159-62 (describing Catholic social thought in general and subsidiarity in particular as “begin[ning] from a fundamentally different ontology from that assumed and
of its nature to furnish help to the members of the body social, and never destroy and
absorb them.”

Joseph Komonchak notes that subsidiarity has both negative (libertarian) and positive (communitarian) aspects:

The principle of subsidiarity requires *positively* that all communities not only permit but enable and encourage individuals to exercise their own self-responsibility, and that larger communities do the same for smaller ones. It requires *negatively* that communities not deprive individuals and smaller communities of their right to exercise their self-responsibility. Intervention, in other words, is only appropriate as “helping people help themselves.”

Part of the confusion over subsidiarity—but also, perhaps, an aspect of the principle’s richness—is its combination, then, of both “libertarian” and “communitarian” elements. Progress in our understanding and application of subsidiarity will require a careful assessment of these considerations and determining when intervention or assistance (*subsidiarium*) from a higher authority is needed and when devolution of responsibility is warranted. More precisely, we will need to determine when authority is properly located at a higher level and when authority is properly recognized in the smaller community. This conclusion, in turn, will require a discussion of subsidiarity’s

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required by individualism, on the one hand, and statist collectivism, on the other” and “refus[ing] stark alternatives between individualism and collectivism”). The terms “libertarian” and “communitarian” in the discussion to follow, then, are used in a broad sense (not, except by analogy, as designating a particular political philosophical position) and merely denote different aspects of subsidiarity as a principle favoring limited government but also government intervention where appropriate.


9 Komonchak, supra note 3, at 302 (emphasis in original). *See also* Dupré, supra note 2, at 191: The principle of *subsidiarity* . . . prevents the common good from assuming an existence independent of private concerns, and thus turning into social ideology. Only a social system based on subsidiarity can avoid turning the state into either a mere legal sanction of private interests (as in nineteenth-century liberalism) or into a personification of a common good in which individual interests are not adequately represented (as in the dictatorial states of the twentieth century).
political theoretical and “anthropological” dimensions, i.e., its grounding in a conception of the person in society. Rather than as a principle only of economic efficiency or limited government, subsidiarity is best viewed as an aspect of Catholic social thought’s emphasis on the human person adequately understood.10 Subsidiarity, as will be argued during the course of this chapter, cannot be properly understood apart from an adequate appreciation of the Catholic theory of political authority, of the state, and of associational life.

The chapter will proceed chronologically through the treatment of subsidiarity in five major documents and periods: (1) Leo XIII’s doctrine of the state and nascent articulation of subsidiarity in *Rerum Novarum;*11 (2) Pius XI’s formulation in *Quadragesimo Anno* of the principle of subsidiarity and the primary influences on him;12

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11 The term “subsidiarity” does not occur in Leo’s writings, but some statements are rightly viewed as anticipations of the concept. See Pope Leo XIII, *Rerum Novarum* ¶ 52 (1891) reprinted in *The Church Speaks to the Modern World: The Social Teachings of Leo XIII* (Etienne Gilson ed., 1954): It is not right, as We have said, for either the citizen or the family to be absorbed by the State; it is proper that the individual and the family should be permitted to retain their freedom of action, so far as this is possible without jeopardizing the common good and without injuring anyone. Though the translation and paragraph numbering of the Gilson edition differ slightly from other English editions of the encyclical (most prominently, the translation of the National Catholic Welfare Conference, the forerunner to the U.S. Conference of Catholic Bishops), the care taken by Gilson in translating and annotating the text renders his edition more helpful than others.

12 The intellectual fathers of subsidiarity are usually considered to be the Bishop Wilhelm Emmanuel von Ketteler and Heinrich Pesch, while the primary figure behind *Quaragesimo Anno,* Oswald von Nell-Breuning, credited Gustav Gundlach with “first formulat[ing] this non-rational insight into a principle and g[iving] it the name under which it has since become so famous.” Komonchak, supra note 3, at 299-300 (quoting Johannes Schwarte, Gustav Gundlach, S.J. (1892-1963) (1975)). For a summary of the historical background and especially the German influences on subsidiarity, see Thomas C. Kohler, In Praise of Little Platoons, in Building the Free Society: Democracy, Capitalism, and Catholic Social Teaching 31 (George Weigel & Robert Royal eds., 1993). A thorough treatment of Ketteler’s influence on Catholic social doctrine can be found in Martin J. O’Malley, Catholic Rights Discourse in Nineteenth-Century Germany: Bishop Ketteler Protected Religious and Social Freedoms from the Equal
(3) the further development of the Catholic theory of the state and of subsidiarity in John XXIII’s *Mater et Magistra* and *Pacem in Terris*; (4) the understanding of the state and the implications for subsidiarity advanced in *Dignitatis Humanae*, the Declaration on Religious Freedom at the Second Vatican Council; and (5) the treatment of subsidiarity and its relation to solidarity in John Paul II, most especially in *Centesimus Annus*.

I. Subsidiarity in Modern Catholic Social Teaching

Preface: Exegetical Considerations

Before examining the sequence of encyclicals and papal pronouncements that form the corpus of official Catholic teaching on subsidiarity, a word about the appropriate exegetical approach toward these texts is in order. In an essay examining the historical contexts in which the popes have written their social encyclicals over the past century, John Coleman helpfully suggests four possible exegetical approaches.\(^\text{13}\) First, we can try to ascertain the mind of each encyclical’s author, so far as we can determine the actual author of a letter if not the pope himself. As Coleman points out, however, this approach is not terribly promising insofar as Oswald von Nell-Breuning is peculiar in both claiming credit for writing a social encyclical (*Quadragesimo Anno*) and in providing an

extensive account of the drafting of it.\textsuperscript{14} A second approach (which Nell-Breuning himself suggests in his essay on the drafting of \textit{Quadragesimo Anno}) would look simply to the text of the encyclical, much as textualists in other fields emphasize the plain meaning of, for example, constitutions or statutes over other sources. Coleman’s third approach “look[s] to movements, disputed questions, etc., to which the encyclical responds” and thereby arrives at an understanding of a letter’s historical context.\textsuperscript{15} Finally, the fourth (and, for Coleman, favored) approach “see[s] any encyclical in continuity with the other writings, allocutions, and actions of the papacy.”\textsuperscript{16}

I agree with Coleman that the fourth exegetical approach has the benefit of placing each encyclical within the larger framework of each pontificate’s work, though a thorough examination of each papacy is beyond the scope of this dissertation. Instead, I will adopt a synthesis among all of Coleman’s approaches, selectively reading an encyclical alongside writings of those who were directly involved in its drafting or otherwise influential, but also parsing the words of the encyclical text itself and locating an encyclical amid a larger framework of the disputes, writings, and events of the relevant period.

In each of the succeeding sections of the chapter, I will discuss the treatment of subsidiarity in the major documents of four popes (Leo XIII, Pius XI, John XXIII, and John Paul II) and one council (Vatican II), with attention paid, where appropriate, to the

\textsuperscript{14} Oswald von Nell-Breuning, S.J., \textit{The Drafting of Quadragesimo Anno}, in \textit{READINGS IN MORAL THEOLOGY NO. 5, supra \textit{note 13}, at 60-68.}
\textsuperscript{15} Coleman, \textit{supra \textit{note 13}, at 179.}
\textsuperscript{16} \textit{Id.} at 181.
work of influential figures in the development of the principle of subsidiarity as reflected in these major documents.

A. Leo XIII

Elected pope in 1878 at the age of 67, Leo XIII is widely acknowledged to be the progenitor of modern Catholic social teaching, even if a significant body of social teaching preceded his pontificate. Though he issued at least twelve documents that could be considered to comprise his social teaching, Leo’s 1891 encyclical *Rerum Novarum* is the most complete and enduring expression of his social theory. *Rerum Novarum* contains lengthy sections on topics that will recur in papal social encyclicals for the next century and that bear on subsidiarity, such as private property, the Church’s hostility toward liberalism and socialism, the rights of workers, and the role of the Church in the social order. It is, however, Leo’s nascent expression of the principle of subsidiarity throughout *Rerum Novarum* that we will explore here. As noted by John Courtney Murray, further elaboration of the principle of subsidiarity and related concepts

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“are substantially in the line set by Leo XIII when he defined the relation of government to the social and economic order.”

Leo ushered in the era of the “Leonine synthesis” in Catholic social doctrine, which “reached its creative high-water mark in the 1930s between the two world wars, but its effects were consolidated at the Second Vatican Council (1962-65).” Leo’s writing on social matters was broadly influenced by the commitment to Thomism advanced in his 1879 encyclical Aeterni Patris. This allegiance to Thomism was itself the product of a contingent philosophical history and the influence of a small circle of nineteenth century Jesuit Thomists, a history recounted in recent years by Alasdair MacIntyre and Gerald McCool. Indeed, the Italian Jesuit Thomist Luigi Taparelli D’Azeglio is arguably the defining influence on the early formulation of what would become the principle of subsidiarity and on much else in Leo’s reappropriation of Thomism.

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20 Russell Hittinger, Introduction to Modern Catholicism, in THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS, AND HUMAN NATURE, 3, 13 (John Witte, Jr. & Frank S. Alexander eds., 2006).
1.  **Rerum Novarum**

*Rerum Novarum*’s theory of subsidiarity—to the extent such a distinct theory can be said to exist—is detailed amid the encyclical’s discussion of four discrete topics: private property, the family, the role of the state, and the significance of associations. The encyclical begins with a famous (and controversial) discussion of private property. In his eagerness to distance the Church from various forms of socialism, some argue that Leo implicitly adopted a modern, Lockean theory of private property that sits uneasily with the Church’s historical teaching on private property.\(^{23}\) Whatever the merits of that argument, themes advanced in the paragraphs of *Rerum Novarum* on private property will mark future discussions of subsidiarity and do not turn, for the most part, on the theory of private property advanced in the letter. Nonetheless, the early paragraphs of *Rerum Novarum* set the church’s social teaching down on one side or another of several contentious issues in modern political theory. Leo asserts the link between human nature and private property at ¶ 6, but this argument is part of a larger argument about human nature and the foundations of politics. Leo, then, stands in the long line of Catholic—and particularly Thomist—argument regarding natural law and moral knowledge.

The argument of ¶¶ 7-17 begins with an assertion about the proper relation of the person to the state: “Man precedes the State [*respublica*], and possesses, prior to the

formation of any State [civitas], the right of providing for the sustenance of his body.”24 This assertion about the person and the state leads Leo to conclude, by way of a historical argument, that private property is “pre-eminently in conformity with human nature” (¶ 11). Similarly, the family has “rights and duties which are prior to those of the community, and founded more immediately in nature” (¶ 13).25 This argument regarding private property and the family builds to Leo’s rejection of “the main tenet of socialism, community goods” as “directly contrary to the natural rights of mankind” (¶ 15).

It might be difficult at first glance to see the relevance of this discussion of private property, the family, and socialism to subsidiarity, but Leo lays the groundwork for such an argument in ¶ 17 with his claim that it is “impossible to reduce civil society to one dead level.” This argument will, however, turn not toward a discussion of levels of civil society and the apportionment of responsibility among them—as one would expect were subsidiarity the principal subject—but instead to the topic of natural differences among human capacities and the inequality that results. The next several paragraphs of the encyclical take up the appropriate response to the plight of the poor and the responsibility of the state and civil society to alleviate the condition of the poor, all while taking care not to frame the discussion in terms of class struggle (¶ 19-30).

This aspect of social harmony is on display, for example, in ¶ 19, where Leo writes that “[j]ust as the symmetry of the human frame is the result of the suitable

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24 RERUM NOVARUM, supra note 11, ¶ 7.

25 See also id. ¶ 12, in which Leo writes of “the family, the ‘society’ of a man’s house—a society very small, one must admit, but none the less a true society, and one older than any State. Consequently, it has rights and duties peculiar to itself which are quite independent of the State.”
arrangement of the different parts of the body, so in a State it is ordained by nature that these two classes [the ‘wealthy’ and ‘working men’] should dwell in harmony and agreement.” But lest this assertion of irreducible harmony among the classes in society lead to neglect of the poor, Leo moves to a set of exhortations regarding the church’s charitable work. “The Church…intervenes directly in behalf of the poor,” he writes, “by setting on foot and maintaining many associations which she knows to be efficient for the relief of poverty” (¶ 29).26

One of the principal questions posed by the contemporary debate over subsidiarity—when is intervention by a higher level of civil authority in the affairs of a local community warranted?—is expressly addressed only once in Rerum Novarum, in ¶ 36. Paragraphs 31 and following treat the proper role of the state, and ¶ 35 asserts that the state “must not absorb the individual or the family; both should be allowed free and untrammeled action so far as is consistent with the common good and the interests of others.” Paragraph 36 then proceeds to ask when the state must intervene. The clearest requirement for such intervention, according to Leo, is where it is necessary for “peace and good order”27 (anticipating the terms of state intervention in matters of religious freedom advanced in Dignitatis Humanae). But Leo goes on to argue that “the limits [of the intervention of public authority] must be determined by the nature of the occasion

26 The Church’s own charitable work is a theme running throughout papal social teaching, even where the tradition is at pains to emphasize the responsibility of the state and the wider society. See POPE BENEDICT XVI, DEUS CARITAS EST (2005) ¶¶ 31-39.
27 The examples of what constitutes “peace and good order” illustrate that Leo has in mind more than mere avoidance of civil war or warding off the Hobbesian state, as when he writes “that all things should be carried on in accordance with God’s laws and those of nature” and “that the discipline of family life should be observed and that religion should be obeyed.” RERUM NOVARUM, supra note 11, ¶ 36.
which calls for the law’s interference—the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief” (¶ 36).

The paragraphs of *Rerum Novarum* that arguably bear most directly on subsidiarity are Leo’s short but suggestive discussion of civil society and associations at ¶ 51 and following:

These lesser societies and the larger society differ in many respects, because their immediate purpose and aim is different. Civil society exists for the common good, and hence is concerned with the interests of all in general, albeit with individual interests also in their due place and degree….Private societies, then, although they exist within the body politic, and are severally part of the commonwealth, cannot nevertheless be absolutely, and as such, prohibited by public authority. For, to enter into a “society” of this kind is the natural right of man; and the State has for its office to protect natural rights, not to destroy them; and, if it forbid its citizens to form associations, it contradicts the very principle of its own existence, for both they and it exist in virtue of the like principle, namely, the natural tendency of man to dwell in society. (¶ 51).

Leo immediately qualifies this assertion of associational rights with the claim that “[t]here are occasions, doubtless, when it is fitting that the law should intervene to prevent certain associations, as when men join together for purposes which are evidently bad, unlawful, or dangerous to the State” (¶ 52).

With this spare statement of the limits of state intervention, Leo laid the groundwork for the elaboration of subsidiarity in later papal documents. Reconstructing Leo’s discussion of subsidiarity in *Rerum Novarum*, we can identify three main themes running through the paragraphs of *Rerum Novarum* that bear on subsidiarity: (1) a rejection of socialism and an inchoate preference for the limited state; (2) a defense of private property; and (3) an extended treatment of the role of the family. We can already
see in this, the first and perhaps most important document in the papal social tradition, subsidiarity being invoked as an aspect of the Church’s rejection of totalitarianism, which, in turn, was originally an argument directed toward socialism and its rejection of private property rights. Following the criticism of socialism by way of a defense of private property, the encyclical then turns to a treatment of civil society and the role of the state. In summary, Leo’s argument is that (1) differences and inequalities are based on differing capacities, which gives rise to the condition of the poor; (2) assistance to the poor requires the intervention of the state, just as the state otherwise intervenes appropriately for peace and good order; and (3) associations of workers and, more generally, public and private societies are a means of complementing the role of the state.

2. *Aeterni Patris* and *Immortale Dei*

Though *Rerum Novarum* is, by a considerable margin, the document from the reign of Leo with which most are familiar, it is important to note the setting of *Rerum Novarum* among the other major encyclicals of Leo’s pontificate. Two warrant particular attention for our purposes: Leo’s 1879 encyclical on Christian philosophy, *Aeterni Patris*, and his 1885 letter on the Christian constitution of states, *Immortale Dei*.

Reading *Rerum Novarum* apart from *Aeterni Patris*, it is difficult to appreciate the place of Leo’s (and his successors’) social teaching within the Catholic intellectual tradition generally and the Thomist tradition more specifically. Even if it is difficult to trace each turn in twentieth century social teaching to its Thomist roots, Thomism is both a methodological and substantive component of Catholic social teaching, including the
principle of subsidiarity. Methodologically, the Thomism of *Aeterni Patris* supplied a resource for criticism of modern rationalism, as argued by Alasdair MacIntyre:

*Aeterni Patris* summoned its readers to renewal of an understanding of intellectual enquiry as the continuation of a specific type of tradition, that which achieved definitive expression in the writings of Aquinas, one the appropriation of which could not only provide the resources for radical criticism of the conception of rationality dominant in nineteenth-century modernity…but also preserve and justify the canonical status of the Bible as distinct from, yet hegemonic over, all secular enquiry.

Substantively, the legacy of Thomism is apparent in the prevalence of natural law theory in Catholic social teaching. In contrast to, for example, the resort to scriptural metaphors often encountered in Protestant social ethics (such as the American Social Gospel Movement of the early twentieth century), Catholic social teaching has frequently relied on philosophical forms of argument that do not presuppose the principles of Christian revelation.

The foregoing discussion of *Rerum Novarum* may mislead the reader into believing that document was an encyclical on church and state. To be clear, *Rerum Novarum* was not a document on church and state as such but rather was addressed to economic matters, particularly the relationship of capital and labor. A shorter and more explicit statement of Leo’s views on church and state is to be found six years before *Rerum Novarum* in his encyclical *Immortale Dei*. There one finds the initial articulations of a broadly Thomist understanding of the state and society:

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28 For a recent attempt to recover the relevance of Aquinas to subsidiarity, see Nicholas Aroney, *Subsidiarity, Federalism, and the Best Constitution: Thomas Aquinas on City, Province and Empire*, 26 LAW & PHIL. 161 (2007).

29 **MACINTYRE, supra** note 21, at 25.
Man’s natural instinct moves him to live in civil society, for he cannot, if dwelling apart, provide himself with the necessary requirements of life, nor procure the means of developing his mental and moral faculties. Hence, it is divinely ordained that he should lead his life—be it family, or civil—with his fellow men, amongst whom alone his several wants can be adequately supplied. But, as no society can hold together unless some one be over all, directing all to strive earnestly for the common good, every body politic must have a ruling authority, and this authority, no less than society itself, has its source in nature, and has, consequently, God for its Author.30

Immortale Dei’s purpose, however, was not to contribute to an overall Catholic theory of the state and the relationship among social forms, as would be most relevant to a treatment of subsidiarity. Instead and as noted by John Courtney Murray in his seminal articles on Leo’s doctrine of church and state, the predominant concern in Immortale Dei and related encyclicals was the problem of religious freedom—religious freedom in the modern state, the role of conscience with respect to the state, and the church’s role in the modern state.31

3. Luigi Taparelli D’Azeglio

Luigi Taparelli (1793-1862) taught the future Leo XIII at the Collegio Romano in the 1820s and was a decisive influence on Leonine social doctrine and on Leo’s adoption of Thomism.32 Appreciation of Taparelli’s significance is hindered in the Anglophone world by the lack of any English translations of his work and only passing attention to

30 POPE LEO XIII, IMMORTALE DEI ¶ 3 (1885).
32 In much of the following discussion, I am indebted to Thomas C. Behr’s Luigi Taparelli and the Nineteenth-Century Neo-Scholastic ‘Revolution’ in Natural Law and Catholic Social Sciences. See Behr, ‘Revolution’, supra note 22.
Taparelli in the work of historians of nineteenth century theology such as Gerald McCool. In Heinrich Rommen’s minor classic *The State in Catholic Thought*, for example, Taparelli is mentioned only three times, two of which are citations to his opposition to universal suffrage. From the important recent dissertation and subsequent writings of historian Thomas Behr, however, we can begin to understand the influence of Taparelli on the initial stages of modern Catholic social teaching.

Taparelli was an important part of the nineteenth century Thomist revival that culminated in *Aeterni Patris*. He was also a regular contributor to the Jesuit periodical *Civiltà Cattolica* for several years and is credited with developing the concept of “social justice.” Taparelli’s most significant work was *Theoretical Treatise on Natural Right Based on Fact* (*Saggio teoretico di diritto naturale appoggiato sul fatto*), which he compiled in response to the lack of any textbook on natural law that was free, in his view, from misleading doctrines. As summarized by Thomas Behr, “[h]is thoroughly Thomistic intention was to merge a deductive, theoretical approach with an inductive histoico-sociological approach in a dialectical method that would form the basis of a modern science of society and politics.”

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33 Heinrich A. Rommen, *The State in Catholic Thought* 110, 437, 458 (1945). In his book *Social Catholicism in Europe: From the Onset of Industrialization to the First World War*, Paul Misner covers Taparelli’s contribution to Leonine social doctrine in two pages, though Misner calls attention to the influence of Taparelli and to the Jesuit periodical *Civiltà cattolica* with which Taparelli was closely associated. See Misner, supra note 17.


35 Pius XI cites and commends *Saggio teoretico di diritto naturale* in a footnote to his encyclical *Divini Illius Magistri* as “a work never sufficiently praised and recommended to University students.” Pope Pius XI, *Divini Illius Magistri* ¶ 50 n.33 (1929).

36 Behr, Development, supra note 22, at 102-03.
Taparelli’s most important contribution to Catholic social doctrine was his development of the basic framework for later discussions of the principle of subsidiarity. As Behr argues, Taparelli used a series of metaphors derived from grammar to illustrate the concept of “Hypotactic Right,” “[t]he natural and just relationships between the myriad of associations that human beings tend to form, ranging from the family to the State and beyond.”³⁷ Behr explains that Taparelli borrowed the term “hypotactic” from the rules of Greek grammar governing “the modalities of coordination between clauses, specifically, the arrangement of inferior clauses within the functioning of the whole sentence.”³⁸ “Hypotactic Right” (dritto ipotattico), then, “convey[s] the rights of social groupings, within their just relationships, organized toward the common good.”³⁹ Behr concludes:

The principles [Taparelli] elaborates in this regard have found their place, though indirectly and imperfectly, in Catholic social doctrine, known as the “principle of subsidiarity,” first explicitly used by Pius XI in the social encyclical, Quadragesimo Anno. Indeed, the Greek hypo taxis can be rendered directly into Latin as sub sedeo. The Latin expression subsidia applied, then, not just to mean “help” but in the first instance to auxiliary troops within the Roman legion, as they “sat below” ready in reserve to support the battle. The “help” in this context is from the bottom up, not from the top down, as the inferior and mediating groups all participate in achieving the common good of the more perfect association. While Taparelli uses the legion as an analogy for society in various contexts, the rights and obligations derived from the laws of subsidiarity vary according to a host of historical considerations and competing rights and obligations.⁴₀

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³⁷ Id. at 104.
³⁸ Id. at 105.
³⁹ Id.
⁴₀ Id.
As the principle of subsidiarity came to be expressed in the social thought of Pius XI and later popes, we will see that some of the original inspiration for the principle in Taparelli’s and Leo’s Thomism came to be forgotten or neglected. For example, Taparelli’s articulation of Hypotactic Right is clearly not a principle of devolution, as the principle of subsidiarity is so often understood in later Catholic social teaching. Rather, the principle of subsidiarity is, at least as originally articulated in the nineteenth century Thomists, a principle of right social ordering toward the common good. As will be argued in later chapters, however, the variation among the “rights and obligations derived from the laws of subsidiarity” does indeed depend on contingent historical circumstances when we would seek to employ subsidiarity in navigating contemporary policy questions.

B. Pius XI

Pius XI deepened and broadened the themes that gave rise to the principle of subsidiarity and provided the principle its name. Rather than address concrete examples—family, workers’ associations, relief of the poor—Pius speaks of abstract “higher” and “lower” orders. As a young Milanese seminary student, Achille Ratti, the future Pius XI, sat in an audience listening to Leo lecture on the importance of philosophical education. Ratti was fresh from obtaining doctorates in theology, philosophy, and canon law, and returned to Milan, eventually becoming Cardinal Archbishop of the Ambrosian see in 1921. A year later and upon the death of Benedict XV, Achille Ratti was elected pope and took the name Pius XI, reigning from 1922 to 1939, covering the period from the wake of World War I to the eve of World War II. During those seventeen years, it seems a productive day did not pass for Pius unless he
issued a condemnation of one sort or another—among others, Communism, socialism, fascism, atheism, artificial contraception, coeducation, and persecution of the Mexican and German churches were condemned by Pius. Racism and anti-Semitism were also due to meet his wrath in encyclicals that were being drafted at the time of Pius’ death.41

The focus of our inquiry here is Pius XI’s 1931 encyclical *Quadragesimo Anno*, his most famous encyclical, passages of which are the *locus classicus* for any discussion of the principle of subsidiarity. Our examination of *Quadragesimo Anno* will proceed in three parts: first, we will examine the text of the letter itself, particularly those sections pertaining to subsidiarity; second, we will place *Quadragesimo Anno* alongside another encyclical of Pius’, *Divini Illius Magistri* (On the Christian Education of Youth); and third, we will consider *Quadragesimo Anno* in light of commentary upon it by its acknowledged author, Oswald von Nell-Breuning, particularly in his book, *Reorganization of Social Economy: The Social Encyclical Developed and Explained*.

1. *Quadragesimo Anno*

*Quadragesimo Anno* is addressed to “the social question,” the problem of human relations. The early paragraphs of the encyclical recount the nineteenth century historical context for *Rerum Novarum* (¶¶ 3-9) and present a broad summary of *Rerum Novarum*’s teaching (¶¶ 10-14). Pius then seeks to summarize—optimistically—the accomplishments of *Rerum Novarum* over the forty years since the letter was issued. After a brief note on the letter’s effect on the Church, Pius XI argues that *Rerum

Novarum has affected civil authority by (re)enforcing a view of the state as not a mere
guardian of law and good order but also as the caretaker of the common good by
watching over the community and its parts. This portion of the encyclical concludes with
a discussion of Rerum Novarum’s lessons for associations and argues that “the individual
members of the association secure, as far as possible, an increase in the goods of the
body, of soul, and of property.”42

Paragraphs 78-80 of Quadragesimo Anno are the classic text on subsidiarity.
Paragraph 78 offers a diagnosis of the ills wrought by individualism, which has
deracinated social life and left the individual “alone” with the state: “[B]ecause things
have come to such a pass through the evil of what we have termed ‘individualism’ that,
following upon the overthrow and near extinction of that rich social life which was once
highly developed through associations of various kinds, there remain virtually only
individuals and the State” (¶ 78).43 Pius argues that the intervention of the state is not
expected to achieve the common good, and he writes of not expecting “universal well-
being…from its [the state’s] activity.” He further argues that the state has assumed too
many tasks and thereby become over-burdened, which “is to the great harm of the State
itself; for, with a structure of social governance lost, and with the taking over of all the
burdens which the wrecked associations once bore, the State has been overwhelmed and
crushed by almost infinite tasks and duties” (¶ 78).

42 QUADRAGESIMO ANNO, supra note 8, ¶ 32.

43 Pius XI’s argument here anticipates the work of Robert Putnam on the decline of associational
life. See ROBERT PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY
(2000).
In subtle contrast to Leo’s concern in *Rerum Novarum* that the market not replace the state in the coordination of economic life, Pius’ concern in *Quadragesimo Anno* is directed more at relieving the state of the crushing burden of “infinite tasks” and the accumulation of too much authority in the state as a result of the decline of associational life. Pius seeks to remedy this over-burdening of the state with an assertion of the principle of “subsidiary function” as classically expressed in ¶ 79 of *Quadragesimo Anno*:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.44

The discussion of subsidiarity—limited to just three paragraphs in an encyclical of 149 paragraphs—concludes with Pius exhorting the central authority of states to leave subordinate associations to handle their own affairs and thereby improve the condition of the polity:

The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function,” the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.45

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44 QUADRAGESIMO ANNO, supra note 8, ¶ 79.
45 Id. at ¶ 80.
These crucial paragraphs on subsidiarity belie the interpretation of Quadragesimo Anno as an unduly corporatist or collectivist document that provided license to overreaching state authority in the 1930s. Indeed, the principle of subsidiarity in Quadragesimo Anno serves as the corrective to the corporatist model of state intervention in economic affairs that is arguably advanced in the earlier paragraphs of the encyclical. It is difficult to overstate the import of Quadragesimo Anno for all later discussion of subsidiarity. Later ecclesial authorities will cite ¶ 79 repeatedly as the clearest articulation of subsidiarity, just as the language of assignment of authority, where proper, to the “lesser and subordinate” community will influence the understanding of subsidiarity among political theorists.46

2. Divini Illius Magistri

Written in 1929 amid the explosive growth of parochial education in the United States, Divini Illius Magistri is important to our treatment of subsidiarity for at least two reasons. First, it is a rare encyclical addressed to all of the faithful and not merely to the bishops or clergy. Second, and of particular note for an American audience, it is almost certainly the only papal encyclical to cite authoritatively a decision of the United States Supreme Court.47 The encyclical is, then, important for this dissertation for purposes of

46 See, e.g., ROMMEN, supra note 33, at 301 (“All organizational forms have their intrinsic values and their objective ends, the upper form does not make the lower one superfluous; it must never abolish it, nor may it take over its functions and purposes.”).

47 DIVINI ILLIUS MAGISTRI, ¶ 33, ¶ 37 n.28 (citing Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925)). For a discussion of Pierce and subsidiarity, see Richard W. Garnett, Taking Pierce Seriously: The Family, Religious Education, and Harm to Children, 76 NOTRE DAME L. REV. 109, 144-45 (2000). Perhaps Pierce 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
the discussion of school finance in Chapter Five. More broadly, however, it provides another, complementary view of the social theory that Pius presented in *Quadragesimo Anno*.

Pius begins by arguing for the essentially social character of education, which is based in the importance of the family in the social order (¶ 9). The encyclical then distinguishes between two “societies,” the imperfect society of the family and the perfect society of civil society:

> In the first place comes the family, instituted directly by God for its peculiar purpose, the generation and formation of offspring; for this reason it has priority of nature and therefore of rights over civil society. Nevertheless, the family is an imperfect society, since it has not in itself all the means for its own complete development; whereas civil society is a perfect society, having in itself all the means for its peculiar end, which is the temporal well-being of the community; and so, in this respect, that is, in view of the common good, it has pre-eminence over the family, which finds its own suitable temporal perfection precisely in civil society. (¶ 10).

A third society, the Church, is, according to Pius, a supernatural society that aims at the end of eternal salvation (¶ 10).

Education, the encyclical argues, belongs to all three societies: the family, civil society, and the Church “in due proportion, corresponding…to the co-ordination of their respecting ends” (¶ 12). The state’s responsibility is to safeguard the right of the family to oversee the education of children, particularly in matters of religious education (¶ 39). Anticipating the later expressions of subsidiarity’s encouragement of the “higher”

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...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.”
authority to aid the “lower” authority when necessary, Pius also discusses the role of the state in protecting children where parental authority is improperly exercised. “It also belongs to the State to protect the rights of the child itself,” he writes, “when the parents are found wanting either physically or morally in this respect, whether by default, incapacity or misconduct, since, as has been shown, their right to educate is not an absolute and despotic one” (¶ 39). In such cases, the state “supplies deficiencies” in the society of the family, always with a view toward the common good.

These exceptional interventions aside, the state’s primary role with respect to education is to “encourage[]” and “assist[]” “the initiative and activity of the Church and the family, whose successes in this field have been clearly demonstrated by history and experience” (¶ 40). The state supplements the work of other societies when they are unable to achieve the ends of education, for the state “more than any other society is provided with the means put at its disposal for the needs of all” (¶ 40). Of particular import for the principle of subsidiarity is Pius’ insistence that the state “should respect the inherent rights of the Church and of the family concerning Christian education, and moreover have regard for distributive justice” (¶ 42). Among the possible violations of such a right is a state’s insistence that children be educated in public schools. Such a monopoly of education is, according to Pius, “unjust and unlawful” insofar as it “forces families to make use of government schools, contrary to the dictates of their Christian conscience, or contrary even to their legitimate preferences” (¶ 42).

Two years before Qua
dragesimo Anno, then, we see that Pius’ social thought has already advanced an understanding of the social order that reflects many of Leo’s neo-
Thomist principles and will echo in later papal social encyclicals. In particular, Pius adopts Taparelli’s insistence on the historical and contingent application of the natural law to circumstances and Leo’s view of the family as a primordial society within society. Pius goes beyond Leo’s late-nineteenth century scholasticism, however, in his willingness to address more fully the limits of the state and to develop a theory of the state apart from and beyond the debates over religious freedom that will continue to rage in Catholic thought for another three decades until the Second Vatican Council.

3. Oswald von Nell-Breuning

Oswald von Nell-Breuning, S.J. (1890-1991) was a follower of the German Jesuit economist Heinrich Pesch. Nell-Breuning wrote his doctoral dissertation on the morality of stock markets, taught for most of his career in Frankfurt at the Hochschule Sankt Georgen and the Goethe University, and is widely acknowledged to be the primary drafter of Quadragesimo Anno. Reorganization of Social Economy is a study guide of sorts, reprinting sections of Quadragesimo Anno and then commenting on the text of the encyclical. In his discussion of the Leonine doctrine of the state, Nell-Breuning observes that Pius, while following Leo’s basic doctrine, “is far from overrating the state’s possibilities.” Instead, “[t]he

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50 REORGANIZATION OF SOCIAL ECONOMY, supra note 51, at 201.
reason for beginning his discussion [of the reconstruction of the social order] with the state is, characteristically enough, not the intention of having the state assume new responsibilities, but, on the contrary, to demand that it refrain from activities into which it has intruded or, in part, been forced.”^51

In response to this crisis of the state, Nell-Breuning argues that Pius diagnosed “an offense against the principle of all social life.”^52 According to Nell-Breuning, this principle is the “famous principle of Subsidiarity or Social Activities” or “the principle of Subsidiarity of Associations, a fundamental principle of Christian social doctrine which renders it essentially different from every collectivistic and one-sidedly exaggerated universalistic social philosophy.”^53 Recognizing the weight of the scholastic tradition within which the encyclical is placed, Nell-Breuning attempts to ground the principle of subsidiarity in Thomism by way of an extended discussion of “whole” and “parts,” of “society” and the “individual.” According to Nell-Breuning, the key claim in the Thomist tradition and now reflected in subsidiarity is that the person is both an individual but also social, and “we proceed from the individual and the society at the same time.”^54

At the conclusion of his brief treatment of subsidiarity, Nell-Breuning himself moves beyond Pius and anticipates the writings on subsidiarity of John XXIII in at least two respects. First, Nell-Breuning argues that subsidiarity is essential for the protection of rights, a view we encountered briefly in Divini Illius Magistri but not otherwise readily

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^51 Id.
^52 Id. at 206.
^53 Id.
^54 Id. at 206-07 (emphasis in original).
associated with Pius XI. Failing to recognize “the principle of subsidiarity of associations” leads, according to Nell-Breuning, to either individualism or collectivism, both of which “are contrary to reality” and lead to a “reversal of social order.” Second, in contrast to Pius’ concerns about over-reaching state authority and totalitarianism, Nell-Breuning is willing to allow that subsidiarity is vital for the rehabilitation of state authority and creates the conditions for state intervention to secure the common good where necessary. Indeed, Nell-Breuning argues that by restricting state authority to the “supreme governing of communities,” such “moderation increases esteem and prestige” with respect to political authority.

