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Never Let a Good Crisis Lead You Astray: The Lessons of Christian Realism and Subsidiarity for Public Policy

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ARTICLE**NEVER LET A GOOD CRISIS LEAD YOU
ASTRAY: THE LESSONS OF CHRISTIAN
REALISM AND SUBSIDIARITY FOR PUBLIC
POLICY**

RICHARD M. ESENBERG

I. INTRODUCTION

The concept of Christian Realism associated with Reinhold Niebuhr might be generally defined as

a reminder of our limits and an affirmation of our hope. It tells us that our knowledge is imperfect, our plans are incomplete, and our expectations are inevitably distorted by self-interest. We are always trying to overcome these limitations, and we are often partly successful; but our partial successes make it all the more important to remember that the limits remain, mocking our confidence with ironic reversals and threatening our pride with forces beyond our control. Final answers and permanent solutions elude us.¹

Although there are certainly concepts in Catholic Social Thought that seem to share much with the ideas associated with Christian Realism, it is my purpose here to treat Christian Realism as a distinct—or at least separate—set of perspectives on law and public policy and to explore how it might interact with the insights of Catholic social teaching. In particular, I want to consider how Christian Realism might be informed by—and how it might inform—the Catholic principles of subsidiarity and solidarity.

Subsidiarity is most often defined as

that most weighty principle, which cannot be set aside or changed . . . [that j]ust 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

1. ROBIN W. LOVIN, CHRISTIAN REALISM AND THE NEW REALITIES 1 (2008).

assign to a greater and higher association what lesser and subordinate organizations can do.²

Solidarity, on the other hand,

is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all.³

There is a real friction in integrating subsidiarity and solidarity. This difficulty reflects, in my view, a creative tension serving an underlying unity. The two are often criticized as conflicting generalities—the latter calling for greater social cohesiveness and collective effort and the former supporting greater social decentralization and private autonomy.⁴

While subsidiarity indeed emphasizes the freedom and responsibility of individuals, voluntary associations, and units of local government, subsidiarity is not, as is sometimes claimed, a merely “instrumental” or “jurisdictional” principle.⁵ Subsidiarity is, to the contrary, a moral judgment about human empowerment. It suggests that public policy ought to be evaluated in terms of its empowerment of individuals and the voluntary and mediating associations into which they gather.⁶ Solidarity, on the other hand, is the objective toward which these persons and associations—freed by subsidiarity—are to strive.⁷ It is not so much a restriction on subsidiarity

2. Pope Pius XI, *Quadragesimo Anno* ¶ 79 (May 15, 1931), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

3. Pope John Paul II, *Sollicitudo rei socialis* ¶ 38 (Dec. 30, 1987), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_30121987_sollicitudo-rei-socialis_en.html.

4. In the context of the adoption of subsidiarity as a constitutive principle of the European Union, one commentator noted that subsidiarity might be called “an empty shell devoid of concrete substance . . . a golden rule, a fashionable term, a concept with which anyone might agree in principle, because all can define for themselves what it means in any specific case.” Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 *FORDHAM INT’L L.J.* 616, 628 (1994).

5. See, e.g., Jerome M. Organ, *Subsidiarity and Solidarity: Lenses for Assessing the Appropriate Locus for Environmental Regulation and Enforcement*, 5 *U. ST. THOMAS L.J.* 262, 264 (2008) (“[T]he principle of subsidiarity is not so much a foundational principle of Catholic Social Thought on its own as it is an instrumental principle designed to promote one of the foundational principles of Catholic Social Thought: the common good.”). I certainly agree that the point of subsidiarity is to serve the common good and to help “members of the body social,” i.e., subsidiarity cannot be seen as a religiously-sanctioned libertarianism in which individual autonomy is the ultimate good. But I do believe that it reflects a judgment about human nature such that the measure of subsidiarity is not simply whether it “works.” See *infra* pp. 388–90.

6. See, e.g., Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 *IND. L. REV.* 103 (2001). To be sure, Professor Vischer and I, while agreeing on the broader implications of subsidiarity, may well disagree on the particulars of those implications. See *infra* pp. 400.

7. See *infra* pp. 373.

but a principle guiding the individuals and the various orders of society.⁸

It is my further suggestion that the perspectives offered by Christian Realism can provide further guidance as to the resolution of this creative attention and application of these principles. It too might be dismissed as a vague counsel against, on the one hand, undue optimism and ambition while warning against, on the other, unwarranted pessimism and passivity—an admonition against being too hot or too cold.⁹ But its counsel of humility and care can tell us something about the limits of ambition and remind us to see the world as it is and not how we want it to be. It reminds us that empiricism is not simply an annoying distraction interfering with the assertion of moral or ideological principles. What we wish for needs to be reconciled with what can be done.

This is not to say that Catholic Social Thought—or Christian Realism—will resolve our policy disputes. Just as subsidiarity does not compel us to be Republicans, solidarity does not mean that God wants us to be Democrats. In the great encyclicals on social theory, the Popes have made it clear that the Church has no models to propose.¹⁰ While I believe that the use of these concepts can clarify—and perhaps even reduce—our ideological differences, it would be unrealistic—in both the Niebuhrian and everyday sense of the word—to believe that they can eliminate them.

8. See, e.g., Pope Benedict XVI, *Caritas in Veritate* ¶ 58 (June 29, 2009), available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html (“The principle of subsidiarity must remain closely linked to the principle of solidarity and vice versa, since the former without the latter gives way to social privatism, while the latter, without the former gives way to paternalist social assistance that is demeaning to those in need.”); Pope John Paul II, *Centesimus Annus* ¶ 15 (May 1, 1991), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html (“The State must contribute to the achievement of these goals both directly and indirectly. Indirectly and according to the principle of subsidiarity, by creating favourable 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.”)

9. One Niebuhr biographer characterized him as someone who “always confounded those who stressed one side of his career or one segment of his standpoint at the expense of another.” RICHARD WIGHTMAN FOX, *REINHOLD NIEBUHR: A BIOGRAPHY* 294 (1985). Without fail, Fox continues, “[h]e confused his comrades as often as his detractors.” *Id.* Another commentator, commenting on President Obama’s professed admiration for Niebuhr, see *infra* pp. 394, writes that Niebuhr was “at various times a patriotic war supporter, a pacifist, an interventionist, a liberal, a socialist, a Christian realist, a pessimist, an optimist, what Robert McAfee Brown has called a ‘pessimistic optimist,’ etc. It is not feasible to hold Obama or anyone else to a Niebuhrian standard because we cannot know what that standard might be.” Liam Julien, *Niebuhr and Obama*, *POL’Y REV.*, Apr.–May 2009, at 19, 31.

10. Pope Benedict XVI, *Caritas in Veritate*, *supra* note 8, ¶ 9 (“The Church does not have technical solutions to offer . . .”); Pope John Paul II, *Centesimus Annus*, *supra* note 8, ¶ 43 (“The Church has no models to present . . .”); Pope John Paul II, *Sollicitudo rei socialis*, *supra* note 3, ¶ 41 (“[T]he Church does not propose economic or political systems . . .”).

It is my contention that these theological concepts offer something, if not perspectives. Solidarity (as well as the underlying ontology of Catholic Social Thought) suggests that we evaluate public policy by its service of the common good as opposed to whether it can command the assent of a majority of differing interests. It rejects agnosticism about the nature of the good.¹¹ Solidarity suggests that legal and political discourse ought not to dismiss the notion that there is a common good as opposed to mere conflicting interests that ought to be mediated. Subsidiarity, however, suggests that this common good requires not only the immediate satisfaction of material wants, but the empowerment of individuals, voluntary associations, and units of local government. Because human beings are creative agents, the status quo is never to be taken as a given. Over the top of this counterpoised unity, realism reminds us that we must always be concerned not only with what law and policy causes to happen, but what they may prevent from happening. It cautions skepticism regarding efforts to impose some centralized view of the common good and modesty about what human effort can accomplish.¹²

In this paper, I propose to use, as a starting point, what many perceive to be a shift toward state intervention and centralized decision-making under the Obama administration as well as its reassertion of classical Progressive Era faith in rational administration.

II. TOP DOWN SOLUTIONS: THE QUEST FOR PERFECTION AS THE ENEMY OF THE GOOD

According to journalist Michael Kinsley, “a gaffe is when a politician tells the truth.”¹³ President Obama’s chief of staff, Rahm Emmanuel, almost certainly gaffed when he said, in relation to the financial meltdown that rocked the nation in the fall of 2008, “You don’t ever want a crisis to go to waste . . .”¹⁴ In Emmanuel’s view, a crisis presents “an opportunity to do important things that you would otherwise avoid . . .”¹⁵ And so it does—even if candid recognition of the fact breeds discomfort.¹⁶

11. See generally John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J.L. & PUB. POL’Y 513 (2009).

12. Cf. Kyle Duncan, *Subsidiarity and Religious Establishments In the United States*, 52 VILL. L. REV. 67, 81, 109 (2007) (arguing that subsidiarity is “anti-perfectionistic” and “substantively modest”).

13. Michael Kinsley, *The Ghost of Columns Past*, THE GUARDIAN (London), Jan. 14, 1992, at 19.

14. Jeff Zeleny & Jackie Calmes, *Obama, Assembling Team, Turns to the Economy*, N.Y. TIMES, Nov. 7, 2008, <http://www.nytimes.com/2008/11/07/us/politics/07obama.html>.

