3

Federal Powers and the Principle of Subsidiarity

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Federal systems across the world are generally designed according to the principle of subsidiarity, which in one form or another holds that the central government should play only a supporting role in governance, acting if and only if the constituent units of government are incapable of acting on their own. The word itself is related to the idea of assistance, as in "subsidy," and is derived from the Latin "subsidium," which referred to auxiliary troops in the Roman military. *See* Oxford Latin Dictionary s.v. (1983).

The modern idea of subsidiarity is usually traced to Catholic social doctrine, articulated most clearly in the papal encyclical *Quadragesimo Anno* (1931), which sought to stave off the takeover of civil society by ever-expanding state power:

> 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. Para. 79[1]

The current Catechism of the Catholic Church puts the idea more succinctly:

> [A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good. Catechism of the Catholic Church, Para. 1883

Contrary to its predominant usage in the literature as signifying exclusively a restraint on the central government, subsidiarity thus also stands for the

[1] Available in English at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html.

justification of central involvement in affairs that cannot adequately be handled at the local level.

The word "subsidiarity" may well sound foreign to Americans, but the federal power principle it stands for should ring familiar. It corresponds to some of the basic tenets underlying federalism in the United States, beginning with the Virginia Plan, which James Madison wrote and Edmund Randolph introduced on the first day of substantive business in the Constitutional Convention as the blueprint for the Constitution. That plan, for example, proposed that the national legislature be granted the power "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." THE RECORDS OF THE FEDERAL CONVENTION OF 1787 20, 21 (Max Farrand, ed., 1911). The Constitutional Convention adopted this provision before sending it to the Committee of Detail, which used it to draft the more specific enumeration of federal powers we now find in Article I, Section 8.

This general federal power principle in one form or another continues to inform political rhetoric, *see, e.g.*, Executive Order 13132, 64 FED. REG. 43255–43259 (August 10, 1999), but subsidiarity and the Virginia Plan's power formula have not been salient features in the operation of our constitutional law at least since Chief Justice Marshall's opinion in *McCulloch v. Maryland*, 17 U.S. 316 (1819). The State of Maryland argued there that the Necessary and Proper Clause had been inserted to clarify that the new Congress, unlike the Congress of the Confederation, could pass laws with binding effect on citizens. As a result, in Maryland's view, that clause constrained Congress's lawmaking generally, allowing only such legislation as was "necessary and proper." *Id.* at 412. The Court, however, disagreed, holding that the Necessary and Proper Clause does not restrict the enumeration of powers elsewhere, but instead removes all doubts regarding Congress's great mass of (additional) powers incidental to those specifically enumerated elsewhere in the Constitution. *See id.* at 412, 420–421. Moreover, even with regard to the additional power conferred on Congress by the Necessary and Proper Clause, judicial review of the "necessity" of federal action would be highly deferential. The Court thus officially set aside any serious examination of the "necessity" of federal action as a tool of constitutional interpretation or of judicial review in the United States.

Not so elsewhere. Canada's Constitution (formerly the British North America Act of 1867) enumerates both federal and provincial government powers. Section 91, which enumerates the federal government's powers, is far more detailed than Article I, Section 8 of the U.S. Constitution. Next to broad topics such as "[t]he Regulation of Trade and Commerce," Const. Act, 1867, Sec. 91(2), Section 91 includes more specific entries such as "Banking, Incorporation of Banks, and the Issue of Paper Money," Const. Act, 1867, Sec. 91(15), which were in part designed to avoid certain constitutional controversies that had previously consumed the United States. Section 92, in turn, expressly gives the Canadian Provinces exclusive power over a whole

range of subjects, from the more circumscribed "Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers," Const. Act, 1867, Sec. 92(4), to the potentially broad "Property and Civil Rights in the Province," Const. Act, 1867, Sec. 92(13).

Section 92 also contains a residual category of exclusive provincial power over "Generally all Matters of a merely local or private Nature in the Province." Const. Act, 1867, Sec. 92(16). Finally, and most important for present purposes, Section 91, contains a competing residual clause, authorizing the federal government "to make laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces." Const. Act, 1867, Sec. 91.

The following controversy arose over whether the federal Ocean Dumping Control Act, which could not be justified as an exercise of one of the more specific federal powers, fell within the federal government's residual power under the "Peace, Order, and Good Government" ("P.O.G.G.") Clause. In interpreting the scope of federal powers under the P.O.G.G. Clause, the Canadian Supreme Court analyzed the federal law in terms of subsidiarity.

