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Subsidiary and Religious Establishments in the United States Constitution

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SUBSIDIARITY AND RELIGIOUS ESTABLISHMENTS IN THE UNITED STATES CONSTITUTION

Kyle Duncan*

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I. INTRODUCTION

SUBSIDIARITY is a theory about the relationship among social structures, the common good and human dignity with a venerable pedigree in European political thought. It concerns how persons become genuinely free by associating with others and what those associations, or “mediating structures,” imply about state authority. Paradoxically, subsidiarity both empowers and limits the state—empowering it to remedy the incapacities of social groups, but limiting its intervention by reference to the integrity of those groups.1 The term comes from the Latin subsidi um, meaning “help” or “reserve forces,” and this etymology underscores the calibrated scope of state action.2 The state helps but does not absorb inter-

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2. See, e.g., Carozza, supra note 1, at 42 n.16, 44; Endo, supra note 1, at 642-40; Vischer, Beyond Devolution, supra note 1, at 118-20.

(67)
mediate associations. In that way, it is thought, the people within these associations will flourish most fully in their humanity, in their communities and in their relationships to the state.\(^3\)

Subsidiarity has two major aspects. Substantively, it functions as a principle ordering the relationships among state authority and social groups. Structurally, it describes the distribution of competences when higher and lower public entities interact in a single system.\(^4\) Thus, subsidiarity may apply substantively to the interactions between the state and labor unions, and it may apply structurally to the interactions between a central government and its constituent governmental entities.\(^5\) The structural aspect of subsidiarity is closely connected to federalism.\(^6\) Indeed, it is as a seed-bed for federalist ideas that subsidiarity has gained recent prominence in the European Community.\(^7\) Though intertwined, the substantive and structural aspects of subsidiarity must be carefully distinguished.

This Article will use subsidiarity to illuminate a strategy for dealing with religious establishments found in the United States Constitution, particularly in its Establishment Clause. Subsidiarity has been applied to many fields, from public international law, to environmental policy, to commerce, to corporate governance and even to human rights.\(^8\) Its appli-

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3. See, e.g., Carozza, supra note 1, at 45 (explaining that subsidiarity’s “end product” is “‘greater flexibility and adaptability’ in the social order,” resulting in “‘a genuinely pluralistic society, . . . which is a union of lesser societies each of which maintains its own identity, function, and end’”) (quoting Clifford Kossel, Global Community and Subsidiarity, 8 COMMUNIO: INT’L CATH. REV. 37, 46-48 (1981)).

4. See, e.g., Endo, supra note 1, at 640-38 (explaining distinction between “non-territorial” subsidiarity, which “initially represented the delimitation of spheres between the private sectors and the public,” and “territorial” subsidiarity, which focuses instead on “the division of powers among several levels such as the EC, the State, the Region, and the Local Authority”).

5. See, e.g., Carozza, supra note 1, at 41 (describing application of subsidiarity to labor relations in Leo XIII’s 1891 papal encyclical, Rerum Novarum); see also Bermann, supra note 1, at 342-43 (describing “respect for internal divisions of component states” as aspect of subsidiarity).

6. See Bermann, supra note 1, at 343 (observing “special relationship that exists between subsidiarity and federalism”); Vischer, Beyond Devolution, supra note 1, at 122-26 (discussing relationship of subsidiarity to American federalism). For a discussion of subsidiarity’s relation to federalism, see infra notes 195-202 and accompanying text.

7. See Bermann, supra note 1, at 344-402 (discussing comprehensively prominence of Federalist ideas within European culture); Endo, supra note 1, at 609-569; see also Carozza, supra note 1, at 50-52.

cation to religious establishments, as yet untried, is quite natural. Religious associations—regardless of whether they figure in religious establishments—are social structures through which persons find meaning, form communities, relate to others and interact with the state. Thus, as a substantive norm, subsidiarity allows one to assess the role of religious associations within a pluralistic society, and it consequently furnishes an illuminating way of understanding the problem of religious establishments as such. As a structural norm, subsidiarity helps place the Establishment Clause within the federal framework of the United States Constitution. It invites us to view the Clause as a structural strategy for dealing with the problem of religious establishments as faced by the authors and ratifiers of the United States Constitution.

Part II of this Article summarizes the general principles of subsidiarity and places them within a theoretical and historical framework. Subsidiarity emerges from this discussion as a theoretical tool particularly well adapted to our modern, pluralistic society. It promotes a robust vision of human freedom that transcends the isolated and individualistic liberty of classical liberalism. Persons find this fuller notion of freedom—including freedom of conscience—in communities that are supported and invigorated, but not supplanted, by a state with powerful but limited competences.

Part III addresses subsidiarity's relationship to constitutional rules and to federalism. In terms of a constitution, subsidiarity appears less as a rule embedded in a constitution—one that can be liquidated and applied by courts—than as a principle guiding the creation of a federal structure and the distribution of governmental competences in that structure.

After this lengthy preparation, Part IV turns to the heart of the matter: how subsidiarity can help us understand both the problem of religious establishments and how that problem is addressed by the Establishment Clause of the United States Constitution. First, as for religious establishments proper, subsidiarity suggests a useful way of understanding the kinds of problems posed by the interaction of religious associations and government. Such problems are less a question of violating indeterminate background principles—such as “neutrality” or “separation of church and state”—than a question of the state absorbing the functions of a religious association in a way that degrades the mediating character of the association and compromises the state's ability to pursue society's common good. At the same time, subsidiarity indicates that such problems are better han-

dled prudentially through political management than through rule-based judicial resolution. Second, these insights suggest how the Establishment Clause itself functions within the federalist structure of the United States Constitution. The Clause emerges as a structural strategy for partitioning the federal government from a volatile area of social policy—one described by the First Amendment’s rubric of “laws respecting an establishment of religion”—to an area thought by the framing generation to be more securely managed by individual states. Both of the conclusions suggested by a subsidiary analysis conflict with our modern understandings of religious establishments and the Establishment Clause. But this vexed area of jurisprudence and scholarship needs provocation to shake off unhelpful theoretical baggage and to find promising ways forward.

Subsidiarity suggests several paths, developed in Part IV. As to the modern problem of church-state interaction, subsidiarity proposes that it is far more complex than slogans such as “separation of church and state” and “neutrality” have led us to believe. Conversely, as to the Establishment Clause itself, subsidiarity proposes that the Clause is far more modest than two generations of Supreme Court jurisprudence have led us to believe. A subsidiary Establishment Clause is, first and foremost, one integrated intelligibly into the overall structure of the Constitution. From that point of view, the Clause addresses structures, institutions and jurisdiction more than it promotes church-state theories or particular substantive outcomes. A subsidiary Clause may not hold the answers to many of the problems we currently associate with the Clause—for instance, the “correct” answers to religious participation in voucher programs, or to the presence of religious symbolism in government buildings—but it promises to be a Clause that courts can use consistently and coherently. Furthermore, a subsidiary Clause may promote a more genuine and stable form of “religious freedom” by situating people’s religious beliefs and activities within communities that are both empowered and circumscribed by state and society. This is an appealing alternative to the stark polarities offered by much of the Supreme Court’s religion clause jurisprudence—a choice between the beliefs of the isolated individual and the interests of a powerful, unified state.

This Article is only a preliminary sketch of how subsidiarity interacts with religious establishments and the Establishment Clause. It leaves many areas unexplored, such as how a subsidiary Establishment Clause jurisprudence might appear, and how a subsidiary Clause might protect liberty of conscience. It deliberately postpones the question of incorporation of the Establishment Clause until the end, for good reason. For the question of how the Clause applies to the states is parasitic on the questions of what the Clause means and how it relates to federalism. A subsidiary view of the Clause does not roll back incorporation, but it does force provocative questions about how incorporation of the Clause should be carried out. These are questions that Establishment Clause scholars have been asking recently with more and more insistence. A discussion of subsidiarity provides a good point of entry into that debate. In fact, sub-
Subsidiarity should be a major part of the incorporation discussion—a discussion about the dynamics of a massive shift in the federal structure of our government—precisely because subsidiarity provides crucial insight into the inner-workings of federalism itself.

One final caveat: this Article does not propose to recast every conundrum of Establishment Clause jurisprudence within the matrix of subsidiarity. Nor does it promote subsidiarity as a new-and-improved “test” for applying the Clause. What the article does is argue that subsidiarity is a powerful tool for explaining the function of the Clause in our constitutional structure. That alone is reason to consider what subsidiarity has to say about religious establishments and the United States Constitution.

II. The Theory of Subsidiarity

A. General Themes

Subsidiarity begins and ends with the person. It assumes that the basic aim of societal structures, private and public, is to promote human dignity and, hence, genuine freedom. It views human persons not as instruments, but as ends in and of themselves. At the same time, persons are irreducibly social and realize their most authentic humanity only in community with others. Consequently, the notion of “freedom” at stake in subsidiarity is not purely individual autonomy without restraint or interference. Rather, the freedom subsidiarity seeks to foster “means freedom to act in such a way as to participate fully in the goods of an authentically human life.”

Subsidiarity builds upward from this basic focus on the person. Human personhood requires a kaleidoscope of associations for its full expression. For instance, individuals need family associations to nurture their basic affective, material, educational and spiritual needs. In the economic sphere, individuals need to form associations for furthering production, exchange and conditions of labor and pay in any free market system. Such groups cannot function in isolation but must interact with other groups to serve their members fully. What results is an organically intermeshed civil society, “understood as the sum of the relationships be-

9. See, e.g., Carozza, supra note 1, at 42-43 (explaining that “subsidiarity presupposes that the human person toward whose flourishing the application of the principle is aimed is naturally social”) (citing Kossel, supra note 3, at 46).

10. See Carozza, supra note 1, at 43 & n.27 (citing John Finnis, Natural Law & Natural Rights 147 (1980)). Finnis explains that:

Human good requires not only that one receive and experience benefits or desirable states; it requires that one do certain things, that one should act, with integrity and authenticity . . . . Only in action (in the broad sense that includes the investigation and contemplation of truth) does one fully participate in human goods.

Finnis, supra.

11. See, e.g., Finnis, supra note 10, at 144-47 (discussing function of family in subsidiarity).

12. See Carozza, supra note 1, at 43. Carozza explains that:
tween individual and intermediate social groupings, which are the first relationships to arise and which come about thanks to 'the creative subjectivity of the citizen'.”

Subsidiarity seeks to nourish these intermediate social groups, whether by protecting them from government interference, empowering them through limited but effective government intervention, or coordinating their various pursuits. The term “mediating structures” captures their basic function. A mediating structure could refer to any voluntary association—a family, a neighborhood, a church, a civic club—that “stand[s] between the individual in his private life and the large institutions of public life.” Mediating structures “tend[] to facilitate self-empowerment and [to] foster a sense of belonging and civic purpose[,]” while at the same time channeling “meaning and value” to larger societal structures, including the state. A legal policy or social structure resonates with subsidiarity if it furthers this basic principle of facilitating, through mediating

[S]ubsidiarity envisions that just as the individual realizes his fulfillment in community with others, so do smaller communities realize their purpose in interactions with other groups—a group of families as part of an educational community, for instance, or a group of workers as part of an economy of production and exchange.

Id.

13. Pontifical Council for Justice and Peace, Compendium of the Social Doctrine of the Church para. 185 (2004) [hereinafter Compendium] (quoting John Paul II, Encyclical Sollicitudo Rei Socialis para. 15 (1987)). The Catholic Church has made subsidiarity a foundation of its social teaching since the nineteenth century. For a discussion of the Catholic Church’s incorporation of subsidiarity, see infra notes 25-27, 83-87 and accompanying text. See generally Vischer, Beyond Devolution, supra note 1, at 108-10. As Robert Vischer correctly notes, “[t]o invoke subsidiarity in public policy debates without acknowledging and exploring its Catholic roots is to cut off the principle from the particular priorities it reflects and the broader values it embodies.” Id. at 109. As with its teaching on natural law, the Church’s teaching on subsidiarity is not grounded in theological sources and is thus, in principle, accessible to anyone regardless of religious presuppositions. See id. at 108; see also George, supra note 8, at 229 (discussing reasons for referring to Church’s natural law teaching); Pope Benedict XVI, Encyclical Deus Caritas Est para. 28a (2005) (explaining that Catholic Church’s social teaching, which was presented “on the basis of reason and natural law,” does not attempt to impose religious faith on state or non-Catholics).


16. Vischer, Beyond Devolution, supra note 1, at 117. Vischer notes that: Neuhaus and Berger’s call for mediating structures—a call that has since been echoed by many scholars—focused on neighborhoods, families, churches, and voluntary associations. When properly functioning, these institutions connect individuals to the wider society in ways that heighten
Subsidiarity recognizes that the state has an obligation to intervene in aid of lower societal structures in appropriate and well-defined ways, but that the intervention must be of a limited, incremental, temporary and remedial nature. Theorists of subsidiarity thus speak of its positive and negative aspects. Positively, the state (or any higher societal association) offers help to subordinate associations to the extent they cannot accomplish their own ends. But negatively, there is a strong presumption against extensive state intervention into lower associations. Subsidiarity thus exhibits a "principled tendency toward solving problems at the local level and empowering individuals, families and voluntary associations to act more efficaciously in their own lives." These inseparable aspects of subsidiarity attempt to reconcile the apparent antithesis of diversity and community. The ultimate goal, built upon the uniqueness of every human person, is to realize a "genuinely pluralistic society."

The character of the help offered to lower associations is discerned at the crossroads of positive and negative subsidiarity. The image of "absorption" offers some signposts. No association nourishes its members' dignity by dissolving their individuality into a homogenized mass. This is true by definition, given the purpose of an association is to nourish individual development. Just so, higher associations must not absorb the unique qualities and functions of lower associations. Interventions by higher associations are necessitated and limited by the same problem—i.e., that the lower organization requires some aid because it, for whatever reason, cannot achieve its goals. But to preserve those lower associations as genuine associations, the nature of the intervention must be partial and incremental—"subsidiary" to the function and character of the association aided. One certainly does not invigorate mediating structures by destroying them. Subsidiarity further cautions that one also fails to do so by providing a kind of intervention that robs them of their essential identity as mediators.

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their social awareness and maximize the impact of their actions, yet preserve their own unique sphere of operation and identity.

*Id.* at 117 n.68; see also *id.* at 117 n.69 (citing Neuhaus & Berger, *Mediating Structures, supra* note 14, at 215).

17. See generally Carozza, *supra* note 1, at 44; Vischer, *Beyond Devolution*, supra note 1, at 118-21. As Fred Crosson writes, "[t]he responsibility of the state . . . is to assist the subsidiary groups in achieving their proper ends, and to implement those ends itself only temporarily in circumstances where the subsidiary group is, perhaps because of particular socio-economic conditions, incapable of functioning normally." Vischer, *Beyond Devolution*, supra note 1, at 119 (quoting Fred Crosson, *Catholic Social Teaching and American Society*, in *PRINCIPLES OF CATHOLIC SOCIAL TEACHING* 170-71 (David A. Boileau ed., 1998)).


20. *Id.* at 45 (quoting Kossel, *supra* note 3, at 46).

21. John Finnis reasons that:
Subsidiarity’s guiding principle is that intervention should “assist but not usurp” mediating structures.22 Various formulae may attempt to capture that idea—for instance, whether a higher association can “more effectively or efficiently” attain a specified objective than the lower association, or whether a particular problem presents “cross-boundary dimension or effects.”23 But verbal formulae are just that—shorthand labels which conceal numerous policy choices and open-ended questions demanding complex argumentation. Also, each presupposes some basic agreement on, or way of determining, the specific objectives to be met, or the particular contours of a problem to be remedied.24 No formula or test mechanically substitutes for the basic goal of subsidiarity—i.e., fostering the vitality of mediating structures in the service of human dignity and the common good.

The Roman Catholic Church’s formulations of the principle of subsidiarity—contained principally in late nineteenth and early twentieth century papal encyclicals on labor relations—are the most carefully elaborated modern statements of the principle and have consequently become benchmarks for its development.25 They are worth quoting at length:

[T]he State must not absorb the individual or the family; both should be allowed free and untrammeled action so far as is consistent with the common good and the interest of others . . . . Whenever the general interest or any particular class suffers, or is threatened with harm, which can in no other way be met or prevented, the public authority must step in to deal with it . . . . The limits [of intervention] must be determined by the nature of the occasion which calls for the law’s interference—the principle be-

[Just as the dissolution of family and property would water down human friendship, so the complete absorption by the family of its members would radically emaciate their personal freedom and authenticity . . . . To say this is to formulate, in relation to the family, a principle which in fact holds good for all other forms of human community (though only in a modified form for full friendship itself). Some recent political thinkers have given this principle the name ‘subsidiarity,’ and this name will be convenient provided we note that it signifies not secondariness or subordination, but assistance . . . . [T]he principle is one of justice.]

FINNIS, supra note 10, at 146.
22. Carozza, supra note 1, at 66.
23. See generally Endo, supra note 1, at 638-33 (discussing various criteria for justifying governmental interventions under principle of subsidiarity). “Cross-boundary effects” ask whether a problem is serious enough, or whether its effects are so diffuse and difficult to contain that the lower association cannot cope with the problem. Endo cites as one example “the measures to prevent acid rain, since this issue in nature can rarely be solved by the efforts of a country or a region alone.” Id. at 635.
24. See generally Bermann, supra note 1, at 378-90 (discussing implementation of subsidiarity as legislative precept).
25. See generally Carozza, supra note 1, at 41-42; Endo, supra note 1, at 627-21; Vischer, supra note 1, at 108-15.
ing that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief . . . Rights must be religiously respected wherever they exist, and it is the duty of the public authority to prevent and to punish injury, and to protect every one in the possession of his own. Still, when there is question of defending the rights of individuals, the poor and badly off have a claim to especial consideration . . . The State should watch over these societies of citizens banded together in accordance with their rights, but it should not thrust itself into their peculiar concerns and their organization.[26]

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. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function,” the stronger social authority and effectiveness will be the happier and more prosperous the condition of the State.[27]


27. Pope Pius XI, Encyclical Quadragesimo Anno para. 79, 80 (1931); see also Pope John Paul II, Encyclical Centesimus Annus para. 48 (1991) (discussing application of subsidiarity to government social assistance). The recently published Compendium of the Social Doctrine of the Church gathers together all the relevant Church texts on subsidiarity. See Compendium, supra note 13, at para. 185-88. In his first encyclical letter, Deus Caritas Est, Pope Benedict XVI reaffirmed the centrality of subsidiarity to the Church’s social teaching:

The State which would provide everything, absorbing everything into itself, would ultimately become a mere bureaucracy—incapable of guaranteeing the very thing which the suffering person—every person—needs: namely, loving personal concern. We do not need a State which regulates and controls everything, but a State which, in accordance with the principle of subsidiarity, generously acknowledges and supports initiatives arising from the different social forces and combines spontaneity with closeness to those in need.

Deus Caritas Est, supra note 13, at para. 28b.
B. Society, Associations and the State

Subsidiarity, as Paolo Carozza writes, "has an intellectual history as old as European political thought." The following sections will attempt to trace some of that history. This will deepen our understanding of subsidiarity generally, but more specifically it will clarify how subsidiarity can apply to the complex of issues posed by the interrelationship of religious associations and the state in a pluralistic society, by the special problem of religious establishments, and finally by the remedy to these various problems offered by the Establishment Clause of the United States Constitution.

Subsidiarity begins with the Aristotelian view that society is a web of associations, each performing specific tasks and providing for its own needs. Aquinas would develop this view by conceiving society as an organism, to which individuals are ordered prior to being ordered to themselves. Far from obliterating the individual, these conceptions recognize the natural links between persons and the inescapable fact that people cannot live outside of a society and a culture. Accordingly, the seventeenth century political theorist Johannes Althusius reasoned that society precedes the state, not historically but ontologically. As the first to systematically describe a subsidiary society, Althusius imagined it as a multitude.

28. Carozza, supra note 1, at 40.

29. My discussion draws heavily from the leading modern work on subsidiarity, Chantal Millon-Delsol’s The Subsidiary State. See Chantal Millon-Delsol, L’Etat Subsidiare: InGérence et Non-InGérence de L’Etat: Le Principe de Subsidiarité aux Fondements de L’Histoire Européenne (1992); see also, e.g., Carozza, supra note 1, at 40 (describing Millon-Delsol’s book as “one of the most comprehensive available and one of the first standard sources for any study of the concept”); Endo, supra note 1, at 646 (depicting it as “the most detailed study [of subsidiarity] so far”). I am working from the Italian translation of Millon-Delsol’s book. See Chantal Millon-Delsol, Lo Stato della Sussidiarietà (Rosario Sapienza trans., 1995).