15. *Id.*

16. Emmanuel’s comment has brought a torrent of criticism. See, e.g., Amity Shlaes, *Rahm Emanuel’s Crisis Breeds Health-Care Trouble*, BLOOMBERG.COM, July 21, 2009, <http://www.bloomberg.com/apps/news?pid=20601039&sid=aqNQLSKwZKAM> (“Rash actions lead to reckless policies. That was a big takeaway of the economic crisis.”); Jonah Goldberg,

But just as hard cases can make bad law,¹⁷ crisis can lead to panic and panic to poor judgment. Andrew Gelman has written that when a simple system such as politics seeks to regulate a complex system such as society, unintended consequences follow.¹⁸ More than one American politician has remarked in some way on the supposed Chinese wisdom that a crisis is “an opportunity riding the dangerous wind.”¹⁹ The danger is as real as the

Obama's Fear Mongering, NAT'L REV. ONLINE, Mar. 11, 2009, <http://article.nationalreview.com/388089/obamas-fear-mongering/jonah-goldberg> (“Scaring people about X in order to achieve Y is fundamentally undemocratic.”); Charles Krauthammer, *The Great Non Sequitur*, WASH. POST, Mar. 6, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/05/AR2009030502951.html> (“The markets' recent precipitous decline is a reaction not just to the absence of any plausible bank rescue plan, but also to the suspicion that Obama sees the continuing financial crisis as usefully creating the psychological conditions—the sense of crisis bordering on fear-itself panic—for enacting his “Big Bang” agenda to federalize and/or socialize health care, education and energy, the commanding heights of post-industrial society. Clever politics, but intellectually dishonest to the core.”); David Boaz, *Obama's Shock Doctrine*, THE GUARDIAN, Feb. 12, 2009, <http://www.guardian.co.uk/commentisfree/cifamerica/2009/feb/10/obama-klein-shock-doctrine> (“It's all out of the ‘shock doctrine’ playbook: scare people to death and then demand that your agenda be enacted without delay.”); Patterico's Pontifications, Rahm Emanuel: Never Allow a Crisis to Go to Waste, (Nov. 13, 2008), <http://patterico.com/2008/11/13/rahm-emanuel-never-allow-a-crisis-to-go-to-waste/> (“Is Obama's goal to fix the crisis—or to use it to accomplish other things that he wanted to accomplish anyway?”).

17. *Northern Securities Co. v. United States*, 193 U.S. 197, 364 (1904) (Holmes, J., dissenting) (“Great cases, like hard cases, make bad law.”).

18. James Quinn, *The Law of Unintended Consequences: 20th Century and Beyond*, SEEKING ALPHA, Jan. 5, 2009, <http://seekingalpha.com/article/113162-the-law-of-unintended-consequences-20th-century-and-beyond> (quoting Andrew Gelman) (“The political system is simple. It operates with limited information (rational ignorance), short time horizons, low feedback, and poor and misaligned incentives. Society in contrast is a complex, evolving, high-feedback, incentive-driven system. When a simple system tries to regulate a complex system you often get unintended consequences.”).

19. Thinkexist.com, Chinese Proverbs Quotes, http://thinkexist.com/quotation/a_crisis_is_an_opportunity_riding_the_dangerous/182149.html (last visited April 21, 2010). Indeed, at least two Presidents have argued that the proposition is embedded in the language itself. *See, e.g.*, John F. Kennedy, Remarks at the Convocation of the United Negro College Fund, Indianapolis, Indiana, Apr. 12, 1959, http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/JFK+Pre-Pres/189POWERS09JFKPOWEES_59APR12.htm (last visited April 21, 2010) (“When written in Chinese, the word “crisis” is composed of two characters—one represents danger, and one represents opportunity.”); Thinkexist.com, Richard M. Nixon Quotes, http://thinkexist.com/quotation/the_chinese_use_two_brush_strokes_to_write_the/6945.html (last visited April 21, 2010) (“The Chinese use two brush strokes to write the word ‘crisis.’ One brush stroke stands for danger; the other for opportunity. In a crisis, be aware of the danger - but recognize the opportunity.”). The ideographic claim is long-standing, *see* Frank Gannon, *The Future Lies Ahead*, *The New Nixon* (Aug. 4, 2009), <http://thenewnixon.org/2009/08/04/the-future-lies-ahead/> (referring to the “now tired old chestnut about the Chinese character that means both ‘crisis’ and ‘opportunity’”), and has even been repeated on *The Simpsons*, *The Simpsons: Fear of Flying* (FOX television broadcast Dec. 18, 1994) (transcript available at <http://snpp.com/episodes/2F08.html>) (“Lisa: Look on the bright side, Dad. Did you know that the Chinese use the same word for ‘crisis’ as they do for ‘opportunity’? Homer: Yes! Cris-atunity.”). The “same word” claim is apparently based on the Mandarin character *wēijī* (危), but appears to be inaccurate. Victor Muir, *Danger + Opportunity ≠ Crisis*, Pinyin.Info: A Guide to the Writing of Mandarin Chinese in Romanticization, <http://pinyin.info/chinese/crisis.html> (last visited on Apr. 21, 2010). I trust that the larger point

opportunity.

It is beyond the scope of this paper to address the causes of our recent financial difficulties. I suspect that they are varied and not consistent with the ideological presuppositions of the right or the left.²⁰ It is clear, however, that one popular diagnosis revolves around the idea that markets are in need of greater regulation and direction.²¹ On this view, the decentralized decisions of participants in the financial marketplace are unlikely—or at least not guaranteed—to reach a desirable equilibrium. Rather than expect optimal outcomes to percolate from the bottom up, it may be necessary for the state to impose—or at least to delimit—outcomes from the top down.²²

A. CENTRALIZING POLICY INITIATIVES

In the wake of the financial crisis, the outgoing Bush and new Obama administrations proposed or enacted a number of bold policy initiatives. Some are in response to and intended to provide relief from the downturn.²³ The Emergency Economic Stabilization Act of 2008, passed in the waning days of the Bush administration, committed \$700 billion to purchase or insure troubled financial assets and instruments. Major provisions of the legislation provided the purchase of devalued or “toxic” assets from the financial institutions holding them, thereby cleaning up their balance sheets and, it was hoped, stimulating additional lending.²⁴

This aspect of the Act, the program commonly referred to as “TARP,” the Troubled Asset Relief Program, was expanded to involve the injection of equity into large financial institutions in return for preferred stock or

remains valid.

20. See, e.g., Jeffrey Friedman, *A Crisis of Politics, Not Economics: Complexity, Ignorance and Policy Failure*, 21 *CRITICAL REV.* 127 (2009) (arguing that complex and interacting regulations fostered the concentration of excessive risk); Amar Bhidé, *An Accident Waiting to Happen*, 21 *CRITICAL REV.* 211 (2009) (blaming under-regulation of banking and overregulation of securities).

21. See, e.g., ROBERT SKIDELSKY, *KEYNES: RETURN OF THE MASTER* (2009); RICHARD A. POSNER, *A FAILURE OF CAPITALISM* (2009); JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010).

22. Although I often refer to state regulation as directed from “the top” and market outcomes as emerging “from the bottom,” these terms may be less descriptive when markets are highly concentrated or where participants engage in collusion. I express no judgment about whether these conditions characterize the financial or any other particular market in the United States or elsewhere. But in principle, subsidiarity may also suggest devolution from larger to smaller private institutions, although I think application of the concept in such a context is even more complex and well beyond the scope of this paper. As we will see, subsidiarity might certainly be consistent with the need for state facilitation of human agency that would not be adequately supported through private arrangements.

23. See, e.g., Emergency Economic Stabilization, Pub. L. No. 110-343, 122 Stat. 3765 (2008).

24. For a good description of the Troubled Asset Relief Program (TARP), see Troubled Asset Relief Program, <http://troubled-asset-relief-program.net/> (last visited on Apr. 21, 2010).

senior debt instruments.²⁵ Participating institutions, at least some of whom initially resisted participation,²⁶ have been subject to compensation restrictions.²⁷ In December 2008, an executive order further expanded the TARP program to allow its funds to be spent on any program deemed necessary by the President to avert financial crisis.²⁸

This led to the use of additional government funds to bail out Chrysler and General Motors, with \$17.4 billion in TARP funds eventually loaned to the automakers.²⁹ That led, with stunning speed, to the acquisition of General Motors by the federal government.³⁰ It led to a government sponsored—and financed—reorganization of Chrysler, resulting in a transfer of a majority stake to the United Auto Workers union with the federal government retaining a minority interest.³¹

In the early weeks of the new administration, a stimulus bill called for almost a trillion dollars in new spending.³² In combination with the recently enacted TARP program, these initiatives, if fully implemented, would have been roughly half the size of the proposed federal budget for 2008. The President's 2011 budget proposal called for over a trillion dollars in increased taxes over ten years.³³ In just three years, the proposed federal budget has increased by almost one-third.³⁴ The prospect of substantial federal control of such iconic corporations raised concerns among many about the expanding role of the federal government.

Other initiatives, while certainly claimed to contribute to financial prosperity, may be better understood as “opportunities” presented by a “good crisis.” The administration's proposed cap and trade legislation would effectively determine carbon emission levels across much of the economy and establish the conditions for allocating permission for such

25. See, e.g., Mark Landler & Eric Dash, *Drama Behind a \$250 Billion Banking Deal*, N.Y. TIMES, Oct. 14, 2008, <http://www.nytimes.com/2008/10/15/business/economy/15bailout.html>.

26. *Id.*

27. *Id.*

28. *Id.*

29. Jon D. McKinnon & John D. Stoll, *U.S. Throws Lifeline to Detroit*, WALL ST. J., Dec. 20, 2008, <http://online.wsj.com/article/SB122969367595121563.html>. The Bush administration turned to TARP funds after a bill authorizing funds for that purpose failed to pass the Senate.

27 Neil King Jr. & Sharon Terlep, *GM Collapses into Government's Arms*, WALL ST. J., June 2, 2009, <http://online.wsj.com/article/SB124385428627671889.html>.

31. Michael J. de la Merced & Micheline Maynard, *Fiat Deal With Chrysler Seals Swift 42-Day Overhaul*, N.Y. TIMES, June 10, 2009, <http://www.nytimes.com/2009/06/11/business/global/11chrysler.html>.

32. *Getting to \$787 Billion*, WALL ST. J., Feb. 17, 2009, http://online.wsj.com/public/resources/documents/STIMULUS_FINAL_0217.html.

33. CCH GROUP, CCH TAX BRIEFING: FY 2011 FEDERAL BUDGET—TAX PROPOSALS, Feb. 5, 2010, available at <http://tax.cchgroup.com/legislation/2011-federal-budget.pdf>.