C. John XXIII

By moving directly from Pius XI to John XXIII, I do not mean to diminish the pontificate of Pius XII (1939-1958), surely one of the dominant figures in twentieth century Catholicism. But Pius XII, unlike his immediate predecessor and his successors, never composed a major social encyclical. His reign was, of course, dominated by World War II and its aftermath, and his famous Christmas addresses contain a masterful if “constrained and restricted repetition of some central values of the Catholic tradition of social thought, values such as the importance of maintaining the moral character of the state.” Pius XII’s pontificate was also influential in developing the Catholic theory of the state in central respects, including in its initial formulation of the question of

55 Id. at 208.
56 Id. at 209.
Catholicism and democracy, even if there is little in Pius XII’s writings that can be accounted a direct contribution to the church’s teaching on subsidiarity.\(^{58}\)

1. *Mater et Magistra*

In a volume devoted to a consideration of John XXIII’s *Mater et Magistra* (and a sequel to an earlier volume that traced the major themes of Catholic social thought from Leo XIII to Pius XII), Jean-Yves Calvez notes that the “first new striking aspect in the thought of John XXIII” was a “more frequent and more important intervention of the State” than found in the earlier papal social tradition.\(^{59}\) Indeed, subsidiarity is invoked in *Mater et Magistra* primarily to argue for the state’s intervention in economic affairs. “[T]he civil power must also have a hand in the economy…,” writes John XXIII, “[a]nd in this work of directing, stimulating, co-ordinating, supplying and integrating, its guiding principle must be the ‘principle of subsidiary function’ formulated by Pius XI in *Quadragesimo Anno’.”\(^{60}\) Later, John XXIII cites subsidiarity as a cautionary principle against state ownership of property and interference with private enterprise, such that “the State and other agencies of public law must not extend their ownership beyond what is clearly required by considerations of the common good properly understood” (¶ 117) and “public authority must encourage and assist private enterprise, entrusting to it, wherever possible, the continuation of economic development” (¶ 152).

\(^{58}\) *Id.* at 181-83.


\(^{60}\) POPE JOHN XXIII, MATER ET MAGISTRA ¶¶ 52-53 (1961).
Also important is *Mater et Magistra*’s discussion of socialization and the role the concept plays in the social tradition’s understanding of the role of the state. “[O]ne of the principal characteristics which seem to be typical of our age is an increase in social relationships,” writes John XXIII, “in those mutual ties, that is, which grow daily more numerous and which have led to the introduction of many and varied forms of associations in the lives and activities of citizens, and to their acceptance within our legal framework” (¶ 59). Rather than a depersonalizing threat, John XXIII sees socialization as offering the potential for the fulfillment of human rights and international cooperation:

[T]his sort of development in social relationships brings many advantages in its train. It makes it possible for the individual to exercise many of his personal rights, especially those which we call economic and social and which pertain to the necessities of life, health care, education on a more extensive and improved basis, a more thorough professional training, housing, work, and suitable leisure and recreation. (¶ 61).

From these texts, Calvez draws the lesson that John XXIII set out to “formulate the Church’s doctrine” with respect to state intervention “in calmer and less belligerent tones.”61 If Leo XIII was at pains to “put upon a solid footing…the government’s right to intervene in economic and social questions,” Pius XI posed “the question of restraining the momentum of State control in full development.”62 In *Mater et Magistra*, though, we see a strong assertion of subsidiarity as more than merely a principle of limitation or devolution alone:

To a person who views the principle of subsidiarity as no more than a principle of limitation, it may seem strange to hear John XXIII declare that “State intervention

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61 CALVEZ, supra note 59, at 48.
62 Id.
…relies upon (innititur) the principle of subsidiarity.” There will be no little surprise simply because such a person has not sufficiently understood that within the very action of intervention is contained its limitation.63

Calvez concludes by noting that, in Mater et Magistra, “the application of the principle of subsidiarity in the thinking of John XXIII is not so much a question of delimiting certain areas which could in part lie outside any action by the State, as it is a matter of the way in which the State intervenes.”64

2. Pacem in Terris

Pacem in Terris is, as Russell Hittinger notes, nothing less than “a compendium of twentieth-century Catholic social, legal, and political thought.”65 Few, if any, documents in the papal encyclical tradition present as thorough and detailed a view of the Church’s teaching on the social order. The document ranges so broadly, however, that its treatment of subsidiarity is limited to just two places, even if the discussion of, for example, human rights is not easily read apart from the Catholic doctrine of the state to which the principle of subsidiarity is a major component. The first mention of subsidiarity occurs in the encyclical’s treatment of the juridical order. John XXIII counsels legislators that “[t]he good order of society also requires that individuals and subsidiary groups within the State be effectively protected by law in the affirmation of their rights and the performance of their duties, both in their relations with each other and with government officials.”66

63 Id. at 49 (emphasis in original).
64 Id. at 50 (emphasis in original).
65 Hittinger, supra note 20, at 23.
66 POPE JOHN XXIII, PACEM IN TERRIS ¶ 169 (1963).
Were that the only mention of subsidiarity in the document, it would hardly be worthy of note as a contribution to the church’s teaching on subsidiarity. But in a later section, John XXIII develops a remarkable view of subsidiarity and its relation to the international order. The encyclical moves from a consideration of economic and political matters in nation-states to an argument about the role of political authority in the global community. “The same principle of subsidiarity which governs the relations between public authorities and individuals, families and intermediate societies in a single State,” he writes, “must also apply to the relations between the public authority of the world community and the public authorities of each political community” (¶ 140). Recall that the initial articulation of the principle of subsidiarity in *Quadragesimo Anno* held out the possibility of intervention in the matters of the lower association but did so within the framework of the state and subsidiary associations. In *Pacem in Terris*, John XXIII argues that there are “problems which, because of their extreme gravity, vastness and urgency, must be considered too difficult for the rulers of individual States to solve with any degree of success” and thereby require the help of international authorities to resolve (¶ 140). The potentially far-reaching implications of this view are muted somewhat, however, by the immediate qualification that “it is no part of the duty of universal authority to limit the sphere of action of the public authority of individual States, or to arrogate any of their functions to itself” (¶ 141). “On the contrary,” John XXIII concludes, “its essential purpose is to create world conditions in which the public authorities of each nation, its citizens and intermediate groups, can carry out their tasks, fulfill their duties and claim their rights with greater security” (¶ 141).
During John XXIII’s short but influential pontificate, we see two developments in Catholic social teaching with respect to subsidiarity. First, the ambivalence regarding state intervention that periodically marked the articulation of subsidiarity amid fears of totalitarianism earlier in the twentieth century was replaced by a much stronger insistence on the importance of state intervention where appropriate, even if limited by other considerations. Second, John XXIII expanded the teachings of Pius XII regarding the global order and its role in securing social justice and invoked subsidiarity to defend the intervention, where appropriate, of international authority in the affairs of states.

D. Vatican II

1. *Gaudium et Spes* and *Dignitatis Humanae*

It may seem unusual to place *Gaudium et Spes*, the Second Vatican Council’s Pastoral Constitution on the Church in the Modern World, and *Dignitatis Humanae*, the Declaration on Religious Freedom, alongside papal social encyclicals that take up the principle of subsidiarity and other themes in Catholic social teaching more directly. By way of illustration, the leading collection of Catholic social teaching documents, edited by David O’Brien and Thomas Shannon for Orbis Press, does not even include *Dignitatis Humanae*.\(^\text{67}\) I include *Dignitatis Humanae* among the major statements of the Catholic understanding of subsidiarity, however, on account of its signal contribution to the

Catholic doctrine of the state and the influence on the document of John Courtney Murray, S.J.68

First, a brief word on Gaudium et Spes. While primarily concerned with an assessment of the church’s place in modernity, Gaudium et Spes includes substantial discussions of political authority and the person. The Constitution echoes John XXIII on socialization:

Among those social ties which man needs for his development some, like the family and political community, relate with greater immediacy to his innermost nature; others originate rather from his free decision. In our era, for various reasons, reciprocal ties and mutual dependencies increase day by day and give rise to a variety of associations and organizations, both public and private. This development, which is called socialization, while certainly not without its dangers, brings with it many advantages with respect to consolidating and increasing the qualities of the human person, and safeguarding his rights.69

In two additional places, Gaudium et Spes sounds the theme of subsidiarity. In its discussion of interdependence and the common good, Gaudium et Spes states that “[e]very social group must take account of the needs and legitimate aspirations of other groups, and even of the general welfare of the entire human family.”70 Finally, Gaudium et Spes echoes John XXIII in Pacem in Terris on subsidiarity and the role of international organizations:

It is the role of the international community to coordinate and promote development, but in such a way that the resources earmarked for this purpose will be allocated as effectively as possible, and with complete equity. It is likewise this

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68 For an extensive treatment of the debate over the Declaration at the Council, see RICHARD J. REGAN, CONFLICT AND CONSENSUS: RELIGIOUS FREEDOM AND THE SECOND VATICAN COUNCIL (1967). A summary of the subsequent reception of Dignitatis Humanae in the Church is provided by HERMINIO RICO, JOHN PAUL II AND THE LEGACY OF DIGNITATIS HUMANAE (2002).
69 GAUDIUM ET SPES ¶ 5 (1965).
70 Id. ¶ 26.
community’s duty, with due regard for the principle of subsidiarity, so to regulate economic relations throughout the world that these will be carried out in accordance with the norms of justice.\textsuperscript{71}

Moving to \textit{Dignitatis Humanae}, for those who take from the document simply a development or outright change in the Church’s teaching on religious freedom, it may be surprising to learn that the document raises at the outset the same topic as many of the social encyclicals we have encountered thus far: the role of the family. Indeed, the document speaks of the family as a society, much as Pius XI did in \textit{Divini Illius Magistri}: “The family, since it is a \textit{society} in its own original right, has the right freely to live its own domestic religious life under the guidance of parents.”\textsuperscript{72} Further echoing Pius XI, the document argues that parents “have the right to determine, in accordance with their own religious beliefs, the kind of religious education that their children are to receive,” and that government is limited in its imposition of education that burdens this religious freedom.\textsuperscript{73}

The central teaching of \textit{Dignitatis Humanae} is, of course, on the role of the state in protecting religious freedom above and beyond the safeguarding of religious education. In the first paragraph, the document asserts that “constitutional limits should be set to the powers of government, in order that there may be no encroachment on the

\textsuperscript{71} \textit{Id.} ¶ 86.
\textsuperscript{72} \textit{DIGNITATIS HUMANAE} ¶ 5 (1965) (emphasis added).
\textsuperscript{73} \textit{Id.}:

Government, in consequence, must acknowledge the right of parents to make a genuinely free choice of schools and of other means of education, and the use of this freedom of choice is not to be made a reason for imposing unjust burdens on parents, whether directly or indirectly. Besides, the right of parents are violated, if their children are forced to attend lessons or instructions which are not in agreement with their religious beliefs, or if a single system of education, from which all religious formation is excluded, is imposed upon all.
rightful freedom of the person and of associations.\textsuperscript{74} The ensuing discussion of limits to state authority in religious matters presents a doctrine of the state that, as Pietro Pavan argues, differs from both “the Catholic-confessional”\textsuperscript{75} model of previous Catholic social teaching and “the laicist or neutralistic” state against which \textit{Dignitatis Humanae} is partly directed.\textsuperscript{76} For purposes of the principle of subsidiarity, the document contains a rich set of reflections on the possibilities of and limits to state intervention.

The “society of societies” terminology that can be traced back to Taparelli is found in \textit{Dignitatis Humanae}’s assertion that the protection of religious freedom rests on each aspect of society “‘in the manner proper to each.’\textsuperscript{77} \textit{Dignitatis Humanae} carves out a special place for the freedom and autonomy of religious communities, which “‘are a requirement of the social nature both of man and of religion itself.’\textsuperscript{78} Within the limits of public order, “religious communities rightfully claim freedom in order that they may govern themselves according to their own norms,” and “have the right not to be hindered

\textsuperscript{74} \textit{Id.} ¶ 1.


\textsuperscript{77} \textit{DIGNITATIS HUMANAE, supra} note 72 ¶ 6:
Since the common welfare of society consists in the entirety of those conditions of social life under which men enjoy the possibility of achieving their own perfection in a certain fullness of measure and also with some relative ease, it chiefly consists in the protection of the rights, and in the performance of the duties, of the human person. Therefore the care of the right to religious freedom devolves upon the whole citizenry, upon social groups, upon government, and upon the Church and other religious communities, in virtue of the duty of all toward the common welfare, and in the manner proper to each.

\textsuperscript{78} \textit{Id.} ¶ 4.
in their public teaching and witness to their faith, whether by the spoken or by the written word.”

Dignitatis Humanae is an unlikely source of insight for the principle of subsidiarity. The document is short (merely fifteen paragraphs) and is almost entirely directed at the problem of religious freedom that had vexed Catholic social doctrine for over a century. But the document contains the basis for a still-to-be-written contemporary Catholic theory of the state to match Rommen’s towering achievement from 1945, including the suggestive endorsement of a constitutionally limited state, the place of religious communities in the modern state, and the distinction between public order and the common good. For these reasons, the document develops the principle of subsidiarity in new and still unexplored directions.

2. John Courtney Murray, S.J.

John Courtney Murray was a widely acknowledged source for what became Dignitatis Humanae, and Murray wrote extensively about Dignitatis Humanae in the two years between the Council’s promulgation of the document and his untimely death in 1967. The focus of Murray’s work was the issue of religious freedom and the relation of church and state, a topic distinct from but related to the broader questions of political

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79 Id.
theory in which subsidiarity finds a place. In his early essays on Leo XIII’s doctrine of the state, Murray noted the nascent articulation of subsidiarity in *Rerum Novarum*:

A third classic text [*Rerum Novarum*, ¶ 51] states the essential action required of government; it is action, not properly intervention. It is an action in favor of those free associations within the commonwealth upon which, according to the principles of right social order, there falls in the first instance the responsibility for promoting the particular social goods which integrate the common good….This principle struck at the social theory and polity, individualist in philosophical origin and totalitarian in political tendency, which denied and destroyed all intermediary institutions between the individual and the state.81

Additionally, toward the end of his famous 1960 collection of essays, *We Hold These Truths*, Murray writes about subsidiarity as a manifestation of medieval natural law theory. The principle of subsidiarity, according to Murray, “asserts the organic character of the state—the right to existence and autonomous functioning of various sub-political groups, which united in the organic unity of the state without losing their own identity or suffering infringement of their own ends or having their functions assumed by the state.”82

Without more, it is difficult to know what Murray means by “the organic character of the state,” though he may simply be referring to the hierarchical conception of the state and of political authority that would be familiar to anyone formed in the scholastic tradition. Murray continues with an application of subsidiarity to the modern state that is clearly important for the view of religious freedom adopted five years later at the Council: “This principle [subsidiarity] is likewise the assertion of the fact that the

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81 Murray, supra note 19, at 552.
freedom of the individual is secured at the interior of institutions intermediate between himself and the state (e.g., trade unions) or beyond the state (the church).”83

In this brief and merely suggestive discussion of subsidiarity in Murray, we see him synthesizing the social tradition while also developing it. Murray highlights the possibility of state intervention in Leo XIII but notes its limits, which serves his objectives well when the question of the state and religious freedom is taken up at the Council.

E. John Paul II

In the long pontificate of John Paul II, he issued several encyclicals that could be accounted social encyclicals, including *Sollicitudo Rei Socialis* and *Evagelium Vitae*. For our purposes, we will focus on his major social encyclical written for the one-hundredth anniversary of *Rerum Novarum, Centesimus Annus*. In *Centesimus Annus*, we see the clearest articulation in John Paul’s social thought of the proper role of the state and also the juxtaposition of subsidiarity with solidarity, a move encountered a few years earlier in *Sollicitudo Rei Socialis*.84 *Centesimus Annus* is, then, important for our discussion of subsidiarity for three reasons: (1) its reaffirmation of the possibility of state intervention,

83 *Id.*

The exercise of solidarity within each society is valid when its members recognize one another as persons. Those who are more influential, because they have a greater share of goods and common services, should feel responsible for the weaker and be ready to share with them all they possess. Those who are weaker, for their part, in the same spirit of solidarity, should not adopt a purely passive attitude or one that is destructive of the social fabric, but, while claiming their legitimate rights, should do what they can for the good of all. The intermediate groups, in their turn, should not selfishly insist on their particular interests, but respect the interests of others.
(2) its emphasis on a limited state, and (3) placing solidarity alongside subsidiarity as a principle for Catholic social doctrine.

First, as with Rerum Novarum, the primary focus of Centesimus Annus’ treatment of the state is with respect to intervention in economic affairs. Writing about economic policies such as wages and hours, John Paul argues that

The State must contribute to the achievement of these goals both directly and indirectly. Indirectly and according to the principle of subsidiarity, by creating favorable conditions for the free exercise of economic activity, which will lead to abundant opportunities for employment and sources of wealth. Directly and according to the principle of solidarity, by defending the weakest, by placing certain limits on the autonomy of the parties who determine working conditions, and by ensuring in every case the necessary minimum support for the unemployed worker.85

The encouragement of private enterprise combined with the direct intervention of the state directly to ensure conditions of economic justice is by now a familiar argument from the preceding papal social tradition.

Second, although some Catholic neo-conservatives perhaps overstate the view that Centesimus Annus straightforwardly endorses American-style liberal capitalism and a limited state,86 the encyclical does offer a longer and more emphatic argument for limiting the reach of the state than any encyclical since Quadragesimo Anno. John Paul criticizes overreaching state intervention in economic matters as a manifestation of the “Social Assistance State”:

86 For a representative expression of this view, see Richard John Neuhaus, The Liberalism of John Paul II, 73 First Things 16 (1997).
In recent years the range of such intervention has vastly expanded, to the point of creating a new type of State, the so-called “Welfare State.” This has happened in some countries in order to respond better to many needs and demands, by remediing forms of poverty and deprivation unworthy of the human person. However, excesses and abuses, especially in recent years, have provoked very harsh criticisms of the Welfare State, dubbed the “Social Assistance State.” Malfunctions and defects in the Social Assistance State are the result of an inadequate understanding of the tasks proper to the State. Here again the principle of subsidiarity must be respected: a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.\textsuperscript{87}

This aspect of \textit{Centesimus Annus}, however, must be placed alongside the reaffirmation, just a few lines earlier, of the traditional doctrine that the state may intervene to secure the “sure guarantees of individual freedom and private property, as well as a stable currency and efficient public services.”\textsuperscript{88} John Paul argues that The State has the further right to intervene when particular monopolies create delays or obstacles to development. In addition to the tasks of harmonizing and guiding development, in exceptional circumstances the State can also exercise a substitute function, when social sectors or business systems are too weak or are just getting under way, and are not equal to the task at hand. Such supplementary interventions, which are justified by urgent reasons touching the common good, must be as brief as possible, so as to avoid removing permanently from society and business systems the functions which are properly theirs, and so as to avoid enlarging excessively the sphere of State intervention to the detriment of both economic and civil freedom.\textsuperscript{89}

The teaching of \textit{Centesimus Annus} with respect to state intervention is, then, rooted in the traditional insistence both on the possibility of the active, intervening state (a theme

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\textsuperscript{87} \textit{Centesimus Annus}, supra note 85, ¶ 48 (emphases added).

\textsuperscript{88} Id.

\textsuperscript{89} Id. (emphasis added).
highlighted in *Rerum Novarum* and *Pacem in Terris*) and on the limits of such state intervention (emphasized in *Quadragesimo Anno* and *Dignitatis Humanae*).

What is truly novel in *Centesimus Annus* is the assertion of solidarity as a principle in social doctrine alongside subsidiarity. Indeed, associational life, which was invoked in *Rerum Novarum* and its progeny as an aspect of subsidiarity (thereby protecting associations from unwarranted interference from the state), is invoked in *Centesimus Annus* as an aspect of solidarity. “Apart from the family, other intermediate communities exercise primary functions and give life to specific networks of solidarity,” writes John Paul II. This shift to solidarity in the thought of John Paul II can partly be ascribed to his overriding anthropological concerns and his insistence—derived from his phenomenological philosophical background—that political theory begin with the human person properly understood. “Man remains above all a being who seeks the truth and strives to live in that truth,” he writes in the conclusion to the section of *Centesimus Annus* that details his views on subsidiarity and solidarity, “deepening his understanding of it through a dialogue which involves past and future generations.” In other social encyclicals, such as *Solicitudo Rei Socialis*, John Paul II combined the discussion of solidarity with an analysis of the emerging context of globalization and the preferential option for the poor.
The papal social tradition broadly and the teaching on the principle of subsidiarity have developed significantly since Rerum Novarum. In the pertinent sections on subsidiarity in Rerum Novarum, Leo worked within the scholastic framework to advance a social theory that began with the family and private property and then built up to the initial formulation of a doctrine of the state. By contrast, the paragraphs of Centesimus Annus under examination here adopt the phenomenological framework of John Paul II and begin with the modern state, in both its possibilities and pitfalls, and conclude with the human person and human relationships in solidarity as the center of Catholic social teaching.

II. Conclusion: Subsidiarity and the Common Good

In a 1988 article addressing the ecclesiological question of subsidiarity’s role within the church, Joseph Komonchak provides nine elements of the principle of subsidiarity as it has evolved in the church’s social teaching:

1. The priority of the person as the origin and purpose of society: *civitas propter cives, non cives propter civitatem.*
2. At the same time, the human person is naturally social, only able to achieve self-realization in and through social relationships—what is sometimes called the “principle of solidarity.”
3. Social relationships and communities exist to provide help (*subsidium*) to individuals in their free but obligatory assumption of responsibility for their own self-realization. This “subsidiary” function of society is not a matter, except in exceptional circumstances, of substituting or supplying for individual self-responsibility, but of providing the sets of conditions necessary for personal self-realization.
4. Larger, “higher” communities exit to perform the same subsidiary roles toward smaller, “lower” communities.

all, those without hope of a better future. It is impossible not to take account of the existence of these realities.

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5. The principle of subsidiarity requires *positively* that all communities not only permit but enable and encourage individuals to exercise their own self-responsibility and that larger communities do the same for smaller ones.

6. It requires *negatively* that communities not deprive individuals and smaller communities of their right to exercise their self-responsibility. Intervention, in other words, is only appropriate as “helping people help themselves.”

7. Subsidiarity, therefore, serves as the principle by which to regulate competencies between individuals and communities and between smaller and larger communities.

8. It is a formal principle, needing determination in virtue of the nature of a community and of particular circumstances.

9. Because it is grounded in the metaphysics of the person, it applies to the life of every society.\(^\text{93}\)

A review of Komonchak’s proposed elements shows their consonance with the themes noted in the foregoing discussion: the importance of anthropological considerations, the place of the common good, and the significance of associations. Even if useful as a handy summary of the principle of subsidiarity as it has developed in papal social teaching, however, Komonchak’s elements—and other, usually quite similar, attempts to summarize subsidiarity as it has developed in Catholic social teaching—are less helpful in answering the central question of this dissertation: how does subsidiarity relate to American constitutional federalism and localism?

To answer that very different question, a voice from outside the Catholic tradition, the English Reformed theologian Jonathan Chaplin, offers a helpful framework. In response to the question of what the state “may do as it acts subsidiarily towards the lesser communities,” Chaplin argues that “three particular kinds of activities may

\(^{93}\) Komonchak, *supra* note 3, at 301-02.
conveniently be distinguished: enabling, intervening, and substituting.”94 These three “activities,” or, as we might term them, “subsidiary functions” form a continuum among minimal (“enabling”) to maximal (“substituting”) aspects of intervention by the state or by centralized political authority.

Chaplin’s category of “substituting activities,” in which “the state directly assumes tasks specifically belonging to lesser communities” is, generally speaking, “ruled out.”95 As examples, Chaplin cites nationalized industries or “a centrally planned economy,” though he allows for exceptional circumstances in which “a particular community is chronically deficient and incapable of performing basic functions” (91-92). In such cases, temporary substitution for the lesser community may be consistent with subsidiarity.

Chaplin’s argument moves to a rejection of hierarchical political authority, which he associates with Thomist metaphysics and, he argues, poses problems for the understanding of subsidiarity in Catholic social teaching. Even without following Chaplin’s argument in that regard, though, his reformulation of the three activities (enabling, intervening, and substituting) is an important clarification to the contemporary debate and allows us to move to the argument of the following chapters. Enabling, according to Chaplin, is finally “the task of creating legal conditions” and thereby “the


95 Chaplin, Political Norm, supra note 94, at 90.
definitive function of the state.” “The distinctive end of the state,” argues Chaplin, “is the creation of a framework of public law embodying the norms of justice and the requirements of the common good” (95). So also intervention in the affairs of lower communities is necessary “when any failure on their part to fulfill their duties bears consequences for the common good.” Finally, when “mere intervention proves insufficient to protect the common good, substitution may be necessary” (96).

As summarized by Chaplin, “enabling activities” are those that “involve the creation of the necessary legal, economic, social and moral conditions in which lesser communities can flourish” (90). This activity arguably comes closest to the original meaning of subsidiarity as “help” or “assistance” and to Taparelli’s older conception of Hypotactic Right. “Intervening activities,” by contrast, are “interventions in the internal affairs of a lesser community,” which “are justified when there is some obvious deficiency or distortion within them which may affect the common good.” Importantly, such intervening functions are “justified not in terms of the benefits accruing to the particular communities themselves, but to those accruing to the common good” (91). Once again, then, we see in Chaplin’s sympathetic interpretation and reconstruction of the Catholic social tradition on the principle of subsidiarity a rejection of an unduly cramped view of subsidiarity as a principle of devolution or otherwise a libertarian directive. Instead, the common good serves as the motivation for such intervention, not the narrower good of particular communities. As formulated by Johannes Messner, the principle of subsidiarity “obliges the state authority to take heed of the common good, preferably by means of subordinate authorities, namely, those of member societies in an
organization of the state community based on the federative and corporative principles."96

96 JOHANNES MESSNER, SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD 214 (J.J. Doherty trans., 1949). Messner goes on to note that this relation between subsidiarity and the common good has important implications for the theory of the state. See id.:

The principle of subsidiarity function, however, certainly does not signify a weak state standing without authority face to face with a pluralistic society. On the contrary, the more strongly the character of society develops in its federative and corporative branches, both regional and occupational, in conjunction with a plurality of free associations based on economic group interests, the more clearly does the common good principle call for a state with strong authority which will enable it, in a pluralistic society with diversified competencies and interests, to carry out its essential functions: namely, to care for the common good and the general interest.
CHAPTER TWO: SUBSIDIARITY AND AMERICAN CONSTITUTIONAL LAW

Introduction

When subsidiarity has (infrequently) arisen as a topic of political discussion in the United States, advocates of subsidiarity-based restrictions on the power of the national government have usually been associated with the libertarian aspects of subsidiarity discussed in Chapter One. At the same time, American constitutional law is amid a raging debate over the character of American federalism that was inaugurated by the Supreme Court’s federalism decisions in, to cite the most prominent recent cases, *United States v. Lopez*,¹ *United States v. Morrison*,² and *Board of Trustees v. Garrett*.³ Many suspect that advocacy of federalism is a jurisprudential mask worn by the Supreme Court to conceal its underlying policy preferences in these cases (just as, some may argue, subsidiarity is adopted as a theological mask to advance certain policy preferences): “[F]ederalism du jour merely serves as a convenient shill for the policy preferences of the current members of the Supreme Court,” writes Ronald Krotoszynski.⁴ I intend to argue that this view is

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² 529 U.S. 598 (2000) (invalidating portions of the Violence against Women Act as exceeding Congress’s power under both the Commerce Clause and the Fourteenth Amendment).
³ 531 U.S. 356 (2001) (invalidating portions of the Americans with Disabilities Act as applied to the states and state employees as exceeding Congress’s power under the Fourteenth Amendment and violating the provisions of state sovereign immunity in the Eleventh Amendment).
misguided, not least in its failure to appreciate fully subsidiarity’s role as a possible theoretical justification for federalism.⁵

All this is not to say, of course, that the Catholic principle of subsidiarity and American federalism are identical, though several commentators note the close family resemblance between them. It would be too strong to say, with Robert Sirico, that subsidiarity “has found its political expression in the American concept of federalism.”⁶ A more balanced view would hold “that federal arrangements…are one possible expression, in history, of the principle of subsidiarity.”⁷ A subtle difference between federalism and subsidiarity is that American constitutional federalism enumerates powers for the national government but does not expressly reserve any powers to the states; subsidiarity, by contrast, offers guidance for the distribution of political authority both “up” (toward higher levels of authority–international or national actors, as we saw especially in our discussion of Pacem in Terris) and “down” (toward lower levels of authority–local communities and families, as we saw especially in our discussion of Pius XI). “[A]lthough federalism conveys a general sense of a vertical distribution, or

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⁵ Though he mentions subsidiarity only in passing, my views here, as will be discussed in the conclusion to this chapter, are consonant with John O. McGinnis’s as found in his article, Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery, 90 CAL. L. REV. 485, 490-91 (2002) (“Because the Rehnquist Court’s jurisprudence seems designed to protect the decentralized order and mediating institutions that Alexis De Tocqueville, the great analyst of American democracy, viewed as our society’s distinctive principle, perhaps the appellation that summarizes the Rehnquist Court’s approach best is Tocquevillian.”).


balance, of power,” George Bermann writes, “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.”8 This chapter will summarize and evaluate the recent debate over American constitutional federalism as it has evolved in a series of Supreme Court decisions and as the Catholic principle of subsidiarity might relate to and illuminate the debate.

Part I of this chapter will take up the Supreme Court’s federalism jurisprudence in two sections. Part I-A will treat the evolution of Commerce Clause jurisprudence from the New Deal expansion of national power to recent cases curtailing the scope of congressional authority.9 Part I-B will examine the scope of Congress’ power under § 5

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9 The New Deal era presents an especially important example of the interaction between subsidiarity and American federalism. Within American Catholicism and in the wake of Quadragesimo Anno, differing views over subsidiarity marked the disagreements between John A. Ryan and the German-American Catholic Central-Verein Movement’s leading figures (Frederick P. Kenkel and William J. Engelen). See Charles E. Curran, American Catholic Social Ethics: Twentieth Century Approaches 26-129 (1982); Philip Gleason, The Conservative Reformers: German-American Catholics and the Social Order (1968); David J. O’Brien, American Catholics and Social Reform: The New Deal Years (1968); and Aaron I. Abell, American Catholicism and Social Action: A Search for Social Justice 1865-1950 (1960).

In American constitutional law, the 1930’s witnessed the famous “switch-in-time” reinterpretation of the Commerce Clause and the scope of the national government’s authority. The historiography of the New Deal Court is currently undergoing considerable revision, with many scholars now contending that the Court did not simply alter its Commerce Clause jurisprudence in response to President Roosevelt’s “court packing” plan (an “externalist” explanation) but instead developed “internalist” constitutional doctrines to assess—and eventually uphold—various New Deal programs. See Barry Cushman, Rethinking the New Deal Court: The Structure of a Constitutional Revolution (1998); G. Edward White, The Constitution and the New Deal (2000); Richard D. Friedman, Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation, 142 U. Pa. L. Rev. 1891 (1994).
of the Fourteenth Amendment, from its original understanding during Reconstruction and in such early cases as *United States v. Harris*\(^{10}\) and the *Civil Rights Cases*\(^{11}\) through recent decisions\(^{12}\) restricting Congress’ substantive and remedial powers under that Amendment. Part II will depart from the set of doctrines narrowly related to federalism and will examine two constitutional doctrines that are also relevant to subsidiarity, namely the freedom of association and parental due process liberty. Associational rights, grounded in constitutional doctrine in the First Amendment, are, I will argue, perhaps the closest thing in American constitutional law to the Catholic principle of subsidiarity.\(^{13}\)

Finally, Part III will briefly conclude the chapter by bringing the principle of subsidiarity to bear on the American debate over constitutional federalism by asking what a regime of constitutional federalism informed by subsidiarity should look like and proposing a theory of what I will term “functional pluralism.”

The final three chapters of the dissertation will turn to a series of controversial political and legal issues to which these concerns of federalism and subsidiarity could be applied. I hope to stand in contrast to the view that subsidiarity and federalism are inherently “nationalist” or “localist” and always favor (or disfavor) an expansion of nationally (especially judicially, but also legislatively) determined rights and policies.

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\(^{13}\) The Supreme Court itself has not invoked subsidiarity by name with the sole exception of Justice Breyer’s dissent in *Morrison*, 529 U.S. at 655-66.
The three areas that will serve as applications of subsidiarity to American federalism are physician-assisted suicide, federal preemption, and school finance. Subsidiarity, it will be argued, will sometimes temper and sometimes reinforce federalist impulses, belying the easy conclusion that subsidiarity always favors the devolution of decision-making. Instead, I intend to argue in Chapters Three through Five that a federalism informed by subsidiarity suggestively cross-cuts ideological (both American political and Catholic ecclesial) categories.

I. The Supreme Court’s Federalism Jurisprudence

In a series of decisions from New York v. United States\textsuperscript{14} in 1992 and United States v. Lopez in 1995 through United States v. Morrison in 2000 and Board of Trustees v. Garrett in 2001, the Supreme Court narrowed the scope of congressional and federal authority and expanded the sphere of policymaking and legislating by the states and local governments. The states and local governments are free, for example, to regulate gun possession in school zones even if Congress is not. These decisions, in turn, have set off a debate concerning the proper scope of federalism and the Court’s role in enforcing the boundaries between the federal and state governments. There are basically four areas within which these decisions and the attendant debate have operated: (1) the power of Congress to enact legislation pursuant to the Commerce Clause of Article I, § 8; (2) the power of Congress to enact legislation pursuant to § 5 of the Fourteenth Amendment; (3) the immunity of the states from private suits under the Eleventh Amendment, and (4) the

\textsuperscript{14} 505 U.S. 144 (1992).
autonomy of the executive and legislative powers of the states from federal commandeering. This chapter will address only the Commerce Clause and § 5 of the Fourteenth Amendment because these constitutional doctrines bear upon the topic of subsidiarity and our discussion of them will broadly lay the groundwork for later chapters.

