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Development of Subsidiarity via Civil and Common Law Jurisprudential Epistemology

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*Justifying
An Analysis of the
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Epistemology*

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*Justifying an Analysis of the Ecclesiological Development of Subsidiarity
via Civil and Common Law Jurisprudential Epistemology*

Abstract

This article seeks to justify an examination of subsidiarity's development within Catholicism. Due to the fact that the European Union ["EU"] codified subsidiarity via the Treaty of Maastricht, subsidiarity is now a part of EU law. Although seemingly intended to resolve questions concerning the proper allocation of powers, its codification has generated substantial debate concerning the proper meaning(s) (if any) and/or application(s) of subsidiarity within the EU.

Due to the facts that 1) the EU's legal traditions are heavily influenced by both the civil and common law traditions, 2) both of these traditions advocate the use of established jurisprudential methodologies to interpret ambiguities, and 3) subsidiarity can reasonably be classified as ambiguous within EU law, utilizing these methods can foreseeably generate insight into subsidiarity's meaning. Furthermore, an examination of these methods arguably authorizes civil and/or common law jurists to investigate the ecclesiological development of subsidiarity even if the term itself is not deemed ambiguous.

A cursory examination of 1) (at least some of) these jurisprudential methodologies, 2) the development of subsidiarity within Catholicism, and 3) the development of subsidiarity within the EU appears to reveal several material similarities and no material dissimilarities. As a consequence, this article concludes that a more detailed examination of subsidiarity's development within Catholicism may potentially resolve pending questions about its application(s) and/or meaning(s) within EU law.

William Pieratt Demond
25 April 2008

*"For what can be explained,
investigated, or demonstrated
about the nature of things
without the assistance of
speech and words which
signify things? Or without
the ministry of
interpretation?"¹*

¹ Johannes Goeddaeus, *Commentarius repetitae praelectionis in tit. XVI libri L. Pandectarum de verborum et rerum significatione* (1591), quoted by IAN MACLEAN, INTERPRETATION AND MEANING IN THE RENAISSANCE: THE CASE OF LAW 87 (1992).

I. INTRODUCTION AND THESIS STATEMENT

Although arguably a principle of common sense,² the principle of subsidiarity appears to be one of the most popularly discussed³ yet ambiguous⁴ topics within EU

² Commission of the European Communities, *The Principle of Subsidiarity: Communication of the Commission to the Council and the European Parliament at Annex, ¶ 2, SEC(92) 1990 final*, Brussels 27 October 1992 (“The subsidiarity principle as applied in the institutional context is based on a simple concept: the powers that a State or a federation of States wields in the common interest are only those which individuals, families, companies, and local or regional authorities cannot exercise in isolation. This commonsense principle therefore dictates that decisions should be taken at the level closest to the ordinary citizen and that action taken by the upper echelons of the body politic should be avoided.”). *See also id.* at 2 (“In practical terms it implies for the Community institutions, and in particular for the Commission, the application of the simple principle of good sense that, in the exercise of its competences, the Community should do only what is best done at this level.”); HELEN J. ALFORD, O.P. AND MICHAEL J. NAUGHTON, *MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION* 77 (2001) (“The term [subsidiarity]...rests on the commonsense truth that people simply do better at tasks they themselves plan and control.”); ANTONIO ESTELLA, *THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE* 82 (2002) (“From a theoretical perspective, subsidiarity is so undefined that the concept amounts, at best, to a common sense principle of good government or a political objective.”); and John E. Linnan, C.S.V., *Subsidiarity, Collegiality, Catholic Diversity, and Their Relevance to Apostolic Visitations*, 49 *THE JURIST* 399, 421 (1989) (“[W]herever just relationships have existed in society, and wherever individuals and smaller groups have realized an appropriate liberty with respect to higher authority or larger societies, this principle [of subsidiarity], formulated or not, has been operative and at least implicitly recognized in practice, if not in theory.”).

³ A lexis search performed on 19 November 2007 reveals 1,378 law review articles containing the word “subsidiarity,” 35 of which contain the term in the title.

⁴ *See, e.g.*, REPORT OF THE COUNCIL ON THE FUNCTIONING OF THE TREATY ON EUROPEAN UNION 9 (1995) (“Admittedly, first experience shows that the institutions and the Council are occasionally having difficulties in agreeing how it [subsidiarity] is to be evaluated and applied.”); A.G. Toth, *A Legal Analysis of Subsidiarity*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY* 37 (O’Keeffe and Twomey eds., 1994) (“It is no exaggeration to say that there are few concepts in the Maastricht Treaty, or indeed in Community law as a whole, which are more elusive than the concept of subsidiarity.”); Jo Steiner, *Subsidiarity under the Maastricht Treaty*, in *LEGAL ISSUES OF THE MAASTRICHT TREATY*, *supra* note 4, at 49, *citing* Lord Mackenzie-Stuart, contribution to the Proceedings of the Jacques Delors Colloquium, *Subsidiarity and the Challenge of Change* (1991) at 39 (“Discussion of the principle...reveal [sic] that it is capable of no less than 30 different meanings.”); P.P. Craig and G. de Búrca, *General Editors’ Preface*, in ESTELLA, *supra* note 2, at v (2002) (“[S]ubsidiarity is a concept that is notoriously fluid and difficult to define, something which promoted many commentators to dismiss its legal relevance at the time of its introduction.”); Nanette A. Neuwahl, *A Europe Close to the Citizen? The ‘Trinity Concepts’ of Subsidiarity, Transparency, and Democracy*, in *A CITIZENS’ EUROPE; IN SEARCH OF A NEW ORDER* 39 (Allan Rosas and Esko Antola eds., 1995); George MacDonald Ross, *In Defence of Subsidiarity*, *PHIL. NOW*, 1993 (“The Philosophy Glossary defined subsidiarity as ‘nobody agrees on what this word means’ (p.32), and John Crosthwaite described its meaning as a ‘grey area’, and ‘hand[ed] the question over to the real philosophers’ (p.25).”), at <http://www.philosophy.leeds.ac.uk/GMR/articles/subsid.html> (last visited 2 July 2007); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *COLUM. L. REV.* 332, 332-333 (1994) (“Subsidiarity has been criticized as ‘inelegant...Eurospeak,’ ‘the epitome of confusion,’ and simple ‘gobbledegook.’”) (internal citations omitted); and Dennis J. Edwards, *Fearing Federalism’s Failure: Subsidiarity in the European Union*, 44 *AM. J. COMP. L.* 537, 544 (1996) (“[Subsidiarity has been called] ‘an empty shell devoid of concrete substance’ and ‘totally alien to...the

jurisprudence.⁵ Despite the considerable legal and ecclesiastical scholarship, however, a noteworthy body thereof appears to focus on either 1) examining subsidiarity's Catholic foundations or 2) analyzing the nature of its application within the EU. At least one article has even attempted to separate the term from its Catholic heritage altogether.⁶ The result is a body of legal scholarship that, in large part, appears to either ignore subsidiarity's Catholic origins altogether or mention such origins only in passing.⁷ This paper seeks to justify rectifying the apparent academic disconnect between subsidiarity's codification within the EU and its origins within Catholicism.

In order to properly understand the principle of subsidiarity within European Union jurisprudence, it is first necessary to examine its development within the Catholic Church. Ultimately, this proposition is built upon the foundational belief that separating a historically established concept from its philosophical moorings inevitably leads to a

logic, structure and wording of the founding Treaties [of the EC] and the jurisprudence of the European Court of Justice.”).

⁵ Admittedly, the mounting legal and ecclesiastical scholarship addressing various aspects of its origin and/or implementation in various languages generates a daunting task for virtually anyone with the potentially ill-advised desire to write a Master's thesis on both. This difficulty is only exacerbated if the aspiring author happens to be non-Catholic, non-European, essentially uni-lingual, and a recent law school graduate.

⁶ Reimer von Borries and Malte Hauschild, *Implementing the Subsidiarity Principle*, 5 COLUM. J. EUR. L. 369, 369-370 (1999) (“The term 'subsidiarity' has, however, misled many authors who have presented extensive studies on the 'subsidiary function' which plays a central role in the social philosophy of the Catholic church [sic]. Many of these publications fail to recognize that the subsidiarity principle as laid down in Article 3(b)(2) of the EC Treaty, rather than being a socio-philosophical doctrine, is a principle of constitutional law. It concerns the relationship between the European Community and its Member States and not the structure of society. Its practical aim is not to 'renationalize' Community competencies but to prevent an overcentralization of power at the EU level and to thereby ensure the acceptance of the EU among the citizens....The term 'subsidiarity principle' is thus no more than a succinct expression of the rule of Section 2 of this Article. More important than its controversial philosophical aspects, therefore, is its application in practice.”).

⁷ Even Professor Bermann's article, *Taking Subsidiarity Seriously*, an exhaustive and well-regarded analysis of subsidiarity's application within the European Union, mentions its ecclesiological roots only once. See Bermann, *supra* note 2, at 339 (“Advocates of subsidiarity in the European Community trace the concept to twentieth-century Catholic social philosophy, citing a 1931 Papal Encyclical of Pius XI entitled *Quadragesimo anno* [sic]...I seek a better understanding of the concept of subsidiarity, first and briefly as a purely analytic matter, and then much more extendedly as a response to the European Community's distinctive legal and political evolution.”).

myopic interpretation of that concept's meaning.⁸ Instead, both civil and common law jurisprudential epistemology appear to permit (if not mandate) the interpretation of ambiguous ideas according to their accepted historical meaning if such meanings are ascertainable. As a consequence, this paper seeks to establish the propositions that 1) the principle of subsidiarity is arguably ambiguous within EU jurisprudence, 2) both civil and common law jurisprudential methodologies encourage investigating the historical development of an ambiguity if it is discernable, and 3) an examination of subsidiarity's development within the Catholic Church yields results that appear to be wholly consistent with the intention underlying its codification via the Treaty of Maastricht. If provable, these three propositions can collectively justify a more comprehensive examination of subsidiarity's ecclesiological development in order to resolve any ambiguities concerning its meaning and/or application within European jurisprudence.⁹

⁸ GEOFFREY SAMUEL, *THE FOUNDATIONS OF LEGAL REASONING* 30 (1994) ("The modern...cannot...be explained without reference to the whole of the past."). *See also id.* at 114 ("In science itself the progress of each science is accomplished by inventions, discoveries and revolutions, but always on the basis of previously accumulated knowledge; and this is 'why the study of the history of science is an absolute requirement for anyone who wants to understand and interpret the sense and scope of existing discoveries.'"); Konrad Zweigat and Hans-Jürgen Puttfarcken, *Statutory Interpretation-Civilian Style*, 44 *TUL. L. REV.* 704, 712 (1970), *in CIVIL LAW* 267 (Ralf Rogowski ed., 1996) ("If a legal rule in the course of its development has been subject to a change of meaning by different interpretations, we cannot today start interpreting it as if it had never been interpreted before; we cannot totally disregard history. The 'legislative materials' may at least serve as a starting point; they may yield aspects of interpretation which are still valid today, and they may be most important as additional support for an interpretation based on actual criteria if the result of such interpretation coincides with the intention of the historic legislator."); and Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 *IND. L. REV.* 103, 109 (2001) ("To invoke subsidiarity in public policy debates without acknowledging and exploring its Catholic roots is to cut off the principle from the particular priorities it reflects and the broader values it embodies.").

⁹ *But see* *POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY* 179 (James W. Skillen and Rockne M. McCarthy, eds., 1991) ("There is no more thankless task than trying rationally to distinguish and to circumscribe – in other words, trying to raise to a scientific or philosophical level – common notions that have arisen from the contingent practical needs of human history and are laden with social, cultural, and historical connotations as ambiguous as they are fertile, and which nevertheless envelop a core of intelligible meaning.").

II. A CURSORY EXAMINATION OF THE EUROPEAN COURT OF JUSTICE'S ROLE IN INTERPRETING THE MEANING OF SUBSIDIARITY

The European Court of Justice ["ECJ"] is the supreme judicial organ of the European Union and is vested with a supranational mandate to ensure that the reasonably predictable laws¹⁰ of the European Union are properly observed.¹¹ This obligation clearly extends to the interpretation of subsidiarity.¹² It is important to note that both the civilian tradition¹³ and its teleological approach¹⁴ have left a profound impact on the

¹⁰ F.A.R. BENNION, STATUTORY INTERPRETATION: A CODE § 403, at 1097 (4th ed., 2002) (1984) ("It is regarded as important that [European] Community law should be so applied as to achieve certainty and predictability in its operation.").

¹¹ See Treaty Establishing the European Community ("TEC"), art. 220, available at http://www.europa.eu.int/eur-lex/en/treaties/dat/C_2002325EN.003301.html (last visited 20 March 2006) ("[The ECJ is obligated] to ensure that in the interpretation and application of [the EU Treaties] the law is observed.").

¹² See *id.*, at pmb1, Article B, and Article 3b. See also TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 185 (2d ed., 2006) ("Subsidiarity is a legally binding rule compliance with which is subject to review by the Court... Given, however, that the principle is political in nature and gives much scope for subjective judgment, the Court cannot employ a high level of scrutiny."); Dr. Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiary*, 20 BERKELEY J. INT'L L. 359, 373 (2002), quoting E.C. Bull., no. 12, at 14, point I.15., P 5 (1992) ("[I]nterpretation of [subsidiarity], as well as review of compliance with it by the Community institution, are subject to control by the Court of Justice, as far as matters falling within the Treaty establishing the European Community are concerned."); and von Borries and Hauschild, *supra* note 6, at 374 ("Regardless, the European Court is obliged to review the observance of the subsidiarity principle.").

¹³ ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 621 (2d ed., 2006) ("[The Court's approach] is also profoundly influenced by its civil law origins[.]").

¹⁴ Carl Baudenbacher, *Some Remarks on the Method of Civil Law*, 34 TEX. INT'L L.J. 333, 346 (1999) ("Purposive interpretation is of particular significance in the case law of the ECJ. Contrary to widespread opinion, the ECJ is not only an administrative and constitutional court, but it also plays an important role in interpreting and further developing civil (or private) law. The Court's former president, Hans Kutscher, stated over twenty years ago that 'the literal and historical methods of interpretation recede into the background. Schematic [i.e., contextual] and teleological interpretation ... is of primary importance.' In fact, the teleological method favored by Community law is similar to the rule contained in Article 1 of the Swiss Civil Code. The ECJ has, however, not limited itself to purposive interpretation, but has in many cases followed the so-called 'dynamic method,' thereby actively promoting integration where the political organs of the Community were unable or unwilling to fulfill this task. That the ECJ seems to have adopted a new restrained approach to judicial activism since the early 1990s is not due to a new methodological orientation, but rather to the fact that since the mid-1980s, the political organs of the Community have increasingly taken the responsibility of moving European integration forward.").

Court's interpretative methodologies¹⁵ and that it generally considers ambiguous provisions "in the context of the instrument as a whole."¹⁶

It is also important to note that if the context of a document in question does not adequately provide the Court with interpretative guidance, it can utilize the "ordinary meanings of the words used."¹⁷ More specifically, where 1) "neither the directive nor the documents relevant for [a provision's] interpretation, such as the *travaux préparatoires*, provide clarification of the exact scope of the concept [in question]" and 2) the general scheme of the provision in question is inconclusive, the Court may utilize the "usual meaning in everyday language" of the concept in question.¹⁸ Thus, due to the fact that there is reason to believe that the Court has found the general scheme of subsidiarity to be unclear,¹⁹ it may utilize the ordinary meaning of the term if the preparatory documents are either unusable or do not clarify its meaning. There is, however, an argument that the

¹⁵ TRIDIMAS, *supra* note 12, at 18 ("[B]y its nature, the Community is a dynamic entity. The founding and amending treaties are moulded by teleology. The EC Treaty itself sets final objectives and intermediate goals, the notion of incremental integration being inherent in its provisions. Recourse to general principles enable the Court to follow an evolutive interpretation and be responsive to changes in the economic and political order."). See also ARNULL, *supra* note 13, at 612 ("An essential component of 'the European way is the teleological and contextual method...It would be quite wrong to suggest that the Court pursues some hidden agenda of its own in its approach to questions of interpretation. If there is an agenda pursued by the Court, it is one set by the authors of the Treaties and by the Community legislature.").

¹⁶ T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW: AN INTRODUCTION TO THE CONSTITUTIONAL AND ADMINISTRATIVE LAW OF THE EUROPEAN COMMUNITY* 85 (3d ed., 1994) (1981) ("The interpretation of the Treaties and Community legislation is one of the principle tasks of the Court. To some extent the Court's approach to this is the same as that of an English court: it looks at the words used and considers their meaning in the context of the instrument as a whole. In doing this, it tries to give the provision an interpretation which fits in with the general scheme of the instrument, though it is much more willing than an English court to depart from the literal meaning of the words used to achieve this.").

¹⁷ ARNULL, *supra* note 13, at 608.

¹⁸ *Id.* at 617, *citing* Case C-336/03, judgment of 10 March 2005. See also BENNION, *supra* note 10, § 221 (2), at 580 ("Whichever status a treaty has, its provisions may be referred to as an aid in the interpretation of a relevant enactment. So too may its preparatory work (*travaux préparatoires*), the decisions on it of foreign courts (*la jurisprudence*) and the views on it of foreign jurists (*la doctrine*).").

¹⁹ See, e.g., TRIDIMAS, *supra* note 12, at 183 ("Since its introduction, the principle of subsidiarity has had virtually no impact as a ground for review or as a rule of interpretation in the case law of the ECJ or the CFI.").

Court is either altogether precluded from relying on such preparatory documents²⁰ or that it simply does not do so as a matter of practice.²¹ Although the Court is by no means obligated to examine the *travaux*, the argument that it is precluded from doing so is becoming less virile now that many preparatory documents are becoming more readily accessible.²²

If the Court makes a proactive effort to interpret subsidiarity, it could foreseeably do so in one of two principle ways: 1) it could utilize its own interpretative methodologies and/or general principles or 2) it could rely on the interpretations of Member States' judiciaries²³ (all of which are currently based upon either civil or common law). Instead of directly analyzing the Court's jurisprudence concerning subsidiarity (which appears to be inconclusive), this paper focuses on select methodologies authorized by both the civil and common law concerning the interpretation of ambiguities. If successful, this analysis could foreseeably prove relevant

²⁰ ARNULL, *supra* note 13, at 614, citing Kutscher, *Methods of Interpretation as seen by a judge at the Court of Justice*, in Reports of a Judicial and Academic Conference held in Luxembourg on 27-28 September 1976, I-21 ("The Court cannot rely on preparatory work which provides a history of how the Treaties came into being...Documents which are not generally accessible must...be ruled out as aids to interpretation for constitutional reasons."). *But see* Vienna Convention on the Law of Treaties, 23 May 1969 (entered into force on 27 January 1980), 1155 U.N.T.S. 331., art. 32 ("Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.").

²¹ HARTLEY, *supra* note 16, at 85 ("[T]he Court makes little attempt to establish the actual subjective intention of the authors of the text. The preparatory documents (*travaux préparatoires*) for the Treaties have never been published; there are certain national materials, such as official statements by the national governments to their parliaments during ratification debates, but these are little used.").

²² See ARNULL, *supra* note 13, at 615.

²³ TRIDIMAS, *supra* note 12, at 29 ("In some cases, instead of developing general principles of EU law, the ECJ has been content to allow national courts to rely on general principles recognized by the law of Member States...Such selective deference to concepts of national law may be seen as an application of judicial subsidiarity in the field of remedies and legal protection."). *See also id.* at 419 ("Community law is supported by a decentralized system of justice in which national courts are the primary venue for the assertion of Community rights.").

to a wider body of scholarship than an analysis that concentrates on ECJ jurisprudence alone.

III. A CURSORY OVERVIEW OF THE PRINCIPLE OF SUBSIDIARITY

a. Etymology

The word "subsidiarity" is derived from the Latin word *subsidium*²⁴ ("to help").²⁵ The word itself, however, does not refer to the government helping society, but rather to society helping the government.²⁶ More specifically, a 1994 paper prepared for the Steering Committee on Local and Regional authorities notes that the term "subsidiary" originally referred to reserve troops in combat.²⁷ Thomas C. Behr observes that the term specifically applied to Roman auxiliary troops who "'sat below' ready in reserve to

²⁴ Ross, *supra* note 4 ("The abstract noun *subsidiarity* comes from the adjective *subsidiary*, which in turn comes from the concrete noun *subsidy*. The English word *subsidy* is a direct borrowing of the Latin *subsidium*, meaning 'support' or 'assistance' (though it has subsequently been confined to a financial sense); and the adjective *subsidiary* originally meant 'providing assistance' or 'supportive'; but it gradually changed its meaning, *via* 'auxiliary' or 'tributary', to 'subordinate'.")

²⁵ See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 146 (1980) (Subsidiarity "signifies not secondariness or subordination but assistance; the Latin for help or assistance is *subsidium*.").

²⁶ Thomas C. Behr, *Luigi Taparelli D'Azeglio, S.J. (1793–1862) and the Development of Scholastic Natural-Law Thought As a Science of Society and Politics*, 6 J. MARKETS & MORALITY 99, 105 (2003) ("The Latin expression *subsidia* applied, then, not just to mean 'help' but in the first instance to auxiliary troops within the Roman legion, as they 'sat below' ready in reserve to support the battle. The 'help' in this context is from the bottom up, not from the top down, as the inferior and mediating groups all participate in achieving the common good of the more perfect association."), *available at* http://www.acton.org/publicat/m_and_m/2003_spring/pdf/mm-v6n1-behr.pdf (last visited 11 November 2005). See also PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, *COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH* ¶ 186, at 81 (2005) ("COMPENDIUM") ("On the basis of this principle, all societies of a superior order must adopt attitudes of help ('subsidium') – therefore of support, promotion, development – with respect to lower-order societies. In this way, intermediate social entities can properly perform the functions that fall to them without being required to hand them over unjustly to other social entities of a higher level, by which they would end up being absorbed and substituted, in the end seeing themselves denied their dignity and essential place.") (emphasis in the original).

²⁷ Alain Delcamp, *Definition and Limits of the Principle of Subsidiarity: Report prepared for the Steering Committee on Local and Regional Authorities*, 10 ("It is in fact the name given in Antiquity to reserve troops."), *available at* http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/documentation/library/localregionalauthorities/55.pdf.

support the battle."²⁸ He goes on to conclude that, "The 'help' in this context is from the bottom up, not from the top down, as the inferior and mediating groups all participate in achieving the common good of the more perfect association."²⁹ Thus, like its etymology suggests, the principle of subsidiarity essentially permits lower consociations to actively participate in the resolution of problems that affect them while requiring higher consociations to refrain from unnecessary interference.³⁰ In these cases, the restraint represents the "negative" aspect of subsidiarity while the necessary intervention represents the "positive" aspect.³¹

b. *Purported Applications*

It is clear that the word "subsidiarity" "involves quite different, even opposed, implications which are to be found in its Latin etymology."³² Professor Elizabeth Defeis³³ has found that, since its formulation, Catholic authors have argued for an

²⁸ Behr, *supra* note 26, at 105.

²⁹ *Id.*

³⁰ Fred Crosson, *Catholic Social Teaching and American Society*, in *PRINCIPLES OF CATHOLIC SOCIAL TEACHING* 170 (David A Boileau, ed., 1998) ("[W]hatever individuals and groups can do for themselves in pursuit of their proper goals should not be done by the state.").

³¹ See PETER G.G. DAVIES, *EUROPEAN UNION ENVIRONMENTAL LAW: AN INTRODUCTION TO KEY SELECTED ISSUES* 19 (2004) ("In effect, two tests must therefore be satisfied: a negative one in the sense that objectives cannot be sufficiently achieved (the 'necessity' criterion); and a positive test in that the objective of the action is better achieved at the EC level by reason of scale or effects of the proposed action (the 'effectiveness' criterion."). See also COMPENDIUM, *supra* note 26, ¶ 186, at 81-82 ("Subsidiarity, understood *in the positive sense* as economic, institutional or juridical assistance offered to lesser social entities, entails a corresponding series of *negative* implication that require the State to refrain from anything that would de facto restrict the existential space of the smaller essential cells of society. Their initiative, freedom and responsibility must not be supplanted.") (emphasis in the original) and Ken Endo, *Subsidiarity: A Matter of Political Vocabulary in a Fragmented World*, at 2, available at <http://www.global-g.jp/paper/4-11.pdf> (last visited 8 November 2005).

³² See Delcamp, *supra*, note 27, at 10.

³³ Professor, Seton Hall University School of Law. I am indebted to Professor Defeis for permitting me to use the following 19 citations, all of which were taken verbatim from one of her recently published articles. See Elizabeth Defeis, *Can [G_d] and Caesar Coexist? Balancing Religious Freedom and International Law* by Robert F. Drinan, *S.J.: Religious Liberty and Protections in Europe*, 45 *J. CATH. LEG. STUD.* 73, 108-109 (2006).

extension of subsidiarity to (*inter alia*) political change,³⁴ health care reform,³⁵ social communication,³⁶ humanism,³⁷ fighting crime,³⁸ organization of corporate culture,³⁹ global civil society,⁴⁰ transnational authorities,⁴¹ globalization,⁴² agriculture,⁴³ education,⁴⁴ public policy,⁴⁵ balanced markets,⁴⁶ international debts,⁴⁷ responsible

³⁴ See Richard R. Gaillardetz, *The Ecclesiological Foundations of Modern Catholic Social Teaching*, in MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS 85 (Kenneth R. Himes, O.F.M., ed., 2005), citing and quoting Pope Paul VI, *Octogesima Adveniens* (Papal Encyclical) ("It is up to these Christian communities...to discern the options and commitments which are called for in order to bring about the social, political, and economic changes seen in many cases to be urgently needed.") and Kenneth Himes, *The Local Church as a Mediating Structure*, in 12 SOC. THOUGHT 23-30 (1986).

³⁵ See Father Place, *Health Care: Essential Building Block of a Free Society*, reprinted in 29 ORIGINS CNS DOCUMENTARY SERVICE 52 (10 June 1999).

³⁶ Pontifical Council for Social Communications, *Ethics in Communications*, reprinted in 30 ORIGINS CNS DOCUMENTARY SERVICE 54 (8 June 2000) ("Principles of social ethics like solidarity, subsidiarity, justice and equity, and accountability in the use of public resources and the performance of roles of public trust are always applicable.").

³⁷ John Paul II, Address to University Professors (9 September 2000), reprinted in 30 ORIGINS CNS DOCUMENTARY SERVICE 54, 287 (8 June 2000) ("The humanism which we desire advocates a vision of society centered on the human person and his inalienable rights, on the values of justice and peace, on a correct relationship between individuals, society and the state, on the logic of solidarity and subsidiarity.").

³⁸ U.S. Bishops' Meeting, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (30 November 2000), in 30 ORIGINS CNS DOCUMENTARY SERVICE 54, 396 (8 June 2000) ("[Subsidiarity] encourages communities to be more involved. Criminal activity is largely a local issue and, to the extent possible, should have local solutions. Neighborhood-watch groups, community-oriented policing, neighborhood treatment centers and local support for ex-offenders all can be part of confronting crime and fear of crime in local communities.").

³⁹ See Father William Byron, Speech at Catholic Health Association's annual meeting: Trust and Integrity in Organizations (7 June 2004), in 24 ORIGINS CNS DOCUMENTARY SERVICE 120 (15 July 2004).

⁴⁰ Father John Coleman, *Globalization's Challenge*, in 24 ORIGINS CNS DOCUMENTARY SERVICE 326 (28 October 2004) ("Catholic voices endorse a notion of global civil society and embrace the concept of subsidiarity in any global governance regime.").

⁴¹ Drew Christiansen, S.J., *Commentary on Pacem in Terris* [Peace on Earth], in MODERN CATHOLIC SOCIAL TEACHING, *supra* note 34, at 245 n.51 ("[W]hile the idea of a universal or transnational political authority is an expression of the Catholic belief in the one human family and by virtue of historical conditions an increasingly necessary ideal, it is an ideal conditioned and limited by the principle of subsidiarity.").

⁴² See John Paul II, *Pastores Gregis*, in 33 ORIGINS CNS DOCUMENTARY SERVICE 387 (6 November 2003).

⁴³ US Bishops' Meeting, *For I Was Hungry and You Gave Me Food: Catholic Reflections on Food, Farmers, and Farmworkers*, in 33 ORIGINS CNS DOCUMENTARY SERVICE 515 (8 January 2004) ("In the case of agriculture, solidarity and subsidiarity lead us to support and promote smaller, family-run farms not only to produce food but also to provide a livelihood for families and to form the foundation of rural communities.").

⁴⁴ Pontifical Council for the Family, *The Truth and Meaning of Human Sexuality*, in 25 ORIGINS CNS DOCUMENTARY SERVICE 535 (1 February 1996) ("[T]he mission of education must always be carried out in accordance with the principle of subsidiarity."). See also Letter from Colorado's Bishops to Colorado dioceses, *The Christian Coalition's Catholic Alliance*, in 25 ORIGINS CNS DOCUMENTARY SERVICE 576 (9 January 1996) ("In keeping with the principles of liberty and subsidiarity, the Catholic Alliance asserts that parents have the right and responsibility to direct the education of their children[.]")

citizenship,⁴⁸ the church itself,⁴⁹ citizen participation in the energy crises of the early 1980s,⁵⁰ production in the economy,⁵¹ and world political order.⁵² Other scholars have linked it directly to economics,⁵³ the development of civil life,⁵⁴ contemporary

⁴⁵ See Archbishop McCarrick, speech to the Distinguished Lecture Series sponsored by the US State Department: Religion in Foreign Affairs (23 January 1997), in 26 ORIGINS CNS DOCUMENTARY SERVICE 564-565.

⁴⁶ John Paul II, Address to Pontifical Academy of Social Sciences: Towards a Balanced, Well-Regulated World Market (25 April 1997), in 27 ORIGINS CNS DOCUMENTARY SERVICE 43 (5 June 1997) (“[I]t is essential that political activity assure a balanced market in its classical form by applying the principles of subsidiarity and solidarity, according to the model of the social state.”).

⁴⁷ See USCC Administrative Board, *A Jubilee Call for Debt Forgiveness*, in 28 ORIGINS CNS DOCUMENTARY SERVICE 795 (6 May 1999).

⁴⁸ See Administrative Board of the National Catholic Welfare Conference, Statement on Social Problems, at ¶ 16 (28 November 1937), in 1 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS: 1792-1940, at 425 (Hugh J. Nolan, ed., 1984) (“The tendency of our time is to make more and more demands on government. Citizens and groups should not ask the government to do for them what they can do for themselves. Sound social policy requires government to encourage citizens to assume as much personal responsibility as possible.”).

⁴⁹ See Committee on Conciliation and Arbitration, Procedures Adopted by the General Membership of the National Conference of Catholic Bishops, ¶ 3 (14 November 1979), in 4 PASTORAL LETTERS OF THE UNITED STATES CATHOLIC BISHOPS 1975-1983, at 331 (Hugh J. Nolan, ed., 1984) (“It shall be the secondary function of the Bishops' Committee on Conciliation and Arbitration to be available as a resource to assist, upon request, with the development and improvement of local-level structures for the resolution of disputes.”).