31. See Millon-Delsol, supra note 29, at 40. As Millon-Delsol explains, Aquinas’s vision “does not mean that man is a simple means of which the community makes use, but that man cannot reach his ends if not in terms of a broader community. Individually, he possesses the capacity to forge his own destiny, but through the means of a society.” Id. (author’s trans.); see also St. Thomas Aquinas, De Regno, reprinted in St Thomas Aquinas: Political Writings 5-8 (R.W. Dyson ed. & trans., 2002) (explaining why “[i]t is . . . necessary for man to live in a community,” and “necessary for there to be some means whereby such a community of men may be ruled”).
of interlocking but distinct social groups, like "Russian dolls that nest one within the other."\textsuperscript{32}

The social groups composing civil society, like the individuals within them, can effectively seek their own ends. They possess an intrinsic capacity that a leading modern theorist of subsidiarity, Chantal Millon-Delsol, terms "human capability."\textsuperscript{33} This describes neither superhuman power nor unlimited enlightenment, but rather a "concrete capability, an intrinsic knowledge of one's own proximate needs, the ability to manage quotidian details, an everyday know-how."\textsuperscript{34} All groups and individuals, however, have natural incapacities and thus must rely on assistance from higher groups, including the state, to realize their own ends.

This insight points us to the justification for political power: neither force nor divine right, but rather the basic need for authority to support human endeavors.\textsuperscript{35} This justification intrinsically limits the exercise of political power. As with any higher social entity, the interventions of the governing authority extend only to areas where lower groups fall short.\textsuperscript{36} This includes state intervention that helps groups maximize their own capacities by coordinating them for the collective good of society.\textsuperscript{37} Govern-

\begin{itemize}
  \item \textsuperscript{32} \textsc{Millon-Delsol}, supra note 29, at 50 (author's trans.); \textit{see also id.} at 48-61 (discussing contribution of Althusius's \textit{Politics} to theory of subsidiarity). Millon-Delsol identifies Althusius as "the first author of federalism . . . and at the same time the first to describe a subsidiary society." \textit{Id.} at 59 (author's trans.); \textit{see also Endo, supra note 1, at 631-30 & n.5} (placing Althusius's contribution in historical context).

  \item \textsuperscript{33} Millon-Delsol locates the concept of human capability primarily in the works of Montesquieu and de Tocqueville. \textit{See generally Millon-Delsol, supra note 29, at 62-82} (discussing contribution of Tocqueville and Montesquieu to theory of subsidiarity); \textit{see also e.g.,} 1 \textsc{Alexis de Tocqueville}, \textsc{Democracy in America} 381 (Harvey C. Mansfield & Delba Winthrop eds. & trans., 2000) (discussing popular sovereignty in terms of individual capabilities); \textsc{Montesquieu, Spirit of the Laws} VIII, VI (Thomas Nugent ed., Colonial Press 1899) (1748).

  \item \textsuperscript{34} \textsc{Millon-Delsol, supra note 29, at 66-67} (author's trans.).

  \item \textsuperscript{35} \textsc{See Aquinas, supra note 31, at 7} (explaining that authority is necessary because "if many men were to live together with each providing only what is convenient for himself, the community would break up into its various parts unless one of them had responsibility for the good of the community as a whole").

  \item \textsuperscript{36} \textsc{See Millon-Delsol, supra note 29, at 26-28.} Millon-Delsol observes, in turn, that social groups' spheres of competence are limited, flexibly, by the capacity of their various actors—tasks that go beyond that capacity should be confided elsewhere. \textit{See id.} The problem of "local despotism" from the social groups themselves, is remedied by applying the "same law of distribution of competences" to those groups. \textit{See id.} at 99-118 (author's trans.).

  \item \textsuperscript{37} \textit{See id.} at 18-19. Millon-Delsol draws this reflection from the Aristotelian idea that the aim of the city was not merely to survive, but to "live well." \textit{See id.} at 19 (author's trans.) (citing \textsc{Aristotle, Politics} I, 2, 1252 b29). The "supplemental" or "subsidiary" aid provided by the city "helps beings to develop themselves, rather than merely to make up for their own deficiencies." \textit{Id.} at 19-20 (author's trans.).
\end{itemize}
ment intervention is thus necessarily partial, incremental and supplemental.\textsuperscript{38} The theory of subsidiarity finds its roots in these ideas.

In stark contrast to the subsidiary state is the despot. The despot intrudes excessively into the competences of lower groups, in effect "transposing" domestic governance into political governance," and thus treating people as incapable of managing their own interests.\textsuperscript{39} Especially in Tocqueville and Montesquieu, the despot becomes not the arbitrary tyrant, but rather the ruler who absorbs his subjects' initiatives.\textsuperscript{40} By contrast, the subsidiary political power, subordinated both to persons and society, does not mediate "between society and its own good (as in despotism), but rather mediates between social ends and their realization."\textsuperscript{41}

Social groups interact with the state through a complex web of political contracts.\textsuperscript{42} These political contracts are not the social compacts of John Locke.\textsuperscript{43} For theorists of subsidiarity, the notion of social compact is meaningless, since "society, in the sense of ties and relationships among individuals, exists by nature."\textsuperscript{44} Against this background of a naturally occurring civil society, political contracts crucially limit the power of the state according to the rights of groups and the persons within them to act within their own spheres of action. Social groups may therefore integrate themselves within "more powerful communities to develop their own well-being," without surrendering their integrity.\textsuperscript{45}

Concrete freedom thus demands the existence of free, intermediate bodies within society. They manage the tensions between the socially

\textsuperscript{38} Any intervention, governmental or not, should also be proximate, that is, applied wherever possible "between close-knit groups," since social groups nearest to people's needs are usually best adapted to meet them. \textit{Id.} at 113 (author's trans.). Millon-Delsol explains the concept of proximity with a memorable illustration: "A giant cannot provide for all the needs of a Lilliputian: if the giant does not annihilate him, he will carry him, but he is in any event incapable of participating in his minuscule concerns." \textit{Id.} at 47 (author's trans.).

\textsuperscript{39} \textit{Id.} at 20 (author's trans.).

\textsuperscript{40} \textit{See id.} at 64-66. As Millon-Delsol explains, these theorists dispel the historical reflex that used good and bad princes as the fundamental criteria in distinguishing political regimes, replacing it with a tendency to "categorize regimes according to the extension of governmental activity." \textit{Id.} at 64-65 (author's trans.); \textit{see also} \textit{Montesquieu}, \textit{supra} note 33, at III; \textit{1 Tocqueville}, \textit{supra} note 33, at 82-93, 250-51, 661-65 (discussing various aspects of despotism).

\textsuperscript{41} \textit{Millon-Delsol}, \textit{supra} note 29, at 43 (author's trans.).

\textsuperscript{42} \textit{See generally id.} at 48-61 (discussing notion of "multiplicity of contracts" in work of Althusius).


\textsuperscript{44} \textit{Millon-Delsol}, \textit{supra} note 29, at 52 (author's trans.).

\textsuperscript{45} \textit{Id.} at 53, 56-59 (author's trans.).
grounded autonomy of individuals and the interventions of the state.\textsuperscript{46} Societal aid, flowing from many decentralized sources, is thus assured of being partial and calibrated to meet particular needs.\textsuperscript{47} This further illustrates why subsidiarity avoids Lockean social contract theory: isolated individuals would inevitably strike bargains with political authority grossly favoring the state. Only persons grounded in preexisting social groups—individuals "rich with activities"—could negotiate genuine liberty with the state.\textsuperscript{48} Consequently, the remedy for political authoritarianism is not the liberty of isolated individuals but rather the mediating activity of free, intermediate associations.\textsuperscript{49}

This subsidiary strategy for securing freedom through mediating groups necessarily implies structural limitations on government power. Again, drawing on Tocqueville and Montesquieu, Millon-Delsol traces a connection between the ability of free associations to flourish and the architecture of a limited government. It is well known, of course, that Tocqueville championed voluntary associations as crucial to individual development and to checking tyranny.\textsuperscript{50} Millon-Delsol points out further that Tocqueville specifically identified American federalism as "one of the most powerful combinations in favor of human prosperity and freedom."\textsuperscript{51} In praising the American federal structure, Tocqueville contrasted the limited competences of the "immense, distant" federal sovereignty with the more responsive sovereignty of states that "envelops each citizen, and takes him over daily in detail."\textsuperscript{52} For Tocqueville, then,

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  \item \textsuperscript{46} Robert Vischer ably explains this mediating aspect of associations: The value of associations derives, in significant part, from the extent to which associations stand in tension with the individual on one side and the state on the other. In other words, associations are important relationally, as their relationship with the individual and the state equips them to fulfill a mediating role. This role allows associations to serve as bridges between the individual and the surrounding, impersonal society, but it also injects tension into the association's relationships with the individual and the state. Robert K. Vischer, \textit{The Good, the Bad, and the Ugly: Rethinking the Value of Associations}, 79 \textit{Notre Dame L. Rev.} 949, 951-52 (2004) [hereinafter Vischer, \textit{Associations}] (citations omitted).
  \item \textsuperscript{47} See Millon-Delsol, \textit{supra} note 29, at 74-76, 100-07 (discussing societal aid).
  \item \textsuperscript{48} \textit{Id.} at 100-18 (author's trans.).
  \item \textsuperscript{49} \textit{See id.} at 107-10.
  \item \textsuperscript{50} \textit{See, e.g., 1 Tocqueville, supra note 33, at 180-86 ("On political association in the United States."); Vischer, \textit{Associations, supra} note 46, at 961 (commenting on Tocqueville's view that "American reliance on associations... were] a bulwark against tyranny and... an essential inculcator of democratic values").
  \item \textsuperscript{51} Millon-Delsol, \textit{supra} note 29, at 74 (explaining that "beginning with a description of America, and not from an imagined ideal, Tocqueville paints the proper role of the State") (author's trans.); \textit{Id.} at 76 (describing that, for Tocqueville, in American federalism, "clearly appear the paradox and the realized unity of liberty and self-sufficiency") (author's trans.).
  \item \textsuperscript{52} 1 Tocqueville, \textit{supra} note 33, at 158; \textit{see also id.} at 57-65 (discussing advantages of localized governance in New England Township). As Harvey Mansfield
American federalism provided the matrix within which associational freedom could operate.53

C. Managing the Common Good

The subsidiary state pursues a substantive vision of the common good, but in a manner subordinate to the efforts of social groups.54 While oriented to the common good, a just government’s power is limited to constructing an ordered framework that oversees the diverse projects of individuals and social groups. Political power is not the author of diversity, but only “produce[s] the unity necessary for the development of diversity.”55 Thus the state safeguards and promotes the common good, rather than defining it, in the sense of making up for the natural incapacities of social groups—social groups whose own efforts contribute to the

and Delba Winthrop explain, “Tocqueville elaborates several of the institutional means Americans employ to temper majority tyranny[,]” including “‘decentralized administration’ in federalism[.].” He also “specifies the means necessary to avert mild despotism: associations—among which he includes local government, a free press, an independent judiciary, respect for forms and formalities generally and for individual rights in particular.” Id. at lxxi.

53. For a discussion of the relationship between subsidiarity and federalism, see infra notes 118-58 and accompanying text. In the same vein, Montesquieu’s theories of governmental structure grew out of the subsidiary vision that the state is secondary and supplemental to society. He rejected as impossible and dangerous the idea of eliminating all injustice, opting instead to devise the best scheme for controlling and prohibiting it. This naturally leads to the subsidiary state, because, as Millon-Delso explains, “[t]he more the activities left to the state increase, the wider becomes the field of injustices that cannot be punished.” MILLON-DELSOL, supra note 29, at 72 (author’s trans.). Only when reasonably detached from society, can the state hope to govern it. Montesquieu’s famous theory of separation of powers within government emerges as a logical sequel, allowing control of government itself by limiting its component parts. See id. at 71-74; see also MONTESQUIEU, supra note 35, Books V, VI, VIII, XI, XV, XIX, XX, XXIII, XXXVI, XXXIX.

54. See generally Patrick Brennan, Jacques Maritain: (1882-1973), in 1 THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS AND HUMAN NATURE 75, 94-95 (J. Witte, Jr. and F. Alexander eds., 2006) (discussing idea of common good, especially in work of Jacques Maritain). In Catholic social thought, the common good is conceived as “the sum total of all those conditions of social life which enable individuals, families, and organizations to achieve complete and efficacious fulfillment.” Id. at 96 (quoting Gaudium et Spes, in VATICAN COUNCIL II: THE CONCILIARY AND POST CONCILIARY DOCUMENTS 59, 74 (Austin Flannery ed., 1975)). Robert Vischer explains that:

Catholic social theory developed its theses [regarding the role of government intervention] in response to the liberalism of John Locke, by which society is understood as a collection of individuals who have come together to promote and protect their private rights and interests. Catholic social theory, by contrast, emphasizes the good of the community, not just the rights of individuals.

Vischer, Beyond Devolution, supra note 1, at 113-14 (internal quotations and citation omitted).

55. MILLON-DELSOL, supra note 29, at 38-40, 44-46 (author’s trans.); see also AQUINAS, DE REGNO, supra note 31, at 1, ch. III, XV.
common good.56 Russell Hittinger identifies this principle as central to subsidiarity, as he explains: “[S]ubsidiarity presupposes that there are plural authorities and agents having their ‘proper’ (not necessarily, lowest) duties and rights with regard to the common good.”57 The state both supervises and coordinates the various activities of social groups, while, in exceptional circumstances, “bringing to a particular entity concrete goods that it would not have been able to produce on its own.”58

This subsidiary view of the relationship between state power and the common good, particularly as it appears in Catholic social theory, is anti-perfectionistic. It recognizes that limited human beings and their institutions will never ideally realize human dignity, as Millon-Delsol describes:

To social problems, one cannot simply find a solution in the sense of a definitive systematization. There are means, imperfect and tentative, for managing this critical condition permanently in the equilibrium of the possible . . . . It is because the value of dignity is plural, that is paradoxical, that [Catholic] social doctrine seeks a compromise between the duty of non-interference and the duty of interference. In this area, the principle of subsidiarity acquires its definitive dimension.59

Consequently, subsidiarity does not furnish a priori criteria for state intervention. In contrast with classical liberalism on the one hand (which allows minimal intervention only for basic security) and with socialism on the other (which allows comprehensive state intervention), subsidiarity promotes equilibrium and not rigid solutions. As John Czarnetzky and Ronald Rychlak explain, because subsidiarity focuses on the common good, applying it requires judgments that are “nuanced, comprehensive, and political” judgments, consequently “better left to political bodies, who are far better equipped than courts” to formulate them.60 The government, within its sphere of competence, thus has a great deal of prudential latitude over the decision whether to intervene. But the very existence of mediating structures checks government intervention: the “will of the [intermediate] groups themselves . . . jealous of their own autonomy will prevent the state from abusing its power by creating pretexts for intervention.”61

56. See MILLON-DELSOL, supra note 29, at 59-61. The conviction that all societal entities (not just the state) contribute to the common good departs from both classical liberalism and socialism. See id.

57. Russell Hittinger, Introduction to Modern Catholicism, in 1 The Teachings of Modern Christianity on Law, Politics and Human Nature, supra note 54, at 23.

58. MILLON-DELSOL, supra note 29, at 131-33 (commenting on Taparelli’s work) (author’s trans.).

59. Id. at 123-26 (author’s trans.).

60. Czarnetzky & Rychlak, Empire of Law, supra note 8, at 121 (discussing application of subsidiarity to International Criminal Court).

61. MILLON-DELSOL, supra note 29, at 144-50 (author’s trans.).
Given subsidiarity's basic flexibility, one may ask legitimately whether it provides reliable standards for conditioning state intervention, and for attributing competences among governmental actors, private associations and individuals. But proponents of subsidiarity find in its apparent "vagueness" not a defect, but the concept's central asset. Subsidiarity is supposed to calibrate the relationship between civil society and the state within the flux of circumstances, in pursuit of a maximum amount of liberty. But liberty expresses itself in concrete conditions that cannot be predicted and managed by a priori rules. The imprecision latent in subsidiarity therefore is exactly the point. Authority acts in a truly subsidiary fashion only if it can adapt itself flexibly to the changing concrete demands of liberty. Thus, subsidiarity does not furnish a blueprint delimiting the functions of the state and this-or-that social group. Rather, it is a "purely formal" principle that manages the relationship between the state and civil society, while their own interactions fix the concrete boundaries between them. Subsidiarity does not allow us to ascribe rigid limits to the competences of any social entity.

D. The Person, Conscience and the Subsidiary State

As we have seen, subsidiarity views persons as naturally social creatures, requiring the relationships society provides to be genuinely autonomous. It therefore discards the individualistic view of classical liberalism, first and foremost, as artificially ignoring human beings' basic social and political nature. In turn, society is more than a mass of atom-

62. See, e.g., Michael P. Moreland, Subsidiarity, Localism and School Finance, 2 J. CATH. SOC. THOUGHT 369 (2005) (discussing "recurring theme in the literature on subsidiarity...that the principle of subsidiarity is indeterminate, vague, and ultimately unhelpful to the resolution of concrete legal and policy questions").

63. See MILLON-DELSOL, supra note 29, at 190. Thus, "[t]o begin to delimit this condition [of developing liberty] would be absurd, since the capacity for liberty varies continually." Id. (author's trans.); see also Czarnetzky & Rychlak, Empire of Law, supra note 8, at 122 (noting that as applied to International Criminal Court, subsidiarity suggests that, "[b]y focusing on an inquiry into the common good of the nation and, therefore, the actual human beings involved, the calculus of whether to assert jurisdiction in a particular case is not mechanically foreordained").

64. See MILLON-DELSOL, supra note 29, at 190.

65. See id. at 193-94.

66. See id. at 39-42, 70-71; see also FINNIS, supra note 10, at 144-45 (discussing subsidiarity and communism); Carozza, supra note 1, at 42-43 ("[S]ubsidiarity presupposes that the human person toward whose flourishing the application of the principle is aimed is naturally social. Her dignity requires relationship with others, in a variety of ways and settings, from family life to political participation.") (internal quotations omitted).

67. See MILLON-DELSOL, supra note 29, at 185. By contrast, in Lockean classical liberalism, the individual can provide for everything he needs, except the security necessary to enjoy it. These premises give rise to a particular conception of state competence. See id. at 85-86; LOCKE, SECOND TREATISE ON GOVERNMENT, supra note 43, § 123 (explaining man chooses to enter political society because, in state of nature, "the Enjoyment of [his freedom] is very uncertain, and constantly ex-
ized individuals. As Russell Hittinger writes, "[s]ociety . . . is not a mere instrument . . . [but rather] [i]t consists of plural and intrinsic forms, not 'masses' to be aggregated." The liberty at the heart of subsidiarity involves more than freedom to participate in governance; rather, it embraces a broader freedom to pursue various kinds of activities. Individual rights are consequently not understood exclusively "with an eye toward the lonely rights bearer," as Paolo Carozza puts it. Freedom and rights are not abstractions nor are they simply claims against the government. Instead the rights of naturally relational individuals are situated in the context of associations that are themselves primary to the state. They take on flesh by emerging from the background of everyday life. Within free associations, individuals can both transcend themselves and create bulwarks against the state, as Robert Vischer describes: "When afforded their natural vitality and vibrancy . . . associations are the vehicle by which we transcend our individual, atomistic existences and carve out a communal role for ourselves that is distinct from, and often in opposition to, the identity of the state." Consequently, genuine human autonomy is likely not to be marked by a strict equality, but instead by the inevitable, healthy variations of free people with different abilities and interests. "Fake people" exhibit a leveled sameness that is rooted in excessive individualism and counterfeits authentic freedom. Because the atomized individual possesses merely a

posed to the Invasion of others"); id. § 131 (discussing consequent limitations on state power); JOHN LOCKE. A LETTER CONCERNING TOLERATION, in ON POLITICS AND EDUCATION 21, 25 (Howard R. Penniman ed., 1947) (discussing limitation on civil magistrate’s jurisdiction over “the salvation of souls”).

68. Hittinger. supra note 57, at 22; see also Endo, supra note 1, at 618 (“[S]ubsidiarity presupposes . . . not the dichotomous society of atomised individuals and a strong State, but the graduated hierarchy in which various organisations enjoy their autonomy.

69. See Millon-Delsol, supra note 29, at 24-25, 42. Conversely, when the government deprives an individual of his ability to freely manage his own areas of competence, it “steal[s] a particle of his being [and] mutilate[s] [him] by breaking a naturally stable continuity.” Id. at 67 (author’s trans.); see also MONTESQUIEU, supra note 33, Books VI, VIII.

70. See Millon-Delsol, supra note 29, at 23.

71. Carozza, supra note 1, at 46-47 (citing MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 47-75 (1991)).

72. See Millon-Delsol, supra note 29, at 49-54.

73. Vischer, Associations, supra note 46, at 958.

74. See Millon-Delsol, supra note 29, at 67-71.

75. Id. at 69 (author’s trans.); see also 2 TOCQUEVILLE, supra note 33, at 663 (describing character of persons under mild despotism as “an innumerable crowd of like and equal men” and as “a herd of timid and industrious animals of which the government is the shepherd”).