A. Commerce Clause

Article I, § 8 of the Constitution states: “The Congress shall have the power…[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes…” 15 Though the meaning of “commerce” was arguably limited at the time of the framing of the Constitution to trade, 16 a series of Supreme Court decisions gradually but decisively expanded the definition of commerce.

1. Gibbons v. Ogden

The most important early case addressing the scope of Congress’s power is Gibbons v. Ogden. 17 Gibbons’ importance is on account of Chief Justice John Marshall’s rejection of narrow definitions of “commerce” or “among the several States.” Rather than a definition of “commerce” that was limited to the buying and selling of goods, the Court wrote that “[c]ommerce undoubtedly is traffic, but it is something more: it is

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16 See Randy E. Barnett, The Original Meaning of the Commerce Clause, 68 U. CHI. L. REV. 101 (2001); THE FEDERALIST NO. 11 (Alexander Hamilton) (Clinton Rossiter, ed., 1961): An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope from the diversity in the productions of different States.
intercourse.”18 Furthermore, the Court rejected a narrow construction of the phrase “among the states” in § 8 that would have rendered all conduct occurring within a single state beyond the reach of the commerce power. Instead, the Court held that “[t]he word ‘among’ means intermingled with. A thing which is among others, is intermingled with them. Commerce among the States, cannot stop at the external boundary of line of each State, but may be introduced into the interior.”19 Finally, the Court rejected the argument that the reservation of powers to the states in the Tenth Amendment20 operated to limit Congress’s commerce power. “If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects,” the Court reasoned, “the power over commerce…among the several States, is vested in Congress as absolutely as it would be in a single government.”21

2. The New Deal

Following Gibbons, the scope of Congress’s commerce power was rarely challenged until the New Deal’s expansion of federal power over a range of economic activities. In a series of cases in the 1930s, the Supreme Court held that a number of federal statutes exceeded the limits of the commerce power. For example, a challenge to the Coal Conservation Act of 1935 included an argument that federal labor law regulations did not fall within the commerce power. “Plainly,” the Court wrote in Carter v. Carter Coal Co., “the incidents leading up to and culminating in the mining of coal do

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18 Id. at 189.
19 Id. at 193.
20 “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.
21 Gibbons, 22 U.S. (9 Wheat) at 197.
not constitute such intercourse. The employment of men, the fixing of their wages, hours of labor and working conditions, the bargaining in respect of these things...each and all constitute intercourse for the purposes of production, not of trade.”

So also in the famous “sick chickens” case, *A.L.A. Schecter Poultry Corp. v. United States*, the Court held that portions of the National Industrial Recovery Act were unconstitutional. The president promulgated a “Live Poultry Code” under the Act, “a code of fair competition for the live poultry industry of the metropolitan area in and about the City of New York.” Among other provisions, the Code limited the workweek to 40 hours, established a minimum wage, and prohibited child labor. The defendant poultry producers argued that the Code exceeded Congress’ commerce power, and the Court agreed. “In determining how far the federal government may go in controlling intrastate transactions upon the ground that they ‘affect’ interstate commerce, there is a necessary and well-established distinction between direct and indirect effects,” the Court began.

The sharp distinction between such direct and indirect effects on interstate commerce provided the basis for the Court’s view that the conduct of the poultry producers, which was limited to New York state, had a merely indirect effect on interstate commerce outside New York’s boundaries. Employing a *reductio* argument, the Court noted a concern that will emerge again when the Court revisited its Commerce Clause jurisprudence in 1995:

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22 298 U.S. 238, 303-04 (1936).
24 *Id.* at 523.
25 *Id.* at 546.
If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.26

For a few years following Schecter Poultry, the effort to draw a principled distinction between direct and indirect effects on interstate commerce marked the Court’s Commerce Clause jurisprudence. This robust limitation on the scope of the commerce power proved to be short-lived, however. In a rapid succession of cases from 1937 to 1942 and culminating in Wickard v. Filburn, the Court acquiesced to a broad view of Congress’s commerce power.

In Wickard, the Court heard a challenge to provisions of the Agricultural Adjustment Act (‘AAA’) that set a production quota in an effort to maintain the price of wheat.27 The plaintiff—forever known to generations of law students as “Farmer Filburn”—alleged that he grew wheat only for his own consumption, but he nonetheless exceeded his production quota and was fined. The Court held that even if Filburn’s wheat was never destined to enter interstate commerce, application of the AAA to him was constitutionally permissible: “Once an economic measure of the reach of the power granted to Congress in the Commerce Clause is accepted, questions of federal power cannot be decided simply by finding the activity in question to be ‘production,’ nor can consideration of its economic effects be foreclosed by calling them ‘indirect.’”28

26 Id.
27 312 U.S. 100 (1941).
28 Id. at 124.
3. 1995 - Present

In the wake of Wickard and over the course of almost sixty years, most constitutional scholars had come to believe that the power of Congress to regulate interstate commerce knew virtually no limits. What limits that were thought to exist, most argued, were policed by Congress itself through the political process. 29 Indeed, many significant pieces of legislation having little to do with interstate commerce as such, including much of the landmark civil rights legislation of the 1960s, were passed under Congress’s interstate commerce power. Because the Supreme Court had ruled in the wake of enactment of the Reconstruction Amendments that the Fourteenth Amendment permitted Congress to regulate state conduct but not to regulate directly private conduct, 30 Congress passed the Civil Rights Act of 1964 pursuant to its commerce power, not the power under § 5 of the Fourteenth Amendment. In Heart of Atlanta Motel, Inc. v. United States 31 and Katzenbach v. McClung 32 (the famous Ollie’s Barbecue case) the Court upheld the Civil Rights Act as a constitutionally permissible use of the commerce power.

In both Heart of Atlanta Motel and Katzenbach v. McClung, the Court adopted a thoroughgoing deference to Congress’s findings regarding the effect of discrimination in public accommodations on interstate commerce. “The commerce power invoked here by

30 The Civil Rights Cases, 109 U.S. 3 (1883).
the Congress is a specific and plenary one authorized by the Constitution itself,” the
Court explained in *Heart of Atlanta Motel*, and:

The only questions are: (1) whether Congress had a rational basis for finding that
racial discrimination by motels affected commerce, and (2) if it had such a basis,
whether the means it selected to eliminate that evil are reasonable and
appropriate. If they are, appellant has no “right” to select its guests as it sees fit,
free from governmental regulation.33

Similarly and relying heavily on *Gibbons* and *Wickard* as precedents for regulating
putatively “local” activity, the Court reasoned in *Katzenbach* that it “must conclude that
[Congress] had a rational basis for finding that racial discrimination in restaurants had a
direct and adverse effect on the free flow of interstate commerce.”34

This expansive view of Congress’ commerce power was dislodged when the
Court invalidated the Gun Free School Zones Act in 1995 in *Lopez*. The Act made it a
federal crime to possess a gun on the grounds of a school or within 1000 feet of school
grounds. Alfonso Lopez, the defendant, was convicted under the statute and sentenced to
six months imprisonment. On appeal, Lopez argued that the Act was beyond the scope of
Congress’s Commerce Clause power. The Fifth Circuit agreed with Lopez, and the
Supreme Court affirmed. Writing for a five justice majority, Chief Justice Rehnquist
argued that, because illegal possession of a gun within a school zone is non-economic
activity, Congress cannot regulate such possession absent some link to economic activity
or interstate commerce. The Fifth Circuit’s holding had relied on the inadequacy of the
congressional findings of a link between gun possession in a school zone and interstate

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33 379 U.S. at 258-59.
34 379 U.S. at 304.
commerce. The Supreme Court evaded the question of the adequacy of the congressional findings and instead held that the prohibition on gun possession in school zones was not substantially related to interstate commerce.

Chief Justice Rehquist’s opinion summarized the Court’s prior Commerce Clause jurisprudence as recognizing three types of permissible regulation under the commerce power. First, Congress may “regulate the use of the channels of interstate commerce,” with the regulation of public accommodations under the civil rights statutes as a particularly important example.35 The second category of permissible federal regulation is over the “instrumentalities of interstate commerce,” such as regulation of highways, railroads, and airlines.36 Finally—and most importantly—Congress may “regulate those activities having a substantial relation to interstate commerce,” which is the most expansive potential use of the commerce power and harkens back to the New Deal cases that culminated in Wickard.37 Because the Gun Free School Zones Act did not fit into any of those categories, it exceeded Congress’s power. Furthermore, criminal law has, the Court argued, traditionally been the province of the states, and allowing Congress to regulate freely in this area would give the national government a broad police power.

In concurring opinions, Justices Kennedy, O’Connor, and Thomas provided a wider framework for the Court’s opinion. Justices Kennedy and O’Connor jointly emphasized the values of federalism. “Of the various structural elements in the

36 Id. at 558.
37 Id. at 558-59 (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937).
Constitution, separation of powers, checks and balances, judicial review, and federalism,” they write, “only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role in maintaining the design contemplated by the Framers.” Joyces Kennedy and O’Connor concluded by arguing that the statute in *Lopez* “forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.” Without expressly invoking subsidiarity by name, Justices Kennedy and O’Connor nonetheless signaled that the Court should properly play a role in policing the limits on national power and should take into account concerns that are, I would argue, related to subsidiarity.

Justice Thomas took the stronger position that the Commerce Clause doctrine inherited from *Wickard* should be discarded and the original meaning of “commerce” should be restored in the Court’s jurisprudence. He flatly rejected the “substantial effects” prong of the commerce power. “I am,” he wrote, “aware of no cases prior to the New Deal that characterized the power flowing from the Commerce Clause as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.” In particular, the “aggregation” of

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38 *Id.* at 575 (Kennedy, J., concurring).
39 *Id.* at 583.
40 *Id.* at 596 (Thomas, J., concurring).
effects on commerce upon which *Wickard* arguably relies, is, in Justice Thomas’ view, unprincipled and subject to abuse.41

The Court’s willingness to engage in judicial enforcement of the Commerce Clause continued in 2000 with *United States v. Morrison*, which considered a constitutional challenge to portions of the Violence Against Women Act of 1994 (VAWA). Among other provisions, VAWA created a private right of action by victims of gender-motivated violence against their attackers, which was motivated by a concern that state criminal prosecutions for sexual assault were inadequate and should be supplemented by the prospect of private civil litigation. An alleged victim of a sexual assault, Christy Brzonkala, filed suit against several football players at Virginia Tech.

Chief Justice Rehnquist, writing again for the same five justices as in *Lopez* (himself and Justices O’Connor, Scalia, Kennedy, and Thomas), argued that Congress’s creation of a private right of action in VAWA exceeded Congress’s power under the Commerce Clause. The Chief Justice’s opinion recited again the three permissible forms of commerce power regulation and noted that VAWA, if a legitimate exercise of congressional power, had to fall into the third category of regulating an activity with a

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41 *Id.* at 600:
The substantial effects test suffers from this flaw, in part, because of its “aggregation principle.” Under so-called “class of activities” statutes, Congress can regulate whole categories of activities that are not themselves either “interstate” or “commerce.”

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one always can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce.
substantial effect on interstate commerce. As in *Lopez*, the non-economic, essentially criminal nature of the regulation was its downfall. Notwithstanding congressional findings that domestic violence and sexual crimes have an effect on interstate commerce (but taking a much less deferential view toward the congressional findings than the Court had in the earlier Civil Rights Act cases such as *Heart of Atlanta Motel*), the Court wrote:

> Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity. While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation’s history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature.\(^{42}\)

By simply aggregating the effects of inherently local crimes, the Court reasoned, there would be no limit to the commerce power: “We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregated effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”\(^{43}\)

Read together, *Lopez* and *Morrison* suggest that the Court’s review of dubious congressional exercises of the commerce power will pose two questions: (1) is the regulated activity economic or non-economic?, and (2) is this an area of law traditionally reserved to the states? Federal criminal statutes (or, as in *Morrison*, a federal statute that touched on an area of state criminal law) are especially susceptible to the challenge that they exceed Congress’s enumerated powers to the extent that whole areas of criminal law


\(^{43}\) *Id.* at 617-18. Applying the holding of *Boerne v. Flores*, discussed below, the Court also rejected the argument that VAWA was a permissible exercise of Congress’s power under § 5 of the Fourteenth Amendment.
(most homicide and crimes, for example) are left to the states. Indeed, Justices Kennedy and O’Connor, in their concurrence in *Lopez*, noted that many states had already enacted prohibitions against gun possession in school zones, thereby rendering federal action superfluous.

Interestingly, the Department of Justice, under both Democratic and Republican administrations, has disfavored a broad, categorical subject matter limitation on federal crimes. There is, then, a sort of subsidiarity limit on federal criminal law in *Lopez* and *Morrison* to address only problems of national concern (e.g., drug trafficking and possession), areas in which state jurisdiction is inadequate or compromised (e.g., interstate crimes such as child pornography trafficking or crimes involving political corruption), or matters of particular federal expertise. Furthermore, jurisdictionally overlapping federal criminal legislation is cured by reliance on federal prosecutorial discretion, which might also sometimes reflect a subsidiarity norm. When deciding whether to bring a charge, so the argument goes, the Department of Justice and the local United States Attorney will be guided in part by federalism concerns and a desire to strike a proper federal-state balance.

But in many cases there is unlikely to be an analogous state criminal prosecution to which federal prosecutors could defer. This issue arises most often in drug cases, but there is little evidence that federal prosecutors defer in other contexts. Once the subsidiarity limits on federal crime legislation have been ignored by Congress, prosecutorial discretion is unlikely to vindicate the federalism interest in leaving regulation of crime up to the states (unless the United States Attorney simply refuses to
enforce the statute at all, which may not be an attractive option). Federal intervention is also frequently justified on the politically popular grounds that federal penalties are often (significantly) higher than state penalties, but it is hard to see why this is, properly speaking, a federal interest. The other concerns (state inadequacy, special federal expertise) are pertinent to subsidiarity, but—apart from political appeal—it is hard to see why higher federal penalties constitute a reason for federal criminal intervention.

Finally, in *Gonzales v. Raich*, the Court considered a claim by users of medical marijuana that the federal prohibition on possession of marijuana under the Controlled Substances Act (CSA) exceeded Congress’s commerce power. By ballot initiative, California had legalized possession of marijuana for legitimate medical purposes, but the CSA contains no such exemption. Those who grow and possess marijuana for medicinal purposes, then, were exempt from state prosecution under California law but were still subject to federal prosecution under the CSA. A different alignment of justices (Justices Stevens, Scalia, Kennedy, Souter, Ginsburg, and Breyer) than the five who had struck down the federal statutes in *Lopez* and *Morrison* upheld the provisions of the CSA that the plaintiffs were challenging. Writing for the Court, Justice Stevens relied on *Wickard v. Filburn* and held that even marijuana grown locally and used for medicinal purposes has, in the aggregate, an effect on interstate commerce, thereby bringing the story of Commerce Clause jurisprudence full circle from Farmer Filburn’s cultivation of wheat for home consumption. Interestingly, Justice Scalia (who had not written separately in

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44 545 U.S. 1 (2005).
either Lopez or in Morrison to explain his views of the limits of the commerce power) concurred with the result in Raich but argued that the case turned on the interpretation of the “Necessary and Proper” Clause. The “substantial effects” category of permissible regulation of commerce, he argued, is grounded not in the Commerce Clause itself but rather in the power of Congress under the Necessary and Proper Clause to make effective its regulation of interstate commerce.⁴⁵

This tour of the Supreme Court’s Commerce Clause jurisprudence suggestively reflects aspects of the principle of subsidiarity. The argument in the Lopez concurrence by Justices Kennedy and O’Connor, for example, on judicial recognition of areas of law that are properly reserved to the states (criminal law, for example, or education) comports with subsidiarity’s view that different levels of authority have different competencies and that the higher level of authority should not, absent good reason, usurp the lower level’s authority. But such a “devolutionary” account of subsidiarity is, as argued in Chapter One, incomplete. Wickard and, more recently, Raich stand for the proposition that a crude devolutionary principle should not prevent the higher authority (here, the federal government) from enacting statutes that are, as Justice Scalia argued in his concurrence in

⁴⁵ Id. at 34 (Scalia, J., concurring) (internal citations omitted):

Congress’s regulatory authority over intrastate activities that are not themselves part of interstate commerce (including activities that have a substantial effect on interstate commerce) derives from the Necessary and Proper Clause…. [T]he category of “activities that substantially affect interstate commerce” is incomplete because the authority to enact laws necessary and proper for the regulation of interstate commerce is not limited to laws governing intrastate activities that substantially affect interstate commerce. Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.
Raich, “necessary and proper” to achieve the constitutionally legitimate aims of the commerce power.

B. Section 5 of the Fourteenth Amendment

Just as the past fifteen years have witnessed a revival and then, in Raich, demise of a more robust limitation on the commerce power, so also the Court has by fits and starts suggested that it is willing to set appropriate limits on Congress’s power to enforce the Fourteenth Amendment. Section 1 of the Fourteenth Amendment provides that “[n]o State shall...deny to any person within its jurisdiction the equal protection of the laws.”46 Under § 5 of the Fourteenth Amendment, Congress is empowered to “enforce, by appropriate legislation” the equal protection and due process guarantees of that amendment.47 The Fourteenth Amendment is thereby “a positive grant of legislative power” to Congress.48 As the Supreme Court noted in Ex Parte Virginia, “Whatever legislation is appropriate, that is, adapted to carry out the objects the [Reconstruction] amendments have in view...is brought within the domain of congressional power.”49 But the Court was clear in City of Boerne v. Flores that “Congress’ discretion [under § 5] is not unlimited...and the courts retain the power, as they have since Marbury v. Madison, to determine if Congress has exceeded its authority under the Constitution.”50 In the words

46 U.S. CONST. amend. XIV, § 1.
47 U.S. CONST. amend. XIV, § 5.
49 100 U.S. 339, 345–46 (1879).
of *Oregon v. Mitchell*, “As broad as the congressional enforcement power is, it is not unlimited.”

The scope of “appropriate” legislation under § 5 has generally been held to share the broad authority granted Congress to legislate pursuant to the Necessary and Proper Clause in Article I, just as Justice Scalia emphasized in his concurrence in *Raich* that the Commerce Clause must be read in combination with the Necessary and Proper Clause. The thorny question posed by § 5 jurisprudence is whether determination of what legislation is “appropriate” should be left entirely to Congress. On one view, Congress has an expansive power under § 5 to forge remedies addressing constitutional violations of equal protection. As the Court noted in *Fullilove v. Klutznick*, “It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than Congress, expressly charged by the Constitution with the competence and authority to enforce equal protection guarantees.” Indeed, some cases suggest that congressional authority extends even to the prohibition of conduct that is

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52 See Morgan, 384 U.S. at 650 (“By including § 5 the draftsmen [of the Fourteenth Amendment] sought to grant to Congress... the same broad powers expressed in the Necessary and Proper Clause...”); see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (interpreting the Necessary and Proper Clause to embrace “all means which are appropriate”).
53 See Boerne, 521 U.S. at 536 (“It is for Congress in the first instance to ‘determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’ and its conclusions are entitled to much deference.” (quoting Morgan, 384 U.S. at 651)).
54 448 U.S. 448, 483 (1980).
“not itself unconstitutional” if necessary to remedy or deter constitutional violations, and the adoption of prophylactic rules to deter infringements of equal protection.

The Civil Rights Act of 1875, like the later Civil Rights Act of 1964, sought to prohibit racial discrimination in a variety of places of public accommodation—hotels, theaters, and railroads, for example. At issue in the *Civil Rights Cases* in 1883 was whether Congress could regulate private conduct under § 5 of the Fourteenth Amendment or whether the § 5 power was limited to state action. The Court ruled that the 1875 Act was an impermissible regulation of private conduct. Because the Fourteenth Amendment “is prohibitory…upon the states[,] invasion of individual rights is not the subject matter of the amendment.” Section 5, then, permits Congress to create remedies for private parties against state action that violates equal protection or due process, but it does not allow Congress itself to act directly on private conduct.

By the terms of § 1 of the Fourteenth Amendment and in the jurisprudence of the Court regarding the extent of congressional power to remedy violations of § 1, then, Congress is limited in its ability to legislate under § 5 by the so-called “state action doctrine.” In the *Civil Rights Cases*, the Court held that the Civil Rights Act of 1875 did “not profess to be corrective of any constitutional wrong committed by the States” but “step[ped] into the domains of local jurisprudence...without referring in any manner to

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55 *Boerne*, 521 U.S. at 518.
any supposed action of the State or its authorities.”⁵⁸ Similarly, the Civil Rights Act of 1871 invalidated in *United States v. Harris* was, in the Court’s words, “directed exclusively against the action of private persons, without reference to the laws of the State, or their administration by her officers.”⁵⁹

On this more limited reading of the § 5 power, the plain meaning of the Fourteenth Amendment and a “time-honored principle” indicate that the equal protection guarantee of § 1 is enforceable only against the states.⁶⁰ As argued by the Court in *Shelley v. Kraemer*, “the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.”⁶¹ More recently, the Court has affirmed the state action limitation in such cases as *Georgia v. McCollum* (“Racial discrimination, although repugnant in all contexts, violates the Constitution only when it is attributable to state action.”)⁶² and in *Lugar v. Edmondson Oil Co.* (“Because the [Fourteenth] Amendment is directed at the States, it may be violated only by conduct that may be fairly characterized as ‘state action.’”).⁶³

The limitation of § 1 to state action applies also to attempts by Congress under § 5 to enforce the provisions of § 1. A review in *City of Boerne v. Flores* of the legislative

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⁵⁸ Id. at 11, 14.
⁵⁹ 106 U.S. 629, 640 (1883).
⁶¹ 334 U.S. 1, 13 (1948).
history of the Fourteenth Amendment argued that § 5 was intended to confer on Congress a “remedial” power “to make the substantive constitutional prohibitions [of § 1] against the States effective.”64 As explained in the Fourth Circuit’s opinion affirmed in Morrison, just as “Section 1 confer[s] rights only against the States…Congress’ Section 5 power to enforce Section 1 is correspondingly limited to remedial action against States and state actors.”65

Congress may, however, reach the conduct of private persons when it does so to remedy discrimination by the States, a view for which United States v. Guest remains the leading case. In Guest, the Court held that Congress possesses authority under § 5 “to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers or others acting under the color of state law are implicated in the conspiracy.”66 In District of Columbia v. Carter, the Court wrote that “[t]he Fourteenth Amendment itself ‘erects no shield against merely private conduct’…[but that] is not to say…that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment.”67

An even more robust argument for federal authority submits that the scope of Congress’ § 5 power should not be unduly cabined by the state action limit of § 1 and that, once Congress has perceived an equal protection violation by the States, the range of

possible remedies is not limited to states or state actors. But, and as mentioned above, the Court was confronted with an analogous question in United States v. Harris and the Civil Rights Cases and affirmed the holdings of both cases as recently as Morrison in 2000. In all three cases (Harris, the Civil Rights Cases, and Morrison), the Court held that federal legislation enacted pursuant to § 5 could not target private individuals, even where such legislation was intended to remedy state violations of equal protection. The private remedies of both the Civil Rights Acts of 1871 (invalidated in Harris) and the Civil Rights Act of 1875 (invalidated in the Civil Rights Cases) were thought to be justified because, as characterized by the Court, “[t]here were state laws on the books bespeaking equality of treatment, but in the administration of these laws there was discrimination.” The state action limits imposed on the permissible scope of § 5 remedies “are necessary to prevent the Fourteenth Amendment from obliterating the Framers’ carefully crafted balance of power between the States and the National Government.” As with the commerce power, this concern is particularly acute where the federal government seeks to act in an area of law generally reserved to the states on the view that “the power of Congress [under § 5]...does not extend to the passage of laws for the suppression of crime within the States.”

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69 United States v. Morrison, 529 U.S. 598, 625 (2000); see also CONG. GLOBE, 42d Cong., 1st Sess. App. 153 (1871) (“The chief complaint is...that, even where the laws are just and equal on their face, yet by a systematic maladministration of them...a portion of the people are denied equal protection under them.”), quoted in Morrison, 529 U.S. at 625.
70 Morrison, 529 U.S. at 620.
71 Harris, 106 U.S. at 638.
But even in legitimate exercises of Congress’ power to craft remedies for equal protection violations, Congress is limited in its ability to define the extent of equal protection. As summarized by Boerne, “The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment’s restrictions on the States.” 72 Though it is initially up to Congress to “determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,” 73 the distinction “between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law...exists and must be observed.” 74

Recent decisions of the Court have further insisted that remedial § 5 legislation must have a “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” 75 This insistence on the tailoring of means or limitation of scope that the Court signaled in Boerne are intended to “ensure Congress’ means are proportionate to ends legitimate under § 5.” 76 “[T]ermination dates,” “geographic restrictions,” and “intrusions into the States’ traditional prerogatives and general authority” are among the factors suggested in Boerne for assessing congruence and proportionality. 77 In a different context, Justice Kennedy, the author of the Court’s

72 City of Boerne v. Flores, 521 U.S. at 507, 519 (1997).
74 Boerne, 521 U.S. at 519-20.
75 Fla. Prepaid Postsecondary Ed. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 639 (1999); see also Boerne, 521 U.S. at 530 (“[T]here must be a congruence between the means used and the ends to be achieved.”)
76 521 U.S. at 533.
77 Id. at 534.
opinion in Boerne, warned of the need to protect the federal balance in the area of
criminal law: “[E]ssential considerations of federalism are at stake here. The federal
balance is a fragile one, and a false step...risks making a whole catalog of ordinary state
crimes a concurrent violation of a congressional statute.”78 The provisions of the
Violence Against Women Act struck down in Morrison, for example, failed in part
because they “applie[d] uniformly throughout the Nation,”79 whereas another § 5 remedy
(portions of the Voting Rights Act) was upheld in Morgan when Congress directed the
remedy only to those states found to be engaged in racial discrimination.80

II. Freedom of Association and Parental Liberty

Though not part of the usual set of doctrines that bear on federalism, freedom of
association and parental liberty are perhaps the closest analogues in American
constitutional law to the principle of subsidiarity. The federalism decisions summarized
in Section II of this chapter address the limits on federal and state power, but, as noted
below in the conclusion of this chapter, it is difficult to move from the language of
subsidiarity in the papal encyclical tradition to the federalism doctrines surrounding the
Commerce Clause and § 5 of the Fourteenth Amendment. While federalism may be the
way in which many observers see a reflection of the principle of subsidiarity in American
constitutional law, a better analogue to subsidiarity can be found in the constitutional

80 Id. at 627.
doctrines of freedom of association and parental liberty, which bear a close resemblance to the papal encyclical tradition’s account of families and civil associations.

A. Freedom of Association

The three leading recent cases on the freedom of association—Roberts v. United States Jaycees,81 Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston,82 and Boy Scouts v. Dale83—concern groups that sought to invoke associational rights against the state’s claim that the group was engaged in unlawful discrimination. In Roberts v. United States Jaycees, the Jaycees brought a challenge to a Minnesota statute that prohibited racial and gender discrimination.84 The Jaycees limited their regular membership to men between 18 and 35, but the Minneapolis and St. Paul chapters had begun to admit women. When the national organization of the Jaycees threatened the local chapters with revocation of their charters, members of the local chapters filed charges with the Minnesota Department of Human Rights, and the national organization brought suit against the state of Minnesota seeking an injunction against enforcement of the Minnesota Human Rights Act.

Writing for the Court, Justice Brennan began by delineating the scope of the freedom of association. One aspect of the right to association, he argued, “conclude[s] that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in

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84 Roberts, 468 U.S. 609.
safeguarding...individual freedom.”85 As such, the freedom of association “receives protection as a fundamental element of personal liberty.”86 A second aspect of the freedom of association, writes Justice Brennan, is for “the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”87 In this sense, freedom of association is “an indispensable means of preserving other individual liberties.”88 Justice Brennan goes on to denote these as, respectively, the “intrinsic and instrumental features of constitutionally protected association.”89

Note that for the Roberts Court, the freedom of association is derivative of individual freedom. Groups, as such, do not enjoy associational rights except and insofar as the state’s interference with a group jeopardizes some exercise of individual liberty. The Court suggests that it is (merely) because “[a]n individual’s freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed” that the freedom of association is recognized.90 Although “[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the

85 Id. at 617-18.
86 Id. at 618.
87 Id.
88 Id.
89 Id.
90 Id. at 622 (emphasis added).
group to accept members it does not desire,”91 the Court nonetheless concluded that enforcement of the Minnesota anti-discrimination statute against the Jaycees was constitutionally permissible. The Court argued that the state has a compelling interest in “eradicating discrimination against its female citizens,” which justifies enforcement against the Jaycees.92 Furthermore, the Court claimed there was no imposition on the expression of the Jaycees.93

The most important recent cases addressing the freedom of association have posed largely the same issue posed in Roberts, namely the attempted enforcement of anti-discrimination statutes against organizations that seek to exclude certain members or those bearing a particular message. The protection afforded freedom of association has, though, arguably expanded considerably since Roberts. In Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, the Court considered a suit brought by GLIB, an Irish-American gay and lesbian group, that sought to march in a St. Patrick’s Day parade in South Boston sponsored by the South Boston Allied War Veterans Council, an organization not notable for its progressive views on sexual matters. GLIB brought constitutional claims and a claim under the Massachusetts public accommodations statute, which prohibited discrimination based on, among other grounds, sexual orientation. The Massachusetts Supreme Judicial Court affirmed a lower court’s holding

91 Id. at 623.
92 Id.
93 Id. at 627.
that the parade was a public accommodation and that there was no expressive purpose in the parade.\textsuperscript{94}

The Supreme Court reversed. Writing for a unanimous Court, Justice Souter began with first principles and noted that “[i]f there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself.”\textsuperscript{95} But parades such as the South Boston St. Patrick’s Day parade are a form of expression, argued Justice Souter, for “we use the word ‘parade’ to indicate marchers who are making some sort of collective point.”\textsuperscript{96} And even though the South Boston parade organizers liberally permitted groups to participate in the parade, “a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech.”\textsuperscript{97} Because “every participating unit affects the message conveyed by the private organizers” the Court argued, “the state courts’ application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.”\textsuperscript{98}

\textit{Hurley}, then, marked a subtle shift in the Court’s freedom of association jurisprudence away from framing the associational right in terms derivative of individual rights and toward according rights to groups as such. Indeed, the Court’s discussion of

\textsuperscript{94} Irish-American Gay, Lesbian and Bisexual Group of Boston v. City of Boston, 636 N.E.2d 1293 (Mass. 1994).
\textsuperscript{96} Id.
\textsuperscript{97} Id. at 569-70.
\textsuperscript{98} Id. at 572-73.
what is denoted by a “parade” signals the collective aspect of the activity. Like Margaret Gilbert’s discussion of sharing an intention to, for example, go for a walk and the “plural subject” created by a “pool of wills,” the activity considered by the Hurley Court was deemed inherently collective. The purpose of gathering for a parade, rather than just walking from point to another, is to engage in collective expression. The forced inclusion of a message with which the group disagrees risks altering the message of the group and does not risk abridging merely the free speech rights of the individual members.

The gesture in Hurley toward a thicker conception of associational rights became more pronounced in Boy Scouts v. Dale. James Dale was an assistant scoutmaster in New Jersey. While in college, Dale became active in gay and lesbian causes and was co-president of the Lesbian/Gay Alliance at Rutgers University. In response, the local Boy Scouts’ council revoked Dale’s adult membership in the Boy Scouts. Dale filed suit under a New Jersey public accommodation statute that, like the statutes in both Roberts and Hurley, prohibited discrimination on a number of grounds, including (under the New Jersey statute) sexual orientation. The New Jersey Supreme Court held that the Boy Scouts were a public accommodation within the meaning of the statute and that the organization’s “large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meeting, establish that the organization is not sufficiently personal or private to warrant constitutional protection.

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under the freedom of intimate association.”\textsuperscript{100} The New Jersey Supreme Court further held that forcibly reinstating Dale “does not compel the Boy Scouts to express any message.”\textsuperscript{101}

The Supreme Court reversed. Chief Justice Rehnquist began by referring to \textit{Roberts} and noting that “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”\textsuperscript{102} But the most remarkable aspect of Chief Justice Rehnquist’s opinion is his insistence that the Court should broadly interpret what constitutes an “expressive association” and should defer to the organization in determining the purpose of expression and what would impair the group’s ability to express itself. The Boy Scout’s stated goals of inculcating values in its members the Scouts are “indisputabl[y]” engaged in expressive activity.

As for any effort to review the content of the Scout’s message on sexual matters or the consistency with which the Scouts have spoken on such topics, the Court contended that “our cases reject this sort of inquiry; it is not the role of the courts to reject a group’s expressed values because they disagree with those values or find them internally inconsistent.”\textsuperscript{103} And just as the Court held that it must defer to an organization’s claims about “the nature of its expression” so it “must also give deference

\begin{itemize}
  \item \textsuperscript{100} Dale v. Boy Scouts, 734 A.2d 1196, 1221 (N.J. 1999) (internal quotation omitted).
  \item \textsuperscript{101} \textit{Id.} at 1229.
  \item \textsuperscript{102} Boy Scouts v. Dale, 530 U.S. 640, 648 (2000).
  \item \textsuperscript{103} \textit{Id.} at 651.
\end{itemize}
to an association’s view of what would impair its expression.”104 In an effort to bring together the unanimous holding of the Court in *Hurley* with his argument for the Boy Scouts’ associational rights in *Dale*, Chief Justice Rehnquist concluded:

Here, we have found that the Boy Scouts believes that homosexual conduct is inconsistent with the values it seeks to instill in its youth members; it will not “promote homosexual conduct as a legitimate form of behavior.” As the presence of GLIB in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scouts’ choice not to propound a point of view contrary to its beliefs.105

As to the question of whether forced inclusion of Dale would then compromise the Boy Scouts’ message, the Court sharply disagreed with the New Jersey Supreme Court’s view that such a step would not significantly affect the Scouts’ ability to disseminate their message. The Court held that a group does not have to gather for the purpose of expression in order nonetheless to receive First Amendment protection.106 Furthermore, internal disagreement or a failure to place a message at the center of the organization’s purpose—both of which were arguably true of the Boy Scouts—does not undermine the protection for expressive association: “The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection.”107

The important difference of framing the right to association as a *group* right rather than an aggregated *individual* right is spelled out by John Garvey in *What Are Freedoms*

104 *Id.* at 653.
105 *Id.* at 654.
106 *Id.* at 655.
107 *Id.* at 656.
For? 108 The Roberts Court roughly reflects what Garvey terms the “individualist” view: “[G]roup action has value because it is an aggregate of valued individual actions….People form groups in order to advance their own interests more effectively.” 109 The alternative to such individualism and as suggested by Hurley emphasizes the potential for genuine group action. Surveying examples drawn from family life and team sports, Garvey concludes:

What distinguishes these cases from the individualist view is that in each of them members see in the group a good more important that their own self-interest. In each case the good is interpersonal, a kind that can only be enjoyed by a group: victory for the team, love, peace, grace. Love, for example, is a relation between persons. It cannot be divided (like a baked Alaska) into separate shares and handed around for individual enjoyment. 110

The insistence upon the possibility of “group personality” is also found in an earlier tradition as reflected in F.W. Maitland’s essay “Moral Personality and Legal Personality.” 111 “If the law allows men to form permanently organised groups,” Maitland writes, “those groups will be for common opinion right-and-duty-bearing units.” 112 As summarized by Russell Hittinger, “[i]n the case of a real group-person, common action is an intrinsic aspect of the common end or purpose….Achievement of a mutually agreeable result is not enough….[F]or each of these groups, their respective corporate unity is one

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109 Id. at 133.
110 Id. at 137.
111 F.W. Maitland, Moral Personality and Legal Personality, in STATE, TRUST, AND CORPORATION 62 (David Runciman & Magnus Ryan eds., 2003).
112 Id. at 68.
of reasons for action—unity is one of the goods being aimed at.”113 By underscoring the importance of genuinely group personality and group activity, the case law surrounding freedom of association and commentators such as Garvey, Maitland, and Hittinger provide an elaboration of Pius XI’s central insight in *Quadragesimo Anno* regarding the nature of subsidiary function: “For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.”114

### B. Parental Liberty

A second set of constitutional doctrines concerns the due process right of parents to direct the upbringing of their children. In *Meyer v. Nebraska*, the Court considered a challenge to a Nebraska statute that prohibited instruction in languages other than English before the eighth grade in any school in the state.115 The plaintiff was a teacher who had taught German to a ten-year-old child.116 The Supreme Court of Nebraska upheld the statute and noted its “salutary purpose:” “The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land.”117 But in a remarkably short opinion for the United States Supreme Court, Justice McReynolds wrote that the scope of the liberty protected by the Fourteenth Amendment included not merely freedom from bodily

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114 Pope Pius XI, *Quadragesimo Anno* ¶ 79 (1931).
115 262 U.S. 390 (1923).
117 262 U.S. at 397-98.
restraint “but also the right of the individual…to establish a home and bring up children, to worship God according to the dictates of his conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” The rights of the plaintiff teacher and the parents of the child being instructed in a foreign language are, the Court concluded, “within the liberty of the Amendment.”