⁵⁰ See Committee on Social Development and World Peace, United States Catholic Conference, Reflections on the Energy Crisis, ¶ 24 (2 April 1981), in 4 PASTORAL LETTERS, *supra* note 49, at 444 and 461 (“Generally speaking, the smaller the entity responsible for a particular decision – individual rather than group, state rather than federal government, local distributor rather than multinational corporation – the better chance an informed citizenry has of affecting it... [T]hose holding authority in the public and private sectors should be constantly looking for ways to center energy decision making as near the grass roots as possible. While adopting this course might lessen efficiency, it should produce results more satisfactory to the people and ultimately to the institutions that serve them.”).

⁵¹ Pope John XXIII, *Mater et Magistra* (Papal Encyclical), ¶ 117 (“The State and other agencies of public law must not extend their ownership beyond what is clearly required by considerations of the common good properly understood, and even then there must be safeguards. Otherwise private ownership could be reduced beyond measure, or, even worse, completely destroyed.”).

⁵² Pope John XXIII, *Pacem in Terris* (Papal Encyclical), ¶ 140, in 5 THE PAPAL ENCYCLICALS 122-123 (Claudia Carlen, ed., 1990) (“The same principle of subsidiarity which governs the relations between public authorities and individuals, families and intermediate societies in a single State, must also apply to the relations between the public authority of the world community and the public relations of each political community. The special function of this universal authority must be to evaluate and find a solution to economic, social, political, and cultural problems which [sic] affect the universal common good. These are problems which, because of their extreme gravity, vastness, and urgency, must be considered too difficult for the rulers of individual States to solve with any degree of success.”), available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_j-xxiii_enc_11041963_pacem_en.html (last visited November 6, 2005).

⁵³ See DIDIER FOUARGE, POVERTY AND SUBSIDIARITY IN EUROPE: MINIMUM PROTECTION FROM AN ECONOMIC PERSPECTIVE 3 (2004) (“In economic terms, the subsidiarity principle states that economic activities that can be efficiently carried out by the market should indeed be undertaken by it.”). See also *id.* at 17 (“A higher, all-enveloping level – such as the government – should carry out activities that cannot be

management theory,⁵⁵ United States President George W. Bush's "compassionate conservatism,"⁵⁶ and peacekeeping and conflict response.⁵⁷ While these various applications indicate that the principle of subsidiarity is flexible, they do not necessarily contribute to a working definition of the term itself. Therefore, a further examination of its development within both the European Union and Catholicism appears to be warranted.

performed efficiently by the market, or that should not be performed by it because of the nature of those activities. In other words, public authorities are to take action when market failures arise. Markets fail to achieve an efficient outcome when competition is imperfect, when information is incomplete, when there are public goods to be produced, when production induces externalities or when the markets face uncertainty. Equity considerations also call for government intervention. Starting from the usual assumption in economics that market allocation is efficient, the State is a subsidiary of the market.”) and U.S. Catholic Bishops, *Economic Justice for All (1986)*, in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE ¶ 323, at 653 (David J. O'Brien and Thomas A. Shannon eds., 1992) (“The principle of subsidiarity calls for government to intervene in the economy when basic justice requires greater social coordination and regulation of economic actors and institutions.”).

⁵⁴ CARLOS EDUARDO MALDONADO, HUMAN RIGHTS, SOLIDARITY AND SUBSIDIARITY: ESSAYS TOWARD A SOCIAL ONTOLOGY 4 (1997) (“The concept of subsidiarity is a principle of coordination between the different levels, functions, and organizations of civil society...Despite its technical and administrative appearance, the principle of subsidiarity is really about the conditions for the development and affirmation of civil life.”).

⁵⁵ Principia Cybernetica Web, *Principle of Subsidiarity*, http://pespmc1.vub.ac.be/ASC/PRINCI_SUBSI.html (“[P]roblems are best solved in the subsystem where they arise. This is similar to the idea of management by exception. Subsystems are encouraged to resolve their conflicts themselves without referring them to higher authority. Whatever solution is adopted, the subsystem will have to carry it out. Since their consent is essential, the optimum condition is for them to resolve their conflicts independently. If a solution is worked out by the subsystem, appeal to authority is not necessary.”) (last visited 10 July 2007).

⁵⁶ Susan J. Stabile, *Subsidiarity and the Use of Faith-Based Organizations in the Fight Against Poverty*, at <http://www.mirrorofjustice.com/mirrorofjustice/stabile/subsidiaritypoverty.pdf> (last visited 10 July 2007), citing William Bole, *Lowering the Safety Net: Say You Want Devolution?*, at <http://www.oursundayvisitor.com/periodicals/show-article.asp?pid=362> (“Bush advisers have said the Catholic principle of 'subsidiarity' played a notable part in fleshing out his mantra of compassionate conservatism.”) (last visited 10 July 2007).

⁵⁷ Serap Bindebir, Mia Handshin, Miodrag Jovanovic, and Christian E. Rieck, *Federalism, Decentralization and Conflict Management in Multicultural Societies*, at <http://www1.worldbank.org/wbiop/decentralization/library1/federalism.pdf> (last visited 10 July 2007).

IV. SUBSIDIARITY'S DEVELOPMENT WITHIN THE EUROPEAN UNION

a. *The first implicit references to subsidiarity*

The European Commission claims that the first implicit invocation of subsidiarity within the European Community arose in Article 5 of the 1951 European Coal and Steel Community Treaty.⁵⁸ Although the term "subsidiarity" is clearly absent, Article 5 reads:

"The Community shall carry out its task in accordance with this Treaty, with a limited measure of intervention.

To this end the Community shall:

- provide guidance and assistance for the parties concerned, by obtaining information, organizing consultations and laying down general objectives;
- place financial resources at the disposal of undertakings for their investment and bear part of the cost of readaptation;
- ensure the establishment, maintenance and observance of normal competitive conditions and exert direct influence upon production or upon the market only when circumstances so require;
- publish the reasons for its actions and take the necessary measures to ensure the observance of the rules laid down in this Treaty.

The institutions of the Community shall carry out these activities with a minimum of administrative machinery and in close cooperation with the parties concerned."⁵⁹

Various scholars, however, appear to disagree with the European Commission's assessment. Specifically, at least one author claims that subsidiarity was introduced into

⁵⁸ Commission of the European Communities, *The Principle of Subsidiarity*, *supra* note 2 ("The subsidiarity principle is enshrined in the preamble and in Articles B and 3b of the Treaty on European Union. It was present in embryonic form in the ECSC Treaty (Article 5), implicit in the Treaty of Rome, and spelled out in the Single European Act in relation to the environment (Article 130r)."). *See also* Ewa Rabinowitz, et al, *Subsidiarity, CAP, and EU Enlargement*, at 18, available at http://www.sli.lu.se/pdf/SLI_rapport_20013.pdf ("The principle of subsidiarity was a guiding principle in the integration process of forming the Community. As long ago as 1951, Article 5 of the European Coal and Steel Community (ECSC) Treaty stipulated that that Community should exert direct influence on production only when circumstances so required.").

⁵⁹ European Coal and Steel Community Treaty, art. 5, 18 April 1951, 261 U.N.T.S. 140.

EU governance in the First Environmental Action Programme of 1973⁶⁰ while others believe that it first appeared in either the Tindemans Report or the MacDougall Report.⁶¹ Another commentator argues that it did not appear until the late 1980s⁶² while yet another believes that it was first utilized at the European level by European Commissioner Roy Jenkins in 1977.⁶³ Therefore, there is considerable disagreement concerning the first invocation of subsidiarity within EU government.

b. *The first explicit references to subsidiarity*

One scholar has even argued that "the subsidiarity principle as a general constitutional rule was for the *first time expressly* mentioned in the Draft Treaty on European Union, which was adopted by the European Parliament in 1984."⁶⁴ She also observes that the European Commission's Spinelli Report on Economic Union (1975) advocated the implementation of subsidiarity-like principles without invoking it by

⁶⁰ Rabinowitz, *supra* note 58, at 18, citing A. Jordan, *The Politics of Multilevel Governance: Subsidiarity and Environmental Policy in the European Union*, 32 ENVIRONMENT AND PLANNING 1307, 1307-1324 (2000).

⁶¹ ESTELLA, *supra* note 2, at 85 ("The first important references to the principle [of subsidiarity within the Community government] were made in the mid-seventies, in the Tindemans Report on the European Union and in the MacDougall Report on fiscal federalism."). See also Albert Breton, Alberto Cassone, and Angela Frascini, *Decentralization and Subsidiarity: Toward a Theoretical Reconciliation*, 19 U. PA. J. INT'L. ECON. L. 21, 21 (1998); von Borries and Hauschild, *supra* note 6, at 371; and Paul D. Marquardt, *Subsidiarity and Sovereignty in the European Union*, 18 FORDHAM INT'L L.J. 616, 620 (1994) ("The word [subsidiarity] appears in debates on EC reform as early as 1975. A committee led by Belgian Prime Minister Leo Tindemans had the task of re-evaluating the development of European political union in light of the stagnation of the 1970's [sic] and proposing new initiatives.").

⁶² Andreas Føllesdal, *Subsidiarity*, at 19, 6 J. POL. PHIL. 231 (1998) ("The principle of subsidiarity was introduced in the European Union in the late 1980s through the initiative of the European Parliament, Britain and Germany in response to fears of centralized power by placing the burden of argument with integrationists."), available at <http://folk.uio.no/andreasf/ms/subsid.rtf> (last visited 10 July 2007).

⁶³ See William Noë, *History of Europe: The Idea of Unification in the Long-Term Perspective*, http://www.ucis.pitt.edu/cwes/EUC/Visitors/noe/History_of_Europe/history_of_europe.html (last visited 3 November 2005) ("Acknowledging diversity again played an important role in the concept of subsidiarity. This idea, derived from Catholic social theory, was *first mentioned* on the European level by Commission President Roy Jenkins in the re-launching of the idea of EMU in 1977 in a speech in Florence.") (emphasis added).

⁶⁴ Rabinowitz, *supra* note 58, at 18.

name.⁶⁵ A closer examination of Spinelli's report, however, reveals that it does in fact utilize the term "subsidiarity" (albeit in French). Specifically, this document provides that:

"No more than the existing Communities have done so, European Union [sic] is not to give birth to a centralizing super-state. Consequently, and in accordance with the *principe de subsidiarité*, the Union will be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently. If the Union is to be given competence in areas not specified in the Act of Constitution, the Act will have to be amended by a procedure probably entailing ratification by all the Member States.

"Hence, the competence of the Union will be limited to what is assigned to it, meaning that its fields of competence will be specified in the Act of Constitution, other matters being left to the Member States. There is nothing new in this. As in the existing Communities, the Union could be given competence of three types: exclusive, concurrent and potential, as explained below. The terms on which competence may be exercised may vary from type to type."⁶⁶

As a result, contrary to at least one official EU report,⁶⁷ Spinelli's Report appears to be the first official EU document to expressly invoke the principle of subsidiarity.⁶⁸

⁶⁵ *Id.* ("[W]ithout mentioning the subsidiarity principle by name, the 1975 European Commission's Spinelli Report on Economic Union advocated an expansion of Community powers only where Member States could not effectively accomplish the desired tasks.").

⁶⁶ Report of the Commission on European Union (25 June 1975) ¶ 12, available at <http://www.ena.lu/europe/crisis-recovery/report-commission-european-union-1975.htm> (click on "Consult this document in European NAVigator" [sic]) (last visited 10 July 2007) (emphasis added). While at least one skeptic argues that Spinelli "proposed subsidiarity only as a clever device [and that] he never intended it to be a guiding principle of the European Union," this argument appears to be uncorroborated. See Lindsay Jenkins, *Godfather of the European Union: Altiero Spinelli*, <http://www.brugesgroup.com/mediacentre/index.live?article=104> (last visited 10 July 2007).

⁶⁷ Delcamp, *supra* note 27, at 13 ("One of the greatest paradoxes of the principle of subsidiarity is that it is not explicitly named anywhere (apart from recent developments in European Union) although much legislation refers to it implicitly, as though most European countries already applied the principle without realising it. It is therefore less surprising that a definition of it is to be found in the European Charter of Local Self-Government, a Council of Europe Convention opened to signature in Strasbourg on 15 October 1985[.]").

⁶⁸ Ken Endo, *Subsidiarity & its Enemies: On a Post-National Constitutional Principle of the European Union*, 12 ("It was Altiero Spinelli... who introduced the principle of subsidiarity in the EU's formal document: he first led the European Commission to make a contribution report to the Tindemans Report in 1975, and then the European Parliament to adopt the Draft Treaty on European Union in 1984. On these two occasions, he attempted to soothe the fear for a over-centralised Leviathan in Brussels, by stressing the negative aspect of subsidiarity."), available at http://www2.warwick.ac.uk/fac/soc/csgr/activitiesnews/conferences/1999_conferences/3rdannualconference/papers/Endo.pdf (last visited 20 November 2007). See also *Subsidiarity*, EURO-KNOW, <http://www.euro->

It is also noteworthy that the 1975 Report on European Union⁶⁹ (published a day later) also expressly invoked the principle of subsidiarity in remarkably similar terms. Specifically, the Report noted, "European Union is not to give birth to a centralizing super-state. Consequently, and in accordance with the *principe de subsidiarité*, the Union will be given responsibility only for those matters which the Member States are no longer capable of addressing efficiently."⁷⁰ The Report also observed that providing specific general powers to the European Community while simultaneously limiting its ability to act within certain spheres was "more in line with [Community] requirements," but that the Community required certain powers because it was responsible for coordinating "the economic development of the Community as a whole."⁷¹ This appears to be an expression of the so-called "negative" aspect of subsidiarity insofar as it

know.org/dictionary/s.html#Subsidiarity (last visited 10 July 2007) ("The 'principe de subsidiarité' first surfaced in a Commission paper submitted to a report on institutional reform in 1975."). Finally, although not an official document, research has revealed that the term "subsidiarity" was used by a European Union official as early as 1971 (albeit in German). More specifically, Ralf Dahrendorf wrote:

"Not everything in Europe is lovely because it happens to be European. A European Europe is also a much differentiated, colourful, multiple Europe. It is a Europe in which those matters are dealt with and regulated in common which could perhaps only sensibly be dealt with in this way. The transition from the First to the Second Europe demands a move away from the dogma of harmonization towards the principle of functional utility (Subsidiarität)."

Ralf Dahrendorf, *A New Goal for Europe*, excerpt from "Wieland Europa," DIE ZEIT, no. 28, 9 July 1971 p. 3, reprinted in EUROPEAN INTEGRATION 82 (Michael Hodges ed., 1972).

⁶⁹ Supp. 5/75, Bull. E.C., available at http://aei.pitt.edu/1761/01/EU_report_1975.pdf (last visited 26 October 2007).

⁷⁰ *Id.* ¶ 12, at 10.

⁷¹ *Id.* ¶ 34, at 16 ("Two lines of approach are possible. The first - typical mainly of the ECSC and Euratom Treaties but in some respects of the EEC Treaty too - is the treaty-law, which would lay down in detail the areas covered by the Union and the ways and means by which it could act in each of these areas. The other line of approach, that of the outline treaty, would give certain general powers to the Union while at the same time setting limits to action by the Union and stating certain fundamental objectives. The experience of the Communities, particularly the difficulties encountered in implementing a treaty-law such as the ECSC Treaty, has shown that this second approach is more in line with requirements. This will be even truer than before as the Union will have to deal with a multitude of matters no longer merely to ensure the free movement of the factors of production, but to render coherent the economic development of the Community as a whole.").

explicitly advocates limiting the Community's authority to address issues that the Member States are capable of adequately resolving on their own.

The Report also appears to directly invoke the "positive" aspect of subsidiarity insofar as it advocates assigning the Community exclusive competence over foreign affairs because Member States cannot conduct them in an effective manner.⁷² In the words of the Report, "The security of each Member State intimately affects the security of the other Member States and of the Union as a whole...Hence the need for action at international level [sic] to be coherent and so make it possible [sic] to protect the interests of the individual and of the whole."⁷³ As a consequence, both the Spinelli report and the 1975 Report on European Union clearly invoked 1) the principle of subsidiarity by name, 2) the negative aspect of subsidiarity, and 3) the positive aspect of subsidiarity. These similarities are important insofar as they could potentially represent evidence that the first express invocations of subsidiarity within EU governance were both compatible with and materially similar to its seemingly accepted meaning within Catholicism.

If laws are to fulfill their intended function of promoting social welfare, it is well settled that they must be understood both by those to whom they apply and by those who will be responsible for applying them.⁷⁴ It should be noted from the outset, however, that any uncertainty generated by a legal provision or concept within the European Union is

⁷² *Id.* ¶ 59, at 22 ("The inclusion of foreign policy within the competence of the European Union is warranted on a number of grounds. Firstly, as recent experience has shown in sometimes dramatic ways, the individual Member State are [sic] no longer capable individually of asserting this role on the international scene with sufficient weight and efficacy.").

⁷³ *Id.*

⁷⁴ ARNULL, *supra* note 13, at 620, *citing* Joined Cases C-283/94, C-291/94 and C-292/94 [1996] ECR I-5063, ¶ 29 ("Legislation is addressed to those affected by it. They must, in accordance with the principle of legal certainty, be able to rely on what it contains.").

only intensified by the Union's unique and unprecedented composition.⁷⁵ Bearing this difficulty in mind, this analysis is intended to lay the foundation for future scholars who are more intimately familiar with the intricacies, subtleties, and nuances of EU jurisprudence.

V. A GENERAL OVERVIEW OF CIVIL AND COMMON LAW INTERPRETATIVE METHODOLOGIES

a. *A General Overview of Common Law Interpretative Methodologies*

i. The Common Law's Approach When No Ambiguity Exists

The common law generally avoids reversion to the principles of interpretation (and/or the rules of construction) where the provision or the word in question is unambiguous.⁷⁶ In other words, if the language itself appears to clearly transmit the will of the legislature, then there is no ambiguity for a court to interpret.⁷⁷ As a general rule,

⁷⁵ TRIDIMAS, *supra* note 12, at 18 ("The need to fill gaps is exacerbated by the distinct characteristics of the Community legal order. Community law is not only a new legal order but also a novel one in the sense that it has no historical precedent or indeed contemporary equivalent."). *See also* ARNULL, *supra* note 13, at 607, quoting CILFIT v. Ministry of Health, Case 283/81 [1982] ECR 3415, ¶¶ 17-20 ("Any objective appraisal of the [ECJ's] methods of interpretation must take account of 'the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.'").

⁷⁶ BENNION, *supra* note 10, § 195, at 470 ("It is a rule of law...that where, in relation to the facts of the instant case-

- (a) the enactment under inquiry is grammatically capable of one meaning only, and
- (b) on an *informed* interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator,

the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly.").

⁷⁷ CRAIES ON LEGISLATION: A PRACTITIONERS' GUIDE TO THE NATURE, PROCESS, EFFECT AND INTERPRETATION OF LEGISLATION § 17.1.1, at 543 (Daniel Greenberg, ed., 8th ed., 2004) (1907), *citing* Warburton v. Loveland, (1832) 2 D. & Cl. (HL) 480, 489 ("Where the language of an Act is clear and explicit, we must give effect to it, whatever may be the consequences, for in that case the words of the statute speak the intention of the legislature."). For commonsensical exceptions to this general rule, *see* CRAIES, *supra* note 77, § 17.1.2, at 544, *citing* Grey v. Pearson, (1857) 6 H.L.C. 61, 106 ("I have been long

courts only resort to the rules of interpretation and/or construction where a "real" or "substantial" doubt exists concerning a word or provision.⁷⁸ However, the common law's presumptions that statutory words are intended both to possess meaning⁷⁹ and to achieve a beneficial effect within society⁸⁰ effectively prohibit a court from exclusively relying

and deeply impressed with the wisdom of the rule, now, I believe, universally adopted – at least in the courts of law in Westminster Hall – that in construing wills, and indeed statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical or ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no further."); and CRAIES, *supra* note 77, § 17.1.9, at 548-549, *citing* Abel v. Lee, (1871) L.R. 6 C.P. 365, 371 ("No doubt the general rule is that the language of an Act is to be read according to its ordinary grammatical construction unless so reading it would entail some absurdity, repugnancy or injustice...But I utterly repudiate the notion that it is competent to a judge to modify the language of an Act in order to bring it in accordance with his view of what is right or reasonable."). It is worth noting, however, that while an absurdity will not necessarily preclude a court from enforcing the enactment in question, courts will generally favor reasonable interpretations if they are available. *See also* CRAIES, *supra* note 77, § 17.1.8, at 547, *citing* Holmes v. Bradfield R.D.C., [1949] 2 K.B. 1, 7 ("The fact that the results of a statute may be unjust or absurd does not entitle this court to refuse to give it effect, but if there are two different interpretations of the words in an Act, the court will adopt that which is just, reasonable, and sensible rather than that which is none of those things."); CRAIES, *supra* note 77, § 20.1.6, at 588-589 ("[I]f two constructions of a provision are possible on its face, and one would clearly advance the legislative purpose and the other would clearly achieve little or nothing, the former is to be preferred."); JELUM HRICK, MODERN STATUTORY INTERPRETATION: PROBLEMS, THEORIES, AND LAWYERING STRATEGIES 101 (2006), *citing* Wilt v. Brunswick Plaza L.L.C. 703 N.Y.S. 2d 700, 702 (N.Y. 2000) ("If the words...have a definite meaning, which involves no absurdity or contradiction, then there is no room for construction and courts have no right to add to or take away from that meaning."); and Vienna Convention on the Law of Treaties, *supra* note 20, at art. 31, 1.A ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty[.]").

⁷⁸ BENNION, *supra* note 10, § 3, at 15 ("If, on an informed interpretation, there is no real doubt that a particular meaning of an enactment is to be applied, that is to be taken as its legal meaning. If there is a real doubt, it is to be resolved by applying the [rules, principles, presumptions and canons which govern statutory interpretation]. For this purpose a doubt is 'real' only where it is substantial, and not merely conjectural or fanciful. A doubt is not substantial where it arises merely because the effect of the enactment depends on a decision required to be taken in the exercise of judgment or discretion.").

⁷⁹ *See id.* § 402, at 1097 ("It is presumed that [European] Community law is intended to be effective to achieve its ends, and any court applying that law is required to act accordingly.") and *id.* § 266, at 682-683 ("It is a principle of legal policy that law should be certain, and therefore predictable. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to reach a conclusion which was reasonably foreseeable by the parties concerned."). *But see* CRAIES, *supra* note 77, § 20.1.6, at 589, *quoting* Hankey v. Clavering, [1942] 2 K.B. 326, 330 ("It is perfectly true that in construing...all documents, the court in a case of ambiguity will lean in favour of reading the document in such a way as to give it validity, but I dissent entirely from the proposition that, where a document is clear and specific, but inaccurate on some matter, such as that of date, it is possible to ignore the inaccuracy and substitute the correct date or other particular because it appears that the error was inserted by a slip.").

⁸⁰ BENNION, *supra* note 10, § 264, at 670-671 ("It is the basic principle of legal policy that law should serve the public interest. The court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that

on the so-called "four corner rule" where 1) an ambiguity arises and 2) it is not clarified within the four corners of the document in question.⁸¹ Therefore, common law courts are arguably required to rely upon the express words of the legislature when a provision is clear or upon reasonable implications discerned via various accepted interpretative guidelines when such words are unclear.⁸² The next section provides a brief overview of some of these well-settled guidelines.

ii. Common Law Approaches to Interpreting Ambiguities

In the preface to his 1839 book *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics*, Francis Lieber expressly advocated acknowledging and synthesizing interpretative guidelines within the common law

the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which is in any way adverse to the public interest."). See also CRAIES, *supra* note 77, § 17.1.12, at 551, *citing* Barnes v. Jarvis [1953] 1 W.L.R. 649, QBD, DC ("A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered.") and CRAIES, *supra* note 77, § 18.1.8, at 563, *citing* Harrods Ltd v. Remick, [1998] 1 All E.R. 52, 57, CA, *per* Sir Richard Scott V.C. ("[W]e should... give a construction to the statutory language that is not only consistent with the actual words used but also would achieve the statutory purpose...").

⁸¹ See BENNION, *supra* note 10, § 2(2), at 14 ("The court is never entitled, on the principle of *non liquet* (it is not clear), to decline the duty of determining the legal meaning of the relevant enactment.").

⁸² CRAIES, *supra* note 77, § 16.1.4, at 539-540, *citing* Salomon v. A. Salomon & Co. Ltd., [1897] A.C. 22, 38, HL ("'Intention of the legislature' is a common but very slippery phrase, which, properly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact, either in express words or by reasonable and necessary implication."). See also CRAIES, *supra* note 77, § 20.1.2, at 586 ("It is important to note at the outset that even in times in which these canons were constructed and first applied, they were never intended to do more than elucidate the intention of the legislature in cases of doubt. They have no application, and have never had any application, in a case where the intention of the legislature is clear on its face.") and *id.* *quoting* [1895] 2 Q.B. 61 ("The duty of the Court when called upon to construe an Act of Parliament is, I conceive, to read the Act itself, and if its language is clear to give effect to what the legislature has said. It is to my mind proper to refer to earlier Acts *in pari materia* only where there is ambiguity.").

tradition.⁸³ He believed that these rules should be followed by all jurists seeking to interpret the law⁸⁴ and that a person to whom a statement is made has an affirmative responsibility to understand the expositor's intention;⁸⁵ although any given word can have several different meanings, jurists must use every available means "which are in constant use among men, to understand the words of one another."⁸⁶

Within the common law, it appears to be accepted that words (as a general rule) have no "true" meaning.⁸⁷ There are, however, two notable exceptions to this general

⁸³ FRANCIS LIEBER, *LEGAL AND POLITICAL HERMENEUTICS: OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS, WITH REMARKS ON PRECEDENTS AND AUTHORITIES* viii (1839) ("[I]n countries, in which the law is allowed to make its own way, immutable principles and fixed rules for interpreting and construing them, should be generally acknowledged, or if they exist already, in a scattered state, should be gathered and clearly represented, so that they may establish themselves along with the laws, as part and branch of the common law of free countries."). See also F.A.R. BENNION, *UNDERSTANDING COMMON LAW LEGISLATION: DRAFTING AND INTERPRETING* 5 (2001) ("[The courts in all common law countries] still mostly observe the principles of the common law when it comes to statutory interpretation. It is therefore important that the uniform principles should be spelt out and generally known.") and SAMUEL VON PUFENDORF, *1 DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO* 83 (*93) (Frank Gardner Moore trans., 1927) (1682) ("Hence, for a right understanding of laws, as well as of agreements, and for the performance of the duty involved, it is of the greatest importance to establish rules of sound interpretation, for words especially, as the commonest sign.").

⁸⁴ LIEBER, *supra* note 83, at 118 ("We have to follow the special rules of interpretation, which have been given by proper authority.").

⁸⁵ *Id.* at 19 ("All the signs...require interpretation, that is, it is necessary for him, whose benefit they are intended, to find out, what those persons who used the sign, intend to convey to the mind of the beholder or hearer...it is one of the occupations of the historian and antiquarian to find out the meaning of these various representations, i.e. the ideas which he who made them (or ordered them to be made) intended to convey to the beholder."). See also BENNION, *supra* note 10, § 2(1), at 14 ("The interpreter's duty is to arrive at the legal meaning of the enactment, which is not necessarily the same as its grammatical meaning. This must be done in accordance with the rules, principles, presumptions and canons which govern statutory interpretation...").

⁸⁶ LIEBER, *supra* note 83, at 75 ("A single word may signify indeed several things, and in order to determine in which sense it has been used in a particular passage, we shall be obliged, as a matter of course, to use grammar, etymology, logic, and every other means, which are in constant use among men, to understand the words of one another. This has been clearly shown as early as by Ernesti in his *Institutes*[.]").

⁸⁷ Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 *HARVARD LAW REVIEW* 417, 417 (1899), reprinted in *LAW AND LANGUAGE* 187 (Frederick Schauer, ed., 1993) ("It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a collection of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in a particular case, and very likely will see that it there has a shade of significance more refined than any given in the wordbook."). See also Paul E. McGreal, *Slighting Context: On the Illogic of Ordinary Speech in Statutory Interpretation*, 52 *U. KAN. L. REV.* 325 (2004).

rule. First, if a word has a commonly accepted meaning (either within society as a whole or within an identifiable section therein), then the word in question is generally presumed to have that accepted meaning.⁸⁸ This exception has been reiterated and strengthened through common law cases,⁸⁹ contemporary treatises,⁹⁰ and the Vienna Convention on the Law of Treaties.⁹¹ If an examination of the commonly accepted meaning does not

⁸⁸ WILLIAM BLACKSTONE, 1 COMMENTARIES *59-60 (“Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use... terms of art, or technical terms, must be taken according to the acceptance of the learned in each art, trade, or science.”). See also LIEBER, *supra* note 83, at 209 (“Words may mean very indefinite things; it is by practice only, that they acquire definite significations.”); *id.* at 100 (“According to the character of the text before us, we are obliged to take words, either in their common adaptation in daily life, or in the peculiar signification which they have in certain arts, sciences, sects, provinces, &c., in short, we have to take words according to what is termed *usus loquendi*.”); Holmes, *supra* note 87, at 419 (“[E]ach party to a contract has notice that the other will understand his words according to the usage of the normal speaker of English under the circumstances, and therefore cannot complain if his words are taken in that sense.”); HENRY CAMPBELL BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 182 (1911) (“Words and phrases which are used only in the law and have a precise legal meaning, and also terms used more or less in common speech but which have acquired a peculiar and appropriate meaning in the law, or which bear a definite signification at common law, are to be understood in their proper technical sense, unless it plainly appears that they were not so used by the legislature.”); and CRAIES, *supra* note 77, § 20.1.33, at 607, *quoting* (1831) 2 D. & Cl. 302, 310 (“There is a principle of general application that while a technical legal expression should be construed in a technical way, a word that has a natural meaning in ordinary English conversation should be given that meaning and not a restrictive technical one. As Lord Tenterden said in *Attorney General v Winstanley* –

‘the words of an Act of Parliament which are not applied to any particular science or art’ are to be construed ‘as they are understood in common language’.”).

⁸⁹ See, e.g., *Mason v. Bolton's Library*, [1913] 1 K.B. 83, 90 (“The proviso is expressed in terms of art; technical phrases are used. It is a stringent rule of construction that in construing an Act of Parliament or a deed containing technical words those words must be given their technical meaning.”); and CRAIES, *supra* note 77, § 20.1.34, at 608, *citing* *Holt & Co. v. Collyer*, (1881) 16 Ch. D. 718, 720 (“If it is a word which is of a technical or scientific character then it must be construed according to that which is its primary meaning, namely, its technical or scientific meaning.”).