Regina v. Crown Zellerbach Canada Ltd.

Supreme Court of Canada, [1988] 1 S.C.R. 401

Per Le Dain, J. (Dickson, C.J.C., McIntyre and Wilson, JJ., concurring):

In issue is the validity of s. 4(1) of the Ocean Dumping Control Act, S.C. 1974–75–76, c. 55, which prohibits the dumping of any substance at sea except in accordance with the terms and conditions of a permit, the sea being defined for the purposes of the Act as including the internal [provincial] waters of Canada other than fresh waters....

I

The respondent carries on logging operations on Vancouver Island in connection with its forest products business in British Columbia.... On 16th and 17th August 1980 the respondent, using an 80-foot crane operating from a moored scow, dredged wood waste from the ocean floor immediately adjacent to the shoreline at the site of its log dump in Beaver Cove and deposited it in the deeper waters of the cove approximately 60 to 80 feet seaward of where the wood waste had been dredged. The purpose of the dredging and dumping was to allow a new A-frame structure for log dumping to be floated on a barge to the shoreline for installation there and to give clearance for the dumping of bundled logs from the A-frame structure into the waters of the log dump area. The wood waste consisted

of waterlogged logging debris such as bark, wood and slabs. There is no evidence of any dispersal of the wood waste or any effect on navigation or marine life.…

II

[T]he Act, viewed as a whole, may be properly characterized as directed to the control or regulation of marine pollution.… The chosen, and perhaps only effective, regulatory model makes it necessary, in order to prevent marine pollution, to prohibit the dumping of any substance without a permit. Its purpose is to require a permit so that the regulatory authority may determine before the proposed dumping has occurred whether it may be permitted upon certain terms and conditions[.]. The Act is concerned with the dumping of substances which may be shown or presumed to have an adverse effect on the marine environment. The Minister and not the person proposing to do the dumping must be the judge of this.…

IV

It is necessary…to consider the national dimensions or national concern doctrine (as it is now generally referred to) of the federal peace, order and good government power as a possible basis for the constitutional validity of s. 4(1) of the Act, as applied to the control of dumping in provincial marine waters.

The national concern doctrine was…given its modern formulation by Viscount Simon in *A.G. Ont. v. Can. Temperance Fed.*, [1946] A.C. 193, [205–206]…[:]

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell v. The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.…

In [*Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, 944–45],…Estey J., with whom Martland, Dickson and Beetz JJ.

concurred,…summed up the doctrine with respect to that basis of federal legislative jurisdiction as falling into three categories: (a) the cases "basing the federal competence on the existence of a national emergency"; (b) the cases in which "federal competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of a merely local or private nature," of which aeronautics and radio were cited as examples; and (c) the cases in which "the subject matter" goes beyond local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole," citing Can. Temperance Fed. Thus Estey J. saw the national concern doctrine enunciated in Can. Temperance Fed. as covering the case, not of a new subject matter which did not exist at Confederation, but of one that may have begun as a matter of a local or provincial concern but had become one of national concern. He referred to that category as "a matter of national concern transcending the local authorities' power to meet and solve it by legislation," and quoted in support of this statement of the test a passage from Professor Hogg's Constitutional Law of Canada, 1st ed. (1977), at p. 261, in which it was said that "the most important element of national dimension or national concern is a need for one national law which cannot realistically be satisfied by cooperative provincial action because the failure of one province to cooperate would carry with it grave consequences for the residents of other provinces."…

From this survey of the opinions expressed in this court concerning the national concern doctrine of the federal peace, order and good government power I draw the following conclusions as to what now appears to be firmly established:

1. The national concern doctrine is separate and distinct from the national emergency doctrine of the peace, order and good government power, which is chiefly distinguishable by the fact that it provides a constitutional basis for what is necessarily legislation of a temporary nature;

2. The national concern doctrine applies to both new matters which did not exist at Confederation and to matters which, although originally matters of a local or private nature in a province, have since, in the absence of national emergency, become matters of national concern;

3. For a matter to qualify as a matter of national concern in either sense it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution;

4. In determining whether a matter has attained the required degree of singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

This last factor, generally referred to as the "provincial inability" test and noted with apparent approval in this court in Labatt, Schneider and Wetmore, was suggested . . . by Professor Gibson in his article, "Measuring 'National Dimensions' " (1976), 7 Man. L.J. 15, [34–35] . . . :

> "By this approach, a national dimension would exist whenever a significant aspect of a problem is beyond provincial reach because it falls within the jurisdiction of another province or of the federal Parliament. It is important to emphasize however that the entire problem would not fall within federal competence in such circumstances. Only that aspect of the problem that is beyond provincial control would do so. Since the 'P.O. & G.G.' clause bestows only residual powers, the existence of a national dimension justifies no more federal legislation than is necessary to fill the gap in provincial powers. For example, federal jurisdiction to legislate for pollution of interprovincial waterways or to control 'pollution price-wars' would (in the absence of other independent sources of federal competence) extend only to measures to reduce the risk that citizens of one province would be harmed by the non-co-operation of another province or provinces." . . .