Shortly thereafter, the Court held in Pierce v. Society of Sisters that an Oregon statute requiring all children to attend public schools was a similar violation of the parental due process liberty right. “The fundamental theory of liberty upon which all governments in this Union repose,” the Court explained, “excludes any general power of the state to standardize its children by forcing them to accept instruction from public school teachers only.” With words that echo in the papal encyclical tradition’s discussion of subsidiarity and the family, the Court further argued that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for his additional obligations.”

Finally, in Wisconsin v. Yoder the Court considered a challenge to a Wisconsin compulsory school attendance statute. The Old Order Amish wished to send their

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118 Id. at 399.
119 Id. at 400.
120 268 U.S. 510 (1925).
121 Id. at 535.
122 Id.
children to school only until the eighth grade, but the state statute required attendance until age 16. The Court sided with the Amish parents in a holding roughly based on both the parental liberty right and the right of religious free exercise, though the *Yoder* Court was famously unclear about precisely what constitutional doctrine was at work. As Steven Smith observes:

> After presenting the *Sherbert* doctrine in half-hearted and less than lucid fashion—doctrinalists may note that the Court doesn’t even get the phrasing right and so never even recites the magic words “compelling interest”—the Court seems almost to forget about the doctrinal framework and instead meanders through assorted topics such as the old-fashioned virtues of working the soil, Jeffersonian educational ideals, and the role of medieval monasteries in preserving classical culture.¹²⁴

But all the same, the Court held that “a State’s interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment, and the traditional interest of parents with respect to the religious upbringing of their children.”¹²⁵

The parental liberty right rooted in *Meyer* and *Pierce* and reflected in some aspects of *Yoder* has, of course, been subject to considerable criticism. James Dwyer provocatively argues that

> [P]arental rights are inconsistent with the general rule against granting individuals rights to control the lives of others. In the past, such other-determining rights have been granted only where the subjugated individual was regarded as “property” or as subsumed under the identity of the right-holder. Today, however, the law

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¹²⁵ 406 U.S. at 214.
recognizes that children are not chattel, but persons, who themselves hold rights under our Constitution. Thus, parental rights of control may be no more just than was the centuries-old institution of slavery or the longstanding legal sanction of marital rape. We should seriously consider, then, what interests parents’ childrearing rights do serve, and on that basis determine whether it is rational and just to perpetuate these rights.126

A more sympathetic perspective offered by Stephen Gilles still worries that parental liberty rights “are both ill defined and vulnerable to unduly deferential judicial review of state educational regulation.”127 I agree with Richard Garnett that the principle of subsidiarity offers a framework and justification for parental liberty that the small body of case law on the topic has not developed adequately. “Perhaps Pierce and the cluster of values and maxims for which it is thought to stand are best defended,” Garnett suggests, “not in terms of parents’ individual ‘rights’ against government, and certainly not in terms of ownership and property, but instead in terms of subsidiarity.” He concludes:

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.” On this view, the State properly refrains from second-guessing families on matters of education and the transmission of religious tradition not only out of respect for the religious freedom and parental authority of the individuals situated within those families, but also out of wise regard for those families’ integrity and health, precisely because the integrity and freedom of these “vital cells” is important to the common good….At their best, families can provide, for their members, their neighbors, and society, a prophetic counter-weight to the State, just as, at its best, religious faith challenges and subverts the State’s claims to virtue and competence. This is precisely why statists understandably seek to atomize the family and to minimize religion’s influence

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through persecution, suppression, or co-option, or perhaps through the milder methods of civic education.\(^{128}\)

III. Conclusion: Subsidiarity as “Functional Pluralism”

The foregoing discussion serves as the basis for the conclusion of this chapter that the appropriate way to frame the relation between the principle of subsidiarity and contemporary American constitutional law is nothing as abstract or useless as “small is beautiful” or a principle of devolution. Instead, I suggest that subsidiarity provides a theoretical basis for “institutional” theories of rights advocated recently by legal scholars. As developed variously by Roderick Hills and John McGinnis, such institutional theories supplant anticoercion or other liberal accounts of rights that fail to account for significant aspects of constitutional jurisprudence.

As summarized by Hills, “[a]nticoercion theories of constitutional rights maintain that the interest being protected by rights is simply the individual’s best interest in being free from ‘coercive’ pressure imposed by institutions for collective self-governance.”\(^{129}\) With some qualification, examples of such anticoercion accounts are Ronald Dworkin’s and John Rawls’s.\(^{130}\) Hills argues, though, that such anticoercion theories cannot justify

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\(^{130}\) See John Rawls, POLITICAL LIBERALISM 134-40 (1993) and RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977). See also Richard H. Pildes, Dworkin’s Two Conceptions of Rights, 29 J. LEGAL STUD. 309 (2000). As Hills shows, it is easier to ascribe the anticoercion label to Dworkin than to Rawls: If political participation merely secures some sort of entitlement to basic social goods consistent with the Difference Principle, then it might constitute a version of anticoercion theory, as the interest is a jurisdictionally indifferent and remedially simple private good—an entitlement to some share of social goods plus an interest in being left alone. In theory, such entitlements could be satisfied in a benevolent bureaucratic despotism with lots of public hearings, a merit-based civil
asciring rights to institutions. Along the way, Hills performs a valuable task by calling into serious doubt the easy distinction between public and private and between constitutional structure (federalism, separation of powers) and constitutional rights. More importantly and in ways that Hills mentions only briefly in his article, institutions act as “private governments” because they legitimately possess authority. For his part, Hills justifies the importance of institutions by arguing for their essentially instrumental value. In contrast to Justice Brennan’s views in Roberts that freedom of association is based on the rights of the individual members’ rights to free speech, Hills argues that “[m]any organizations may (because of their incentives, structure, etc.) be better suited for advancing First Amendment values than the federal, state, and local governments themselves. It is this special expertise (for lack of a better word) that entitles them to preempt other governments’ regulation, not the members’ desire, however sincere, to express themselves.”

Similarly, in his article defending a Tocquevillian interpretation of the Rehnquist Court’s jurisprudence in a range of areas—federalism, freedom of association, the Establishment Clause, and the scope of the right to trial by jury—John McGinnis argues for the unifying theme of “social discovery” through associational rights. In contrast to

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service, and stringently enforced freedom for solitary free-lance journalists, soap-box orators, etc. The abstract requirement of equal political participation can be guaranteed just as easily by abolishing elective office equally as by giving everyone an equal right to vote for such offices. Given that Rawls leaves most specific institutional questions to later stages of his “four stages” of analysis, which he himself does not discuss, it is probably best to be agnostic about what precisely Rawls’s theory implies.

Hills, supra note 129, at 159 n.36.

Hills, supra note 129, at 218.
the Warren Court’s enthusiasm for centralized federal power balanced by areas of hypertrophied individual autonomy in areas such as privacy and criminal procedure, McGinnis argues that the Rehnquist Court has substituted an enthusiasm for decentralized associational and localized “social discovery.” Just as John Hart Ely’s *Democracy and Distrust* provided the intellectual ballast for the Warren Court, McGinnis hopes to provide a unifying framework for the Rehnquist Court’s decisions in a wide range of constitutional doctrines.

In doing so, McGinnis underscores the recent acknowledgment of the influence of the English political philosopher Michael Oakeshott on Chief Justice Rehnquist. Rehnquist wrote an M.A. thesis at Stanford on competing theories of rights, which was only posthumously published in the *Stanford Law Review* and began an M.A. thesis on Oakeshott at Harvard. From Oakeshott, Rehnquist adopted a measure of skepticism toward politics that reflected deeper epistemological commitments by Oakeshott remotely derived from Oakeshott’s qualified appreciation for Hobbes. In turn and as argued by Doug Kmiec, this skepticism or anti-utopianism led Rehnquist to adopt a suspicion of national power that, soon upon his confirmation to the Supreme Court, stood in marked contrast to the Warren Court’s federalism jurisprudence and the *Wickard* high-water mark of the New Deal Court.

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For his part, McGinnis looks to Tocqueville and Hayek as the remote intellectual forces on the Rehnquist Court. Regardless of their source, however, the decisions surveyed by McGinnis that evince a commitment to social discovery are justified, according to McGinnis, by the instrumental ends served by such social discovery. So it is that, for McGinnis, associations “are independently valuable because they themselves generate potentially beneficial norms for society through their competition. The norms that survive this market-test have some claim to being beneficial.”135 Later in his article when defending the Court’s decision in *Dale*, McGinnis argues that:

> [T]he advantages of having a full range of civil associations lies in society’s engagement of a range and intensity of views on an issue pressed from different perspectives. An alternative constitutional world, which provides special solicitude only for the autonomy of groups with an express political agenda and neglects that of civil association, is one where contentious political advocacy alone supplements the norms encouraged by the government.136

In place of—or perhaps as an elaboration of—the theses advanced by Hills and McGinnis to defend the role of associations and the states and local governments in the American constitutional order, I propose that subsidiarity offers a more adequate and complete justification. On this view, subsidiarity is a principle reflecting what I term “functional pluralism” in the social order. By “functional,” I mean to denote that subsidiarity focuses upon the *ends* of political societies—families, towns, civic organizations—and thereby seeks to determine the goods they pursue and the means that are properly adapted to those ends. By “pluralistic,” I merely suggest that different ends

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136 *Id.* at 534.
are pursued by different social forms. So, for example, the ends served by Villanova University are different than the ends served by the federal government, the Commonwealth of Pennsylvania, the Boy Scouts, or the family. Note that this view of functional pluralism need not contradict the instrumentalist accounts variously offered by Hills and McGinnis. One can proceed from an agnosticism about the worthiness of ends served by the Church of Jesus Christ of Latter-Day Saints or by the Rotary Club but still believe it may well be beneficial (understood instrumentally) to the larger society if there are a multitude of such groups and if their associational rights are duly protected by constitutional doctrine.

One advantage accorded by subsidiarity as functional pluralism, though, is that one need not be committed to adopting such an agnosticism toward the ends pursued by different groups, thereby deflecting for now the charge that advocates of associational rights cannot offer principled grounds for distinguishing between the Episcopal Church and the Ku Klux Klan. Constitutional scholars have, for example, either wrung their hands over squaring the Court’s rulings in Roberts or Runyon v. McCrory with Dale or have argued simply that Dale was wrongly decided. Such confusion is sown by adopting an agnosticism toward the ends served by any form of expressive association, whether for the purposes of gathering for religious worship, camping, organizing a

137 427 U.S. 160 (1976) (holding that § 1981 prohibition on racial discrimination was applicable to private, commercially operated, nonsectarian school).

parade, or engaging in racially motivated violence. But functional pluralism permits—indeed requires—some such “peek behind the curtain” of the reasons for which the group is engaging in expressive association or has come together in the first place, even if not for purely expressive purposes. The remaining chapters of this dissertation are an exploration of when constitutional doctrine or public policy may engage in such inquiry into the ends an association pursues.

Hills captures an aspect of this point by his discussion of Joseph Raz’s argument for political authority in the *Morality of Freedom* and in Hills’ discussion of “jurisdictional limits” to associational rights. As summarized by Hills, “[i]n contrast to anticoercion theories, which are jurisdictionally indifferent, under Raz’s theory, authorities are limited by jurisdiction.”139 By “jurisdictionally indifferent,” Hills means that anticoercion accounts of rights “do not make the definition of impermissible ‘coercion’ depend on the identity of the allegedly coercive jurisdiction.”140 An implication of such jurisdictional indifference, according to Hills, is that “rights are not entitlements to any particular institutions for collective self-governance.”141 By contrast, in the account of authority offered by Raz, “[a]n authority is entitled to deference only on those questions where deference to the authority’s views will improve the consistency of the decision with the appropriate social norm.”142 For our purposes, the key step in the

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139 Hills, supra note 129, at 196.
140 Id. at 157.
141 Id.
142 Id.
argument by Hills and of importance for synthesizing his theory of institutional rights and
the principle of subsidiarity is the need for reasoned justification for authority:

Razian authority, in other words, is critically connected to the justifications for
decisions rather than the acts or consequences that result from the decision. Since
the institutional rights of private government that I defend are a species of Razian
authority, they depend on reasons as well. Thus, private organizations have rights
to make decisions if their justifications are the proper ones for the sphere in which
those organizations have jurisdiction. This creates a certain symmetry between
rights of private organizations and powers of government: Both are invalid if they
are based on improper reasons. Such symmetry should hardly be surprising.
Under my theory, the institutional rights of private organizations are, as a matter
of principle, indistinguishable from the powers of the state. Both are simply
instruments of self-government.143

Though the justification for authority in the Catholic social tradition would emphasize the
common good more than mere instrumentalism, the jurisdictional limits for which Hills
argues are consonant with that tradition. As Johannes Messner argues in Social Ethics,
“[b]ecause the subsidiary function principle protects the particular rights of the natural
and the free associations against the state’s claim to omnicompetence, it is a fundamental
principle of the pluralistic society.”144

This account of subsidiarity as functional pluralism and its role in American
constitutional law prompts an important question, though: are the states and local
governments appropriately considered such subsidiary institutions? The argument for a
consonance between the associational and parental rights in such cases as Dale and
Pierce and functional pluralism is easy to see. Indeed, the documents from the Catholic

143 Id.
144 JOHANNES MESSNER, SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD 213 (J.J.
Doherty trans., 1949) (emphasis in original).
social tradition surveyed in Chapter One that initially formulated the principle of subsidiarity and then later elaborated upon it spoke of precisely such associations as reflecting subsidiarity—families (preeminently), unions, guilds, civic associations, and the like. The more difficult issue is how to square functional pluralism with the apparently random boundaries of geographically determined political units in a federal system.

I offer an initial response here to this concern and will leave for the later chapters an illustration of how subsidiarity might be worked out amid such governmental units. Even if the states and local governments are not “natural” forms of association in the sense in which families are or are not “voluntary” associations in the way that the Rotary Club is, they exist as a matter of positive constitutional (or sub-constitutional) law. Following the same account of functional pluralism and applying it to the states and local governments, then, we can describe the ends of such political units as those powers that are assigned them by positive law. Furthermore, for reasons famously articulated by Mancur Olson in *The Logic of Collective Action*, there is a relation between the size of any group or organization and the provision of some collective good. The collective action problems associated with large groups are often overcome in smaller units. A more complete exploration of this theme will await the discussion of school finance at the state and local levels in Chapter Five. It is enough here to note that both positive law and

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arguments regarding the scale of authority and the provision of collective goods offer a way to reconcile the *jurisdictional* pluralism of American government—federal, state, and local—with the *functional* pluralism of subsidiarity as articulated in this dissertation.
CHAPTER THREE: ASSISTED SUICIDE AND LIBERALISM

Introduction: Federalism and Assisted Suicide

Federalism and related institutional considerations have been in disfavor among political theorists for a generation. As Jacob Levy points out, “[T]he dominant mood in political philosophy since the early 1970s has been one of disdain for questions of institutional design” because “[i]n this post-1971 intellectual landscape [since the publication of John Rawls’ *A Theory of Justice*], it has sometimes been suggested, or causally assumed, that liberalism is synonymous with moral universalism applied to politics.”\(^1\)

This chapter will seek to dispute that assumption by building on the last chapter and arguing for an institutionally pluralistic approach to contested moral questions. I will argue, with the aid of the principle of subsidiarity as developed in the last two chapters, that a broader conception of political liberalism—one protective of rights and democratic deliberation, such as one associates with the grand liberal tradition from Locke to Rawls—is better advanced on some questions through subsidiarity and federalism than through uniform national policymaking. This chapter seeks to play provocatively on the “political safeguards of federalism” debate inaugurated by Herbert Wechsler\(^2\) and Jesse


\(^2\) Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the
Choper over whether the national political process would adequately protect federalism by arguing that constitutionally enforced federalism provides a safeguard for basic concerns of political liberalism.

The focus of this chapter is the ongoing debate over the legal status of physician-assisted suicide and the Supreme Court’s recent decisions on a range of questions related to physician-assisted suicide. As we saw in the last chapter, the Court has, albeit inconsistently, been willing to enforce limits on federal power, as suggested by Lopez and Morrison (in the Court’s Commerce Clause jurisprudence) and by Boerne (in its § 5 jurisprudence). Correlatively, the power of the states is expanded by these decisions, at least insofar as the states retain, after Lopez, Morrison, and Boerne, the power to enact gun possession laws of a kind and religious freedom protection statutes, but Congress does not. So also, federal legislation under the Controlled Substances Act to prohibit physician-assisted suicide, for example, is constitutionally ambiguous. As the Court argued in Raich, the CSA is indisputably a valid exercise of the interstate commerce power because the sale and trafficking of drugs is “economic” activity and because the prohibitions on drug trafficking contained in the CSA are necessary and proper to the carrying out of the commerce power. But as one author notes, a federal statute that would prohibit dispensing drugs to aid in a suicide is directed at intrastate drug regulation:

“[W]hile drugs travel in interstate commerce, a terminally ill patient’s decision to ask a

Composition and Selection of the National Government, 54 COLUM. L. REV. 543 (1954).

3 JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 175-93 (1980) (“Numerous structural aspects of the national political system serve to assure that states’ rights will not be trampled, and the lesson of practice is that they have not been.”).
doctor for a prescription to end his life and a doctor’s decision to comply are medical rather than commercial decisions.”

One can imagine a similar constitutional uncertainty were such a statute defended on Fourteenth Amendment grounds. What if Congress determined that equal protection (for the disabled, for example) required that physician-assisted suicide not be a legal option under the CSA? Out of a concern that the disabled or elderly would be (over-) encouraged to avail themselves of physician-assisted suicide, Congress could claim that a ban on assisted suicide is an exercise of congressional power to enforce the Fourteenth Amendment’s Equal Protection Clause. But, here again, the uncertainty in the § 5 jurisprudence occasioned by Boerne and the congruence and proportionality limits to the § 5 power render such an exercise of federal power problematic.

Finally, a looming uncertainty emerging from the last chapter and elaborated upon here is the place of federalism concerns in administrative law decisions. In a 2001 case, the Court ruled that the Army Corps of Engineers could not claim jurisdiction over a landfill site with migratory birds, despite the Clean Water Act’s grant of jurisdiction to the Corps of “navigable waters.” As we will see, the decisions in the Oregon physician-assisted suicide case referred only in passing to the SWANCC Court’s view that administrative rulings that “alter[] the federal-state framework by permitting federal encroachment upon a traditional state power” will trigger a narrowing construction of the

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relevant statute (the Clean Water Act in SWANCC and the CSA in Gonzales v. Oregon).  

A broad interpretation of the SWANCC rule might entail a wholesale reevaluation of the scope of Chevron deference to administrative agencies, as any administrative ruling that, in the Court’s view, “encroached upon a relevant state power” could be subject to judicial scrutiny and potentially invalidated so as not to raise constitutional objections to the underlying statute itself: “This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.”  

Gonzales v. Oregon chose not to adopt such a broad rule, relying instead on a narrower statutory interpretation of the CSA. But the Court’s language in SWANCC suggests that it may be prepared to place federalism worries at the center of administrative law cases as well.

I. Assisted Suicide and Constitutional Rights

In 1997, the Supreme Court rejected due process and equal protection challenges to state law prohibitions on physician-assisted suicide. In the first case, Glucksberg v. Washington, the Court considered a due process claim against Washington’s assisted suicide statute. A panel opinion of the U.S. Court of Appeals for the Ninth Circuit was written by Judge John T. Noonan, Jr. In the Ninth Circuit case, Compassion in Dying v. Washington, the appellate court reviewed a district court ruling that the plaintiff patients

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7 SWANCC, 531 U.S at 172-73.
8 49 F.3d 586 (9th Cir. 1995).
and physicians were deprived of a due process liberty and were denied equal protection by the Washington statute. Rejecting the view that the Supreme Court’s decision in Planned Parenthood v. Casey somehow expanded the scope of due process liberty to include every decision affecting personal autonomy, Judge Noonan wrote that “[a]ny reader of judicial opinions knows that they often attempt to generality of expression and sententiousness of phrase that extend far beyond the problem addressed.”9 Because a right to physician-assisted suicide has never been recognized, “[u]nless the federal judiciary is to be a floating constitutional convention, a federal court should not invent a constitutional right unknown to the past and antithetical to the defense of human life that has been a chief responsibility of our constitutional government.”10

Judge Noonan’s opinion is an especially helpful survey of the possible arguments offered on behalf of the state’s interest in prohibiting assisted suicide. First, the state has an “interest in not having physicians in the role of killers of their patients.”11 As argued more elaborately by Leon Kass, among others, legal permission for assisted suicide would transform the nature of the medical profession and present a marked transformation in the role of physicians in their relationships with patients.12 Second, the state has an interest in protecting patients from “psychological pressure to consent to their own deaths.”13 Financial pressures on families and despair over terminal conditions

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9 Id. at 590.
10 Id. at 591.
11 Id. at 592.
13 49 F.3d at 592.
might lead to coercion that would make the choice for assisted suicide less than fully autonomous.\textsuperscript{14} Third, the state is legitimately concerned with protecting the poor and minorities from exploitation and manipulation. Fourth, the disabled would be especially vulnerable to pressure to avail themselves of assisted suicide, which, in turn, gave rise in the 1990s to a concerted anti-euthanasia effort among the disability rights community. Fifth, the state is legitimately worried that there might be a slippery slope from permitting terminally ill patients to have the aid of a physician in committing suicide to the giving the same option to suffering (but not terminally ill) competent patients and finally to involuntary euthanasia. The literature on the long-running experiment with legalized euthanasia in the Netherlands raises doubt that limits on assisted suicide can be maintained.\textsuperscript{15}

An en banc panel of the Ninth Circuit vacated Judge Noonan’s opinion. Writing for the court, Judge Stephen Reinhardt began his analysis of the liberty interest by positing “the fact that we have previously failed to acknowledge the existence of a particular liberty interest or even that we have previously prohibited its exercise is no barrier to recognizing its existence.”\textsuperscript{16} Building on the Supreme Court’s decisions in \textit{Planned Parenthood v. Casey} and \textit{Cruzan v. Missouri}, the en banc Ninth Circuit held that

\textsuperscript{14} The role of “autonomy” in the physician-assisted suicide debate and in bioethics more generally is much contested. Two very fine treatments of the topic are ONORA O’NEILL, AUTONOMY AND TRUST IN BIOETHICS (2002) and CARL E. SCHNEIDER, THE PRACTICE OF AUTONOMY: PATIENTS, DOCTORS, AND MEDICAL DECISIONS (1998).


terminally ill patients have a due process liberty interest in procuring the aid of a physician in ending their lives.

The litigation against New York’s prohibition on assisted suicide began when Dr. Timothy Quill, who had written a controversial piece in the *New England Journal of Medicine* describing an assisted suicide, filed suit along with two other New York physicians. The Second Circuit did not follow the Ninth Circuit’s lead in concluding that there was a Fourteenth Amendment due process liberty interest in physician-assisted suicide, but it did hold that the statutory prohibition against assisted suicide was a violation of the Equal Protection Clause. The court reasoned that the longstanding right to refuse medical treatment that dates back to Judge Cardozo’s famous opinion in *Schloendorff v. Society of New York Hospital* results in an unequal treatment of patients in end-of-life settings. A competent patient who seeks to refuse medical treatment or who seeks removal of life sustaining treatment is protected under New York law. The patient who cannot hasten his death in such a manner, though, and seeks instead to have the assistance of a physician in ending his life is not given such a right under New York law:

> [I]t seems clear that New York does not treat similarly circumstanced persons alike: those in the final stages of terminal illness who are on life-support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life-sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.

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18 105 N.E. 92 (N.Y. 1914).
Underlying the court’s reasoning is an assault on the distinction between killing and letting die, which has been a familiar argument in the bioethical literature.\textsuperscript{20} The court seizes on the argument from the district court that there is a difference between “allowing nature to take its course,” on the one hand, and hastening death on the other. But “there is nothing ‘natural’ about causing death by means other than the original illness or its complications,” the court argues, and the withdrawal of life-sustaining treatment “hastens…death by means that are not natural in any sense. It certainly cannot be said that the death that immediately ensues is the natural result of the progression of disease or condition from which the patient suffers.”\textsuperscript{21}

The Supreme Court rejected both the due process and the equal protection arguments.\textsuperscript{22} The Court noted that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”\textsuperscript{23} This federalism rationale in Chief Justice Rehnquist’s majority opinion for the outcome was brought to the fore in Justice O’Connor’s concurrence:

There is no reason to think the democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end their suffering and the State’s interests in protecting those who might seek to end life mistakenly or under pressure….States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues….In such circumstances, “the…challenging task of crafting
appropriate procedures for safeguarding…liberty interests is entrusted to the States….”

On a controversial question of “morality policy,” then, the Court deferred to the federalist system of democratic deliberation in the several states.25 26

We could generalize from the Court’s opinion in Glucksberg and Quill to a principle that the federal government (including the federal judiciary) should refrain from making law or policy on controversial questions that generate deep moral conflict. Even if this principle is intuitively appealing, however, it still stands in need of justification. Federalism for the sake of federalism will not do; what is needed is a political theoretical justification for preferring state-by-state adjudication of these controversial moral questions. I will argue that subsidiarity provides such a justification.

After recounting the forms of federal opposition to the Oregon physician-assisted suicide statute, I will look at two ways in which one committed to the basic principles of political liberalism could decide the question of physician-assisted suicide. One alternative—a uniform, national approach by way of constitutional rights—is provided by

24 Id. at 737 (O’Connor, J., concurring) (citations omitted).
26 Obviously, the area of law most difficult to square with the Court’s opinion (and Justice O’Connor’s concurrence) in Glucksberg is abortion. In a brief passage, the Court sought to distinguish a claimed right to physician-assisted suicide from Roe and Casey:

“[T]he Court’s opinion in Casey described, in a general way and in light of our prior cases, those personal activities and decisions that this Court has identified as so deeply rooted in our history and traditions, or so fundamental to our concept of constitutionally ordered liberty, that they are protected by the Fourteenth Amendment… That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and Casey did not suggest otherwise.” Glucksberg, 523 U.S. at 726-27.
the authors of “The Philosophers’ Brief” and argues for a federal constitutional due
process liberty right to physician-assisted suicide. The second alternative favors state-by-
state determination of the issue but also from what might be described as a broadly
“liberal” perspective but one consistent with aspects of subsidiarity.

II. Assisted Suicide in Oregon: A Test Case for Federalism

The Controlled Substances Act (CSA), which is primarily directed at drug
trafficking, prohibits “dispens[ing] a controlled substance” unless authorized under the
statute. Physicians can obtain authorization (and register with the federal government)
under the statute to dispense drugs “to the extent authorized by their registration and in
conformity with the other provisions of this subchapter.”27 According both to case law
interpreting the CSA and Drug Enforcement Administration (DEA) regulations
implementing the statute, one such limitation on physicians is that prescriptions must be
in accord with “legitimate medical purposes”: “A prescription issued for a controlled
substance must be issued for a legitimate medical purpose by an individual practitioner
acting in the usual course of his professional practice.”28 The extent to which a federal
determination (made by the Attorney General) of what constitutes a “legitimate medical

28 21 C.F.R. § 1306.04(a). See also United States v. Moore, 423 U.S. 122, 140-42 (1975):
[T]he scheme of the [CSA], viewed against the background of the legislative history,
reveals an intent to limit a registered physician’s dispensing authority to the course of his
“professional practice.”…Implicit in the registration of a physician is the understanding
that he is authorized only to act “as a physician.”…[R]egistration is limited to the
dispensing and use of drugs “in the course of professional practice or research.” Other
provisions throughout the Act reflect the intent of Congress to confine authorized medical
practice within accepted limits.
purpose” can preempt a state’s determination was at the center of the dispute over federal intervention in Oregon.

In November of 1994, Oregon voters passed by ballot initiative the Death with Dignity Act (DDA), thereby becoming the first state to legalize a form of physician-assisted suicide. After rejecting a second ballot proposal to repeal the Act in 1997, the law went into effect after those challenging the statute failed to convince the Ninth Circuit that the statute violated the equal protection guarantee of the Fourteenth Amendment.29 The DDA provides, in relevant part, that “[a]n adult who is capable, is a resident of Oregon, and has been determined by the attending physician and consulting physician to be suffering from a terminal disease, and who has voluntarily expressed his or her wish to die, may make a written request for medication for the purpose of ending his or her life in a humane and dignified manner.”30

Even before the 1997 ballot initiative and Ninth Circuit decision, however, Senator Orrin Hatch (Republican of Utah) and Congressman Henry Hyde (Republican of Illinois)—the then-chairmen of the Senate and House Judiciary Committees, respectively—sent a letter to the DEA advocating the position that the DEA is authorized under the CSA to revoke the registration of physicians and pharmacists who prescribe death-causing medication under the Oregon statute: “In our view, assisting in a suicide by prescribing or filling a prescription for a controlled substance cannot be a ‘legitimate medical purpose’ under DEA regulations, especially when the practice is not reasonable

and necessary to the diagnosis and treatment of disease and injury, legitimate health care, or compatible with the physician’s role as healer.”\textsuperscript{31}

On November 5, 1997, DEA Administrator Thomas Constantine agreed and concluded in his response to the Hatch/Hyde letter “that delivering, dispensing or prescribing a controlled substance with the intent of assisting a suicide would not be under any current definition a ‘legitimate medical purpose.’”\textsuperscript{32} The state of Oregon, acting through its deputy attorney general, asked the Department of Justice to reconsider the DEA opinion by Administrator Constantine. On June 5, 1998, Attorney General Janet Reno reversed the decision of the DEA Administrator and determined that “[t]here is no evidence that Congress, in the CSA, intended to displace the states as the primary regulators of the medical profession, or to override a state’s determination as to what constitutes legitimate medical practice in the absence of a federal law prohibiting that practice.”\textsuperscript{33}

In an effort to clarify congressional intent, the Pain Relief Promotion Act (PRPA) was introduced in Congress in the summer of 1999. If enacted, the PRPA would have amended the CSA to give the DEA authority to prohibit the use of controlled substances

\textsuperscript{31} Letter from Orrin G. Hatch, Chairman of the Comm. on the Judiciary, U.S. Senate & Henry J. Hyde, Chairman of the Comm. on the Judiciary, U.S. House of Representatives, to The Honorable Thomas A. Constantine, Adm’r, Drug Enforcement Admin. of the U.S. (July 29, 1997).


for the purpose of hastening the death of a terminally ill patient. Specifically, the bill provided:

For purposes of this Act and any regulations to implement this Act, alleviating pain or discomfort in the usual course of professional practice is a legitimate medical purpose for the dispensing, distributing, or administering of a controlled substance that is consistent with public health and safety, even if the use of such a substance may increase the risk of death. Nothing in this section authorizes intentionally dispensing, distributing, or administering a controlled substance for the purpose of causing death or assisting another person in causing death. 34

The PRPA passed the House but languished in the Senate. As the end of the 106th Congress approached, Senator Ron Wyden (Democrat of Oregon) announced his intention to filibuster the PRPA if it reached the Senate floor. Wyden, though claiming to be personally opposed to physician-assisted suicide and an opponent of the Oregon ballot measure, raised federalism concerns about the PRPA in his testimony to the Senate Judiciary Committee. 35 “[W]hen it comes to determining legitimate medical purposes of these controlled substances, these drugs have always fallen under the supervision of the states,” Wyden said, “….These state approaches differ from state to state and exist solely under state, not federal authority, without disturbing the federal government’s jurisdiction.” 36 Despite efforts by the chief sponsor of the PRPA in the Senate, Senator Don Nickles (Republican of Oklahoma), to attach the bill to an appropriation measure, Congress adjourned on December 15, 2000, without enacting the PRPA.

35 Testimony of U.S. Senator Ron Wyden before the Senate Committee on the Judiciary Regarding the Pain Relief Promotion Act, April 25, 2000.
36 Id.
With control of the Senate shifting to the Democrats in the spring of 2001, opponents of Oregon’s physician-assisted suicide statute shifted strategy and moved from seeking a legislative nullification of the DDA to seeking an administrative reversal of Reno’s earlier interpretation of the CSA. On June 27, 2001, Deputy Assistant Attorney General Sheldon Bradshaw and Special Counsel Robert Delahunty in the Office of Legal Counsel submitted a legal memorandum to Attorney General John Ashcroft concluding that practices authorized by the Oregon DDA do not constitute a “legitimate medical purpose” and therefore violate the CSA. On November 6, 2001, Attorney General Ashcroft informed the Administrator of the DEA, Asa Hutchinson, that prescribing drugs intended to kill a terminally ill patient does not constitute a “legitimate medical purpose” under the Controlled Substances Act, and “prescribing, dispensing, or administering federally controlled substances to assist suicide may render [a physician’s] registration…inconsistent with the public interest and therefore subject to possible suspension or revocation under [the CSA].” Oregon filed suit in federal district court the next day challenging the Ashcroft directive and seeking a temporary restraining order. The TRO was issued on November 8, and a preliminary injunction followed in two weeks.