⁹⁰ BENNION, *supra* note 10, § 365, at 1026 (“If a word or phrase has a technical meaning in relation to a particular expertise, and is used in a context dealing with that expertise, it is to be given its technical meaning, unless the contrary intention appears.”). See also *id.* § 363, at 1013 (“The starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification. If there is more than one ordinary meaning, the most common and well-established is preferred (other things being equal).”); *id.* § 366, at 1027 (“If a word or phrase has a technical meaning in a certain branch of law, and is used in a context dealing with that branch, it is to be given that meaning unless the contrary intention appears.”); and *id.* § 367, at 1030 (“If a word or phrase has a technical meaning in relation to a certain area of trade, business, technology, or other non-legal expertise, and is used in a context dealing with that expertise, it is to be given its technical meaning, unless the contrary intention appears.”).

⁹¹ Vienna Convention on the Law of Treaties, *supra* note 20, at art. 31, 1.A (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty[.]”).

clarify the ambiguity in question, then courts are permitted to look beyond the four corners of the document to ascertain its intended meaning.⁹² Second, a speaker or author may conceivably intend a word to mean something that it does not ordinarily mean; under these circumstances, the author's (or utterer's) intention determines the meaning of the word in question.⁹³ If neither one of these conditions is not met, however, the common law appears to presume that a word has no "true" meaning.

If adherence to this general rule and its two exceptions does not successfully clarify a word's meaning, Blackstone posits that jurists should seek to interpret an ambiguous term by first examining its context (frequently in the form of a preamble).⁹⁴ If this is unsuccessful, then an examination of other laws passed by the same legislator may clarify the relevant intent.⁹⁵ Blackstone also recognizes that if the effects of a word

⁹² See CRAIES, *supra* note 77, § 18.1.1, at 555 ("In advocating the literal approach one is quickly forced to concede a great many exceptions and qualifications. The most important exception, which emanated entirely from common sense, is that however literal one wishes to be, if the natural construction of the words does not answer the question being asked, the courts are forced to look outside the strict letter of the legislation for the intention."). See also HRICIK, *supra* note 77, at 97 ("An intentionalist does not need a reason – like ambiguity or absurdity – to consider sources beyond the text."); *id.* at 100 ("[P]urposivists do not need a reason – like ambiguity or absurdity – to look to extratextual sources to discern meaning."); and *id.* at 103, *citing* Train v. Colo. Pub. Interest Research Group, Inc., 426 U.S. 1, 10 (1976) ("[W]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination.").

⁹³ Glanville L. Williams, *Language and the Law*, in *LAW AND LANGUAGE* 141 (Frederick Schauer, ed., 1993) ("Scientifically speaking, words have no true or proper meaning, except in two senses. First, words have an ordinary – *i.e.*, commonly-accepted – meaning. The ordinary meaning need not be current among the community as a whole: it may be confined to a particular section of the community, such as educated persons, business men, scientists or lawyers...Second, the particular person who uses a word may assign to it a special meaning[.]").

⁹⁴ BLACKSTONE, *supra* note 88, *60. See also Vienna Convention on the Law of Treaties, *supra* note 20, at art. 31, 2 ("The context for the purpose of the interpretation of a treaty shall comprise...the text...its preamble, and annexes[.]").

⁹⁵ BLACKSTONE, *supra* note 88, *60. Although this examination could conceivably generate a legislative intent that differs from the Church's definition, there is no immediate reason to suspect that this is the case. Therefore, due to the lack of immediate evidence and both the size and the intricacy of this particular research thread, it appears reasonable to reserve this task (as well as an analysis of equitable considerations) for future scholarship.

are either absurd or minimal, then deviation may be required in order to effectuate the proper intention.⁹⁶ It should be noted, however, that

"the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it."⁹⁷

The common law also supports equitable solutions because the law is incapable of foreseeing all potential disputes.⁹⁸ Even if the law was perfectly clairvoyant, it still would be unable to adequately address all disputes with the requisite precision and clarity.⁹⁹ Blackstone expressly recognized the dangers potentially associated with

⁹⁶ *Id.* *61 ("Therefore the Bolognian law, mentioned by Puffendorf, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.""). *See also* Vienna Convention on the Law of Treaties, *supra* note 20, at art. 32 ("Recourse may be had to supplementary means of interpretation...to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.") and PUFENDORF, *supra* note 83, at 84 (*94) ("As for the effect and consequences, this is the rule: when words, simply and literally taken, would entail either no effect, or an absurd one, there must be a slight departure from the commonly received meaning, in so far as the necessity of avoiding the meaningless or the absurd requires.").

⁹⁷ BLACKSTONE, *supra* note 88, *61. *See also* Vienna Convention on the Law of Treaties, *supra* note 20, at art. 31, 1.A ("A treaty shall be interpreted in good faith in...the light of its object and purpose.").

⁹⁸ *See* BLACKSTONE, *supra* note 88, *61-62 ("For since laws in all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed."). *See also* PUFENDORF, *supra* note 83, at 85 (*96) ("[N]ot all cases can be foreseen, or stated, on account of their infinite variety[.]"). *See also* PETER GOODRICH, *READING THE LAW: A CRITICAL INTRODUCTION TO LEGAL METHOD AND TECHNIQUES* 37 (1986) ("In practice the judiciary are involved in interpreting words and phrases whose meaning is unclear, dealing with lacunae within a text which purports to be a complete exposition of the law and applying the code to situations which could not have been foreseen by the legislature.") and Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 *LA. L. REV.* 677, 722 (2005), *citing* Angelo Piero Sereni, *The Code and the Case Law*, in *THE CODE NAPOLEON AND THE COMMON-LAW WORLD* 62 (Bernard Schwartz ed., 1956) ("Those changing and petty details with which the legislator ought not to be preoccupied and all those matters that it would be futile and even dangerous to attempt to foresee and to define in advance, we leave to the courts.").

⁹⁹ THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 225 (1857) ("The imperfection of language is a serious evil when it occurs in those legislative commands on which the repose, discipline, and well-being of society depend. In regard to laws, as in other cases, difficulties will arise, in the first place from the

equitable solutions, however, as overindulgence may foreseeably "destroy all law, and leave decision of every question entirely in the breast of the judge."¹⁰⁰

Although ambiguities concerning such terms may be clarified by reviewing the works of credible authorities who have addressed similar topics,¹⁰¹ jurists should not permit their veneration for the past to stifle the law's ability to progressively develop.¹⁰² They should, however, be aware of historical precedents concerning similar topics¹⁰³ (as well as their concomitant effects).¹⁰⁴ Further, at least one commentator has argued that utilizing established technical meanings facilitates a system in which, "doubts concerning the meanings of statutes are diminished to their smallest possible proportions. For thus an enactment of to-day has the benefit of judicial renderings extending back through centuries of past litigation."¹⁰⁵ These methods notwithstanding, the inevitable ambiguities concerning legal language will invariably continue to generate disputes concerning interpretation.¹⁰⁶

disputed meaning of individual words, or, as is usually said, of the language employed; and in the second place, assuming the sense of each separate word to be clear, doubt will result from the whole context.").

¹⁰⁰ *Id.*

¹⁰¹ LIEBER, *supra* note 83, at 102-103 ("[W]ith respect to living languages, from works or persons of the same nation, community, profession, art, &c., to which the doubtful word may relate, after these persons have established their character for competency and truth; from previous expounders, of weighty authority, who are known to have paid much attention to the subject, and have done it with patience, learning, shrewdness, and conscientiousness; and from scholia, glosses, versions, and commentators.").

¹⁰² *Id.*, at 103 ("We have in this particular, to guard ourselves against an inordinate veneration of old authors, merely because they are old, or against a too implicit reliance upon old authors, simply because they have been relied upon so long. Science advances, and it would be a matter of great regret, if successive centuries were unable to supersede by their labors some works of previous periods, though they have justly enjoyed, and for a long time, the reputation of authority.").

¹⁰³ *Id.*, at 217 ("Whether we attribute authority to precedents or not, we ought always to pay proper attention to them; for whatever subject may occupy our reflection, it will always be found of great assistance, to inquire how others, in different situations, have viewed and acted upon the matter.").

¹⁰⁴ *Id.* at 219 ("Precedents must be taken with all their adjuncts, or they will be totally misunderstood; and not only with their adjuncts at the time, but likewise with their consequences and effects.").

¹⁰⁵ JOEL PRENTISS BISHOP, COMMENTARIES ON THE WRITTEN LAWS AND THEIR INTERPRETATION § 242 (b), at 225 (1882).

¹⁰⁶ *See, e.g.*, Holmes, *supra* note 87, at 418 ("By the theory of our language, while other words may mean different things, a proper name means one person or thing and no other. If language perfectly performed its function, as Bentham wanted to make it, it would point out the person or thing named in every case. But

If it appears that the author(s) of a particular piece of legislation did not "use the words with skill, knowledge, and accurate care and selection," then an investigation into the word's etymology or classical utility will be to no avail.¹⁰⁷ Thus, we must examine the source of the text itself and the knowledge of those who drafted it in order to effectively discern its meaning.¹⁰⁸ In order to accurately construe the intention of the legislature, however, it is important to presume that the measure in question was approved in a good faith effort to promote the welfare of the citizenry.¹⁰⁹

iii. An Application of Common Law Interpretative Methodologies

1. Ascertaining Subsidiarity's "True" Meaning

The common law recognizes that the word "subsidiarity" has no "true" meaning unless it has been 1) commonly used within society as a whole (or within a specific section therein) or 2) its meaning has been altered by the person using it. In this particular case, the term "subsidiarity" has been commonly and uniformly used within a

under our random system it sometimes happens that your name is *idem sonans* with mine, and it may be the same even in spelling. But it never means you or me indifferently. In theory of speech your name means you and my name means me, and the two names are different. They are different words...In such a case we let in evidence of intention not to help out what theory recognizes as an uncertainty of speech, and to read what the writer meant into what he has tried but failed to say, but, recognizing that he has spoken with theoretic certainty, we inquire what he meant in order to find out what he has said.").

¹⁰⁷ LIEBER, *supra* note 83, at 99 ("Faithful interpretation implies that words, or assemblages of words, be taken in that sense, which we honestly believe that their utterer attached to them. We have to take words, then, in their most probable sense, not in their original, etymological, or classical sense, *if* the text be such that we cannot fairly suppose the author use the words with skill, knowledge, and accurate care and selection.") (emphasis added).

¹⁰⁸ *Id.*, at 101 ("The general character of the text, whether it has emanated from a high or low source, and was drawn up with care or in haste, with a knowledge of the technical terms or not, the peculiar character of the author, and the especial connexion in which we find a doubtful word, must direct us in fixing upon a proper meaning.").

¹⁰⁹ *Id.*, at 240 ("We must be convinced that those who have adopted the measure in question, act with us on the same principles, or on principles we acknowledge as good, and that with them the measure is neither the consequence of chance nor the effect of sinister motives, but carefully adopted or developed on those principles.").

specific section of society, specifically, the Catholic Church.¹¹⁰ Although it could foreseeably be argued that the term has also been used within European society as a whole since 1992, this is probably insufficient to generate a "true" meaning insofar as it has been the topic of considerable debate for at least fifteen years since its codification at Maastricht.¹¹¹ Therefore, due to the fact that the Catholic Church utilized the term "subsidiarity" for at least sixty years prior to its codification at Maastricht,¹¹² the common law would seemingly advocate examining that usage in an effort to ascertain its "true" meaning.

This argument could, of course, conceivably be dismissed if it were provable that those who codified the term at Maastricht intended to use it in a manner that differed from the Catholic Church's meaning.¹¹³ This appears to be unlikely because there is no evidence indicating that the legislators in question intended to break from the definition developed within Catholicism.¹¹⁴ Instead, a superficial examination yields evidence concerning the direct influence of Catholicism upon Jacques Delors¹¹⁵ (the President of the European Commission at the time the Treaty of Maastricht was signed). Although

¹¹⁰ See Section VI *infra*.

¹¹¹ See *supra* note 4.

¹¹² See Section VI (2) *infra*.

¹¹³ But see G.A. ENDLICH, ESQ., A COMMENTARY ON THE INTERPRETATION OF STATUTES 11 (1888), quoting Wilberforce, Stat. Law, p. 102 ("It is inaccurate to speak of the meaning or intent of a statute as something separate or distinct from the meaning of its language. 'The intention of the Legislature is to be ascertained by means of the words which it has used, and though these words are often modified, though their literal sense is not always adopted, though they are sometimes strained, transported, treated as inadequate or superfluous, they are still the only interpreters of the mind of the Legislature.'").

¹¹⁴ But see DAVIES, *supra* note 31, at 19 (The principle of subsidiarity as enshrined within the Treaties is "deliberately ambiguous in nature allowing much room for political discussion as to its practical implementation.").

¹¹⁵ See Marquardt, *supra* note 61, at 624 ("Catholic social theory was influential in Delors's [sic] thinking, and the German federalist principle thus fell on fertile ground."), citing Marc Wilke & Helen Wallace, *Subsidiarity: Approaches to Power-Sharing in the European Community* 30 (1990). See also Føllesdal, *supra* note 62, at 19 ("The Catholic argument for subsidiarity rests on the view that the human good is to develop and realize [sic] one's good potential, thus realizing one's dignity as made in the image of [G_d]. As developed by Mounier, this theory of *Personalism* had profound influence on Jacques Delors.").

this is obviously insufficient to conclusively prove the point, it is nonetheless insightful considering the lack of evidence demonstrating that the legislators in question intentionally utilized a definition that diverged from Catholicism's. Further, President Delors was apparently aware of subsidiarity's connection to both Johannes Althusius¹¹⁶ and Pierre-Joseph Proudhon.¹¹⁷ The former was concerned with human autonomy and solidarity within the religious sphere¹¹⁸ while the latter was concerned with human dignity within the secular sphere.¹¹⁹ Thus, when combined with the fact that various invocations of subsidiarity within the EU (including the Treaty of Maastricht) appear to track the language and/or general values promoted by the Catholic Church's definition of subsidiarity, the potential connection between President Delors' familiarity with

¹¹⁶ Thomas Hueglin, *Federalism, Subsidiarity, and the European Tradition*, at <http://www.ecsanet.org/conferences/ecsaworld2/hueglin.htm> ("In an internal memorandum to the President of the European Commission, Jacques Delors, it has been pointed out that the Subsidiarity now anchored in the Maastricht Treaty can be traced back to 16th century European political thought and practice, and in particular to the 17th century political theory of Johannes Althusius (1557-1638)... This recourse to the history of European political thought and practice seems to suggest that subsidiarity has its roots in an early-modern Europe not yet dominated by a fully sovereign nation-state system, and that it is therefore uniquely appropriate for the organisation of a post-nation-state European Union. It is, in other words, the timeless operational principle of a federally organised democratic European polity.").

¹¹⁷ Rabinowitz, *supra* note 58, at 11 ("Of particular interest and importance is a conference on subsidiarity, chaired by the Commission President Jacques Delors, and held in Maastricht in 1991, the same year that the agreement on the Maastricht Treaty was reached. Tracing the concept back to Proudhon, Delors argued that the application of the subsidiarity principle in general would change Community structures completely.").

¹¹⁸ THOMAS O. HUEGLIN, *EARLY MODERN CONCEPTS FOR A LATE MODERN WORLD: ALTHUSIUS ON COMMUNITY AND FEDERALISM* 153 (1999) ("What emerges from Althusius' federalism as the meaning of subsidiarity... is an expression of a complex relationship and tension between autonomy and solidarity in a multilevel system of governance that can claim universal validity. It is as much applicable in the family and kinship relationships as in a commonwealth or, indeed, in an international political order.").

¹¹⁹ Pierre-Joseph Proudhon, *De la Justice*, t. 1, p. 423, *reprinted in* K. STEVEN VINCENT, *PIERRE-JOSEPH PROUDHON AND THE RISE OF FRENCH REPUBLICAN SOCIALISM* 226 (1984) ("Man, by virtue of the reason with which he is endowed, has the faculty to feel his dignity in the person of his fellow man as in his own person, of affirming himself simultaneously as individual and as species.

"JUSTICE is the product of this faculty: it is *the respect, spontaneously felt and reciprocally guaranteed, for human dignity, in whatever person and whatever circumstances it finds itself compromised, and at whatever risk its defense exposes us to...*

"From the definition of Justice are deduced those of *right* and *duty*.

"Right is for each one the faculty of requiring of others respect for the human dignity of his person; - duty, the obligation for each one to respect this dignity in another.").

subsidiarity's secular and ecclesiological development is arguably worth further investigation.

Thus, due to the facts that 1) the term "subsidiarity" had been uniformly used within the Catholic Church for at least sixty years prior to its codification at Maastricht and 2) there is no immediate evidence suggesting that the legislators at Maastricht intended to disregard that usage, this prong of the common law's approach to interpreting ambiguities appears to sanction the examination of the development of subsidiarity within the Catholic Church.

2. *Examining the Context*

Even if adherence to this general rule and its two exceptions fails to clarify subsidiarity's meaning, its context (especially the preamble) should also be examined.

Here, the relevant provisions within the Treaty of Maastricht's preamble read as follows:

"CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,
DESIRING to deepen the solidarity between their peoples while respecting their history, their culture and their traditions,
DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them...
RESOLVED to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity[.]"¹²⁰

These express concerns appear to comport with the Catholic Church's definition of subsidiarity.¹²¹ More specifically, the EU's desire to respect the histories, cultures,

¹²⁰ Treaty of Maastricht (signed Feb. 7, 1992; effective Nov. 1, 1993), O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719 ["TEU"], available at http://europa.eu/eur-lex/en/treaties/dat/EU_treaty.html (last visited 17 July 2007).

traditions, and liberties of its peoples implies that it will not unnecessarily interfere with those traditions. When coupled with the EU's resolve to take action as close to the citizen as possible, it appears that the legislators at Maastricht intended for the term to comport with the definition put forth by the Catholic Church. Therefore, the common law's analysis of an ambiguity's context appears to indicate that an examination of the Church's use of "subsidiarity" is warranted because the EU has both expressly invoked the term itself and implicitly invoked the meaning that it was accorded within Catholicism.

3. Examination of Technical Meanings

The common law also expressly sanctions utilizing technical meanings where they are sufficiently established. Therefore, if subsidiarity's meaning within Catholicism is sufficiently technical, the common law encourages an examination of that meaning. When doubts arise, however, they should almost always be resolved in favor of the people.¹²² Therefore, the common law would arguably deem Catholicism to be sufficiently technical and therefore permit an analysis of subsidiarity's development therein; if the term remains ambiguous, however, then it appears that the common law would prefer any ambiguities concerning the application of subsidiarity to be resolved in favor of the Member States due to their relative closeness to the citizenry.

¹²¹ See Section VI, *infra*.

¹²² LIEBER, *supra* note 83, at 172 ("In cases of doubt between the authority and an individual, the benefit of the doubt, all other reasons being equal, ought to be given to the individual, not to the authority; for the state makes the laws, and the authority has the power; yet it is subversive of all good government, peace, and civil morality, if subtlety is allowed to defeat the wise object of the law, or if a morbid partiality for an evil-doer guides the interpreter.").

4. Legislative Skill

Finally, jurists should examine whether the legislators at Maastricht used the term with, "skill, knowledge, and accurate care and selection."¹²³ Due to the fact that (at present) there appear to be no facts evidencing that the officials at Maastricht did not know its established meaning, jurists should not presume otherwise.¹²⁴ Instead, the authors' express invocation of the term itself, when coupled with their references to liberty, closeness to the citizen, and respect for individuals' cultures appear to indicate that they perfectly understood its meaning within Catholicism and intended to invoke it in its entirety. However, future analysis may benefit from ascertaining what influence (if any) the teachings of Catholicism had on the other officials that signed the Treaty of Maastricht.¹²⁵

¹²³ *Id.*, at 99 ("Faithful interpretation implies that words, or assemblages of words, be taken in that sense, which we honestly believe that their utterer attached to them. We have to take words, then, in their most probable sense, not in their original, etymological, or classical sense, *if* the text be such that we cannot fairly suppose the author use the words with skill, knowledge, and accurate care and selection.") (emphasis added).

¹²⁴ See CRAIES, *supra* note 77, § 17.1.3, at 545, *citing* Spillers Ltd. Cardiff Assessment Committee, [1931] 2 K.B. 21, 42-43 ("It ought to be the rule, and we are glad to think that it is the rule, that words are used in an Act of Parliament correctly and exactly, and not loosely and inexactly. Upon those who assert that that rule has been broken the burden of establishing their proposition lies heavily. And they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred.").

¹²⁵ This analysis may be especially insightful due to the widespread election of Catholic leaders after the Second World War. See Altiero Spinelli, *The Growth of the European Movement Since the Second World War*, in EUROPEAN INTEGRATION 49 (Michael Hodges ed., 1972) ("After the war, there was a tendency for political parties inspired by the Catholic religion to become predominant in all countries of Western Europe.").

iv. Conclusions Concerning The Application of Common Law Interpretative Methodologies

Thus, under the factors examined herein, the common law appears to encourage jurists to examine the ecclesiological development of subsidiarity. More specifically, Catholicism utilized the term for at least sixty years prior to its codification at Maastricht and there is no evidence that the legislators intended it to mean something other than it did within Catholicism. This could arguably lead common law scholars to conclude that the Catholic Church's definition of subsidiarity accounts for its "true" meaning. Furthermore, an examination of the Preamble to the Treaty of Maastricht provides examples that comport with Catholicism's use of the term, thereby providing an independent justification for examining its development within Catholicism. The common law also encourages the use of technical meanings when they have been developed; assuming that subsidiarity's meaning within Catholicism is sufficiently technical,¹²⁶ then this method warrants an examination of its ecclesiological development as well. Finally, some common law scholars sanction the use of any reasonable method in an effort to understand a word's meaning. Each of these common law methodologies provides an independent justification for examining the ecclesiological development of subsidiarity.

There are, however, potential arguments to the contrary. Specifically, the common law encourages the examination of both 1) other laws codified by the legislators

¹²⁶ See BENNION, *supra* note 10, § 376, at 1047, *citing* London and North Eastern Rly Co. v. Berriman [1946] AC 278 at 305 ("It seems that evidence should be admitted to establish whether or not a term is a technical term. If the evidence shows that it is, then the court determines whether it was intended in the technical sense. If the court finds it was, then evidence of what the technical meaning is becomes admissible.").

in question and 2) equitable considerations, both of which have been reserved for future scholarship. Assuming temporarily that neither of these methodologies prevents an examination of subsidiarity's ecclesiological development, it should be noted that none of the aforesaid justifications appear to be trumped by either a lack of skill or by minimal or absurd effects.

b. *A General Overview Civil Law Interpretative Methodologies*

i. Introduction

Although European jurisprudence has been influenced by specific components of the common law,¹²⁷ the civil law tradition informs the legal values of Western Europe¹²⁸ and most EU countries are (at a minimum) influenced by its dictates.¹²⁹ As a consequence, any attempt to justify an examination of subsidiarity's ecclesiological

¹²⁷ See, e.g., Baudenbacher, *supra* note 14, at 337 (“It is finally time that people on both sides of the Atlantic take notice of the fact that the law of the European Union (as well as the law of the European Economic Area) is made up of elements of civil law and of common law. Given the history of European integration with the United Kingdom and Ireland on the sidelines for the first fifteen years, it is clear that EC law was originally comprised of civil law. However, it has since been supplemented by important common law elements. Examples include the concept of true and fair view in accounting law, the evolution of due process in competition law, and an interpretation of Article 81(1) (former Article 85(1)) of the EC Treaty - the provision prohibiting cartels - as a sort of a rule of reason.”) and Ana M. Lopez-Rodriguez, *Towards a European Civil Code Without a Common European Legal Culture? The Link Between Law, Language and Culture*, 29 BROOK. J. INT’L L. 1195, 1210 (2004) (“Common law is silently permeating continental Europe.”).

¹²⁸ JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 3 (1969) (“[Civil law] is the dominant legal tradition in most of Western Europe...[and] was the legal tradition familiar to the Western European scholar-politicians who were the fathers of international law. The basic charters and the continuing legal development and operation of the European Communities are the work of people trained in the civil law tradition. It is difficult to overstate the influence of the civil law tradition on the law of specific nations, the law of international organizations, and international law.”).

¹²⁹ See Stephen Jacobsen, *Catalan Nationalism and Civil Codification in Nineteenth-Century Europe: Law and Nationalism in Nineteenth-Century Europe: The Case of Catalonia in Comparative Perspective*, 20 LAW & HIST. REV. 307, 307 (2002) (“By the close of the nineteenth century, most continental Europeans tacitly accepted, if they thought about it at all, the notion that a civil code governed multiple personal and familial relationships in their daily lives.”). See also JAMES S.E. OPOLOT, *WORLD LEGAL TRADITIONS AND INSTITUTIONS* 13 (1981) (“European civil law countries include France, Germany, Netherlands, Sweden, Austria, Switzerland, Italy, Spain, Scandinavia, Belgium, and Portugal.”).

development in order to clarify its meaning within the Treaty of Maastricht should be sanctioned within the civil law tradition as well.

1. Civil Law as a Legal Science

In order to understand the civil law's interpretative methodologies, it first seems necessary to recognize that it views itself as a "legal science."¹³⁰ Although there are arguably countless reasons why civil law jurists have adopted scientific methodologies, Planiol argued that the narrow method of interpretation originally utilized by the Romans failed to test the value of their propositions, thereby effectively lowering the civil law's standards.¹³¹ Another scholar has observed that the development of legal science was in many ways deemed necessary due to the "confusion of laws" that appeared as a result of increased growth and contact with other legal cultures.¹³²

Legal science within the civil law requires binding laws to be transcribed¹³³ in a manner that is comprehensible to those whom it is intended to bind,¹³⁴ thus promoting

¹³⁰ See, e.g., A. FOUILLÉE, J. CHARMONT, L. DUGUIT, AND R. DEMOGUE, MODERN FRENCH LEGAL PHILOSOPHY § 90, at 119 (Franklin W. Scott and Joseph P. Chamberlain, trans., 1968) ("The law presupposes general science."), quoting SALEILLES, LES MÉTHODES D'ENSEIGNEMENT DU DROIT ET L'ÉDUCATION INTELLECTUELLE DE LA JEUNESSE 17.

¹³¹ MARCEL PLANIOL, 1 TREATISE ON THE CIVIL LAW § 224, at 161-162 (Louisiana State Law Institute, trans., 12th ed., 1959) (1899) ("Judicial logic has existed for many centuries. Its origin goes back to Roman jurisprudence. Its counterpart is found in the ability displayed by the old jurists and above all by those of the great period, called the age of classical law. (1-III Century A.D.). Unfortunately, an art evolved from these conditions which was somewhat narrow, confined its ambition to the almost mechanical combination of texts and reached conclusions without testing their value. This judicial logic, which had its literature, soon exercised a pernicious influence and tended to lower legal standards. If juridical science was reduced to this level, law schools could be closed without any great damage being done... All human knowledge, as far as the jurist was concerned, could be compressed into a few maxims.").

¹³² GUY CARLETON LEE, HISTORICAL JURISPRUDENCE: AN INTRODUCTION TO THE SYSTEMATIC STUDY OF THE DEVELOPMENT OF LAW 1 (1927) ("National growth caused an intermingling of men and a consequent confusion of laws. Because of social and economic reasons, this confusion was intolerable. Scientific arrangement and adjustment became imperative.").

¹³³ See, e.g., Guido Alpa, *The European Civil Code: "E Pluribus Unum"*, 14 TUL. EUR. & CIV. L.F. 1, 12 (1999) ("The first problem is language.... The problem of language suggests that it is fundamental to choose written rules rather than those derived from case law.").

legal certainty¹³⁵ and facilitating the realization of the greatest possible good.¹³⁶ Hans Georg Gadamer (the influential expositor of Gadamerian hermeneutics)¹³⁷ notes that, "Whoever wants to learn a science has to learn to master its methodology."¹³⁸ Therefore, in order to effectively harness the powers of legal science, one must first understand its legal method. Due to the fact that the vast majority of this method lies outside the scope and competence of this particular paper, the analysis contained herein will be limited to the civil law's methodologies concerning the interpretation of ambiguities.

¹³⁴ See, e.g., ARNULL, *supra* note 74.

¹³⁵ See MERRYMAN, *supra* note 128, at 51 ("Certainty frequently implied rigidity; law that is certain may be difficult to mold in response to changed circumstances or to bend to the requirements of a particular case...In the civil law world, the supreme value is certainty, and the need for flexibility is seen as a series of 'problems' complicating progress toward the ideal of a judge-proof law...if judges are not carefully controlled in the way they interpret legislation, the law will be rendered more uncertain."). See also FRANÇOIS GÉNY, *METHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF* § 98, at 182 ("The principle [of legal certainty] acquires particular importance, *inter alia*, in economic law. Economic and commercial life is based on advance planning so that clear and precise legal provisions reduce transaction costs and promote efficient business. Legal certainty may thus be seen as contributing to the production of economically consistent results.") and Barnes, *supra* note 99, at 718-720 ("Preventing a freewheeling judiciary is one of the reasons for the ideology of the code, but what is the reason behind this reason? Certainty in the law. Within civil law jurisdictions, certainty 'has come to be a kind of supreme value, an unquestioned dogma, a fundamental goal.' Certainty is unquestionably a value in common law jurisdictions as well, but not to the extent it is in the civil law. Approaching the law from more of a scientific perspective than the rugged experiential approach of the common law, civil law jurisdictions approach their codes as the embodiment of logic and reason itself. Civil law codes are drafted, developed, and utilized based on the view that there is order to life, rather than haphazard happenstance of events.").

¹³⁶ PLANIOL, *supra* note 131, § 224, at 162 ("Laws, however, are made in order to obtain for man the greatest possible amount of good. A juridical science which would lead to unjust or dangerous solutions would be false. It would defeat its own purpose.").

¹³⁷ Baudenbacher, *supra* note 14, at 348 ("According to modern hermeneutics [led by Hans Georg Gadamer], the judges' preconception and understanding of the law determines above all the choice of method. Since the 1970s, it has been common ground that this preunderstanding constitutes the starting point of every interpretation. Like every interpreter, a judge may understand a text only if he or she faces it with a certain purposive expectation of the meaning...The interpreter is examining his or her own preconception against the text of the norm in the so-called 'hermeneutic circle' - he or she projects an understanding for the whole of the text and understands each part in the light of that projection, revising the interpretation step by step while further penetrating the text.").

¹³⁸ Hans-Georg Gadamer, *The Universality of the Hermeneutical Problem*, in *PHILOSOPHICAL HERMENEUTICS* 11 (David E. Linge, ed., 1976).