V

Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole. The question is whether the control of pollution by the dumping of substances in marine [i.e. salt] waters, including provincial marine waters, is a single, indivisible matter, distinct from the control of pollution by the dumping of substances in other [i.e. fresh] provincial waters. . . .

. . . In many cases the pollution of fresh waters will have a pollutant effect in the marine waters into which they flow, and this is noted by the United Nations Report, but that report . . . emphasizes that marine pollution, because of the differences in the composition and action of marine waters and fresh waters, has its own characteristics and scientific considerations that distinguish it from fresh water pollution. Moreover, the distinction between salt water and fresh water as limiting the application of the Ocean Dumping Control Act meets the consideration emphasized by a majority of this court in [prior case law] that in order for a matter to qualify as one of national concern falling within the federal peace, order and good government power it must have ascertainable and reasonable limits, insofar as its impact on provincial jurisdiction is concerned.

For these reasons I am of the opinion that s. 4(1) of the Ocean Dumping Control Act is constitutionally valid as enacted . . . and . . . in its application to the dumping of waste in the waters of Beaver Cove. . . .

La Forest, J., (dissenting) (Beetz and Lamer, JJ., concurring):

. . . Many of th[e] subjects [such as radio, aeronautics, or the capitol region] are new and are obviously of extra- provincial concern. They are thus

appropriate for assignment to the general federal legislative power. They are often related to matters intimately tied to federal jurisdiction. Radio (which is relevant to the power to regulate interprovincial undertakings) is an example. The closely contested issue of narcotics control . . . is intimately related to criminal law and international trade [both of which are enumerated powers of the federal government].

The need to make such characterizations from time to time is readily apparent. From this necessary function, however, it is easy but, I say it with respect, fallacious to go further, and, taking a number of quite separate areas of activity, some under accepted constitutional values within federal, and some within provincial legislative capacity, consider them to be a single indivisible matter of national interest and concern lying outside the specific heads of power assigned under the Constitution. By conceptualizing broad social, economic and political issues in that way, one can effectively invent new heads of federal power under the national dimensions doctrine, thereby incidentally removing them from provincial jurisdiction or at least abridging the provinces' freedom of operation. . . .

. . . All physical activities have some environmental impact. Possible legislative responses to such activities cover a large number of the enumerated legislative powers, federal and provincial. To allocate the broad subject matter of environmental control to the federal government under its general power would effectively gut provincial legislative jurisdiction. . . . In man's relationship with his environment, waste is unavoidable. The problem is thus not new, although it is only recently that the vast amount of waste products emitted into the atmosphere or dumped in water has begun to exceed the ability of the atmosphere and water to absorb and assimilate it on a global scale. . . . In Canada, both federal and provincial levels of government have extensive powers to deal with these matters. Both have enacted comprehensive and specific schemes for the control of pollution and the protection of the environment. Some environmental pollution problems are of more direct concern to the federal government, some to the provincial government. But a vast number are interrelated, and all levels of government actively cooperate to deal with problems of mutual concern. . . .

To allocate environmental pollution exclusively to the federal Parliament would, it seems to me, involve sacrificing the principles of federalism enshrined in the Constitution. . . .