On April 17, 2002, Judge Robert E. Jones granted Oregon’s motion for summary judgment.\textsuperscript{39} Interestingly, the decision by Judge Jones avoided confronting any major federalism questions, such as the scope of Congress’s power under the Commerce Clause or the reservation of powers to the states under the Tenth Amendment, though the Oregon did argue both points in its briefing to the court. Instead, the court rested its decision entirely on administrative law and statutory interpretation issues, arguing that the statutory language, the legislative history, and the case law surrounding the CSA did not support the Attorney General’s view that he can provide his own interpretation of “legitimate medical purpose” over and against a state’s regulation of medical practice. “I resolve this case as a matter of statutory interpretation,” wrote Judge Jones, “and my interpretation of the statutory text and meaning is that the CSA does not prohibit practitioners from prescribing and dispensing controlled substances in compliance with a carefully-worded state legislative act.”\textsuperscript{40}

The Ninth Circuit affirmed the district court’s holding that the Attorney General’s directive exceeded the scope of his authority under the CSA, and the Supreme Court agreed. Writing for the Court, Justice Kennedy began by noting that the case involved the underlying moral and political question of assisted suicide, “but its resolution requires an inquiry familiar to the courts: interpreting a federal statute to determine whether Executive action is authorized by, or otherwise consistent with, the enactment.”\textsuperscript{41}

\textsuperscript{39} Oregon v. Ashcroft, 192 F. Supp. 2d 1077 (D. Or. 2002).
\textsuperscript{40} Id. at 1093.
summarizing the history of the Interpretive Rule, the Court discussed the thorny administrative law issues in the case. Most importantly, the Court concluded that the CSA provided the Attorney General with “limited powers, to be exercised in specific ways.”\textsuperscript{42}

Furthermore, the regulatory aims of the CSA are, the Court argued, limited to combating illicit drug trafficking: “Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the [CSA] manifests no intent to regulate the practice of medicine generally.”\textsuperscript{43} And while most of Justice Kennedy’s opinion for the Court steered clear of the substantive dispute over physician-assisted suicide, he did conclude on a federalism note: “Just as the conventions of expression indicate that Congress is unlikely to alter a statute’s obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States’ police power.”\textsuperscript{44}

\textbf{III. Political Liberalism and Assisted Suicide}

In all of the decisions recounted here (the Oregon ballot initiative, the various Supreme Court decisions, proposed federal legislation, and the Ashcroft directive), we could explore the levels of political accountability in each and ask whether that should be relevant to deciding the federalism and physician-assisted suicide question. For example,

\textsuperscript{42} \textit{Id.} at 259.  
\textsuperscript{43} \textit{Id.} at 270.  
\textsuperscript{44} \textit{Id.} at 274.
should democratic deference to a ballot initiative prevail over federal administrative decisions? Or are there republican reasons to worry about ballot initiatives but not, for instance, congressional legislation? But the primary question considered in this chapter is whether federalism should matter in the assisted suicide debate. To that end, I will consider two attempts to use the resources of political theory to adjudicate the assisted suicide question. One view—represented by “The Philosophers’ Brief”—argues for a federal constitutional right to assisted suicide. An alternative view, based in subsidiarity and still “liberal” in the broadly theoretical sense, contends that the values of political liberalism are best served on this matter by federalism.

A. “The Philosophers’ Brief”

In the March 27, 1997, issue of the *New York Review of Books*, six prominent philosophers published an *amicus* brief they had filed with the U.S. Supreme Court as the Court considered the two federal appellate rulings on assisted suicide that became *Vacco v. Quill* and *Washington v. Glucksberg*. The brief, aptly titled “The Philosophers’ Brief,” argued for recognition by the Court of a constitutional right to physician-assisted suicide for terminally ill patients. Among the six authors were probably the most prominent liberal theorist of the twentieth century, John Rawls (whose work I will use later to argue for a federalist solution to physician-assisted suicide), and also the University Professor of Jurisprudence at Oxford, Ronald Dworkin. Though the Supreme Court did not adopt the reasoning or the conclusions of “The Philosophers’ Brief,” a contribution to a contested public policy question by such notable theorists provides an interesting glimpse of the interplay between moral philosophy, political theory, and legal debate.
Though the argument of the brief cannot be repeated here in its entirety, the three central contentions of the authors can be summarily stated. First, the authors asserted a constitutional principle that decisions regarding the termination of life are governed “on the basis of a religious or ethical conviction about the value or meaning of life itself,” and, furthermore, that the U.S. Constitution “forbids government to impose such convictions on its citizens.”45 There is a presumption of neutrality regarding moral questions, and the categories of “moral,” “ethical,” and “religious” are often collapsed in the brief under this principle of non-interference.

This “liberty interest,” as the authors term it, is protected by two considerations, one drawn from the text of the Constitution and the other from two Supreme Court cases. The Due Process Clause of the Fourteenth Amendment, the brief argues, guarantees the right of citizens to be “allowed to make [deeply personal] decisions for themselves, out of their own faith, conscience, and conviction.”46 The decision as to the manner of one’s own death is held to be a primary instance of such a decision, for, as the brief states in a peculiar turn of phrase, “Death is, for each of us, among the most significant events of life.”47 Additionally, the 1992 decision of the Supreme Court upholding the right of a woman to an abortion, Planned Parenthood v. Casey, recognized a “sphere of autonomy” into which government may not intrude. As the Court wrote in its now-famous “mystery passage,” “At the heart of liberty is the right to define one’s own concept of existence, of

46 Id.
47 Id. at 44.
meaning, of the universe, and of the mystery of human life.” What could lie closer to one’s concept of existence, the brief asks rhetorically, than one’s attitude toward death? Finally, in *Cruzan v. Missouri*, the 1990 case holding that a competent patient may refuse life-sustaining treatment such as artificial nutrition and hydration, the Court, according to the philosophers, laid the groundwork for a right to determine the time and manner of one’s death, including a right to physician-assisted suicide. If one has the right to refuse unwanted medical intervention and to seek death through an act of omission, then, the brief contends, one may also seek death through an act of commission, such as the ingestion of a lethal dose of medication.

The use of the *Cruzan* case leads from a treatment of the brief’s assertion of a liberty interest to its attack on the traditional distinction between killing and letting die. “If it is permissible for a doctor deliberately to withdraw medical treatment in order to allow death to result from a natural process,” the authors write, “then it is equally permissible for him to help a patient hasten his own death more actively, if that is the patient’s express wish.” This dispute over the question of whether there is a moral distinction to be made between acts that allow a patient to die, such as removal of a respirator, and acts of killing a patient, such as the administration of lethal drugs, has, as noted above, raged since James Rachels’ famous article “Active and Passive Euthanasia” appeared in the *New England Journal of Medicine* in 1975, and the central place given to

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50 *The Philosophers’ Brief*, supra note 45, at 45.
obliterating the distinction by “The Philosophers’ Brief” demonstrates the ongoing importance of the question.

Finally, the brief argues that the various versions of the “slippery slope” argument advanced by critics of physician-assisted suicide do not justify an absolute prohibition. These arguments usually take two forms. One argues that the extension of a right to physician-assisted suicide to terminally ill and competent patients will quickly lead to the extension of such a right to non-competent patients. Why, it is argued, should non-competent patients, for example, those in a coma, be prevented from exercising the same right to a hastened and dignified death that competent patients enjoy? (This was, as mentioned earlier, basically the argument adopted by the Second Circuit in Vacco.) The second form of the argument points to the potential for various types of subtle or not so-subtle coercion of the free choice of physician-assisted suicide among the most vulnerable members of the population: the elderly, the young, and the poor. Particularly in an environment of cost-containment through managed care arrangements, many share the fears of M. Cathleen Kaveny and John P. Langan writing in the New York Times: “If every person diagnosed with a terminal illness is seen as a potential candidate for assisted suicide, a fatal overdose prescribed by a doctor could well become the most powerful cost-control tool available to managed care.”

The brief responds by arguing that no evidence exists to justify such assertions by opponents of physician-assisted suicide. The data from the Netherlands, the only

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jurisdiction among liberal democracies with extended experience of decriminalized assisted suicide, is, the authors contend, insufficient to override the liberty interests at stake. Furthermore, the states would be permitted to enact regulatory schemes to limit the practice of assisted suicide, thus preventing non-competent patients from falling victim to it or the coercion of the vulnerable. Because a constitutional right is at stake, the authors argue that the burden of proof lies on the government to demonstrate that the exercise of that right should be prohibited. Subtle coercion by doctors or family members is presumably also a danger in decisions to withdraw life-support, but, the brief argues, the right of competent patients to refuse such treatment is held to override such fears.

The Court rejected each of the arguments presented in the brief. Regarding the distinction between physician-assisted suicide and the withdrawal of life-support, the Court writes that the distinction is “widely recognized and endorsed in the medical profession [citing the American Medical Association] and in our legal traditions, is both important and logical; it is certainly rational.”52 The Court accepted the reasoning of not only the AMA but also several bioethicists that the removal of life-support leads to the patient’s death due to the underlying condition, whereas a lethal dose of medication is the direct cause of a patient’s death. Though “The Philosophers’ Brief” ascribed the same intention to the patient in both cases (causing one’s death), a moral and material distinction can, the Court argued, be drawn between (1) the intention of relieving oneself from unwanted medical intervention that also has the effect of causing one’s death, and

(2) the intention of ending one’s life directly and immediately. One is an acknowledgment of the human condition; the other is or is tantamount to murder/suicide.

Though engaging the issue of protecting the vulnerable in far less detail than the distinction between killing and letting die, the Court also agreed that states have a legitimate interest in safeguarding the poor, the elderly, and the disabled from pressure to prematurely end their lives. Citing a New York State task force that studied the question, the Court agreed that “[l]egalizing assisted suicide would pose profound risks to many individuals who are ill and vulnerable...The risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized social group.” The Court also cited empirical research on the practice of euthanasia in the Netherlands showing that a high proportion of patients killed did not give consent as justification for Washington State’s fear that there is a “slippery slope” leading from voluntary to involuntary euthanasia.

In concluding this part of my analysis, I would like to call attention to two critical questions or issues that emerge from this confrontation between “The Philosophers’ Brief” and the Supreme Court. First, what is the relationship between abstract philosophical reflection and an “applied” political or legal question such as physician-assisted suicide? “The Philosophers’ Brief” sought to argue for a constitutional right that had never been recognized but lay dormant, the brief argued, within the constitutional

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text. The Supreme Court sharply disagreed, and Chief Justice Rehnquist made clear in his opinion that the historical prohibition on physician-assisted suicide in the states was a determinative factor in the Court’s reasoning, as was the research on Dutch practice. The resolution of the cases by the Court may provide a helpful though inexact guide to the prudential use of concrete, historical, and empirical data in such cases.

Second, the underlying conception of the human person or anthropology of “The Philosophers’ Brief” could be the subject for considerable debate. Of course, one of the central contentions of the brief is that it has no such conception of the person but is merely seeking to assert a constitutional principle that the government may not take a position on such metaphysical or anthropological verities. Nevertheless, as authors such as Michael Sandel have argued, liberalism does adopt, however implicitly, an anthropological view.54 In the instance of “The Philosophers’ Brief,” its authors clearly hold such notions as autonomy and freedom to be constitutive of human well-being. People have a considerable capacity to be “competent, rational, informed, stable, and uncoerced” in the face of momentous decisions.55 As the debate on physician-assisted suicide and other similar issues continues, courts and scholars could be more attentive to the ways in which a communitarian insistence upon the historical and cultural embeddedness of decision making challenges the presumption of liberal autonomy. In the meantime, the Court’s decisions in the physician-assisted suicide cases make clear that

55 The Philosophers’ Brief, supra note 45, at 47.
the Court will not read the Fourteenth Amendment so broadly as to encompass the liberal
cconception of rights found in “The Philosophers’ Brief.”

B. Federalism as a Safeguard of Political Liberalism

My view, ultimately grounded in a commitment to the concerns of subsidiarity
voiced in Chapter One, is that a vibrant federalism is not just a faithful reading of the
constitutional text, structure, and original intent of the Framers and thereby a necessary
element of our constitutional republic—though it is all these things. I also want to argue
that a strong federalist system protects certain values of any liberal society, including and
especially on such controversial moral issues as physician-assisted suicide. Borrowing
again from Roderick Hills’ work, I will argue that a federal system (and state-by-state
resolution of these controversial moral matters) allows for a better pluralistic matching of
preferences and policies across the country and brings about what Hills terms a
“Westphalian” solution on these issues.

The literature on federalism is famously lacking in robust theoretical defenses of
federalism. A notable exception is Michael McConnell’s review of Raoul Berger’s
Federalism: The Founder’s Design, in which McConnell calls attention to three distinct
advantages of decentralized decision making in a federal system. The first of these
advantages is “responsiveness to diverse interests and preferences,” by which McConnell
means the familiar argument that in a decentralized system “local laws can be adapted to

56 See Yale Kamisar, Foreward: Can Gluckberg Survive Lawrence? Another Look at the End of
Life and Personal Autonomy, 106 MICH. L. REV. 1453 (2008) and Paul J. Weithman Of Assisted Suicide and
local conditions and tastes, while a national government must take a uniform and hence less desirable approach.”57 McConnell’s example is to take two states of 100 people each. 70% of the people in State A wish to outlaw smoking in public places but only 40% in State B wish to do so. A national solution to ban smoking will please 110 people and anger 90. A different decision in each state (reflecting the different majorities for each view in each state) will please 130 and anger 70.58 To this argument of McConnell’s, we might add interstate mobility and the classic argument of Albert Hirschman’s regarding voice and exit serving to permit the displeased minority in State A to move to State B and vice versa.59 A nationally-imposed solution cuts off the “exit” option within the federal system, and, arguably, makes “voice” more difficult (because, among other reasons, lobbying the federal government is harder).

On the other hand, those who favor national solutions to such questions might argue that citizens of states that permit morally offensive practices impose an “ideological externality”60 on the rest of the Union (as most would say is true with regard

58 Id. at 1494.
60I owe the term “ideological externality” to Rick Hills. In the parlance of economics, an externality exists when there is external benefit or external damage affecting individuals not involved in the consumption or production of some good. Residents of culturally conservative states (e.g., Oklahoma and Utah) are, if one accepts the notion of ideological externalities, thereby affected by conduct in culturally liberal states (e.g., Oregon and Vermont). Of course, states also impose internal costs on citizens who disagree with the state’s political conservatism or liberalism—an “internality” (Oregonians opposed to assisted suicide or Vermonters opposed to same-sex civil unions, for example). For a discussion of the concept of externalities and its relation to liberal theory, see Don Herzog, Externalities and Other Parasites, 67 U. CHI. L. REV. 895, 910-14 67 (2000) (arguing that “the economists’ invocations of externalities are invidiously opportunistic” because “the concept is secretly parasitic on the liberal harm principle”).
to race and is reflected in the Reconstruction Amendments). So also, it might be argued based upon a thick concept of the common good and subsidiarity, no society should permit some of its citizens to participate in physician-assisted suicide, even if this eliminates the decentralized matching of preferences to policies.

Another way to make the same point with regard to morality policy is to consider risk aversion and expected utility. Recall the usual formulation of risk aversion: a risk averse person will prefer a sure chance of losing a small amount to a small chance of losing a large amount. In the terms of morality policy and physician-assisted suicide, an opponent of physician-assisted suicide would prefer the certainty that some states will allow assisted suicide (e.g., Oregon and similarly culturally liberal states) to the chance (albeit much smaller) that a national policy favoring physician-assisted suicide will be implemented. Likewise, the proponent of legalized physician-assisted suicide will rest comfortably with the knowledge that some states will prohibit the practice, but states such as Oregon will allow it. He or she stands to lose much more if the federal government adopts a national policy (particularly since any national policy on the issue, post-\textit{Glucksberg} and \textit{Quill}, is likely to prohibit physician-assisted suicide, not to permit it).

In the federalism context, then, the risk averse person will rationally prefer the sure departure from his or her values in some states (but only limited to those states) over the chance that the national government will impose a solution on some controverted question for everyone, which would be a very large loss. If we assume that one wants to see one’s preferences enacted into law, one should favor a system in which one allows for
some sure victories and losses but excludes the possibility of losing everything at once. Or as John Rawls explains in his famous thought experiment of the “original position,” “It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice. Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like.”

The point of this argument, for Rawls, is to “strip away” (theoretically, at least) those preferences that lead to a biased outcome on questions of justice: “Since all are similarly situated and no one is able to design principles to favor his [or her] particular condition, the principles of justice are the result of a fair agreement or bargain.” This quality of “fairness” in outcome I take to be a crucial element of Rawls’ theory specifically and liberal theory generally. In a much later book, Rawls explains, “This requirement is fair because in establishing the fair terms of social cooperation (in the case of the basic structure) the only relevant feature of persons is their possessing the moral powers (to a sufficient minimum degree) and having the normal capacities to be a cooperating member of society over a complete life.”

As applied to the context of federalism and physician-assisted suicide, one should imagine that—whatever one’s policy preferences on the issue—we are seeking to design a system to take account of these basic requirements of fairness. Would one prefer, then,

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62 Id.
a national solution (whether judicially imposed in the form of a constitutional right to
physician-assisted suicide, legislatively through something like the PRPA, or
administratively in the Ashcroft directive) or a state-by-state resolution of the question?
For many of the same risk-averse reasons explained above, we might expect one to favor
federalism. Because one does not know whether the national resolution of the problem
will be for or against one’s view, the “safer” course is to leave the matter to the states. If
left to the states, one at least has a chance to “win” sometimes even if “losing” other
times, regardless of one’s substantive views.

Beyond the potentially self-referencing reasons of risk aversion, however, we
might also favor federalism on grounds of toleration. In a pluralistic society in which
controversial moral questions such as assisted suicide (and we could add same-sex
marriage or the death penalty) divide us—often evenly across the population—respect
and toleration for the views of others combines with Rawls’ conceit of the original
position to favor a patchwork of solutions instead of a single, national solution, even if a
national solution with which one happens to agree. Within proper limits (especially those
imposed by the Bill of Rights and by the Reconstruction Amendments’ protections
regarding race and basic liberties), federalism, then, is the genuinely liberal solution to
controversial questions such as physician-assisted suicide.

See id. at xxiv-xxviii (commenting on toleration and the origins of liberal political theory).
This is also the solution offered by Roderick Hills in his article “Federalism as Westphalian Liberalism,” which, from a liberal standpoint, offers a theory of federalism that is consonant with the principle of subsidiarity as functional pluralism, as discussed in the last chapter. Hills begins with an implicit theory of consent under which “[t]he constitutional legitimacy of a democracy rests on the fiction that each citizen consents to the overall decisions of his elected representatives” (769). He then describes and rejects two forms of liberalism—dubbed “Madisonian” and “Millian”—as inadequate for resolving deep moral disagreement. Madisonian liberalism “allocate[s]…power in a highly centralized manner, to the national legislature of a large republic” (771). Such a centralization of authority ensures that any resolution of a contested moral question will be based on a broad consensus of public opinion on the matter, as the national lawmaking process will “refine away partial resolutions of issues of deep disagreement.” As Hills observes, such a “vision of the national legislature as transcending parochial local prejudice or greed has a powerful pull on the judicial imagination” (772). But such Madisonian solutions are increasingly seen now as obsolete and ineffective. Madison’s confidence in the Federalist Papers that factions would rub against each other in the national legislative process and thereby lead to the best outcome fails to account for the possibility—indeed, likelihood in contemporary political experience—of gridlock and extortion. “[M]utual vetoes of each faction hardly ensures that the legislative dross will be siphoned off, leaving only pure ore,” Hills concludes, “Rather, the national legislature

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may simply grind to a halt as the national agenda is consumed with simple culture war
salvos—Terri Schiavo, flag burning, same-sex marriage, abortion, etc.—shrill enough to
be heard by an inattentive citizenry above the din of its favorite soap opera or sporting
event” (773).

By contrast, Millian liberalism allocates power over contested moral matters to
individuals and “limiting the state to the role of defining the jurisdiction of each
individual independent of his idea of the good” (774). But Hills points out that such an
account of liberalism depends on a contested understanding of what constitutes a “harm,”
which merely delays but does not resolve the disagreement: “Mill’s system of liberalism
creates a system of private governance but no rules for defining the jurisdictions that do
the governing” (779). Unless private entitlements and harms can be defined in such a way
as to evade disagreement—and, experience shows, they cannot—then there will still be
disagreement about the initial allocation of rights and responsibilities. “It is this failure of
Mill and his epigoni to define private entitlements in a way that can overcome deep
disagreement that creates the necessity for some process that respects each person’s view
on the intractable questions of entitlement” (780), Hills argues. Following Jeremy
Waldron’s terminology of the “right of rights,” Hills submits that the right to have a say
in resolution of the definition of what constitutes a right “entitl[es] the individual to a
share of the collective power to define individual rights” (780).

We can now draw out the implications of Madisonian and Millian liberalism for
the physician-assisted suicide debate. The Ashcroft Directive and the proposed Pain
Relief Promotion Act were efforts to enact a national resolution of the assisted suicide
question, but they suffer from the defect of such Madisonian solutions noted above, namely that they do not reflect the tempering of factions but are instead the premature imposition of a national solution over and against the deep opposition of some. So also, a Millian individualized resolution of physician-assisted suicide would beg the question of what constitutes an entitlement or harm in the physician-assisted suicide debate. If we assume for the sake of argument that Judge Noonan’s opinion in the Ninth Circuit panel decision is plausible in its presentation of legitimate state interests and Judge Reinhardt offers a plausible argument for individual liberty and autonomy on the same question, then we still stand in need of some prior account of what constitutes a good reason for legislative action. As Hills argues, “[t]he difficulty with the Millian solution is that we remain deeply divided on the proper scope of the private sphere, and these disagreements are frequently impossible to resolve on the basis of any shared consensus about private liberty” (786-87).

The advantage of “Westphalian liberalism” is that it avoids both disagreement over the public-private distinction of Millian liberalism and preserves the jurisdictional pluralism that Madisonian liberalism sacrifices. Hills argues that the famous Peace of Westphalia is liberal in two senses that are relevant here: “by using territorial jurisdictions to define power over religious disputes, the Peace substituted geography for theology” and “the Peace provided a solution to the difficulty of drawing a distinction between the public and the private” (781). Most importantly for purposes of showing the significance of subsidiarity for such questions, subsidiarity, like Hills’ Westphalian liberalism, “better avoids the gratuitous suppression of reasonable views through the preservation of
jurisdictional diversity” (788). A gratuitous suppression of disagreement occurs when it is “unnecessary to ensure adequate provision of some collective good” (790). On a version of this Westphalian principle that precisely tracks the vocabulary of subsidiarity, Hills argues that “one could insist on a stronger principle of subsidiarity under which all policies would be devolved to the smallest unit of government capable of providing the good to the largest possible majority of all persons affected by the good” (792). This, in turn, “assures the losing faction that their loss was not gratuitous, meaning that their loss was the minimal sacrifice required by any system of collective self-government, because any collective decision would result in at least the same number of equally disappointed persons” (792).

Hills’ account, then, converges with the theory of subsidiarity as functional pluralism advanced in the last chapter and helps us see the importance of a jurisdictionally differentiated approach to contested moral questions such as assisted suicide. It also points to a provocative convergence of subsidiarity and liberalism, albeit understood in a highly qualified sense that is not reducible to Millian individualism. A more complete account would need to consider the various social goods that different jurisdictions should be charged with providing, what jurisdictional limits can meaningfully be imposed, and what constitutes a social good in the first place.

But yet another virtue of this pluralistic approach is that it permits debates about goods to be conducted on a scale that, at least potentially, makes such debate productive—at the level of the household, the community, or the sub-national political unit. Arguments about the goods at stake in the physician-assisted suicide debate, such as
caring for the terminally ill, the danger of coerced decisions by patients, individual autonomy, and the threat to the medical profession posed by permitting assisted suicide, are most likely to be conducted rationally and respectfully when they are not made either at the national level or by merely delegating the decisions on such questions to individuals. As Hills concludes, “The political processes of federalism, in other words, do not protect liberty as some object distinct from those processes themselves. Those subnational processes are themselves conducive of liberty, where ‘liberty’ stands for the equal right of all affected by a definition of ‘rights’ to have a say in rights’ definition” (797).
CHAPTER FOUR: SUBSIDIARITY AND FDA PREEMPTION

Introduction

As the foregoing chapters have argued, the principle of subsidiarity offers an analytic framework for addressing a range of contested political question from a standpoint informed by the common good and what I have termed functional pluralism. We should not imagine, though, that subsidiarity is only relevant to questions close to the heart of Catholic moral theology, such as the debate over physician-assisted suicide discussed in the last chapter. Indeed, if Catholic social thought provides a way of thinking about politics as such, then we should expect that the functional pluralism of subsidiarity can be brought to bear on a range of policy questions. If subsidiarity is not, as the provocative quotation from Justice Scalia in Chapter One suggests, a merely formal principle that provides no meaningful guidance, then we can hope that it can be applied to even mundane and intricate policy debates. In this chapter, we will consider the debate over FDA preemption, which, like the debate over physician-assisted suicide, is in large part a dispute over whether national- or state-levels of authority should shape a particular policy question.

“Tort reform” conjures images of pitched legislative battles at the federal and state level over limiting medical malpractice claims,\(^1\) restricting class action suits,\(^2\)

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\(^1\) See Help, Efficient, Accessible, Low Cost, Timely Healthcare (HEALTH) Act of 2005, H.R. 5, 109th Cong. (2005) (proposed federal legislation setting a $250,000 cap on non-economic damages in medical malpractice suits); see also FLA. STAT. § 766.118 (2007); GA. CODE ANN. § 51-13-1 (2006); MISS. CODE ANN. § 11-1-60 (2006); NEV. REV. STAT. § 41A.035 (2007); OHIO REV. CODE ANN. § 2323.43 (West
immunizing gun manufacturers from liability,\(^3\) capping damages in products liability suits,\(^4\) or imposing legislative resolutions for mass torts such as asbestos litigation.\(^5\) A quieter but equally important tort reform debate, however, has been conducted for several years in the once obscure area of federal preemption of state tort law claims. This chapter will summarize the background to the preemption debate and discuss in detail a recent and highly controversial such effort at tort reform by preemption, the assertion by the Food and Drug Administration (FDA) in 2006 that FDA labeling rules preempt state law tort claims alleging inadequacies in drug labeling.

At the nexus of constitutional law and administrative law, preemption is the seemingly straightforward constitutional doctrine based in the Supremacy Clause that a “state law that conflicts with federal law is ‘without effect.’”\(^6\) Preemption is traditionally divided among “express,” “conflict,” and “field” preemption:

Congress’ intent may be explicitly stated in the statute’s language or implicitly contained in its structure and purpose. In the absence of an express congressional command, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it.\(^7\)

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\(^{7}\) Id. (internal quotations and citations omitted).
In the face of a products liability suit filed in state court, a successful federal preemption defense raised by a defendant manufacturer is a powerful tool requiring dismissal of the claim. More broadly, preemption defenses are a federalized version of a regulatory compliance defense under which accord with a relevant safety standard would serve to defeat a claim of design defect or failure to warn—the Holy Grail of the products liability defense bar since the advent of strict liability for products liability claims in the mid-twentieth century.

Though the preemption debate had simmered for many years in such contexts as federal nuclear safety statutes and tobacco litigation, the FDA’s release in January 2006 of a revision to its physician labeling rule for prescription drugs and an accompanying preamble asserting that the rule preempts state common law causes of action ushered in a firestorm of litigation and controversy. Some states already have enacted statutes that provide measures of protection against liability for pharmaceutical defendants demonstrating compliance with FDA requirements. A 2007 Texas state court

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11 See Cipollone, 505 U.S. at 504. See also Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008) (holding that misrepresentation claim was not preempted by the Federal Cigarette Labeling and Advertising Act).
decision in the Vioxx litigation against Merck highlights the effect of such statutes.\textsuperscript{13} Preemption at the federal level by the FDA would, of course, be a much more powerful defense in pharmaceutical products liability litigation than relying on a patchwork of state products liability statutes. The FDA’s action, then, represented a newer, more aggressive approach to federal preemption that some termed “silent tort reform.”\textsuperscript{14}

There are essentially five questions at the heart of the FDA preemption (or preemption by any other agency) debate:

1. Where Congress has not expressly preempted the states (or where the statute is ambiguous) how broadly may courts invoke principles of conflict preemption to find state tort claims preempted?

   Beginning with \textit{Geier v. American Honda Motor Company} (discussed below), the Supreme Court has addressed preemption cases involving statutes that did not \textit{expressly} preempt state common law claims, but the Court has moved toward a broader doctrine of \textit{conflict} preemption in such cases. Because the FDA preemption cases premised on failures to warn do not pose an example of express preemption, the availability of conflict preemption in such cases has become the central question.

2. Do state tort claims pose a conflict with federal regulation?


A recurring question in the preemption debate is whether permitting judges and juries to second-guess federal administrative safety determinations undermines the federal safety regime. Justice Blackmun’s partial concurrence and dissent in *Cipollone v. Ligget Group* is the most forceful statement of the view that tort law serves different purposes than administrative regulation (notably, providing compensation to injured plaintiffs) and that defendant manufacturers should simply view common law judgments for damages as the cost of doing business. Whether that view or Justice Breyer’s assertion in *Geier* that common law liability poses efficiency and administrative obstacles prevails will partly shape the future of preemption jurisprudence.

3. How should traditional considerations of federalism affect the preemption debate?

Invocations of state sovereignty and deference to the traditional role of the states in tort law dominate the preemption case law. One side, as expressed by Erwin Chemerinsky, argues that “[c]onservatives are hypocrites when it comes to federalism” because judicial and political conservatives favor federalism in many contexts but not when it helps corporations evade state tort liability. Others argue that preemption serves the goals of a national market and that constitutional federalism is consistent with a national regulatory approach. This disagreement over the role of the states and the federal government is reflected in lobbying and public relations efforts over preemption.

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by, on one side, the business lobby (such as the U.S. Chamber of Commerce and the National Association of Manufacturers)\textsuperscript{17} and on the other, state and consumer-interest groups (such as the National Conference of State Legislatures).\textsuperscript{18} More generally, the preemption debate has often focused narrowly on details of statutory interpretation and eschewed constitutional structural questions, leading Richard Epstein and Michael Greve to argue in their introduction to a set of essays on preemption that “[w]hat the preemption debate needs…is an examination that reflects the delicate interplay between broad institutional considerations and regulatory detail.”\textsuperscript{19}

4. Should one’s view of the FDA’s approval process affect preemption analysis?

Justice Stevens’ opinion for the Court in \textit{Medtronic v. Lohr} presciently raised the issues that were sharply posed in the wake of Merck’s highly publicized withdrawal of Vioxx, namely whether the FDA is capable of effectively approving new products and monitoring their safety. Such a concern is based in the perception that the “FDA is an underfunded agency charged with regulating products that collectively constitute nearly 25% of the U.S. gross domestic product.”\textsuperscript{20} If concerns about FDA effectiveness continue, how, if at all, should they shape courts’ willingness to find FDA preemption of

\textsuperscript{17} U.S. Chamber of Commerce, Federal Preemption, \url{http://www.uschamber.com/nclc/caselist/issues/preemption.htm}.
\textsuperscript{18} National Conference of State Legislatures, Preemption Monitor, \url{http://www.ncsl.org/standcomm/sclaw/PreemptionMonitor_Index.htm}.
state common law claims? Is the FDA sufficiently funded to perform its administrative
duties adequately? Should the analysis depend on whether the agency examined a safety
issue and reached a determination (or how adequate the review process was), as
illustrated in the anti-depressant suicide cases discussed below?

5. Are agency determinations with respect to preemption entitled to
administrative deference?

Justice Breyer’s opinion for the Court in *Geier* clearly signaled the Court’s
willingness to treat the preemptive determinations of agencies with deference, even
where the agency has, arguably, changed its position over time. The legacy for
preemption in both the FDA and related contexts will depend on whether courts defer
toward agency views on preemption for the reasons articulated in *Geier* (summarized
below) or, instead, worry that political considerations have undermined agency expertise
and judgment, making agency views unworthy of deference.

This chapter will survey the background and implications of the FDA rule. Part I
will summarize the FDA’s labeling regime and the content of the new physician labeling
rule. Part II will discuss the Supreme Court’s preemption jurisprudence in health and
related products liability fields. Part III will briefly survey the litigation in response to the
labeling rule leading to the Supreme Court’s decision in *Wyeth v. Levine*. In Part IV, I will
suggest why federal preemption may (perhaps unexpectedly) be justified for subsidiarity-
based reasons.
I. FDA Approval and Labeling Process

The 1938 Food, Drug, and Cosmetic Act (FDCA) governs approval and labeling of new prescription drugs.21 The FDCA provides the FDA with general regulatory oversight of the safety and efficacy of prescription drugs, including the labeling requirements for prescription drugs. A new drug application (NDA) filed with the FDA by a prospective seller of a drug must contain “specimens of the labeling proposed to be used for such drug.”22 The FDA is further charged with ensuring that prescription drugs are not misbranded and that a label accompanying a prescription drug communicates adequate warnings.23 An adequate label includes “indications, effects, dosages, routes, methods, and frequency and duration of administration, and any relevant hazards, contraindications, side effects, and precautions under which practitioners licensed by law to administer the drug can use the drug safely and for the purposes for which it is intended....”24

Through a set of regulations promulgated under the FDCA’s statutory authority, the FDA has governed the labeling of pharmaceutical products with extensive regulatory provisions since 1979.25 In response to growing physician concern about over-warning of minimal risks, the FDA began in the 1990s to consider an overhaul of its labeling

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22 Id. § 355(b)(1).
23 Id. §§ 331, 352.
24 21 C.F.R. § 201.100(c)(1) (1975).
25 Id. §§ 201.56-201.57.
requirements, issuing a proposed rule in late 2000. After an extensive comment period, the FDA published the final rule in January 2006. Many changes contained in the proposed rule were incorporated into the final rule, including use of a “highlights” section for introductory and important prescribing information. Most controversial, however, was the FDA’s assertion in a preamble to the rule that “under existing preemption principles, FDA approval of labeling under the [FDCA]…preempts conflicting or contrary State law.”