2. Civil Law Jurists May Only Consult the Law Itself

The civil law is generally promulgated by a code¹³⁹ that must be complete, clear, and without any internal conflicts.¹⁴⁰ This belief in the possibility of a complete code is aptly demonstrated by the French Civil Code's implication that it adequately foresees and addresses every conceivable legal dispute.¹⁴¹ Due to the fact that such codes are generally perceived to be complete expressions of the law,¹⁴² civil law judges are theoretically restricted to utilizing the law itself (embodied by pertinent statutes, regulations and customs) in their efforts to adjudicate disputes;¹⁴³ the use of any other

¹³⁹ See FRITZ SCHULZ, *PRINCIPLES OF ROMAN LAW* 13 (Marguerite Wolff, trans., 1956) (1936) (“[A] code purports to be a complete and finished whole, which it is not[.]”). See also Barnes, *supra* note 99, at 721-722 (“[S]ince positive law in a civil law jurisdiction is ideologically expressed exclusively in the comprehensive provisions of the code, the power of courts to adjudicate disputes is limited quite literally and strictly to the scope of coverage of the code precepts.”); and Jeffrey A. Talpis, *The Civil Law in North America: The Civil Law Heritage in the Transformation of Quebec Private International Law*, 84 *LAW LIBR. J.* 177, 177 (1992) (“Also fundamental to a civil law system is tradition: a code is based on history and is a legal expression of a culture of a people, a symbol reflected in its language, the source of its rules and particular policies, and the pulse of a nation.”).

¹⁴⁰ MERRYMAN, *supra* note 128, at 30 (“If a judge were required to decide a case for which there was no legislative provision, he would in effect make law and thus violate the principle of rigid separation of powers. Hence it was necessary that the legislature draft a code without gaps. Similarly, if there were conflicting provisions in the code, the judge would make law by choosing one rather than another as more applicable to the situation. Hence there could be no conflicting provisions. Finally, if a judge were allowed to decide what meaning to give to an ambiguous provision or an obscure statement, he would again be making law. Hence the code had to be clear.”).

¹⁴¹ C. CIV. art. 4 (Fr.) (Georges Rouhette and Anne Berton, trans., 2004) (“A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient, may be prosecuted for being guilty of a denial of justice.”), at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm#PRELIMINARY%20TITLE%20OF (last visited 22 June 2007).

¹⁴² See Barnes, *supra* note 99, at 720 (“Because civilians value the ability of human reason to effect a legal order, the code is envisaged as complete, with the wherewithal to furnish the resolution of any legal issue which could possibly arise as to matters within its jurisdiction.”).

¹⁴³ MERRYMAN, *supra* note 128, at 25. See also Barnes, *supra* note 99, at 721-722 (“The court must come to its resolution of the case by working strictly within the framework of the code. Because of the dogmatic philosophy that the code is complete and sufficient, the court may not rely on any authorities not contained in the code itself. So devout is this dogma of completeness, courts are generally prohibited from declining to adjudicate a dispute based on any perception of gaps in the code's coverage of a particular subject matter.”). *C.f.* Peter G. Stein, *Judge and Jurist in the Civil Law: A Historical Interpretation*, 46 *LA. L. REV.* 241, 241-242 (1985) (“Very broadly, the official myth in the civil law is that, although academic writings

source is a *prima facie* violation of the separation of powers doctrine and represents an impermissible usurpation of the legislature's law-making function by the judiciary.¹⁴⁴

Thus, without further investigation, it would appear that civil codes restrict civilian jurists to the consultation of the law itself in their efforts to resolve any ambiguities that may arise.

3. Civil Law Nonetheless Recognizes and Accepts the Inevitability of Interpretation

It is generally accepted that civil law jurisdictions nonetheless grant their judges the authority to interpret law.¹⁴⁵ This is due (at least in part) to the recognition that humanity is incapable of foreseeing all possible disputes¹⁴⁶ or accounting for every conceivable change within society.¹⁴⁷ Due to the fact that civilian jurisdictions generally

have authority, judicial decisions have none; in practice, however, great attention is paid to the latter. As all law librarians know to their cost, the publication of case law reports in civil law countries is a massive industry which reflects this reality.").

¹⁴⁴ MERRYMAN, *supra* note 128, at 40 ("[T]he doctrine of separation of powers, when carried to an extreme, led to the conclusion that courts should be denied any interpretative function and should be required to refer problems of statutory interpretation to the legislature itself for solution. The legislature would then provide an authoritative interpretation to guide the judge. In this way defects in the law would be cured, courts would be prevented from making law, and the state would be safe from the threat of judicial tyranny.").

See also Barnes, *supra* note 99, at 720 ("The people democratically elect the legislatures, which enact the laws. The judges, not being subject to the electorate, are not empowered to enact laws.").

¹⁴⁵ *See Id.*, at 726-727 ("Quite obviously, in actual practice, the dogma of metaphysical completeness of the civil code is a fiction. Short of perfect clairvoyance, not every conceivable scenario can ever be accounted for in a code in advance. Moreover, even where provision is made in a code, the dogma of perfect lucidity and clarity so as to obviate the need for any interpretation is likewise a fiction. Accordingly, though the civil law courts do in fact practice...deductive and analogizing processes...they also may fairly be said to engage in a considerable amount of statutory interpretation."). *See also* MERRYMAN, *supra* note 128, at 47 ("[T]here is general agreement in civil law jurisdictions that judges do have the power to interpret evolutively. The discussion thus shifts from the legitimacy of this function to the question of its justification and its proper limits.") and Julio C. Cueto-Rua, *The Civil Code of Louisiana is Alive and Well*, 64 TUL. L. REV. 147, 170 (1989) ("Every civil code has its interpretative jurisprudence; the two complement each other.").

¹⁴⁶ *See, e.g.,* A. FOULLÉE, et. al., *supra* note 130, § 93, at 122 ("No one can believe in this day that the written law is all-sufficing[.]").

¹⁴⁷ Cueto-Rua, *supra* note 145, at 168-169 ("The law in force in any community is never static, rigid, unchangeable...Developments in legislation, in customary behavior, in judicial practices, and in doctrinal contributions may give new life, greater energy, and unexpected possibilities to the articles of the Civil Code.").

concede that it is impractical (if not impossible) for any man-made source of law to be completely comprehensive,¹⁴⁸ the existence of potentially ambiguous provisions remains virtually inevitable.¹⁴⁹ Thus, interpretation is acceptable within the civil law tradition.

4. *The Civil Law Requires Rules Governing Interpretation so that Certainty may be Maintained*

It is therefore clear that the civil law tradition demands certainty in the law¹⁵⁰ and that it requires jurists to interpret the inevitable ambiguities arising therein.¹⁵¹ These ambiguities (and their concomitant need for interpretation) does not (and indeed cannot) conflict with the EU's preference for legal certainty.¹⁵² In other words, the imperfections

¹⁴⁸ Baudenbacher, *supra* note 14, at 336-337 ("The assumption of a complete - and therefore self-sufficient - code, however, is at best an historical footnote today; this is the case in every European country. Contrary to the theoretical basis of the mechanical theory, most civil codes acknowledge that they are not complete. The codes of Austria, France, Italy, and Spain even contain rules providing guidance to judges on how to proceed in the case of a gap. The Swiss Code expressly grants judges the authority to develop judge-made law in certain circumstances. Whether the courts have ever accepted the completeness dogma is doubtful.").

¹⁴⁹ GÉNY, *supra* note 135, § 57, at 78-79 ("As any human work, the statute will always be incomplete. No matter how subtle the human mind may be, it is incapable of a complete synthesis of our world. This deficiency which can not be remedied, is especially noticeable in law...Even if we should imagine the impossible, a legislator sufficiently acute to penetrate in all breadth and depth the complete living legal order of his time, still we must recognize that he could not foresee and regulate all future legal relations."). See also MERRYMAN, *supra* note 128, at 44 ("[T]he dogma that a code can be complete and coherent fails to survive even a cursory glance at the jurisprudence...The books are full of decisions in which the court has had to fill gaps in the legislative scheme and reconcile apparently conflicting statutes. Although the text of a statute remains unchanged, its meaning and application often change in response to social pressures, and new problems arise that are not even touched on by any existing legislation.").

¹⁵⁰ See *supra* note 135.

¹⁵¹ See Section V (b)(3) *supra*.

¹⁵² TRIDIMAS, *supra* note 12, at 245 ("To state the obvious, the use of abstract terms in Community legislation does not render the provision in question incompatible with the principle of legal certainty."). See also BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 98 (2004) ("[Judicial discretion does not necessarily undermine legal certainty] if there are shared background understandings or customs - either within society or within the legal culture - that inform the application of the broad standards.").

of language,¹⁵³ when coupled with the civil law's overriding interest in the certainty of the law, demands recognized and accepted methodologies of juridical interpretation.¹⁵⁴

Among the various methods of interpretation available to civil law jurists, none are deemed to be appropriate for all situations at all times.¹⁵⁵ Although the first civil law treatises concerning interpretative methodologies began to appear over 500 years ago,¹⁵⁶ an overview of permissible methodologies and/or sources is nonetheless necessary. This examination should reveal the sources and/or methodologies civilian jurists are permitted to use in their attempts to properly discern the meaning of the term "subsidiarity."

¹⁵³ GÉNY, *supra* note 135, § 106, at 207 ("Sometimes it happens that the legislator has not completely and precisely articulated the rule he meant to issue. Such a mental failure is nothing rare in the sphere of manifestations of human will...[These] gaps are equally inevitable in the drafting of legislative acts, especially where the legislative thought could not always stop long enough to clarify all the details.") and *id.* § 15, at 22 ("[T]he thought of the legislator is often not faithfully expressed in the terms he uses. To a legal interpreter, who is to adhere to these terms, the formulation appears obscure, incomplete and therefore insufficient to yield the desired solution.").

¹⁵⁴ See MACLEAN, *supra* note 1, at 103 ("[T]he series of procedures or method associated with interpretation...operates as a sort of algorithm for the performance of a difficult operation: Erasmus illustrates the need for method in such circumstances by evoking the physical problem involved in moving a heavy weight; many hands can attempt the task, but success will only come through a methodical approach.").

¹⁵⁵ Baudenbacher, *supra* note 14, at 348-349 ("The findings of legal hermeneutics have laid to rest the last possible notion among scholars that the right result of interpretation can be deduced from the written law by way of mechanical application of a certain method. In interpreting the law, the judge necessarily leaves his or her own mark on it...Since the theories of hermeneutics have been accepted by most of the scholars, the search for the be-all and end-all method of legal interpretation has been practically abandoned.").

¹⁵⁶ MACLEAN, *supra* note 1, at 84 ("The first monographs to appear on the subject [of legal interpretation] are difficult to date with precision: Matthaeus Mathesilanus' short *Tractatus extensionis ex utroque iure eleucubratus*, [was] probably produced around 1435...the *De interpretatione legis extensiva* of Bartolomaeus Caepolla, who was writing in the 1460s, is longer and divided into chapters, prefaced by a general account of extensive interpretation. Constantinus Rogerius' *Tracatus de iuris interpretatione*, dated 1463, is more comprehensive still, and obviously designed to fulfil a pedagogical purpose[.]").

ii. Some Acceptable Methods of Interpretation within the Civil Law Tradition

As a general rule, courts in civil law jurisdictions may utilize virtually every conceivable method of interpretation in order to effectively adjudicate legal disputes.¹⁵⁷

In most (if not all) cases, however, judges are only permitted to interpret the law when its express provisions are unclear.¹⁵⁸ When this is the case, judges should usually begin the

¹⁵⁷ PLANIOL, *supra* note 131, § 224, at 162 (“The jurist, truly worthy of the name, is not satisfied with merely solving practical questions. He weighs and judges laws. To do so, he should be able to criticize competently. This he cannot do without bringing into play resources of a wide intellectual culture. The history of the law will make known to him the origin of the institutions. Political economy will reveal to him the practical results achieved by them. Comparative law will acquaint him with points of comparison taken from different legal systems. It is only under these conditions that the law can fulfill its mission.”); and *id.* § 204, at 152 (“Judicial interpretation is free in principle. Every tribunal may adopt the solution which it considers the most just and the best. It is bound neither by decisions which it may have handed down previously in analogous cases nor by those of a higher court.”). *See also* GÉNY, *supra* note 135, § 15, at 22 (“In similar cases...it is necessary to rely on the improperly so called *logical* interpretation which, as Jhering has shown, consists of a search for the meaning of the statute in the intent of the author, without paying attention to the words...[I]t is necessary to inquire by other means into the legislative will which inspired it, in order to confirm, correct, supplement and widen or narrow the letter. So one looks for the intention of the legislator, by all available means referring in this process to circumstances far outside the statute itself, especially those which have accompanied its birth and which, aptly treated, make it possible to fructify the statute and multiply its effects.”); CRAIES, *supra* note 77, § 18.1.3, at 557 (“Recent developments...combine both [literal and purposive interpretation] to produce and reflect a situation in which it is now beyond doubt that the courts will go to any sensible length to discern and give effect to the underlying policy intention of legislation, and that in construing a statute they will use all kinds of material available to them as tools to discover that intention.”); Roger Perrot, *The Judge: The Extent and Limit of His Role in Civil Matters*, 50 TUL. L. REV. 495, 500 (1976) (“[I]t would be incomprehensible if one had to limit himself to a banal inquiry into the legislative will. The truth is that beyond all the exegetical analyses, the civil judge remains fundamentally attached to the principle of autonomy of the will and to the climate of economic liberalism of which he is the expression.”); Baudenbacher, *supra* note 14, at 345-346 (“It is, however, safe to affirm that civil law courts do not rule out any method of interpretation, and that no order of priority of the single elements of interpretation exists. That means that a court might in one case come to the conclusion that the right solution should be derived from the text of a provision. In another case the court may rely on the legislative history, on contextual interpretation, or on the purpose (the *telos*) of the provision. According to widespread opinion, courts should go through all the mentioned elements of interpretation. The balance, however, will often tip in favor of purposive interpretation. In following that approach, courts tend to take into account the social reality at the time of the application of the law.”); and *id.* at 358 (“With regard to the methods of interpretation, it is fair to say that purposive interpretation plays a crucial role in all civil law countries and that it clearly prevails in the case law of the European courts.”).

¹⁵⁸ MACLEAN, *supra* note 1, at 89 (“Bartolus, following D 1. 3. 12 and D 1. 3. 23, claims that judges may interpret the law ‘nisi verba essent plana, quia tunc non potest aliter interpretari quam verba loquuntur’ (except in cases when the words are clear: in these cases it is not possible to interpret in any other way than according to the literal meaning)[.]”). *See also* GÉNY, *supra* note 135, § 14, at 21 (“The legal rule is clear,

task of interpreting the relevant ambiguity by examining the literal meaning of the words used¹⁵⁹ and supplementing that meaning with the sometimes elusive "historic intent, the legal context or framework of the norm to be interpreted, teleological considerations, and the legislative purpose or the ratio legis."¹⁶⁰ Thus, in the event that a jurist encounters an unclear provision within the civil law, they should (as a general rule)¹⁶¹ first seek to ascertain the intention of the relevant legislator(s).¹⁶²

Although Gény recognizes that French lawyers of his time claimed to objectively analyze legislative intent,¹⁶³ he counters that their efforts were erroneously conceived

precise, well constructed. It suffices to carefully analyze its content, weigh its concepts and relate it to facts. The wisely set up organism functions in such a case automatically and it would be dangerous and against its purpose to try to go too far into it. We shall be halted by one of the maxims which synthesize the wisdom of generations of lawyers: 'When the law is clear, one must not go against the text under the pretext of discovering its spirit.');" J. WALTER JONES, HISTORICAL INTRODUCTION TO THE THEORY OF LAW 51-52 (1940) ("And Portalis was no less alive than Savigny to the danger of arbitrariness if judges were not inspired by scientific aims. Where the statute is clear the judge need only study its terms; when it is vague he should turn to well-established custom, an uninterrupted series of decisions, or an accepted juristic opinion or maxim, for 'these take the place of the statute'; when it is silent, and the faces are new, he must resort to equity or 'natural law'. And to Portalis this natural law is no other than legal science, for the judge should be inspired by that 'spirit of the law' which is above the statutes themselves.").

¹⁵⁹ See, e.g., C. CIV. (Louisiana) ["LA. C. CIV."], at art. 11 ("The words of a law must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the law involves a technical matter."), available at <http://www.legis.state.la.us/> (last visited 20 November 2007).

¹⁶⁰ Wolfgang Oehler, *Working with a Code: Is there a Difference Between Civil-Law and Common-Law People?*, 1997 U. ILL. L. REV. 711, 715 (1997).

¹⁶¹ But see Baudenbacher, *supra* note 14, at 348 ("The findings of legal hermeneutics have laid to rest the last possible notion among scholars that the right result of interpretation can be deduced from the written law by way of mechanical application of a certain method.").

¹⁶² See, e.g., Barnes, *supra* note 99, at 726 ("Civil law courts are to take into account not only the express grammatical provisions of the code section, but they are also to consider the legislative intent and the social goal of the provision. This is sometimes referred to as the 'teleological approach' – that is, interpreting legislation in light of evolving societal or market forces.") and William Tetley, *Mixed Jurisdictions: Common Law v. Civil Law (Codified and Uncodified)*, 60 LA. L. REV. 677, 704 (2000) ("In civil law jurisdictions, the first step in interpreting an ambiguous law, according to Mazeaud, is to discover the intention of the legislator by examining the legislation as a whole, including the 'travaux préparatoires,' as well as the provisions more immediately surrounding the obscure text."). See also IAN S. FORRESTER, SIMON L. GOREN, AND HANS-MICHAEL ILGREN, *THE GERMAN CIVIL CODE (AS AMENDED TO JANUARY 1975)* § 133 (1975) ("In interpreting a declaration of intention the true intention shall be sought without regard to the declaration's literal meaning.") and C. CIV., § 133 (F.R.G.), available at http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf (last visited 26 October 2007).

¹⁶³ GÉNY, *supra* note 135, § 25, at 35.

insofar as they supplanted that intent with their own.¹⁶⁴ This practice was (and remains) unacceptable because it clearly "suppress[es] the precision and stability which are the capital merit and salient advantage of written law."¹⁶⁵ Instead, Gény observes that the very etymology of the word "interpretation" requires strict adherence to the intention of the legislator.¹⁶⁶ Planiol appears to concur with Gény's assessment¹⁶⁷ and advocates an examination of preparatory studies because the law-makers' thoughts are often contained

¹⁶⁴ *Id.* ("The use of this method not only makes the interpreters rectify the thought and will of the legislator...it leads to the substitution of their own ideas for the ideas of the statute and even to a complete remaking of the statute. But [those practitioners] pose clearly as spokesmen for the authors of the statute and use their procedure of construction satisfied that they are completely faithful to the basic postulate of their method[.]").

¹⁶⁵ GÉNY, *supra* note 135, § 97, at 180 ("I agree that the statute, once enacted, separates itself from the person of the legislator. But we still have to recognize that he left it filled with his thought and intent; otherwise we have to consider the text an empty vessel which everybody can fill according to his pleasure. To authorize such freedom is nothing less than to suppress the precision and stability which are the capital merit and the salient advantage of written law."). *See also* FOUILLÉE, ET AL, *supra* note 130, § 85 at 114 ("That system which separates the text from the legislator's thought, giving it an independent existence, subject to the law of evolution and subordinate to its social environment, substitutes the interpreter's purpose for that of the law, and sacrifices the very essence of the law, namely the deliberate conscious will of the legislator, the meaning of which is fixed when this will is formulated.") and *id.* § 93, at 123, *citing* ALFRED MARTIN, OBSERVATIONS SUR LES POUVOIRS ATTRIBUÉS AU JUGE PAR LE CODE CIVIL SUISSE 16 ("But it must nevertheless not be forgotten that the law is above all an expression of declared will. What security could there be in the legal system of a country whose judges, under pretext of recognizing insensible changes in the law, 'should claim the right of attributing to such and such an article the meaning which it would have if it had been drawn up by them?").

¹⁶⁶ GÉNY, *supra* note 135, § 20, at 20 ("It is not always easy to discover in this process what is textual interpretation proper and what is more. All depends on how broad a meaning one gives to the concept of interpretation. If it is understood, as the very etymology of the word indicates, as a simple diagnosis of a will (legislative intent) expressed in a formula (statutory text), one can not deny that no matter how much this field of legal diagnosis may be broadened, certain current practices go far beyond these limits and refer to ideas completely extraneous to the text and superior to its formulae."). *See also id.* § 106, at 206 ("I think the first thing to banish from the legitimate sphere of statutory interpretation is any search which aims not at the effective and expressed intent of the legislator, but at what rule he would have adopted had he directed his thinking on the particular objective."). *C.f.* Barnes, *supra* note 99, at 726-727 ("Civil law courts are to take into account not only the express grammatical provisions of the code section, but they are also to consider the legislative intent and the social goal of the provision....[The judge asks] himself what would have been their intent if the same article had been framed by them today. He must say to himself that in the light of all changes that have occurred in the course of a century of ideas, ethical standards, and institutions, in view of the economic and social conditions now prevailing in France, justice and reason direct him to adapt the statutory text, liberally and with humanity, to the realities and needs of modern life.").

¹⁶⁷ PLANIOL, *supra* note 131, § 224A, at 163 ("The authors of the Civil Code had no intention of eliminating from the interpretation of texts that considerable degree of liberty which had existed under the old law...During the greater part of the XIX Century, the dominant method of interpretation of laws followed in the French schools was that of an analysis of the text of the law and an endeavor to ascertain the thought of the law-maker. This exegetical method is common to all great French civilians. It, however, was used by each of them, more or less rigorously, according to his temperament.").

therein.¹⁶⁸ Finally, jurists within the civil law tradition are encouraged to consult history when a relevant record is available.¹⁶⁹ This investigation into historical jurisprudence can effectively chronicle the development of legal norms while simultaneously elucidating the nature of that development.¹⁷⁰

iii. The Application of Civil Law Interpretative Methodologies

Jurists play a significant role in construing the law in civil law systems¹⁷¹ and may utilize virtually every conceivably method of interpretation to adjudicate legal disputes. As demonstrated above, they must generally begin their examination of an ambiguous term by ascertaining its literal meaning and supplementing it with (*inter alia*) historical intent and teleological considerations. Attempts to ascertain the literal meaning of "subsidiarity," however, purportedly encounter numerous difficulties.¹⁷² Therefore, a dictionary appears to be a logical place to seek its literal meaning¹⁷³ and/or etymology.¹⁷⁴

¹⁶⁸ *Id.* § 218, at 159 ("The first thing to be done to dissipate doubt, is to consult the preparatory studies leading up to the making of the law... There the thought which guided the law-making is often explained.").

¹⁶⁹ JONES, *supra* note 158, at 52, *citing* FENET, INTERROGEONS L'HISTORIE, ELLE EST LA PHYSIQUE EXPÉRIMENTALE DE LA LEGISLATION, vi, 37 ("Codes are not made, they grow. Whenever possible, we must consult history, 'the experimental laboratory of legislation'").

¹⁷⁰ CARLETON LEE, *supra*, note 132, at 6 ("Historical Jurisprudence [sic] deals with law as it appears in its various forms and at its several stages of development. It holds fast the thread which binds together the modern and the primitive conceptions of law, and seeks to trace... the line of connection between them. It takes up custom as enforced by the community, and traces its development. It seeks to discover the first emergence of those legal conceptions which have become a part of the world's common store of law, to show the conditions that gave rise to them, to trace their spread and development, and to point out those conditions and influences which modified them in the varying course of their existence.").

¹⁷¹ Baudenbacher, *supra* note 14, at 354.

¹⁷² REV. JOHN J. KELLEY, S.M., FREEDOM IN THE CHURCH: A DOCUMENTED HISTORY OF THE PRINCIPLE OF SUBSIDIARY FUNCTION 14 (2000) ("The word 'subsidiary' has many entanglements and thus it has been a trap for the finest minds in the world.").

¹⁷³ *See* CRAIES, *supra* note 77, § 27.1.2, at 667, *citing* R. v. Peters, (1886) 16 Q.B.D. 636, 641 ("I am quite aware that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books."). *See also* BENNION, *supra* note 10, § 375, at 1046, *quoting* R v. Peters (1886) 16 QBD 636 at 641 ("Most judges allow their putative memories to be refreshed by the citation of dictionaries and other works of reference. Lord Coleridge said

As a general rule, any dictionary utilized in juridical interpretation should be "well known and authoritative."¹⁷⁵ The Second Edition of the Oxford English Dictionary ["OED"] is generally deemed to satisfy these criteria.¹⁷⁶ Its entry for "subsidiarity" reads as follows:

[trans. G. *subsidiarität* (1931, paraphrasing Pope Pius XI in *Rundschreiben über die gesellschaftliche Ordnung (Quadragesimo Anno* § 80); cf. F. *subsidiarité* and SUBSIDIARY *a.*] The quality of being subsidiary; *spec.* the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level."¹⁷⁷

The entry proceeds to list six separate publications in chronological order that utilized the term "subsidiarity" between 1936 and 1982. The first five are directly related to the Church. Thus, between the definition itself and the five subsequent entries concerning its use, it would appear that the OED readily recognizes that the term both 1) originates within the Catholic tradition¹⁷⁸ and 2) it subordinates the role of centralized powers to more localized ones.

of dictionaries [sic] 'it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books.'").

¹⁷⁴ BENNION, *supra* note 10, § 375, at 1046 ("Dictionaries can be used to arrive at the etymology of the word, which may guide the court.").

¹⁷⁵ *Id.* § 375, at 1046, *quoting* Per Cozens-Hardy MR in *Camden (Marquess) v. IRC* [1914] 1 KB 641 at 647 ("A dictionary cited should be 'well-known and authoritative.'").

¹⁷⁶ At least one article refers to the OED as, "the most authoritative historical dictionary of English[.]" (Carol E. Jordan, Karen Quinn, and Bradley Jordan, and Celia R. Daileader, *Stalking: Cultural, Clinical and Legal Considerations*, 38 BRANDEIS L.J. 513, 525-526 (2000)) while another calls it, "the generally accepted authority for the early usage of words." (G. Robert Blakely and Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 B.Y.U.L. REV. 829, n. 656 (2002)).

¹⁷⁷ 17 OXFORD ENGLISH DICTIONARY 59 (2d ed. 1989).

¹⁷⁸ *But see id.* ("The 'principle of subsidiarity' – a meaningless or even misleading phrase in English, is being discussed in the European Parliament in connection with the eventual revision of the Treaty of Rome. It is defined to mean that the European Community's activities should be limited to those which are better performed in common than by member states individually."). Although some may foreseeably argue that this sixth and final entry from 1982 represents a superseding definition, such an argument would be misguided. More specifically, the author of the *Times* article from which this excerpt is taken both 1) speculates that the term is either meaningless or misleading and 2) arguably utilizes an inaccurate

The civil law also encourages an examination of preparatory studies. However, a cursory examination of documents leading up to the relevant intergovernmental conferences¹⁷⁹ reveals few meaningful additions to the development of the subsidiarity principle.¹⁸⁰ There are, however, a few notable exceptions that may warrant future analysis.¹⁸¹

definition. Although some may perceive the author's definition to be accurate, there does not appear to be any official European Union documentation concerning a definition of subsidiarity that refers to activities "which are better performed in common." As a consequence, an examination of this entry could reasonably justify an examination of subsidiarity's ecclesiastical development insofar as it clearly refers to its origin within the Catholic Church without providing an official or agreed upon superseding definition. *But see* Williams, *supra* note 93, at 142 ("Historical or etymological meaning is simply the ordinary meaning of the word, or of the parts from which it is compounded, at some period of the past. It is an unreliable guide to the present meaning of a word, because meanings change.").

¹⁷⁹ See RICHARD CORBETT, *THE TREATY OF MAASTRICHT: FROM CONCEPTION TO RATIFICATION: A COMPREHENSIVE REFERENCE GUIDE* (1993).

¹⁸⁰ Specifically, this examination included the following documents, all of which expressly invoked the term subsidiarity and can be found in CORBETT, *supra* note 179: 1) Resolution on the intergovernmental conference decided at the European Council in Madrid, 19 November 1989; 2) Resolution on the Intergovernmental Conference in the context of Parliament's strategy for European Union, 14 March 1990 (Martin I Report); 3) Resolution on Economic and Monetary Union, 16 May 1990 (Herman Report); 4) Belgian Government's Memorandum of 20 March 1990; 5) Resolution on the Intergovernmental Conference in the context of Parliament's strategy for European Union, 11 July 1990 (Martin II Report); 6) Resolution on the principle of subsidiarity, 12 July 1990 (Giscard d'Estaing Report); 7) Dutch Government 1st Memorandum, May 1990 ("Possible Steps Towards European Political Union"); 8) Report of the Foreign Ministers on the need for treaty changes for political union, presented to Dublin II European Council, 25-26 June 1990; 9) European Commission, Proposal for a draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, 21 August 1990; 10) Danish Government Memorandum, approved by the Market Committee of the *Folketing*, 4 October 1990; 11) European Commission, Formal opinion pursuant to Article 236 of the EEC Treaty on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union, 21 October 1990; 12) Dutch government, Policy document on European Political Union presented to the Parliament, 26 October 1990; 13) United Kingdom Parliament, Extract from House of Lords select committee on the European Communities Twenty-Seventh Report: Economic and Monetary Union and Political Union, 30 October 1990; 14) Italian Council Presidency, Institutional Conference on Political Union: report of 16 November 1990; 15) Conference of Parliaments of the European Community ("Assizes"), Final Declaration adopted on 30 November 1990; and 16) European People's Party Dublin Congress Document: For a federal constitution of the European Union, 15-16 November 1990.