76. See Millon-Delsol, supra note 29, at 70-71. As Millon-Delsol writes:

A person alone will never or rarely develop his own capacity for freedom.
He will remain proud, but naked, clothed only with the abstract essence
truncated, abstract liberty, he therefore must be sustained by what Tocqueville called the “immense tutelary power” of the omnipotent state.\textsuperscript{77} By contrast, the ordered liberty of subsidiarity is a concrete mean between the poles of authoritarian government and purely individual liberty, mediated through social groups and situated in the details of practical life, as the following lyrical description attempts to capture: “Before legislating, administrating, constructing palaces and temples, [and] waging war, society works, labors, navigates, exchanges, [and] profits from the sea and the earth. Before consecrating kings and instituting dynasties, a people founds the family, blesses weddings, constructs cities, [and] stabilizes property and succession.”\textsuperscript{78}

Modern theorists, principally the neo-thomist scholar Luigi Taparelli, have developed the relationship between subsidiarity and rights, particularly the rights of conscience.\textsuperscript{79} The subsidiary state is empowered to intervene by creating the conditions for individual action, by aiding particular groups in need, and by undertaking tasks useful to the common good, but which had been neglected. This state power carries with it the concomitant responsibility of protecting a person’s basic rights, grounded in human dignity—the right to live, to have means for preserving life and to apply oneself freely to activities.\textsuperscript{80} But these rights, as Russell Hittinger underscores, come not from the state but rather from the “proper mode

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  \item of the free man that declarations confer upon him. But associating himself with others elevates him to the realization of autonomy, and he becomes genuinely free.
  \item \textit{Id.} (author’s trans.); \textit{see also} 2 Tocqueville, supra note 33, at 482-84 (describing individualism in democratic countries).
  \item \textit{77. See, e.g.,} 2 Tocqueville, supra note 33, at 663 (describing actions of mildly despotic state); 1 \textit{id.} at 426 (“As conditions become more and more equal and each man in particular becomes more like all the others, weaker and smaller, one gets used to no longer viewing citizens so as to consider only the people; one forgets individuals so as to think only of the species.”). \textit{See generally id.} at lxiii-lxvi (discussing Tocqueville’s treatment of equality and individualism).
  \item \textit{78. Millon-Delsol, supra} note 29, at 111 (author’s trans.) (quoting M. Ri-\textit{vière, De la capacité politique des classes ouvrières} 215 (1924)).
  \item \textit{79. See, e.g.,} Hittinger, supra note 57, at 16, 23 (describing contribution of Taparelli to modern understanding of subsidiarity). Apparently, none of Taparelli’s work on subsidiarity has been translated into English. Of his work, Millon-Delsol remarks that “in his \textit{Essay on Natural Law}, and in his numerous articles appearing in [the journal] \textit{Civilità Cattolica}, Taparelli laid the groundwork for the social doctrine that would soon be articulated by the Vatican, opposing himself both to liberalism and socialism and seeking an alternative to modern individualism.” \textit{Millon-Delsol, supra} note 29, at 131 (author’s trans.).
  \item \textit{80. See Millon-Delsol, supra} note 29, at 119-38. Because of its different conception of the human person, the Lockean state has a more restricted role, providing only for basic peace and security. It also lacks the capacity to conceive of, and therefore to positively foster, any objective notion of the common good of its subjects. It tends to “suspect in the development of groups the birth of particular despotisms,” and holds that “only the individual is the subject of rights.” \textit{Id.} at 86-89 (author’s trans.).
\end{itemize}
of action” of social groups themselves. The upshot is that the state has no power to interfere with the consciences of persons, an insight that allowed Taparelli to ground the right of conscience firmly within subsidiarity. As Millon-Delsol describes, Taparelli affirm[ed] that no one, and above all not the political authority, can force someone to believe. Spiritual allegiance depends on personal decision and authority has no right in that regard. But the perfect society would be that in which there is a general allegiance to perfect values. And authority cannot help but try to guide society towards that perfection.

Integrating subsidiarity into its social teaching in the nineteenth century, the Catholic Church grounded the affirmative duties of the state on the protection of human dignity rather than on abstract equality or individual liberty. The Church’s view of human persons as having a fundamental and equal dignity by virtue of being human included both their liberty and equality, but sought a richer autonomy than either alone provided. The Church’s social teaching thus avoided absolutizing individual

81. See Hittinger, supra note 57 at 23 (explaining that, in Taparelli’s thought, subsidiarity “describes the right (dritto ipotattico) of social groups, each enjoying its own proper mode of action”).

82. MILLON-DELSOL, supra note 29, at 136 (author’s trans.). This is a notable development because the theory of subsidiarity had developed earlier in the context of societies, such as the seventeenth century of Althusius, where the state guaranteed religious conformity, often enforcing a single religious system on all persons and communities. There was, in short, no subsidiarity with regard to religious practice or belief. The theory of subsidiarity should be distinguished from its application in different eras, with different conceptions of liberty of conscience. As Millon-Delsol explains with regard to Althusius:

Althusius is not antidemocratic and it is this that distinguishes him from his antecedents. He believes in popular sovereignty and cannot conceive of legitimation without consent. His entire social system belies the smallest intention of dictatorship, except on the religious plane. But he is a child of his own era: the notion of liberty of conscience remains unknown to him . . . . This reveals, instead, the conception of the era and recalls for us the immense religious disputes of that period in which Althusius was the administrator of Emden. Beyond that, it reminds us that the liberty of autonomy claimed in the Politics [of Althusius] is a liberty as far as means, but not as far as ends. It is only in the 20th century that the notion of a subsidiarity state will truly consider liberty as extending to ends, when the individualistic society will have become an inescapable reality.

Id. at 56 (author’s trans).

83. See generally id. at 119-26, 138-50 (discussing Church’s adoption of subsidiarity as foundation of social teaching); Bermann, supra note 1, at 339 (noting concept of subsidiarity can be traced to twentieth-century Catholic social philosophy); Carozza, supra note 1, at 41-42 (describing development of Catholic social theory and subsidiarity); Endo, supra note 1, at 627-22 (explaining Catholic roots of subsidiarity); Vischer, Beyond Devolution, supra note 1, at 108-10 (explaining Catholic roots of subsidiarity).

84. See MILLON-DELSOL, supra note 29, at 119-26. The concept of human dignity necessarily embraces individual liberty and personal responsibility, “but at
ual liberty, as in classical liberalism, and equality, as in socialism. On this view, a person’s rights are various facets of the entire complex of human dignity itself. As with Taparelli, the upshot of this reasoning placed strict limits on the power of the state to interfere with the individual or social groups in matters of conscience. For example, commenting on the thought of Pope Pius XII and John Courtenay Murray, Russell Hittinger explains that the “juridical” (that is, limited or “instrumental”) state “coordinates and facilitates rather than exemplifies the perfections and actions of society. Not being an end in itself, the state cannot be sacralized nor directly assigned juridical care of religious institutions.” These interrelated ideas—the limited state, human dignity, and the rights of conscience and religious freedom—would prove decisive in the documents of the Second Vatican Council, most famously Dignitatis Humanae, affirming a robust view of the inviolability of human conscience by the state and of the state’s responsibility to protect religious freedom.

This delicate relationship between conscience and the subsidiary state can also be appreciated from a different angle: how some theorists of subsidiarity have worked out the apparent tension between individual rights of conscience and the state’s promotion of the common good. Admittedly, there must be some minimal objective vision of the common good if the state hopes to fulfill its affirmative, albeit subsidiary, role in guiding society toward its realization. But the problem remains of how such a vision is compatible with an individual’s freedom of opinion and belief. By shifting from the older concept of an organic society to a newer vision of an organized society, modern theorists of subsidiarity have adapted its view of the common good to the modern understanding of rights, especially the rights of conscience.

The organic concept of society presupposed a relation in which “an individual is tied to society as a branch is to a tree or a hand to a person.” The common good emerged from an internal consensus of society, but was itself an objective truth transcending any individual’s own conception. Contradicting that common good would be viewed as irrational, a conclusion in tension with a modern understanding of liberty of conscience. Simply imposing such a view of the common good would involve a kind of despotism. To adapt subsidiarity to a modern individualistic society required reconceiving the common good in terms of the

85. See id. at 121-26. Indeed, Catholic social thought saw a fundamental danger in selecting certain rights to the exclusion of others.
86. Hittinger, supra note 57, at 21 & nn.50-51.
87. See generally id. at 23-26.
88. See Millon-Delsol, supra note 29, at 136-38.
89. Id. at 169-76 (author’s trans.).
90. See id. at 176-77.
91. See id. This is not to say that the older understanding of the common good was a form of despotism, but simply that the changed conditions of modern
human person. The personalistic philosophy of theorists like Jacques Maritain furnished one of the primary theoretical bases for this task.

Personalism is a philosophy that places the human person at the center of society, but not as the isolated individual of classical liberalism. It seeks to preserve (as classical liberals did not) a notion of the common good as a positive objective of the state. Embracing a pluralistic society with its diversity of goals, the state would no longer define the common good, but would instead facilitate society’s pursuit of it through individual action and purposes. As James Schall explains, “any political common good is always itself related to the individual persons whose good it fosters and . . . it is their good or purpose, not its own, for which any organized civil society exists.” The community is thus ordered to the person, not only as to the means of action, but also as to the ends of action. This is perhaps best summed up in what Patrick Brennan calls “the most famous line associated with Maritain: ‘Man is by no means for the State. The state is for man.'” While the classical liberal conceives the common good simply as a complex of circumstances the state secures, a personalist would claim the state must positively foster individual human dignity. The

society make that notion of an objectively held common good, if imposed from above, despotic. See id. at 178.


93. See Millon-Delsol, supra note 29, at 169; see also Endo, supra note 1, at 617-14 (discussing role of personalism in subsidiarity). Another important philosophical basis was the notion of solidarity, which sought to provide a moral grounding for societal ties among persons while emphasizing the realistic limits of societal perfection. See Millon-Delsol, supra note 29, at 169-70; see also Susan J. Stabile, Subsidiarity and the Use of Faith-Based Organizations in the Fight Against Poverty, 2 J. Cath. Soc. Thought, 313, 333-34 (2005) (discussing relationship of subsidiarity to solidarity).

94. See Millon-Delsol, supra note 29, at 171.

95. See id. at 178-79.

96. Schall, supra note 92, at 205 (describing Maritain’s understanding of common good).

97. See Millon-Delsol, supra note 29, at 179 (“Personalism opposes the person to the state, in order to make of the state a means, and the person an end.”) (author’s trans.). Maritain sharply dismissed the idea that the state itself has a personality to which human persons are subordinate. See Schall, supra note 92, at 204-05. Instead, the state is simply an “instrument in the service of man[.]” Maritain, Man and the State, supra note 92, at 11; see also Czarnetzky & Rychlak, Empire of Law, supra note 8, at 101 & n.170 (discussing Maritain’s personalist view of common good).

98. Brennan, supra note 54, at 94 (quoting Maritain, Man and the State, supra note 92, at 19).

99. See Millon-Delsol, supra note 29, at 179; see also Brennan, supra note 54, at 96 (explaining that “Maritain defined the state as that part of the body politic
common good is inextricably bound to the good of individual persons, as Maritain explains in his classic work, *Man and the State*.

What is the final aim and most essential task of the body politic or political society? It is . . . to improve the conditions of human life itself, to procure the common good of the multitude, in such a manner that each concrete person, not only in a privileged class but throughout the whole body politic, may truly reach that measure of independence which is proper to civilized life and which is ensured alike by the economic guarantees of work and property, political rights, civic virtues, and the cultivation of the mind.\(^{100}\)

The common good thus transcends vague notions of public welfare and order, possessing “more concrete human implications, for it is by nature the good human life of the multitude and is common to both the whole and the parts, the persons into whom it flows back and who must derive benefit from it.”\(^{101}\) This personalist re-calibration of subsidiarity seeks a middle ground between an impersonal common good and the detached good of isolated individuals. Subsidiarity thus “places the necessity of individual development within the context of the common good.”\(^{102}\) For these reasons, Paolo Carozza can accurately affirm that subsidiarity’s “basis is personalistic, rather than contractual or utilitarian,” and that “the value of the individual human person is ontologically and morally prior to the state or other social groupings.”\(^{103}\)

The question that remains is how to determine the content and practical application of this person-centered common good, given that it simply cannot be imposed from on high as a matter of blind traditionalism or authoritarianism.\(^{104}\) What is required is a means of achieving broad consensus that is not necessarily the same as majoritarian determination. Millon-Delsol describes this process as a “battle of argumentation to convince [others] of the justice of the content which they would give to the common good.”\(^{105}\) This does not subjectivize the content or application of whose aim is to secure the common good, including persons’ achieving their normality of functioning, for the body politic”.

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100. **Maritain, Man and the State**, *supra* note 92, at 49. Describing Maritain’s thought, James Schall explains that “[t]he state is subordinate to and stands in the service of the reality of the person who has freedom and intelligence and who is directly related to the external common good.” *Schall*, *supra* note 92, at 205.


102. **Millon-Delsol**, *supra* note 29, at 181 (author’s trans.).

103. Carozza, *supra* note 1, at 42.

104. See, e.g., Brennan, *supra* note 54, at 97 (distinguishing between Maritain’s thoughts regarding legitimate authority in law—which arises from law’s comporting with human practical reason—and exercise of power, “which is force merely obliged to obey”).

105. **Millon-Delsol**, *supra* note 29, at 185-88 (author’s trans.).
the common good. To the contrary, the common good represents the prudential working out of a distinct notion of human dignity, grounded in cultural history, philosophical notions of right, and religious conceptions of the human person. Notably, Millon-Delsol identifies "secularization"—or the concrete relationship between religion and public life—as an apt subject for this process of public argumentation in which the content of the common good is hammered out. Such a debate on the place of religion in society does not simply pit two monolithic and irreconcilable positions against each other, but rather "express[es] the contradictions that one confronts when one must translate these values into concrete terms." In this debate, the state does not somehow adopt a supra-moral and abstract stance of neutrality. At the same time, while society's common good must include the spiritual ends of human beings, this does not mean that the state has direct superintendence over those ends. To the contrary, as Patrick Brennan explains, "although the common good is society's ultimate end, even society is limited insofar as the person has an end in another, surpassing order." Maritain recognized that society should seek to foster conditions favorable to persons' spiritual development, but also affirmed that "[t]he end of political society is not to lead the human person to his spiritual perfection and to his full freedom of autonomy."

The personalistic emphasis of subsidiarity informs the question of when the state should intervene with regard to lower organizations. As discussed, the pivot of subsidiarity in its modern form is the dignity of the human person. Instead of abstract liberty, "it is [a person's] dignity that defines him, in the measure that his dignity includes liberty, the need for security, the need for minimal material well-being, [and] the need for con-

In any case, determining the content of the common good by consensus remains the only possibility open to us in the conditions of diversity in which we find ourselves. We have no other choice, if we are not to return to religious or ideological coercion. This will not prevent anyone from believing that an objective notion of the common good exists, but he will have to persuade others of his idea without any longer being able to impose it. This will involve a battle of argumentation to convince others of the rightness of the content that one gives to the common good—a difficult but legitimate prospect, given that to convince others one will have to refine his own theses.

Id. at 186 (author's trans.).

106. See id. at 187 (discussing foundations of notion of common good); see also Brennan, supra note 54, at 95 (observing that, for Maritain, "[t]he common good is the shared life of a political community of free persons living oriented toward justice, friendship, and the transcendent").

107. See Millon-Delsol, supra note 29, at 187.

108. Id. (author's trans.).

109. See id.

110. Brennan, supra note 54, at 95.

111. Id. (quoting Jacques Maritain, Integral Humanism; Temporal and Spiritual Problems of a New Christendom 134 (Joseph W. Evans trans., 1973)).
sideration, among other things."\textsuperscript{112} A person's rights concretely express that intrinsic dignity. Those rights are inseparable from an ability to develop oneself through actions, which in turn reminds us that full human flourishing requires association with others and the aid various associations provide.\textsuperscript{113} "This conception of rights suggests that state intervention demands not just a purely subjective desire, but also a need "felt by the individual in relationship to his requirements of dignity, and also in relationship to the society in which he lives."\textsuperscript{114} At a minimum, the rights protected by the subsidiary state must include "immunity from external coercion as well as psychological freedom."\textsuperscript{115} But at bottom the personalislist re-imagination of subsidiarity reinforces the idea that the cornerstone principle of government non-interference applies not only to action, but also to thought and belief.\textsuperscript{116} As Maritain wrote, even if the state may punish someone for an act of conscience that violates the law, "in like circumstances the State has not the authority to make me reform the judgment of my conscience, any more than it has the power of imposing upon intellects its own judgment of good and evil, or of legislating on divine matters, or of imposing any religious faith whatsoever."\textsuperscript{117} Here again appears the interplay between the subsidiary state, the essential dignity of the human person and that person's rights of conscience.

III. SUBSIDIARITY AND FEDERALISM

What has been said so far about subsidiarity provides sufficient tools to apply the theory to the question of religious establishments as such.\textsuperscript{118} But if the theory is to be applied to the Establishment Clause as well, one additional question needs exploring. That question is whether the principle of subsidiarity can be expressed in a constitution and if so, what form that expression should take. As will be discussed, the answer to this question will affect how subsidiarity applies to the Establishment Clause. Specifically, this answer will determine whether it makes more sense to say

\begin{itemize}
  \item \textsuperscript{112} Millon-Delsol, supra note 29, at 198 (author’s trans.).
  \item \textsuperscript{113} See id. at 196-99 (explaining necessity of human associations).
  \item \textsuperscript{114} Id. at 202-06 (author’s trans.).
  \item \textsuperscript{115} Philip A. Pucillo, Toward a Subsidiarity-Based Judicial Federalism, 2 J. Cath. SOC. THOUGHT 463, 466 (2005) (citing POPE PAUL VI, DIGNITATIS HUMANÆ para. 2 (1965)). Pucillo also observes that when the state intervenes to vindicate individual rights, subsidiarity would require [the state] to minimize the extent to which its ruling would disturb the pursuits of individuals and communities who have no direct involvement in the dispute. That way, the state can intervene for the purpose of performing an essential function while respecting the rights of any number of individuals and communities to pursue their objectives.
  \item \textsuperscript{116} Id. at 468.
  \item \textsuperscript{117} See Millon-Delsol, supra note 29, at 202-06.
  \item \textsuperscript{118} For a discussion of the theory of subsidiarity, see supra notes 9-117 and accompanying text.
\end{itemize}
there is a substantive notion of subsidiarity embedded in the Clause itself—one which a court presumably could apply to particular church-state problems—or whether the Clause serves a subsidiary function in the overall constitutional structure by severing the federal government from a particular area of social policy. As will be seen, the latter view better captures the subsidiary function of the Clause in relation to the federal structure of the Constitution.

Subsidiarity can apply to the role of any authority, public or private.119 Asking how subsidiarity illuminates the relationship between state authority and civil society, however, raises the interconnected questions of whether the principle is intelligibly embedded in a constitution and whether the principle is susceptible to judicial enforcement. Certainly, subsidiarity is expressed in various ways in several European constitutions.120 But the theory and function of subsidiarity raise doubts about the utility of simply “writing subsidiarity into” a limiting constitutional provision—for example, a provision requiring a higher governmental authority to “take action in accordance with the principle of subsidiarity” only to the extent that lower states cannot “sufficiently achieve” proposed objectives.121 While the classical liberal state confines the competences of state authority to definite boundaries, “the idea of subsidiarity implicates, to the contrary, that public intervention does not have virtually any limit preventatively fixed by socio-political doctrine.”122 Subsidiarity, then, is better described as a condition on the exercise of state authority, rather than an a priori limit on it:

The conditions requiring intervention cannot be objectively defined: incapacity, negligence, [and] pressing need are oscillating

119. As Millon-Delsol explains, subsidiarity can apply to “every field of social life which poses the problem of the attribution of competences.” MILLON-DELSOL, supra note 29, at 207 (author’s trans.).

120. See id. at 213 (discussing provisions in German constitutions directly inspired by subsidiarity); see also Maastricht Treaty on European Union art. A, Feb. 7, 1992, 1757 U.N.T.S. 30615 (requiring new European Union “decisions [to be] taken as closely as possible to the citizen”); id. art. B (requiring Community institutions to “respect[... the principle of subsidiarity]” in pursuing their objectives under the treaty); id. art. 3b (requiring Community, in non-exclusive areas, to “take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States”); Bermann, supra note 1, at 344-47 (discussing provisions in European Community treaties based on subsidiarity); Lorenza Violini, Subsidiarity and Modern Public Administration: The State of the Art in Matters Related to the Implementation of the Principle in Italian Regions, 2 J. CATH. SOC. THOUGHT, 401, 402-04 (2005) (discussing failed attempt to embed subsidiarity in Italian Constitution and its eventual implementation at regional level).