In the years running up to the rule, the FDA had taken the position in *amicus* briefs filed by the Department of Justice that FDA labeling approval preempted state common law claims, particularly in cases involving alleged failure to warn of the suicide risks of anti-depressant drugs. The FDA claimed that its position on the interpretive rule with respect to preemption “represents the government’s long standing views on preemption, with a particular emphasis on how that doctrine applies to State laws that

26 Requirements on Content and Format of Labeling for Human Prescription Drugs and Biologics; Requirements for Prescription Drug Product Labels; Proposed Rule, 65 Fed. Reg. 81081, 81083 (Dec. 22, 2000) (“Physicians believe that labeling overly stresses the occurrence of extremely rare events. They also asserted that although they can generally find the information they need, the usefulness of labeling could be improved by highlighting and providing an abstract of the most important information.”).


28 *Id.* at 3934.

would require labeling that conflicts with or is contrary to FDA-approved labeling.”

Highlighting the “damned if you do, damned if you don’t” dilemma of pharmaceutical manufacturers forced to comply with the FDA labeling requirements but also facing the prospect of state law damages claims, the FDA concluded:

The agency believes that State law conflicts with and stands as an obstacle to achievement of the full objectives and purposes of Federal law if it purports to preclude a firm from including in labeling or advertising a statement that is included in prescription drug labeling. By complying with the State law in such a case and removing the statement from labeling, the firm would be omitting a statement required…as a condition on the exemption from the requirement of adequate directions for use, and the omission would misbrand the drug under [the FDCA]. The drug might also be misbranded on the ground that the omission is material…and makes the labeling or advertising misleading….  

More specifically, the FDA’s preamble to the physician labeling rule asserts that “at least” six types of claims are preempted:

- First, the rule preempts liability for failures either to include information in the highlights section of the label or “otherwise emphasize any information the substance of which appears anywhere in the labeling.” This assertion responded to an industry concern that creation of the highlights section and decisions about what information is worthy of including as a highlight would create new forms of liability.
- Second, the rule preempts direct-to-consumer advertising claims where the plaintiff alleges that “a drug sponsor breached an obligation to warn by failing to

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30 Requirements on Content and Format of Labeling for Human Prescription Drugs and Biological Products, 71 Fed. Reg. at 3934.
31 Id. at 3935.
32 Id. at 3935-36.
include in an advertisement any information the substance of which appears anywhere in the labeling,” when the sponsor has complied with FDA draft guidance.33

- Third, and perhaps most importantly, the rule preempts claims alleging a breach of “an obligation to warn by failing to include contraindications or warnings that are not supported by evidence that meets the standards set forth in this rule.”

- Fourth and fifth, the rule preempts failure to warn claims in which the plaintiff alleges that a manufacturer failed “to include a statement in labeling or in advertising” either where the FDA had determined that the substance of the warning did not need to be included on the label, or where the FDA had prohibited inclusion on the label.

- Finally, statements that the FDA had approved for inclusion on the label cannot be the basis for a failure to warn claim.

In the wake of the 2006 rule, defendants in pharmaceutical products liability suits raised the defense of FDA preemption with the *imprimatur* of the agency in the form of an interpretive rule, a much more influential basis for the defense than the FDA *amicus* briefs of previous years. Whether the rule did, in fact, preempt state tort claims, though, depended on application of the Supreme Court’s preemption jurisprudence, to which we now turn.

II. The Supreme Court and Preemption, 1992–

Commentators routinely characterize the Supreme Court’s preemption case law as a “muddle,” turning on lawyerly discussions of statutory construction, agency deference, and federalism. The Court’s preemption jurisprudence traces back to such cases as San Diego Building Trades Council v. Garmon, involving the National Labor Relations Act, and Silkwood v. Kerr-McGee Corporation, in which the Court held that a claim for punitive damages was not preempted by the Atomic Energy Act. In recent years, the pace of preemption decisions has quickened considerably, particularly cases in which defendants argue that federal law preempts state common law claims. A complete treatment of the Court’s preemption cases is beyond the scope of this chapter, but the relevant issues for the arguments over FDA preemption can be gleaned from four cases decided since 1992: (1) Cipollone v. Liggett Group, (2) Medtronic v. Lohr, (3) Geier v. American Honda Motor Company, and (4) Buckman Company v. Plaintiffs’ Legal Committee.

A. Cipollone: The Advent of Broader Preemption

Notwithstanding a confusing four-justice plurality opinion to which two additional opinions concur and dissent in part, the Court’s decision in Cipollone is rightly seen as “a watershed decision in which a divided Court signaled a broader approach to

37 Mary J. Davis, Unmasking the Presumption in Favor of Preemption, 53 S.C. L. REV. 967, 1030 n.9 (2002) (“A search by the author of preemption cases decided by the Supreme Court since 1940 disclosed approximately 150 decided between 1940 and 1980 and an additional 150 in the twenty years between 1980 and 2000, roughly double the amount of the previous forty years.”).
preemption and a willingness to set aside state common law in the name of federal
goals.”38 Indeed, although Justice Stevens’ himself was to become more reluctant in later cases to find federal preemption, his plurality opinion in *Cipollone* is a roadmap for resolving such cases in favor of defendants seeking preemption.

In *Cipollone*, the surviving son of a woman who died of lung cancer brought state law claims for failure to warn, breach of warranty, fraudulent misrepresentation, and conspiracy to conceal material facts. The Third Circuit39 held that the claims were preempted by the Federal Cigarette Labeling and Advertising Act of 1965, a federal statute enacted following the Surgeon General’s famous report on the dangers of cigarette smoking.40

A cardinal rule of all preemption cases is starting with congressional intent.41 In *Cipollone*, the Court began by tracing the legislative history behind enactment of the federal warning requirement on cigarettes. A successor statute to the 1965 Act, the Public Health Cigarette Smoking Act of 1969,42 required a warning label on all cigarette packages stating “Cigarette Smoking Is Dangerous to Your Health.” With respect to preemption of state law, the 1969 Act stated “[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or

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promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.”

Thus, to resolve defendant’s preemption argument, the Cipollone court analyzed the defendant’s assertion that plaintiff’s claims constituted requirements or prohibitions within the meaning of the federal statute: “The phrase ‘[n]o requirement or prohibition’ sweeps broadly and suggests no distinction between positive enactments and common law….” Relying on Prosser’s Law of Torts and a primarily regulatory conception of tort law, the Court argued that “common-law damages of the sort raised by [plaintiff] are premised on the existence of a legal duty, and it is difficult to say that such actions do not impose ‘requirements or prohibitions.’”

The Court also held that common law claims are “imposed under State law” within the meaning of the statute, at least insofar as “whether the legal duty that is the predicate of the common-law damages action constitutes a ‘requirement or prohibition’ based on smoking and health.” With regard to state law failure to warn claims, the Court concluded that “claims . . . requir[ing] a showing that respondents’ post-1969 advertising or promotions should have included additional, or more clearly stated, warnings . . . are pre-empted.” Because the remaining claims for breach of warranty, fraudulent misrepresentation, and conspiracy to conceal material facts did not implicate

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45 Id. at 522.
46 Id. at 523.
47 Id. at 524.
the concern about uniform national standards, however, they were not preempted by the federal statute.\footnote{Id. at 526, 529-30. In dissent, Justice Scalia (joined by Justice Thomas) argued based on principles of statutory interpretation that the federal statute preempted all of the plaintiff’s claims: Under the Supremacy Clause, our job is to interpret Congress’s decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning. If we did the job in the present case, we would find, under the 1965 Act, pre-emption of petitioner’s failure-to-warn claims; and under the 1969 Act, we would find pre-emption of petitioner’s claims complete . . . . The test for pre-emption in this setting should be one of practical compulsion, i.e., whether the law practically compels the manufacturers to engage in behavior that Congress has barred the States from prescribing directly. Id. at 544-46 (Scalia, J., concurring in the judgment in part and dissenting in part).}

Dissenting from the Court’s holding with respect to preemption of common law claims, Justice Blackmun, joined by Justices Kennedy and Souter, found the Court’s conclusion “little short of baffling.”\footnote{Id. at 534 (Blackmun, J., concurring in part and dissenting in part).} Most importantly, Justice Blackmun disputed the Court’s assertion that common law claims “exert a regulatory effect on manufacturers analogous to that of positive enactments.”\footnote{Id. at 536.} Arguing that manufacturers do not, in fact, face a “damned if you do, damned if you don’t” dilemma when choosing between regulatory compliance and liability for common law claims, Justice Blackmun asserted that “no particular course of action (e.g., the adoption of a new warning label) is required.”\footnote{Id.} A manufacturer can “decide to accept damages awards as a cost of doing business and not alter its behavior in any way . . . [o]r, by contrast, it may choose to avoid future awards by dispensing warning through a variety of alternative mechanisms . . . .”\footnote{Id.}

Finally, Justice Blackmun suggested that tort law and regulation serve “separate
function[s],” thereby calling into question the Court’s argument that common law claims can pose requirements or prohibitions within the meaning of the statute.53

B.  **Lohr: The Limits of FDA Preemption**

Four years after *Cipollone*, the Court faced a preemption claim regarding the 1976 Medical Device Amendments (MDA) to the FDCA, which regulate the “safety and effectiveness of medical devices intended for human use.”54 If *Cipollone* and *Geier* represent the high-water mark of preemption in the recent Supreme Court case law, *Lohr* is the most favorable case for plaintiffs seeking to rebut a preemption defense. As discussed below, however, Justice Breyer’s concurrence in *Lohr*’s otherwise anti-preemption holding sowed the seeds of the anti-preemption holding’s own destruction.

The plaintiff in *Lohr* alleged that her pacemaker failed due to a product defect.55 As in *Cipollone*, the Court interpreted the conflicting requirement provision of a federal statute:

> No State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.56

Justice Stevens again wrote for the Court but arrived at a different conclusion on the preemption issue, largely because his opinion in *Lohr* took a different view from

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53 *Id.* at 537-39.
56 21 U.S.C. § 360k(a) (1938).
Cipollone of the conflicting requirement language in the MDA (as opposed to the cigarette-related statutes in Cipollone):

[W]hen Congress enacted § 360k [of the MDA], it was primarily concerned with the problem of specific, conflicting state statutes and regulations rather than the general duties enforced by common-law actions…In each instance, the word is linked with language suggesting that its focus is device-specific enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries.57

More particularly, the Court argued that the MDA preempts state law that imposes requirements, according to the statute, “with respect to” medical devices. “[T]he general state common-law requirements in this suit were not,” according to the Court, “specifically developed ‘with respect to’ medical devices….These state requirements therefore escape pre-emption, not because the source of the duty is a judge-made common-law rule, but rather because their generality leaves them outside the category of requirements that [the MDA] envisioned to be ‘with respect to’ specific devices such as pacemakers.”58

Additionally, in the background of Justice Stevens’ opinion for the Court in Lohr is a policy concern that the FDA’s approval process for the pacemaker was not sufficiently protective of patient safety. Amid a detailed recitation of the FDA medical device approval process, the Court drew a distinction between the “rigorous” premarket approval process that new devices undergo and the cursory review accorded to devices

57 Medtronic, 518 U.S. at 489.
58 Id. at 501-02.
that are “substantially equivalent” to pre-existing devices. On account of the FDA’s limited ability to conduct full-scale pre-market review of many devices, “the § 510(k) premarket notification process became the means by which most new medical devices…were approved for the market.” These policy considerations—the capacity of the FDA to conduct thorough review of medical devices and pharmaceutical products—are, of course, broadly relevant to the prescription drug approval process and were sharply posed in the wake of Merck’s 2004 withdrawal of Vioxx.

In a concurrence that provided a fifth vote for the judgment in the case, Justice Breyer wrote that the plurality opinion was wrong to foreclose the possibility that the MDA could preempt a state tort claim. “One can,” Justice Breyer argues, “reasonably read the word ‘requirement’ as including the legal requirements that grow out of the application, in particular circumstances, of a State’s tort law.” In support, Justice Breyer relied on the Court’s (and Justice Stevens’) own words in Cipollone holding that “similar language ‘easily’ encompassed tort actions because ‘[state] regulation can be as effectively asserted through an award of damages as through some form of preventative relief.’” Attacking the plurality’s asserted distinction between a conflicting state regulation and a conflicting state court judgment, Justice Breyer argued that “[t]o distinguish between them for preemption purposes would grant greater power…to a

59 Id. at 476-79.
60 Id. at 479.
62 Medtronic, 518 U.S. at 504.
63 Id. (quoting Cipollone v. Ligget Group, Inc., 505 U.S. 504, 521 (1992)).
Justice Breyer agreed with the plurality, however, that the MDA’s statutory language was ambiguous and that, in turn, the Court should look to the determination of the relevant agency with respect to preemption: “[I]n the absence of a clear congressional command as to preemption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have pre-emptive effect.”

Because the FDA itself had, with respect to medical device regulation, issued a narrowing preemption regulation, Justice Breyer concurred with the Court’s conclusion that the plaintiff’s claim in Lohr was not preempted and that the FDA’s determination was entitled to deference. But in a passage that would have lasting effect for the Court’s preemption jurisprudence and is significant to our discussion of the 2006 FDA labeling rule, Justice Breyer noted that an agency can communicate preemptive intentions “through statements in ‘regulations, preambles, interpretive statements, and responses to comments,’ as well as through the exercise of its explicitly designated power to exempt state requirements from pre-emption.”

In a vigorous dissent, Justice O’Connor, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, argued that the MDA preempted the common law claims. Justice O’Connor agreed with Justice Breyer that common law claims “impose

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64 Id.
65 Id. at 505.
‘requirements’ and are therefore preempted where such requirements would differ from those imposed by the FDCA.”

Justice O’Connor would not, however, have deferred to the FDA’s own views regarding preemption: “It is not certain that an agency regulation determining the preemptive effect of any federal statute is entitled to deference….Where the language of the statute is clear, resort to the agency’s interpretation is improper.”

In retrospect, Lohr stands for at least two propositions, one “pro-preemption” and one “anti-preemption.” Most squarely, of course, the decision holds that the MDA does not preempt state common law claims with respect to medical devices that undergo the premarket notification process. But Justice Breyer’s concurrence signaled the potential for finding preemption in related contexts and provided the basis for favoring preemption in later cases through his argument about the effect of state tort litigation on federal agency safety rules. The countervailing policy considerations of FDA safety oversight (in Justice Stevens’ opinion for the Court) and of concerns about judicial second-guessing of agency safety determinations (in Justice Breyer’s concurrence) were clearly framed in Lohr. Similarly, the dispute between Justice Breyer’s concurrence and Justice O’Connor’s dissent with respect to deference to agency preemption determinations arises in subsequent cases and runs throughout litigation over the 2006 labeling rule.

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67 Id. at 509.
68 Id. at 512.
69 In 2008, the Court decided a question left unresolved by Lohr, namely whether claims against manufacturers of devices that undergo the pre-market approval process are preempted under the MDA. The Court concluded that such claims were preempted under the MDA. See Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008).
C. **Geier: The Triumph of Justice Breyer’s Preemption Jurisprudence**

It took only four years for Justice Breyer’s concurrence in *Lohr* to become the basis for his opinion for the Court in *Geier*, arguably the most important products liability preemption decision of the past twenty-five years. At issue in *Geier* was whether a Federal Motor Vehicle Safety Standard (FMVSS) regarding airbags issued by the Department of Transportation would preempt a tort suit brought in the District of Columbia in which the plaintiff claimed that the manufacturer should have installed an airbag in her vehicle.

Turning first to Honda’s argument that the underlying federal statute in *Geier* (the National Traffic and Motor Vehicle Safety Act of 1966) expressly preempted the plaintiff’s claims, the Court noted that the statute contained a “saving” clause that preserved common law claims. Specifically, the clause stated that compliance with a federal safety standard “does not exempt any person from any liability under common law.” But the Court quickly moved to analyze conflict preemption and noted that “the saving clause . . . does not bar the ordinary working of conflict pre-emption principles.”

Formulating a preference for preemption that has occasionally guided the Court, Justice Breyer argued that permitting state courts to entertain common law claims would

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71 See Davis, supra note 37, at 1012 (“Geier represents a seismic shift in the Court’s preemption doctrine.”).
73 Geier, 529 U.S. at 869 (emphasis in original). See also Freightliner Corp. v. Myrick, 514 U.S. 280, 288 (1995) (“The fact that an express definition of the pre-emptive reach of a statute “implies”—i.e., supports a reasonable inference—that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied pre-emption.”).
necessarily interfere with achieving federal objectives. According to Justice Breyer, such an approach would “avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create.”

Conflict preemption is applicable in such cases, the Court contended, because “the rules of law that judges and juries create or apply in such [state common law] suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts.” Adopting a view of common law claims that sharply contrasts with the view of Justice Blackmun in Cipollone, the Court in Geier asserted that “[i]nsofar as [plaintiff’s] argument would permit common-law actions that ‘actually conflict’ with federal regulations, it would take from those who would enforce federal law the very ability to achieve the law’s congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect.”

On the issue of deference to an agency’s own determination with respect to the preemptive effect of federal statutory or regulatory requirements, the Court accorded significant weight to the Department of Transportation’s interpretation of the FMVSS as expressed by the views of the Solicitor General in Geier. As summarized by the Court:

The agency is likely to have a thorough understanding of its own regulation and its objectives and is uniquely qualified to comprehend the likely impact of state requirements. And DOT has explained [the FMVSS’s] objectives, and the

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74 Geier, 529 U.S. at 871.
75 Id.
76 Id. at 872.
interference that ‘no airbag’ suits pose thereto, consistently over time. In these circumstances, the agency’s own views should make a difference.\textsuperscript{77}

In taking such a forceful position on deference to an agency’s views about preemption, the Court did not address whether it was employing the same deferential standard the Court applies in other administrative law settings pursuant to \textit{Chevron U.S.A. v. Natural Resources Defense Council}.\textsuperscript{78} As discussed below, the topic arises frequently in post-\textit{Geier} preemption litigation.

Joined by Justices Souter, Thomas, and Ginsburg, Justice Stevens dissented in \textit{Geier}. Agreeing with the Court that the federal statute did not expressly preempt the state common law claims, Justice Stevens proceeded to argue that neither did the federal statute impliedly preempt the claims under principles of conflict preemption. With respect to the central issue in the conflict preemption analysis—whether the state requirement would frustrate or undermine the federal safety interest—Justice Stevens argued that the safety standard imposed “minimum, rather than fixed or maximum, requirements.”\textsuperscript{79} Exposure to tort liability would, in fact, help achieve the federal safety goal, according to Justice Stevens: “The possibility that exposure to potential tort liability might accelerate the rate of increase [of airbag installation] would actually further the only goal explicitly

\textsuperscript{77} \textit{Id.} at 883 (internal quotation and citations omitted).
mentioned in the standard itself: reducing the number of deaths and severity of injuries of vehicle occupants.\textsuperscript{80}

Finally, Justice Stevens raised a policy argument grounded in federalism and the presumption against preemption, particularly “when the pre-emptive effect of an administrative regulation is at issue”.\textsuperscript{81}

The signal virtues of this presumption are its placement of the power of pre-emption squarely in the hands of Congress, which is far more suited than the Judiciary to strike the appropriate state/federal balance (particularly in areas of traditional state regulation), and its requirement that Congress speak clearly when exercising that power. In this way, the structural safeguards inherent in the normal operation of the legislative process operate to defend state interests from undue infringement.\textsuperscript{82}

This so-called presumption against preemption dates to the Court’s 1947 decision in Rice v. Santa Fe Elevator Corporation (a field preemption case) in which the Court stated that “in a field which the States have traditionally occupied . . . [the Court] start[s] with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”\textsuperscript{83} Following Geier, many commentators have followed Justice Stevens’ lead and claimed that the Court has eliminated the presumption against preemption.\textsuperscript{84} In defense of the Court’s

\textsuperscript{80} \textit{Id}. at 903-04.
\textsuperscript{81} \textit{Id}. at 908.

\textsuperscript{82} \textit{Id}. at 907. \textit{See also} Watters v. Wachovia Bank, N.A., 127 S. Ct. 1559, 1585 (2007) (Stevens, J., dissenting) (“[T]he fact that that [Tenth] Amendment was included in the Bill of Rights should nevertheless remind the Court that its ruling affects the allocation of powers among sovereigns. Indeed, the reasons for adopting that Amendment are precisely those that undergird the well-established presumption against preemption.”).


\textsuperscript{84} \textit{See} Calvin Massey, \textit{Joltin’ Joe Has Left and Gone Away: The Vanishing Presumption Against Preemption}, 66 ALB. L. REV. 759 (2003); Susan Raeker-Jordan, \textit{A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption?}, 17 BYU J. PUB. L. 1

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disregard of the presumption against preemption in *Geier*, however, one could argue that the presumption is primarily a rule of statutory interpretation in express preemption cases (and so was rightly prominent in *Cipollone* and *Lohr*) but has generally not been invoked by the Court in conflict preemption cases.85

In *Geier*, the fault lines on preemption cases were drawn for the foreseeable future. Justice Stevens’ insistence on a broad presumption against preemption and reluctance to find preemption based solely on administrative action has found expression in a variety of subsequent cases.86 But Justice Breyer’s majority opinion for the Court signals all of the major themes in the debate over preemption, each of which is the subject to considerable dispute:

1. deference to an administrative agency’s own determinations about the preemptive effect of its statutes or regulations,
2. the conflict between state common law claims and the aims of federal uniform safety regulation, and

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The rumors of the death of the *Rice* presumption against preemption may be exaggerated. Against *Geier*, one can set three more recent decisions that refused to preempt state law, one of which recited *Rice’s* clear statement rule as a justification for its holding. If the Court were so inclined, there is little doubt that the ambiguity in its preemption precedents would leave it ample room to convert *Rice* into a more powerful default rule disfavoring preemption by ambiguous federal laws. 82 N.Y.U. L. Rev. at 62 (citing Gonzales v. Oregon, 546 U.S. 243 (2006); Bates v. Dow Agrosciences L.L.C., 544 U.S. 431 (2005); Sprietsma v. Mercury Marine, 537 U.S. 51 (2002)) (internal footnotes omitted).85 I am grateful to Jim Beck for this insight. *See* Drug and Device Law Blog, http://druganddevicelaw.blogspot.com/2006/11/presumption-against-preemption.html (Nov. 28, 2006).86 *See* Watters, 127 S. Ct. at 1573-86 (Stevens, J., dissenting).
3. the expansive scope of implied conflict preemption even where express preemption is not available as a matter of statutory interpretation.

D. Buckman: Preemption of “Fraud on the FDA” Claims

Continuing the limited line of cases finding preemption, the Court concluded unanimously in 2001 that the MDA preempted a “fraud on the FDA” claim. In Buckman, the Court considered a claim that a bone screw manufacturer made fraudulent statements to the FDA during the medical device approval process. The suit was brought under Pennsylvania tort law “claiming that [the manufacturer]…made fraudulent representations to the FDA as to the intended use of the bone screws and that, as a result, the devices were improperly given market clearance and were subsequently used to the plaintiffs’ detriment.”

The Court’s disposition of the preemption issue is terse but adds to the cumulative weight of case law favoring preemption. Because the manufacturer’s dealings with the FDA were “dictated” by the MDA and “in contrast to situations implicating ‘federalism concerns,’” the Court concluded that “no presumption against pre-emption obtains in this case.” The FDA is charged with enforcing fraud against it and has a “variety of enforcement options that allow it to make a measured response to suspected fraud upon the Administration.” Permitting state common law claims premised on fraud on an administrative agency would, in the Court’s view, “inevitably conflict with the FDA’s

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88 Id. at 347-48.
89 Id. at 349.
responsibility to police fraud consistently with the Administration’s judgment and objectives.”

By some lights, *Buckman* is a narrow case—the Court merely held that where “the fraud claims exist solely by virtue of the FDCA disclosure requirements,” the claim was preempted. Even Justice Stevens, writing separately but concurring in the judgment, agreed that where the FDA does not agree with the fraud allegations and has not removed a product from the market, the plaintiff cannot prove “an essential link in the chain of causation that . . . but for [defendant’s] fraud, the allegedly defective orthopedic bone screws would not have reached the market.” But *Buckman* also evinces a heightened “concern for the potential balkanization of federal regulatory authority” and the importance of integration of safety standards within a national market. Furthermore, the holding with respect to fraud on the FDA claims is significant in its own right and has led to the dismissal of claims in several cases, including some in which the reasoning of *Buckman* was extended to other, non-FDA related administrative contexts.

### III. FDA Labeling Rule Litigation

With the Court’s recent preemption jurisprudence as background, we can turn to the 2006 FDA rule. Not surprisingly, the preemption decisions were at first inconsistent,

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90 Id. at 350.
91 Id. at 353.
92 Id. at 353; *but see* id. at 354 (Stevens, J., concurring) (“If the FDA determines both that fraud has occurred and that such fraud requires the removal of a product from the market, state damages remedies would not encroach upon, but rather would supplement and facilitate, the federal enforcement scheme.”).
93 Issacharoff & Sharkey, *supra* note 38, at 1397-98.
leading some to invoke the manufacturers’ dilemma amid the legal uncertainty between regulatory compliance and liability exposure.\textsuperscript{96} Two sets of cases illustrate the differing approaches courts adopted toward the FDA preemption defense in the wake of the 2006 rule. In \textit{Colacicco v. Apotex}\textsuperscript{97} and \textit{Sykes v. Glaxo-SmithKline},\textsuperscript{98} courts dismissed claims as preempted by the FDA labeling requirement. But in \textit{McNellis v. Pfizer},\textsuperscript{99} \textit{Jackson v. Pfizer},\textsuperscript{100} and \textit{Levine v. Wyeth},\textsuperscript{101} courts rejected such a defense. On appeal, the Supreme Court agreed with the lower court in \textit{Wyeth v. Levine} and found preemption inapplicable. This section will survey the litigation leading up to \textit{Levine} before turning to a defense of preemption on subsidiarity-based grounds in the next section.

\textbf{A. Cases Upholding FDA Preemption}

In \textit{Colacicco}, a federal district court in the Eastern District of Pennsylvania ruled that the FDCA preempted a state law failure to warn claim. At issue in \textit{Colacicco} was the alleged failure to warn of the increased suicide risk for users of anti-depressant drugs. The court’s argument began with deference to the FDA’s own views regarding preemption of plaintiff’s claims as expressed both in a series of amicus briefs and in the preamble to the 2006 rule.\textsuperscript{102} The court then quoted extensively from the briefs and the

\textsuperscript{96} See Linda Pissott Reig & John T. Chester, \textit{Courts’ Misapplication of FDA Preemption Policy Creates Quandary for Drug Producers}, 14 ANDREWS MED. DEVICES LITIG. REP. 9 (2007) (“Cases such as \textit{McNellis, Jackson, and Rush [v. Wyeth]} impose the impossible on drug companies.”).
\textsuperscript{100} \textit{Jackson v. Pfizer, Inc.}, 432 F. Supp. 2d 964 (D. Neb. 2006).
\textsuperscript{101} \textit{Levine v. Wyeth}, 944 A.2d 179 (Vt. 2006).
\textsuperscript{102} \textit{Colacicco}, 432 F. Supp. 2d at 525: The FDA’s view is critical to this Court’s analysis because Supreme Court precedent dictates that an agency’s interpretation of the statute and regulations it administers is entitled to deference…. In
preamble to the 2006 rule in support of its conclusion that the state law failure to warn claims were preempted.

Though *Colacicco* held that the plaintiff’s claims were preempted, the court did raise an issue that has vexed defendants in related litigation. Whether the FDA has consistently adopted a position favoring preemption is, according to the court in *Colacicco*, relevant to determining the scope of deference to the agency, though the court did not explain why consistency of position should affect the preemption deference question. Indeed *Chevron* itself, which famously held that courts should defer to an agency’s reasonable administrative interpretation, expressly leaves open the possibility of agencies changing position while still entitled to administrative deference: “[T]hat the agency has from time to time changed its interpretation . . . does not . . . lead us to conclude that no deference should be accorded . . . An initial agency interpretation is not instantly carved in stone.”¹⁰³ Later cases have, however, listed consistency as among the factors in determining the level of deference courts should accord an agency’s interpretation of its own regulations.¹⁰⁴ The policy—or, frankly, political—effect of raising inconsistency in an agency’s position as a reason for not according deference is, of course, to suggest that preemption decisions are influenced by political pressure and

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¹⁰⁴ See *Bates v. Dow Agrosciences L.L.C.*, 544 U.S. 431, 449 (2005) (stating that EPA's position supporting preemption was “particularly dubious given that just five years ago the United States advocated the interpretation that we adopt today”); *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (“The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to (1) the degree of the agency’s care, (2) its consistency, formality and relative expertness . . . .”); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (“[T]he consistency of an agency’s position is a factor in assessing the weight that position is due.”).
agency accountability to outside interest groups that have reasons for favoring or disfavoring preemption.

Another federal district judge in the Eastern District of Pennsylvania ruled in *Sykes* that the FDCA preempted a failure to warn claim regarding a childhood vaccine.\(^\text{105}\) Beginning with a detailed presentation of the FDA labeling approval process and concluding with the 2006 labeling rule, the court concluded that “the failure to warn claims seek to hold defendants liable for failing to include labeling that was not scientifically supported and would have been false and misleading under federal law.”\(^\text{106}\) The *Sykes* court did, however, entertain at length the plaintiff’s argument that “the FDA’s position on the preemption of state law failure to warn claims has not been the model of consistency.”\(^\text{107}\) Nonetheless, the court concluded, whatever the inconsistencies in the FDA’s position, such inconsistencies either were legally irrelevant or *Colacicco* was correct in observing that the previous *amicus* briefs and other indicia of FDA’s position were not as inconsistent as the plaintiff contended.

**B. Cases Rejecting FDA Preemption**

Preemption defenses in state failure to warn cases in the wake of the 2006 rule were not uniformly successful, as shown by *Jackson*, *McNellis*, and *Levine*. *Jackson* and *McNellis*, like *Colacicco*, raised failure to warn claims for the labeling of anti-depressant drugs following suicides. In *Jackson*, a federal district court in Nebraska, writing shortly after *Sykes*, held that the Vaccine Act preempted plaintiffs’ design defect claims. The court also held that the Vaccine Act preempted plaintiffs’ design defect claims.

\(^\text{105}\) *Sykes* v. Glaxo-SmithKline, No. Civ.-A 06-111 (E.D. Pa. March 28, 2007). (The court also held that the Vaccine Act preempted plaintiffs’ design defect claims.)

\(^\text{106}\) *Id.* at *23.

\(^\text{107}\) *Id.* at *21.
after the 2006 rule was released, held that “the recent notice issued by the FDA claiming preemption is not persuasive” and that Eighth Circuit case law viewed FDA regulations as “minimum standards.” The court also argued in a footnote that the FDA’s failure to comply with the requirement to consult with the states before releasing the 2006 rule reduced the weight the court would accord to the rule.

In *McNellis*, a New Jersey federal court concluded that, even after the 2006 rule, “the FDA’s approved warnings will continue to reflect merely ‘minimum standards,” and that the preemption preamble was inconsistent with the underlying regulations and the 2006 rule itself. *McNellis* was also the strongest statement of the view that the FDA’s allegedly inconsistent view with respect to preemption should lead to a lower level of deference, if any, to the 2006 rule. “Here,” the court argued, “the FDA’s interpretation of

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109 Id. at 968 n.3. The consultation requirement is imposed by Executive Order 13132, which requires an agency before issuing a rule with preemptive effect to “provide all affected State and local officials notice and an opportunity for appropriate participation in the proceedings.” See Exec. Order No. 13,132, 64 Fed. Reg. 43255 (Aug. 4, 1999). The court in *Jackson* disregarded or rejected FDA’s claims in the preamble that it had complied with the requirements of the executive order:

> FDA sought input from all stakeholders on new requirements for the content and format of prescription drug labeling through publication of the proposed rule in the Federal Register. Although the proposed rule did not propose to preempt state law, it did solicit comment on product liability issues. FDA received no comments on the proposed rule from State and local governmental entities.

> Officials at FDA consulted with a number of organizations representing the interests of state and local governments and officials about the interaction between FDA regulation of prescription drug labeling (including this rule) and state law.

> In conclusion, the agency believes that it has complied with all of the applicable requirements under Executive Order 13132 and has determined that this final rule is consistent with the Executive order.

71 Fed. Reg. at 3969. Notwithstanding the court’s conclusion in *Jackson*, Executive Order 13132 states that it is “not intended to create any right or benefit, substantive or procedural, enforceable at law.” 64 Fed. Reg. at 43259.

110 McNellis v. Pfizer, Civ. No. 05-1286, Section II.A(2)(b)(1) (D.N.J. Sept. 29, 2006) (“[T]he Preamble is squarely contradicted by the plain language of the regulations themselves . . . . The Preamble’s words are in irreconcilable tension with the Final Rule itself.”).
regulations in 2006 (as expressed in the Preamble to the Final Rule) is in stark contrast to the FDA’s position regarding the same regulations outlined in the FDA’s 2000 Proposed Rules.” The court concluded that “[t]he Preamble [to the 2006 rule], without more, does not signal to this Court Congressional intent to obviate state law.” The McNellis court also criticized Colacicco on the issue of agency deference, alleging that Colacicco “overstate[d] the deference due to an agency’s interpretation.”

All of these arguments were brought to a head when the Supreme Court agreed to hear Wyeth’s appeal from the Vermont Supreme Court’s decision in Wyeth v. Levine. In Levine, the plaintiff’s arm was amputated following complications caused by improper administration of Phenergan, an anti-nausea drug. The defendant manufacturer raised a preemption defense, which the Vermont state courts rejected. Addressing the preemption defense generally, the Vermont Supreme Court cited McNellis approvingly for the proposition that FDA labeling requirements set a minimal standard that manufacturers are encouraged to exceed. “There is thus no conflict between federal labeling requirements and state failure-to-warn claims,” the court concluded, because the FDCA “allows, and arguably encourages, manufacturers to add and strengthen warnings that, despite FDA approval, are insufficient to protect consumers. State tort claims simply give these manufacturers a concrete incentive to take this action as quickly as possible.” As to the 2006 preamble, the Vermont court held that the FDA’s position was entitled to “no

111 Id. at Section II.A (1).
112 Id.
113 Id.
114 Levine v. Wyeth, 944 A.2d 179, 186 (Vt. 2006).

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deference” and that the court’s conclusions regarding conflict preemption were undisturbed by the new preamble and rule.115

In the most anticipated preemption case for many years, the Supreme Court affirmed the Vermont Supreme Court. Writing for the Court, Justice Stevens argued that “the [2006] preamble is at odds with what evidence we have of Congress’ purposes, and it reverses the FDA’s own longstanding position without providing a reasoned explanation, including any discussion of how state law has interfered with the FDA’s regulation of drug labeling during decades of coexistence.”116 FDA’s changed position on state tort law preemption, the lack of consultation with the states, and the Court’s interpretation of the FDCA all argued in favor of preemption, according to the majority. In concurrence, Justice Breyer (the author, recall, of Geier) sought to salvage the possibility of state tort law sometimes interfering with federal objectives.117 Justice Thomas concurred only in the judgment and offered a structural-federalist view of preemption that sidesteps altogether the Court’s “purposes and objectives” approach to preemption, thereby filling out the textualist understanding of preemption that he and Justice Scalia had sketched in Cipollone. Just as “[a]pplying ‘purposes and objectives’ pre-emption in Geier… allowed this Court to vacate a judgment issued by another sovereign based on nothing more than assumptions and goals that were untethered from the constitutionally enacted federal law authorizing the federal regulatory standard that

115 Id.
116 Wyeth v. Levine, No. 06-1249, slip. op. at 21 (U.S. March 4, 2009).
117 Id., slip. op. at 1 (Breyer, J., concurring).
was before the Court,”118 Justice Thomas argued, so also the Court’s conclusion in Levine should be grounded in nothing more than the statutory text of the FDCA and considerations of dual sovereignty and federalism.