34. *Id.* The proposed budget for fiscal year 2011 is \$3.8 trillion. The proposed budget for fiscal year 2008 was approximately \$2.9 trillion. See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOV'T, FISCAL YEAR 2008, available at <http://www.gpoaccess.gov/usbudget/fy08/pdf/budget/tables.pdf>.

emissions.³⁵ It would impose new taxes of up to \$200 billion per year.³⁶ The bill would declare—by fiat—that emissions must be reduced by 83 percent by the year 2050, a level not seen since the turn of the twentieth century. Those businesses unable to reduce emissions would have to purchase emission permits from those who no longer (if they ever did) need them—assuming such available permits exist. Failing the availability of permits, such businesses could purchase offsets for ameliorating activities—the nature and value of which would presumably be determined by administrative fiat.

Although the idea of permitting private companies to trade emission permits is a nod to decentralization, the idea of a centrally determined emission level (as opposed to, say, a carbon tax designed to internalize the cost of emissions) represents a significant increase in centralized management of economic life. Even as it became clear that a cap and trade bill, having passed in the House, might not be approved by the Senate, the administration announced that the Environmental Protection Agency would begin to regulate carbon emissions.³⁷

Although cap and trade legislation may never be passed and equivalent regulation may never be imposed, the administration has, as this article was going to press, passed a health care bill of such a scope that its proponents regard it as “historic” and its opponents call it “catastrophic.” I think it is fair to say that the bill substantially overhauls the delivery of health care in the United States. It requires employers to provide—and individuals to purchase—health insurance plans meeting federally mandated criteria,³⁸ including a centralized determination of cost effectiveness. The new law imposes substantial obligations on states both in terms of Medicaid expansion and with respect to the establishment of insurance exchanges.

Although certainly an exaggeration, *Newsweek* magazine hinted at the magnitude of several months change in proclaiming that “we are all socialists now.”³⁹ Although I don’t believe that the President can properly

35. See U.S. HOUSE OF REPRESENTATIVES, COMMITTEE ON ENERGY AND COMMERCE, THE AMERICAN CLEAN ENERGY AND SECURITY ACT (H.R. 2454), July 2009, available at http://energycommerce.house.gov/Press_111/20090724/hr2454_housesummary.pdf (the full text of the statute is available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2454pcs.txt.pdf).

36. TREASURY DEPARTMENT, ANALYSIS OF CAP AND TRADE PROGRAM, available at www.openmarket.org/wp-content/uploads/2009/09/foia-release.pdf (last visited April 21, 2010) (produced pursuant to Freedom of Information Act request by letter dated Sept. 18, 2009, from Jennifer Beasley to Christopher Horner).

37. John M. Broder, *E.P.A. Moves to Curtail Greenhouse Gas Emissions*, N.Y. TIMES, Sept. 30, 2009, <http://www.nytimes.com/2009/10/01/science/earth/01epa.html>.

38. For a summary of the Patient Protection and Affordable Care Act, see THE HENRY J. KAISER FAMILY FOUNDATION, FOCUS ON HEALTH REFORM – SUMMARY OF NEW HEALTH REFORM LAW (2010), available at <http://www.kff.org/healthreform/upload/8061.pdf>.

39. Jon Meachem & Evan Thomas, *We Are All Socialists Now*, NEWSWEEK, Feb. 9, 2009,

be called a “socialist,” it certainly seems that the Age of Reagan has ended and counterrevolution is in the air.

B. A NEW PROGRESSIVE ERA?

Each of these initiatives seems to involve substantial increases in the authority and role of the federal government. Each seems to involve a substantial increase in the centralization of decision-making and in the determination of standards and constraints governing decision-making. It is beyond the scope of this paper to fully explore and pass judgment on any of them (some of which remain only tentatively defined and subject to change), nor do I wish to argue that any particular program “violates” the tenets of subsidiarity.

In the inaugural issue of the journal *National Affairs*, the Hudson Institute’s William Schambra argues that Barack Obama is a “policy” rather than a “program” President.⁴⁰ Schambra explains that this approach, first identified by Daniel Patrick Moynihan, argues that:

[G]overning means not just addressing discrete challenges as they arise, but formulating comprehensive policies aimed at giving large social systems—and indeed society itself—more rational and coherent forms and functions. In this view, the long-term, systemic problems of health care, education, and the environment cannot be solved in small pieces. They must be taken on in whole, lest the unattended elements react against and undo the carefully orchestrated policy measures.⁴¹

As Moynihan put it, “everything relates to everything,” and, therefore, “there are no social interests about which the national government does not have some policy or other.”⁴²

The need for comprehensive solutions has led proponents of this approach to chafe at our constitutional structure of limited government and divided power. Progressive reformers throughout the twentieth century, including most notably Woodrow Wilson and Franklin Roosevelt, came, in Schambra’s words, “to denigrate the wisdom and relevance of the American Constitution, which frustrated centralization and coordination by dispersing governing power across the states and over the branches of government.”⁴³ Wilson famously wrote:

Government is not a machine; but a living thing. It falls, not under

<http://www.newsweek.com/id/183663> (“As boomers age and spending grows, we will become even more French.”).

40. William Schambra, *Obama and the Policy Approach*, 1 NAT’L AFF. 127 (2009), available at <http://www.nationalaffairs.com/publications/detail/obama-and-the-policy-approach>.

41. *Id.* at 127–28.

42. *Id.* at 128.

43. *Id.* at 130.

the theory of the universe, but under the theory of organic life. It is accountable to Darwin, not to Newton. It is modified by its environment, necessitated by its tasks, shaped to its functions by the sheer pressure of life. No living thing can have its organs offset against each other, as checks, and live. On the contrary, its life is dependent upon their quick co-operation, their ready response to the commands of instinct or intelligence, their amicable community of purpose There can be no successful government without the intimate, instinctive co-ordination of the organs of life and action. . . . Living political constitutions must be Darwinian in structure and in practice. All that progressives ask or desire is permission—in an era when “development,” “evolution,” is the scientific word—to interpret the Constitution according to [the] Darwinian principle.⁴⁴

In this view, the challenges of public policy are about applying the right type of expertise. Schambra cites Progressive reformer Herbert Croly who wrote that a “better future would derive from the beneficent activities of expert social engineers who would bring to the service of social ideals all the technical resources which research could discover and ingenuity could devise.”⁴⁵

The “policy” or “classical progressive” approach tends to despair of the messiness of the political process and the stumbling blocks it places in the way of reform driven by professional expertise. Franklin Roosevelt, for example, called for a “re-appraisal of values” in which property rights must be supplanted “by the day of enlightened administration”⁴⁶ Thus, as Paul Rahe has explained, progressives have sought the expansion of the administrating state and the progressive impulse has been to respond to crises “genuine and imaginary, and exploit these opportunities by strengthening and extending the scope of the central administration in something akin to the fashion that the old progressives had once advised. From war, depression, and other crises, real or imagined, the administrative state has drawn strength.”⁴⁷

Placing this in our contemporary context, Schambra writes:

Obama insists, we must come up with comprehensive policies that account for the entire sweep of interconnected social and economic factors contributing to the problem, and whose coordination will contribute to its solution. Echoing Moynihan’s understanding of the

44. PAUL A. RAHE, *SOFT DESPOTISM, DEMOCRACY’S DRIFT: MONTESQUIEU, ROUSSEAU, TOCQUEVILLE, AND THE MODERN PROSPECT* 249 (2009) (quoting WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908)).

45. Schambra, *supra* note 40, at 130.

46. FRANKLIN ROOSEVELT, *Commonwealth Club Address*, in FRANKLIN DELANO ROOSEVELT, 1882–1945, at 99–107 (Howard F. Bremer ed., 1971).

47. RAHE, *supra* note 44, at 256.

implications of the policy approach, Obama suggests that tackling only isolated pieces of the problem, or trying to solve only one problem at a time, will merely introduce further distortions into what should be treated as a unified and coordinated system. A comprehensive policy approach will enable us to take maximum advantage of natural- and social-science expertise, displacing expensive or ineffective local practices by spreading system-wide those programs that have proven to be more effective and less expensive, as documented by thorough research and experimentation.⁴⁸

In the President's view, "selfishness or ideological rigidity has led us to look at the problem in isolated pieces rather than as an all-encompassing system; we must put aside parochialism to take the long systemic view" and must "formulate a uniform national policy supported by empirical and objective data rather than shallow, insular opinion"⁴⁹ Thus, in his New Foundations speech delivered at Georgetown University, President Obama argues that the pillar of economic prosperity is composed of interacting and interconnected federal policy in the areas of education, health care, the environment, financial regulation, and fiscal policy.⁵⁰ The President has consistently derided political and ideological differences as "false choices"⁵¹ and has consistently committed the specifics of reform—the precise nature of a cap and trade system, the specifics of "bending" the health care cost curve, the manner in which the structural deficit is to be addressed—to subsequent administrative determination.⁵²

48. Schambra, *supra* note 40, at 135.

49. *Id.* at 136–37.

50. Barack Obama, President of the United States of America, Address at Georgetown University: A New Foundation for the Economy (Apr. 14, 2009), *available at* http://www.realclearpolitics.com/articles/2009/04/14/a_new_foundation_for_the_economy_obama_48911.html.

51. Christopher Beam, *The Fallacy of False Choices: Why Obama's Favorite Rhetorical Tic Can Be Misleading*, SLATE, Dec. 10, 2009, <http://www.slate.com/id/2238074/> (collective examples) (rejecting "stark choice between the narrow pursuit of interests [and] an endless campaign to impose our values around the world") ("[W]e reject as false the choice between our safety and our ideals.") (rejecting the idea that we must "choose between paying down our deficits on the one hand, and investing in job creation and economic growth on the other. This is a false choice") ("[Obama] reject[s] the false choice between securing this nation and wasting billions of taxpayer dollars") ("[W]e need not choose between a chaotic and unforgiving capitalism and an oppressive government-run economy") ("Our government has forced what [Obama] believe[s] is a false choice between sound science and moral values") ("There's been a tension between those who have sought to conserve our natural resources for the benefit of future generations, and those who have sought to profit from these resources. But [Obama is] here to tell you this is a false choice.").