121. Maastricht Treaty on European Union art. 3b. See also Bermann, supra note 1, at 345-46; see also Violini, supra note 120, at 406-07 & n.9 (observing “[t]he decision whether to assign the judiciary a role in reviewing legislative respect for subsidiarity has been considered a highly problematic one” and collecting sources addressing issue).

122. MILLON-DELSOL, supra note 29, at 212 (author’s trans.).
criteria that depend on circumstances. The essential characteristic of the principle is its flexibility without which it would have no reason to exist, since it seeks to create an equilibrium. One could not, in any case, render it rigid . . . by prescribing in a juridically obligatory manner a sector of reserved competences; to the contrary, [subsidiarity] presupposes that there are no reserved competences.\(^{123}\)

Thus subsidiarity does not translate easily into a judicially enforceable set of rules and, to that extent, does not function as an *a priori* constitutional limit on state authority.\(^{124}\) Even theorists such as George Bermann, who see a limited role for the European Court of Justice in enforcing subsidiarity principles, view the primary function of subsidiarity as informing the political judgments of legislatures, to which courts should strongly defer.\(^{125}\)

\(^{123}\) *Id.* at 215 (author’s trans.).

\(^{124}\) Millon-Delsol envisions a limited judicial role in enforcing subsidiarity, reasoning that “its juridical formulation can help avoid both the excesses of state intervention as well as the gaps of non-intervention, leaving open the possibility of recourse to the law in a case of conflict.” *Id.* (author’s trans.). But she cautions that:

> [T]he principle cannot be applied directly, but can only guide the valuations of political and social actors. In German and Swiss law, the idea of subsidiarity appears, not so much as a norm of right, as much as an atmosphere, a kind of background, an implicit reference point. It inspires the entire federal system.

*Id.* (author’s trans.). George Bermann notes that:

The German Constitutional Court has in effect determined that the largely comparable provisions on federal subsidiarity in the German Constitution are nonjusticiable, with the result that the “necessity” for federal government legislation in areas of concurrent competence is essentially a political question to be decided by the political branches without judicial interference.

Bermann, supra note 1, at 393-94 (footnotes omitted); see also *id.* nn.248-49 (commenting on German Constitutional Court decisions on justiciability of Article 72 of Grundgesetze Constitution); P.J.C. Kapteyn, *Community Law and the Principle of Subsidiarity*, 2 REVUE DES AFFAIRES EUROPEENNES 35, 42-51 (1991) (arguing principle should be considered categorically nonjusticiable) (cited by Bermann, supra note 1, at 393 n.247). For a different view of subsidiarity and judicial review based on a variation of federal abstention doctrine, see Pucillo, supra note 115, at 485-93.

125. Bermann reasons that:

If, as seems evident, subsidiarity addresses issues that are ordinarily relegated to the political realm, then subsidiarity’s central function must be its legislative one. This means in turn that each participant in the Community’s legislative process should . . . determine whether the measure under consideration meets the test of subsidiarity, and act on the measure accordingly.

Bermann, supra note 1, at 367; see also *id.* at 378-90 (describing subsidiarity as “mode of legislative analysis”). Bermann takes a limited view of the Court of Justice’s role in enforcing subsidiarity. See *id.* at 390-403 (discussing judicial enforcement). He notes that the contingencies which make subsidiarity difficult for a legislature to apply “make the inquiry even more problematic for the Court.” *Id.* at 391. He therefore advocates limiting Court review to the procedural question of
This question takes on a different aspect if we ask not whether subsidiarity can be translated into judicially enforceable constitutional rules, but whether the principle can be integrated into, and expressed through, a governmental structure. Federalism bears the strongest earmarks of a subsidiary structure. Indeed, for Millon-Delsol, a federal system represents "the concrete expression of the formal principle [of subsidiarity and] its most meaningful and elaborated expression." In a federal system, a central government comprehends entities that are themselves genuine state authorities. The system exemplifies subsidiarity because the coalition of lower state entities preexisted the formation of the central government, consenting to its creation and empowerment. The constituent states already possessed the competences of self-government, but decided, in view of their mutual benefit, to divest themselves of certain competences "without themselves abandoning the tasks thought necessary to the common good." The clearest examples of the creation of federal systems, explains Millon-Delsol, are the United States and Switzerland, and her description of the dynamics of those systems tracks the structure of the U.S. Constitution:

[T]he powers of the federal state are delegated to it, and all the powers not devolved on the federal state remains with the federated states. This transmission from low to high reveals where the origins of power lie. The [governmental] competences belong naturally and without need of any rational justification to the nearest entities. The competences of the [central] state must, on the contrary, receive justification, since they emerge from a secondary need. The competences of the federal state are enumerated, that is, restrictive and based on rational calculation.

Thus, the formation of a federal state is subsidiarity-in-action, the structural elaboration of the theory itself. Millon-Delsol can thus say broadly that the "history of federalism follows the philosophical history of the principle of subsidiarity." whether the Community institutions properly considered local remedies, as opposed to the substantive question of whether Community action comports with a norm of subsidiarity. See id. at 391-92, 400. Review would "pay[ ] pronounced deference to [legislative] judgments on the substance of the matter." Id. at 400.

127. Id. at 215 (author's trans.).
128. Id. at 215-16 (author's trans.). Such a divestment of governmental functions—"guaranteed by a contract at the moment of the creation of the central state"—stands in marked contrast to the downward concession of powers by a pre-existing central sovereign. Id. at 216 (author's trans.).
129. Id. at 217 (author's trans.).
130. Id. (author's trans.). Among some commentators, there appears to be a sharp difference of opinion about the relationship between subsidiarity and American federalism. Thus, David Currie claims that "subsidarity is the guiding principle of federalism in the United States," while George Bermann concludes that subsidiarity is neither in the "lexicon of U.S. Constitutional law" nor a "central
Subsidiarity also provides insight into the most difficult practical aspect of federalism: the division of competences between the central and constituent governments. From the viewpoint of subsidiarity, the division is not so much a rationalized parceling-out of discrete governmental functions—one to the central government, another to the lower governments—but rather “a question of equilibrium” that can itself change according to circumstances. This equilibrium must be understood, of course, within the context of the delegated competences of the central government. The combination of those two aspects in the matrix of subsidiarity suggests the twin aspects of federal power in the U.S. Constitution—i.e., that the powers of the federal government are limited in the sense that they are delegated, but also plenary within their sphere of operation.

feature of U.S. Constitutional practice” and is “foreign to the law and practice of federal legislation." Compare David P. Currie, Subsidiarity, in 1 GREEN Bac 2d 359, 359 (1998), with Bermann, supra note 1, at 403, 406. But the divergence may not be as deep as it sounds. Currie is essentially echoing Millon-Delsol in discerning the lineaments of subsidiarity in the American federal structure, specifically in the enumeration of congressional powers, which Currie calls “a concretization of the subsidiarity principle.” Currie, supra, at 360. But as to the actual operation of federal powers, Currie sees subsidiarity at work, not as an independent limiting principle, but as a background premise seen, for example, in the interstitial and ad hoc nature of federal law, in the gradual expansion of federal power in areas beyond state competence and in judicial decisions limiting the reach of federal power. See id. at 360-64. Bermann, on the other hand, focuses primarily on whether there is an independent subsidiarity check in the American system on the operation of federal power. Beyond political checks inherent in the federal structure itself, Bermann discerns no independent subsidiarity principle in that structure. He does, however, see the potential for application of subsidiarity in, for instance, legislative frameworks, judicial enforcement of commerce power and other doctrines, and agency regulations (although he is skeptical about how well subsidiarity meshes in practice with American federalism). See Bermann, supra note 1, at 403-48, 449-53. For our purposes, the important difference between these two commentators centers on whether a federal structure as such qualifies as a structural expression of subsidiarity. Millon-Delsol and Currie think a federal structure does not necessarily function as a subsidiary structure, while Bermann believes it does. The difference may simply lie in an emphasis on substantive outcomes over structure. Robert Vischer takes both commentators’ views into account, but like Currie and Millon-Delsol, finds subsidiarity reflected in the theoretical and structural premises of American federalism. See Vischer, Beyond Devolution, supra note 1, at 122-26; see also Stephen Gardbaum, Rethinking Constitutional Federalism, 74 TEX. L. REV. 795, 836 (1996) (proposing model of American constitutional federalism based on subsidiarity); Douglas W. Kmiec, Liberty Misconceived: Hayek’s Incomplete Relationship Between Natural and Customary Law, 40 AM. J. JURIS. 209, 215 (1995) (discerning subsidiarity in Tenth Amendment).

131. See Kmiec, supra note 130, at 217-19; see also, e.g., THE FEDERALIST No. 37 (James Madison) (describing difficulties in drawing line between federal and state competences in drafting of U.S. Constitution).

132. MILLON-DELSOL, supra note 29, at 218 (author’s trans.). Millon-Delsol illustrates this dynamic equilibrium by reference to the history of power sharing between the Swiss cantons and the central government. One could find analogues of this equilibrium in American federalism—for instance, in the waxing and waning of federal congressional power throughout the twentieth century, or in the gradual incorporation of the federal bill of rights against the states.
Subsidiarity

ation, and that these powers are constrained ultimately by the representative structure of the government and by the sheer existence of lower governments and social groups.133

Viewed through the lens of subsidiarity, federalism integrates governmental structure with individual freedom.134 The federal organization resonates with subsidiarity because it promotes a liberty situated less within the confines of abstract theories of right than within concrete situations and realistic human capacities.135 In effect, federalism declares itself unable to provide rationalized solutions to intractable political and social dilemmas.136 Rather, it proposes a flexible matrix for pluralistic societies through a graduated governmental structure. As Millon-Delsol explains:

Defenders of federalism maintain that [subsidiarity’s] political organization of proximity, which ties the necessity of sovereignty to respect for autonomies, would be the only one able to effectively manage the increasingly explosive diversities of contemporary societies. It deals above all with managing and not resolving, since politics for [its defenders] is not a science capable of resolving human problems. The idea of subsidiarity—and consequently also of the federal organization—implies a realistic philosophy in which human paradoxes can be held together, assumed, managed, without attempting to resolve them, given the inherent imperfection of nature.137

By this account then, federalism provides a structure within and through which the theoretical substance of subsidiarity is aptly expressed. This is not to say, of course, that a federal governmental structure is the only means of expressing subsidiarity in practice. But it is to say that one sees subsidiarity clearly at work within the lineaments of federalism. Further, subsidiarity allows one to grasp better the purpose of a federal structure. For at bottom, subsidiarity is not simply about devolution of power to the lowest possible level of government. Instead, as Russell Hittinger explains, subsidiarity is “a normative structure of plural social forms . . . an

133. See, e.g., McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 378 (1819) (concluding federal power supreme within its sphere); The Federalist No. 9 (Alexander Hamilton), No. 10 (James Madison) (discussing nature of federal power).
134. See Millon-Delsol, supra note 29, at 219.
135. See id.
136. A famous example of this sort of “refusal” to provide definite solutions to social and political problems is Madison’s explanation in Federalist 10 and 51 of the Constitution’s solution to the problem of factions. In those writings, Madison explained that an extended federal republic remedied the problem of majority factions through indirect and mechanical means—i.e. an extended geography, increasing pluralism and divided governments would prevent majority factions from coalescing—rather than the direct means of, for instance, creating a monarchical “will” separate from the majority. See The Federalist Nos. 10, 51 (James Madison); see also George W. Carey, The Federalist: Design for a Constitutional Republic (1989) (discussing Madison’s treatment of majority factions).
137. Millon-Delsol, supra note 29, at 220 (author’s trans.).
account of the pluralism in society.” The theory of subsidiarity therefore clarifies the animating purpose of federalism—to offer a structure for managing pluralism. Federalism provides a matrix within which diverse constituent governments can co-exist for their mutual benefit without relinquishing their own identities or capacities for self-government.

As we will see, this account of federalism resonates with the formation and operation of the U.S. Constitution. This will be crucial in understanding the role of the Establishment Clause within our federalist structure. The problem of how religious associations relate to a secular state, particularly the problem of religious establishments, is a paradigm instance of delicate social issues that demand political management rather than mathematical solutions. A subsidiary account of the Establishment Clause depicts the Clause not as providing courts with the overarching equation for deriving solutions to the establishment problem, but instead as insuring the fundamental political and social conditions within which the problems posed by religious establishments can be, and in fact were, resolved. Part IV will explore the intricacies and challenges presented by this subsidiary view of the Establishment Clause.

IV. Subsidiarity, Establishments and the Establishment Clause

We can now use the theory of subsidiarity to construct a framework for understanding the general problem of religious establishments and the narrower question of how the Establishment Clause addresses that problem. This will present its share of difficult questions, but grappling with them will show how subsidiarity can clarify thinking about this area. First, this part of the Article will translate the notion of a religious establishment into the vocabulary of subsidiarity. This will suggest a helpful way of understanding the establishment problem, one rooted in the actual functioning of religious associations and the state, and one unencumbered by the tedious conceptual baggage of establishment clause jurisprudence.

The Article will then address the Establishment Clause itself and ask how subsidiarity can illuminate its function within the wider framework of the U.S. Constitution. As the analysis thus far suggests, subsidiarity is not a source for judicially-enforceable rules about relationships between state authority and religious associations. Paradoxically, this will help explain the role of the Establishment Clause within the constitutional structure. Through the lens of subsidiarity, the Clause can be understood as a strategy for partitioning the national government from the divisive issue of founding-era religious establishments, consequently leaving to states the task of managing how various religious groups would coexist with each other and with state authority.

138. Hittinger, supra note 57, at 23.
A. Subsidiarity and the Establishment Problem

Religious associations are a prime example of mediating structures—social groups that provide individuals with meaning, opportunities for action and a matrix for relationships unavailable to them in isolation—those intermediate associations which, as we have seen, are central to the functioning of the subsidiary state.\textsuperscript{139} As associations, they possess their own unique identities and range of competences capable of transmitting meaning to society and to the state, and capable of contributing to the common good. Situating religious associations within the framework of subsidiarity enables us to evaluate their functions in relation to other associations and to the state. A problematic religious “establishment” can then be conceived as a situation in which state authority has compromised a religious association’s mediating functions. Conversely, an “establishment” could arise when a religious association has improperly absorbed the governing functions of state authority. This provides a helpful vantage point from which to view a religious “establishment,” one measured against the concrete interactions between state and associations, instead of against the elusive standards of modern establishment clause jurisprudence.

Situating the problem of religious establishments within the vocabulary of subsidiarity first requires explaining why religious associations are properly seen as social groups that mediate between individuals and the state.\textsuperscript{140} This is a straightforward concept, and so requires only a brief sketch. As subsidiarity has increasingly embraced individual liberty of conscience, the theory naturally includes religious associations as mediating structures. That inclusion meshes with the treatment of religious associations in both state and federal jurisprudence in this country. Religious groups have long been deemed autonomous legal associations capable of interacting with other groups and with the state in order to transmit values and work for the common good.

Subsidiarity developed in significant part during a period in Western European history when state authority enforced religious orthodoxy.\textsuperscript{141}

\textsuperscript{139} Robert Vischer explains that “[t]he mediating status of a group or institution stems . . . from their tendency to facilitate self-empowerment and foster a sense of belonging and civic purpose.” Vischer, Beyond Devolution, supra note 1, at 117. A mediating structure connects individuals to the wider society in ways that heighten their social awareness and maximize the impact of their actions, yet preserve their own unique spheres of operation and identity. From a subsidiarity perspective, these attributes are invaluable because they instill a sense of responsibility for one’s self and one’s surroundings, along with the tools needed to act in betterment of both.

\textit{Id.}

\textsuperscript{140} On the nature of associations as mediating structures, see generally Vischer, Associations, supra note 46.

\textsuperscript{141} For a discussion of the development of the principle of subsidiarity in Europe, see supra notes 1-25 and accompanying text. See also John Witte, Jr., Religion and the American Constitutional Experiment: Essential Rights and Liberties 9-19 (2000). On the relationship between church and state throughout the
The common good was understood as an objectively verifiable, universally held truth that encompassed religious belief and practice, one that was upheld by the state. Individuals and groups may have been free to choose means for accomplishing their own purposes, but their autonomy did not include free ends, including religious ends. Those ends lay in state custody. This was less a product of subsidiarity itself than of the era’s limited notion of the liberty of conscience and of the common good.\textsuperscript{142} Subsidiarity has since developed, particularly in the work of Catholic social theorists and the Catholic Church itself, into a careful integration of liberty of conscience with the common good.\textsuperscript{143} With this development, subsidiarity naturally embraces religious associations as mediating structures, both as to ends (i.e., religious opinions and beliefs, worship and organization) and means (i.e., religiously-motivated social action, such as charity, education or political action). Modern theorists of subsidiarity classify religious groups among the most important of mediating structures.\textsuperscript{144} For instance, in their pioneering work, Richard Neuhaus and Peter Berger emphasize that religious institutions “are singularly important to the way people order their lives and values at the most local and concrete levels of their existence,” and that consequently “they are crucial to understanding family, neighborhood, and other mediating structures of empowerment.”\textsuperscript{145}

American law has long echoed this insight of subsidiarity by treating religious groups as autonomous legal associations deserving statutory and constitutional protection. There are many ways of demonstrating this, but two in particular will serve here. First, American states have consistently

\textsuperscript{142} See Millon-Delsol, supra note 29, at 56.

\textsuperscript{143} For a discussion of subsidiarity as Catholic social theorists understand it, see supra note 83 and accompanying text.

\textsuperscript{144} See, e.g., Carozza, supra note 1, at 47 (considering “religious communities” and “the freedom of religious belief and worship” as building blocks of subsidiarity in context of international human rights law); Pucillo, supra note 115, at 466 (including among mediating structures “religious, national, cultural and educational organizations”).

\textsuperscript{145} Neuhaus & Berger, Mediating Structures, supra note 14, at 228. Elaborating this claim, Robert Vischer explains that:

Nearly one-half of all associational memberships in this country are church related, one-half of all volunteering occurs in a religious context, and one-half of all personal philanthropy is religious. Further, there is a significant spillover effect, as churchgoers are substantially more likely to be involved in secular associations. And because religion is, at its center, about community, religious associations provide valuable insight into the sense of belonging that is made possible by associational life.

and strongly affirmed the legal autonomy of religious associations. Most early state constitutions explicitly recognized the religious pluralism reflected in the variety of religious "institutions," "societies," "associations" and/or "corporations."\(^\text{146}\) Such entities took a broad array of forms besides traditional churches: "lower schools, colleges, seminaries, charities, cemeteries, hospitals, asylums, poor houses, mission societies, [and] religious clubs[]."\(^\text{147}\) Thirty-six state constitutions guaranteed equality for these associations.\(^\text{148}\) A few constitutions went further, granting affirmative constitutional rights to religious associations for purposes such as incorporating, holding property, receiving donations and entering employment contracts.\(^\text{149}\) The existence of this robust associational pluralism was not only an end in itself, but also, as John Witte observes, a critical means of "ensuring religious liberty . . . [by] serv[ing] as a natural check both on the monopolistic inclination of any church and on the establishment tendencies of any state."\(^\text{150}\)

Second, although one could look to modern jurisprudence\(^\text{151}\) and scholarship\(^\text{152}\) affirming the associational integrity of religious groups, the example of pre-incorporation Supreme Court jurisprudence makes the

\(^{146}\) As John Witte describes: The Delaware Constitution guaranteed the "rights, privileges, immunities and estates of religious societies." Kansas included a right of religious groups to incorporate and to hold corporate property. Louisiana and Maryland protected the rights of religious trusts and charities to receive donations. Maine and Massachusetts provided that religious societies had freedom to enter contracts with their ministers. New Mexico explicitly protected the church authority's right to acquire and use sacramental wines. But most states left the issue of particular religious group rights to statutory, rather than constitutional, formulation.

\(^{147}\) Id. at 90.

\(^{148}\) See id. (explaining state constitutional guarantees for religious associations).

\(^{149}\) Id. at 91. Two states, Virginia and West Virginia, went in the opposite direction and "banned the right of religious groups to organize themselves as corporations." Id.

\(^{150}\) Id. at 90.


point forcefully. Before the incorporation of the religion clauses against the states in the 1940s, the Supreme Court had heard only seventeen cases touching religion, nine of which concerned church property disputes. Justice Miller’s observation in Watson v. Jones, an 1871 intra-church dispute over religious property, summarizes the Court’s positive view of religious associations: “Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints.” John Witte explains that in such cases, the Court acted on the premise that “[r]eligious groups, like all other legal associations, must be allowed to retain a corporate charter once lawfully given and must be allowed to use their properties in any lawful manner they deem apt, without undue interference by the state.” The Court even deferred to the decisions of religious authorities, reasoning in a famous passage that:

[T]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association . . . is unquestioned.