IV. Subsidiarity and Preemption

Even before Levine, though, the academic commentary in response to the FDA’s preemption rule had been almost uniformly hostile. The scholarly response—even where moderately supportive of preemption—has fallen roughly into three categories: concerns about patient safety, arguments for the limits on agency authority, and discussions of federalism and institutional design.

The set of concerns over patient safety share a view of tort law as primarily serving compensatory goals. Depriving plaintiffs of a tort remedy against pharmaceutical manufacturers undermines the objectives of tort law, the argument runs, and does not properly incentivize manufacturers to take precautions when introducing products to the market. As summarized by David Kessler and David Vladeck:

Statutory gaps in the FDA’s authority to gather information, especially post-approval, hamstring its ability to ensure the safety of the drugs on the market. The FDA Amendments Act may help close those gaps somewhat, but they remain substantial. Nothing in the Act gives the FDA comprehensive authority to obtain whatever records it deems necessary to do its work. And closing that gap would not guarantee that emerging safety information is made available to physicians and patients, who need it just as much as the FDA. Even with the additional resources provided for under the Act, the FDA faces resource constraints. It is still a small “David” facing dozens of “Goliaths.” That is not about to change. As the Senate’s chief sponsor of the Act warned, “the resources of the drug industry to collect and analyze postmarket safety data vastly exceed the resources of the FDA, and no matter what we do, they will always have vastly greater resources to

118 Id., slip op. at 20 (Thomas, J., concurring).
monitor the safety of their products than the FDA does.” Failure-to-warn litigation brings to light information that is not otherwise available to the FDA, doctors, other health care providers, or consumers. The benefits of this litigation should not be discarded lightly, and, as we have said, we see no benefit to the FDA or the public in finding failure-to-warn litigation preempted.119

In a similar vein, Richard Nagareda took a more moderate approach to preemption and argues that preemption should run alongside heightened information disclosure requirements from industry, but he hedges his bets on the beneficial effects of tort litigation:

The approach to preemption offered here proceeds squarely from the premise that information about the impact of tort litigation on the pharmaceutical industry will remain a fiercely contested empirical question for the foreseeable future. In such a world of scholarly impasse, institutional design should seek to wield preemption as a preference-revealing device vis-à-vis regulated industry. Rather than scholars settling the debate over the detrimental effects of tort litigation on regulated industry, proper design of a preemptive regulatory regime would position industry itself to settle the debate, in effect, through its own actions. If tort litigation is indeed such an arbitrary force, then industry should have little quarrel with the heightened information demands sketched here. An approach to preemption keyed to industry forthrightness would challenge Big Pharma to put its money where its mouth is – to demonstrate by its actions that it has nothing to hide as the predicate for agency action with the power to wield preemptive force.120

What all of these commentators share is a broad commitment to the ideal of the tort system as an ex post deterrence to manufacturers that will ensure maximal safety outcomes.

A second set of scholars proceeded from administrative law arguments about the limits of agency authority and agency capture concerns. As noted above, Nina Mendelson

argues that so-called *Chevron* deference should not apply to agency preemption
determinations. Also, the discussion mentioned above over the effect of Executive Order
No. 13132 and the importance of striking a federal-state balance in agency preemption
decisions argues against an overly broad reading of preemption.

Finally, a third set of commentators do not take as strong an anti-preemption view
as those who highlight patient safety or the limits on agency authority but instead frame
the question around federalism and institutional design. In his article “Against
Preemption,” Roderick Hills argues that an anti-preemption presumption would improve
the national legislative process.121 Catherine Sharkey eschews anything as broad as an
anti-preemption presumption but argues that, as a functional matter, courts have looked to
agency expertise when deciding preemption cases, and she offers a defense of what she
terms an “agency reference model”:

The theme of my proposed middle course approach—between the extremes of
applying a strong-form presumption against preemption and granting mandatory
*Chevron* deference to the FDA—is fairly easy to state. State-law failure-to-warn
claims based upon a risk for which the FDA has made a specific determination,
either prior to or after approval, should be preempted. Conversely, state-law
failure-to-warn claims should not be preempted when the FDA has not made a
specific determination about a particular risk at the time the cause of action arises.
In other words, the mere fact that the FDA does not require a warning on a
product label at the time of initial approval would not preempt failure-to-warn
claims; but if the FDA takes some action and rejects a proposed warning, or
reviews evidence and declines to require a change, then potential grounds for
preemption exist.122

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121 See Hills, supra note 84.
But using the Texas and Michigan statutes discussed at the outset of this chapter, we see that a handful of states have enacted products liability defense statutes that permit defendants to argue compliance with regulatory standards as a defense to such claims. Set against the background of long-arm jurisdiction and choice-of-law rules that allow states to impose externalities on other states by subjecting out-of-state defendants to damages, pharmaceutical litigation is an example of Thomas Merrill’s observation that “[o]ne person’s healthy regional diversity is another’s interstate externality.”\textsuperscript{123} The contrarian election of some states, though, is to strike a drug safety balance through regulatory compliance defense statutes. Such statutes reduce costs for prescription drugs to all consumers, not just those in states that have enacted such statutes, and the lower cost encourages the sale of drugs that the FDA has determined are safe but perhaps cannot be sold profitably on account of the litigation risk posed by the externality-imposing states.

A state-by-state approach—that is, watching while states such as Texas and Michigan enact such statutes but while most states continue to permit tort claims to proceed notwithstanding regulatory compliance—will be ineffective, though, at reducing drug costs and litigation. State regulatory compliance defense statutes provide an \textit{ex ante} benefit to all consumers, but plaintiffs in those states bear an \textit{ex post} cost relative to plaintiffs in other states without such regulatory compliance defense statutes. Residents of (as it happens, most) states have incentives to accrue litigation benefits to themselves.

at the expense of out-of-state plaintiffs, but everyone would be better off if the states could agree on a preemption rule.

Virtually every participant in the preemption debate assumes a basic federal-state tension that subsidiarity dissolves. All assume that federal preemption undermines legitimate state interests in vindicating state tort claims. Even moderate defenders of preemption, such as Sharkey, justify preemption on the grounds that it is a necessary structural resolution to products liability litigation amid a national market. But as Gary Schwartz has argued, “[t]he value associated with federalism in allowing experimentation at the state level seems undercut by the practical inability of manufacturers distributing products at the national level to respond to whatever experiments state courts might undertake.”

As I argued in the conclusion to Chapter One, subsidiarity as functional pluralism signals that different political societies (including the states) are properly concerned with different ends. In the preemption debate, the states are apparently best served by an anti-preemption rule that leaves state tort claims in place. But the foregoing argument suggests that the states’ genuine interests can sometimes be accomplished by a preemption rule that overcomes the collective action problem in pharmaceutical regulation. Aided by the principle of subsidiarity, with an emphasis not on efficiency or national supremacy but instead on functional pluralism, we might see that preemption can be understood as a way of helping the states achieve state objectives.

CHAPTER FIVE: SUBSIDIARITY AND SCHOOL FINANCE

Introduction

Roughly fifty years after *Brown v. Board of Education*¹ and thirty years after *Serrano v. Priest*² and *San Antonio Independent School District v. Rodriguez*,³ an apprehension lurks at the intersection of discussions of race, public education, and school finance. The apprehension is that concerns of equality – racial and economic integration, equal educational opportunity – and concerns of efficiency must be traded off against each other. The task of this chapter, aided by recent work by economists and empirical research on the relationship of school finance and equality and informed by the principle of subsidiarity, is to argue that the supposed trade-off between efficiency and equity distorts and misconstrues the school finance debate.

The United States spends over $400 billion per year to fund public K-12 education, the largest area of public expenditure.⁴ In 2002-03, local governments provided 43% of the revenue for schools, with some states relying more on local government funding (e.g., Pennsylvania at 55%) and some states relying less on local government funding (e.g., Minnesota at 20%).⁵ Such revenue normally derives from local property taxes. The states contribute an average of 49% of the funding for public education. The federal government provides the remaining average 8% of funding,

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¹ 347 U.S. 483 (1954).
² 487 P.2d 1241 (Cal. 1971).
⁵ Hawaii is the sole state with a unitary school district and so has virtually no local government funding for education.
mostly through the provision of Title I funds for special needs education and in the wake of the No Child Left Behind Act of 2001.

On one side of the discussion, a body of literature argues that vast disparities of funding exist between wealthy and poor districts, with race frequently serving as a marker for these categories. Blame for these disparities is laid at the doorstep of localism (understood both as a political principle and as a public finance mechanism), and centralization of funding is viewed as the necessary prescription to insure equal opportunity. The alternative, according to this argument, is to allow purportedly arbitrary disparities in wealth (more specifically, disparities in the property tax bases of localized school districts) to determine the availability of public educational resources. A competing body of literature proceeds by showing the economic benefits of localized financing. According to these authors, it is largely by linking the benefits of paying property taxes to the quality of local public schools that voters support funding public education in the first place. Alternative methods of financing education, whether state income taxes or other taxes, fail to capture these benefits and result in inefficiency, voter apathy, and a decline in the quality of public education.

The tension, then, between the sentiments expressed in Jonathan Kozol’s widely read and influential book *Savage Inequalities* and concerns of economic efficiency and political participation lies at the heart of this chapter. Where Kozol appeals to the reader’s sense of justice and a desire for racial and socioeconomic integration, other authors point to the political and economic benefits of resisting Kozol’s argument for

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*Jonathan Kozol, Savage Inequalities: Children in America’s Schools (1991).*
school finance equalization. As William Fischel writes at the beginning of his book on local government and public finance, the incentive to do well can be squared with the incentive to do good: “[M]ercenary concern with property values, especially that of homeowners, motivates citizens to organize and make personal sacrifices for such things as public schools.” That suggestion elicits the central question of this chapter: can the insights of authors such as Fischel regarding the importance of local financing of public education be reconciled with the demands of racial justice, equality, and integration? My argument is that these demands can be reconciled, and, perhaps more importantly, that the data on school finance reform efforts thus far reveals that, to put it bluntly, local control is the worst form of school financing except for the alternatives. The purposes of subsidiarity, which, as we have seen, sometimes counsel in favor of responsibility being placed at the local level and sometimes at the national level, are best served in the school finance debate by local control.

In the background to this entire discussion, of course, is fifty years’ worth of judicial intervention and public policy in the wake of the Supreme Court’s decision in Brown v. Board of Education. Fifty years after Brown, the United States is still embroiled in a debate over the relationship between public education and race. Though the series of desegregation cases of which Brown is the original and most prominent example is now largely at an end – as school districts across the country are declared by federal district courts to be “unified” and released from the requirements of busing decrees to integrate

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students – it would be a mistake to suppose that debates over race and public education will fade away. By the lights of many observers, the Supreme Court’s decision in *Milliken v. Bradley* effectively ended aggressive efforts to implement *Brown* by foreclosing the ability of federal district courts to order inter-district remedies. \(^8\) “[T]he continuing problems of public school desegregation in our country are not due, directly, to the failings of *Brown,*” writes Douglas Reed, “but to the success of *Milliken.*” \(^9\)

The current debate occurring at the intersection of race and public education, however, is largely not about busing or other desegregating remedies for prior *de jure* racial segregation. Instead, the debate of the past several years and likely of the future will be over the alleged discrepancies between the levels of funding afforded inner city – often largely minority – school districts and their wealthier counterparts. Despite this rather obvious link between school financing and race, however, James Ryan is right to observe that “[v]ery little scholarly attention has been devoted to the relationship between school finance and desegregation or to the role that race plays in school finance reform.” \(^10\) For Ryan, school finance reform should be viewed alongside desegregation efforts in the courts, though the argument in his two articles on race and school finance is driven by a fear that school finance reform will prove to be a “poor substitute” for

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\(^8\) See 418 U.S. 717 (1975).


genuine desegregation. His conclusion is “not only that school finance reform has done little to improve the academic performance of students in predominantly minority districts, but also that it may be a costly distraction from the more productive policy of racial and socioeconomic integration.”

To focus this inquiry, I have chosen a particular and recurrent issue in school finance and one that obviously relates to the principle of subsidiarity, namely the proper role of localism in the school finance debate. Beginning with the California Supreme Court’s decision in *Serrano v. Priest* in 1971, results in school finance reform litigation have often turned on whether local control over the financing and administration of public schools constitutes a sufficiently important government interest. If so, then the equal protection worries caused by inequitable financing schemes are generally overridden by the state’s interest in maintaining local control over education. Such an argument was rejected in *Serrano* and in several subsequent cases in other states, but other state courts (notably the Wisconsin Supreme Court) have acknowledged local control as an important state interest and left allegedly inequitable financing schemes in place. In virtually every case, however, the courts – both state and federal – have been unclear as to precisely why localism is necessary or important to public education. This chapter will treat the place of localism in the dispute over school finance reform through the lens of efficiency versus equity concerns with particular attention to the fears that localism serves to foster racial or class-based segregation in public education. I hope to add legal meat–by looking at several cases addressing localism in school finance reform

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11 Ryan, *Schools, Race, and Money*, supra note 10, at 256.
and at conceptions of “localism” in the academic literature—to the econometric bones of Caroline Minter Hoxby’s conclusion that “equating local finance with efficiency and centralized finance with equity is incorrect and greatly exaggerates the real efficiency-equity tradeoff…. Local finance actually resolves much of the efficiency-equity problem, cutting it down to a manageable size.”

The paper will proceed in three parts. Part I will survey the treatment of localism and locally controlled school finance by courts deciding school finance reform cases. This section will seek to be both a descriptive account of what weight localist concerns have been accorded by courts and, normatively, what such courts have understood as “localism” and local control over school finance. Part II will consider the racial and class segregation problems thought to beset localism and locally based school finance. Part III, using the recent work of William Fischel and Caroline Minter Hoxby, will argue that objections to localism in the school finance reform jurisprudence and academic commentary are overstated but that subsidiarity provides a firmer footing for localism (and also acknowledges localism’s shortcomings) than mere concerns of economic efficiency.

I. Localism in School Finance Reform Litigation

Descriptively, courts weighing the value of localism in school finance reform litigation have rendered decisions falling into two general categories. Broadly speaking, localism can be employed (a) to forbid centralizing school finance at the state level or

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similar types of reform (if localism is accorded high value), or (b) to require school
finance reform through the centralization of financing to remedy inter-district funding
inequities (if localism is thought to be merely discretionary or perhaps even pernicious).
To take one of the preeminent examples of the former, the Wisconsin Supreme Court, in
*Buse v. Smith*\(^{13}\) and *Kukor v. Grover*,\(^{14}\) held local control over education to be an interest
of such significance that the state’s financing scheme, though inequitable, was
constitutionally permissible. (Indeed, the court ruled in *Buse* that localism served to
render one component of a proposed equalization scheme – so-called “negative aid” –
constitutionally forbidden.)

Other state courts, however, have fallen into a second category of balancing the
state’s interest in maintaining local control over education against the inequities brought
about by leaving levels of school funding up to local governments. In *Brigham v. State*,
for example, the Vermont Supreme Court ruled that local control was only a discretionary
means of providing for the basic right to education and that the state could not “abdicate
the basic responsibility for education by passing it on to local government, which are
themselves creations of the state.”\(^{15}\) The court concluded that local financing was not a
“constitutional imperative” sufficient to overcome the problem of inequitable access to
educational opportunities in Vermont.\(^{16}\)

But as a normative matter, neither the courts (such as Wisconsin’s) that elevate
local control to constitutional status, nor the courts (such as Vermont’s) that give local

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13 247 N.W.2d 141 (Wis. 1976).
14 436 N.W.2d 568 (Wis. 1989).
16 See id.
control only “legislative discretionary” status have sufficiently explained what they take to be the meaning and import of localism. As Richard Briffault observes, “The courts’ use of the term ‘local control’ has obscured, more than it has enlightened, our understanding of the appropriate role of local factors and local decisionmaking in public education.”

Is the value accorded localism a policy choice by these courts, and, if so, on what grounds is such a choice made? What role do considerations of efficiency play in these decisions? If, as will be argued in Part III, there is substantial reason to believe that severing the link between local control and school finance ultimately harms public education, should courts take notice of such possible consequences in addressing equal protection challenges? After summarizing the relevant case law in this part of the chapter, I will conclude by addressing these normative questions by outlining competing models of localism in school finance cases.

As of 2002, nineteen states had ruled that the equal protection or adequate education guarantees of their state constitutions required that the state legislature reform the financing of public education, usually by rendering the system of financing more centralized and less reliant on local government taxation: Alabama, Arizona, Arkansas, California, Connecticut, Idaho, Kentucky, Massachusetts, 

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18 See Ex Parte James, 713 So. 2d 869 (Ala. 1997).

30 See DeRolph v. State, 677 N.E.2d 733 (Ohio 1997).
40 See Coalition for Adequacy & Fairness in Sch. Funding v. Chiles, 680 So.2d 400 (Fla. 1996).
47 See Skeeve v. State, 505 N.W.2d 299 (Minn. 1993).
50 See Bismarck Public Sch. Dist. #1 v. State, 511 N.W.2d 247 (N.D. 1994).
Washington, and Wisconsin. The summary of state decisions here takes account of instances in which there have been two or more decisions regarding school finance reform. The Ohio Supreme Court, for example, has rendered decisions on both sides of the issue. Also, this list of states and accompanying cases in the footnotes selects either the first or the most significant state case on school finance reform; in some states – the Abbott litigation in New Jersey, for example – litigation challenging the school finance system has proceeded through multiple stages and resulted in several state supreme court rulings.

For our purposes, a limited issue and a limited set of examples drawn from the case law on school finance reform will suffice to illustrate the debate over the place of localism in these cases. On the question of whether local control over school finance should be a factor in deciding school finance reform cases and, if so, to what extent localism should matter, we can gain a sense of the range of decisions from four examples. In two cases – the Wisconsin Supreme Court’s ruling in Kukor v. Grover and the U.S. Supreme Court’s ruling in Rodriguez – the importance placed on local control over public education (including finance) led to decisions against school finance reform plaintiffs.

59 See Kukor v. Grover, 436 N.W.2d 568 (Wis. 1989).
60 Because most school finance reform litigation occurs in the state courts, San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), might appear to be an odd choice to serve as a representative example of the role of localism in school finance. I choose to use Rodriguez as an archetype for a certain type of judicial deference to localism and justify using it – even though a federal case – for two reasons. First, subsequent state supreme court decisions, such as Buse and Kukor in Wisconsin, cite Rodriguez’s analysis of the importance of local control, notwithstanding its lack of precedential authority, strictly speaking, for their own state constitutional analysis. Because Rodriguez was one of the first school finance reform cases of any sort (federal or state) to be decided, its analysis of the issues in such litigation – including local control – has been important for subsequent courts. Second, much of the reason for state
In Vermont and Wyoming, by contrast, the state supreme courts held that localism was merely a factor amid other overriding concerns (Vermont) or that localism was constitutionally proscribed (Wyoming). Consideration of these four cases will provide us with a two-by-two matrix of positions as to the assessment of localism and its constitutional (both state and federal) weight in school finance reform litigation.

A. Local Control as Constitutionally Required: Wisconsin

The Wisconsin litigation that culminated in the Wisconsin Supreme Court’s ruling in Kukor v. Grover challenged the state’s system of school finance based on both the education and equal protection provisions of the Wisconsin Constitution. According to the state Constitution, “The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable,”62 and “[a]ll people are born equally free and independent, and have certain inherent rights.”63 The plaintiffs in Kukor alleged that the Wisconsin school finance system failed “to compensate for the ‘educational overburden’ resulting from a high concentration of poverty students…in poverty districts” and “municipal overburden” (denoting the “high costs of education in metropolitan districts”), and also resulted in “disparities in per-pupil expenditures among

supreme court adjudication of school finance reform litigation is, of course, Rodriguez’s reluctance to make the issue a matter of federal constitutional equal protection. Justice Powell’s analysis of school finance issues, then, is important for its effect on all later school finance litigation, even though the issue has (post-Rodriguez) been primarily a state, rather than federal, constitutional matter.

61 436 N.W.2d 568.
62 Wis. Const. art. X, § 3 (emphasis added).
63 Id. art. I, § 1.
districts...demonstrative of the deficiency in the operation of the current school finance system."64

A prior decision of the Wisconsin Supreme Court in Buse v. Smith,65 laid the groundwork for the court’s Kukor ruling. In Buse, the court held that the so-called “negative aid” provisions of the state’s school district financing statutes were unconstitutional. Under the negative aid scheme, certain (mostly wealthy) districts in the state were required to pay a portion of their property tax revenues to a state fund. The state government, in turn, redistributed the revenue from the state fund to under-funded districts.66 Five school districts and their residents brought a class action suit for declaratory judgment against the negative aid financing. The court relied on provisions of the Wisconsin Constitution that, according to the court’s interpretation, required that local districts be vested with considerable authority over public education.67 The court concluded that “the power possessed by local districts to determine what educational subjects it will offer over and above those required by the state, and to raise funds therefore, is not merely a delegated power. Rather the state-local dichotomy in that limited regard is part and parcel of the constitution.”68

When faced with a challenge from the other side (an equal protection challenge brought by poorer districts to the disparities in levels of funding across the state), the Wisconsin court fell back on its view in Buse that local control and local variation were

64 Kukor, 436 N.W.2d at 573.
65 247 N.W.2d 141 (Wis. 1976).
66 See id. at 143-47.
67 See id. at 150. The Wisconsin Constitution requires that “each town and city raise tax for the support of common schools therein.” Id. (quoting Wis. CONST. art. X, § 3).
68 Buse, 247 N.W.2d at 151.
constitutionally required: “The principle of local control in Wisconsin, therefore, is not merely a theoretical notion, but rather is a constitutionally based and protected precept as to which the framers of our constitution were firmly committed.” In assessing the equal protection challenge, the court adopted the United States Supreme Court’s rational basis standard from Rodriguez for reviewing the plaintiffs’ challenge and found the state interest of local control over education sufficient. Applying the standard to Wisconsin’s system of school finance, the court held, “[T]here is a rational basis justifying any disparities in per-pupil expenditures resulting from the operation of [the school finance system], the rational basis being the preservation of local control over education as mandated by…the Wisconsin Constitution.” In a footnote, the court stated that local control would still be sufficient to uphold the state system under strict scrutiny: “[E]ven if strict scrutiny were the appropriate standard to be applied, we would find the school finance system constitutional…. The requirement that local control of schools be retained is of constitutional magnitude and necessarily compelling.” Passing to the “narrow tailoring” prong of strict scrutiny, the majority also found the “school finance system is ‘narrowly drawn’ to promote local control while assuring the maximum uniformity in educational opportunity deemed practicable.”

Summarizing its two cases striking down negative aid redistribution of property tax revenues from wealthy districts to poor districts (in Buse) and upholding the state’s

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69 Kukor, 436 N.W.2d at 580-81.  
70 Id. at 580. For a more in-depth discussion of Rodriguez, see infra Part I.B.  
71 Kukor, 436 N.W.2d at 582.  
72 Id. at 582 n.13  
73 Id.
school finance system against an equal protection challenge (in *Kukor*), the Wisconsin
court places all of the credit (or blame) for uneven levels of funding on local
governmental decisions. Such local variation in school funding, the court suggests, is a
constitutionally protected right of local government and local taxpayers. Much as if it
had recognized an associational right of local communities and thereby insulated them
from state constitutional liability, the court concluded that “[t]o the extent that district
per-pupil expenditures may differ as a consequence of the operation of [the school
finance system], this difference is a result of decisions made at the local level – a
variation whose legitimacy is grounded in the constitutional requirement that control be
retained by localities.”74 Just as we saw in Chapter Two that the freedom of association
cases sometimes protected voluntary associations from the operation of state anti-
discrimination laws, the Wisconsin Supreme Court adopts something like an associational
right for local governments to be free from state interference in their school funding
decisions.

B. Local Control as Constitutionally Permitted: *Rodriguez*

When deciding to uphold localism as a value to be safeguarded in school finance
reform litigation, courts in states that include some provision for local control in the text
of their constitutions might follow Wisconsin’s example. More likely, however, a state’s
constitution will be silent as to the value of localism (in education or any other context),
and so the court must fashion a place for localism among other state interests. Such was
the path followed by the United States Supreme Court in *San Antonio Independent School*

74 *Id.* at 580.
Though the case involved an interpretation of the role of localism as it pertains to the federal constitutional equal protection guarantee, Rodriguez’s analysis of the value of localism is germane to the discussion of localism as a constitutionally cognizable value as such and has served as persuasive authority for subsequent state court school finance reform cases.

The litigation leading up to the Court’s decision in Rodriguez was based on a Fourteenth Amendment equal protection challenge to Texas’ system of school finance. Though school finance reform plaintiffs had already achieved an early and important victory in the California Supreme Court with Serrano v. Priest, a victory at the United States Supreme Court would have resulted in a Brown-style, national reworking of school finance in every state. Brown itself inspired confidence in the plaintiffs, for one of Brown’s more famous paragraphs, after asserting that “education is perhaps the most important function of state and local governments,” concluded with the observation that “[s]uch an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

In Rodriguez, however, the Court (per Justice Powell) held that the inequities in Texas’ funding of public schools need only pass rational basis review: “A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State’s

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76 487 P.2d 1241 (Cal. 1971).
system be shown to bear some rational relationship to legitimate state purposes.”

Localism filled the role of a “legitimate state purpose” for the Rodriguez Court: “We are asked to condemn [Texas’] judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests.” The Court refused to go this far in expanding the scope of equal protection, holding that “[w]hile assuring a basic education for every child in the State, [the Texas system of school finance] permits and encourages a large measure of participation in and control of each district’s schools at the local level.”

In its analysis of localism, the Court spoke not in the idiom of constitutional necessity (as the Wisconsin Supreme Court does in Buse and Kukor) but in the language of constitutional permission. More properly, the Court held that delegation of control of public education to local governments was a legitimate state interest. Though not going as far as the Wisconsin Court when it claimed – albeit in a footnote and in dicta – that local control was a compelling state interest (and thereby sufficient for strict scrutiny), the importance of local control was enough to offset statewide inter-district inequities in funding according to Rodriguez. As summarized by the Court, “While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of ‘some inequality’ in the manner in which the State’s rationale is achieved is not alone a

78 411 U.S. at 40.
79 Id.
80 Id. at 49.
sufficient basis for striking down the entire system.” A yet stronger assertion of 
localism’s importance can be found in the Court’s suggestion that localism is 
“analog[ous] to the Nation-State relationship in our federal system” insofar as a division 
between state and local government, like a division between the federal and state 
governments, “affords some opportunity for experimentation, innovation, and a healthy 
competition for educational excellence.”

C. Local Control as Constitutionally Suspect: Vermont

In his book On Equal Terms, Douglas Reed cites the Vermont Supreme Court’s 
decision in Brigham v. State as an example of “higher law” constitutionalism, by which 
Reed denotes a form of judicial policymaking claiming that “state constitutions are 
national constitutions in miniature, a higher law controlling the rough and tumble of 
legislative and executive lawmaking.” Regardless of the judicial philosophical tag one 
attaches to the Vermont court, the Brigham decision stands as an example of the position 
inverse to Rodriguez, i.e., local control as an insufficiently important state interest to 
overcome an equal protection challenge to inequitable school funding.

The Vermont court was mostly unconcerned with the precise contours of the test 
to be applied to the plaintiffs’ challenge to the state’s funding system:

Whether we apply the ‘strict scrutiny’ test urged by plaintiffs, the ‘rational 
standard’ advocated by the State, or some intermediate level of review, the 
conclusion remains the same; in Vermont the right to an education is so integral to 
our constitutional form of government, and its guarantees of political and civil

81 Id. at 50-51 (citations omitted).
82 Id. at 50.
83 REED, supra note 9, at 88.
rights, that any statutory framework that infringes upon the equal enjoyment of that right bears a commensurate heavy burden of justification.84

It is difficult to know how seriously to take both the court’s view that it makes no difference what level of constitutional scrutiny is being applied and, more importantly, Brigham’s claim that “any statutory framework” that results in inequitable educational opportunity will be unconstitutional. Future cases will have to resolve whether, for example, a legislative decision to experiment with charter schools in some districts but not others will be inequitable and thereby struck down by the state supreme court.

The basis for the Vermont court’s decision are the provisions of the Vermont Constitution governing education, from which the court extrapolates from the constitution’s silence to an argument about what is and is not required of the state legislature: “Although [the Education Clause of the Vermont Constitution] requires that a school be maintained in each town unless the Legislature permits otherwise, it is silent on the means of their support and funding.”85 Though “[t]he Legislature has implemented the education clause by authorizing school districts to raise revenue through local property taxes,” the court observes, “neither this method, nor any other means of financing public education, is constitutionally mandated. Public education is a constitutional obligation of the state; funding of education through locally-imposed property taxes is not.”86

85 Id. at 392.
86 Id.
In its defense, the State of Vermont asserted that local control was constitutionally required (a successful argument in *Buse and Kukor*) or, in the alternative, that local control was sufficiently important to overcome the alleged inequities in the state school finance system. Though lacking constitutional text to support its views, Vermont claimed that funding “must be derived from whatever sources are available locally,” and the State’s “only responsibility, if any, is to ameliorate inequities if they become too extreme.”

In response, the court drew a distinction between *local control* (which is unobjectionable, in the court’s view) and *local funding* (which, if it results in inter-district inequities, is constitutionally suspect). As to local control, the court acknowledged that “[i]ndividual school districts may well be in the best position to decide whom to hire, how to structure their educational offerings, and how to resolve other issues of a local nature.”

Nonetheless, the Court wrote:

> The State has not explained…why the current funding system is necessary to foster local control…. [I]nsofar as ‘local control’ means the ability to decide that more money should be devoted to the education of children within a district, we have seen – as another court once wrote – that for poorer districts ‘such fiscal freewill is a cruel illusion.’

In elaborating on the local control-local funding distinction, the court employed a means-end analysis. The state legislature, according to the court, is constitutionally charged with achieving the *end* of an equal education for all Vermont children; to achieve that end, the legislature must find a constitutionally legitimate *means*. The local control

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87 *Id.* at 395.
88 *Id.* at 396.
89 *Id.* (quoting *Serrano v. Priest*, 487 P.2d 1241, 1260 (Cal. 1971)). *See also id.* (“[P]oorer districts cannot realistically choose to spend more for educational excellence than their property wealth will allow, no matter how much sacrifice their voters are willing to make.”).
defense of inter-district inequities, however, “confuses constitutional ends…with legislative means, that is, the methods it has employed to fulfill its obligation.”90 Local sources of revenue for public education are “longstanding and traditional components of the educational financing system in Vermont, but none of these represents a constitutional imperative.”91 Unsurprisingly, the court’s conclusion is that “the current system for funding public education in Vermont, with its substantial dependence on local property taxes and resultant wide disparities in revenues available to local school districts, deprives children of an equal educational opportunity in violation of the Vermont Constitution.”92 The constitutional requirement, then, is that inequitable funding be redressed by the Vermont legislature. There is language in Brigham suggesting that local funding is constitutionally problematic not simply because it is local (a view closer to the Wyoming Supreme Court, discussed below) but because it causes “wide disparities in revenues.” This requires negative aid schemes and other mechanisms for equalizing funding across the state but stops short of the stronger claim that local control is itself a problem and constitutionally suspect.

D. Local Control as Constitutionally Forbidden: Wyoming

What Wyoming lacks in population it makes up for in the prolixity of its constitution93 and the complexity of the school finance system designed in the wake of the Wyoming Supreme Court’s decision in Washakie County School District No. One v.

90 Id. at 395.
91 Id.
92 Id. at 386.
93 The state constitution runs to fifty pages and twenty-one articles, among the longest of any state.
Herschler.\textsuperscript{94} In Washakie, the court held public education to be a fundamental right under the Wyoming Constitution and struck down the state’s school finance system on equal protection grounds: “[U]ntil equality of financing is achieved, there is no practicable method of achieving equality of quality.”\textsuperscript{95} In response to the Washakie decision, the Wyoming legislature enacted a new school finance system that included a formula for recapturing revenues in local districts that exceeded a certain amount (“negative aid”) and redistributing funds to poorer districts in the state. Local districts were left free to raise funds through an optional mill levy, and the state “power equalized” the funding available to districts attempting to raise funds.

The Wyoming Supreme Court’s opinion in the litigation challenging the post-Washakie system of school finance ranks among the most elaborate and forceful rejections of local financing in any state supreme court decision on the issue of public education funding. Relying on two provisions of the Wyoming Constitution, the court held in Campbell County School District v. State that the entire post-Washakie system (designed, recall, in response to an earlier state supreme court decision striking down local financing) was unconstitutional.\textsuperscript{96} Rather than rehearsing the court’s analysis of specific provisions of the plan, which was extraordinarily complex by any measure—as the court noted, “if lack of clarity alone were sufficient to strike these statutes down, this case would be less difficult”—we will concentrate here on the court’s dismissal of the

\textsuperscript{94} 606 P.2d 310 (Wyo. 1980).
\textsuperscript{95} Id. at 334.
\textsuperscript{96} 907 P.2d 1238 (Wyo. 1995).
state’s localism arguments offered in defense of the plan found unconstitutional by the court.  

At issue in *Campbell County* was the interpretation of two provisions of the Wyoming Constitution, both found in the article of the constitution governing public education in Wyoming. The first is a seemingly boilerplate requirement that “The legislature shall provide for the establishment and maintenance of a complete and uniform system of public instruction.”

The second provision at issue gives more detail as to the constitutionally required means of financing public education in Wyoming: “The legislature shall make such further provision by taxation or otherwise, as with the income arising from the general school fund will create and maintain a thorough and efficient system of public schools, adequate to the proper instruction of all youth of the state.”

As we shall see, in interpreting these two sentences – both of which have analogues in many other state constitutions – much turns on the presence and meaning of the word “legislature.”