It is true, of course, that we are not invited to create a general environmental pollution power but one restricted to ocean pollution. But it seems to me that the same considerations apply. . . . In my view, ocean pollution fails to meet th[e] test [of singleness, distinctiveness and indivisibility that would clearly distinguish this matter from those of provincial concern] for a variety of reasons. In addition to those applicable to environmental pollution generally, the following specific difficulties may be noted. First of all, marine waters are not wholly bounded by the coast; in many areas, they extend upstream into rivers for many miles. The application of the Act appears to be restricted to waters beyond the mouths of rivers (and so

intrude less on provincial powers), but this is not entirely clear, and if it is so restricted, it is not clear whether this distinction is based on convenience or constitutional imperative. Apart from this, the line between salt and fresh water cannot be demarcated clearly; it is different at different depths of water, changes with the season and shifts constantly[.] In any event, it is not so much the waters, whether fresh or salt, with which we are concerned, but their pollution. And the pollution of marine water is contributed to by the vast amounts of effluents that are poured or seep into fresh waters everywhere[.] There is a constant intermixture of waters; fresh waters flow into the sea and marine waters penetrate deeply inland at high tide only to return to the sea laden with pollutants collected during their incursion inland. Nor is the pollution of the ocean confined to pollution emanating from substances deposited in water. In important respects, the pollution of the sea results from emissions into the air, which are then transported over many miles and deposited into the sea.... I cannot, therefore, see ocean pollution as a sufficiently discrete subject upon which to found the kind of legislative power sought here. It is an attempt to create a federal pollution control power on unclear geographical grounds and limited to part only of the causes of ocean pollution. Such a power then simply amounts to a truncated federal pollution control power only partially effective to meet its supposed necessary purpose, unless of course one is willing to extend it to pollution emanating from fresh water and the air, when for reasons already given such an extension could completely swallow up provincial power, no link being necessary to establish the federal purpose....

...The difficulty with the impugned provision is [furthermore] that it seeks to deal with activities that cannot be demonstrated either to pollute or to have a reasonable potential of polluting the ocean.... The prohibition in fact would apply to the moving of rock from one area of provincial property to another. I cannot accept that the federal Parliament has such wide legislative power over local matters having local import taking place on provincially owned property.

Notes and Questions

1. *What qualifies for federal regulation under the P.O.G.G. Clause?* What does or should qualify as a matter of "national concern" under the "provincial inability" test? The court focuses principally on externalities and other collective action problems. Let us call these "inter-jurisdictional difficulties." For example, the court highlights the relevance of "the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter," and it discusses the problem of "pollution price-wars," that is, races to the bottom in environmental regulation. Are there other aspects of subsidiarity that this formulation ignores?

   Consider a second category of benefits of centralization: the reduction of transaction costs (including economies of scope and scale). Certain regulatory and other services might be provided more efficiently in a single location as opposed to through multiple smaller agencies. For example, some U.S. scholars have made

a case in favor of the involvement of the Department of Justice in handling difficult criminal cases based on the extensive technical resources of a single large investigating unit. *See* Jamie S. Gorelick & Harry Litman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995). An argument based purely on economies of scope or scale or the reduction of transaction costs more generally would not, however, seem to make out a sufficient case for federal regulation under the Court's P.O.G.G. Clause doctrine. Why might that be?

Consider a third category of provincial problems—call them "intra-jurisdictional difficulties," that is, local democratic defects, such as majority oppression, minority capture, or corruption. Here, the effects of the defect are felt most intensely by those living inside—not outside—the local jurisdiction, and yet, centralization may help. Indeed, this was Madison's main argument in support of the federal government in Federalist No. 10—that the sieve of federal politics and political pluralism at the national level would provide for better democracy than would exist at the local level. James Madison, *The Federalist No. 10*, *in* THE FEDERALIST PAPERS 56 (J.E. Cooke, ed., 1961). A similar argument served as the basic justification for the Reconstruction amendments in the United States, which centralized civil rights protection, especially for African Americans. As presented in the *Crown Zellerbach* case, the provincial inability test does not seem sensitive to the problem of intra-jurisdictional difficulties either. Is that wise?

2. *Is the P.O.G.G. Clause instrumental or substantive?* The Canadian Supreme Court begins its application of the provincial inability test to the facts of the case by noting: "Marine pollution, because of its predominantly extra-provincial as well as international character and implications, is clearly a matter of concern to Canada as a whole." Accordingly, the only question the court addresses is whether marine dumping control is single, indivisible, and distinct from dumping control in other provincial waters.

Although plausible, is this point of departure constitutionally sufficient? Need the court not locate the desire to combat environmental pollution in the provinces themselves? Or can the federal government simply pronounce pollution control as a goal of governance against the wishes of the provinces? Put another way, the court seems to assume that the federal government is merely coordinating localities in the achievement of a mutually desired goal. That may well be true. But perhaps the failure of provincial environmental control is not that British Columbia, for example, lacks the proper incentives to regulate pollution that travels beyond its borders. Maybe British Columbia simply has a different, more sanguine, substantive assessment of the harm of environmental pollution itself. Does (or should) the P.O.G.G. Clause only allow the federal government to help the provinces achieve the provinces' own goals, or does (or should) the P.O.G.G. Clause allow the federal government to impose something as a national goal for the "Peace, Order, and good Government of Canada" against the wishes of the provinces?