52. Charles R. Kesler, *The Tea Party Spirit*, 10 CLAREMONT REV. OF BOOKS 1, 3 (2010) (noting that the health care reform bill contains "scores of places where power is delegated to administrative agencies and special boards, which are charged to fill the gaps in the written legislation by promulgating thousands, if not tens of thousands, of new pages of regulations that will then be applied to individual cases").

III. THE YIN AND YANG: SUBSIDIARITY AND SOLIDARITY

A. SUBSIDIARITY: THE VALUE OF DECENTRALIZATION

The idea of subsidiarity has a long pedigree in Catholic social teaching. First hinted at by Leo XIII in the encyclical *Rerum Novarum*,⁵³ it was expressly set forth by Pius XI in *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.⁵⁴

In this, Pius XI echoed Leo XIII's admonition that "the State must not absorb the individual or the family"⁵⁵ and "the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief . . ."⁵⁶ that lead to the need for intervention.

The idea has been repeated in subsequent encyclicals and is a well accepted principle of the Church's social teaching. Pope John XXIII wrote of the importance of "the founding of a great many such intermediate groups"⁵⁷ and Paul VI warned that "[r]ulers must be careful not to hamper the development of family, social or cultural groups nor that of intermediate bodies or organizations . . ."⁵⁸ As noted above, Pope John Paul II emphasized the importance of the concept in *Centesimus Annus*, explaining that "the social nature of man is not completely fulfilled in the State, but is realized in various intermediary groups, beginning with the family and including economic, social, political and cultural groups, which stem from human nature itself and have their own autonomy."⁵⁹ The Compendium of the Social Doctrine of the Church calls subsidiarity "one of the most constant and characteristic directives of the Church's social doctrine . . . present since the first great social encyclical."⁶⁰ Most recently, Pope

53. Pope Leo XIII, *Rerum Novarum* ¶¶ 13–14 (May 15, 1891), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html.

54. Pope Pius XI, *Quadragesimo Anno*, *supra* note 2, ¶ 79.

55. Pope Leo XIII, *Rerum Novarum*, *supra* note 53, ¶ 35.

56. *Id.* ¶ 36.

57. Pope John XXIII, *Pacem in Terris* ¶ 24 (Apr. 11, 1963), available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html.

58. Pope Paul VI, *Pastoral Constitution on the Church in the Modern World—Gaudium et Spes* ¶ 75 (Dec. 7, 1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html.

59. Pope John Paul II, *Centesimus Annus*, *supra* note 8, ¶ 13.

60. Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the*

Benedict XVI called subsidiarity “an expression of inalienable human freedom,”⁶¹ and “the most effective antidote against any form of all-encompassing welfare state.”⁶²

It is important to note, as Pius XI and his successors insisted, that subsidiarity applies not only to create a presumption in favor of the freedom of individuals, but also to “lesser” or “smaller” associations into which individuals may organize themselves. As the Compendium puts it:

It is impossible to promote the dignity of the person without showing concern for the family, groups, associations, local territorial realities; in short, for that aggregate of economic, social, cultural, sports-oriented, recreational, professional and political expressions to which people spontaneously give life and which make it possible for them to achieve effective social growth.⁶³

Richard John Neuhaus and Peter Berger have called those voluntary associations standing between men and women and the mega-structures of society “intermediary institutions” and argued that they serve as antidotes to the alienation associated with larger institutions.⁶⁴ In their view, large mega-structures, including but not limited to the state, fail to provide “meaning and identity for individual existence.”⁶⁵ Recognition of the value such “mediating” institutions is not limited to subsidiarity. The Calvinist notion of sphere sovereignty claims that there are social spheres — the state, the church, the family, for example — that are autonomous in their areas of responsibility.⁶⁶ Tocqueville regarded “associationalism”—the existence of robust voluntary associations—as among the signal strengths of American democracy.⁶⁷ These institutions stand between the individual and large institutions such as the state and that fact is seen as both protecting and empowering the individual.

The notion is that support for a free market and decentralized government is epistemic—i.e., based on the idea that “[w]e cannot know enough to produce the outcomes we desire by forethought and deliberations

Church ¶ 81 (2004), available at http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html [hereinafter *Compendium*].

61. Pope Benedict XVI, *Caritas in Veritate*, *supra* note 8, ¶ 57.

62. *Id.*

63. *Compendium*, *supra* note 60, ¶ 185.

64. PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 2* (1977).

65. *Id.*

66. ABRAHAM KUYPER, *LECTURES ON CALVINISM 90* (Wm. B. Eerdmans Pub. Co. 1970) (1931).

67. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 123 (Henry Reeve trans., Arlington House 1966) (1835) (“[America] is the only [country] in the world where the continual exercise of the right of association has been introduced into civil life, and where all the advantages which civilization can confer are procured by means of it.”).

without doing more harm than good.”⁶⁸ Centralized decision-makers cannot possibly know enough to direct activities with which they are not directly involved; in complex and diverse societies, dispersing authority among a variety of public and private actors is more likely to result in good decisions.

There is, as will be explored in more detail later, subsidiarity offers more than merely instrumental value. There is also a sense of empowerment, not simply to serve the autonomy of the individuals whose liberty is unimpeded, but to allow each to participate in the definition and advancement of the common good. John McGinnis, for example, sees intermediary institutions as generators of alternative values. That these values might generate a spontaneous order—or what Friedrich Hayek called *catallaxy*⁶⁹—is one of the posited values of free markets. There is certainly support, if not unqualified endorsement, for this idea in the social encyclicals. It is part of the value of subsidiarity, although, as we will see, not its full measure.⁷⁰

This may certainly have “jurisdictional” or even “conservative” implications. John Courtney Murray wrote:

Rerum novarum, adhering to the Western Christian political tradition, makes it clear that government, strictly speaking, creates nothing; that its function is to order, not to create. Perhaps more exactly, its function is to create the conditions of order under which original vitalities and forces, present in society, may have full scope to create the values by which society lives. Perhaps still more exactly, the only value which government *per se* is called upon to create is the value of order. But the value of order resides primarily in the fact that it furnishes *opportunitates, facilitates . . .* for the exercise of the freedoms which are the rightful prerogative of other social magnitudes and forces. These freedoms, rightly ordered, are the true creative sources of all manner of social values.⁷¹

It is quite common, in the American context, for conservatives (or those offering a “conservative” critique of centralized economic regulation) to criticize such strategies as inconsistent with subsidiarity found in Catholic

68. MICHAEL NOVAK, *THE CATHOLIC ETHIC AND THE SPIRIT OF CAPITALISM* 256 n.8 (1993).

69. Hayek used the term to “describe the order brought about by the mutual adjustment of many individual economies in a market.” FRIEDRICH A. HAYEK, *THE MIRAGE OF SOCIAL JUSTICE* 107–09 (1976) (forming the word from the Greek verb “*katallatein . . .* which meant, significantly, not only ‘to exchange’ but also ‘to admit into the community’ and ‘to change from enemy into friend.’”). While hardly endorsing an untrammelled free market, the social encyclicals recognize that profit may be a way of knowing that needs have been fulfilled. Pope John Paul II, *Centesimus Annus*, *supra* note 8, ¶ 35.

70. *See infra* pp. 387–90.

71. John Courtney Murray, *Leo XIII and Pius XII: Government and the Order of Religion*, in *RELIGIOUS LIBERTY: CATHOLIC STRUGGLES WITH PLURALISM* 49, 78 (J. Leon Hooper ed., 1993).

Social Thought⁷²based almost entirely on what are seen to be subsidiarity's claims. While I may welcome this observation from my brothers and sisters on the right, I cannot end with it.

As a merely jurisdictional principle, subsidiarity is highly indefinite. While it "inculcates a steady bias toward decentralization, freedom, and initiative,"⁷³ subsidiarity also admits of the need for higher authorities to assist lower ones. This aspect has been said to justify much in the way of state intervention, and, even, in some encyclicals, to call for stronger structures of global governance and authority.⁷⁴ Even in *Centesimus Annus*, arguably the most "pro-market" of the Church's social encyclicals, Pope John Paul II wrote:

Economic activity, especially the activity of a market economy, cannot be conducted in an institutional, juridical or political vacuum. On the contrary, it presupposes sure guarantees of individual freedom and private property, as well as a stable currency and efficient public services. Hence the principle task of the State is to guarantee this security, so that those who work and produce can enjoy the fruits of their labours and thus feel encouraged to work efficiently and honestly. The absence of stability, together with the corruption of public officials and the spread of improper sources of growing rich and of easy profits deriving from illegal or purely speculative activities, constitutes one of the chief obstacles to development and to the economic order.⁷⁵

The state, it seems, may have a "duty to sustain business activities by creating conditions which will ensure job opportunities, by stimulating those activities where they are lacking or by supporting them in moments of crisis."⁷⁶ While it is "wrong to assign a larger and higher organization functions that smaller and lower bodies can perform sufficiently well,"⁷⁷ subsidiarity does not tell us what those functions are.

Catholic Social Thought tends to view the state, its elements, and private institutions as an organic whole, rather than as Madison's competing factions. Thus, while the state may not do what the individuals or the lower orders can do for themselves or are within their sphere of responsibility, there are things that only the state can do⁷⁸ and there are circumstances in

72. See, e.g., Vischer, *supra* note 6, at 104 (collecting examples); Robert A. Sirico, *Subsidiarity, Society, and Entitlements: Understanding and Application*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 549 (1997).

73. Francis Canavan, *The Popes and the Economy*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 429, 437 (1997).

74. See, e.g., Pope Benedict XVI, *Caritas in Veritate*, *supra* note 8, ¶ 67.

75. Pope John Paul II, *Centesimus Annus*, *supra* note 8, ¶ 48.

76. *Id.*

77. Pope Pius XI, *Quadragesimo Anno*, *supra* note 2, at ¶ 79.

78. *Id.* ¶ 80 ("Thereby the State will more freely, powerfully, and effectively do all those

which the state may facilitate—or remove obstacles to—the work of lower orders.

