

SUBSIDIARITY AS A PRINCIPLE OF GOVERNANCE: BEYOND DEVOLUTION

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INTRODUCTION

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

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

I. SUBSIDIARITY AND DEVOLUTION

The link between compassionate conservatism and subsidiarity has been

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 144-45 (footnote omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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