The point can be illustrated more generally and starkly when we shift to ideological "externalities." Just as environmental pollution is "a by-product of everything we do," so, too, every action has ideological valence. A citizen in one jurisdiction may be offended by the actions of a citizen in another. That offense is certainly real, but whether we recognize the offense as a legitimate basis for regulation involves difficult, substantive questions about the nature of rights and harms. *See* Don Herzog, *Externalities and Other Parasites*, 67 U. CHI. L. REV. 895 (2000). Consider, for example, abortion, physician-assisted suicide, or

gay marriage. The ideological (and physical) effects of local policies in these areas will often cross jurisdictional lines. Does the principle of subsidiarity in general or the P.O.G.G. Clause in particular authorize the center to address these and other "externalities" against the wishes of local governments?

3. *Subsidiarity and environmental regulation in the United States*. The U.S. Constitution, too, was written before environmental regulation was the coherent and distinct policy objective it is today. In the United States, however, the constitutionality of federal environmental regulation is not generally thought of as based on the "need" for federal regulation in light of the political- or resource-based constraints on the States's ability to regulate the environment effectively. Instead, the constitutionality of federal environmental regulation simply depends on whether Congress is nominally acting within the domain of a specifically enumerated power, such as the power to regulate interstate and foreign commerce or to implement international treaties. Although the U.S. Supreme Court sometimes makes reference to functional considerations sounding in subsidiarity, these considerations rarely provide the actual basis for decision. Consider the following examples:

   (a) *Federal Power and the Clean Water Act:* In reviewing the federal migratory bird rule, which required a federal permit before dredging wetlands used by migratory birds, the U.S. Supreme Court interpreted the federal statute as not reaching isolated wetlands, but only wetlands "that actually abu[t] on a navigable waterway." *Solid Waste Agency of Northern Cook Cty. (SWANCC) v. Army Corps of Engineers*, 531 U.S. 159 (2001); *cf. Rapanos v. United States*, 547 U.S. 715 (2006). Although rendered as a matter of statutory interpretation, the decision had constitutional overtones, given that the Court's narrow interpretation of the act expressly avoided reaching the question of the outer limits of Congress's powers. Does the distinction between wetlands that abut navigable waterways and isolated wetlands serve any functional purpose when judged against the principle of subsidiarity? Is the distinction any less defensible than the Canadian Supreme Court's distinction between freshwater and saltwater, which enters toward the end of the otherwise functional Canadian judgment?

   In dissent, Justice Stevens interpreted the statute as reaching isolated wetlands and then noted that there were several functional reasons why Congress should have the power to pass the migratory bird rule:

   > The destruction of aquatic migratory bird habitat, like so many other environmental problems, is an action in which the benefits (e.g., a new landfill) are disproportionately local, while many of the costs (e.g., fewer migratory birds) are widely dispersed and often borne by citizens living in other States. In such situations, described by economists as involving "externalities," federal regulation is both appropriate and necessary. (SWANCC, 531 U.S. at 195–96 (citing Richard L. Revesz, Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation, 67 N.Y.U. L. Rev. 1210, 1222 (1992)) (Stevens, J., dissenting)

   Should it be important for Commerce Clause purposes that these costs are economic as opposed to, say, ideological?

   (b) *Federal Power and the Migratory Bird Treaty:* In *Missouri v. Holland*, 252 U.S. 416 (1920), Justice Holmes upheld Congress's power to implement the Migratory Bird Treaty. In light of the Court's pre-New Deal jurisprudence, there was serious doubt at the time whether the Commerce Clause extended to the

regulation of migratory birds. *See* Charles A. Lofgren, *Missouri v. Holland in Historical Perspective*, 1975 Sup. Ct. Rev. 77. The Court in *Missouri v. Holland*, however, held that, regardless of the Commerce Clause, implementing the Treaty with Canada was within Congress's powers under the Necessary and Proper Clause as combined with the federal government's power to make treaties. In upholding the treaty and the implementing act, Justice Holmes noted that "the States individually are incompetent to act" and that the treaty served "a national interest of very nearly the first magnitude . . . [that] can be protected only by national action in concert with that of another power." 252 U.S. at 433, 435. Despite the functional rhetoric in this case, however, the Supreme Court has never invoked the absence of functional justifications as a reason to strike down a Treaty. Would it ever be appropriate for the Court to strike down a treaty that was actually concluded with a foreign government as beyond the federal government's powers under the Treaty Clause? *See* Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 Wayne L. Rev. 841 (2001).