B. SOLIDARITY: THE VALUE OF COMMUNITY

The matter is further complicated by the emphasis of Catholic Social Teaching on solidarity, that is, the idea that social justice requires regard for the well-being of all persons. Catholic Social Teaching has long emphasized the universal destination of goods.⁷⁹ Thus Pope John Paul II wrote that while subsidiarity might suggest the importance of “the free exercise of economic activity,” solidarity calls upon the state to defend the weakest.⁸⁰ Solidarity is often treated as a virtue, something that ought to inform and guide decision making by various decision makers. It is, for example, a duty of private as well as public bodies.⁸¹

But the Church’s social encyclicals are replete with references to the need for state intervention in economic matters in the interest of “social justice” and to the need for higher authorities to intervene in order to “facilitate” the ability of lower orders to fulfill their intended purposes. Although this requirement is not properly understood as a warrant for radical equality⁸² or socialism,⁸³ it may certainly provide support for state intervention in support of the economically disadvantaged:

The State must contribute to the achievement of these goals both directly and indirectly. Indirectly and according to the *principle of subsidiarity*, by creating favourable 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.⁸⁴

Insistence upon “social justice” and a “preferential option for the

things that belong to it alone because it alone can do them”).

79. Pope Paul VI, *Pastoral Constitution on the Church in the Modern World—Gaudium et Spes*, supra note 59, ¶ 69 (“God destined the earth and all it contains for all men and all peoples so that all created things around be shared fairly by all mankind under the guidance of justice tempered by charity.”). See generally *Compendium*, supra note 60, ¶¶ 171–84.

80. Pope John Paul II, *Centesimus Annus*, supra note 8, ¶ 15.

81. *Compendium*, supra note 60, ¶ 193 (providing that solidarity is “a moral requirement inherent within all human relationships”).

82. See Pope John Paul II, *Centesimus Annus*, supra note 8, ¶ 15.

83. Pope Benedict XVI, *Caritas in Veritate*, supra note 10, ¶ 40 (“[B]usiness management cannot concern itself only with the interests of the proprietors, but must also assume responsibility for all the other stakeholders who contribute to the life of the business: the workers, the clients, the suppliers of various elements of production, the community of reference.”).

84. Pope John Paul II, *Centesimus Annus*, supra note 8, ¶ 15.

poor”⁸⁵ has also been said to justify substantial “top down” intervention by the state.⁸⁶

The Church has defended the right to private property, but has, at the same time, emphasized the universal destination of all goods. The state is entitled to—and should—intervene to protect the weak. It may—and should—act to “ensure wage levels adequate for the maintenance of the worker and his family”⁸⁷ and to “block shameful forms of exploitation, especially to the disadvantage of the most vulnerable workers, of migrants, and those on the margins of society.” The social encyclicals have long emphasized notions of distributive and social justice.

C. THE INDETERMINANCY OF SUBSIDIARITY AND SOLIDARITY.

Thus, may the irresistible force of subsidiarity seem to meet the irresistible force of solidarity. Solidarity recognizes “the social responsibility of humans” and a “rejection of individualism,”⁸⁸ but subsidiarity calls for “the responsibility of people and intermediary communities.”⁸⁹ Respecting the autonomy of lower orders—local governments or private associations, for example—may lead to some degree of inequality that is either thought to be unacceptable or greater than that which could be obtained (at least in theory) by state intervention. These positions are not contradictory, but they are at best, dialectical, and at worst, confounding.

The operation of markets may undermine the efficacy of mediating structures and leave individuals unable—due to poverty or want of education—to fully exercise their own subjectivity. Decentralization can empower individuals and associations, but it may also simply leave the loss where it lies. It may result in the hegemony of institutions—for example, monopolists or the media or the socially dislocating operation of the

85. See, e.g., Pope John Paul II, *Sollicitudo rei socialis*, *supra* note 3, ¶ 42.

86. See, e.g., National Conference of Catholic Bishops, Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy (Nov. 13, 1986), available at <http://usccb.org/sdwp/international/EconomicJusticeforAll.pdf>.

87. Pope John Paul II, *Centesimus Annus*, *supra* note 8, ¶ 15.

88. Vischer, *supra* note 6, at 110 (quoting J. Verstraeten, *Solidarity and Subsidiarity*, in *PRINCIPLES OF CATHOLIC SOCIAL TEACHING* 133 (David A. Boileau ed., 1998)). But individualism ought not to be confused with individual liberty. The latter sees autonomy not as an end in itself, but as a necessary (i.e., not simply to be cast aside when it might not seem to be working) condition to a greater good. See *Compendium*, *supra* note 60, ¶ 192 (“Solidarity highlights in a particular way the intrinsic social value of the human person, the equality of all in dignity and the rights and the common path of individuals and peoples towards an ever more common unity.”).

89. Vischer, *supra* note 6, at 110; see *Compendium*, *supra* note 60, ¶ 185 (“It is impossible to promote the dignity of the person without showing concern for the family, groups, associations, local territorial realities; in short, for that aggregate of economic, social, cultural, sports-oriented, recreational, professional and political expressions to which people spontaneously give life and which make it possible for them to achieve effective social growth.”).

market—that undermines the freedom of individuals and usurps the role of intermediary institutions.

But interventions to accomplish a greater degree of equality may impinge upon the prerogatives of individuals and lower orders. One cannot simply brush this off by saying that any intervention that is intended to lead to a “better” or more egalitarian result is reserved to a higher order without rendering subsidiarity meaningless.

Pope John Paul II came closest to proposing an economic policy in *Centesimus Annus*:

If by ‘capitalism’ is meant an economic system which recognizes the fundamental and positive role of business, the market, private property and the resulting responsibility for the means of production, as well as free human creativity in the economic sector, then the answer is certainly in the affirmative, even though it would perhaps be more appropriate to speak of a ‘business economy’, ‘market economy’ or simply ‘free economy’. But if by ‘capitalism’ is meant a system in which freedom in the economic sector is not circumscribed within a strong juridical framework which places it at the service of human freedom in its totality, and which sees it as a particular aspect of that freedom, the core of which is ethical and religious, then the reply is certainly negative.⁹⁰

It would be difficult to find any mainstream political figure in the United States who would disagree.

III. THE UNITY OF SUBSIDIARITY AND SOLIDARITY

There is no way out of this bind, but perhaps we can find a way to mediate the inevitable conflict. It remains my contention that subsidiarity does provide an important heuristic by which to evaluate such proposals. Subsidiarity is, in my view, particularly useful in counteracting the particular temptations inherent in seeing crisis as opportunity or the natural tendency to see crises as more readily preventable than they are. It does so not merely by creating a rule or presumption of decentralization, but by making claims about both the instrumental and intrinsic value of the empowerment of individuals and the various associations and institutions into which they gather.

It is not simply a judgment about what works, but about what is authentically human. If solidarity implies the value of every human life, then subsidiarity claims that each of us is, at least potentially, efficacious—that is, we are not simply objects of assistance, but also subjects capable of transcending our present circumstance. Subsidiarity emphasizes the subjectivity of the human person as someone who is not only acted upon

90. Pope John Paul II, *Centesimus Annus*, *supra* note 8, ¶42.

and served but as someone who acts and serves. Human freedom is extrinsically valuable because it allows for full development of the human person.

Thus, in *Populorum Progressio*, Pope Paul VI noted that it is not enough to increase the general fund of wealth and distribute it more fairly: “Man is truly human only if he is the master of his own actions and the judge of their worth, only if he is the architect of his own progress. He must act accordingly to his God-given nature, freely accepting its potentials and its claims upon him.”⁹¹

As noted earlier, Pope John Paul II has written that the social nature of man is not fulfilled in the state,⁹² but in the intermediary associations of which he is a part. It is by having “something he can call ‘his own’ and the possibility of earning a living through his own initiative” that he recognizes “his dignity as a person” and builds an “authentic human community.”⁹³ This initiative is “important not only for the individual, but also for the common good.”⁹⁴ Only when it is free can development be “integrally human.”⁹⁵

Indeed, the Latin word “subsidiium” means “support, assistance, aid, help, protection . . .”⁹⁶ and the notion of subsidiarity seems to be more about the allocation of responsibility than checks and balances.⁹⁷ The “service” to be provided, however, is not that of the lower orders fulfilling the objectives of those institutions higher in the chain of command, *but of the higher ones*. It is for *them* to offer assistance and not command.⁹⁸ Thus, the underpinnings of subsidiarity are not simply jurisdictional and it is not right to view it simply as a protection against the concentration of power (even though it may serve that purpose). While one might say that the primary role the state plays in assuring solidarity is to provide a “juridical framework” for society and economy, and not take over their proper functions, the point is that there is intrinsic value in empowering the

91. Pope Paul VI, *Populorum Progressio* ¶ 34 (March 26, 1967), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html.

92. Pope John Paul II, *Sollicitudo rei socialis*, *supra* note 3, ¶ 13.

93. Pope John Paul II, *Centesimus Annus*, *supra* note 8, ¶ 13.

94. Pope John Paul II, *Sollicitudo rei socialis*, *supra* note 3, ¶ 14.

95. Pope Benedict XVI, *Caritas in Veritate*, *supra* note 8, ¶ 17.

96. See Charton T. Lewis & Charles Short, A Latin Dictionary, available at <http://www.perseus.tufts.edu/hopper/morph?l=subsidiium&la=la#lexicon>.

97. Indeed subsidiarity is seen as “a form of assistance to the human person via the autonomy of intermediate bodies.” Pope Benedict XVI, *Caritas in Veritate*, *supra* note 8, ¶ 57.

98. Gregory Beabout and Mary Catherine Hodes trace the word to the Roman “subsidiium,” a group of military leaders that would sit behind those planning an operation in case extra support was needed. Gregory R. Beabout & Mary Catherine Hodes, *John Paul II on the Relationship Between Civil Law and the Moral Law: Understanding Evangelium Vitae in Light of the Principle of Subsidiarity and the Moral Grammar of John Paul II*, 21 NOTRE DAME J.L. ETHICS & PUB. POL’Y 71, 87 (2007).

“lower” orders. Subsidiarity is not a matter of devolution because it does not involve the granting or delegation of powers from a higher power to a lower.