These early religion cases embraced the premise that religion, as both an individual and corporate enterprise, deserved legal protection, and that religious groups were entitled to use property and arrange internal business according to their own self-understanding. Consequently, it is easy to say that the basic conditions for applying subsidiarity to religious

153. See Witte, supra note 141, at 108.
155. Id. at 714 (noting Court’s view of religious associations, as discussed in Witte, supra note 141, at 109).
156. Witte, supra note 141, at 108 (describing Justice Story’s opinion in Terrett v. Taylor) (citing Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815)). In Terrett, the Supreme Court’s first religion case, the Court struck down an 1801 Virginia law rescinding the 1776 charter of the Episcopal Church and requiring it to dispose of its glebe lands because the law violated “principles of natural justice.” Terrett, 13 U.S. (Cranch) at 52 (rejecting complainant’s contention that church lands had been divested after revolution and that complainants (overseers of poor of parish of Fairfax) were enjoined from claiming title to land).
157. Watson, 80 U.S. at 728-29. Witte also discusses the 1872 case, Bouldin v. Alexander, in which the Court stated: “[W]e have no power to revise or question ordinary acts of church discipline, or of excision of church membership . . . . [W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off.” Witte, supra note 141, at 109-10) (quoting Bouldin v. Alexander, 82 U.S. (15 Wall.) 131, 139-40 (1872)).
158. See Witte, supra note 141, at 110; see also JAMES HITCHCOCK, 1 THE SUPREME COURT AND RELIGION IN AMERICAN LIFE 3-17 (2004) (discussing Supreme Court’s treatment of church property and governance disputes).
associations—associational integrity and autonomy—have long existed in American law.  

Recognizing that religious groups function as mediating associations invites inquiry into the particular roles and competences of such groups. Religious associations perform a myriad of societal functions that go beyond providing individuals with a place for religious worship. Reflection on any period of history finds religious groups at work in virtually every field of social endeavor. One barely starts by mentioning charities, health care, education, counseling, legal reform and social and political advocacy. Unsurprisingly then, much of the Supreme Court’s religion jurisprudence involves the participation of religious groups in social functions—preeminently education, but also, in the Court’s first disestablishment case, the provision of health care.

Since subsidiarity is supposed to adapt its requirements to the concrete demands of liberty in particular circumstances, the theory itself forecloses an exhaustive list of the competences of religious associations. Those competences will fluctuate depending on the kind of association and its particular social and historical milieu. The basic point is that reflection on how religious associations act as mediating structures begins by considering how religious groups function in a definite time and place. While it is difficult to speak comprehensively about a topic as broad as the “function” of religious associations in our pluralistic society, Robert Vischer has constructed a helpful taxonomy of how associations generally perform mediating functions—“identity, expression, purpose and meaning”—which “correspond to the four dimensions in which the mediating relationship occurs: place (identity), voice (expression), power (purpose) and autonomy (meaning).” Indeed, Vischer uses religious associations as primary examples of such mediating functions. In terms of Vischer’s

159. See, e.g., Garnett, Henry Adams’s Soul, supra note 152, at 1842 (observing Supreme Court cases recognizing freedom of expressive and religious association are “true to the principle of subsidiarity”).


161. See id.

162. A striking and instructive example from the Middle Ages is the role of religiously-grounded guild associations in the creation of the very notion of the city. See id.

163. An excellent starting point for reflection on the societal roles that religious groups have played in our own history is the two-volume set, A Documentary History of Religion in America to 1877 (Edwin S Gaustad & Mark A. Noll eds., 3d ed. 2003), particularly Volume 2, chapter 8, entitled “Religion and Society Engaged.”

164. See Bradfield v. Roberts, 175 U.S. 291, 297-300 (1899) (upholding congressional grant to build two hospitals in District of Columbia that were run by order of Roman Catholic nuns); see also Witte, supra note 141, at 107-08 (discussing jurisprudence of religious organizations acting in societal roles).

165. Vischer, Associations, supra note 46, at 963-64.

166. See, e.g., id. at 960 (noting that “much of my analysis focuses on religious associations, primarily because they are such a crucial component of voluntary as-
categories, one begins to imagine the powerful and wide-ranging roles that religious associations perform in our society. To sketch a few, the religious association is a vital center for individuals to join freely together and forge a place for constructing a common set of values and beliefs, for speaking and acting more powerfully and coherently in the surrounding society, and for creating effective buffers against corrosion by the state or other societal forces.\textsuperscript{167} Given that most religious associations focus on those questions at the deepest heart of human concern, it is difficult to overstate the delicate character of their mediating function. As Vischer observes, "[t]he worldview embodied by a particular association of individuals dedicated to a like-minded conception of ultimate meaning is at the center of those individuals' very being."\textsuperscript{168}

In view of the various functions of religious associations—whether the more inwardly-focused ones of providing places for communal belief, worship and support, or the more externally-focused ones of providing loci for care, social criticism and political action, one naturally considers their interaction with state authority. Subsidiarity, as we have seen, fundamentally concerns the attribution of competences among societal groups, including the state itself. It is precisely here that subsidiarity can illuminate the problem of religious establishments. Subsidiarity suggests thinking through the practical problems of church-state relationships, not only descriptively, but normatively. The theory does not merely illuminate the contours of the competence problem, but goes further by considering how the competences of religious associations \textit{ought} to co-exist with, overlap or be kept separate from, the competences of the state. Subsidiarity aims to preserve the vitality of mediating structures—in this case the religious association—in the societal web, and thereby promote both the genuine freedom of the person within the association, the vitality of the association itself and the common good.\textsuperscript{169}

Like any other healthy social group, a religious association mediates between individuals and the state by creating a unique relational space, one standing in constructive, creative tension with both the state and individuals.\textsuperscript{170} Robert Vischer describes this relational role of associations:

[T]he value of associations derives, in significant part, from the extent to which associations stand in tension with the individual on one side

\begin{itemize}
  \item \textsuperscript{167} See id. at 969-1011 (generally discussing these four kinds of associational mediation).
  \item \textsuperscript{168} Id. at 984.
  \item \textsuperscript{169} See, e.g., Vischer, \textit{Beyond Devolution}, supra note 1, at 116 (finding subsidiarity's "focus is on fostering the vitality of mediating structures in society"); id. at 118 ("While mediating structures do function as bulwarks against government encroachment, they are also facilitators of individual empowerment and efficacy.").
  \item \textsuperscript{170} See Vischer, \textit{Associations}, supra note 46, at 963.
\end{itemize}
and the state on the other. In other words, associations are important relationally, as their relationship with the individual and the state equips them to fulfill a mediating role. This role allows associations to serve as bridges between the individual and the surrounding, impersonal society, but it also injects tension into the association’s relationships with the individual and the state.\textsuperscript{171}

Because subsidiarity is designed to safeguard the integrity of associations, as applied to religious groups, the theory leads one to conceive of a problematic religious “establishment” as an attribution of competences among the state and religious associations that compromises an association’s mediating character to the detriment of the association itself, to the person, to the state and to society at large. One might say that because the state has taken too much from the association (or given too much to it), the association’s basic ability to create a particular relational space has been damaged. This approach to thinking about religious establishments has some distinct advantages over the ways we have become accustomed to contemplating them.\textsuperscript{172}

An adequate, stable description of a religious establishment continues to elude American jurisprudence and scholarship. Even if one were limited to describing an establishment as a legal phenomenon with historical roots in sixteenth and seventeenth century England and its American colonies, formulating a useful legal taxonomy would be daunting.\textsuperscript{173} The difficulties are vastly compounded by taking the view that a “law respecting an establishment of religion” is not merely an identifiable historical legal construct, but rather a governmental practice that partakes of some “aspect” of an historical establishment, or one that tends to manifest the “evils” of bona fide establishments.\textsuperscript{174} One can thus understand, if not excuse, the

\textsuperscript{171} Id. at 951-52 (citations omitted).

\textsuperscript{172} Indeed, as I discuss below, the most dramatic advantage that subsidiarity affords is to encourage us not to think of the “establishment problem” necessarily as a problem of constitutional magnitude, but rather to conceive most of the dilemmas that we now call “establishment problems” as prudential matters subject to political management. In this section, however, I am simply comparing a subsidiarity-driven analysis of common “establishment problems” with the usual analysis, which is of course driven by a variety of constitutional law tests. For a discussion of subsidiarity’s application to establishment problems, see infra notes 178-92 and accompanying text.


\textsuperscript{174} Michael McConnell writes that:

In the absence of more serious historical consideration of establishment and disestablishment at the time of the Founding, the Supreme Court has based its interpretation of the First Amendment on abstractions, such as “advancement of religion,” “entanglement,” “coercion,” “endorsement,” “neutrality,” and above all the “wall of separation between church and state.” While not entirely inaccurate, these abstractions are several steps removed from the actual experiences that lay behind the decision to deny
excrescence of judicial tests formulated to root out establishments—e.g., whether a law lacks a “secular purpose,” “advances or inhibits religion,” “entangles the government in religion,” “psychologically coerces religion,” “endorses religion,” creates “divisiveness” or fails to be “neutral” between “religion and non-religion” and so on. These formulations may be of little help in reaching objective decisions, but at least it is clear why they exist: to identify an undesirable church-state arrangement, or an “establishment of religion” that is putatively banned by the Establishment Clause.

Reconfiguring this quest within the framework of subsidiarity does not promise a new test, but it does point toward an analysis that transcends slogans and attempts to get to the heart of why certain relationships between religion and government are problematic. As already explained, subsidiarity holds that state authority should act to remedy the incapacities of social groups, but should never absorb them, in the sense of substituting its own maladapted functions for their more precisely calibrated ones. Thus, subsidiarity would see the archetypal “religious establishment” as presenting, in essence, a problematic distribution of competences among state authority and religious associations. The analysis would focus on how that distribution impacts the mediating character of the religious associations and, by extension, the freedom of the persons within them. Generally speaking, one would want to identify church-state arrangements in which religious associations’ mediating role becomes degraded because of involvement with state authority.

Perhaps the function of a religious

the government authority to erect or maintain an establishment of religion. At best they are oversimplifications; in some respects they are misleading.

Id. at 2205-06.


176. As Steven Smith observes, “[n]early all scholars—and, in less judicious moments, many judges and Justices—complain that the constitutional doctrines of religious freedom elaborated by the Supreme Court make little sense, and that the decisions rendered under these doctrines are chaotic.” STEVEN D. SMITH, GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA 1 (2001) [hereinafter SMITH, EQUALITY]; see also id. at 10 (“[T]here is something approaching unanimity on the proposition that the prevailing discourse of religious freedom—or the official framework and language within which issues of religious freedom are argued about and judicially resolved—is deeply incoherent.”).

177. See id.

178. Throughout his discussion of the mediating functions of associations, Robert Vischer describes various examples of such degradation. See Vischer, Associations, supra note 46, at 965 (stating that if state intervention prevents association from pursuing “ventures found meaningful by members, the functions of expression, identity, and purpose would be eviscerated; the association would cease playing a mediating role, and would simply be an arm of the state”); id. at 990 (discussing “an association that unwittingly eviscerates its own mediating function by becoming reliant on governmental largesse”); id. at 1000 (“[If a religious association] forego[es] its core mission or water[es] down its identity, . . . [this

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association has been compromised because it has lost religious authority to the state—as when, for instance, the government dictates a form of worship or meddles in a church doctrinal dispute. Perhaps the association has been compromised in the opposite direction by absorbing coercive authority from the state—as when, for instance, the government hands over licensing authority to a religious group. This approach is structural and functional, and it consequently suggests a baseline for thinking about problematic church-state relationships; as to any discrete function, state authority and a religious association should never coalesce into an identical, entirely overlapping entity. In the vocabulary of subsidiarity, the state would have completely absorbed the function of a religious association, and henceforth those functions of governing authority and religious association would be indistinguishable.

One might reasonably claim, however, that the object of the analysis is outdated. After all, such overlapping church-state relationships have not existed in the United States since 1833, when Massachusetts jettisoned the last trappings of its congregationalist establishment. True enough, but one should note why subsidiarity wants to avoid the paradigm example of a religious establishment in which church and state authority coalesce. Subsidiarity condemns the arrangement, but not because, as we are used to saying, it “advances religion” or is “non-neutral with regard to religion”—these formulations both prove too much and nothing at all about the undesirability of certain church-state arrangements. Subsidiarity, by contrast, operates on a more concrete plane. It condemns the paradigm religious establishment because the state has inappropriately involved itself in the functions and competences of a religious association. That sort of involvement is undesirable precisely because of its impact on the mediating function of the religious group and its members, and also because of the accompanying impact on the mediating function of other social groups and on the ability of the state to manage the common good. Through the lens of subsidiarity, an “establishment” describes a situation in which the mediating function of a religious association has been compromised. Its absorption into the state means either that it can no longer

would] . . . necessarily preclude any mediating function—i.e., as allegiance to the government as a funding source increases, the association’s ability to serve as a mediating force between individuals and the government necessarily declines.”). Vischer’s analysis shows how a focus on mediating structures helps flesh out why a religious establishment is undesirable. I am not proposing the analysis, as he seems to, as a means of interpreting the Establishment Clause itself. See, e.g., id. at 984-85 (discussing application of Establishment Clause in Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)); id. at 996-1000 (discussing Zelman v. Simmons-Harris, 536 U.S. 699 (2002) and school vouchers). For a further discussion of these analyses, see infra notes 183-87 and accompanying text.

179. See, e.g., Witte, supra note 141, at 93-94 (discussing disestablishment aspects of amendment of Massachusetts Constitution in 1833); see also GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 23-24 (1987) [hereinafter BRADLEY, RELATIONSHIPS IN AMERICA] (describing that in 1833, Massachusetts became last state to abandon “public prop” of tax-supported congregations).
contribute to the greater human flourishing of its own members (because it is no longer an autonomous organization), or that it can no longer contribute to, and indeed would impede, society’s realization of the common good (because it has monopolized one or more important aspects of that common good). Directing the inquiry in this way is appropriate not only analytically but historically, because it focuses on the central rationale for founding-era establishments. As Michael McConnell explains, the “dominant purpose of the establishment” in both England and the colonies “was not to advance religious truth, but to control and harness religion in service of the state.”

Of course, modern establishment problems rarely present the complete absorption of a religious association’s functions by the state. In few cases does a government entity either itself control, or delegate its own functions to, a religious group. Instead the problem typically lies somewhere on a spectrum short of complete absorption. For instance, school voucher controversies present a struggle between state and religious education that falls somewhere in this intermediate realm. The problem arises because the state attempts, through a voucher program, to create more educational flexibility for schoolchildren. One side of the dispute fears that the state is surrendering its public educational function to religious groups, or conversely, that religious associations will find their own autonomy co-opted by participation in the voucher program. The other side wants to equip parents with broader educational choices and to share the fruits of private schools, whether religious or non-religious, with the less wealthy. This side also wants to create healthy competition for public schools and thereby improve overall educational quality. The voucher problem, in short, is not the simple case of the state bluntly co-opting religious organizations, but instead presents a web of competing and partially overlapping interests and functions—public vs. private, religious vs. non-religious, less wealthy vs. affluent.

180. See McConnell, Establishment and Disestablishment, supra note 173, at 2208.

181. Id.


184. See id.

Thinking through this problem in terms of subsidiarity would begin with refusing to dilute its complexity. The problem does not map onto formulae like "neutrality" or "choice," not least because the contours of those formulae are themselves debatable (as is the prior question of whether the Establishment Clause proposes them as norms). Subsidiarity takes a different route. Subsidiarity seeks to establish a constructive equilibrium among an array of actors and their social functions: state authority, public schools, religious schools and their connected associations, non-religious private schools, religious and non-religious associations without connected schools, students eligible for vouchers and their parents and so on. Rejecting on principle that there is a neat solution, a subsidiarity analysis would investigate the unique circumstances of a particular voucher problem (considering, for instance, the variety and types of religious and non-religious groups in the area, its educational resources, its history of religious conflict, its socio-economic and religious makeup, etc.) and assess the relative competences of the various associations involved. It would seek to locate decision-making authority as locally as possible (individual schools or school districts), while recognizing that higher authorities (school boards or state educational boards) would need to discern what kinds of interventions would be necessary to remedy problems as they arise. The overarching concern would be to preserve the maximum amount of autonomy for all private associations involved, consistent with the freedom of the children and parents participating in the program. In superintending this complex minuet, state authorities would be acting to maximize the educational health of the entire society, while recognizing at the same time that they are doing so not through a monopoly, but through cooperation with private associations who are capable of pursuing the common good themselves.

Needless to say, this sketch barely scratches the surface and an exhaustive, subsidiarity-based analysis of any particular situation is beyond the scope of this Article. Generally speaking, however, working through the analysis might result in an array of differently-configured school voucher programs. Or it might result in none at all. A particular state authority might reasonably decide that, in the interest of the educational common good, voucher programs should be rejected precisely because of their potential for creating religious conflict or because of their risk of diluting religious associations' educational missions. By the same token, local authorities might decide to experiment with vouchers on a limited (stating that Ohio's voucher program is consistent with Establishment Clause); Lupu & Tuttle, *Zelman's Future*, supra note 183 (discussing Supreme Court's effect on relationships between government and religious institutions).

186. See, e.g., Smith, *Equality*, supra note 176, at 13-17 (discussing difficulty of applying concept of "equality" to substantive questions of religious freedom).

basis, or to forego experimentation. Individual religious schools might decide to participate in a voucher program, or instead might decide the risks are too great. But whatever resolution is reached will not depend on a pre-programmed rule about the right relationship between religion and government. From the point of view of subsidiarity, general rules of the genre—"separation of church and state" or "neutral between religion and non-religion"—simply fail to do justice to the concrete paradoxes and complexities that inevitably present themselves in a religiously pluralistic society.

The above sketch shows that, unlike current analyses of religious establishments, subsidiarity does not propose any a priori substantive view about the "correct" relationship between church and state. Such a substantive view—e.g., that the state should be formally or effectively neutral between religion and non-religion—would be foreign to subsidiarity because it would introduce a substantive bias into what is essentially a procedural inquiry. It would create rigid divisions where subsidiarity seeks flexibility and adaptability. That is, subsidiarity is interested in facilitating the creation of a constructive equilibrium in which religious associations, and the people in them, are as free as possible to pursue their goals, consistent with the overall common good. It is inconsistent with that goal, however, to say that the common good already includes some substantive view of the relationship between government and religion.

To be sure, we might say that subsidiarity has a built-in procedural view of church-state relationships. As already explained, it holds that government should not absorb the functions of religious associations and vice versa. But this procedural "separation of church and state" is far more modest than the well-known varieties of substantive "separation"—again, such as theories of neutrality or non-endorsement. Consequently, the separation latent in subsidiarity would leave a broader space within civil soci-

188. See, e.g., STABLE, supra note 93, at 355-63 (discussing potential threats to religious associations' identities from acting as mediating institutions for social services); Vischer, Associations, supra note 46, at 999 (suggesting that particular religious associations might decline to pursue state funding because "the outside influence that accompanies the funding—whether through government regulation, public pressure or otherwise—may actually hinder the groups' pursuit of their original purposes, alienating core constituencies in the process").

189. The kind of analysis subsidiarity suggests for these problems can be described as "prudential." For an excellent discussion of prudential decision-making in the context of religious freedom, see SMITH, EQUALITY, supra note 176, at 62-82.

190. Patrick Brown writes that since "subsidarity should be viewed as an open and heuristic notion," then "[u]ltimately there is no rule, formula, or concept that can tell us precisely how power should be delegated or tasks should be distributed between any particular hierarchy of communities or organizations or within communities or organizations. Everything depends on concrete insights appropriate to particular and often changing situations." Patrick Brown, Overcoming "Inhumanly Inept" Structures: Catholic Social Thought on "Subsidiarity" and the Critique of Bureaucracy, Law, and Culture, 2 J. CATH. SOC. THOUGHT 413, 428 (2005) (describing functional subsidiarity and its contribution to common good).
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by the interaction of religious associations and government. Thus, by comparison to traditional establishment analysis, subsidiarity is more attuned to the distinct interactions between government and religious associations. It is not, however, concerned with background substantive theories that prophylactically limit the permissible interactions between religious associations and government. Nor, by the same token, is it interested in predicting, as current establishment analysis does, whether those interactions will have the “effect” of “advancing religion” or creating “divisiveness.” One might say, in sum, that the key difference between a subsidiarity-driven analysis of establishments and a traditional analysis is that subsidiarity is far more substantively modest.

It must be emphasized, however, what a subsidiarity analysis of religious establishments does not say. It does not suggest that subsidiarity provides a new and more powerful tool for courts to analyze church-state problems. Indeed, the very difficulty and contingency of the subsidiarity analysis confirm in practice what theory suggests: i.e., that subsidiarity does not function comfortably as a source of a priori judicial standards. Instead, it is a general conditioning principle for attributing relative competences among associations, which can aid decision-makers in chiseling out solutions to multifaceted problems. The decision-maker, however, is not necessarily, or even preferably, a court applying a constitutional or statutory principle that purports to concretize, in advance, the requirements of subsidiarity.