¹⁸¹ See, e.g., 1) Belgian Government's Memorandum of 20 March 1990, § III, *reprinted in* CORBETT, *supra* note 179, at 123 ("At a time when the development of the European enterprise is leading to a major transfer of legislative power at the Community level, it is essential that the principle of subsidiarity be formally written in to the Treaty, for example in the form in which it was expressed in the draft Spinelli Treaty: 'The Union shall only act to carry out those tasks which may be undertaken more effectively in common than by Member States acting separately, in particular those whose execution requires action by the Union because their dimension or effects extend beyond national frontiers.'"); 2) Dutch Government 1st Memorandum, May 1990 ("Possible Steps Towards European Political Union"), § VII, *reprinted in* CORBETT, *supra* note 179, at 133 ("[Taking the principle of subsidiarity into account] implies that when decisions are to be taken at Community level the question of whether this constitutes a more effective way of fulfilling the responsibilities of government towards individuals citizens must first be answered affirmatively...As long

as we are still on the road to integration, the principle can only be applied in a flexible manner which at each step compels us to consider whether the benefits achieved have an added value which more than compensates for the further distancing of the public from the decision-making process."); 3) Danish Government Memorandum, approved by the Market Committee of the *Folketing*, 4 October 1990, § VII (B), *reprinted in* CORBETT, *supra* note 179, at 163 ("In the area of fiscal and budgetary policy of the individual Member States the Treaty must reflect the principle of subsidiarity. It must furthermore be clear that the Council will not be able to take legally binding decisions on any Member State's budget surplus or deficit or its revenue and expenditure, just as distribution policy must remain a national matter. Anything else would be unacceptable to the national parliaments."); 4) European Commission, Formal opinion pursuant to Article 236 of the EEC Treaty on the proposal for amendment of the Treaty establishing the European Economic Community with a view to political union, 21 October 1990, § IV (2), *reprinted in* CORBETT, *supra* note 179, at 170 ("The question of subsidiarity is closely linked to the redefinition of certain powers. The Commission considers that this common-sense principle should be written into the Treaty, as suggested by Parliament in its draft treaty on European Union."); 5) Dutch government, Policy document on European Political Union presented to the Parliament, 26 October 1990, § 1.6, *reprinted in* CORBETT, *supra* note 179, at 176 ("[T]here will be a need for political judgments to be made case by case. It is not possible to freeze the division of powers between the Community and the Member States. This is why in the discussions in Brussels the Netherlands has rejected the idea of so-called positive and negative lists respectively granting or not granting powers exclusively to the Community. The Netherlands would prefer to have a generally applicable provision, for example in the Preamble to the EEC Treaty.... The Government believes that unnecessary centralization should indeed be avoided. As was successfully done in the case of removing technical obstacles to trade, we should pursue integration through decentralized methods where possible."); 6) United Kingdom Parliament, Extract from House of Lords select committee on the European Communities Twenty-Seventh Report: Economic and Monetary Union and Political Union, 30 October 1990, at ¶ 216, *reprinted in* CORBETT, *supra* note 179, at 190 ("The principle of subsidiarity should be written into the Treaty, but should not be justiciable before the Court. The balance between Community action and national action should remain a political responsibility.") *C.f.* Italian Council Presidency, Institutional Conference on Political Union: report of 16 November 1990, § 4 (b), *reprinted in* CORBETT, *supra* note 179, at 196 ("[R]espect for subsidiarity involving post-control in the exercising of competence could be entrusted to the Court of Justice, especially from the viewpoint of correlation between means and goals."); 7) Conference of Parliaments of the European Community ("Assizes"), Final Declaration adopted on 30 November 1990, pmbl, art. E, *reprinted in* CORBETT, *supra* note 179, at 198 ("[Conference of Parliaments of the European Community] proposing that, in keeping with the subsidiarity principle, only those powers should be conferred on the common institutions that are necessary for the proper discharge of the Union's duties."); § 23 ("Takes the view that any allocation of new powers to the Union must be based on the subsidiarity principle, i.e., the Union will only act to discharge the duties conferred on it by the Treaties and to attain the objectives laid down therein; where powers have not been exclusively or completely assigned to the Union, it shall act to the extent that the attainment of these objectives requires its intervention because their scope or their implications transcend Member States frontiers or because they can be carried out more effectively by the Union than by the Member States acting alone[.]") and § 24 ("Takes the view that the subsidiarity principle must be enshrined in the preamble to the Treaties, and that, as regards interpretation, there must be scope for *a priori* political evaluation, while enabling the Court of Justice to confirm *a posteriori* the extent of the powers of the Community; considers that the principle of subsidiarity must be consolidated in amending the Treaties, and its substance clearly defined[.]"); and 8) European People's Party Dublin Congress Document: For a federal constitution of the European Union, 15-16 November 1990, Chapter I-B, ¶ 15, *reprinted in* CORBETT, *supra* note 179, at 203 ("The subsidiarity principle must be the basis for distribution amongst the Union, the Member States, and the regions – i.e. action taken by the Union will be subsidiary. The Union should be granted those powers which it can make best use of or of which it will have sole use. In other words, the Union will have powers in those areas where it can act more effectively than Member States working alone, particularly in cases where the scale or the effects of the action go beyond national frontiers."). *See also* CORBETT, *supra* note 179, at 18 ("Parliament also advocated the entrenchment in the Treaties of the principle of subsidiarity. This principle was often quoted by federalists as the basis for allocating competences between different tiers of government. It had been mentioned in Parliament's 1984 draft Treaty on European Union, since when its use in the English language had blossomed... There was broad agreement on the idea of spelling

Finally, the civil law tradition appears to expressly authorize jurists to consult historical records if they are available. Here, the ecclesiological development of subsidiarity appears to qualify as a historical record and is clearly available (at least in part) as evidenced in Section VI *infra*.

iv. Conclusions Concerning the Application of Civil Law Interpretative Methodologies

Thus, although the civil law clearly prohibits interpretation if a provision is clear, it permits jurists to utilize virtually every conceivable method to clarify ambiguities. Although jurists should arguably examine relevant preparatory studies in search of this intent, they are by no means limited to this source alone. Ultimately, jurists should strive to ascertain both the legislative intent and the purpose of the law itself without replacing that intent with their own. Jurists may also consult reliable historical records concerning ambiguous terms when they are available. Although there is a perfectly valid argument that the jurists should accord the intent of the legislator less importance as more time passes,¹⁸² this argument has little to no impact in this case because the provision in question was only codified fifteen years ago.

out the principle of subsidiarity in the Treaty, but in view of the highly divergent interpretations given to the term, the exact formulation became a matter of controversy. Some Members advocated a 'positive' definition ('the Union shall carry out those tasks...') whilst others felt that a 'negative' definition ('the Union shall carry out only those tasks...') was more reassuring to the Member States in what would effect always be a political judgment. In the end, Parliament opted for the 'negative' definition, but specified that the Community should act wherever most effective.").

¹⁸² Zweigat and Puttfarcken, *supra* note 8, at 712 ("It is another result of this historical development of different meanings of a legal rule that there is a proportion between the age of the rule and the weight of its 'legislative intention': as for a recent statute, there is a presumption that its meaning as intended by its draftsmen in the legislature should be its actual meaning; however, the older a statute, the more legitimate is a method of interpretation which frees itself from the ideas of the historic legislator and attempts to find its meaning from different criteria based on the conditions of today."). *See also id.* at 709-710 ("[E]very case which presents an issue of statutory interpretation is a case of today, *i.e.*, an actual conflict of interests.

c. *Similarities Between Common Law and Civil Law Interpretative Methodologies*

Both the civil law and the common law traditions recognize that the law is plainly incapable of adequately foreseeing or addressing every conceivable conflict,¹⁸³ that ambiguities within the law are inevitable,¹⁸⁴ that rules for interpreting those ambiguities

However, facts and values of society and standards of social behavior change in the course of time, and they do so at an ever-increasing rate. Value judgments made by the historic legislator may have lost their basis and, consequently, their validity under the social conditions of today. Were the judge to decide a case on an historical interpretation of a statute, the law would be petrified in the value judgments of the historic legislator.").

¹⁸³ Compare PUFENDORF, *supra* note 83, at 85 (*96) ("[N]ot all cases can be foreseen, or stated, on account of their infinite variety[.]") and GOODRICH, *supra* note 98, at 37 ("In practice the judiciary are involved in interpreting words and phrases whose meaning is unclear, dealing with lacunae within a text which purports to be a complete exposition of the law and applying the code to situations which could not have been foreseen by the legislature.") with FOUILLÉE, et. al., *supra* note 130, § 93, at 122 ("No one can believe in this day that the written law is all-sufficing[.]") and Cueto-Rua, *supra* note 145, at 168-169 ("The law in force in any community is never static, rigid, unchangeable...Developments in legislation, in customary behavior, in judicial practices, and in doctrinal contributions may give new life, greater energy, and unexpected possibilities to the articles of the Civil Code."). See also Barnes, *supra* note 99, at 722, citing Angelo Piero Sereni, *The Code and the Case Law, in THE CODE NAPOLEON AND THE COMMON-LAW WORLD* 62 (Bernard Schwartz ed., 1956) ("Those changing and petty details with which the legislator ought not to be preoccupied and all those matters that it would be futile and even dangerous to attempt to foresee and to define in advance, we leave to the courts.").

¹⁸⁴ Compare SEDGWICK, *supra* note 99, at 225 ("The imperfection of language is a serious evil when it occurs in those legislative commands on which the repose, discipline, and well-being of society depend. In regard to laws, as in other cases, difficulties will arise, in the first place from the disputed meaning of individual words, or, as is usually said, of the language employed; and in the second place, assuming the sense of each separate word to be clear, doubt will result from the whole context."); and Holmes, *supra* note 87, at 418 ("By the theory of our language, while other words may mean different things, a proper name means one person or thing and no other. If language perfectly performed its function, as Bentham wanted to make it, it would point out the person or thing named in every case. But under our random system it sometimes happens that your name is *idem sonans* with mine, and it may be the same even in spelling. But it never means you or me indifferently. In theory of speech your name means you and my name means me, and the two names are different. They are different words...In such a case we let in evidence of intention not to help out what theory recognizes as an uncertainty of speech, and to read what the writer meant into what he has tried but failed to say, but, recognizing that he has spoken with theoretic certainty, we inquire what he meant in order to find out what he has said.") with GÉNY, *supra* note 135, § 106, at 207 ("Sometimes it happens that the legislator has not completely and precisely articulated the rule he meant to issue. Such a mental failure is nothing rare in the sphere of manifestations of human will...[These] gaps are equally inevitable in the drafting of legislative acts, especially where the legislative thought could not always stop long enough to clarify all the details.").

should be established,¹⁸⁵ and that jurists should not seek to interpret statutes or provisions that are clear on their face.¹⁸⁶ Further, both recognize that words have no inherent

¹⁸⁵ Compare MACLEAN, *supra* note 1, at 103 (“[T]he series of procedures or method associated with interpretation...operates as a sort of algorithm for the performance of a difficult operation: Erasmus illustrates the need for method in such circumstances by evoking the physical problem involved in moving a heavy weight; many hands can attempt the task, but success will only come through a methodical approach.”) with LIEBER, *supra* note 83, at viii (“[I]n countries, in which the law is allowed to make its own way, immutable principles and fixed rules for interpreting and construing them, should be generally acknowledged, or if they exist already, in a scattered state, should be gathered and clearly represented, so that they may establish themselves along with the laws, as part and branch of the common law of free countries.”); F.A.R. BENNION, UNDERSTANDING COMMON LAW LEGISLATION: DRAFTING AND INTERPRETING 5 (2001) (“[The courts in all common law countries] still mostly observe the principles of the common law when it comes to statutory interpretation. It is therefore important that the uniform principles should be spelt out and generally known.”); PUFENDORF, *supra* note 83, at 83 (*93) (“Hence, for a right understanding of laws, as well as of agreements, and for the performance of the duty involved, it is of the greatest importance to establish rules of sound interpretation, for words especially, as the commonest sign.”).

¹⁸⁶ Compare ENDLICH, *supra* note 113, at 6, quoting *Western Un. Tel. Co. v. District of Columbia*, 2 Centr. Rep. 694 (“When, indeed, the language is not only plain but admits of but one meaning, the task of interpretation can hardly be said to arise (and ‘those incidental rules which are mere aids, to be invoked when the meaning is clouded, are not to be regarded’.”); *id.*, citing *Law of N.*, b. 2, s. 263 (“It is not allowable, says Vattel, to interpret what has no need of interpretation.”) and HRICIK, *supra* note 77, at 96 (Arguing that even strict textualists believe that it is proper to analyze supplementary materials if the text in question “is either ambiguous or absurd.”), citing *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 471 (2004) (Thomas, J. concurring) (“If the text...[is] clear, resort to anything else [is] unwarranted.”) with MACLEAN, *supra* note 1, at 89 (“Bartolus, following D 1. 3. 12 and D 1. 3. 23, claims that judges may interpret the law ‘nisi verba essent plana, quia tunc non potest aliter interpretari quam verba loquuntur’ (except in cases when the words are clear: in these cases it is not possible to interpret in any other way than according to the literal meaning)[.]”); GÉNY, *supra* note 135, § 14, at 21 (“The legal rule is clear, precise, well constructed. It suffices to carefully analyze its content, weigh its concepts and relate it to facts. The wisely set up organism functions in such a case automatically and it would be dangerous and against its purpose to try to go too far into it. We shall be halted by one of the maxims which synthesize the wisdom of generations of lawyers: ‘When the law is clear, one must not go against the text under the pretext of discovering its spirit.’”); LA. C. CIV., *supra* note 159, at art. 13 (“When the law is clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”); JONES, *supra* note 158, at 51-52 (“Where the statute is clear the judge need only study its terms[.]”); Thomas W. Tucker, *Interpretations of the Louisiana Civil Codes, 1808-1840: The Failure of the Preliminary Title*, 19 TUL. EUR. & CIV. L.F. 57, 82-83 (2004) (“Grammatical interpretation is one based on the meaning of the words... Logical is based ...‘upon the intention of the legislator’...If a grammatical interpretation provides a solution, it excludes the use of a logical one.”) (internal citations omitted); James L. Dennis, *Interpretation and Application of the Civil Code and the Evaluation of Judicial Precedent*, 54 LA. L. REV. 1, 6-7 (1993) (“Gény’s theory of ‘free scientific research’ provides that judges are bound by the text of the written law only when, and to the extent that, the text is clear. Otherwise, they must consider, within the context of the basic principles and values reflected in the legal system as a whole, the social, economic, and moral factors involved in the particular case and arrive at a rule that best promotes justice and social utility for the given situation.”); and LA. C. CIV., *supra* note 159, at art. 9 (“When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.”).

meaning¹⁸⁷ and that they should generally be interpreted according to their popular meaning.¹⁸⁸ Additionally, both traditions agree that if the ambiguity in question is a technical term of art, then the authoritative definition should be the one that is utilized by those who are trained in that particular art.¹⁸⁹ Furthermore, it appears that both the civil and common law traditions expressly advocate interpreting a term according to the

¹⁸⁷ Compare MERRYMAN, *supra* note 128, at 46 (“Words have no inherent significance; they are supplied with meaning by those who use them, and the problem before the judge is to supply meaning when it is not clear what the legislator meant when he used the words. The resort to legislative intent may be helpful in some cases, but reconstruction of the historical process of forming and expressing intent in a forum as complex as a representative legislature is a very risky enterprise. In a surprising number of cases, the legislative history will show that the legislature did not foresee the problem facing the judge, and consequently had no intent concerning it. Indeed, it is generally agreed among scholars that the search should be not for the actual legislative intent, but for the ‘intention, spirit, objective content of the norm [i.e. statute] itself.’”) and Barnes, *supra* note 99, at 727 (“When the text presents some ambiguity, when doubts arise as to its meaning and scope, when it can to a certain extent be contradicted or contracted or when on the contrary expanded through comparison with another text, I believe that the judge has the broadest powers of interpretation. He does not need to confine to an obstinate inquiry into the meaning that, in framing such and such an article, the framers of the Code had actually intended a hundred years ago. He must ask himself what would have been their intent if the same article had been framed by them today. He must say to himself that in the light of all changes that have occurred in the course of a century of ideas, ethical standards, and institutions, in view of the economic and social conditions now prevailing in France, justice and reason direct him to adapt the statutory text, liberally and with humanity, to the realities and needs of modern life.”), citing ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW* 1135-36, n.24 (2d Ed., 1977), quoting BALLOT BEAUPRE, *LE CENTENAIRE DU CODE CIVIL* 27 (1904) with Holmes, *supra* note 87, at 417 (“It is true that in theory any document purporting to be serious and to have some legal effect has one meaning and no other, because the known object is to achieve some definite result. It is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a collection of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in a particular case, and very likely will see that it there has a shade of significance more refined than any given in the wordbook.”) and McGreal, *supra* note 87.

¹⁸⁸ Compare LA. C. CIV., *supra* note 159, at art. 11 (“The words of a law must be given their generally prevailing meaning.”) with BLACKSTONE, *supra* note 88, *59-60 (“Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use.”). See also PUFENDORF, *supra* note 83, at 83 (*93) (“With regard to ordinary terms this is the rule: words are regularly to be interpreted in their proper and well-known signification, imposed upon them not so much by propriety or grammatical analogy or consistency with derivation, as by popular usage[.]”) and Vienna Convention on the Law of Treaties, *supra* note 20, at art. 31, 1.A (“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty[.]”).

¹⁸⁹ Compare LA. C. CIV., *supra* note 159, at art. 11 (“Words of art and technical terms must be given their technical meaning when the law involves a technical matter”) with BLACKSTONE, *supra* note 88, *59-60 (“[T]erms of art, or technical terms, must be taken according to the acceptance of the learned in each art, trade, or science.”). See also ENDLICH, *supra* note 113, at 4 (“The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not[.]”) and PUFENDORF, *supra* note 83, at 83 (*93) (“Terms of the arts are to be explained according to the definitions of men versed in the particular art. But if technical terms are differently defined by different persons, expressing in ordinary terms what we mean by the other word makes for the prevention of suits.”).

legislator's intent,¹⁹⁰ even if it seemingly contradicts the meaning of the words that were used.¹⁹¹ Finally, both schools recognize that there are circumstances under which the meaning of a particular word can acceptably be altered.¹⁹²

¹⁹⁰ Compare HERBERT FELIX JOLOWICZ, *ROMAN FOUNDATIONS OF MODERN LAW* 8 (1978) (“[W]hereas the plain words of a statute need no glossing, for, as Coke said, ‘absoluta sententia expositore non exigit’, it is also held that a law must not be applied except in accordance with its purpose, for ‘cessante ratione legis, cessat lex ipsa.’”) with CRAIES, *supra* note 77, § 16.1.4, at 539, *citing* R. v. Secretary of State for the Environment, Transport and the Regions and another, Ex p. Spain Holme Ltd. [2001] 2 A.C. 349, 396, HL (“The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the ‘intention of Parliament’ is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning ‘cannot be what Parliament intended’, they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.”).

¹⁹¹ Compare BLACKSTONE, *supra* note 88, *61 (“[T]he most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it.”) with GEORGE MOUSOURAKIS, *THE HISTORICAL AND INSTITUTIONAL CONTEXT OF ROMAN LAW* 32 (2003) (“Principles of interpretation relating to legal acts...proceed from the assumption that priority should be given to the parties’ real intentions...over the words or form in which a legal act had been expressed[.]”), *citing* D. 50. 17. 96. (Marcianus) (“If ambiguous utterances occur, the intention of the person who used them should be taken into consideration.”) and MACLEAN, *supra* note 1, at 115 (“The authority quoted for translation according to the sense (spirit) rather than the letter (which often provokes also a quotation of St Paul [sic] (2 Cor. 3:6: ‘the letter killeth, but the spirit giveth life’)) is Jerome, whose strictures on interpretation in his letter to Pammachus and in his commentary on Galatians are well known.”), *citing* “Jerome, *Epistolae*, lvii, ad Pammachum, *PL*, xxii. 568 and *Commentarius in Epistolam ad Galatas*, i.11-12 [vii.386], *PL*, xxvi.322 (also 473).” See also Vienna Convention on the Law of Treaties, *supra* note 20, at art. 31, 1.A (“A treaty shall be interpreted in good faith in...the light of its object and purpose.”) and *id.* at art. 31, 2 (“The context for the purpose of the interpretation of a treaty shall comprise...the text...its preamble, and annexes[.]”).

¹⁹² Compare LIEBER, *supra* note 83, at 115 (“[T]here are considerations, which ought to induce us to abandon interpretation, or with other words to sacrifice the direct meaning of a text to considerations still weightier; especially not to slaughter justice, the sovereign object of laws, to the law itself, the means of obtaining it.”) with Zweigat and Puttfarcken, *supra* note 8, at 708 (“If a code provision, taken at face value, thus ceases to conform to today’s standards of law and social order, its meaning has to be changed by reinterpretation[.]”); Barnes, *supra* note 99, at 728 (“Civilians thus view the role of the judiciary, not as making law, but as serving a function in assisting in the actualization of the code - the courts add definition and sharpness to the code, they fill in the gaps of the code, and they even adjust it to conform to new societal pressures and innovations.”); and JOLOWICZ, *supra* note 190, at 13 (“Benignius leges interpretandae sunt quo cluntas earum conservetur.”), *translated in* BLACKS LAW DICTIONARY 1621 (7th ed. 1999) (“Laws are to be liberally interpreted so that their intent may be preserved....”).

d. Conclusions Concerning Civil and Common Law Interpretative Methodologies

Due to the fact that the term "subsidiarity" is arguably ambiguous, neither civil nor common law jurists appear to be categorically precluded from interpreting its meaning. Therefore, even if it is presumed that the word "subsidiarity" has no true meaning on its face, it is nonetheless evident that it has both a popular meaning and a technical meaning within the Catholic Church. Further, although both traditions advocate the elevation of the legislator's intent over the specific words that were used, there is no evidence that the legislators at Maastricht either 1) did not know the meaning of the term as it was developed within Catholicism or 2) intended to adopt a definition that diverged from either the technical or popular meaning of the term "subsidiarity" within the Catholic Church. Finally, there do not appear to be any overriding circumstances demanding an alteration of the term's meaning. Therefore, it would appear that both the civil and common law traditions encourage an examination of subsidiarity's ecclesiological development in order to ascertain its meaning within the Treaty of Maastricht.

VI. THE ECCLESIOLOGICAL DEVELOPMENT OF SUBSIDIARITY

a. *Introduction*

The legal profession has apparently encountered substantial difficulty identifying the origins of subsidiarity. While Pope Pius XI has been identified as the original

proponent of subsidiarity by numerous legal scholars¹⁹³ (and at least one Catholic scholar),¹⁹⁴ a review of Catholic scholarship reveals assertions that the doctrine was taught and/or practiced by Aristotle¹⁹⁵ (384 BCE-322 BCE), Benedictine monks,¹⁹⁶ St. Bernard¹⁹⁷ (~1090-1153), St. Thomas Aquinas¹⁹⁸ (~1225-1274), Johannes Althusius¹⁹⁹

¹⁹³ See, e.g., Bermann, *supra* note 2; Douglas W. Kmiec, *Is the American Democracy Compatible with the Catholic Faith?*, 41 AM. J. JURIS. 69, 72 (1996) (“The principle of subsidiarity was first explicitly formulated in 1931 in *Quadragesimo Anno*.”); Joseph S. Spoerl, *Forum on Public Morality: Making Laws on Making Babies: Ethics, Public Policy, and Reproductive Technology*, 45 AM. J. JURIS. 93, 109 n.27 (2000) (“In the Roman Catholic moral tradition, the relevant principle is known as ‘the principle of subsidiarity,’ first articulated by Pope Pius XI in his encyclical *Quadragesimo Anno*.”); Edith Brown Weiss, *The Rise or the Fall of International Law*, 69 FORDHAM L. REV. 345, 362 n.58 (2000) (“The principle of subsidiarity is arguably rooted in Catholic social theory, where it was first articulated by Pope Pius XI in the 1931 encyclical *Quadragesimo Anno*.”). See also Jared Bayer, Comment, *Re-balancing the State and Federal Power: Toward a Political Principle of Subsidiarity in the United States*, 53 AM. U.L. REV. 1421, 1446 (2004); Henkel, *supra* note 12, at 364 (“In the understanding of the Catholic doctrine, the Principle of Subsidiarity was, however, most distinctly enunciated by Pope Pius XI in his encyclical letter *Quadragesimo Anno*, in 1931.”); and Peter Judson Richards, *Property and Epikieia: Theory, Life and Practice in the Western Christian Tradition*, 82 U. DET. MERCY L. REV. 59, n. 245 (2005) (“The principle [of subsidiarity] was most clearly and elaborately stated in the papal encyclical of Pius XI...”).

¹⁹⁴ REV. KELLEY, *supra* note 172, at 12 (“The phrase ‘principle of subsidiary function’ (*‘subsidiarii officii principium’*) was used by Pius XI in *Quadragesimo Anno* for the first time.”).

¹⁹⁵ See, e.g., HUEGLIN, *supra* note 118, at 153 (“[Subsidiarity] can be traced back to Aristotle who drew up an organic model in which individuals (persons) belonged to groups and groups formed the organs of the larger social body. Each group’s autonomy had to be respected. The personal principle and subsidiarity were strongly connected in the mind of Aristotle, and they developed side by side with the concept of federal states.”); ESTELLA, *supra* note 2, at 77 (“[T]he agreed point of departure for tracing the origins of subsidiarity is Aristotle.”); Delcamp, *supra* note 27, at 7, n.2; and Éva Bóka, *The Idea of Subsidiarity in the European Federalist Thought: A Historical Survey*, Working Paper (2005), available at <http://www.ivan-herman.net/Eva/Past/Szubszidiaritaswpaper.pdf> (last visited 18 November 2007).

¹⁹⁶ See Section VI (b)(i)(1) *infra*.

¹⁹⁷ See Linnan, *supra* note 2, at 419 and 421 (1989) (“Bernard says that to violate the principle of subsidiarity is to violate the laws of nature and of [G_d].”).

¹⁹⁸ See CATHOLIC ENCYCLOPEDIA 762 (“[The doctrine of subsidiarity], though not by name...is contained in the writings of Thomas Aquinas about the nature of law and the state.”). See also TRACEY ROWLAND, CULTURE AND THE THOMIST TRADITION: AFTER VATICAN II 61 (2003) (“[Alasdir MacIntyre has developed] a Thomistic critique of the professionalisation of administration by relying upon an interpretation of Aquinas on the subject of authority. He asserts that Aquinas held that ‘what the law is, on fundamentals at least, rests with plain persons and that the most important things that lawyers and administrators know about the law, they know as plain persons and not as lawyers and administrators’. [sic] This is consistent with the traditional principle of ‘subsidiarity’[.]”); and Louis B. Ward, *Forward to Benedict*, The Angelus, August 2001, Volume XXIV, Number 8, at http://www.sspcx.ca/Angelus/2001_August/Benedict.htm (last visited 23 October 2005) (“It will be good to recall simply that St. Thomas Aquinas taught that the best political system would fuse monarchy at the highest level, aristocracy at a subordinate level and democracy at the lowest level—at the level closest to the lives of people, thus giving people real control over the events that effect [sic] them most. This is a type of application of the principle of subsidiarity.”). C.f. AD LEYS, ECCLESIOLOGICAL IMPACTS OF THE PRINCIPLE OF SUBSIDIARITY 76 n. 68 (1995) (stating that, although O. von Nell Breuning sj [sic] and Hoffner both argue (in German) that the principle of subsidiarity is present in both the works of Thomas Aquinas and Dante, “this idea does not seem to be historically correct.”).

(1557-1638), Pope Leo XIII²⁰⁰ (1810-1903), Bishop Wilhelm Emmanuel Freiherr von Ketteler²⁰¹ (1811-1877), F.J. von Buss²⁰² (1803-1878), Heinrich Pesch²⁰³ (1854-1926), O. von Nell Breuning²⁰⁴ (1890-1991), Gustav Gundlach²⁰⁵ (1892-1963) and Fr. Bernard

¹⁹⁹ See Section VI (b)(i)(2) *infra*.

²⁰⁰ Henkel, *supra* note 12, at 363. See also Thomas A. Shannon, *Commentary on Rerum Novarum* (The Condition of Labor), in *MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS*, *supra* note 34, at 141 (“[I]n a sentence anticipating some elements of the later development of the principle of subsidiarity, [Pope Leo XIII] says, ‘the law must not undertake more, nor go further, than is required for the remedy of the evil or the removal of the danger.’”) *C.f.*, LEYS, *supra* note 198, at 57 (“One could say that Leo did not go beyond the first steps towards subsidiarity because there was no integration of liberal thought *and* the organological concept...because there is no integration Leo could not yet arrive at a formulation of the principle of subsidiarity.”).

²⁰¹ See LEYS, *supra* note 198, at 25 (“W.E. von Ketteler...is, in modern catholic [sic] tradition, the first one to use the principle of subsidiarity, without formulating it expressly.”) (citation omitted). See also Virgil P. Nemoianu, *Foreword* to CHANTAL DELSOL, *ICARUS FALLEN: THE SEARCH FOR MEANING IN AN UNCERTAIN WORLD* 11 (2003) (“The term ‘subsidiarity’ was probably coined by the socio-Catholic essayist Bishop von Ketteler...soon after the middle of the nineteenth century. The concept was used...in Leo XIII’s celebrated encyclical *Rerum Novarum* and then defined limpidly by Pius XI in 1931 in his *Quadragesimo Anno*.”), available at <http://www.isi.org/books/content/343foreword.pdf> (last visited 9 July 2007); William R. Luckey, Associate Professor and Chairman, Dept. of Political Science and Economics, Christendom College, *The Intellectual Origins of Modern Catholic Social Teaching on Economics: An Extension of a Theme of Jesús Huerta de Soto*, at 7, paper presented to the Austrian Scholars Conference at Auburn University (23-25 March 2000) (“[I]t is commonly known that [Ketteler] had a great influence on the way Pope Leo XIII viewed the economic world.”) (citations omitted), available at <http://www.mises.org/journals/scholar/Lucky6.pdf> (last visited 9 July 2007); and Delcamp, *supra* note 27, at 11, n.12 (claiming that Ketteler “invented” the term subsidiarity).

²⁰² Compare LEYS, *supra* note 198, at 39 (F. J. von Buss (1803-1878) is reported to have written that “the individual person, and not the state, must take responsibility for those things he can do; and that, what an association of people can do, must be done, not by the state, but by that association.”) with Pope Pius XI, *Quadragesimo Anno* (Papal Encyclical), ¶ 79 (“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.”), available at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html (last visited 9 July 2007).

²⁰³ Religion as Economic Praxis, <http://www.sfecon.com/Religion.htm> (last visited 9 July 2007) (“Fr. Pesch originated much of the terminology (e.g.: subsidiarity, solidarity) used by the Holy Fathers in guiding us away from the Marxian Error.”).

²⁰⁴ See Marianne Helene Tofte Andersen Groesmeyer, MA Dissertation, *The Social Teaching of the Roman Catholic Church from a Social Science Perspective*, (Chapter 6) (2002) (unpublished MA dissertation, University of Copenhagen, Department of Economics) (“The drafting, sub silentio, of the second major social encyclical, *Quadragesimo Anno*, was by Nell-Breuning. Clearly influenced by Pesch’s teaching, Nell-Breuning introduced the principle of subsidiarity in *Quadragesimo Anno*, and published shortly after the promulgation an extended commentary ‘Reorganisation of Social Economy: The Social Encyclical Developed and Explained.’”) (internal citations omitted), available at <http://mariannetofte.tripod.com/id10.html> (last visited 9 July 2007).

²⁰⁵ Anton Rauscher, *Gustav Gundlach, S.J.: One of the architects of Christian social thinking*, <http://www.catholic.net/rcc/Periodicals/Homiletic/2002-10/rauscher.html> (last visited 9 July 2007) (“In preparing the first draft (1930) of *Quadragesimo Anno* and in analyzing the great disorders of the industrial society and threat of the expanding ideologies, [Gundlach] concluded that a complete reorganization of

W. Dempsey, S.J.²⁰⁶ (1903-1960). Other authors have observed that the idea of subsidiarity can be found in the writings of Locke²⁰⁷ (1632-1704), Montesquieu²⁰⁸ (1689-1755), William von Humboldt²⁰⁹ (1767-1835), Alexis de Tocqueville²¹⁰ (1805-1859), President Abraham Lincoln²¹¹ (1809-1865) and Pierre-Joseph Proudhon²¹² (1809-1865). Although a review of these scholars reveals substantial disagreement concerning its

society was necessary. Taking into account the economic, social, and political situation of his day, Gundlach concluded that society was not adequately fostering individual social talents and abilities, the keys to building up society and culture. What had been neglected was the 'principle of subsidiarity.' Gundlach was able to formulate for the first time in history a principle that is today acknowledged worldwide." See also Björn Gehrmann, *Br(e)aking Centralization?: Subsidiarity Costs and the European Constitutional Treaty*, paper submitted to the annual meeting of the European Public Choice Society at the University of Durham, at 2 (2005) ("The first notion of subsidiarity can be traced back to German priest and social philosopher Gustav Gundlach in the early 20th century."), available at <http://www.dur.ac.uk/john.ashworth/EPCS/Papers/Gehrmann.pdf> (last visited 9 July 2007), and Paul Misner, *A Role for Intermediate Bodies in Social Insurance: Precedents in the 'Ghent System' and the Weimar Republic* ("What Gustav Gundlach was starting to call the principle of subsidiarity was operative in this equal participation as well as in the background role of the state in authorizing the labor agencies that administered the compulsory contributions."), available at <http://www.stthomas.edu/cathstudies/cst/mgmt/images/papers/misner.pdf> (last visited 23 October 2005).