This leads to my first claim. Subsidiarity is not simply instrumental. It makes a moral claim. It is not simply a statement about what will “work”—that is, a claim that those closest to a problem will tend to reach the “best” solution. Nor is it merely a claim that devolution is necessary to check the inevitable abuse of centralized power. While neither of these observations are wrong, subsidiarity is a good in and of itself for it fully recognizes persons as subjects, rather than objects. Tracing the idea in the writings of John Paul II, Michael Novak writes:

The underlying principle of the Polish Pope’s anthropology is the ‘creative subjectivity’ of the human person, together with the resulting ‘subjectivity of society.’ From his earliest work on, including his phenomenological inquiry *The Acting Person*, the Pope had been struck by the human being’s most arresting characteristic: his or her capacity to originate action; that is, to imagine and to conceive of new things and then to do them. He found in creative acts the clue to human identity. Humans, he held, cannot take refuge from this responsibility by hiding behind ‘society’—there, too, they are responsible for their acts. Being in society does not absolve them of the burdens of subjectivity.⁹⁹

Novak argues that “[i]t is an affront to human dignity for a social system to repress the human capacity to create, to invent and to be enterprising.”¹⁰⁰

This is most readily seen in the Church’s criticism of socialism. The problem is not simply that it failed to achieve social justice or to produce economic abundance (though it did fail on both accounts), but that it disregarded the subjectivity of its citizens, treating them as interchangeable cogs in social machinery or as objects of state beneficence. Socialism was based on a faulty anthropology. The denial of economic initiative “diminishes, or in practice absolutely destroys the spirit of initiative, that is to say, the creative subjectivity of the person.”¹⁰¹ This results not in true equality but a “leveling down” and “in the place of creative initiative, there appears passivity, dependence and submission”¹⁰² In doing so, it produced an enervated citizenry; men and women who were not fully able to realize their human potential.

This suggests, it seems to me, that we ought to be concerned with not only the purpose of an intervention by a higher order, but also its (often

99. NOVAK, *supra* note 68, at 117.

100. *Id.*

101. Pope John Paul II, *Sollicitudo rei socialis*, *supra* note 3, ¶ 15.

102. *Id.*

unintended) impact. With Frederic Bastiat, we must acknowledge both the seen and unseen; what has happened and what has not.¹⁰³ While a social safety net is imperative, perhaps we should be more concerned with empowerment than leveling. We ought to be wary of replacing opportunity with security. Indeed, recent encyclicals also criticize what they call the Social Assistance State. “By intervening and depriving society of its responsibility,” it “leads to a loss of human energy”¹⁰⁴ The rationale for intervention is at its weakest when it is premised on a claim that a higher order can better accomplish what can be accomplished by a lower one or is in a better position to determine what is “right.”

In *Centesimus Annus*, John Paul II told us that, in the production of wealth, “the decisive factor is increasingly *man himself*, that is, his knowledge, especially his scientific knowledge, his capacity for interrelated and compact organization, as well as his ability to perceive the needs of others and to satisfy them.”¹⁰⁵ Policy cannot be evaluated without regard for its effect on human incentives and innovation.

But there is more than that. Solidarity reminds us that this subjectivity is shared by all persons and, in Novak’s terms, all must have a real opportunity to “create, to invent and to be enterprising.” As John Courtney Murray wrote, even in a decentralized regime, the state may have a positive duty, not to create, but to “facilitate,” and that may justify intervention to aid—rather than to supplant—the functions of the lower orders.¹⁰⁶ Recognition that “one’s neighbor is the loving image of God” suggests, with solidarity, that policy cannot be evaluated without regard to its impact on the capacity to give as many opportunities as possible to participate.

IV. THE CONTRIBUTION OF CHRISTIAN REALISM

If the road to hell is paved with good intentions,¹⁰⁷ Christian Realism may help us to understand why. I define Realism as the recognition that, in our fallen world, there must be humility in human endeavors and a recognition that sin is intractable and can arise from even our best intentions. But Realism also cautions against retreat from the concerns of the world and abandonment of the demands of justice. Thus, like the yin and yang of subsidiarity and solidarity, it will rarely point to specific policy results or legal outcomes. It, too, is a perspective, rather than a prescription.

103. FREDERIC BASTIAT, *What Is Seen and What Is Not Seen*, in *SELECTED ESSAYS ON POLITICAL ECONOMY 1* (Seymour Cain trans., Irvington-on-Hudson 1995) (1848).

104. Pope John Paul II, *Centesimus Annus*, *supra* note 8, ¶ 48.

105. *Id.* ¶ 32.

106. *See supra* p. 383.

107. The origin of the phrase is most often attributed to Saint Bernard of Clairvaux (1091–1153), who wrote that “Hell is full of good intentions or desires.” *See* *The Road to Hell is Paved With Good Intentions: Not Samuel Johnson!*, <http://www.samueljohnson.com/road.html> (last visited Apr. 22, 2010).

Indeed, one of Reinhold Niebuhr's most cited statements on the proper stance of the Christian in public life seems to point us in at least two directions:

We have now come to the fairly general conclusion that there is no "Christian" economic or political system. But there is a Christian attitude toward all systems and schemes of justice. It consists on the one hand of a critical attitude toward the claims of all systems and schemes, expressed in the question whether they will contribute to justice in a concrete situation; and on the other hand a responsible attitude, which will not pretend to be God nor refuse to make a decision between political answers to a problem because each answer is discovered to contain a moral ambiguity in God's sight. We are men, not God; we are responsible for making choices between greater and lesser evils, even when our Christian faith, illuminating the human scene, makes it quite apparent that there is no pure good in history; and probably no pure evil, either. The fate of civilizations may depend on these choices.¹⁰⁸

We must choose with humility, understanding our limitations. But this "critical attitude" ought not to prevent us from choosing. We cannot be less than human. We cannot be God.

We must, as prominent Niebuhr scholar Robin Lovin writes, "relate the biblical demand for justice to investigations into social facts, theories about the economy and society, and informed assessments of the probable results of alternative courses of action."¹⁰⁹ But, at the same time, realism cannot slip into defeatism:

The naïve faith of the proletarian is the faith of the man of action. Rationality belongs to the cool observers. There is of course an element of illusion in the faith of the proletarian, as there is in all faith. But it is a necessary illusion, without which some truth is obscured. The inertia of society is so stubborn that no one will move against it, if he cannot believe that it can be more easily overcome than is actually the case. And no one will suffer the perils and pains involved in the process of radical social change, if he cannot believe in the possibility of a purer and fairer society than will ever be established.¹¹⁰

Thus, Niebuhr posits a publicly-engaged Christian in a form of equipoise, presenting "[a]n adequate religion is always an ultimate optimism which has entertained all the facts that lead to pessimism."¹¹¹

108. REINHOLD NIEBUHR, *Theology and Political Thought in the Western World*, in FAITH AND POLITICS 56 (Ronald H. Stone ed., 1968).

109. ROBIN W. LOVIN, REINHOLD NIEBUHR AND CHRISTIAN REALISM 102 (1995).

110. REINHOLD NIEBUHR, MORAL MAN AND IMMORAL SOCIETY 221 (1932).

111. REINHOLD NIEBUHR, CHRISTIANITY AND POWER POLITICS 182 (1940).

So, on the one hand, Christian Realism suggests a gimlet-eyed view of the facts. Although the social encyclicals have made clear that the moral law is superior to the economic law, this cannot be read as a warrant to ignore economic facts. Catholic social teaching also emphasizes truth. Without truth, Benedict XVI tells us, charity degenerates into sentimentality.¹¹² There is a moral duty not only to seek justice, but also to learn and act in accordance with the facts on the ground. While there may be a right to minimum material substance, there may be no corresponding right to—or need for—“a universal agency empowered to guarantee it.”¹¹³ Catholic Social Thought is not a warrant for the adoption of well-intentioned but ineffectual policies. Father Sirico reminds us of the distinction between the “universality of faith and the universality of social organization.”¹¹⁴

This too may have jurisdictional and even “conservative” implications. Economists tell us that centralized decision-making inevitably suffers from the inability of one decision maker to have enough knowledge to make superior decisions.¹¹⁵ The argument is, in part, that those who are “closer” to a situation will have “better” knowledge of pertinent facts and interests. But it is also a claim about the limits of human knowledge. No one person or institution can ever know “enough” to impose a solution and better outcomes flow the bottom up, that is, from the collection of independent decisions made by a variety of individuals and institutions. Political theorists tell us that public processes are likely to be captured by the especially interested. Consultation with and cooperation among “stakeholders” is as likely to lead collectively bargained rent seeking as is to promotion of the common good.¹¹⁶

This may impact the oft-cited claim that the “moral law” somehow “trumps” the economic law. Taken alone, this is certainly true. But the moral law cannot truly be formed without consideration of the economic law. However we might see the moral value in a just wage, we cannot wish away the consequences of a legislative mandate that conditions the creation of a job upon its payment. While we can recognize the potential value of labor unions as intermediary associations, this does not excuse us from a clear-eyed appraisal of their economic impact on employment and prices. To do otherwise would be an abdication of moral responsibility. Without a

112. Pope Benedict XVI, *Caritas in Veritate*, *supra* note 8, ¶ 3.

113. *Id.*

114. Sirico, *supra* note 72, at 555.

115. Michael Novak, for example, criticized *Quadragesimo Anno*'s call for a “directing principle” in economic life on the grounds that such principle may not be directed toward furthering the common good and, in any event, is unlikely to work as intended. Michael Novak, *Liberty and Social Justice: Rescuing a Virtue*, in *CATHOLIC SOCIAL THOUGHT AND THE NEW WORLD ORDER* 269, 276 (Oliver F. Williams & John W. Houck eds., 1993).

116. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 141–44 (1965).

firm commitment to “the common good” (which must certainly include a commitment to be effective), solidarity is, in John Paul’s terms, nothing but a “vague feeling of compassion.”¹¹⁷ According to Benedict, “[d]eeds without knowledge are blind.”¹¹⁸ While one can find examples in the Church’s encyclicals that the “moral law” must trump the “economic law,” Realism would seem to remind us that the moral law cannot be formed without consideration of the economic law.