On the positive side, the analysis suggested by subsidiarity functions without the baggage of slogans such as “separation of church and state” or “maximum religious liberty.” Whether or not those phrases have any determinate practical content is debatable. Taken on their own terms as sources of legal rules, however, they rarely provide enough guidance to resolve the difficult problems that the church-state area seems determined to present.

These conclusions present a problem, however. In light of them, one is tempted to conclude further that subsidiarity is useless for interpreting the Establishment Clause of the Constitution. After all, for the last sixty years, that Clause has been applied to church-state disputes through the matrix of judicially-created legal rules. This part of the Article has thus far

191. In a recent essay, Michael Novak articulates a similar understanding of a more modest “separation of church and state.” He writes that:

[Separation] does point to an important difference of function and public role. But that “separation” is not the same thing as demanding an end to the interpenetration of religion and society. Church and state do not cover the same territory as religion and society. Church and state are narrower, institutional concepts. Citizens have a right to the free exercise of their religion in private and in the full range of the public activities of civil society.


192. For a discussion of the problems this conclusion presents in terms of current Establishment Clause jurisprudence, see infra notes 193-97 and accompanying text.
suggested: (1) that subsidiarity itself does not function comfortably as a source for fixed judicial rules; and (2) that the "establishment problem" viewed through the lens of subsidiarity is therefore not amenable to rule-based determination. The natural conclusion would seem to be that, whatever policy aid subsidiarity might furnish at the intersection of religion and government, it can offer no help in interpreting the Establishment Clause. The next section grapples with this forceful objection.

B. Subsidiarity and the Establishment Clause

We can now attempt to understand the Establishment Clause itself as an expression of subsidiarity. This will involve three steps, two of which have already been discussed. First, in one aspect, subsidiarity describes a structural strategy for allocating government powers, best seen in a federalist structure. Second, the federalist structure of the U.S. Constitution evokes that aspect of subsidiarity. The third step—one that will be explored for the remainder of this Article—is to suggest that the Establishment Clause can be understood as part of the subsidiary strategy of the Constitution. Applied in this way, subsidiarity helps explain a great deal about the content and function of the Clause, about its history and application and about its place within the overall constitutional structure.

Recall the two related but distinct aspects in which subsidiarity appears: (1) as a normative ordering principle guiding a decision-maker in hammering out an equilibrium between competing social groups and the state; and (2) as a description of the strategic allocation of governmental powers in a federalist structure. In its first aspect, subsidiarity appears ill-fitted as a source for judicially-enforceable rules delimiting state authority in advance because subsidiarity is by definition a conditioning influence on state intervention that demands flexibility. Limiting intervention ahead of time to rigid categories or contingencies would sap the principle of its power or change it into a toothless hortatory provision. Such is not the case, however, when subsidiarity is expressed in a federalist system. There the pre-existence of the constituent states allows subsidiarity to be expressed through a governmental structure. Already possessing the competences of self-government, the pre-existing states assign to the new central government certain spheres of competence that they judge better located there. Here subsidiarity does not function as a normative rule for evaluating the exercise of governmental powers but is rather the theoretical blueprint for a tangible structure.

As a simple illustration will show, the U.S. Constitution has obvious affinities with such a structure. About a decade after the American col-

193. For a discussion of subsidiarity's application to allocation of governmental powers, see supra note 62 and accompanying text.
194. For a discussion of subsidiarity's use as a blueprint for a governmental power structure, see supra note 65 and accompanying text.
195. For a discussion of the relationship between the American governmental structure and the concept of subsidiarity, see supra note 67 and accompanying text.
onies broke free from England, a group of states decided to reconfigure their relationship from a loose confederation into a more tightly bound and complexly imagined federal republic. The “people” of the constituent states were envisioned as reclaiming sovereignty and redistributing portions of it to a new central government, “in order to form a more perfect Union.”196 The new government of the “United States” possessed powers divided among branches and delimited to spheres of sovereignty with respect to the states. For instance, the national legislature’s powers were enumerated in terms of areas of competence, such as to “declare War,” to “establish a uniform Rule of Naturalization” and to “regulate Commerce with foreign nations.”197 Other provisions calibrated areas of competence between the states and the national government—e.g., with regard to militias or the election of federal representatives.198 The essentially limited nature of the grant of powers is explicitly recognized by the Tenth Amendment, which 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.”199 This strategy of formation articulates concretely what subsidiarity prescribes in theory.

A glance at the ratification debates (well reflected in the Federalist Papers and the writings of their anti-federalist opponents) shows that the overriding concern of the framing generation was to confine the new federal government’s powers and to reserve to the states sufficient autonomy to preserve a healthy measure of autonomy and a fortiori their very existence.200 Recurring throughout anti-federalist authors, for instance, is a fear, often cast in the idiom of subsidiarity, that the powerful central government will “absorb” or “annihilate” the states.201 In response, various

196. U.S. Const. pmbl.
197. See id. art. I, § 8, cl. 3-4, 11 (listing Congress’s powers).
198. See id. cl. 16 (empowering Congress to “provide for organizing, arming, and disciplining, the Militia” while “reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress”); id. § 4, cl. 1 (declaring that state legislatures shall prescribe “Times, Places and Manner of holding Elections for Senators and Representatives,” but Congress may “at any time by Law make or alter such Regulations, except as to the Places of choosing Senators”).
199. Id. amend. X.
201. For instance, in the sixth of his essays against ratification, “Brutus” summarizes his concerns as:

[W]hether the general government of the United States should be so framed, as to absorb and swallow up the state governments? or whether, on the contrary, the former ought not to be confined to certain defined national objects, while the latter should retain all the powers which concern the internal police of the state[s]?
numbers of The Federalist take pains to reassure states that their own existences will survive, and indeed flourish, under the aegis of the newly created central government, and also that its powers have been carefully limited to those necessary to promote the common welfare of the whole.202

But our initial question remains: Assuming that subsidiarity accurately describes the structural allocation of competences in the American federal system, how does that help us understand the Establishment Clause as a component of that system? For applying subsidiarity to the Clause immediately creates a paradox. Subsidiarity would view the Clause as a decision by the constituent states not to vest the new central government with competence over a field the Clause describes as laws “respecting an establishment of religion,” and a concomitant decision to retain power over that field at the state level. It follows that the Clause would not posit any comprehensive substantive theory of church-state relationships at the federal

Brutus No. 6 (Dec. 27, 1787), reprinted in The Anti-Federalist Papers and the Constitutional Convention Debates 280 (Ralph Ketcham ed., 1986). In his second letter, the “Federal Farmer” warns that the imbalance between federal and state power would inevitably mean that “the state governments must be annihilated, or continue to exist for no purpose.” Letters from the Federal Farmer to the Republican, No. 2 (Oct. 9, 1787), reprinted in The Anti-Federalist Papers and the Constitutional Convention Debates, supra, at 268. As Gordon Wood explains, the anti-federalists “had no doubt that it was precisely an absorption of all the states under one unified government that the Constitution intended, and they therefore offered this prospect of an inevitable consolidation as the strongest and most scientifically based objection to the new system that they could muster.” Wood, supra note 200, at 526.

202. See, e.g., The Federalist No. 45, at 237, 241 (James Madison) (addressing “whether the whole mass of [federal powers] will be dangerous to the portion of authority left in the several states,” and reasoning that “[t]he powers delegated by the proposed constitution to the federal government, are few and defined,” whereas “[t]hose which are to remain in the state governments, are numerous and indefinite”); see also The Federalist No. 9, at 37-41 (Alexander Hamilton), No. 46, at 242-48 (James Madison). See generally The Federalist Nos. 41-44, at 207-37 (James Madison). My claim is not that subsidiarity, as a political theory, is embedded in the U.S. Constitution. Rather, my point is simply that the federal structure erected by the Constitution evidences in concrete practice the theoretical lineaments of subsidiarity. Furthermore, this claim concerns the structure of the U.S. Constitution, and not necessarily the operations of the national government’s powers. To make the latter claim would re-introduce all the problems inherent in using subsidiarity as a source of normative constitutional rules. While subsidiarity gives an account of why the federal government was allocated certain areas of competence, it may well not describe how the federal government actually exercises its powers. For instance, the federal government might well exercise its powers to regulate interstate commerce in a way that disregards the competing competences of state governments, or it may act in a more restrained manner. Regardless, the claim is not that subsidiarity is an a priori constitutional limit on the exercise of federal power (although it may function as a prudential limitation on federal representatives), nor is the claim that federal courts are somehow “enforcing” subsidiarity when they police the boundaries of the commerce power. One would do better to speak of a court enforcing subsidiarity indirectly when it enforces the constitutional limits on federal power.
level. The Clause would also appear to be an unlikely source for judicially enforceable rules about most church-state issues. The paradox presented, of course, is that this subsidiary view of the Establishment Clause bears little resemblance to the Clause the Supreme Court has been struggling to interpret for the past two generations. That Clause is supposed to contain, albeit in a maddeningly obscure fashion, answers to questions such as: "Does a large menorah next to a Christmas tree outside city hall constitute a forbidden establishment of religion?" The subsidiary Clause, by greatest contrast, would offer as its only response to such a question: "We have thought it best to leave such questions to the states."

So we are thrown back again, and now even more pointedly, on the original dilemma: What good is subsidiarity to understanding the Establishment Clause? But again, simply refining the question suggests some answers. The counter-intuitive picture of the subsidiary Establishment Clause actually illuminates a basic difficulty courts and commentators have encountered in interpreting and applying the Clause. Specifically, subsidiarity shows why it is difficult to reconcile modern Establishment Clause jurisprudence, which treats the Clause as a source of rules for resolving specific church-state issues, with the history of the Clause, which suggests that the Clause was neither proposed as a normative source for resolving most church-state disputes, nor intended to embody any overarching theory of church-state relationships.

The genesis of the Constitution and the First Amendment bedevils our modern search for "constitutional" church-state principles. The framing, text and ratification of the First Amendment do not reveal what substantive church-state theory, if any, was being promoted by the religion

203. In another sense, however, subsidiarity simply underscores and provides a fuller theoretical account for something that religion clause scholars have long observed, so much so that Steven Smith describes it as a "commonplace": i.e., that "[t]he religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise in federalism." Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 18 (1995) [hereinafter Smith, Foreordained Failure] (listing sources collected in Note, Rethinking the Incorporation of the Establishment Clause, 105 Harv. L. Rev. 1700, 1703 n.25 (1992)).

204. See, e.g., County of Allegheny v. ACLU, 492 U.S. 573, 600-01 (1989) (noting Establishment Clause "limits religious content of the government's own communications" as well as "[prohibits] government support and promotion of religious communications by religious organizations . . . . By prohibiting government endorsement of religion, the Establishment Clause prohibits precisely . . . the government's lending its support to the communication of a religious organization's religious message").

205. That is not to say, it bears noting, that the menorah-and-Christmas-tree situation even implicates the basic idea of a religious establishment, nor that the subsidiary Establishment Clause would bar the federal government from setting up such a display. The example is meant to suggest only that the subsidiary Clause would not have been formulated to answer substantive questions such as the one the Court labored at so mightily in Allegheny County. For a discussion of Allegheny County, see supra note 204.
The Constitution those clauses amended contains only one substantive rule about the place of religion in the federal government (Article VI’s ban on federal, but not state, religious tests for office) and one subtle accommodation of religious scruples (the “oath or affirmation” provisions). Debates over substantive church-state theories in framing and ratifying the original Constitution are sparse and inconclusive, supporting Gerard Bradley’s common sense conclusion that “[t]he Philadelphia Framers were not concerned with religion, because they believed theirs was a project unrelated to it.” A straightforward search for constitutional church-state theories in the framing and ratification debates thus seems to lead nowhere.

Subsidiarity reorients our search for Establishment Clause meaning to the states’ perspectives, focusing on their concerns about the powers of the new central government and their own abilities to continue to govern themselves. When we do that, the lack of substantive theorizing about church-state relations becomes less surprising. It is widely understood that the overriding concerns about the Constitution as a whole centered around the nature and extent of the powers being confided to the new central government, and the possible consequences of the exercise of those powers on the states. Subsidiarity would see state concerns about church-state matters as mirroring states’ wider concerns about federal

206. See, e.g., Bradley, RELATIONSHIPS IN AMERICA, supra note 179, at 112 (“Not a single state recorded debates, and individual voting behavior was rarely memorialized.”); Witte, supra note 141, at 64 (“The record of the Congress’s effort [to draft the religion clauses] is considerably slimmer than is apt for such a momentous act.”).

207. U.S. CONST., art. VI, cl. 3 (“[N]o religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”); id. (binding all federal and state officers “by Oath or Affirmation, to support this Constitution”); id. art. II, § 1, cl. 8 (setting forth “Oath or Affirmation” of President as “I do solemnly swear (or affirm)”).

208. The one exception is the debate over the No Religious Test Clause in Article VI. For a discussion of the Religious Test Clause, see supra note 205. For a discussion of the debate, which centered on state concerns that the absence of any federal religious test would open federal office to Catholics, Muslims, Jews and other undesirables, see generally Bradley, RELATIONSHIPS IN AMERICA, supra note 179, at 74-75; Gerard V. Bradley, The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself, 37 CASE W. RES. L. REV. 674, 694-711 (1987) [hereinafter Bradley, The No Religious Test Clause].

209. James Hitchcock has written that “[t]he great enigma of the Religion Clauses of the Bill of Rights is the fact that they occasioned so little discussion during their enactment.” 2 Hitchcock, supra note 158, at 29 (2004). He notes further that “there is little record of the way in which the Religion Clauses were received in the states.” Id.


211. See generally, e.g., McDonald, supra note 200, at 186 (observing that “one absolutely central issue—perhaps the absolutely central issue—before the [Philadelphia] convention was the role, if any, that the states would play in the reorganized and strengthened common authority”); Wood, supra note 200, at 519-32 (describing political debates surrounding extent and nature of federal powers under new Constitution).
power in general. The framers and ratifiers would thus have had no inclination to debate what substantive theory of church-state relationships to embed in the new Constitution (as opposed to debating, for instance, the scheme of representation in Congress or the taxing power of the federal government). This makes sense of John Witte’s observation that “[i]t was commonly assumed at the convention that questions of religion and of religious liberty were for the states and the people to resolve, not the budding federal government.”

The church-state issue that did occupy the states was not substantive, but jurisdictional: Whether the new Constitution reliably limited federal power over their own church-state arrangements. Thus six states were moved to condition ratification on the adoption of limitations on federal power, variously phrased, over some aspect of religion or religious establishments. These proposals and the formulations that then percolated through the Congress, while motivated by substantive church-state theories, were clearly not designed to create new federal powers modeled on those theories. Instead they were meant to curtail federal power over a sensitive area of state competence. Subsidiarity readily makes sense of such proposals within the framework of building a federalist, and hence a subsidiary, governmental structure. On the threshold of their bold new experiment in a federal republic, the pre-existing constituent states wanted to safeguard their own prerogatives in an area where the bitter memories of an established national church were still fresh. The Establishment Clause was drafted to declare and underwrite that understanding. As Carl Esbeck explains, the Clause was not only a vertical, federalism-based restraint on federal power,

but also a public proclamation of sorts. The First Congress was laying to rest latent but widespread fears about the new central government by declaring the popular sentiment: although

212. Witte, supra note 141, at 61.

213. See 2 Hitchcock, supra note 158, at 29 & n.70 (listing authorities). Commenting on the “mysterious” silence of the Framers on the content of the Religion Clauses “given the passionate debates engendered by those terms in later history,” James Hitchcock writes that the “silence is comprehensible on the assumption that the terms were largely devoid of positive content and were intended merely to ensure that the federal government did not interfere with the religious arrangements of the various states.” Id. at 29.

214. See Witte, supra note 141, at 63-64.

215. See id. at 64 (citing several proposed amendments on religious liberty, in particular stating that those from New Hampshire, Virginia, New York and North Carolina were “critical”). For instance, Virginia’s proposal claimed:

That religion, or the duty which we owe our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.

Id.
there were state-by-state disagreements concerning official support for religion, the national government was one of limited delegated powers and hence had no say in the matter.\textsuperscript{216}

Subsidiarity thus supports the understanding that the framing and ratification of the religion clauses, and the Establishment Clause in particular, were principally directed to preserving state power and confining federal power over church-state arrangements.\textsuperscript{217} Behind the amendment proposals and the final Clause itself was the background goal of preventatively limiting the exercise of some inchoate power of the new federal\textsuperscript{218} government over a particular realm of state decision-making (a power which, of course, federalist proponents of the new Constitution vehemently denied).\textsuperscript{219} When federalists denied that such amendments were necessary, they did not emphasize positive federal guarantees in favor of religious liberties. Instead they stressed the lack of enumerated federal power to interfere in state religious arrangements and, famously in Madison’s \textit{Federalist 10} and \textit{51}, the checking function of a thriving multiplicity of religious sects.\textsuperscript{220} In that vein, Gerard Bradley writes that the

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\textsuperscript{217} This understanding of the original meaning of the Establishment Clause has occasioned a lively debate among scholars. \textit{See generally Ira C. Lupu & Robert Tuttle, Federalism and Faith, 56 Emory L.J.} 19 (forthcoming 2006), available at www.ssrn.com/abstract=900372 (last visited Oct. 31, 2006) (summarizing debate over federalism aspects of Establishment Clause) [hereinafter Lupu & Tuttle, \textit{Federalism and Faith}]. The purpose of this article is not to take sides in the debate, but to argue that subsidiarity supports the view that the primary goal of the Establishment Clause was federalist—i.e., to keep the federal government out of state church-state arrangements—and that the Clause affirmatively did not posit any independent substantive theory of church-state relationships at the federal level.

\textsuperscript{218} \textit{See} \textit{Wythe, supra} note 141, at 48, 300 n.84. Underscoring this point, Madison alone showed an interest in amending the Constitution to extend guarantees and disabilities in the area of religion to the states, but his view was not widely held and was not influential in the drafting debates. \textit{See id.} at 48, 74-75.

\textsuperscript{219} \textit{See, e.g., id.} at 61 (reporting Madison’s comment to Virginia Ratifying Convention that “[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation” and James Iredell’s remark to North Carolina Ratifying Convention that federal government “certainly [has] no authority to interfere in the establishment of any religion whatsoever, and I am astonished that any gentlemen should conceive they have”).

\textsuperscript{220} \textit{See id.} at 79-80; \textit{see also The Federalist No. 10, at 42-48} (James Madison) (discussing structural remedies against factionalism and including within causes of faction “[a] zeal for different opinions concerning religion”); \textit{The Federalist No. 51} (Alexander Hamilton or James Madison) (claiming that “[i]n a free government the security for civil rights must be the same as that for religious rights . . . consist[ing] in the one case in the multiplicity of interests, and in the other in the multiplicity of sects”). In his remarks to the Virginia Ratifying Convention in June 1788, Madison remarked that “[h]appily for the states, they enjoy the utmost freedom of religion,” which “arises from that multiplicity of sects, which pervades
thrust of the proposed religion amendments "reveals that the religious liberty endangered, and for which protection was sought, was that liberty the people had long enjoyed, which was currently enshrined in all state constitutions and accorded with contemporary popular views on the subject." 221

Subsidiarity's focus on limiting federal power also clarifies the sparse records of the framing of the religion clauses. 222 Instead of attempting to wring theoretical substance from the subtle shifts in the clauses' phrasing, 223 subsidiarity suggests concentrating on the framers' structural motivations and how they afforded a surprising measure of consensus among federalists and anti-federalists. As Gerard Bradley describes, these complementary motivations were "the federalist view that Congress had no enumerated authority over religion in the first place . . . [and] the basic antifederalist endeavor to preserve existing state constitutional regimes from intermeddlying federal legislation." 224 Those twin goals around which both sides could unite capture subsidiarity's project of allocating distinct governmental competences during the formation of a federal structure. The Establishment Clause thus becomes not a latent formula for resolving church-state disputes, but a political compromise designed to avoid making those disputes a convulsive national issue.

This approach also helps contextualize the reservations expressed during debates over the phrasing of the religion clauses. It becomes clear that these reservations were neither about the contours of federal power recognized by the clauses nor about what church-state theory the clauses were instantiating, but instead were anxieties about what possible misuse of the provisions would mean for state religious arrangements. For instance, during the House debate, Representative Peter Sylvester of New York worried that a misguided "construction" of the amendment "might be thought to have a tendency to abolish religion altogether," while Roger Sherman "thought the amendment [was] altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments," a position also suggested

America, and which is the best and only security for religious liberty in any society." 5 The Founders' Constitution 88 (Philip B. Kurland & Ralph Lerner eds., 1987).

221. Bradley, Relationships in America, supra note 179, at 78. Bradley concludes that, in flat contradiction to the Everson Court's historical understanding of the Establishment Clause as representing a revolution in church-state relationships, "the ratifying process was deeply conservative in its celebration of the present and immediate past and in its insistence that the prevailing regime need be preserved inviolate." Id. at 80.