²⁰⁶ KELLEY, *supra* note 172, at 18 ("In 1936 a translation of [Oswald von Nell-Breuning's] book, *Reorganization of Social Economy: The Social Encyclical Developed and Explained* was published by Bruce Publications. The translator, Fr. Bernard W. Dempsey, S.J., uses the word subsidiarity, apparently for the first time in English."). See also Ross, *supra* note 4 ("The first occurrence of *subsidiarity* in English is in 1936, in a translation by B.W. Dempsey of a German work on political economy, which discussed Pius's [sic] principle.").

²⁰⁷ FOUARGE, *supra* note 53, at 15 ("[T]he State should only have powers that cannot be dealt with at a lower level, such as justice and security...[Locke] favoured an individualistic society where the necessity of the State arises from the incapacity of entities at lower levels to resolve particular problems. The main task of the State is to safeguard the interests of its citizens."). See also Endo, *supra* note 68, at 10-11.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See Alain de Benoist, *The First Federalist: Johannes Althusius*, at 56, at

http://www.alaindebenoist.com/pdf/the_first_federalist_althusius.pdf (last visited 9 July 2007).

²¹¹ Ken Endo, *Subsidiarity & its Enemies: On a Post-National Constitutional Principle of the European Union*, 11 ("The legitimate object of government is to do for a community of people whatever they need to have done but cannot do at all, or cannot so well do for themselves in their separate and individual capacities. In all that people can do individually well for themselves, government ought not to interfere."), available at

http://www2.warwick.ac.uk/fac/soc/csgr/activitiesnews/conferences/1999_conferences/3rdannualconference/papers/Endo.pdf (last visited 9 July 2007) citing OSWALD NELL-BREUNING, BAUGESATZE DER GESELLSCHAFT: SOLIDARITÄT UND SUBSIDIARITÄT (1990).

²¹² Rabinowitz, *supra* note 58, at 11 ("Of particular interest and importance is a conference on subsidiarity, chaired by the Commission President Jacques Delors, and held in Maastricht in 1991, the same year that the agreement on the Maastricht Treaty was reached. Tracing the concept back to Proudhon, Delors argued that the application of the subsidiarity principle in general would change Community structures completely.").

pedigree, it is clear that its core teachings are very old indeed.²¹³ Thus, in accordance with civilian and common law interpretative methodologies (outlined in Section V *supra*), an examination of some of these authors' writings can foreseeably provide guideposts that will help identify the meaning of the term "subsidiarity."

b. *A Selected Examination of Subsidiarity's Chronological Development*

While at least one scholar notes that subsidiarity is "not an exclusive possession of the Catholic social doctrine,"²¹⁴ there is little dispute that Catholic scholars, commentators, and ecclesiastical authorities have significantly contributed to its development. European jurisprudence therefore appears to demand an investigation into the Church's attempts to systematize the principle of subsidiarity because they are potentially capable of revealing the original meaning of the term.²¹⁵ Thus, this section examines select contributors and surveys their respective impacts on subsidiarity's development.

²¹³ David L. Gregory, *Dorothy Day's Lessons for the Transformation of Work*, 14 HOFSTRA LAB. L.J. 57, 99 (1996) ("Subsidiarity is powerfully situated in Catholic social theory, possessing political roots many centuries old.").

²¹⁴ Dr. M. Spieker, *The Actuality of Catholic Social Doctrine*, in PRINCIPLES OF CATHOLIC SOCIAL TEACHING, *supra* note 30, at 27 ("The subsidiarity principle is, of course, not an exclusive possession of Catholic social doctrine and is definitely not a doctrinal rule. It is an organization principle that is anthropologically founded and that can be made rationally insightful.").

²¹⁵ Ken Endo, *Subsidiarity & its Enemies: On a Post-National Constitutional Principle of the European Union*, at 13 ("[T]he Church has made deliberate efforts to systematise the principle of subsidiarity. This fact makes it necessary to investigate specifically the context in which the Church elaborated the principle of subsidiarity and the world view that the Church expected to see with the introduction of this principle."), available at http://www2.warwick.ac.uk/fac/soc/csgr/activitiesnews/conferences/1999_conferences/3rdannualconference/papers/Endo.pdf (last visited 26 October 2007).

i. Pre-Papal Contributors

1. Benedictine monks

a. Introduction

Saint Benedict (c. 480-543) established a monastic order within Catholicism whereby each monastery ruled itself concerning matters not settled by ecclesiastical law.²¹⁶ Each monastery is effectively governed by an Abbot²¹⁷ who is authorized to appoint monks to assist him if monastical life becomes too complex.²¹⁸ Such assistance foreseeably helps the Abbot fulfill his duties to the monks,²¹⁹ the most important of which is the non-delegable duty to safeguard their spiritual welfare.²²⁰

²¹⁶ RIGHT REV. CUTHBERT BUTLER, *BENEDICTINE MONACHISM; STUDIES IN BENEDICTINE LIFE AND RULE* 235 (1919) (“[E]ach monastery was an entirely independent unit, just as if it were the only monastery in existence. Consequently when the question of union among Benedictine monasteries arises, the Rule has nothing to say, beyond this, that any union must be effected in such a way as not to interfere with St Benedict’s [sic] fundamental principles.”).

²¹⁷ See SAINT BENEDICT OF NURSIA, *REGULA BENEDICTI* [“THE RULE OF SAINT BENEDICT”], Chapter 45 (“We foresee, therefore, that for the preservation of peace and charity it is best that the government of the monastery should depend on the will of the Abbot; and if it can be done, let the affairs of the monastery (as we have explained before) be attended to by deans, as the Abbot shall dispose; so that, the same office being shared by many, no one may become proud.”), available at <http://www.kansasmonks.org/RuleOfStBenedict.html> (last visited 2 July 2007). See also RIGHT REV. BUTLER, *supra* note 216, at 216 (“[A]ccording to St Benedict’s [sic] idea the ruler of the monastery is the abbot.”).

²¹⁸ SAINT BENEDICT OF NURSIA, *supra* note 217, at Chapter 21 (“If the brotherhood is large, let brethren of good repute and holy life be chosen from among them and be appointed Deans; and let them take care of their deaneries in everything according to the commandments of [G_d] and the directions of their Abbot. Let such be chosen Deans as the Abbot may safely trust to share his burden.”). See also RIGHT REV. BUTLER, *supra* note 216, at 216 (“But he [St. Benedict] recognised that if the number of monks grows to any size, the abbot must have helpers in the government of the community...His reason is that if the authority be distributed among several no one of them will wax proud[.]”) and *id.* at 217 (“But as soon as...the life of the monastery became in any degree complex, the practical need for a second in command made itself felt[.]”).

²¹⁹ DOM DAVID KNOWLES, *THE BENEDICTINES* 40 (1930) (“[T]he Abbot is in a real sense the servant of the monks. He is to lead them to [G_d], not in his way or at his pace, but in the way [G_d] wishes for each.”).

²²⁰ SAINT BENEDICT OF NURSIA, *supra* note 217, at Chapter 2 (“Let the Abbot always bear in mind that he must give an account in the dread judgment of [G_d] of both his own teaching and of the obedience of his disciples. And let the Abbot know that whatever lack of profit the master of the house shall find in the sheep, will be laid to the blame of the shepherd. On the other hand he will be blameless, if he gave all a shepherd’s care to his restless and unruly flock, and took all pains to correct their corrupt manner....Above all things, that the Abbot may not neglect or undervalue the welfare of the souls entrusted to him, let him

b. Internal Monastical Affairs

Further, it appears that the Rule of Saint Benedict also encourages an Abbot to ask other monks within the monastery for assistance in the event that a monk begins to waver in his commitment.²²¹ If these efforts prove to be unsuccessful, however, then the Abbot is encouraged to intensify corrective measures via prayer or administering corporal punishment.²²² These methods arguably represent subsidiarity's preference for action at lower levels until they prove incapable of adequately addressing the issue in question. If these methods do not successfully achieve reform, however, then the Abbot should dismiss the monk from the monastic community.²²³ Therefore, although the Rule appears to prefer addressing problems at lower levels, the Abbot's ultimate responsibility for the monks' welfare demands that he personally take action when lower levels are

not have too great a concern about fleeting, earthly, perishable things; but let him always consider that he hath undertaken the government of souls, of which he must give an account."). *See also* KNOWLES, *supra* note 219, at 44 ("The danger, however, remains...that the Abbot...may forget that the welfare...of the individual monk is his responsibility, and that the care of it...cannot be delegated to any subordinate official.").

²²¹ SAINT BENEDICT OF NURSIA, *supra* note 217, at Chapter 27 ("Let the Abbot show all care and concern towards offending brethren because 'they that are in health need not a physician, but they that are sick' (Mt 9:12). Therefore, like a prudent physician he ought to use every opportunity to send consolers, namely, discreet elderly brethren, to console the wavering brother, as it were, in secret, and induce him to make humble satisfaction; and let them cheer him up 'lest he be swallowed up with overmuch sorrow' (2 Cor 2:7); but, as the same Apostle saith, 'confirm your charity towards him' (2 Cor 2:8); and let prayer be said for him by all.").

²²² *Id.* at Chapter 28 ("If a brother hath often been corrected and hath even been excommunicated for a fault and doth not amend, let a more severe correction be applied to him, namely, proceed against him with corporal punishment. But if even then he doth not reform, or puffed up with pride, should perhaps, which [G_d] forbid, even defend his actions, then let the Abbot act like a prudent physician. After he hath applied soothing lotions, ointments of admonitions, medicaments of the Holy Scriptures, and if, as a last resource, he hath employed the caustic of excommunication and the blows of the lash, and seeth that even then his pains are of no avail, let him apply for that brother also what is more potent than all these measures: his own prayer and that of the brethren, that the Lord who is all-powerful may work a cure in that brother.").

²²³ *Id.* at Chapter 28 ("But if he is not healed even in this way, then finally let the Abbot dismiss him from the community, as the Apostle saith: 'Put away the evil one from among you' (1 Cor 5:13); and again: 'If the faithless depart, let him depart' (1 Cor 7:15); lest one diseased sheep infect the whole flock.").

unsuccessful. Thus, it appears that the internal workings of Benedictine monasteries arguably embody both the positive and negative aspects of subsidiarity.

c. The Autonomy of Each Monastery

Further, each monastery is to remain autonomous unless it comes under the rule of an unrighteous Abbot.²²⁴ Although initial research is inconclusive, it could foreseeably be argued that this is also a manifestation of subsidiarity insofar as it is representative of a preference for action at a lower level (i.e., the monastery itself) until that level proves incapable of addressing the issue before it (e.g., the wickedness of the Abbott). Further, at least one scholar observes that the monastic order of Cîteaux, a Benedictine order founded in 1098, employed a "system of filiation which...resulted in greater subsidiarity."²²⁵ Due to the fact that subsidiarity is expressly embraced by (at a minimum) the Cisterian Order,²²⁶ the American-Cassinense Congregation,²²⁷ and the

²²⁴ *Id.* at Chapter 64 ("But even if the whole community should by mutual consent elect a man who agreeth to connive at their evil ways (which [G_d] forbid) and these irregularities in some come [sic] to the knowledge of the Bishop to whose diocese the place belongeth, or to neighboring Abbots, or Christian people, let them not permit the intrigue of the wicked to succeed, but let them appoint a worthy steward over the house of [G_d], knowing that they shall receive a bountiful reward for this action, if they do it with a pure intention and godly zeal; whereas, on the other hand, they commit a sin if they neglect it.").

²²⁵ *Exordium: Batch 2*, O.C.S.O. [Cistercian Order of the Strict Observance [Trappists]], at http://www.ocso.org/HTM/exord_unit1.pdf (last visited 9 July 2007).

²²⁶ *Declaration of the General Chapter of the Cistercian Order on the essential elements of cistercian life today*, Declaration 83 (2000), at <http://www.ocist.org/RBDCL-engl.htm> (last visited 2 July 2007) ("In the organization and legislation of monastic life as well as in the exercise of personal authority one must carefully respect those sociological principles based in natural law that have been perceived more clearly in recent times and are proclaimed with great insistence by the Magisterium of the Church. The most important of these for us are the correlative principles of personalism and solidarity as well as subsidiarity and a legitimate pluralism within a necessary unity."). *See also id.* at Declaration 86 ("*The principle of subsidiarity* orders the relations between individuals and the community as well as between narrower and wider communities. It states that the higher authority of the broader community should leave those things to the subordinates themselves which they can accomplish well, and indeed very often better, but that when the subordinates are of themselves inadequate or neglect their duty, then the higher authority should offer assistance and help. In this way both the vitality and the responsibility of the subordinates remains intact and the higher authority can carry out more effectively its own task of coordination and higher decision."); and *id.* at Declaration 110 ("The principles of subsidiarity and of legitimate pluralism have great importance in the structure of the congregations. Whatever the individual monasteries for their part can

Benedictine Sisters of Mount St. Scholastica,²²⁸ it is reasonable to conclude that elements of the Benedictine Order subscribe to the principles of subsidiarity concerning the conditional autonomy of each monastery.

d. Conclusion

Although a direct invocation of the word "subsidiarity" is altogether absent from the writings of Saint Benedict, his teachings nonetheless appear to invoke its meaning. More specifically, it appears that subsidiarity at least informs (if not governs) the internal affairs of each Benedictine monastery. Further, this principle could also potentially apply to the autonomy of each independent monastery. Finally, the Rule of Saint Benedict is ultimately concerned with preventing centralized authorities from encroaching upon the "natural autonomy and independent life and power" inherent in each individual.²²⁹ As a

carry out through their effective competence and more accurate knowledge of local conditions should be left to them. It belongs to the organs of the congregation to help the efforts of the individual communities with fraternal advice and aid, to coordinate their efforts toward common goals, and to correct abuses if any should creep in; they also represent them before ecclesiastical and civil authorities. According to the principle of pluralism, the monasteries' specific characteristics and special tasks are to be recognized and the diversity of their gifts are to be directed toward the harmony of common goals lest the unity of the Congregation be endangered.").

²²⁷ American-Cassinese Congregation, *The Constitutions and the Directory*, at <http://www.osb.org/amcass/const/genprin.html> (last visited 2 July 2007) ("The Congregation exists to promote and protect the growth of its autonomous member monasteries in their life according to the Gospel, the *Rule of Saint Benedict*, and their own sound traditions, for the up building of the Body of [Chr_st]. It aims to do this, with due respect for the principle of subsidiarity and for legitimate pluralism, both by juridical means and by the encouragement of fraternal cooperation and support.").

²²⁸ Benedictine Sisters of Mount St. Scholastica, *Federation [of St. Scholastica] Purpose and History*, <http://www.mountosb.org/federation/federationex.html> (last visited 9 July 2007) ("[I]t is recognized that each monastery has its own unique capacity to respond.... In its relationship to the member monasteries, the Federation functions according to the principle of subsidiarity. It facilitates communication among the monasteries and between the individual monasteries and the Apostolic See, thus maintaining the ecclesial relationship of the Benedictine tradition. Each Benedictine monastery, however, exercises the cenobitic authority present within it when the prioress and the community deliberate together, in the light of the Holy Spirit, on the Rule, tradition and their own experience.").

²²⁹ RIGHT REV. BUTLER, *supra* note 216, at 238 ("When there is a question of union and organisation among monasteries, the chief point to consider is whether St Benedict's [sic] ideal of each monastery being a family is maintained, or whether the natural autonomy and independent life and power of reproduction inherent in a family are unduly encroached upon by any central authority.").

consequence, the Rule is rationally connected to the teachings of the Catholic Church concerning subsidiarity and is arguably worth further examination.

2. Johannes Althusius

a. Introduction

Although scholars dispute the appearance of the term "subsidiarity" in Althusius' *Politica Methodice Digesta, Atque Exemplis Sacris et Profanis Illustrata*²³⁰ (originally published in 1603), there is no question that his ideas are inherently federalistic.²³¹ One commentator has gone so far as to suggest that "the spirit of federalism...pervades [*Politica*] from bottom to top."²³² In his book, Althusius identified the Bible as the original source of federalist thought²³³ and essentially established himself as "the first post-medieval defender of the principle of subsidiary authority."²³⁴

²³⁰ Compare Ken Endo, *Subsidiarity & its Enemies: On a Post-National Constitutional Principle of the European Union*, 3 ("It is reasonable however, to also identify Althusius as the first proponent of subsidiarity and federalism (he uses, in fact, the word of 'subsidia' in the text)."), available at http://www2.warwick.ac.uk/fac/soc/csgr/activitiesnews/conferences/1999_conferences/3rdannualconference/papers/Endo.pdf (last visited 18 November 2007) and Benoist, *supra* note 210, at 55 ("The word 'subsidiarity,' which Althusius used often...") with HUEGLIN, *supra* note 118, at 152-153 ("Althusius in fact did not use the word subsidiarity which rather has its modern terminological root in nineteenth- and twentieth-century Catholic social doctrine where it was employed as a principle of the autonomy of family and church as its intermediary powers within modern state and individualized society. Althusius, in his discussion of the general elements of politics, once refers to the *subsidia vitae* (requirements of life) which can only be provided through mutual sharing and aid. Hence, there is at least a direct etymological link: subsidiarity as a concept denoting agency of one on behalf of another has its root in *subsidium* (literally: help or aid).") and Breton, et al, *supra* note 61, at n.2.

²³¹ While federalism and subsidiarity are not identical, "subsidiarity 'has dominated discussions of European federalism for over five years." Edwards, *supra* note 4, at 544, citing Bermann, *supra* note 2, at 332.

²³² OTTO VON GIERKE, *THE DEVELOPMENT OF POLITICAL THEORY* 257 (Bernard Freyd, Ph.D., trans., 1966).

²³³ See Daniel J. Elazar, *Althusius' Grand Design for a Federal Commonwealth*, in JOHANNES ALTHUSIUS, *POLITICA METHODICE DIGESTA, ATQUE EXEMPLIS SACRIS ET PROFANIS ILLUSTRATA* xxxvi (Frederick S. Carney, trans., 1995) (1614) ("The first grand federalist design, as Althusius himself was careful to acknowledge, was that of the Bible, most particularly the Hebrew Scriptures or Old Testament. Biblical thought is federal (from the Latin *foedus*, covenant) from first to last – from [G_d's] covenant with Noah establishing the biblical equivalent of what philosophers were later to term natural law (Genesis, chapter 9) to the Jews' reaffirmation of the Sinai covenant under the leadership of Ezra and Nehemiah, thereby adopting the Torah as the constitution of their second commonwealth (Ezra, chapter 10; Nehemiah, chapter

b. The Necessity of Associations

Althusius opened his book with the belief that,

"Politics is the art of associating men for the purpose of establishing, cultivating, and conserving social life among them. Whence it is called 'symbiotics.' The subject matter of politics is therefore association, in which the symbiotes pledge themselves each to the other, by explicit or tacit agreement, to mutual communication of whatever is useful and necessary for the harmonious exercise of social life...

Truly, in living this life no man is self-sufficient, or adequately endowed by nature...[I]n his adulthood [he is unable] to obtain in and by himself those outward goods he needs for a comfortable and holy life, [nor] to provide by his own energies all the requirements of life."²³⁵

Althusius further believed that the resulting and necessary mutual communication and common enterprise involves 1) things, 2) services, and 3) common rights;²³⁶ this communication, in turn, permits each individual or association to assume and maintain the advantages and responsibilities that are necessary or appropriate under the circumstances.²³⁷

Althusius also maintained that,

"[G_d] did not give all things to one person, but some to one and some to others, so that you have need for my gifts, and I for yours. And so was born, as it were, the need for communicating necessary and useful things, which communication was not possible except in social and political life. [G_d] therefore willed that each need the service and aid of others in order that friendship would bind all together, and no one would consider another to be valueless...

"Thus, the needs of the body and soul, and the seeds of virtue implanted in our souls, drew dispersed men together in one place...[and into a commonwealth]. And that this was the true

8). The covenant motif is central to the biblical world view, the basis of all relationships, the mechanism for defining and allocating authority, and the foundation of the biblical political teaching.").

²³⁴Alain de Benoist, *supra* note 210, at 56 ("By posing the question of shared jurisdictions, and by arguing that on all levels of public life the state should take care only of tasks that lower levels cannot accomplish, Althusius established himself as the first post-medieval defender of the principle of subsidiary authority.").

²³⁵JOHANNES ALTHUSIUS, *THE POLITICS OF JOHANNES ALTHUSIUS* 12 (Frederick S. Carney, trans., 1964) (1614).

²³⁶*Id.* at 14.

²³⁷*Id.*

origin first of villages, and then of larger commonwealths embracing wide areas, is taught by the most ancient records of history and confirmed by daily experience."²³⁸

Thus, associations are both produced and maintained because they are inherently necessary.²³⁹ It therefore follows that because associations are necessary, so too is the developed and civil society in which man exists.²⁴⁰ Althusius readily admits, however, that the populace itself is plainly incapable of efficient and beneficial administration due to the inevitability of discord and difference; as a result, he argues that a leader or an administrator must be appointed so that both people and associations can be held responsible for the fulfillment of their respective duties.²⁴¹

c. The Development of Associations

Althusius observes that society naturally develops from small, private associations into much larger and public ones in an effort to establish "an inclusive political order."²⁴² As this public association grows in size and diversity, it requires an increasing level of assistance in order to maintain its self-sufficiency.²⁴³ Unless this diversity is, "held together by some order of subordination, and regulated by fixed laws of subjection and

²³⁸ Althusius, *supra* note 233, § I (26-27), at 23.

²³⁹ *Id.* § I (33), at 25 ("Necessity therefore induces association; and the want of things necessary for life, which are acquired and communicated by the help and aid of one's associates, conserves it.").

²⁴⁰ *Id.* ("For this reason, it is evident that the commonwealth, or civil society, exists by nature, and that man is by nature a civil animal who strives eagerly for association.").

²⁴¹ *Id.* § VIII (52), at 62 ("For the public business of the various and differing orders of the province cannot be administered and governed conveniently and beneficially, let alone consistently and for any length of time, by many persons, much less by all, because of discord, dissension, and difference of opinion. Therefore, it is necessary that some director and governor be established who can hold the others, both orders and individuals, to their duties.").

²⁴² *Id.* § V (1), at 39 ("[H]uman society develops from private to public association by the definite steps and progressions of small societies. The public association exists when many private associations are linked together for the purpose of establishing an inclusive political order.").

²⁴³ *Id.* ("The larger this association, and the more types of association contained within it, the more need it has of resources and aids to maintain self-sufficiency.").

order, it would be destroyed in a short time by its own confusion."²⁴⁴ Althusius' beliefs that 1) society is inherently composed of smaller associated entities,²⁴⁵ 2) society only possesses those powers expressly assigned to it by smaller consociations,²⁴⁶ and 3) smaller consociations therefore maintain autonomy over those affairs which they have not directly assigned to the government²⁴⁷ conclusively and syllogistically demonstrate his relationship to contemporary federalist philosophy.²⁴⁸

d. The Negative Aspect of Subsidiarity

Althusius expands this argument even further by suggesting that inferior associations should be permitted to handle their own affairs until they prove incapable of doing so. In Althusius' words,

"Many districts of an extensive and populous city, or of a province, together with their presbyteries, constitute a diocese with its assembly of many churches. The

²⁴⁴ *Id.* § I (35), at 25, quoting Petrus Gregorius, De republica, XIX, I, 1,7 ad 16 f.: I, 3, 12 f.

²⁴⁵ Daniel J. Elazar, *Althusius' Grand Design for a Federal Commonwealth*, in ALTHUSIUS, *supra* note 235, at xxxviii ("Althusius' grand design is developed out of a series of building blocks or self-governing cells from the smallest, most intimate connections to the universal commonwealth, each of which is internally organized and linked to the others by some form of consensual relationship."). See also GIERKE, *supra* note 231, at 266 ("[L]arger society is always composed of smaller societies as corporative units, and only through them does it act upon their members[.]").

²⁴⁶ *Id.* at 266 ("[E]very smaller society, as a true and original community, draws from itself its own communal life and its own sphere of right [and gives] up to the higher society only so much of this as is indispensably required for the attainment of its specific end[.]").

²⁴⁷ See ALTHUSIUS, *supra*, note 233, § XIX (7), at 121 ("The supreme magistrate exercises as much authority as has been explicitly conceded to him by the associated members or bodies of the realm. And what has not been given to him must be considered to have been left under the control of the people or universal association."). See also *id.* § VIII (50), at 62 ("In difficult matters involving the entire province...the prefect can do nothing without the consent and agreement of the provincial orders.").

²⁴⁸ See WILLIAM S. LIVINGSTON, FEDERALISM AND CONSTITUTIONAL CHANGE 308 (1956) ("Federal government presupposes a desire and an ability to secure the component units against encroachment by the central government."). See also *id.* at 310 ("By its very nature federalism is anti-majoritarian. A federal government is designed to protect and afford a means of articulation for the territorial diversities within the larger community. All the instrumentalities of federal government are devices whose purpose is to prevent the unqualified majority of the whole society from riding unchecked over the interests of any of the federated elements.").

more serious controversies and questions concerning doctrine and church matters that cannot be decided by a presbytery are referred to this assembly for decision."²⁴⁹

Although this passage does not expressly require lower levels to resolve less serious controversies, the construction of the sentence permits a good faith argument that Althusius presumes that they should be permitted to do so until they prove incapable.

Although Hueglin argues that the negative aspect of subsidiarity is manifested via a lower level's retention of those powers that are not expressly delegated,²⁵⁰ this observation is potentially subject to dispute.²⁵¹ Instead, it appears that Althusius' expression of subsidiarity's negative aspects can be found in his belief that:

"Every city is able to establish statutes concerning those things that pertain to the administration of its own matters, that belong to its trade and profession, and that relate to the private functions of the community...Also pertaining to this communication are the right of the vote in the common business and actions of managing and administering the community, and the form and manner by which the city is ruled and governed according to laws it approves and a magistrate that it constitutes with the consent of the citizens. When, on the contrary, these common rights of the community are alienated, the community ceases to exist..."²⁵²

²⁴⁹ ALTHUSIUS, *supra* note 233, § VIII (33), at 60.

²⁵⁰ HUEGLIN, *supra* note 118, at 167 ("Lower level consociations retain all residual powers not explicitly delegated to a higher level. This is the negative aspect of subsidiarity.").

²⁵¹ See *New York v. United States*, 505 U.S. 144, 156-157 (1992) ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."). See also Peter A. Lauricella, *The Real 'Contract with America': The Original Intent of the Tenth Amendment and the Commerce Clause*, 60 ALB. L. REV. 1377, n. 99 (1997) ("Patrick Henry, a fervent Anti-federalist, made the typical argument for a State sovereignty amendment at the Virginia convention: 'What do they tell us? - That our rights are reserved. Why not say so?' 3 The Debates in the Several State Conventions on the Federal Constitution 448 (Jonathan Elliot ed., 1941) (1836)...It should be noted that this statement by Henry supports the argument that the Tenth Amendment is pure tautology and not a substantive limitation.").

²⁵² ALTHUSIUS, *supra* note 233, § VI (43-45), at 49.

This represents the negative aspect of subsidiarity insofar as it stands for the proposition that lower consociations should have exclusive control over "those things that pertain to the administration of its own matters."²⁵³

e. Conclusions

Althusius essentially believed that associations naturally developed throughout society in response to humanity's natural inability to be individually self-sufficient. As these associations develop, so too does the scope of their respective responsibilities. Lower levels must become responsible for some of these duties in order for the higher levels to effectively fulfill their functions. Those higher levels, in turn, must refrain from unnecessarily interfering with the responsibilities of the lower levels. Finally, Althusius' concern with protecting peoples' liberties²⁵⁴ represents a central component of the subsidiarity.²⁵⁵

²⁵³ Compare ALFORD, *supra* note 2, at 103 ("In other words, the operation of the principle of subsidiarity requires that power rest at the most basic level of production, so that those working at this level can call on higher levels of management to aid them in their contribution to the common effort.") with ALTHUSIUS *supra* note 233, § VI (43-45), at 49.

²⁵⁴ ALTHUSIUS, *supra* note 233, § XXIX (2), at 175 ("The imperium of the king ought not to be so enlarged that the liberty of the people is suppressed.").

²⁵⁵ HUEGLIN, *supra* note 118, at 221 ("In practice [the principle of subsidiarity entails] the appropriate distribution of powers in such a way as to maximize self-organizing autonomy for a plurality of communities of character without giving up a commitment to necessary degrees of mutual solidarity. In many ways this is of course exactly what civil society theory would like to suggest. Maintaining the dichotomous juxtaposition of state and civil society, however, precludes a more radically restructured vision of organized social life in which government by the state would be replaced by multilevel governance shared among a plurality of self-organizing communities. For Althusius, such a vision still was within practical reach[.]").

3. Other Noteworthy Contributors

While several scholars have concluded Bishop Wilhelm Emmanuel Freiherr von Ketteler was initial promulgator of subsidiarity²⁵⁶ (although they apparently disagree on whether or not he actually used the term),²⁵⁷ at least three others claim that its origins lie with Gustav Gundlach.²⁵⁸ Further, at least one scholar appears to believe that an economist named Heinrich Pesch is responsible for the term's origin.²⁵⁹

Like Pope John XXIII, Pesch believed that subsidiarity was a natural component of a properly functioning economy.²⁶⁰ Pesch also believed that individuals' autonomy

²⁵⁶ See, e.g., JUDITH A. MERKLE, FROM THE HEART OF THE CHURCH: THE CATHOLIC SOCIAL TRADITION 99-100 (1986) ("Subsidiarity is a social concept that arose out of the German social movement of Bishop von Ketteler.") and ESTELLA, *supra* note 2, at 78 ("Ketteler may...be considered as the father of the concept of 'subsidiarity'.").

²⁵⁷ Compare LEYS, *supra* note 198, at 25 (1995) ("W.E. von Ketteler...is, in modern Catholic tradition, the first one to use the principle of subsidiarity, without formulating it expressly.") (internal citation omitted) with Nemoianu, *supra* note 201, at 11 ("The term 'subsidiarity' was probably coined by the socio-Catholic essayist Bishop von Ketteler...soon after the middle of the nineteenth century. The concept was used...in Leo XIII's celebrated encyclical *Rerum Novarum* and then defined limpidly by Pius XI in 1931 in his *Quadragesimo Anno*."), available at <http://www.isi.org/books/content/343foreword.pdf> (last visited 9 July 2007) and Delcamp, *supra* note 27, at 11, n.12 (claiming that Ketteler "invented" the term subsidiarity).