Christian Realism reminds us of this as well. Recall that Niebuhr cautions not only against efforts to, in the words of Eric Voegelin, “immanentize the eschaton,”¹¹⁹ it also suggests that we not retreat in despair. We need to be “realistic” while also being aware that Christians must live in—and care for—the real world and real people.

Professor Lovin warns against an idolatry of theory on the right as well as the left:

When the practical lesson about restraint is raised to a principle, however, it becomes unrealistic. It substitutes the idea that government is at best the agency of last resort for the solution of society’s problems for a realistic evaluation of the possibilities and limitations of the state as a center of resources, to be deployed in specified ways for the solution of particular problems. A realism that tempers our tendency to assume that government can solve all our problems becomes instead the “too consistent” pessimism of Augustinian-Lutheran realism, which sees all forms of government as inherently limited by the need to bring under control forces of evil which cannot be dealt with according to the norms of Christian morality.¹²⁰

He calls for a balanced realism that would stress “the indeterminacy of human vitalities in both their individual and their collective forms.”¹²¹

There is much to appreciate in this. But subsidiarity, as we have seen, is about more than devolution and defense against abuse. It is a judgment, not only about what serves human flourishing, but also about what human flourishing is. If subsidiarity calls for devolution or for intervention by the state in *subsidium*, the purpose is to facilitate human creativity and initiative. It is to avoid what Tocqueville called the “soft despotism” of a state that, as Paul Rahe writes, “provides for our security, . . . foresees and supplies our needs, . . . guides us in our principal affairs, . . . directs our industry, . . . regulates our testaments, . . . divides our inheritances, and . . . covers the ‘surface’ of our society ‘with a network of petty regulations—

117. Pope John Paul II, *Sollicitudo rei socialis*, *supra* note 3, ¶ 38.

118. Pope Benedict XVI, *Caritas in Veritate*, *supra* note 8, ¶ 30.

119. ERIC VOEGLIN, *THE NEW SCIENCE OF POLITICS* 120 (1952).

120. LOVIN, *supra* note 109, at 187.

121. *Id.*

complicated, minute, and uniform.”¹²² Such a state, Tocqueville warned, is [g]enerally . . . gentle; almost never is it harsh. “It does not break wills; it softens them, bends them, and directs them.” Only on the rarest of occasions “does it force one to act, but it constantly opposes itself to one’s acting on one’s own; it does not destroy, it prevents things from being born; it does not tyrannize, it gets in the way: it curtails, it enervates, it extinguishes, it stupefies.” And, step by step, relentlessly, with every passing day, as we gradually succumb to the spirit of irresponsibility and self-indulgence, this power grows in influence and scope, making us more and more like “a herd of timid and industrious animals, of which the government is the shepherd.”¹²³

John Paul echoed Tocqueville in warning against a paternalistic suppression of initiative that replaces “creative initiative” with “passivity, dependence and submission to the bureaucratic apparatus.”¹²⁴

V. HOW DOES IT MATTER?

So where does this leave us? Determining when and where and how a higher order may intervene to “assist” a lower one is not an easy task. People of good faith can and will disagree about what will “work.” In fact, people of good faith can and do disagree about the impact of past policies. The Church does not propose to resolve this tension. As noted earlier, Popes have repeatedly emphasized that she has no models to propose.¹²⁵ But it does suggest, I think, that neither the market nor the state offer redemption. In the present context, we should not lightly presume that the former can save us from the latter.

President Obama claims the mantle of Realism. He says that Reinhold Niebuhr is his favorite philosopher and recognizes

the compelling idea that there’s serious evil in the world, and hardship and pain. And we should be humble and modest in our belief we can eliminate those things. But we shouldn’t use that as an excuse for cynicism and inaction. I take away . . . the sense we have to make these efforts knowing that they are hard, and not swinging from naïve idealism to bitter realism.¹²⁶

Once again, we have a statement that few would disagree with. But, at least to my ear, there is a certain (at least) rhetorical dissonance. In my view, a Niebuhrian Realist ought to at least pause in the face of claims that

122. RAHE, *supra* note 44, at 270.

123. *Id.*

124. Pope John Paul II, *Sollicitudo rei socialis*, *supra* note 3, ¶ 15.

125. *See supra* note 8.

126. David Brooks, *Obama, Gospel and Verse*, N.Y. TIMES, Apr. 26, 2007, http://select.nytimes.com/2007/04/26/opinion/26brooks.html?_r=1.

“Yes, we can” make “this the moment” when, as he told a congregation in South Carolina, “we can create a Kingdom right here on Earth.”¹²⁷ While the President is certainly correct to say that we should be neither naïve nor bitter, I believe that the lesson to be taken from Realism is not simply that reform is “hard.” To the contrary, “making these efforts” may have—indeed, is likely to have—unintended consequences, and there is a limit to what we can expect “these efforts” to accomplish. We must recognize that we act in a fallen world and human capacity often falls short of human aims. In Bastiat’s terms, the intervention of the state or “higher orders” has costs which are unseen.

Of course, an admonition to be “careful” is, if useful, somewhat underdetermined. This is where Realism can now be aided by Catholic Social Thought. On the one hand, the centralization—and resulting restriction—of human creativity and of the scope of intermediary associations raises moral—as well as prudential—concerns. We must be concerned with the limitations of the power and the importance of jurisdictional questions. This is not because subsidiarity or any theological principle can be reduced to that, but because the empowerment of individuals and lower orders has intrinsic, as well as instrumental, value. We must focus on the nurturing of human agency and creativity. We ought to recognize that persons are subjects and not merely objects whose needs are a problem for others to solve. Their subjectivity and creativity must be respected and abetted. Efforts to “help” must be informed by the ways in which assistance might comprise interference and suppression.

But, at the same time, we must understand that we are indeed to be men and women for others and that all persons possess a subjectivity and creativity that they ought to have a real—as opposed to theoretical—right to exercise. A critical attitude toward the administrative state ought to be combined with a critical attitude toward markets. We ought not to make an idol of the Ph.D. or the MBA.¹²⁸ We should proceed with humility—not retreat in despair.

To select an example, in evaluating proposals for and enactments of health care reform, a concern for the common good and acknowledgment of the imperative of solidarity suggests that we may not be indifferent to the availability of health care to all. While it may not be necessary to insure a complete equality in access to health care, it seems clear that some access to

127. Peter Hamby, *Obama: GOP Doesn't Own Faith Issue*, CNN, Oct. 8, 2007, <http://www.cnn.com/2007/POLITICS/10/08/obama.faith>.

128. David Brooks, *The Populist Addiction*, N.Y. TIMES, Jan. 26, 2010, <http://www.nytimes.com/2010/01/26/opinion/26brooks.html> (“Ever since I started covering politics, the Democratic ruling class has been driven by one fantasy: that voters will get so furious at people with M.B.A.’s that they will hand power to people with Ph.D.’s. The Republican ruling class has been driven by the fantasy that voters will get so furious at people with Ph.D.’s that they will hand power to people with M.B.A.’s.”).

a level of adequate care ought to be a policy imperative. Solidarity suggests that we cannot be indifferent to the inability of others to obtain adequate care.

But this does not mean that individuals have no obligation to contribute to the cost of his or her care. To say otherwise would be to deny human agency and responsibility. Recognition of this might imply that the failure to assume this responsibility will have consequences. It would be wrong to too readily assume that individuals are incapable of providing for and taking control of their care.

This will only get us so far, perhaps ruling out approaches that are entirely laissez-faire or completely statist. But there is more. We should also be concerned about the manner in which reform might impact medical innovation. The recognition of human agency and creativity warns against ever assuming that the present state of affairs is static. We ought never to assume that creativity and innovation are givens unaffected by public policy. We should be careful about assuming that innovation and creativity can be centrally directed. Centralization necessarily limits creativity from the bottom (or at least outside the favored agency) and creates concerns about the dangers of placing too much power in a small number of hands.

Perhaps we can go a bit further. As noted above, subsidiarity is not a mere matter of jurisdiction. Solidarity, while not imbuing the state with the authority to (try to) create a perfect world, cautions against a doctrinaire individualism. But recognition of the ways in which an overly ambitious centralization of authority and standardization of policy cannot only enable abuse but stifle creativity may have implications for talk about federalism and structural limits on the authority of the state—both for health care policy and beyond. . Consider the matter of federalism and structural limitations on the authority of the state.

Nevertheless, some have seen subsidiarity as a warrant for a more robust federalism or more substantial limitations on federal authority.¹²⁹ These writers have tended to emphasize that aspect of subsidiarity which mirrors Realism's skepticism about human capacities and see subsidiarity as a protection against the dangers inherent in centralized authority structures.

But there is also a sense in which recognition of these limitations might have an intrinsic as well as an instrumental value. Although not writing about subsidiarity but Tocqueville's notion of "associationalism," John McGinnis¹³⁰ sees the Rehnquist Court's strengthening of the principles of

129. See, e.g., Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 833 (1996); Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 215 (1995).

130. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

federalism¹³¹, freedom of association¹³², and the creation of additional constitutional space for the expression of competing religiously based norms¹³³ as the creation of “discovery machines” for the generation of competing values.¹³⁴ The idea is not simply that power will be abused or that no single authority can be expected to get things right, but that broad participation is, in and of itself, a good thing. The view of subsidiarity advanced here may suggest that certain constitutional provisions—the Tenth Amendment¹³⁵, the Commerce power¹³⁶, or the Necessary and Proper¹³⁷ clause—are not simply a bulwark against abuse or overly ambitious power, but a facilitation of empowerment of human agency – not simply when exercised by the government, but individually and throughout civil society.¹³⁸

If that is so, we may wish to see these constitutional provisions not as demarcation of predetermined spheres of authority but as tools for the assessment of claims for federal power. The inquiry would not be whether there is, say, a plausible connection between a congressional enactment and interstate commerce,¹³⁹ but whether facilitation of interstate commerce—in

131. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000) (“Violence Against Women Act” exceeds Congress’ Commerce Clause power.)

132. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (upholding ability of private association to exclude from leadership those who it believes undermine its associational purpose); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (associational rights of political parties); *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217 (2000) (upholding constitutionality of viewpoint neutral government support for civil associations).

133. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995).

134. McGinnis, *supra* note 130, at 490–91.

135. The Tenth Amendment provides that “[t]he 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.

136. The Commerce Clause provides that Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art. I, § 8, cl. 3.

137. “The Congress shall have Power - To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” U.S. CONST. art. I, § 8, cl. 18.

138. In a recent book, Erwin Chemerinsky sees federalism not as a limitation on the power of the federal government but a grant of power to many levels of government. ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT* (2008). It means that the federal government may act when the states have not and, with some limitations, the state may act when the federal government has not. The idea is not to restrict the authority of any level of government to in deference to the authority of lower levels of government, civil society or individuals, but to empower multiple public agencies. Whatever the merits of this idea, it has little in common with the notion of subsidiarity discussed here.

139. An extreme “but for a nail” view of the Commerce Clause, for example, seems to have been rejected by the Court in *United States v. Lopez*, 514 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 598 (2000). But see *Gonzales v. Raich*, 545 U.S. 1 (2005), in which the Court

which individuals and intermediary associations engage—*requires* the enacted intervention. Perhaps even a connection between regulation of local and “noncommercial” or “noneconomic” activity and a regulatory scheme might not be sufficient to warrant federal regulation if it unduly interferes with the decisions of individuals or “lower” orders. Justice Kennedy, for example, has expressed concern about using the Commerce power to “foreclose the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise . . . by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.”¹⁴⁰

This may require some rethinking of current doctrine and discourse. The Court’s modern jurisprudence on the demarcation of Congressional authority, at least in the modern era, seems relatively unconcerned with defining limits based upon the role and capacity of various units of government and intermediary institutions.¹⁴¹ Indeed, one might argue that post-New Deal jurisprudence on the structural limits of federal power has become desultorily formalist. If we can imagine a way in which an activity—perhaps commercial, but perhaps not, if engaged in by a sufficiently large number of people, may affect commerce (broadly defined) among the states (also broadly defined), then the commerce power is, at least presumptively, properly exercised without regard to much further analysis as to whether it makes sense for a centralized determination of the policy questions in hand.¹⁴² There appear—or so some say—little justiciable limitations of Congressional authority under the Necessary and Proper and General Welfare clauses.¹⁴³

Beyond this, in assessing the “individual mandate” of the health care bill¹⁴⁴, some have argued that the legislation does something largely unprecedented, i.e., it mandates that every citizen of the United States, whether engaged in commercial activity or not, buy a product—the nature

upheld regulation of local—and arguably noncommercial—activity as necessary to serve a comprehensive regulatory scheme.

140. *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

141. See generally RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006) (seeking to reopen debate over whether the Constitution protects economic liberties and confers only limited authority on Congress under the Commerce Clause); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION 1* (2004) (“Since the adoption of the Constitution, courts have eliminated clause after clause that interfered with the exercise of government power.”). But see CHEMERINSKY, *supra* note 138, at 1 (criticizing a view of federalism as a limitation of governmental power that the author argues has been “very much followed by the Supreme Court over the past ten years”)

142. See, e.g., *Gonzales*, 545 U.S. at 34–35 (Scalia, J., concurring in the judgment).

143. See *infra* text accompanying note 155.

144. The bill requires all persons who are not insured through their employer or a public program to purchase insurance. Failure to do so will result in the imposition of a fine to be added to the noncompliant individual’s income tax liability. Patient Protection and Affordable Care Act, Pub. L. 111-148, 124 Stat. 119 (2010).

of which will be defined by federal fiat—or face a financial penalty.¹⁴⁵ Supporters of the legislation have argued either the mandate is within the Commerce power because health care is an interstate market and mandating the participation of young and healthy persons is necessary to reduce the cost to those who are older and less healthy.¹⁴⁶ Further, the failure of these individuals to insure will create demands on the public fisc (they will not be allowed to go without care) and interfere with the state's regulatory scheme.¹⁴⁷ This is a rather aggressive reading of the Commerce authority—coming perilously close (although perhaps not quite) to a claim that a person can be regulated because his or her mere existence (or the way in which the government might respond to it) will affect interstate commerce.

An even more expansive theory justifies the individual mandate because if the fine is collected it is collected as a “tax” and, when it comes to tax, anything goes.¹⁴⁸ To accept such a theory would be to largely abandon the notion of structural limits on Congressional authority.

Some celebrate this. Malcolm Feeley and Edward Rubin, for example, see the Court's federalism jurisprudence as “incoherent” because it serves a set of concerns (division along geographic and state lines) that no longer exists and that has been superseded by the demands of the modern administrative state, an entity that is presumed necessary to rationalize economic and social relationships.¹⁴⁹ This seems entirely consistent with the Obama administration as a “Policy” presidency.

To be sure, unlike the constitution of the European Union in which it is expressly mentioned¹⁵⁰, subsidiarity is not itself a constitutional principle in the United States. It is nowhere to be found in the constitutional text and, at least as formulated and expounded by the Catholic Church, could not have been known to the Founders. Nevertheless, federalism and separation of powers are evocative of subsidiarity (at least in its jurisdictional sense) and Founding era document warning of the dangers of the usurpation of power by higher orders¹⁵¹ and the wisdom of the decentralization and division of

145. See, e.g., David B. Rivkin, Jr., Lee A. Casey, & Jack M. Bakin, *A Healthy Debate: The Constitutionality of an Individual Mandate*, 158 U. Pa. L. Rev. PENnumbra 93, 99 (2009), <http://www.pennumbra.com/debates/pdfs/HealthyDebate.pdf> (“Whether such a requirement would be constitutional under the Commerce Clause is perhaps the most challenging question posed by such a proposal, as it is a novel issue whether Congress may use this clause to require an individual to purchase a good or service.”).

146. *Id.* at 94–95.

147. *Id.* at 106–08.

148. *Id.* at 102–05.

149. See MALCOLM M. FEELEY AND EDWARD R. RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2008).

150. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 8.

151. Professor McGinnis cites James Wilson's admonition, stating that “James Wilson warned against sacrificing the primacy of civil society on the ‘idol of government.’” McGinnis, *supra* note 130, at 490.

power¹⁵² are not hard to find.¹⁵³

Stephen Gardbaum, for example, has argued that certain decisions of the Rehnquist Court suggest that, rather than seeing structural limitations as merely a matter of what authority Congress has been denied, there are areas of concurrent authority between Congress and states in which the power to preempt state action is not unlimited but subject to a burden of proof that Congressional jurisdiction is superior.¹⁵⁴ He argues that the Necessary and Proper clause might be interpreted to require that an exercise of Congressional jurisdiction in an area that is concurrently within the authority of the states, “the capabilities and interests of the states are genuinely considered and reasonably outweighed”—a requirement “strikingly similar” to the notion of subsidiarity as embodied in the Maastricht Treaty.¹⁵⁵ As noted above, John McGinnis argues that the Rehnquist Court ushered in a “Tocqueville jurisprudence” characterized by a recognition that devolution of authority generates human creativity and the generation of alternative values.¹⁵⁶ It is beyond the scope of this paper to analyze, for example, whether the health care bill’s individual mandate is constitutionally permissible. My suggestion here is that, to the extent that constitutional text and history is indeterminate, the insights of subsidiarity, solidarity, and Realism may help us organize our thoughts.

But this hardly ends controversy over the proper role and scope of federal authority or government in general. Robert Vischer has attempted to use subsidiarity to argue for increased federal involvement in four areas of policy.¹⁵⁷ He argued that the protection of intermediary institutions might be aided by more aggressive enforcement of antitrust laws and greater legal protection for collective bargaining. He saw regulation of campaign finance as a way to counter the potential for wealth to crowd out political participation by those who are not wealthy, and federal environmental regulation as a way to correct an obstacle to state regulation of the environment—that is, the tendency of competition for jobs to create a “race to the bottom.”

Professor Vischer offers reasonable arguments in support of each of these propositions, although none is clearly correct under the lens provided

152. See, e.g., THE FEDERALIST No. 51 (James Madison) (“[T]he society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority.”)

153. See Vischer, *supra* note 6, at 123 (“From executive orders requiring that a proposed federal action be weighed against the efficacy of state action, to congressional restraint in areas of state regulatory competence, to judicial enforcement of state-federal boundaries, much of this country’s political and legal landscape comports fully with subsidiarity’s ideal.”).

154. Gardbaum, *supra* note 129, at 796–98.

155. *Id.* at 835–36.

156. McGinnis, *supra* note 130.

157. Vischer, *supra* note 6, at 127–42.

by the notions of subsidiarity and solidarity aided by the insights of Christian Realism. To the extent that the application of antitrust law involves management of competition by the judicially mediated “expertise of economists,” both subsidiarity and Christian Realism might cause us to pause and consider the plausibility that such a thing can be done. While collective bargaining might certainly empower labor, it can also create rigid and ossified structures that stifle innovation and exclude economic participation by the unorganized or less productive members of society. Campaign finance reform can be a form of incumbent protection, and environmental regulation also, by its nature, generally requires the centralized management of highly complex market systems.

VI. CONCLUSION: THE PRIMACY OF PARADOX

In the end, the value of our theological insights might be to make us uncomfortable in our ideological cocoons. Life is paradoxical and so is public policy. While solidarity calls us to seek the common good of all, subsidiarity reminds us that the common good consists not only of the provision of material goods and license for individuals in those matters seen as private, but also of the exercise of authentic human creativity and responsibility. While subsidiarity may create a preference for decentralization and devolution, solidarity reminds us that we cannot be indifferent to the lack of opportunity for all to exercise that responsibility and creativity. Christian Realism reminds us of our limitations and the moral call to be effective as well as empathic. It cautions that we think about Bastiat’s “unseen things.” At the same time, it also warns us not to become paralyzed by pessimism and uncertainty.

Recalling these paradoxes will not make us agree on the issues that divide us. But it may help us talk about them.