222. See, e.g., Witte, supra note 141, at 64-72 (discussing drafting of First Amendment religion clauses).

223. See id. at 72 (noting that "[t]he final text [of the religion clauses] has no plain meaning" and "[t]he congressional record holds no Rosetta Stone for easy interpretation").

224. Bradley, Relationships in America, supra note 179, at 92 (commenting on Samuel Livermore's addition of "Congress" to clarify House version of amendment, but stating that his comments apply equally to entire drafting process).
more subtly by Madison in the debate. Taking a different tack, Daniel Carroll supported the amendment and suggested that "[h]e would not contend with gentlemen about the phraseology," but only because "it would tend more towards conciliating the minds of the people to the Government." Elbridge Gerry's reaction to the proposed insertion of "national" before "religion" shows that worries over federal power were foremost in his mind. Gerry objected to the change from "no religion shall be established" to "no national religion shall be established," not because he wanted to clear the way for Congress to found a national religion, but because the word "national" raised the specter of a consolidated government so repugnant to anti-federalists. Finally, Benjamin Huntington's anxieties most dramatically illustrate solicitude for state religious arrangements. Huntington feared that a broad interpretation of the amendment would grant a federal court jurisdiction to interfere in New England states' enforcement of compulsory support for ministers' salaries, but Madison assured him it would not. As generations of religion clause scholars can attest, the unhappy truth is that these minimalist debates provide little help in defining an "establishment of religion." Subsidiarity helps us see, however, that the debate was not even directed to the question of resolving anything so momentous as "the church-state question." Rather, the debates strongly suggest a shared anxiety about reserving state management over a sensitive area of social policy. Although

225. Witte, supra note 141, at 66. Madison followed Carroll's comments by explaining his view that the provision meant "that Congress should not establish a religion," enforce it by law, nor compel anyone to worship contrary to his conscience. Id. But Madison immediately added that "[w]hether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain" fears about Congress' power under the necessary and proper clause." Id.

226. Id.

227. Id. at 67.

228. Id. (explaining that "[i]t has been insisted upon by those who were called antifederalists, that this form of Government consolidated the Union").

229. See id. at 66-67 (explaining views of Huntington and Madison); see also 5 The Founders' Constitution, supra note 220, at 92-94 (setting out House debates on religion clauses). Gerard Bradley accurately parses the final exchange between Huntington and Madison. Huntington, as Bradley explains, "was asking Madison whether the New England system, much more coercive than even the general assessment opposed by Madison in 1785, might be an establishment... Madison alleviated this fear, clearly indicating that there was no conflict." Id. Bradley adds that, in Everson, Justice Rutledge's dissent got this exchange exactly backwards, understanding Madison to be saying that the compulsory clergy tax was in fact an "establishment of religion." See Bradley, Relationships in America, supra note 179, at 91; see also Everson v. Bd. of Educ., 330 U.S. 1, 11-23 (1947) (Rutledge, J., dissenting).

230. See 5 The Founders' Constitution, supra note 220, at 90. In that vein were the remarks of future Supreme Court Justice James Iredell at the North Carolina Ratifying Convention in July 1788, one year before the drafting of the religion clauses. Iredell defended at length Article VI's prohibition on federal religious tests as a prime instance of the proposed Constitution's solicitude for religious liberty. The connection in Iredell's thinking between the discrete limitation over
the participants did not know the term, this was a debate over subsidiarity, and not one over substantive church-state matters.

In addition to suggesting that the Establishment Clause was originally concerned with protecting state competences over establishment policy, subsidiarity also suggests it is anachronistic to read the Clause as offering a comprehensive theory of church-state relationships for enshrinement at the national level (or, for that matter, for incorporation against the states).231 The absence of church-state theory in the Clause follows from the withholding of federal competence over religious establishments. Viewed through the lens of subsidiarity, if the Clause represents the election not to nationalize church-state relationships, then the last thing we should expect to find within the Clause is a substantive theoretical account of those relationships. A "substantive theoretical account" simply refers to what Steven Smith calls "first-order or substantive" questions about religion and the state, such as: "Should the state subsidize a religion? Should it support all religions, or at least all Protestant religions, on equal terms? Should religious heresy or blasphemy be punished?"232 By contrast, "second-order" questions concern "governmental organization, or the allocation of jurisdiction."233 In Smith's terms, subsidiarity suggests that the Establishment Clause is not concerned with first-order religion questions. Instead, the subsidiary Clause underscores the answer already implicitly given by the Constitution to the second-order question about jurisdiction over state religious establishments.

Unlike most originalist examinations of the Clause, a subsidiarity analysis of the Clause's theoretical content avoids the hopeless task of parsing different formulations of the religion clauses and divining the in-

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231. For a discussion of incorporation of the Establishment Clause, see infra notes 246, 249 & 251 and accompanying text.

232. Smith, Foreordained Failure, supra note 203, at 19.

233. Id.
tentions of their authors or ratifiers. 234 If, as subsidiarity suggests, the states' overriding concern centered on the exercise of federal power over the subject matter of religious establishments, then the religion clause architects likely would have avoided as impractical and unnecessary the task of formulating some preferred theory of church-and-state and projecting it into the Constitution. This view does not tempt us to search the entrails of the various religion clause formulations for hidden theories, but instead to take a wider view of the background against which those amendments were made and debated. For subsidiarity, the key historical point is this: Before and after the passage of the Constitution and its religion clauses, the hard substantive work in the church-state area occurred not at the national level but in the states, where it would continue for another century-and-a-half. 235 As Carl Esbeck explains, the "disestablishment" of existing state establishments was neither a national watershed nor was it even the work of the First Amendment. Instead, "disestablishment unfolded more gradually, state by state, and somewhat differently in each state, depending on the state's unique colonial background." 236 Given where the work of disestablishment occurred, the state level was where church-state theories were needed, and a subsidiary Establishment Clause would be chiefly concerned to see that they were kept there.

As a subsidiary provision, the Clause is in fact the opposite of grand theorizing. As already observed, theories of church-state relationships certainly lay behind founding-era debates about whether an Establishment

234. After a careful parsing of the various state proposals, the numerous House and Senate formulations and the recorded debates, John Witte concludes that "[t]he final text has no plain meaning . . . [t]he congressional record holds no Rosetta Stone for easy interpretation," and that, even given twenty separate drafts of the clauses to sift, "[t]he congressional record holds no dispositive argument against any one of the nineteen interim drafts and few clear rules on why the sixteen words that comprise the final text were chosen." Witte, supra note 141, at 72; see also Smith, Foreordained Failure, supra note 205, at 46-48 (discussing difficulties of modern, originalist project of trying to reconstruct answers to first-order religion questions from historical evidence).

235. Commenting on the surface secularity of the new Constitution, John Witte elaborates precisely this point:

The seeming impiety of the work of the 1787 Constitutional Convention must be understood in political context. It was commonly assumed at the convention that questions of religion and of religious liberty were for the states and the people to resolve, not the budding federal government. By 1784, eleven of the thirteen states had already crafted detailed constitutional provisions on religious liberty. . . . The mandate of the 1787 convention was to create a new national sovereign with enumerated powers and delineated procedures. What was specifically not given to this new federal sovereign was to be retained by the sovereign states and the sovereign people.

Federal power over religion was not considered part of this new constitutional calculus.

Witte, supra note 141, at 61.

Clause (and the Religious Test Clause) was desirable. The content of those theories, however, differs from a subsequent decision to vest a church-state theory in the federal constitutional milieu via the Establishment Clause. Separating these two distinct ideas is crucial to a subsidiary view of the Clause. Subsidiarity as a structural principle is not concerned with managing substantive legal theories or legal outcomes. In this area, for example, it does not arbitrate between “benevolent neutrality” or “strict neutrality.” Nor does it propose to answer the problem of religious symbolism in the public square. Instead, as it relates to federalism and the Establishment Clause, subsidiarity concerns the assignment of competences among constituent governmental structures. Thus subsidiarity asks whether the Clause integrates into a federal structure and, if so, whether it adds or subtracts competences to or from the central government. As discussed above, subsidiarity supports a view of the Clause’s historical context which suggests that the Clause is a negative provision vis-à-vis the federal government. But in any case, the answers to those questions are separate from the question of whether the Clause enacts a theory of church-state relationships. The latter is not a concern of subsidiarity when one views it as a principle of structural allocation of competences.

Subsidiarity would thus read the historical context as contradicting the idea that the “religion” clauses of the First Amendment are actually concerned with the finer points of religious political theory. Their objective would have been emphatically to avoid adding a substantive layer of church-state theory to the nascent federal government. This helps explain why the framers and ratifiers were able to agree on the religion clauses in the first place. An abiding mystery is how the founding generation—with church-state views as divergent as Virginia voluntarists, Massachusetts traditionalists and Baptist dissenters—managed to agree with such apparent ease on a national “religion” amendment. Subsidiarity supports the commonsense, but paradigm-shifting, answer of a theorist like Steven Smith, who states that, in fact:

[T]hey did not agree; instead, they chose in effect to avoid answering the first-order question [about religion and government] by leaving it to the states. The religion clauses kept the national government out of religion not because governmental support for religion was generally regarded as improper—that was precisely the issue on which the traditional and voluntarist positions divided—but rather because the religion question was within the jurisdiction of the states.

If we ask, therefore, what principle or theory of religious liberty the framers and ratifiers of the religion clauses adopted, the most accurate answer is “None.”237

On this account, theoretical accounts of church-and-state in the First Amendment elude us because the framers and ratifiers of the First Amendment could have never agreed which theory to include there.\textsuperscript{238} Subsidiarity thus underwrites Smith’s elegant explanation that amending the Constitution sought to keep the application and development of such theories off of the national stage.\textsuperscript{239}

As subsidiarity elaborates, the dynamics of building a federalist structure are deeply incompatible with the idea that the Establishment Clause added a new sphere of federal competence to the Constitution. The next one-hundred-and-fifty years of American religious history silently but eloquently illustrate that same point: The Constitution and its religion clauses played virtually no direct role in regulating church-state relationships.\textsuperscript{240} As it had before, the delicate task of balancing the interactions of religious groups, non-religious groups and government authority continued in myriad state constitutional provisions, statutes and judicial decisions.\textsuperscript{241} In short, the states’ broad police powers over church-state arrangements were not touched by the First Amendment. As Forrest McDonald vividly explains, this meant “the states could still, in the interest of public morality, establish the mode and manner of religious worship and instruction, and they could levy taxes for the support of religion—as Connecticut and Massachusetts continued to do for many years.”\textsuperscript{242} At most, the religion clauses could be said to have maintained the political and sociological conditions under which various aspects of religious liberty could emerge through experimentation and evolution. This has all the earmarks of a subsidiary solution to a thorny problem—seeking equilibrium, as opposed

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\item \textsuperscript{238} As Daniel Conkle observes, the various actors involved in framing and ratification of the religion clauses simply could not have agreed on a general principle governing the relationship of religion and government . . . . If the establishment clause had embraced such a principle, it would not have been enacted. What united the representatives of all the states, both in Congress and in the ratifying legislatures, was a much more narrow purpose: to make it plain that Congress was not to legislate on the subject of religion, thereby leaving the matter of church-state relations to the individual states. Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 Nw. U. L. Rev. 1113, 1133 (1988).
\item \textsuperscript{239} See Smith, Foreordained Failure, supra note 203, at 21 (arguing that “it is futile to try to extrapolate or reconstruct a principle or theory of religious liberty from the original meaning of the religion clauses,” given that “[t]hose clauses quite simply were not based on any such principle or theory”).
\item \textsuperscript{240} See, e.g., Witte, supra note 141, at 87 (observing that “[f]or the first 150 years of the republic, principal responsibility for the American experiment in religious rights and liberties lay with the states”). Witte observes that the Free Exercise Clause figured in slightly more than a dozen Supreme Court cases before 1940, but that the Court never found a free exercise violation and “often employ[ed] rudimentary analysis of the religion clauses.” Id. at 101. The Establishment Clause factored into even fewer cases, with the Court also finding no violations. See id. at 107-08.
\item \textsuperscript{241} See generally id. at 87-100.
\item \textsuperscript{242} McDonald, supra note 200, at 288 (citations omitted).
\end{itemize}
to definitive solutions by locating decision-making authority at the level best adapted to managing the issue.

But this subsidiary view of the Establishment Clause’s object and theoretical content confounds our modern expectations of the substantive work the Clause is supposed to do. Dating from the 1940s, the Supreme Court’s Establishment Clause project has trained us to expect courts to massage a substantive theory of church-state relationships from the Clause with a caravan of accompanying rules and tests. *Everson v. Board of Education of Ewing Township*,243 the first modern disestablishment case, attempted to do just that in one sweeping paragraph—a kind of judicial *fiat lux*—whose contradictions are still contorting the Supreme Court’s jurisprudence.244 But the prevalence that subsidiarity affords to the Clause’s function in the federalist structure unhappily opens a void where we seek substance. While such analysis has impressive explanatory power, it leaves one viewing the Establishment Clause as a constitutional appendix where

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244. In *Everson*, the Court announced:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”

*Id.* at 15-16. *Everson’s* tendentious use of history to interpret the Establishment Clause has been widely criticized. See, e.g., *Bradley, Relationships in America, supra* note 179, at 91-92 (stating that Justice Rutledge “misfired, badly and momentously”); *Smith, Foreordained Failure, supra* note 203, at 5 (mentioning Court’s “dismal historical performance in *Everson*”); Conkle, *supra* note 238, at 1130-35 (discussing “Everson-Rehnquist historical debate”); Esbeck, *Establishment Clause, supra* note 216, at 25-26 (summarizing that “[i]goring federalism in the Clause was an act of sheer judicial will [by the Supreme Court] which is still debated by academicians today”); John Courtney Murray, *Law or Prepossessions?, in Essays in Constitutional Law* (Robert G. McCloskey ed., 1957); Michael Stokes Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 Notre Dame L. Rev. 311, 317-18 (1986) (commenting that in *Everson*, Supreme Court “forced a square historical peg into a round doctrinal hole by filing off a few of the more inconvenient sharp edges of history“). As Michael McConnell writes, “[w]hen the Supreme Court began to decide cases involving claims about an establishment of religion in the 1940s, . . . the Justices made no serious attempt to canvass the legal history of establishment . . . or to distinguish between the First Amendment and the various conflicts over establishment at the state level.” McConnell, *Establishment and Disestablishment, supra* note 173, at 2107.
one was used to seeing it as a major organ. But the theory of subsidiarity furnishes more than a negative account of the limits of the Establishment Clause. At the same time, it provides an affirmative account of the role the Establishment Clause has played in managing the problem of religious establishments in our complex, religiously pluralistic society.

As we have seen, subsidiarity is at bottom a conditioning principle for attributing competences to the state and various social groups. In its modern form, subsidiarity can help construct a stable equilibrium in disputes about the role of religious associations in a pluralistic society. While we are accustomed to resolving such disputes through interpreting the Establishment Clause, the upshot of our discussion is that in the church-state sphere, subsidiarity does not comfortably function as a source for a priori rules for resolving those disputes. Thus subsidiarity, as said, is in tension with the post-1940s development of Establishment Clause jurisprudence, but it is able to provide what that jurisprudence has lacked from its beginning: an intelligible account of the relationship between our constitutional structure and the Establishment Clause itself. Simply put, subsidiarity interprets the Clause as directing argumentation about church-state issues and the concrete resolution of those issues out of the federal sphere, where it virtually always existed before the 1940s. In that way, the Establishment Clause interacts with subsidiarity just as federalism interacts with the Clause. Just as federalism is the structural expression of subsidiarity-in-action, so too is the Establishment Clause in the specific realm of "law[s] respecting an establishment of religion."

Several consequences follow from this subsidiary view of the Clause. First, the Clause becomes a direct assertion about the allocation of government power and, at the same time, an indirect assertion about individual and collective rights. While it evidences a decision not to nationalize church-state relationships, subsidiarity also explains that this decision is not merely a negative judgment about centralized authority, nor does it simply ignore the question of individual rights and the common good. To the contrary, the Clause stands as a prudential judgment about where the common good regarding church-state matters was to be reliably pursued and consequently, where individual and collective religious liberties were to emerge most securely and concretely. Subsidiarity thus instructs us that a limited Establishment Clause has nonetheless advanced a positive good because it underwrites both federalism and religious pluralism as a way of managing the problem of religious establishments. This supports Steven Smith's argument that, in the two generations following the framing, a combination of federalism and religious pluralism worked powerfully in favor of religious liberties at the state level:

"It seems clear that this [religious] pluralism deserves most of the credit for the elimination of religious establishments in this country and for the spectacular growth of a diversity of religions and faiths. For example, within a half-century after the adoption
of the Constitution, all states had eliminated their official religious establishments—wholly without prodding, we should note, from the Supreme Court. During this same period a large number of religious movements and experiments sprang up throughout the country.245

Second, while subsidiarity limits the theoretical content of the Establishment Clause, it does not empty the Clause of all judicially-enforceable content. Importantly, however, it shifts our expectations about the kind of content to be found in the Clause. If we understand the Clause as an expression of structural subsidiarity (as opposed to subsidiarity as a substantive norm), then we should expect to find in the clause, for lack of better terms, "boundary" rules as opposed to "substantive" rules. That is, if the major thrust of the Clause is to cordon off an area of competence from the central government and reserve it to the constituent states, then one should be able to derive from the Clause fairly concrete rules for policing those boundaries.246 Conversely, one should not expect to find rules for resolving disputes that clearly lie across the boundary. Thus, one would employ the Clause in accord with subsidiarity by saying that a federal law violates the Clause by trenching on state competence in managing its own church-state relationships. But one would employ the Clause against the grain by using it to say that a particular resolution of a church-state problem is or is not appropriate in accord with some a priori rule latent in the Clause.

This more limited scope for the Clause does not drain it of substance. The boundary, after all, must be delineated. Consequently, a federal court enforcing the Clause would need to discern the area of competence withheld from the central government—according to the Clause, laws "respecting an establishment of religion." But this does not simply throw us back on the perennial difficulty of defining that phrase. Viewing the Clause as a subsidiary measure would have the additional benefit of limiting and channeling the inquiry as to what constitutes a "law respecting an establishment of religion." Because the Clause would now be viewed as a concrete political compromise developed in a particular historical and legal context, the questions a court would ask about the Clause's boundaries would be accordingly limited. For example, one would be interested in understanding as precisely as possible the legal contours of an "establishment of religion" at the time of the framing and ratification of the Clause. One would also inquire into the political and religious motivations behind

245. Smith, Equality, supra note 176, at 21. Smith goes on to note that although this process was uneven and sometimes allowed persecution, "the ferment that caused religious diversity to flourish—and that is largely responsible for the condition of religious freedom we enjoy today—was a product of pluralism; it owed little or nothing to judicial review, or to the legal elaboration and enforcement of any constitutional "principle of religious freedom."
    Id.
246. Cf. Esbeck, Establishment Clause, supra note 216, at 104-09 (exploring question of "boundary keeping" posed by structural view of Establishment Clause).
the collective decision not to vest the new federal government with control
over state religious establishments. Furthermore, one would need to iden-
tify the legal mechanisms that would have been used by states to "disestab-
lish" the existing establishments, which would be strongly indicative of the
legal means that were denied the federal government by the Clause. Of
course, we are not operating on a blank slate here, for there is a rich body
of historical and legal scholarship on these issues. It should be said,
however, that a subsidiary view of the Establishment Clause is not simply a
call for improved originalism. Subsidiarity focuses the legal-historical in-
quiry in such a way as to help fill out the substantive content of the Clause.
It also prevents legal history from being crudely co-opted as simply an-
other pillar of support for a particular theorist's preferred notion of
church-state relationships.

Moreover, viewing the Clause as a source for boundary rules does not
necessarily exclude some residual substantive content. Even positing that
the Clause was meant to assign governmental competences over church-
state matters, it is plausible that the Clause would also disable the federal
government from passing laws that produce secondary effects which would
trespass into state competences. For instance, if the federal government
established its own national religion, this would effectively interfere with
state decisions in the church-state area, while formally leaving those rela-
tionships untouched. Or the federal government might enact a nation-
wide voucher scheme that practically impedes state-crafted voucher
solutions, assuming that voucher schemes would fall within the "establish-
ment" competences of the states. Another upshot of this analysis is that
the Establishment Clause would not necessarily deprive the federal gov-
ernment of all power over the general subject matter of religion (so that it
might have the power to pass laws like the Religious Land Use and Institu-
tionalized Persons Act (RLUIPA) or Title VII's exemption for religious
employers). The Clause would instead be understood as cordonning off the
government from an area of competence defined in terms of a

247. See generally Philip Hamburger, Separation of Church and State
(2002); McConnell, Establishment and Disestablishment, supra note 173, at 2131-81
(discussing legal components of establishments in colonies and early states). Mc-
Connell argues that the Supreme Court's historical understanding of what a reli-
gious establishment was, and how that should bear on interpretation of the
Establishment Clause, has been "truncated" and "careless." He contends that "[i]t
is difficult to know what the Framers of the First Amendment opposed if we do not
know what those who favored establishment supported." But "attempt[ing] to de-
scribe the actual laws and debates over establishment and disestablishment . . . will
help foster a richer, and perhaps less brittle and bipolar, understanding of the
issues we face today." Id. at 2109-10.

Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (a) (1)-
(2)).

249. See Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding
exemption of religious organizations from Title VII's prohibition of employment
distinct set of legal conditions, conceived in light of the historical experience of establishments of religion. The Clause would speak only by inference to the exercise of other federal powers with regard to the broader subject matter of religion.

The third consequence of a subsidiary view of the Clause, related to the second, concerns the feasibility of deriving judicial norms from the Clause. The view that a subsidiary Clause is a more likely source for boundary rules than substantive rules helps explain core difficulties in the Court’s Establishment Clause cases. There is no need to rehearse the convolutions of that jurisprudence, but subsidiarity suggests two general explanations for the difficulties: (1) many church-state problems present complex, intractable conflicts that are not amenable to rule-based judicial resolution; and (2) judges and justices must develop and apply their own theoretical premises to resolve church-state problems. Subsidiarity offers no solutions to these dilemmas except to say that they were predictable. If, as subsidiarity suggests, church-state problems often present irreducible paradoxes that cannot be solved by a priori rules and can only be compromised through political argument, then it is not surprising that judicial attempts to solve them through rules would soon be mired in inconsistency and unpredictability. If, as subsidiarity suggests, the Establishment Clause is appropriately viewed as a structural attribution of governmental competences rather than the incarnation of a particular church-state theory, then it follows that judges attempting to employ the Clause as if it contained such a theory would be constrained to import one.

These kinds of judicial rule-making dilemmas are not merely instances of bad rules that fail to provide predictable answers. Rather, they are situations where courts attempt to craft all-encompassing rules for problems that seem inherently resistant to rule-based resolutions. Establishment case law bristles with examples. Arguably, the most tortured was the Court’s attempt to discern whether various forms of aid to religious schools “advanced religion,” resulting in a labyrinth of super-fine distinctions. Another has been the Court’s attempt to discern whether an “accommodation” of religion appropriately lifts a burden on religious activity or unfairly “fosters” it. Yet another quagmire has been the Court’s in-

250. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 106-12 (1985) (Rehnquist, J., dissenting) (describing jurisprudential disarray at length and asserting that “in the 38 years since Everson our Establishment Clause cases have been neither principled nor unified”).

251. See id. at 110-11 (laying out contradictions of Court’s no-aid jurisprudence). Among many possible examples, Justice Rehnquist observed that “a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class,” and “[a] State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class.” Id. (citing Wolman v. Walter, 433 U.S. 229, 249 (1977); Meek v. Pittenger, 421 U.S. 349, 362-66 (1971); Bd. of Educ. v. Allen, 392 U.S. 286 (1968)).

252. See, e.g., Amos, 483 U.S. at 334-35 (describing Court’s approach as “recogniz[ing] that the government may (and sometimes must) accommodate re-
creasing use of an analysis which asks whether government use of religious symbolism legitimately acknowledges the place of religion in society, or instead wrongly endorses religion. Finally, some members of the Court have begun to inquire whether a law has resulted, or will result, in an unacceptable amount of “religious divisiveness.” Applying even sophisticated rules to such situations has not led the Court consistently toward non-subjective solutions, but rather has invited various justices simply to reformulate church-state problems in the rule’s terms. Conceivably, the Court might announce blanket rules that would settle some of these questions—e.g., that the Establishment Clause forbade all government use of religious imagery (including, presumably, the Declaration of Independence, the national motto, the national anthem and the names of various cities like Corpus Christi, Texas), or that it forbade all government aid to religion (including, presumably, all tax exemptions for religious organizations and clergy, or perhaps the provision of fire and police services to churches). But my point is that the Court has instead attempted to erect complex rules that ostensibly balance the various competing interests and policies in these conflicts, and this has resulted in spiraling confusion in its religious practices and that it may do so without violating the Establishment Clause”; that “[t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause”; that “[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference”; but that “[a]t some point, accommodation may devolve into an unlawful fostering of religion”) (internal quotations omitted) (citing Hobbie v. Unemployment Appeals Comm’n, 480 U.S. 136, 144-45 (1987); Walz v. Tax Comm’n, 397 U.S. 664, 673, 669 (1970)).

253. See, e.g., McCreary County v. ACLU, 125 S. Ct. 2722, 2733 (2005) (stating that Court’s analysis, in part, involves asking whether “the government sends the message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members”) (internal quotations omitted) (citing Santa Fe Ind. Sch. Dist. V. Doe, 530 U.S. 290, 309-10 (2000) (quoting Lynch v. Donnelly, 465 U.S. 668, 668 (1984) (O’Connor, J., concurring))).

254. See, e.g., Van Orden v. Perry, 125 S. Ct. 2854, 2857, 2871 (2005) (Breyer, J., concurring) (upholding Ten Commandments display by relying in part on fact that “[t]his display has stood apparently uncontested for nearly two generations” and “[t]hat experience helps us understand that as a practical matter of degree this display is unlikely to prove divisive”); Zelman v. Simmons-Harris, 536 U.S. 639, 717 (2002) (Breyer, J., dissenting) (“I write separately . . . to emphasize the risk that publicly financed vouchers programs pose in terms of religiously based social conflict.”); id. at 685-86 (Stevens, J., dissenting). Justice Stevens stated:

Admittedly, in reaching that conclusion I have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another. Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.

Id. For an excellent discussion of, and demolition of, this divisiveness project, see Richard W. Garnett, Religion, Division and the First Amendment, 94 GEO. L. REV. 1667 (2006).
jurisprudence. Viewing the Establishment Clause as a subsidiary provision explains why: the Clause was not built for such uses.

It also explains why Establishment cases have featured dueling theories of church-and-state, most purporting to be derived from the historical genesis of the Clause. At different times and in different cases, various justices have attempted to solve disputes by reference to a smorgasbord of church-state theories, classified under rubrics such as "separation of church and state," "strict separation," "accommodation," "non-preferentialism," "neutrality," "benevolent neutrality" and so on. In the same vein, justices have also taken differing views of the role history should play in the interpretation of the Establishment Clause, often using history to underwrite a particular theory or outcome. My modest point is that a subsidiary view of the Clause explains why such promiscuous theorizing would occur. Because the Clause itself contains no theory, justices would therefore be constrained to import one if they want to use the Clause to solve particular church-state disputes. It is not hard to predict that this will often result in a theoretical stalemate.

Finally, subsidiarity suggests a different approach to the difficult theoretical question of how the Clause can logically apply to the states. In a sense, incorporation of the Clause is where the Supreme Court and religion clause commentators are not on speaking terms. The Court has applied the Clause against the states without ever considering the Clause's

255. See, e.g., Witte, supra note 141, at 152-63 (classifying "unique, and often sharply juxtaposed, approaches" Court has developed since 1947 for addressing Establishment Clause problems).

256. For instance, compare the different conclusions reached by using history to interpret the Establishment Clause in then-Justice Rehnquist's dissent in Wallace, Justice Black's majority opinion in Everson, Justice Rutledge's dissenting opinion in Everson, Justice Souter's concurring opinion in Lee v. Weisman, and Justice Scalia's dissenting opinion in McCreary. See McCreary, 125 S. Ct. at 2748-51 (Scalia, J., dissenting); Lee v. Weisman, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring); Wallace, 472 U.S. at 91-104 (Rehnquist, J., dissenting); Everson v. Bd. of Educ., 330 U.S. 1, 8-15 (1947) (majority opinion of Black, J.); id. at 32-43 (Rutledge, J., dissenting).

257. Cf. Smith, Foreordained Failure, supra note 203, at 63 (discussing possibility of comprehensive constitutional theory of religious freedom). Steven Smith goes further than simply asserting the theoretical emptiness of the religion clauses. He argues that the attempt to formulate any comprehensive constitutional theory of religious freedom—whose purpose is "to mediate among a variety of competing religious and secular positions and interests, or to explain how government ought to deal with these competing positions and interests"—will end up inevitably preferring one of those background "positions and interests" to others. Id. This is so, explains Smith, because "any account of religious freedom will necessarily depend on . . . more basic background beliefs concerning matters of religion and theology, the proper role of government, and 'human nature.'" Id.; see also Smith, Equality, supra note 176, at 45-61 (further elaborating why unified "theory" of religious liberty is impossible). If Smith is correct about the impossibility of formulating a theory of religious liberty that does not silently privilege some competing religious or secular claim, this would exacerbate the problem of unmoored judicial theorizing about the content of the Establishment Clause.
federalism aspects, and has rebuffed any suggestion to reconsider the content of the incorporated Clause in light of its original function.258 Commentators, whether or not they want to reconsider the content of an incorporated Clause, have often observed that application of the Clause to the states presents a basic logical problem.259 Along these lines, one might object that the entire analysis presented in this Article is practically irrelevant: Whatever light subsidiarity sheds on the original place of the Clause in the constitutional framework, the fact is that since 1947, the Court has applied the Clause to the states via the Due Process Clause of

258. See, e.g., Wallace, 472 U.S. at 48-51 (rejecting as against “elementary proposition of law” district court’s “remarkable conclusion” that Establishment Clause should be interpreted as not applying to states). But see Cutter v. Wilkinson, 544 U.S. 709, 727-28 (Thomas, J., concurring) (asserting that “an important function of the Clause was to make clear that Congress could not interfere with state establishments,” and that Establishment Clause “is best understood as a federalism provision that protects state establishments from federal interference” (internal quotations omitted) (citing Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50 (2004) (Thomas, J., concurring); Zelman, 536 U.S. at 677-680 (Thomas, J., concurring); Lee, 505 U.S. at 641 (Scalia, J., dissenting)).

259. Steven Smith notes that “First Amendment scholars have often noted the federalist element in the religion clauses, particularly in the establishment clause, and have realized that this element poses difficulties, both historical and conceptual, for the theory that the establishment clause was ‘incorporated’ into the Fourteenth Amendment and thereby extended to the states.” Smith, Foreordained Failure, supra note 203, at 18 (arguing that “the federalism of the First Amendment may be even more important than its libertarianism”) (citing, inter alia, Mark DeWolfe Howe, The Garden and the Wilderness 29 (1965)); Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1158-59 (1991) (stating that conventional wisdom led to idea that “[i]f we assume that virtually all the provisions of the Bill of Rights, except the Tenth Amendment, were essentially designed to protect individual rights, total incorporation of the first nine amendments seems imminently sensible . . . . Unfortunately, that assumption is false”); Conkle, supra note 238, at 1133; Mary Ann Glendon & Raul F. Yanes, Structural Free Exercise, 90 Mich. L. Rev. 477, 481 (1991) (asserting that “[a]s a matter of judicial craftsmanship, it is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, language that had long [protected] the states against the federal government”); Joseph M. Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U. L.Q. 371, 389 (declaring that “the First Amendment built not one, but two walls of separation”); Note, Rethinking the Incorporation of the Establishment Clause, 105 Harv. L. Rev. 1700, 1703 n.25 (1992) (commenting that there is “mounting evidence that a main purpose of the Clause was ‘to protect state religious establishments from national displacement’) (quoting Laurence H. Tribe, American Constitutional Law § 14-3, at 1161 (2d ed. 1988)). Akhil Amar captures the conundrum well:

[T]he nature of the states' establishment-clause right against federal disestablishment makes it quite awkward to mechanically 'incorporate' the clause against the states via the Fourteenth Amendment. . . . [T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself.

Amar, supra note 200, at 33-34. For a recent exploration of the federalism-incorporation debate among Establishment Clause scholars, see generally Lupu & Tuttle, Federalism and Faith, supra note 217.
the Fourteenth Amendment. That brute fact would seem to make the insights of subsidiarity superfluous to modern application of the Clause. But, as before, identifying seemingly intractable analytical difficulties often reveals unexpected ways that subsidiarity can aid our understanding of the Clause. In this case, subsidiarity provides both a critique of the Clause’s incorporation against the states, as well as a way of helpfully re-conceiving it.

Incorporation of the Clause has actually been in the background of this Article all along. Incorporation is, after all, the mechanism that enabled the Court to apply the Clause to church-state problems in the states. But the Court has never drawn a distinction between application of the Clause against the federal government and against the states—it has purported to apply the Clause in the same way against both. Thus, a subsidiarity-based criticism of the Court’s Establishment Clause jurisprudence is, at the same time, a criticism of the way incorporation itself has been carried out. It is not necessarily a criticism of the idea of incorporation of the Clause itself.

But one could further object that a subsidiary view of the Clause by definition forecloses its application against the states. If the Clause is primarily a structural barrier against federal interference in state establishment matters, then is it not true, as Steven Smith has argued, that incorporating the Clause effectively repeals it? Possibly, but that conclusion has less to do with subsidiarity than with the content of the Fourteenth Amendment. If, correctly understood, the Fourteenth Amendment mechanically applies against the states all the substantive guarantees formerly applicable only against the federal government, then simple logic dictates that the Establishment Clause could not have been incorporated—there would be no substance to incorporate. On that view, attempting to apply the Clause to the states misses the fact that the pre-incorporation Clause already addressed itself to both the federal and state governments (unlike, for instance, the Fourth Amendment). As subsidiarity enters the analysis, however, its structural aspects suggest a helpful way of looking at incorporation and the Fourteenth Amendment. Fully exploring this issue is beyond the scope of this Article, but it can be addressed briefly.

Just as subsidiarity provides a vantage point for understanding federalism, it can achieve the same result for incorporation. Incorporation, after

260. See Smith, Foreordained Failure, supra note 203, at 49-50.

261. See, e.g., Amar, supra note 200, at 34 (reasoning that, because “the original establishment clause . . . is not antiestablishment but pro-states’ rights [and] . . . is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally,” then attempting to incorporate Clause is like attempting to incorporate Tenth Amendment); id. at 41 (noting that since “Congress had no more authority in the states to disestablish than to establish . . . . [T]he establishment clause seems more difficult to incorporate against the states”).
all, involves a realignment of the federal structure, shifting certain areas of competence from the states to the central government. The extent of that realignment was the subject of intense and lengthy debate mainly focused on the historical context and legal content of the Reconstruction Amendments.262 A subsidiary analysis of the incorporation of the Establishment Clause would attempt to situate its incorporation within the wider historical and legal context of Reconstruction.

When the Supreme Court decided to apply the Clause to the states, it asked no questions about the feasibility of incorporation. It simply assumed that the protections the Clause provided were in some sense fundamental, and proceeded to apply them with reference to what it now widely recognized as shoddy historiography.263 Subsidiarity, at the very least, would provide an intelligible matrix for understanding incorporation of the Clause.264 One would start by focusing on the historical context of Reconstruction, looking for evidence that states wanted to transfer to the central government certain responsibilities with regard to church-state matters. Identifying specific church-state problems at issue would be crucial because subsidiarity holds that the intervention of higher authority should be limited by the contours of the particular incapacities that call for intervention. This would involve intense historical work, but it is likely that a great deal has already been done. Next, one would ask how the Fourteenth Amendment can be understood as effecting a transfer of authority to the nation over the subject matter of church-state relationships, or over some subset of those relationships. This would also be a crucial step in terms of subsidiarity, since the theory would require that such a

262. See generally AMAR, supra note 200, at 137-214; RAOUl BERGER, GOVERN- 
MENT BY JUDICIARY 155-89 (2d ed. 1997) (discussing incorporation of Bill of Rights in 
Fourteenth Amendment); MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE 

263. For a discussion of historiography, see supra note 245.

264. Other scholars have suggested rethinking incorporation of the Establish- 
ment Clause by reference to the context of Reconstruction. See, e.g., AMAR, supra 
ote 200, at 246-57 (concluding after historical analysis that “we can now see how 
the entire First Amendment was, in profound ways, reconstructed by the Four- 
teenth”); Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the 
Nonestablishment Principle, 27 ARiz. ST. L.J. 1085 (1995) (stating that by Reconstruc- 
tion, northern state courts had translated prohibition of original Establishment 
Clause to be expression of fundamental religious liberty); Kurt T. Lash, The Second 
Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amend- 
ment, 88 NW. U. L. REV. 1106 (1994) (concluding that “[t]o those who would give 
effect to the constitutional movements of the People since the Founding, the relig- 
ion clauses must be read according to the intentions of those who fought a war 
over slavery and amended their Constitution to incorporate the lessons of that 
conflict”). Responding to Lash, Steven Smith states that Lash’s arguments 
underscore a crucial point: If a new originalism is to be based on a revisionist 
account of the Fourteenth Amendment, the picture of government’s relation to religion that this new originalism produces will likely look very different than anything that would have recommended itself 
either to Thomas Jefferson or to the justices in Everson.

SMITH, FOREORDAINED FAILURE, supra note 203, at 50-54.
transfer of authority be effected by an intelligible political compromise, hammered out in light of concrete circumstances. The entire inquiry would be conducted against the background assumption that the original Establishment Clause confided the calibration of the vast majority of church-state matters to the states. That background, of course, is not only a function of subsidiarity, but is an accurate description of American legal history from 1776 until 1947.

Whatever such an inquiry may yield, it is unlikely that it would drain the incorporated Establishment Clause of all substance. But it would probably result in a far more modest Clause. Its primary benefit would be to focus an inquiry concerning a major structural shift in federalism precisely on the dynamics of that shift. It would also remove the aura of unreality surrounding incorporation of the Establishment Clause—namely, that a constitutional provision that had never been used to police religion in the federal government, and whose history suggested no theoretical content beyond a structural limitation on federal power, could somehow be brought to life after 150 years of dormancy and used to regulate the myriad religious controversies of an increasingly pluralistic and religious nation. As with the content of the Establishment Clause, subsidiarity does not promise a solution to the incorporation problem. Instead, it proposes an intelligible way of managing it within a concrete legal structure and historical context, in a way that does not involve endless permutations of church-state theory.

V. Conclusion

This Article proposes subsidiarity as a way of understanding the kinds of problems posed by the interaction of religious associations and government. It suggests that such problems are better handled through political management than rule-based judicial resolution. The Article also offers subsidiarity as a way of situating the Establishment Clause within the federalist structure of the U.S. Constitution. It proffers that the Clause is properly understood as a structural strategy for partitioning off the federal government from a volatile area of social policy, one better left to individual states. Both conclusions are in real tension with our modern understanding of religious establishments and the Establishment Clause. But this vexed area of jurisprudence and scholarship needs provocation to shake off unhelpful theoretical baggage and to find promising ways forward.

Subsidiarity suggests several paths. As to the modern problem of religious establishments as such, it proposes that it is far more complex and multifaceted than the slogans of "separation of church and state" and "neutrality" have led us to believe. Conversely, as to the Establishment Clause, subsidiarity posits that the Clause is far more modest than two generations of Supreme Court jurisprudence have led us to believe. A subsidiarity Establishment Clause is simply one integrated into the overall
structure of the Constitution. From that point of view, the Clause appears to address structure, function and jurisdiction more than it promotes church-state theories or particular substantive outcomes. A subsidiary Clause may not hold the answers to many of the problems we currently associate with the Clause—for instance, the “correct” answers to religious participation in voucher programs, or to the presence of religious symbolism in government buildings—but it promises to be a Clause that courts can use consistently and coherently.

This Article is only a sketch, albeit a lengthy one, of how subsidiarity interacts with establishments and the Establishment Clause. By necessity, it leaves many areas unexplored, such as how subsidiarity might actually work in a variety of church-state problems, and also what a jurisprudence of a subsidiary Establishment Clause might look like. One significant area for further study is the question of rights. A structural Establishment Clause, even one applied to the states through incorporation, might appear to slight the individual rights we have come to associate with the Clause—such as the right against compelled tax support of religion or the right not to be subjected to official religious ceremonies. The first half of this Article is intended to lay a theoretical foundation for addressing that problem by charting the connections between limited government, associational rights and human dignity. But much more could be said about how that theoretical construct actually works in the context of religious associations, the individuals within them and the individuals in the larger society. As the theoretical sections indicate, subsidiarity would address this problem by focusing on the dignity of the individual person who, precisely because of his personhood, requires vibrant associations to be genuinely free.

Exploration of those questions awaits further study, but a key insight of subsidiarity, which this Article has attempted to explicate, is that before we can understand how the Establishment Clause protects individual and associational rights, we must first understand how the Clause interacts with the federal structure of the Constitution as a whole. Incorporation of the Establishment Clause has not liberated us from that difficult task. In fact, the spectacle of the Supreme Court’s establishment clause jurisprudence should warn us that foundational questions about the meaning and function of the Clause are unavoidable. The fruit of ignoring them, as *Everson* did two generations ago, seems to be congenital incoherence. Subsidiarity provides key theoretical insights into the relationship between the Clause and federalism, and thus contributes to an ongoing conversation about the future role the Clause should play in resolving church-state disputes.