²⁵⁸ 16 NEW CATHOLIC ENCYCLOPEDIA 199 (The Catholic University of America, ed., 1967). See also Rauscher, *supra* note 205 ("In preparing the first draft (1930) of *Quadragesimo Anno* and in analyzing the great disorders of the industrial society and threat of the expanding ideologies, [Gundlach] concluded that a complete reorganization of society was necessary. Taking into account the economic, social, and political situation of his day, Gundlach concluded that society was not adequately fostering individual social talents and abilities, the keys to building up society and culture. What had been neglected was the 'principle of subsidiarity.' Gundlach was able to formulate for the first time in history a principle that is today acknowledged worldwide."); Gehrman, *supra* note 205, at 2 ("The first notion of subsidiarity can be traced back to German priest and social philosopher Gustav Gundlach in the early 20th century."), available at <http://www.dur.ac.uk/john.ashworth/EPCS/Papers/Gehrman.pdf> (last visited 10 July 2007); and Paul Misner, *A Role for Intermediate Bodies in Social Insurance: Precedents in the 'Ghent System' and the Weimar Republic* ("What Gustav Gundlach was starting to call the principle of subsidiarity was operative in this equal participation as well as in the background role of the state in authorizing the labor agencies that administered the compulsory contributions."), available at <http://www.stthomas.edu/cathstudies/cst/mgmt/images/papers/misner.pdf> (last visited 23 October 2005).

²⁵⁹ Religion as Economic Praxis, <http://www.sfecon.com/Religion.htm> (last visited 10 July 2007) ("Fr. Pesch originated much of the terminology (e.g.: subsidiarity, solidarity) used by the Holy Fathers in guiding us away from the Marxian Error.").

²⁶⁰ RICHARD E. MULCAHY, S.J., THE ECONOMICS OF HEINRICH PESCH 175-176 (1952) ("[L]ike socialism, a planned economy is rejected in theory and practice by Pesch. Fundamentally, it is opposed to the principle of subsidiarity which requires that a higher social organization should not undertake what a social organization, lower in scale, can do at least equally well.").

should not be suppressed by centralizing authorities so long as the common good could still be pursued and that such suppression was only justifiable if the common good was endangered.²⁶¹ Therefore, it appears that Pesch's belief that higher associations should not interfere with lower levels unless it is necessary to effectuate the common good embodies both the positive and negative components of subsidiarity.

ii. Papal Contributors

The Pope is unquestionably the highest authority within the Catholic Church.²⁶² Of all the various teachings that each Pope promulgates, documents called "encyclicals" are the most authoritative²⁶³ and the Church considers the teachings contained therein to be both universally valid²⁶⁴ and permanent.²⁶⁵ This section examines the relevant encyclicals of several popes that have materially contributed to Catholicism's position concerning subsidiarity.

²⁶¹ *Id.*, at 176-177, quoting HEINRICH PESCH, DIE VOLKSWIRTSCHAFTSLEHRE 198-199 (1924) ("On principle, private property and private enterprise may not be suppressed in any sphere where its effective continuance can satisfy the common welfare. Rather, only according to the postulates of social justice does a limitation of freedom take place: a substitution of private enterprise by the public enterprise takes place exclusively, solely, and only, in such sectors where indubitably the national economic need in reference to the whole rightly demands the suppression of a private enterprise incapable, unsuited or harmful to the needs of the national economy.").

²⁶² David A. Boileau, *Introduction* to PRINCIPLES OF CATHOLIC SOCIAL TEACHING, *supra* note 30, at 14 ("All is natural law based, and the Magisterium of the Pope is the only legitimate interpretation."). See also PATRICK GRANFIELD, THE LIMITS OF THE PAPACY: AUTHORITY AND AUTONOMY IN THE CHURCH I (1987) ("Catholics...usually start with three dogmatic truths. First, the papacy, as the continuation of the primatial ministry established by [Chr_st] in Peter, is of divine origin; it can be reformed but not abolished. Second, the episcopate, in succession to the apostolic college, received from [Chr_st] the authority to govern the local Churches and, under the leadership of the Pope, this College of Bishops has supreme authority. Third, all believers, through the *sensus fidelium*, manifest, when in harmony with Scripture and tradition, the infallibility of the Church.").

²⁶³ JOHN PAUL II: THE ENCYCLICALS IN EVERYDAY LANGUAGE ix (Joseph G. Donders, ed.) (2001) ("Encyclicals are the most important and the most authoritative documents a pope writes.").

²⁶⁴ Pope John XXIII, *supra* note 51, ¶ 72 ("The above principles are valid always and everywhere.") and *id.* ¶ 220 ("The principles [the Church] gives are of universal application, for they take human nature into account, and the varying conditions in which man's life is lived. They also take into account the principal characteristics of contemporary society, and are thus acceptable to all.").

²⁶⁵ *Id.* ¶ 218.

1. Pope Leo XIII

Pope Leo XIII presented an encyclical entitled *Rerum Novarum* on 15 May 1891 in an effort to demonstrate the inherent incompatibility between Catholicism and socialism. Specifically, the Pope observed that socialism would naturally lead to an injustice because it, "would rob the lawful possessor, distort the functions of the State, and create utter confusion in the community."²⁶⁶ This arguably represents an invocation of subsidiarity insofar as it draws a bright line rule demarcating unacceptable intervention from higher consociations.

Although the Pope recognized that governments are primarily responsible for the protection of their respective citizens,²⁶⁷ he also believed that the unique orientation of a family vis-à-vis society meant that families possessed unique rights and obligations.²⁶⁸ The Pope proceeded to invoke the specter of subsidiarity (albeit via natural law) when he concluded that, "The socialists...in setting aside the parent and setting up a State supervision, act against natural justice, and destroy the structure of the home."²⁶⁹

²⁶⁶ Pope Leo XIII, *Rerum Novarum* (Papal Encyclical), ¶ 4, available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html (last visited 4 November 2007).

²⁶⁷ *Id.* ¶ 14 ("The foremost duty, therefore, of the rulers of the State should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as of themselves to realize public well-being and private prosperity. This is the proper scope of wise statesmanship and is the work of the rulers."). See also Pope Pius XI, *supra* note 202, ¶ 25 ("With regard to civil authority, Leo XIII...fearlessly taught that government must not be thought a mere guardian of law and of good order, but rather must put forth every effort so that 'through the entire scheme of laws and institutions . . . both public and individual well-being may develop spontaneously out of the very structure and administration of the State.'") (citing internal footnote 19).

²⁶⁸ Pope Leo XIII, *supra* note 266, ¶ 12 ("Hence we have the family, the 'society' of a man's house - a society very small, one must admit, but none the less a true society, and one older than any State. Consequently, it has rights and duties peculiar to itself which are quite independent of the State.")

²⁶⁹ *Id.* ¶ 14.

Like Althusius before him, the Pope recognized humanity's tendency to enter into associations²⁷⁰ and postulated that failure to account for and/or to respect this tendency could lead people to detest society.²⁷¹ Thus, Pope Leo XIII arguably outlined the negative prong of subsidiarity insofar as he believed unnecessary governmental action concerning the affairs of the people would impede "public well-being and private prosperity."²⁷²

The Pope also directly invoked subsidiarity's positive prong by indicating that if lower levels of society (e.g., families) are incapable of properly fulfilling their responsibilities, then the government has an obligation to intervene. More specifically, the Pope said that,

"[I]f a family finds itself in exceeding distress, utterly deprived of the counsel of friends, and without any prospect of extricating itself, it is right that extreme necessity be met by public aid, since each family is a part of the commonwealth. In like manner, if within the precincts of the household there occur grave disturbance of mutual rights, public authority should intervene to force each party to yield to the other its proper due; for this is not to deprive citizens of their rights, but justly and properly to safeguard and strengthen them....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. Now, it is to the interest of the community, as well as of the individual, that peace and good order should be maintained... there can be no question but that, within certain limits, it would be right to invoke the aid and authority of the law."²⁷³

²⁷⁰ *Id.* ¶ 27 ("And if human society is to be healed now, in no other way can it be healed save by a return to Christian life and Christian institutions. When a society is perishing, the wholesome advice to give to those who would restore it is to call it to the principles from which it sprang; for the purpose and perfection of an association is to aim at and to attain that for which it is formed, and its efforts should be put in motion and inspired by the end and object which originally gave it being.").

²⁷¹ *Id.* ¶ 13 ("That right to property...must...belong to a man in his capacity of head of a family...A family, no less than a State, is...a true society, governed by an authority peculiar to itself, that is to say, by the authority of the father. Provided, therefore, the limits which are prescribed by the very purposes for which it exists be not transgressed, the family has at least equal rights with the State in the choice and pursuit of the things needful to its preservation and its just liberty...[T]he family must necessarily have rights and duties which are prior to those of the community, and founded more immediately in nature. If the citizens, if the families on [sic] entering into association and fellowship, were to experience hindrance in a commonwealth instead of help, and were to find their rights attacked instead of being upheld, society would rightly be an object of detestation rather than of desire.").

²⁷² *Id.* ¶ 14.

²⁷³ *Id.* ¶¶ 14 and 38.

The Pope perceived such assistance to represent an "intrusion" upon the dignity of the people²⁷⁴ and warned that, although they are sometimes warranted,²⁷⁵ such intrusions should be as limited as possible.²⁷⁶ As a consequence, he advised governments to analyze each situation, prospective intrusion, and the limitation placed thereon on a case-by-case basis.²⁷⁷ Specifically, the Pope feared that undue government influence in the affairs of society could very well destroy the essence of the freedoms that the government had a specific duty to protect.²⁷⁸ Thus, Pope Leo XIII's efforts to prevent governmental interference until lower levels prove incapable of addressing the problems before them appears to represent an implicit invocation of the principle of subsidiarity.

²⁷⁴ *Id.* ¶ 14 ("The contention, then, that the civil government should at its option *intrude* into and exercise intimate control over the family and the household is a great and pernicious error.") (emphasis added).

²⁷⁵ *Id.* ¶ 36 ("If by a strike of workers or concerted interruption of work there should be imminent danger of disturbance to the public peace; or if circumstances were such as that among the working class the ties of family life were relaxed...if religion were found to suffer through the workers not having time and opportunity afforded them to practice its duties; if in workshops and factories there were danger to morals through the mixing of the sexes or from other harmful occasions of evil; or if employers laid burdens upon their workmen which were unjust, or degraded them with conditions repugnant to their dignity as human beings; finally, if health were endangered by excessive labor, or by work unsuited to sex or age-in such cases...").

²⁷⁶ *Id.* ¶ 14 ("But the rulers of the commonwealth must go no further; here, nature bids them stop. Paternal authority can be neither abolished nor absorbed by the State; for it has the same source as human life itself.").

²⁷⁷ *Id.* ¶ 38 ("The limits must be determined by the nature of the occasion which calls for the law's interference - the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.").

²⁷⁸ *Id.* ¶ 35 ("[T]he State must not absorb the individual or the family; both should be allowed free and untrammelled action so far as is consistent with the common good and the interest of others....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, for things move and live by the spirit inspiring them, and may be killed by the rough grasp of a hand from without.").

2. Pope Pius XI

Pope Pius XI presented an encyclical entitled *Quadragesimo Anno* to commemorate the fortieth anniversary of *Rerum Novarum*²⁷⁹ and, in doing so, made a substantial contribution to the ecclesiological development of subsidiarity.²⁸⁰ There, Pope Pius XI expressed his fear that if governments did not serve a "subsidiary function,"²⁸¹ they would take on far more responsibilities than they could efficiently bear;²⁸² thus, he effectively and expressly invoked the principle of subsidiarity as a means of effectuating "the proper ordering of civil society."²⁸³ This proper ordering meant that it was "wrong" to prevent lower levels of society from attempting to address issues that affected them. More specifically, Pope Pius XI expressed that,

"As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: *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.*"²⁸⁴

²⁷⁹ Hence the name, *Quadregesimo Anno*, or "Fortieth Year."

²⁸⁰ SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 174 (2002) ("[I]t was Pope Pius XI...who played a large part in developing subsidiarity as a substantial doctrine of Catholic philosophy.").

²⁸¹ Pope Pius XI, *supra* note 202, ¶ 80.

²⁸² *Id.* ¶ 78 ("When we speak of the reform of institutions, the State comes chiefly to mind...[because] there remain virtually only individuals and the State. This is to the great harm of the State itself; for, with a structure of social governance lost, and with the taking over of all the burdens which the wrecked associations once bore, the State has been overwhelmed and crushed by almost infinite tasks and duties.").

²⁸³ MERKLE, *supra* note 256, at 100.

²⁸⁴ Pope Pius XI, *supra* note 202, ¶ 79 (emphasis added).

Furthermore, Pope Pius XI also suggested that lower levels of society should be permitted to execute functions where they are capable of doing so, thereby enabling the state to concentrate its resources on issues of greater importance and/or complexity.²⁸⁵

Pope Pius XI (and later, Pope John XXIII) warned that the unnecessary involvement of government in the affairs of the people could potentially result in the pursuit of political aims instead of the public good.²⁸⁶

The Pope affirmed the negative component of subsidiarity through the promotion of the idea that lower levels of society should be permitted to address those issues that affect them where common benefits are being pursued.²⁸⁷ He proceeded to expressly invoke its positive component by advocating the intervention of governments when lower levels of society prove incapable of adequately resolving or addressing the issues that affect them.²⁸⁸ Finally, Pope Pius implicitly recognized that associations other than the government can be relied upon to promote the common good.²⁸⁹

²⁸⁵ *Id.* ¶ 80 (“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.”).

²⁸⁶ *Id.* ¶ 95 (“We are compelled to say that to Our certain knowledge there are not wanting some who fear that the State, instead of confining itself as it ought to the furnishing of necessary and adequate assistance, is substituting itself for free activity; that the new syndical and corporative order savors too much of an involved and political system of administration; and that...it rather serves particular political ends than leads to the reconstruction and promotion of a better social order.”). *See also* COMPENDIUM, *supra* note 26, ¶ 565, at 245 (“Special attention must be paid to [the observation of, *inter alia*, subsidiarity] by those who occupy institutional positions dealing with the complex problems of the public domain, whether in local administrations or national and international institutions.”) (citations omitted).

²⁸⁷ Pope Pius XI, *supra* note 202, ¶ 25 (“Just freedom of action must, of course, be left both to individual citizens and to families, yet only on condition that the common good be preserved and wrong to any individual be abolished.”).

²⁸⁸ *Id.* ¶ 94 (“Strikes and lock-outs are forbidden; if the parties cannot settle their dispute, public authority intervenes.”).

²⁸⁹ ALBINO BARRERA, O.P., MODERN CATHOLIC SOCIAL DOCUMENTS AND POLITICAL ECONOMY 264 (2001) (“[Quadragesimo Anno] observes that the wisdom of subsidiarity is not only that it strikes a balance between the legitimate demands of individual initiative and collective action, but that it also allows for a

3. Pope John XXIII

Minimizing governmental interference with lower levels of society was also advocated by Pope John XXIII in his encyclical entitled *Mater et Magistra*. There, Pope John XXIII recognized that although governments are responsible for facilitating economic development, they should not do so at the expense of individuals' freedom.²⁹⁰ Echoing Popes before him, he maintained that Catholicism mandated cooperation between the State and the People in order to generate economic benefits.²⁹¹ Although one Catholic scholar observes that Pope John XXIII recognized that modern society required more state interference than past generations,²⁹² he also clearly believed that the State has an obligation to proactively impose limitations upon itself in order to prevent

fuller and richer specification of the latter. The state is no longer the only institution that can work toward the protection and promotion of the common good; it can also rely on various social institutions and associations of individuals to discharge on various social institutions and associations of individuals to discharge this duty.").

²⁹⁰ Pope John XXIII, *supra* note 51, ¶ 55 ("But however extensive and far-reaching the influence of the State on the economy may be, it must never be exerted to the extent of depriving the individual citizen of his freedom of action. It must rather augment his freedom while effectively guaranteeing the protection of his essential personal rights. Among these is a man's right and duty to be primarily responsible for his own upkeep and that of his family. Hence every economic system must permit and facilitate the free development of productive activity.").

²⁹¹ See *id.* ¶ 56 ("Moreover, as history itself testifies with ever-increasing clarity, there can be no such thing as a well-ordered and prosperous society unless individual citizens and the State co-operate in the economy. Both sides must work together in harmony, and their respective efforts must be proportioned to the needs of the common good in the prevailing circumstances and conditions of human life."). See also Francis Caravan, S.J., *The Popes and the Economy*, 11 ND J. L. ETHICS & PUB. POL'Y 429, 436 (1997), quoting Paul VI, *Populorum Progressio* (Papal Encyclical), ¶ 34 (1967) ("Every programme made to increase production has, in the last analysis, no other raison d'etre than the service of man... It is not sufficient to increase wealth for it to be distributed equitably. It is not sufficient to promote technology to render the world a more human place in which to live... Economics and technology have no meaning except from man, whom they should serve. And man is only truly man insofar as, master of his own acts and judge of their worth, he is author of his own advancement, in keeping with the nature which was given him by his Creator, and whose possibilities and exigencies he himself freely assumes."), available at http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_26031967_populorum_en.html (last visited 20 November 2007).

²⁹² MERKLE, *supra* note 256, at 117 ("While John XXIII affirmed the principle of subsidiarity, he also recognized that the common good required far more state 'interference' than was needed in the past. Men and women had to join together in new associations, such as health care and insurance programs, to meet their needs in modern society.").

the destruction of private property.²⁹³ Further, like Althusius before him, Pope John XXIII recommended implementing a system of checks and balances to ensure that power is not impermissibly consolidated.²⁹⁴ Thus, Pope John XXIII believed that governments must pursue the common good, that this pursuit will ultimately result in the development of society, and that higher consociations must be a part of the community while also seeking to promote the common good.²⁹⁵

iii. Conclusions Concerning the Ecclesiological Development of Subsidiarity

Thus, it appears that Catholicism has made a significant contribution to the development of subsidiarity.²⁹⁶ St. Benedict arguably embodied the earliest institutional example of subsidiarity via his teachings concerning the Abbott. Specifically, the preference that the Abbott refrain from personally intervening until other monks fail to

²⁹³ Pope John XXIII, *supra* note 51, ¶ 117 (“State and public ownership of property is very much on the increase today. This is explained by the exigencies of the common good, which demand that public authority broaden its sphere of activity. But here, too, the ‘principle of subsidiary function’ must be observed. The State and other agencies of public law must not extend their ownership beyond what is clearly required by considerations of the common good properly understood, and even then there must be safeguards. Otherwise private ownership could be reduced beyond measure, or, even worse, completely destroyed.”).

²⁹⁴ *Id.* ¶ 118 (“It is important, too, not to overlook the fact that the economic enterprises of the State and other agencies of public law must be entrusted to men of good reputation who have the necessary experience and ability and a keen sense of responsibility towards their country. Furthermore, a strict check should constantly be kept upon their activity, so as to avoid any possibility of the concentration of undue economic power in the hands of a few State officials, to the detriment of the best interests of the community.”).

²⁹⁵ *Id.* ¶ 65 (“To this end, a sane view of the common good must be present and operative in men invested with public authority. They must take account of all those social conditions which favor the full development of human personality. Moreover, We consider it altogether vital that the numerous intermediary bodies and corporate enterprises—which are, so to say, the main vehicle of this social growth—be really autonomous, and loyally collaborate in pursuit of their own specific interests and those of the common good. For these groups must themselves necessarily present the form and substance of a true community, and this will only be the case if they treat their individual members as human persons and encourage them to take an active part in the ordering of their lives.”).

²⁹⁶ LEYS, *supra* note 198, at 42.

remedy the issue in question appears to be a manifestation of both the positive and negative aspects of subsidiarity. Furthermore, monastical autonomy could foreseeably represent a manifestation of subsidiarity as well.

Further, Althusius taught that the inevitable growth of necessary associations required increased assistance from society in order to remain viable while advocating the propriety of permitting lower levels to address those issues that they were capable of addressing. Althusius also believed that it was important to protect personal liberty and autonomy. Pesch agreed that this autonomy was necessary in order to promote the common good and believed that centralizing authorities should not intervene unless that common good was threatened.

Pope Leo XIII believed that the State should not supplant lower levels of society (specifically parents) unless and until such lower levels proved incapable of adequately addressing the issues that were confronting them. Like Althusius, he believed that people naturally developed collectives and that the government should honor their respective developments and freedoms. As a consequence, the State should either avoid undue intrusions altogether or limit them where necessary in order to prevent the destruction of liberty and/or autonomy.

Pope Pius XI furthered this idea by suggesting that too much government was ultimately ineffective, that a proper ordering of society was required, and that unnecessary intrusions perpetrated injustices thereon. As a consequence, his teachings advocated permitting lower levels to address that which they were capable of addressing, thereby leaving higher levels to dedicate their resources to larger problems. This, in turn, promoted the common good.

Finally, Pope John XXIII concurred with Pesch concerning both the government's responsibility for economic development and its obligation to do so while concurrently protecting freedom within the society. This result could foreseeably be achieved by facilitating cooperation between the State and the People so long as the State avoided the destruction of private property interests. This cooperation could, in turn, permit the government to allocate a greater number of resources to pursuing the common good. Essentially, Catholics appear to believe that the principle of subsidiarity permits individuals to contribute to the community while preventing the destruction of autonomy.²⁹⁷

VII. ANALYSIS CONCERNING THE ECCLESIOLOGICAL AND SECULAR DEVELOPMENT OF SUBSIDIARITY

a. *Similarities between EU and Ecclesiological Development*

i. The Ability of Subsidiarity to Adapt to Political and Social Realities

The Catholic Church, as the original expositor of subsidiarity, has noted that, "To arrive at a proper understanding of the principle of subsidiarity, one must look to the nature of the state and society."²⁹⁸ Further, while by no means binding on the European Union, Pope Leo XIII has specifically observed that, "The limits [of governmental assistance] must be determined by the nature of the occasion which calls for the law's

²⁹⁷ COMPENDIUM, *supra* note 26, ¶ 187, at 82 ("[The principle of subsidiarity] is imperative because every person, family and intermediate group has something original to offer to the community. Experience shows that the denial of subsidiarity, or its limitation in the name of an alleged democratization or equality of all members of society, limits and sometimes even destroys the spirit of freedom and initiative.") (emphasis in the original).

²⁹⁸ CATHOLIC ENCYCLOPEDIA 762.

interference - the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief."²⁹⁹ As a consequence, the Church clearly advocates preventing unnecessary interference in the affairs of the citizenry³⁰⁰ and believes that such necessity should be determined on a case-by-case basis.³⁰¹

It is noteworthy that the European Parliament clearly concurs with the Catholic Church on this all-important assessment.³⁰² Further, the European Union was developed (at least in part) in an effort to foster economic development while respecting individual and social autonomy.³⁰³ In order to do so, the Union recognized that it would require a flexible structure capable of changing with the times.³⁰⁴

Thus, both the European Union and Catholicism believe that the proper allocation of responsibilities between higher and lower consociations should be determined on a case-by-case basis. This similarity is crucial insofar as it demonstrates a fundamental

²⁹⁹ Pope Leo XIII, *supra* note 266, at ¶ 38. It is also noteworthy that Hueglin has argued that subsidiarity meant something different to Althusius at the time that he was writing due to the different economic mold of his time. See HUEGLIN, *supra* note 118, at 160.

³⁰⁰ See Crosson, *supra* note 30, at 170 ("[W]hatever individuals and groups can do for themselves in pursuit of their proper goals should not be done by the state."). See also GRANFIELD, *supra* note 262, at 123 ("[T]he Pope should not do for all other local Churches what they can well do for themselves.").

³⁰¹ See *supra* note 277.

³⁰² Commission of the European Communities, Commission Staff Working Document: Annex to the Report from the Commission "Better Lawmaking 2004" pursuant to Article 9 of the Protocol on the application of the principles of subsidiarity and proportionality (12th Report), at 22 ("While subsidiarity allows Community action to be extended if circumstances so require, it also means such action must be limited or ended when it is no longer justified."), available at <http://www.cymru.gov.uk/keypubassemeuropeancomm2/content/euleg050328/7583-05-add1.pdf> (last visited 17 December 2005).

³⁰³ Report on European Union by Belgium Prime Minister, ["Tindemans Report"], 1/76 Bull. Eur. Communities (29 December 1975), at 24 ("One of the fundamentals of the European Union...is the common search within a wider framework for progress towards a modern society and a form economic growth which respects human values and social needs. Social and regional policies meet this objective and give substance to the solidarity of Europeans by reducing the inequalities which separate them. In this field I propose that the European Council should adopt the following general guidelines."), available at http://aei.pitt.edu/942/01/political_tindemans_report.pdf (last visited 26 October 2007).

³⁰⁴ Supp. 5/75, *supra* note 69, ¶ 15, at 11 ("The Union should be dynamic in character and flexible in structure, so that it can adapt to political reality and to the requirements of a changing society.").

compatibility between ecclesiastical and secular positions on an issue that is of critical importance to each. Furthermore, it is also noteworthy that both the European Union and Catholicism advocate the involvement of centralized authorities where the greater interests of the community as a whole are at stake.³⁰⁵

ii. Closeness to the Citizen and the Propriety of Intervention

Although some commentators argue that subsidiarity inherently implies that authority should be vested in the lowest possible level of government,³⁰⁶ others argue that it simply requires authority to be vested in the best level available.³⁰⁷ One article has gone so far as to mistakenly suggest that, "The principle of closeness to the citizen, while meriting high regard, is not an inherent part of the subsidiarity principle...because the subsidiarity principle addresses only the relationship between the Community and the

³⁰⁵ Compare Pope Paul VI, *supra* note 291, ¶ 33 ("Individual initiative alone and the interplay of competition will not ensure satisfactory development. We cannot proceed to increase the wealth and power of the rich while we entrench the needy in their poverty and add to the woes of the oppressed. Organized programs are necessary for "directing, stimulating, coordinating, supplying and integrating" the work of individuals and intermediary organizations...It is for the public authorities to establish and lay down the desired goals, the plans to be followed, and the methods to be used in fulfilling them; and it is also their task to stimulate the efforts of those involved in this common activity. But they must also see to it that private initiative and intermediary organizations are involved in this work. In this way they will avoid total collectivization and the dangers of a planned economy which might threaten human liberty and obstruct the exercise of man's basic human rights.") with TEU, *supra* note 120, at Title V, art. J.1 (4) ("The Member States shall support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations. The Council shall ensure that these principles are complied with."); *id.*, art. J.2 (2) ("Whenever it deems it necessary, the Council shall define a common position. Member States shall ensure that their national policies conform to the common positions."); *id.*, art. J.3 (1) ("The Council shall decide, on the basis of general guidelines from the European Council, that a matter should be the subject of joint action."); and *id.*, art. J.8 (1) ("The European Council shall define the principles of and general guidelines for the common foreign and security policy.").

³⁰⁶ See, e.g., Nicholas Emiliou, *Subsidiarity: Panacea or Fig Leaf*, in LEGAL ISSUES OF THE MAASTRICHT TREATY, *supra* note 4, at 66, *citing* Task Force Report on The Environment and the Internal Market, EC Commission, December 1989, x ("[S]ubsidiarity establishes the presumption that the primary responsibility and decision-making competence should rest with the lowest possible level of authority of the political hierarchy.").

³⁰⁷ See, e.g., Stabile, *supra* note 56, at 4 ("[S]ubsidiarity emphasizes action at the level most suited to address a problem, not merely action at the lowest level.").

Member States."³⁰⁸ These authors fail to recognize, however, that subsidiarity's preference for Member State action when they are capable of adequately addressing the issue in question inherently represents action closer to the citizenry. In other words, the Member States are "closer to the citizen" than the Institutions are. As a consequence, closeness to the citizen is not necessarily precluded from a working definition of subsidiarity within the EU.

Similarly, Pope Leo XIII noted that if an employer deals unjustly with his or her employees, then the naturally occurring and relevant association within the society in question should be the first to address it instead of the government.³⁰⁹ Pope John XXIII believed that since physical labor represents both a duty and a right, the laborer should possess the responsibility to manage work-related relationships until s/he proves unwilling or incapable of properly doing so.³¹⁰ If laborers are in fact incapable or unwilling, then, and only then, does the State possess proper justification for

³⁰⁸ von Borries and Hauschild, *supra* note 6, at 374. If this were true, however, then it arguably represents "the most serious flaw" of the EU's codification of subsidiarity. See HUEGLIN, *supra* note 118, at 157 ("[T]he most serious flaw in the 'subsidiary' construction of the European Union [is the fact that] the process of deliberation from below is truncated and begins only at the nation-state level.").

³⁰⁹ Pope Leo XIII, *supra* note 266, at ¶ 45 ("If through necessity or fear of a worse evil the workman accept harder conditions because an employer or contractor will afford him no better, he is made the victim of force and injustice. In these and similar questions...in order to supersede undue interference on the part of the State, especially as circumstances, times, and localities differ so widely, it is advisable that recourse be had to societies or boards such as We shall mention presently, or to some other mode of safeguarding the interests of the wage-earners; the State being appealed to, should circumstances require, for its sanction and protection.").

³¹⁰ Pope John XXIII, *supra* note 51, ¶ 44 ("On the subject of work, Pius XI repeated the teaching of the Leonine encyclical, maintaining that a man's work is at once his duty and his right. It is for individuals, therefore, to regulate their mutual relations where their work is concerned. If they cannot do so, or will not do so, then, and only then, does 'it fall back on the State to intervene in the division and distribution of work, and this must be according to the form and measure that the common good properly understood demands.'") (citing internal footnote 21).

intervention.³¹¹ *Mater et Magistra* reiterated this notion by requiring higher consociations to assist lower ones.³¹²

It should be noted that both Spinelli and Pope Pius XI are concerned with efficient governance within higher echelons of authority³¹³ and the potential problems that lower levels may encounter when attempting to resolve the issues that affect them.³¹⁴ Further, both Spinelli and the Catholic Church seek to avoid the creation of super-states and advocate the maintenance of proper order so that each level can fulfill its respective responsibilities.³¹⁵ Finally, Spinelli and the Church both advocate the delimitation of

³¹¹ *Id.*

³¹² BARRERA, *supra* note 289, at 25 (“*Mater et Magistra* strengthens the principle of subsidiarity by noting that, together with a healthy respect for the realm properly reserved for private initiative, higher bodies are obligated to furnish assistance to floundering lower bodies (MM #53, 65).”).

³¹³ *Compare* Report of the Commission on European Union, *supra* note 66, ¶ 12 (“Consequently, and in accordance with the *principe de subsidiarité*, the Union will be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently.”) with Pope Pius XI, *supra* note 202, ¶ 80 (“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.”).

³¹⁴ *Compare* Report of the Commission on European Union, *supra* note 66, ¶ 12 (“[T]he Union will be given responsibility only for those matters which the Member States are no longer capable of dealing with efficiently.”) with Pope Pius XI, *supra* note 202, ¶ 79 (“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.”).