Reviewing the historical background to the ratification of the Wyoming Constitution, the supreme court offered an original understanding argument and placed reservations about local control (and a concomitant preference for centralized control) in the minds of the state constitutional framers:

[A]t the time of the constitutional convention, educational issues were not limited to the problem of establishing schools but included those problems inherent to local control….by the time of the constitutional convention, however, the

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97 Id. at 1248 (quoting *Roosevelt Elem. Sch. Dist. v. Bishop*, 877 P.2d 806, 809-810 (Ariz. 1994)).
99 Id. § 9.
shortcomings and inadequacies of local control were obvious. The framers addressed this by settling that education was a state concern to be addressed at the state level.\textsuperscript{100}

From this, the court concluded that the “framers intended the education article as a mandate to the\textit{ state legislature}.”\textsuperscript{101} Relying also on its prior decision in \textit{Washakie}, the court asserted that:

[T]he plain meaning of our state constitution’s Education Article left no doubt the legislature completely controlled the state’s school system in every respect, and the matter of providing a school system as a whole and financing it is a responsibility of the legislature. In view of this determination that an education system is a function of state control, it would be paradoxical to permit disparity because of local control.\textsuperscript{102}

Unlike any of the foregoing decisions – \textit{Kukor}, \textit{Rodriguez}, or \textit{Brigham} – the Wyoming court expressly adopted a strict scrutiny standard for reviewing the state’s education finance scheme: “[T]his court will review any legislative school financing reform with strict scrutiny to determine whether the evil of financial disparity, from whatever unjustifiable cause, has been exercised [sic] from the Wyoming educational system.”\textsuperscript{103} The court’s decision is confusing on this point, however, for it is not clear whether the state’s proffered defense of localism is constitutionally impermissible (a view supported by the court’s original understanding argument drawn from the Wyoming Constitution) or if localism fails to amount to a compelling state interest for purposes of passing strict scrutiny. To be sure, the state’s system – leaving significant funding discretion at the local level – would be found unconstitutional under either theory. The

\begin{itemize}
\item \textsuperscript{100} Campbell County Sch. Dist, 907 P.2d at 1271.
\item \textsuperscript{101} Id. at 1259 (emphasis added).
\item \textsuperscript{102} Id. at 1270 (citation omitted).
\item \textsuperscript{103} Id. at 1266 (citation omitted).
\end{itemize}
elaborate use of constitutional text and history, however, supports the view that any form of localism for financing public education in Wyoming would be constitutionally prohibited, regardless of the state interest in fostering localism and local self-governance.

To appreciate the distance between *Campbell County* and, for example, the Wisconsin Supreme Court’s decision in *Kukor*, consider the Wyoming court’s bold claim that “there cannot be both state and local control in establishing a constitutional education system…. Historical analysis reveals local control is not a constitutionally recognized interest and cannot be the basis for disparity in equal educational opportunity.” The force of such claims is mitigated by the court’s employment of the same distinction seen in *Brigham* between local control and local finance:

> [T]he framers did not prohibit a local role but left the nature and scope of that local role to the discretion of the legislature. The problems associated with local control were known to the framers, and they addressed them by vesting authority, responsibility, and control in the state legislature, effectively ensuring the state would establish the education system.\(^{105}\)

By so sharply limiting the scope of local authority over education, the Wyoming court poses issues that were not a problem for the other decisions discussed in this section. Can, for example, local districts raise money through an optional mill levy under *Campbell County*? The court is guarded in its answer, holding both that the “system [of financing public education] must be a function of state wealth”\(^{106}\) and that districts can raise extra funds and experiment with new programs financed by those funds. Nonetheless, what the court gives with one hand it takes away with the other. If by

\(^{104}\) Id. at 1270.

\(^{105}\) Id. at 1272 (emphasis in original).

\(^{106}\) Id. at 1274.
raising extra funds through local levies a district alters the meaning of a “proper education,” then all other districts in the state will be entitled to finance the same type of program (and those without the financial means to do so will receive assistance from the state, which may, in turn, recapture the extra funds raised in the district that instituted the program in the first place). As summarized by the court, “The definition of a proper education is not static and necessarily will change. Should that change occur as a result of local innovation, all students are entitled to the benefit of that change as part of a cost-based, state-financed proper education.”

This is perhaps the most interesting (and, from a localist perspective, most disturbing) aspect of *Campbell County*. One assumes we can look to Wyoming in the coming years to determine the metes and bounds of this requirement as implemented in practice. For now, we can only speculate whether a district that offers, for example, Advanced Placement courses and finances them through extra tax levies will find itself forced to subsidize Advanced Placement courses in the rest of the state. The danger of suppressing district innovation (or the political will to extract new funding for such innovation in the first place) is apparent and marks the work of William Fischel and Caroline Minter Hoxby, to which we will turn in Part III.

**E. Conclusion**

We might summarize the approaches to local control in *Brigham, Campbell County, Rodriguez*, and *Kukor* by placing each case in a category defined by the intersection of two variables. On one axis, the courts divide as to whether localism is sufficiently important to offset inequities in inter-district public school financing. In

107 *Id.*
Wisconsin and in *Rodriguez*, the courts adopted a localist justification in ruling for the state; in Vermont and Wyoming, the supreme courts of each state ruled on behalf of the reform-minded plaintiffs and rejected the states’ localist defense. On the other axis, the courts divide on the issue of whether the question of localism is one of constitutional dimensions or merely a “state interest” (though, as we have seen, the weight accorded such an interest varies depending on the test adopted by the court). In Wisconsin and Wyoming, the courts shared the view that localism was a *constitutional* issue, though divided on whether that entailed equalization of funding; in *Rodriguez* and Vermont, localism was not so much a constitutional matter as a prudential matter of state interest to be weighed against other concerns. For *Rodriguez*, local control was a legitimate state interest and thereby sufficient to pass rational basis review. In *Brigham*, by contrast, the Vermont court held that local control was insufficiently compelling to pass any level of judicial scrutiny, even if the court also stopped short of the full-fledged constitutional requirement of state control that marked the Wyoming decision in *Campbell County*.

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II. “The Mockery of Local Control”

With this survey of judicial approaches to localism in school finance reform litigation before us, we now turn to two briefer sections in which localism is decried (Part II) or extolled (Part III) by legal scholars and economists.

As the courts have worked through the implications of localism in cases before them, much of the academic commentary on localism generally and local control over education specifically has ranged from suspicious to hostile. Richard Briffault’s assessment is typical: “Local control contributes to the economic and social stratification of contemporary metropolitan areas. Furthermore, local control may contribute not simply to inequity in school funding, but to a broader inadequacy in the level of support for school funding.”108 In an even stronger vein, Michael Blanchard baldly asserts that “the esteemed benefits of local control over the means of education finance are illusory. Local control of education is premised on nineteenth century visions of community and local government that simply do not reflect modern society.”109

Alongside this suspicion of localism for political theoretical or public finance reasons, a further critique of local control over education argues that localism fosters segregation along racial and class lines. James Ryan notes that “one must understand the dynamics of race relations and school desegregation in order to understand fully the limits and dynamics of school finance reform.”110 Ryan argues that “the importance of

108 Briffault, The Role of Local Control, supra note 17, at 803.
110 Ryan, The Influence of Race, supra note 10, at 434.
preserving local control of education” motivated the United States Supreme Court in *Milliken v. Bradley*, shifting the fight for racial equality to school finance reform efforts, albeit in a way that leaves racial issues hidden from view much of the time: “[A]fter *Milliken*... the focus in desegregation cases... shifted away from integrative remedies. Replacing that focus was a concern for the quality of education offered in the racially isolated school districts.... In other words, the goal was not equality through integration, but adequacy through remedial funding.”111

While Ryan may be correct that little attention has been paid to the racial aspects of school finance reform litigation, it is also true that localism’s bad name in the eyes of Briffault and Blanchard is a result of perceived flaws in local approaches to a wide variety of issues and not only education. Exclusionary zoning and attendant racial or class-based segregation, for example, are thought to be a function of giving zoning power to small units of local government. Various proposals for regional or metropolitan governments are premised on the ill-effects of local control, including local control over education. This section will examine the view that localism, as variously defined, fosters racial and socioeconomic segregation in public education.

Briffault draws a distinction between localism as local control and localism as local fiscal responsibility, a move already encountered in our discussion of the Vermont and Wyoming supreme court decisions.112 More importantly, Briffault provides the theoretical justification for a common view in the school finance literature, namely that

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local control is a fantasy for poor districts. Briffault is essentially describing the familiar phenomenon of income effects and limits imposed on consumer choices. Just as the person in the minimum wage job who eschews Hawaiian vacations is not properly said to have “chosen” not to go to Hawaii, so the poorer districts unable to raise extra funds for public education (due to low property values) cannot be said to “choose” lower levels of education funding. “[F]ormal legal and administrative authority does not by itself necessarily lead to real local power in practice….,” Briffault writes, “many localities lack the resources for the effective exercise of their formal legal powers. For these localities, the state is not an enemy but, rather, a potential source of vital financial assistance.”

In Briffault’s view, this problem of income effects in education funding is not merely an economic issue. A recurring theme of Briffault’s work, especially in his important set of articles on “Our Localism,” is the disjunction between normative claims for greater local autonomy and the descriptive fact that local governments lack political power. “[F]or a substantial number of localities fiscal incapacity makes a mockery of local control…. As the school finance cases illustrate, local autonomy in a setting of limited local fiscal capacity – remediable only through greater state financing at the risk of state control – is a central dilemma of our localism.”

More pointedly, localism’s most pernicious side is not powerlessness but inequality, and it is here that Briffault’s critique maps onto the racial concerns of Ryan and others. As a species of “economic

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113 Id. at 38.
localism,” local public school financing runs the danger of “accepting the preexisting
distribution of wealth” and “prefer[ring] the interests of businesses and investors over
those of individuals and families, those of the affluent over those of the poor and those of
localities with healthy tax bases over those of localities with limited fiscal capacity.”\textsuperscript{116}

The problem of localism finally, according to its critics, is a matter of politics and
not merely economic efficiency or inefficiency. In the terms made famous by Albert
Hirschman’s \textit{Exit, Voice, and Loyalty}, Briffault and others worry that “exit” will
undermine “voice” in the financing of public education:

\begin{quote}
[L]ocal financial responsibility may “skim off” the ablest, most active, and most
effective parents from inner city communities that need them most, thereby
leaving those communities not only with fewer economic resources, but bereft of
the political resources necessary to secure the accountability of local political
institutions and to empower local participation.\textsuperscript{117}
\end{quote}

In contrast to the vaguely Tocquevillian sense that local government (including local
control over the funding of public services) is the surest refuge of democratic self-
governance and accountability, Briffault and others argue that localism undermines
political participation and offers false ideals of autonomy to poor communities.

Lacking the sharp rhetoric or exclusive focus on local government law that marks
writers such as Briffault, Douglas Reed’s \textit{On Equal Terms} is an examination of school
finance reform as a constitutional matter. Reed is circumspect about his views of school
finance reform, as illustrated by the proposals that mark the conclusion of the book.
Rather than a straightforward advocacy of continued school finance litigation, Reed

\textsuperscript{116} Briffault, \textit{Our Localism: Part II}, supra note 114, at 425.
\textsuperscript{117} Briffault, \textit{The Role of Local Control}, supra note 17, at 805-06.
proposes that a “public school attendance property tax credit” be created in underprivileged or predominantly minority districts (specifically, in “school attendance zones”). His second proposed reform – linking magnet and charter school programs to “magnet” neighborhoods – is even more incrementalist. The modest character of these reforms and Reed’s acquiescence to the Court’s decision in *Rodriguez* leave him resigned to the fact that *Brown’s* aspiration for equal opportunity “has not been fully implemented.”

Nonetheless, much of Reed’s book is taken up with offering empirical evidence for the benefits of school finance reform efforts that have already been implemented. Aspects of his work, then, stand as an empirical verification for Briffault’s suspicion of localism. For example, reviewing the levels of education funding in five states in which a locally-based school finance system was replaced by more centralized funding (Connecticut, New Jersey, Kentucky, Tennessee, and Texas), Reed concludes that “sizable and enduring changes in the level of inequality among the relevant school districts” resulted. “[T]hese changes tell a story, in most instances, of persistent and meaningful decreases in inequality over time.” Reed writes, “[T]he lesson we should learn from court-initiated school finance equalization is that it generally achieves results.” Reed also proffers evidence from three states – Illinois, North Carolina, and Oklahoma – in which school finance reform litigation failed. In all three states, to a varying degree,

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118 REED, *supra* note 9, at 5-9.
119 *Id.* at 182.
120 *Id.* at 29.
121 *Id.*
Reed finds that inequality in spending across school districts has increased.\textsuperscript{122} “We see that improvements in equality typically follow state supreme court decisions that order improvements in equality,” Reed concludes, “and that little change or worsening inequality follows from decisions upholding the existing school finance systems…”\textsuperscript{123}

Though a valuable contribution to the literature on school finance reform, particularly for its provision of significant empirical data (a persistent lacuna in the school finance literature),\textsuperscript{124} Reed’s book cannot be counted as a complete vindication of Briffault-style anti-localism. As will be seen in Part III, there is a considerable body of data to the contrary, and Reed does not cite to the studies of Caroline Minter Hoxby that emerge with a quite different assessment of school finance reform’s results.\textsuperscript{125} One could also quibble with details of Reed’s studies. For example, he cites no data from California, arguably the foremost case study in school finance reform. Despite its status as the longest-running experiment in school finance reform, California was not included in Reed’s selection of states to be surveyed apart from his observation that “[a]fter the \textit{Serrano} decision and Proposition 13, California has, in the estimation of some analysts, produced a funding system that is relatively equal but woefully underfunded.”\textsuperscript{126}

William Fischel, whose work will also be discussed in detail below, counters that \textit{Serrano} actually \textit{caused} the anti-tax revolt that culminated in passage of Proposition 13.

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{122}] \textit{Id.} at 31-34 (“In all three cases [Oklahoma, North Carolina, and Illinois], equality was either worse or the same after the court decision.”).
\item[\textsuperscript{123}] \textit{Id.} at 34.
\item[\textsuperscript{125}] \textit{See infra} Part III.
\item[\textsuperscript{126}] \textit{See REED, supra} note 9, at 196 n.21.
\end{itemize}
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To anticipate his argument here, Fischel – contrary to Reed’s view that *Serrano* and Proposition 13 *happen* to have combined to cause a state with equal but under-funded education – asserts that “voters tolerate property taxes only when the public services financed by them are capitalized in home values. The spread of *Serrano*-like cases around the country has, I submit, contributed to a disaffection with local property taxation”\(^\text{127}\) On this view, pointing to the equality achieved by *Serrano* and similar decisions while bemoaning the lack of funding wrought by Proposition 13 misses the point. It is, Fischel argues, precisely because *Serrano* equalized funding across the state that California voters lost their willingness to pay high property taxes. Reed may have a rejoinder to Hoxby’s studies and Fischel’s argument about the link between *Serrano* and Proposition 13, and, in fairness, his underlying argument goes to the *constitutional* demands of equality in the financing of public education – an argument that need not rise or fall based on the outcome of empirical study. Nonetheless, the failure to cite either Hoxby or Fischel, particularly at those points in the argument where they have offered contradictory evidence, qualifies the empirical arguments of *On Equal Terms* and the book’s defense of equal and centralized funding.

**III. Tiebout’s Revenge: The Importance of Local Control for Public Education**

**A. Economic Efficiency and Localism**

William Fischel’s book, *The Homevoter Hypothesis*, is a recent attempt to offer a defense of locally-based school finance over and against *Serrano* - (and *Brigham*- or

Campbell County-inspired reform efforts to centralize the funding of education. Fischel argues – contrary to settled expectations, and certainly contrary to the views of the Vermont and Wyoming supreme courts – that the quality of public education and the problems of racial and economic disparities in school financing are best addressed by maintaining a strong link between local property taxes and public school expenditures. This section of the chapter will take up Fischel’s argument and related econometric studies that support it.

Two overarching questions will guide this section of the chapter. First, does Fischel’s argument (and the variation on the Tiebout Hypothesis on which it rests) address the objection that local control fosters racial and class-based segregation in public education? To put the question another way, is Fischel’s argument driven by concern for the situation of high-valuation districts? (Though the assumption that “high valuation” districts are largely segregated, wealthy districts is attacked in Fischel’s book.) If so, what of the plight of poor, urban, minority districts? Second, how might Fischel’s view affect legal doctrine and policymaking on school finance reform? If, as was shown from the survey of school finance reform case law in Part I, preferences for and against localism are partially policy choices by courts, then should courts now reconsider the weight given local control in light of Fischel’s argument that the courts in many states have harmed public education by imposing equalizing measures?

Fischel’s argument for locally-based school financing shares the same premises as the arguments in the book for local property taxes, local control over aspects of environmental regulation, and exclusionary zoning. As the title of his book suggests,
Fischel views homeowners (who vote and become “homevoters”) as the driving force in local government decision making: “The homevoter hypothesis holds that homeowners, who are the most numerous and politically influential group within most localities, are guided by their concern for the value of their homes to make political decisions that are more efficient than those that would be made at a higher level of government.”128 These decisions are efficient in the first place, so Fischel argues, because the value of local services (including public schools) becomes capitalized in the value of homes.

A corollary element of Fischel’s argument is the famous view advanced in Charles Tiebout’s “A Pure Theory of Local Expenditures”: “Policies that promote residential mobility and increase the knowledge of the consumer-voter will improve the allocation of government expenditures.”129 Fischel adds a political component to Tiebout’s economic model “by inserting homeowners as the prime movers of the model.”130 Succinctly stated, the Tiebout model “stands for the proposition that local government provision of geographically isolated public goods is superior to the provision of the same goods by larger, more centralized units of government.”131 Once one sees that public education as provided in geographically isolated and distinct school districts is an instance of such a good, then it is a short step to the conclusion that more (and locally funded) school districts in an area are preferable to fewer.

One of the key assumptions attacked by Fischel is the easy assumption that the poor live in “poor” school districts. In James Ryan’s aforementioned two articles on

128 See Fischel, Homevoter Hypothesis, supra note 7, at 4.
130 See Fischel, The Homevoter Hypothesis, supra note 7, at 80.
131 Id. at 58.
school finance reform and race, for example, there is repeated use of the term “poor” with little attention to this significant qualification. “The modest value of the homes in which [the poor] live is offset,” according to Fischel, “by the larger-than-average amount of commercial and industrial property located in such districts.”

Insofar, then, as authors such as Ryan or Kozol assume that the plight of inner-city, largely minority districts will be helped by taking money from “wealthy” (usually suburban) districts, they neglect this point. To be sure, Fischel also passes over some factors in his own argument. He pays scant attention to the “municipal overburden” phenomenon commonly addressed in school finance reform litigation (the view that certain districts have higher educational demands due to, for example, poorly maintained buildings or children with higher learning needs), which reinforces Ryan’s argument that “poor” districts really are poor, even if not property tax base-poor in Fischel’s terms.

Fischel’s strongest argument, largely unrebutted by school finance reform advocates, is that centralization of school finance decreases the quality of public schools: “Centralization of school funding – more state money, less reliance on property taxes – appears to have statistically significant, large, negative effects on average SAT scores.”

If substantiated in further research, this argument appears to force the advocates of centralized, non-local funding to bear the effect of forcing all public schools in a state

132 Id. at 133.
133 Id. at 141 (citing Thomas A. Husted and Lawrence W. Kenny, Evidence on the Impact of State Governments on Primary and Secondary Education and the Equity-Efficiency Tradeoff, 43 J.L. & ECON. 285 (2000)).
toward mediocrity for the sake of equality. Commenting on the situation in Vermont in the wake of Brigham, Julie Underwood, dean of the School of Education at Miami University of Ohio, terms this the “Robin Hood” problem:

There is no one right way to correct inequities in educational funding, no magic formula…. But there is a wrong way. Taking money from wealthy districts only makes their schools worse, which makes no sense when the goal is to make schools better. Pulling a Robin Hood is a recipe for disaster.

Though considerations of race and class are virtually absent from Fischel’s argument, one might argue that Fischel’s failure to mention these factors illustrates the occupational hazard of economists to posit ideal types, separated from the thick context of actual decision making such as one encounters in state supreme court cases. More plausible is the view that Fischel is merely providing an analytic framework for thinking about school finance and local government and that the charge of racism or class bias is largely irrelevant to his thesis as such. To pose a challenge to Fischel on race or class grounds is to commit a category mistake. Normatively, Fischel’s argument makes virtually no claims about what local governments should do with their majoritarian power (other than his argument about what they already do in catering to the demands of homeowners) to increase racial or class integration. His argument is, in that respect at least, under-determined. Even when it would be easy to mention the racial or class component of some phenomenon to which he is drawing our attention, Fischel inevitably

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134 But at least one author argues that the early results from a new experiment in centralized funding (Michigan) are generally positive. See Heise, *supra* note 124, at 562-63 (“[I]nitial evidence suggests two positive themes. First, in terms of per-pupil spending, no district is better off than it was before the reform legislation….Second, although per-pupil spending discrepancies endure, Michigan’s present school finance system makes it more difficult to exacerbate them.”).

favors the clarity of the capitalization model to any sociological or policy analysis beyond favoring localism over alternative approaches.

Caroline Minter Hoxby, who provides much of the econometric support for Fischel’s conclusions regarding school finance, does nod to the problems of local control in her discussion of the infelicitously termed phenomenon of “human capital spillovers,” essentially denoting the fact of racial and economic segregation in the housing market. She offers a note of realism about the problem of racial and class-based segregation in a Tiebout-model scheme of localized school finance: “Households will do Tiebout-style sorting on the basis of their demand for spillovers…,” she writes, but (and here is her rejoinder to the race or class-based segregation objection), “It is essential to recognize that households will sort this way regardless of whether the system of school finance is local or centralized.”

Once again, an equity-based objection to the argument for localized school funding is, on this view, a category mistake, as it attempts to solve one problem by creating another problem. As Hoxby concludes, “a desire to change human capital spillovers – laudable though it may be – cannot generally form the basis of an argument for centralized school finance.”

Which is not to say, of course, that centralized funding will not continue to be popular among some state supreme courts and state legislatures. According to Hoxby, though, there is an easy explanation for this democratic phenomenon:

[T]he combination of an instinct that not enough is currently done to help students from central city households with low human capital, the misconception that such

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136 Hoxby, supra note 12, at 62 (emphasis in original).
137 Id.
students typically experience unusually low spending so that they would be better off with their state’s median spending, and the mistaken instinct that centralized finance implies perfect integration of human capital [cause legislatures and judges to embrace school finance reform].¹³⁸

There is, then, nothing finally inconsistent with affirming both the homovoter hypothesis (and a strong preference for localized school funding) and a concern that localized school finance imposes high social costs and causes a downward spiral of “human capital spillovers.” Fischel and Hoxby do not set themselves the task of deflecting the argument that localized governance may reflect the racial or class biases of homeowners, only that such governance is economically efficient and democratically accountable. Alternatives, such as those offered by the Wyoming and Vermont courts or the authors examined in Part II, will, according to this argument, inevitably sacrifice one or both of these values.

**B. Subsidiarity and Localism in School Finance**

The bulk of this chapter has been a survey of how courts have viewed localism, with at least four possible views represented in the jurisprudence of school finance reform. The academic commentary on localism and school finance offered by the authors surveyed in Parts II and III is only slightly clearer about the benefits and burdens of localism than the courts who have addressed the issue. Some (Briffault and Ryan) are suspicious of localism and would presumably endorse the attitudes toward localism found in the Vermont and Wyoming decisions. For them, equality of funding is the object of the school funding debate, and localism – with its socioeconomic and racial parochialism –

¹³⁸ *Id.* at 66 (emphasis added).
undermines equality. Reed offers some empirical evidence to support this conclusion, though, as I have argued in Part II, there are objections to Reed’s selection of states for study, and his decision not to engage authors (notably Fischel and Hoxby) who offer contrary conclusions goes to show how efficiency concerns are eclipsed in his argument by concerns of constitutional equality. It is the merit of Fischel and Hoxby’s work that they grab both horns of the efficiency-equity dilemma and, while defending localism and Tieboutian efficiency, display an awareness of the equitable anxieties of other authors. For Fischel and Hoxby, however, the way out of the dilemma is found in their argument that single-mindedly pursuing equity (by centralizing funding and at the expense of local efficiency) produces a system of school finance that is neither efficient nor equitable.

We have, then, identified two aspects of the school finance debate as it is currently framed: (1) the treatment of localism by the courts leaves unanswered the question of why localism is important in the first place, and (2) the normative debate over localism is marked by interminable disagreement between localism’s boosters and detractors. Reduced to its essentials, the boosters of localism seem to privilege efficiency over equity, and localism’s detractors seem to privilege equity over efficiency.

It is at this point in the argument that the principle of subsidiarity might offer a way beyond the equity-efficiency impasse. Subsidiarity illuminates the school finance debate in at least two ways. First, subsidiarity provides a thick, normative account of when and why localism is important. The courts – such as the Wisconsin Supreme Court – holding that the importance of local control forgives inter-district inequality largely fail to explain why localism is important in the first place. In turn, those economists who
defend local control and financing rely largely if not exclusively on the language of efficiency, characterizing residents as market consumers of public goods who rationally maximize their self-interest. Subsidiarity’s devolutionary import favors localism but provides a normative principle beyond competitive efficiency whereby we can assess when local control is important and worth preserving. By the lights of subsidiarity, competitive efficiency alone is unable to capture many of the concerns at play in determining whether school finance should be left to local government. While building on the insights of public finance economists regarding the importance of localism, subsidiarity uniquely provides a normative grounding for localism beyond Tieboutian competition or capitalized home prices. That grounding is, as argued in Chapter One, ultimately an anthropological claim rooted in a conception of the person as essentially social and a functional pluralist account of the social order.

Second, subsidiarity provides a richer moral language to resolve the efficiency-equity tradeoff that currently frames the school finance debate. Conducting the debate in those terms is unduly narrow, with efficiency counseling localism no matter the consequences for poor school districts and equity counseling equality or minimal standards of adequate funding no matter the consequences for local control, support for public education, or educational quality. Both sides in the debate seem to occupy, in Chesterton’s words, the “clean and well-lit prison of one idea.” The apparent confusion at the heart of subsidiarity with which I began Chapter One – the “small is beautiful” language from Pius XI and the “bigger is better” language from John XXIII –

139 G.K. CHESTERTON, ORTHODOXY 38 (1944).
might more charitably be characterized as providing a capacity for discernment among levels of authority and which tasks are best suited to certain levels. On the one hand, subsidiarity’s appreciation of localism leaves intact the role of local financing for well-functioning school districts. On the other hand, subsidiarity and related themes in Catholic social teaching – solidarity, the common good, the preferential option for the poor – force us to consider how best to aid those districts that are chronically underfunded and under-performing. For example, the aforementioned problem of “municipal overburden” arguably calls for intervention of a higher authority such as the state or federal governments in the case of school finance through targeted impact aid.

Subsidiarity does not, then, resolve the school finance debate by urging adoption of local financing no matter the consequences for distributive justice nor by urging that localism be abrogated in the name of equality. Instead, as Arthur McGovern notes, subsidiarity serves “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….only experience and empirical evidence can determine this (and analysts sharply disagree about both).”140 That said, we have some indication of what a school finance debate that took subsidiarity seriously might look like. By assessing the competencies that accord to each level of government, we might conclude that local financing of public schools should continue to be the norm. It should not require elaborate capitalization studies to conclude that the willingness to invest in public

education will often correlate to localized financing. Nonetheless, the imperative to address the obvious inequalities in the system of public education should lead to the intervention of the higher authority – usually state spending but sometimes federal spending – to use targeted “level-up” expenditures rather than, as often occurs when financing is centralized, a “level-down” mandate imposed on high revenue districts, making everyone worse off, if equally so.

Let me conclude by attempting to draw a lesson for Catholic social thought generally and the discussion of subsidiarity specifically. Those in the theological academy who work in the area of Catholic social thought and lawyers with interests in Catholic social thought are understandably drawn to the grand issues of poverty, globalization, war and peace, and First Amendment struggles over establishment and free exercise. But in a country of 25,000 units of local government – municipalities, towns, counties, school districts, etc. – attention to the workings of local government is sorely neglected by Catholic social ethics. Undoubtedly the machinations of local government can be mundane – as anyone who has attended a school board meeting can attest – but it is nonetheless a central aspect of American political life. Indeed, two of the most important tasks of government – land use/zoning regulation and the present subject of financing and administering public schools – are largely controlled by local governments. Perhaps this examination of school finance and the proper place of local government in the debate could serve as a reminder that much of political life proceeds in small ways and demands the sustained attention of those working at the intersection of Catholic social thought and the law.
CONCLUSION

In an essay addressing moral agency and social structures, Alasdair MacIntyre argues that:

[T]o have confidence in our deliberations and judgments we need social relationships of a certain kind, forms of social association in and through which our deliberations and practical judgments are subjected to extended and systematic critical questioning that will teach us how to make judgments in which both we and others may have confidence.¹

This dissertation has proposed the principle of subsidiarity as an extended answer to the challenge posed by MacIntyre. The chapters of this dissertation have ranged over a series of policy questions, but the central concept throughout has been subsidiarity as functional pluralism, as explained in Chapters One and Two. Amid different policy contexts, the argument of the dissertation counsels against always interpreting subsidiarity as a principle of devolution, which is a common mistake in the literature.

More broadly, the account of subsidiarity offered here is consistent with recent work on the importance of civil society. In the introduction to the essays collected in Civil Society and Government, Nancy Rosenblum and Robert Post advance a similarly normative account of pluralism:

In saying that civil society is the realm of pluralism, we are endorsing Isaiah Berlin’s observation of the historicity of human nature, his notion that human identities cannot be other than local and particular, and his belief that this diversity is not transitory. Civil society is not a residue on the way to a unified state in which citizenship eclipses other aspects of belonging, or on the way to a cosmopolitan order in which universality is our essence. Pluralism has a normative as well as a descriptive dimension.²

In contrast to Rosenblum and Post, though, the principle of subsidiarity does not rest content with Berlin’s assertion of an irreducible plurality of values. Instead, normative pluralism—different ends pursued by different groups within society—in Catholic social theory is related to the intrinsically social character of the human person. “As these ends, though parts of the whole moral order, are still real ends” Heinrich Rommen writes, “it behooves rational, free beings to organize themselves and to act in performing the end by their own initiative.”

What, then, does reasonable deliberation lead us to conclude by way of articulating policy prescriptions on such specific matters as physician-assisted suicide, federal preemption, and school finance? From the argument of the foregoing chapters, I should like to conclude with three reference points for thinking about subsidiarity with respect to these and other policy questions: the autonomy of groups, the circumscribed importance of efficiency, and the exercise of prudence. First, social analysis informed by subsidiarity should begin neither with the individual nor with the national government, but should instead take seriously the genuine autonomy (in the literal “self-legislating” sense) of groups. In the American constitutional order, such autonomy includes the sovereignty, properly understood, of the sub-national units of government, particularly the states. As the Supreme Court has observed on various occasions, “[t]he States entered the federal system with their sovereignty intact.”

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3 Heinrich A. Rommen, The State in Catholic Thought 303 (1945).
questions such as physician-assisted suicide, the states’ interest in reasonable regulation of pharmaceuticals and in reducing the costs of drugs, and the importance of local control over public education are all instances of the functional autonomy of groups, even if reasonable policy outcomes can differ and are sometimes subject to empirical analysis.

Second, any argument on such a range of policy questions must properly locate the importance of efficiency. As noted in the introduction to this dissertation, most of the prevailing debate on federalism is focused on efficiency and variations on the Tiebout-sorting advantages of jurisdictional competition. Placing all of the federalism eggs in the fiscal federalism efficiency basket poses at least two problems, however. First, as Malcolm Feeley and Edward Rubin have argued recently, “Federalism…is a mode of governmental organization that grants rights to particular institutions, specifically to geographical subunits of the polity. An approach based on rational actor theory dissolves institutions into individual behavior….In short [fiscal federalism] is a theory of decentralization, not federalism.”5 Second, from the standpoint of Catholic social theory, efficiency is always a circumscribed good. As Robert Pecorella notes, “Market economies require a careful balancing of the social values of efficiency and equity….An overemphasis on efficient production promotes cultural tendencies toward a consumerism that affords material things a role in personal definition that both devalues human dignity

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and transforms the common good into the aggregation of individual utilities.”6 In the
discussion of the three policy questions in Chapters Three through Five, I have attempted
to give efficiency and competitive concerns their due—particularly in the discussion of
the shortfalls of school finance reform efforts in Chapter Five—while avoiding the
pitfalls properly diagnosed by the Catholic social tradition.

Finally, the discernment of specific policy prescriptions must always be
undertaken with the guidance of prudence. As many commentators on Catholic social
thought have noted, the level of generality at which the Church’s teaching on social
questions is presented leaves a great deal to the appropriate exercise of prudential
judgment. Indeed, the Compendium of the Social Doctrine of the Church devotes two
paragraphs to the importance of prudence, the first of which states:

The lay faithful should act according to the dictates of prudence, the virtue that
makes it possible to discern the true good in every circumstance and to choose the
right means for achieving it. Thanks to this virtue, moral principles are applied
correctly to particular cases. We can identify three distinct moments as prudence
is exercised to clarify and evaluate situations, to inspire decisions and to prompt
action. The first moment is seen in the reflection and consultation by which the
question is studied and the necessary opinions sought. The second moment is that
of evaluation, as the reality is analyzed and judged in the light of God’s plan. The
third moment, that of decision, is based on the preceding steps and makes it
possible to choose between the different actions that may be taken.7

The policy questions taken up in Chapters Three through Five each involve the exercise
of prudential judgment amid a tangle of ethical and legal (constitutional, statutory, and
regulatory) sources. For each, the policy conclusions were, I submit, a reasonable but

6 Robert F. Pecorella, Property Rights, the Common Good and the State: The Catholic View of
7 Compendium of the Social Doctrine of the Church § 547 (2004).
contingent application of prudential judgment. In Chapter One, we saw the relation between the early social encyclicals of Leo XIII and his call for a renewal of Thomism. It is fitting, then, to note Aquinas’ own assessment of prudence’s important role in government, for “prudence in its special and most perfect sense belongs to a king who is charged with government of a city or kingdom.”8 In determining how to apply subsidiarity to concrete questions, we should bear in mind Johannes Messner’s caution that “in actual life the order of subsidiarity, like the order of justice generally, will never take shape in perfect form...[Subsidiarity] concerns not least the much discussed relationship between individual and community, freedom and authority, a problem which arises anew in every historical epoch.”9 Or to paraphrase Elizabeth Anscombe (who was speaking about the quite different topic of the principle of double effect), the denial of the principle of subsidiarity has been the corruption of non-Catholic thought, and its abuse has been the corruption of Catholic thought.10 I hope this dissertation goes some small way toward addressing confusion about subsidiarity and its import both within and without the Catholic social tradition.

8 THOMAS AQUINAS, SUMMA THEOLOGIAE II-II, q. 50, a. 1.
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