³¹⁵ *Compare* Report of the Commission on European Union, *supra* note 66, ¶ 12 (“European Union is not to give birth to a centralizing super-state.”) with COMPENDIUM, *supra* note 26, ¶ 441, at 191 (“In the course of history...there has been a constant awareness of the need for a similar authority to respond to worldwide problems arising from the quest for the common good: it is essential that such an authority arise from mutual agreement and that it not be imposed, nor must it be understood as a kind of ‘global super-State.’”) (citations omitted) and John Courtney Murray, S.J., *The Juridical Organization of the International Community*, in BRIDGING THE SACRED AND THE SECULAR: SELECTED WRITINGS OF JOHN COURTNEY MURRAY, S.J. 31 (J. Leon Hooper, S.J., ed., 1994) (“[T]he Catholic doctrine of the organic state...maintains the natural necessity for a corporative organization of society, based on the principle that there is a natural sociability among the members of particular groups within a state and among the member of a national community. This natural sociability is based on certain common aspirations, interests, and needs; and it creates the right to pursue by organized action the ends that are of value to the group. Catholic doctrine, therefore, would maintain that national states, with their proper sovereignty, are natural

responsibilities for each authority that is potentially involved in a particular issue.³¹⁶

Thus, it appears that both the EU and Catholicism prefer lower levels to take those actions they are capable of effectively taking.

iii. Pursuit of the Common Good

Both the Catholic Church and the European Union clearly advocate doing what is necessary in the interests of the common good.³¹⁷ Although this interest is obviously

political units; they exist by natural necessity and right, and they may not be merged into a community of world citizens under some supranational government.”).

³¹⁶ Compare Report of the Commission on European Union, *supra* note 66, at 12 (“Hence, the competence of the Union will be limited to what is assigned to it, meaning that its fields of competence will be specified in the Act of Constitution, other matters being left to the Member States. There is nothing new in this.”) with COMPENDIUM, *supra* note 26, ¶ 418, at 179-180 (“*The State must provide an adequate legal framework for social subjects to engage freely in their different activities and it must be ready to intervene, when necessary and with respect to the principle of subsidiarity, so that the interplay between free associations and democratic life may be directed to the common good. Civil society is in fact multifaceted and irregular; it does not lack its ambiguities and contradictions. It is also the arena where different interests clash with one another, with the risk that the stronger will prevail over the weaker.*”) (emphasis in the original).

³¹⁷ Compare Pope Pius XI, *supra* note 202, ¶ 110 (“The public institutions themselves, of peoples, moreover, ought to make all human society conform to the needs of the common good; that is, to the norm of social justice. If this is done, that most important division of social life, namely, economic activity, cannot fail likewise to return to right and sound order.”) and Pope John XXIII, *supra* note 51, ¶ 40 (“The second point which We consider basic in the encyclical is his teaching that man's aim must be to achieve in social justice a national and international juridical order, with its network of public and private institutions, in which all economic activity can be conducted not merely for private gain but also in the interests of the common good.”) with Roy Jenkins, President of the Commission of the European Communities, Europe's Present Challenge an Future Opportunity, Jean Monnet Lecture delivered in Florence, 28 October 1977, at 14 (“We must only give to the Community functions which will, beyond reasonable doubt, deliver significantly better results because they are performed at a Community level. We must fashion a Community which gives to each Member State the benefits of results which they cannot achieve alone. We must equally leave to them functions which they can do equally well or better on their own.”), available at http://aei.pitt.edu/archive/00004404/01/001971_1.pdf (last visited 10 July 2007). See also FOUILLÉE, et al, *supra* note 130, § 86, at 115 (“Juridical organization proposes in fact to realize in the life of humanity an ideal of justice and utility, 'meaning by utility that which the general opinion regards as the greatest good for the greatest number.’”) citing GÉNY, *supra* note 135, at 471; and JOLOWICZ, *supra* note 190, at 14 (“It is also permissible in deciding between possible interpretations, quite apart from the question of 'mildness', to take into account the relative values of the results that will be achieved, though the Romans themselves put the point slightly differently; and under this head can be brought the so-called *argumentum ad absurdum*, for a sensible result is more likely to have been intended by the legislator than an absurd one. The principle can also appear as a general theory of 'beneficial' construction, not in the sense of construction which is favourable to a particular person, but of what is favourable to the human race generally.”) (internal citations omitted).

concerned with the public at large, governments should also be directly concerned with the development of each individual.³¹⁸ The law should pursue "the greatest possible amount of good" as a function of its purpose³¹⁹ while considering utility and equity in order to facilitate the achievement of that good.

Similarly, subsidiarity is a core principle of Catholic social philosophy³²⁰ and is inherently concerned with promoting the public good.³²¹ As a consequence, Catholics believe that the devolution of authority via subsidiarity will directly facilitate individual development while promoting human dignity.³²² The Church posits that this dignity is naturally and inextricably connected to the principle of subsidiarity.³²³ Thus, when

³¹⁸ GIERKE, *supra* note 232, at 45 ("The government, however, is concerned not only with the good of the whole but also with the good of the individuals, and while it wields the State's rights of superiority over persons and property, it must avoid any arbitrary encroachment on liberty or property.").

³¹⁹ PLANIOL, *supra* note 131, § 224, at 162 ("Laws, however, are made in order to obtain for man the greatest possible amount of good. A juridical science which would lead to unjust or dangerous solutions would be false. It would defeat its own purpose."). See also CARL JOACHIM FRIEDRICH, *THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE* 18 (2d. ed., 1963) (1958) ("For since it is the task of...a founder of the law to make the community as a whole and its members happy, and since such happiness can be understood only as a participation in the idea of the good, law must in every respect be shaped in such a way that the human beings living under it become better.").

³²⁰ Jonathan Chaplin, *Subsidiarity as a Political Norm*, in *POLITICAL THEORY AND CHRISTIAN VISION: ESSAYS IN MEMORY OF BERNARD ZYLSTRA* 84 (Jonathan Chaplin and Paul Marshall, eds., 1994) ("Subsidiarity has always been understood to apply comprehensively to all social relationships and thus lies at the heart of Catholic social philosophy.")

³²¹ COMPENDIUM, *supra* note 26, ¶ 160, at 71 ("*The permanent principles of the Church's social doctrine constitute the very heart of Catholic social teaching. These are the principles of: the dignity of the human person...the common good, subsidiarity, and solidarity.*") (internal citation omitted).

³²² Føllesdal, *supra* note 62, at 19 ("The Catholic argument for subsidiarity rests on the view that the human good is to develop and realize [sic] one's good potential, thus realizing one's dignity as made in the image of [G_d].").

³²³ See Joseph Card. Ratzinger and Alberto Bovone, *Introduction on Christian Freedom and Liberation* ¶ 73, 22 March 1986 ("The supreme commandment of love leads to the full recognition of the dignity of each individual, created in [G_d's] image. From this dignity flow natural rights and duties. In the light of the image of [G_d], freedom, which is the essential prerogative of the human person, is manifested in all its depth. Persons are the active and responsible subjects of social life. Intimately linked to the *foundation*, which is man's dignity, are the *principle of solidarity* and the *principle of subsidiarity*. By virtue of the first, man with his brothers is obliged to contribute to the common good of society at all its levels. Hence the Church's doctrine is opposed to all the forms of social or political individualism. By virtue of the second, neither the State nor any society must ever substitute itself for the initiative and responsibility of individuals and of intermediate communities at the level on which they can function, nor must they take away the room necessary for their freedom. Hence the Church's social doctrine is opposed to all forms of collectivism."), *available at*

politicians act in conformity with the principle of subsidiarity, they augment the ability of society to promote the common good.³²⁴ Similarly, the Pontifical Council for Justice and

Peace has argued that:

"On the basis of this principle, all societies of a superior order must adopt attitudes of help ('subsidium') – therefore of support, promotion, development – with respect to lower-order societies. In this way, intermediate social entities can properly perform the functions that fall to them without being required to hand them over unjustly to other social entities of a higher level, by which they would end up being absorbed and substituted, in the end seeing themselves denied their dignity and essential place."³²⁵

This development of freedom and dignity is inextricably connected to the principles of natural law theory that form the foundations of both the civil law tradition³²⁶ and Catholicism.³²⁷ Due to the inevitable changes within both society at large and the development of the EU, resulting changes in relationships between various levels of

http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19860322_freedom-liberation_en.html (last visited 26 October 2007).

³²⁴ *Id.* ¶ 84 (“As a result, the political authorities will become more capable of acting with respect for the legitimate freedoms of individuals, families and subsidiary groups; and they will thus create the conditions necessary for man to be able to achieve his authentic and integral welfare, including his spiritual goal.”).

³²⁵ COMPENDIUM, *supra* note 26, ¶ 186, at 81 (emphasis in the original). See also ALBERTO M. PIEDRA, NATURAL LAW: THE FOUNDATION OF AN ORDERLY ECONOMIC SYSTEM 159 (2004).

³²⁶ TRIDIMAS, *supra* note 12, at 2-3, citing H.G. SCHERMERS AND D. WAELBROECK, JUDICIAL PROTECTION IN THE EUROPEAN UNION 28-30 (6th ed., 2001) (“Schermers and Waelbroeck identify...compelling or constitutional legal principles...[that] encompass[] principles which stem from the common European constitutional heritage and are perceived by the authors to form part of natural law, such as the protection of fundamental rights.”)

³²⁷ PIEDRA, *supra* note 325, at 126 (“Man must come to the realization that he has to respect an objective moral order founded on Natural Law and be committed to the principle of responsible freedom. Unless capitalism corrects its traditional prejudice against the application of moral values in economic matters and responds exclusively to market forces, the threat of the State overstepping its boundaries and endangering personal freedom becomes a distinct reality. To avoid such an eventuality the free enterprise system must accept and apply [a] basic principle[] which [is] at the core of Catholic Social Doctrine and which [is] indispensable for the proper ordering of society...[i.e.] the principle of subsidiarity...To ignore [it] threatens to impede the harmonious relationships between individuals, in particular between capital and labor, not to mention intermediary associations such as the family.”). See also Linnan, *supra* note 2, at 437 (“The pope is obliged to observe the natural law...The pope must also observe the divine positive law, that is, all that is understood to have been revealed by [G_d].”).

consociations are to be expected.³²⁸ Subsidiarity permits all associations to adapt to those changes by supporting the development and maintenance of dignity, autonomy, and efficiency. Finally, lower consociations are presumed to be aware of their inability "to achieve a truly human life by their own unaided efforts" and, as a consequence, they establish political communities in order to further the common good.³²⁹ Thus, in many ways, it can be claimed that, "The law of subsidiarity and the law of the common good are, in substance, identical."³³⁰

b. *Conclusions Concerning the Ecclesiological and Secular Development of Subsidiarity*

Both EU and Catholic scholars have observed that subsidiarity is primarily concerned with preserving harmonious relationships while protecting individual autonomy from both internal and external threats.³³¹ Further, both have recognized that

³²⁸ POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY, *supra* note 9, at 199 ("In our times profound transformations are to be noticed in the structure and institutions of peoples; they are the accompaniment of cultural, economic, and social development. These transformations exercise a deep influence on political life, particularly as regards the rights and duties of the individual in the exercise of civil liberty and in the achievement of the common good; and they affect the organization of the relations of citizens with each other and of their position vis-à-vis the state.").

³²⁹ *Id.*, at 200 ("Individuals, families, and the various groups which make up the civil community, are aware of their inability to achieve a truly human life by their own unaided efforts; they see the need for a wider community where each one will make a specific contribution to an even broader implementation of the common good. For this reason they set up various forms of political communities. The political community, then, exists for the common good: this is the full justification and meaning and the source of its specific and basic right to exist. The common good embraces the sum total of all those conditions of social life which enable individuals, families, and organizations to achieve complete and efficacious fulfillment.").

³³⁰ Chaplin, *supra* note 320, at 86, quoting J. MESSNER, SOCIAL ETHICS 196 (JJ. Doherty trans., 1949).

³³¹ Compare BARRERA, *supra* note 289, at 11 ("[Subsidiarity] seeks to defend the scope of individual action not only from an overextended state but also from the threat emanating from within the private sector itself in the form of the larger corporations' insatiable appetite for expanding and absorbing smaller entities."); Føllesdal, *supra* note 62, at 19 ("The Catholic argument for subsidiarity rests on the view that the human good is to develop and realize [sic] one's good potential, thus realizing one's dignity as made in the image of [G_d.]"); Ratzinger and Bovone, *supra* note 323; JOHN COURTNEY MURRAY, S.J., WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 334 (1960) ("[Subsidiarity] asserts the

the state exists for the benefit of the people³³² and that centralized decision-making can ultimately alienate intended constituencies.³³³ Therefore, it becomes clear that both the EU and Catholicism believe that subsidiarity requires lower levels of authority to address

organic character of the state – the right to existence and autonomous functioning of various sub-political groups, which unite in the organic unity of the state without losing their own identity or suffering infringement of their own ends or having their functions assumed by the state. These groups include the family, the local community, the professions, the occupational groups, the minority cultural or linguistic groups within the nation, etc.”); and Peter Widulski, *Subsidiarity and Protest: The Law School's Mission in Grutter and Fair*, 42 GONZ. L. REV. 415, 421 (2006), citing FINNIS, *supra* note 25, at 147 (“Since an individual fully participates in human good only through his or her own actions, ‘one who is never more than a cog in big wheels turned by others is denied participation in one important aspect of human well-being.’”) with Endo, *supra* note 68, at 12 (“It was Altiero Spinelli...who introduced the principle of subsidiarity in the EU’s formal document: he first led the European Commission to make a contribution report to the Tindemans Report in 1975, and then the European Parliament to adopt the Draft Treaty on European Union in 1984. On these two occasions, he attempted to soothe the fear for a over-centralised Leviathan in Brussels, by stressing the negative aspect of subsidiarity.”), available at http://www2.warwick.ac.uk/fac/soc/csgr/activitiesnews/conferences/1999_conferences/3rdannualconference/papers/Endo.pdf (last visited 20 November 2007); Delcamp, *supra*, note 27, at 10, n. 9 (“[S]ubsidiarity proceeds from a moral defence, which makes respect for the *dignity* and *responsibility of the individuals* of which it is composed the purpose of every society.”) and POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY, *supra* note 9, at 140 (“The principle of subsidiarity is concerned broadly with the harmonious relationship among persons and institutions (autonomous in their own peculiar spheres) in a hierarchically ordered society.”).

³³² Compare MERKLE, *supra* note 256, at 100 (“[T]he state and all other associations exist for the individual.”) with TEU, *supra* note 120, at pmb1.

³³³ Compare COMPENDIUM, *supra* note 26, ¶ 187, at 82 (“In order for the principle of subsidiarity to be put into practice there is a *corresponding need* for: respect and effective promotion of the human person and the family; ever greater appreciation of associations and intermediate organizations in their fundamental choices and in those that cannot be delegated to or exercised by others; the encouragement of private initiative so that every social entity remains at the service of the common good, each with its own distinctive characteristics; the presence of pluralism in society and due representation of its vital components; safeguarding human rights and the rights of minorities; bringing about bureaucratic and administrative decentralization; striking a balance between the public and private spheres, with the resulting recognition of the *social* function of the private sphere; appropriate measures for making citizens more responsible in actively ‘being a part’ of the political and social reality of their county.”) with European Parliament, Committee on Legal Affairs and the Internal Market, Report on the Commission report to the European Council on better lawmaking 2000 (pursuant to Article 9 of the Protocol to the EC Treaty on the application of the principles of subsidiarity and proportionality)(COM(2000) 772 – C5-0097/2001 – 2001/2044(COS)) and on the Commission report to the European Council on better lawmaking 2001 (pursuant to Article 9 of the Protocol to the EC Treaty on the application of the principles of subsidiarity and proportionality)(COM(2001) 728 – C5-0102/2002 – 2001/2044(COS)), Final, a5-0100/2003, 25 March 2003, at 6, ¶ 1 (“[L]egislative and regulatory inflation in the Member States and at the Community level weakens the rule of law and alienates citizens from their institutions.”). See also DONAL DORR, THE SOCIAL JUSTICE AGENDA: JUSTICE, ECOLOGY, POWER AND THE CHURCH 91-92 (1991) (“It has become clear in recent times that people become alienated when they find that the major decisions which affect their lives are made by people with whom they have little personal contact...The present situation requires a twofold movement away from the...emphasis on the nation-State. On the one hand, some of the authority exercised in the past by the State must now be passed *upward* to international agencies. On the other hand, some of it must be passed *downward* to regional or local authorities.”).

issues that affect them when they are capable of doing so.³³⁴ Both EU and Catholic scholars also believe that higher levels of society are responsible for organizing activities that lower levels are simply incapable of implementing on their own.³³⁵ Finally, both EU and Catholic scholars recognize that subsidiarity has both a positive and a negative component.³³⁶

³³⁴ Compare ESTELLA, *supra* note 2, at 5 (“[T]he principle of subsidiarity implies...that central intervention...must cede to intervention by the Member States. This amounts to giving priority to 'autonomy' when the circumstances of the case recommend it.”) with U.S. Catholic Bishops, *Economic Justice for All* (1986), in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE ¶ 124, at 608 (David J. O'Brien and Thomas A. Shannon eds.) (1992) (“[The principle of subsidiarity] states that, in order to protect basic justice, government should undertake only those initiatives which exceed the capacity of individuals or private groups acting independently. Government should not replace or destroy smaller communities and individual initiative. Rather, it should help them to contribute more effectively to social well-being and supplement their activity when the demands of justice exceed their capacities.”).

³³⁵ Compare POLITICAL ORDER AND THE PLURAL STRUCTURE OF SOCIETY, *supra* note 9, at 140 (“With respect to institutions, for example, the rational law of nature dictates, and the common good requires, that the lower or smaller societies depend on the higher or more self-sufficient societies for ordering activities and support that they cannot provide for themselves.”) with COMPENDIUM, *supra* note 26, ¶ 188, at 82-83 (“Various circumstances may make it advisable that the State step in to supply certain functions...One may...envison the reality of serious social imbalance or injustice where only the intervention of the public authority can create conditions of greater equality, justice, and peace. In light of the principle of subsidiarity, however, this institutional substitution must not continue any longer than is absolutely necessary, since justification for such intervention is found only in the exceptional nature of the situation. In any case, the common good correctly understood, the demands of which will never in any way be contrary to the defence and promotion of the primacy of the person and the way this is expressed in society, must remain the criteria for making decisions concerning the application of the principle of subsidiarity.”) (emphasis in the original) and U.S. Catholic Bishops, *Economic Justice for All* (1986), in CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE ¶ 124, at 608 (David J. O'Brien and Thomas A. Shannon eds., 1992) (“This does not mean, however, that the government that governs least governs best. Rather it defines good government intervention as that which truly 'helps' other social groups contribute to the common good by directing, urging, restraining, and regulating economic activity as 'the occasion requires and necessity demands.' This calls for cooperation and consensus-building among the diverse agents in our economic life, including government. The precise form of government involvement in this process cannot be determined in the abstract. It will depend on an assessment of specific needs and the most effective ways to address them.”).

³³⁶ Compare DAVIES, *supra* note 31, at 19 (“In effect, two tests must therefore be satisfied: a negative one in the sense that objectives cannot be sufficiently achieved (the 'necessity' criterion); and a positive test in that the objective of the action is better achieved at the EC level by reason of scale or effects of the proposed action (the 'effectiveness' criterion.”) with COMPENDIUM, *supra* note 26, ¶ 186, at 81-82 (“Subsidiarity, understood in the positive sense as economic, institutional or juridical assistance offered to lesser social entities, entails a corresponding series of negative implication that require the State to refrain from anything that would de facto restrict the existential space of the smaller essential cells of society. Their initiative, freedom and responsibility must not be supplanted.”) (emphasis in the original) and Ken Endo, *Subsidiarity: A Matter of Political Vocabulary in a Fragmented World*, at 2, available at <http://www.global-g.jp/paper/4-11.pdf> (last visited 8 November 2005). See also TAMANAHA, *supra* note 152, at 77 (“Self-determination can be understood, in negative terms, to mean that individuals should be left alone by government to live as they desire; self-determination can also be understood, in positive terms,

VIII. CONCLUSION

Thus, an examination of 1) the methods utilized by civil and common law jurisdictions to interpret ambiguities like subsidiarity, 2) subsidiarity's development within Catholicism, and 3) subsidiarity's development within the EU appears to reveal seemingly material similarities and no material dissimilarities.

Although by no means exhaustive, the analysis undertaken herein indicates that religious and secular scholars alike have either implemented the principle of subsidiarity or contributed to its development. Refraining from interference in matters concerning lower consociations until such levels prove incapable of addressing those matters has been practiced and/or advocated by (*inter alia*) St. Benedict, Althusius, Pesch, Pope Leo XIII, Pope Pius XI, and Pope John XXIII. Each of these contributors was expressly concerned with preserving the autonomy and dignity of lower consociations within society.

This concern with protecting autonomy and freedom is clearly echoed within the European Union. More specifically, the EU has expressly recognized that devolution of power towards the citizenry can produce both a more efficient government and a more involved citizenry. These results could arguably permit the Union to concentrate its efforts on addressing those issues which require the force, resources, and/or organization that it alone is capable of harnessing. This compatibility between EU and Catholic goals could foreseeably indicate that the invocation of subsidiarity within the Treaty of Maastricht either comports with or relies upon the Catholic definition of the term.

to mean that the government is obligated to empower individuals – to assist them in acquiring the tools necessary to become self-determining – in order that their liberty may be fully enjoyed.").

This conclusion is generated in large part through the application of select jurisprudential methodologies. This application is arguably justified because the European Court of Justice could potentially interpret the term according to (at least) two primary methodologies. First, it could apply its own interpretative methodologies; second, it could defer to the general principles of law as developed by Member States' judiciaries (all of which are currently rooted in either the civil or the common law). A cursory examination of these methodologies appears to reveal at least an occasional willingness to rely upon (*inter alia*) unambiguous texts where present, established meanings where ascertainable, and/or a variety of historical records where available in an effort to interpret and apply the intended meaning of ambiguities.

As a consequence, "subsidiarity" could be deemed unambiguous on its face because the Treaty of Maastricht either 1) provides its intended meaning³³⁷ or 2) intended to invoke its Catholic meaning.³³⁸ Conversely, the term could be deemed ambiguous and therefore be interpreted according to either its ordinary or its technical definition (both of which are available within its Catholic pedigree). Further, the Court could foreseeably rely on the historical development of the term within Catholicism as an independent interpretative aid. Therefore, unless the Court finds that the Treaty of Maastricht clearly

³³⁷ See Theodore Shilling, *Subsidiarity as a Rule and a Principle, or; Taking Subsidiarity Seriously*, <http://www.jeanmonnetprogram.org/papers/95/9510ind.html> (last visited 20 March 2006) ("Could it possibly be that "the word that saved Maastricht" is just that, just a word, bare of any concept? It may well be that this was the intention of some, or even many, of the delegations at the Maastricht Conference. However, it is not possible to ascertain how the individual members of the Maastricht Conference conceived of this word. Neither is it necessary. They introduced the word into what, after ratification, became the amended treaties, and it is there, in the treaties, where its meaning, the concept of subsidiarity, must be found. In the context of Community law, the German adage according to which the law is wiser than the law-giver must clearly apply. There was never any question of applying, to European law, anything similar to the American theory of original intent. Possible mental reservations of some, or many, delegations at the Maastricht conference are therefore no argument against taking subsidiarity seriously.") (internal citations omitted).

³³⁸ After all, even the European Commission has clearly recognized that, "Subsidiarity...[was] not invented at Maastricht." Commission of the European Communities, *The Principle of Subsidiarity*, *supra* note 2, at 2.

identifies the intended meaning of subsidiarity, an examination of its development within Catholicism appears to be warranted.

Originally, it appears that the concept of the Union itself was, “bearable to the member states [sic] as long as only very little was to be decided at the European level.”³³⁹

The people of Europe could conceivably manifest their support for this proposition through apparent opposition to increased centralization.³⁴⁰ While the principle of subsidiarity is potentially capable of mitigating the complexities (and the resulting controversies) of modern political life³⁴¹ while remaining vital to Union legislation,³⁴² it remains a source of substantial disagreement³⁴³ and may even be subject to "perpetual

³³⁹ Dahrendorf, *supra* note 68, at 74.

³⁴⁰ Anna Vergés Bausili, *Rethinking the Methods of Dividing and Exercising Powers in the EU: Reforming Subsidiarity and National Parliaments*, Jean Monnet Working Paper 9/02 (2002) (“It has been estimated that in 5% of cases of legislation, the Community has trespassed the limits as to what was necessary or better achieved by the Community. Yet at the same time, and although it has been quantified as only a 5% of cases where subsidiarity and proportionality have not been observed, pervasive public perception is that the proportion is higher and Community action is too intrusive. The Court itself has never found a violation of the principle of subsidiarity by legislative actions of the Community. Its overuse is also made by using it as a catch-phrase or reassuring measure for hostile public opinion's perceptions of creeping federalism.”), available at <http://www.jeanmonnetprogram.org/papers/02/020901.pdf>.

³⁴¹ Phil Syrpis, *Legitimising European Governance: Taking Subsidiarity Seriously within the Open Method of Coordination*, EU Working Papers, European University Institute, Law No. 2002/10, at 11, quoting De Burca, *Reappraising Subsidiarity's Significance After Amsterdam*, 1999, at 3 (“[Subsidiarity forms] part of a language which attempts to articulate and mediate...some of the fundamental questions of political authority, government and governance which arise in an increasingly interlocking and independent world.”)

³⁴² European Parliament, Committee on Legal Affairs and the Internal Market, Report on the Commission report to the European Council on better lawmaking 2000 (pursuant to Article 9 of the Protocol to the EC Treaty on the application of the principles of subsidiarity and proportionality)(COM(2000) 772 – C5-0097/2001 – 2001/2044(COS)) and on the Commission report to the European Council on better lawmaking 2001 (pursuant to Article 9 of the Protocol to the EC Treaty on the application of the principles of subsidiarity and proportionality)(COM(2001) 728 – C5-0102/2002 – 2001/2044(COS)), Final, a5-0100/2003, 25 March 2003, at 5 (“[T]he subsidiarity principle has a vital role to play in establishing the authority of Community legislation”), available at [http://www.europarl.eu.int/registre/seance_pleniere/textes_deposes/rapports/2003/0100/P5_A\(2003\)0100_EN.doc](http://www.europarl.eu.int/registre/seance_pleniere/textes_deposes/rapports/2003/0100/P5_A(2003)0100_EN.doc) (last visited 27 October 2005). See also Rabinowitz, *supra* note 58, at 125 (“Subsidiarity is likely to play a growing role in the general development of the EU in the 21st century, not only in agriculture, but also in fiscal policy, defence and many other areas.”).

³⁴³ See, e.g., Prime Minister Margaret Thatcher, speech to the House of Commons, 21 November 1989, Hansard HC [162/21-35], available at <http://www.margaretthatcher.org/speeches/displaydocument.asp?docid=107824> (last visited 20 March 2006) (“[[T]he present draft of the social charter] will lead to the export of jobs to other more competitive countries and will also infringe a principle with the terrible jargon name of subsidiarity, which means that the Community should not set out to do those things that nation states can best do for themselves. It is still

redefinition"³⁴⁴ due to the inevitable changes that will occur within politics and/or society.³⁴⁵ Therefore, in order to properly understand and apply the principle of subsidiarity, jurists should examine the ecclesiastical and secular forces that gave rise to its codification at Maastricht.

Charles Phineas Sherman once wrote, "Strenuous endeavors to improve the law are not impeded but forwarded by a zealous study of legal history....To-day we study the day before yesterday, in order that yesterday may not paralyze to-day, and that to-day may not paralyze to-morrow."³⁴⁶ Therefore, a study of subsidiarity's history could

possible for our approach to succeed if others are willing."). *See also* Prime Minister Margaret Thatcher, speech at the House of Commons, 26 June 1991, Hansard HC [193/1026-31] ("[O]ne of the difficulties of discussing the matter of the Community is that it is riddled with jargon and Euro-speak, and that words are used which do not have a precise meaning, such as the word 'subsidiarity'. It is a vague term which [sic] raises far more questions than it answers. When we use those terms, we should be careful to define them."), available at <http://www.margaretthatcher.org/speeches/displaydocument.asp?docid=108276> (last visited 20 March 2006); Bermann, *supra* note 2, at 332, *citing* Editorial Comment, *Subsidiarity: Furthering the Confusion*, 5 *Europe* 2000 – Executive Review (June 1992) (Subsidiarity is "the epitome of confusion."); and Toth, *supra* note 4, at 37 ("It is no exaggeration to say that there are few concepts in the Maastricht Treaty, or indeed in Community law as a whole, which are more elusive than the concept of subsidiarity.").

³⁴⁴ Andrew Duff, *Towards a Definition of Subsidiarity*, in *SUBSIDIARITY WITHIN THE EUROPEAN COMMUNITY* 31 (Andrew Duff ed.) (1993) ("In the constitutional development of the European Community...subsidiarity promises to be an abiding force subject to perpetual redefinition.").

³⁴⁵ HUEGLIN, *supra* note 118, at 154 ("The question of who gets to do what...can only be answered through a continuous process of deliberation and negotiation according to changing times and circumstance. It is this dynamic quality which, while clearly setting Althusius' notion of subsidiarity apart from its more static employment in Catholic social doctrine, may indeed have been a source of inspiration for the architects of European political union."). *See also* BISHOP, *supra* note 105, § 92 (d), at 83 ("Language is the offspring of the past, but its life is in and for the ever opening and progressive future. Its principle mission is to convey, from one mind to the other, the new thoughts as they arise; for the old is continually dying, while the new is being born. If each word had a single fixed and unchanging meaning, and if there were simply certain established collocations of words, each with its one signification, the powers of language would be very limited, and it could never express a new idea.").

³⁴⁶ CHARLES PHINEAS SHERMAN, *1 ROMAN LAW IN THE MODERN WORLD* 11 (2d. ed., 1994) (1922) *citing* MAITLAND, *3 COLLECTED PAPERS*, "A *Survey of A Century*" 438-439. *See also* Lieber, *supra* note 83, at 198 ("We are, indeed, as to experience, the old ones, and the past generations the young ones, provided all the opportunities are the same, or we do not throw away the experience of past ages by neglecting faithfully to study them.") *See also* SAMUEL, *supra* note 8, at 30 ("The modern...cannot...be explained without reference to the whole of the past."); and *id.* at 114 ("In science itself the progress of each science is accomplished by inventions, discoveries and revolutions, but always on the basis of previously accumulated knowledge; and this is 'why the study of the history of science is an absolute requirement for anyone who wants to understand and interpret the sense and scope of existing discoveries.'").

foreseeably transform the interpretation of its meaning from an "epitome of confusion"³⁴⁷ (or worse) into a viable doctrine capable of facilitating an increasingly efficient allocation of governmental resources while impermeably protecting ever priceless freedoms as the invariably changing conditions of our collective existence require. This transformation appears to be a worthy goal indeed.

³⁴⁷ See Bermann, *supra* note 2, at 332, citing Editorial Comment, *Subsidiarity: Furthering the Confusion*, 5 Europe 2000 – Executive Review (June 1992).