4. *Subsidiarity as enumeration versus subsidiarity as interpretive guide?* In Canada, subsidiarity functions as enumeration, that is, the Canadian Supreme Court interprets the P.O.G.G. Clause as incorporating subsidiarity into the basic constitutional enumeration of federal powers. In *SWANCC* and in *Missouri v. Holland*, in contrast, subsidiarity might have served as an interpretive guide to determine the meaning of the otherwise vague grants of federal power over interstate commerce and treaty making, respectively. Over Justice Stevens's objection, the *SWANCC* majority refused to entertain this idea, holding firmly to the formal distinction between wetlands that abut navigable waterways and isolated wetlands. Justice Holmes's purported functionalism in *Missouri v. Holland* has not proven decisive in later treaty cases either.

   Is it possible, however, to read other U.S. Supreme Court decisions as implicitly relying on subsidiarity as interpretive guide to otherwise vaguely defined powers? In *United States v. Darby*, 312 U.S. 100 (1941), for example, the Court upheld federal minimum wage and maximum hour regulations on manufacturers of goods shipped in interstate commerce, expressly deferring to Congress's view that "interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." *Id*. at 115. *Cf. General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 S.C.R. 641 (upholding Canada's national Combines Investigation Act as within the federal "trade and commerce power" in part because "provincial legislation cannot be an effective regulator.")

   Might *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), be justified along similar lines? As a matter of doctrine, the Court's opinions here, as so frequently elsewhere, refuse to analyze in functional terms what is needed to make the federal system work as a productive whole, focusing instead on formal jurisdictional "entitlements" received at the Founding. *See* Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 Va. L. Rev. 732, 795–97 (2004). The decisions simply posit that only activities of an "economic nature" can be regulated under the substantial effects prong of Congress's interstate commerce jurisdiction. *See Morrison*, 529 U.S. at 610–12. But perhaps some functional idea of subsidiarity might yet justify shielding policy areas such as violent crime, family law, and education from federal

intervention. Such a decision might include the substantive judgments (1) that non-economic activities are intimately connected with communal self-expression and fundamental rights, (2) that federal market regulation alleviates collective action problems posed by individual state regulation, and (3) that a common market serves to integrate the body politic. *See* Roderick M. Hills, Jr., *The Individual Right to Federalism in the Rehnquist Court*, 74 GEO. WASH. L. REV. 888 (2006). *But see* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001). Would such broader functional considerations support or challenge the Court's subsequent holding in *Gonzales v. Raich*, 545 U.S. 1 (2005) (upholding federal ban on personal cultivation and use of marijuana)?

5. *Subsidiarity as side constraint*. Moving beyond subsidiarity as enumeration and subsidiarity as interpretive guide, consider a third and final use of subsidiarity: subsidiarity as side constraint. The European Union provides an instructive example in this regard. The Treaty on European Community contains an express limitation on the Community's exercise of enumerated concurrent powers:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. TREATY ON EUROPEAN COMMUNITY, Art. 5.

Notice that this provision, unlike the Canadian P.O.G.G. Clause, clearly assumes that the central level of governance has (by enumeration elsewhere) the express power to determine the regulatory policy goal. According to Article 5 EC, the substantive policy decision lies with the Community and subsidiarity operates as a purely instrumental side constraint. Put another way, the assumption is that the Community, acting pursuant to its concurrent powers, has taken aim at a particular regulatory goal. The only remaining question under Article 5 EC is instrumental: can the Member States achieve the Community defined goal just as well as the Community itself could?

The European Court of Justice has been highly reluctant to adjudicate this form of subsidiarity (i.e., as a side constraint on Community action). In *Germany v. Parliament and Council*, C-233/94, [1997] ECR I-2405, for example, Germany had challenged an EC Directive requiring each Member State to set up a bank deposit guarantee scheme within each territory. Germany argued that the Community institutions had failed to give reasons for its action (which is a general requirement under Article 190, now 253, EC) by failing to address the issue of subsidiarity. The Court ruled (at ¶¶ 26–28):

> In the present case, the Parliament and the Council stated in the . . . preamble to the Directive that "consideration should be given to the situation which might arise if deposits in a credit institution that has branches in other Member States became unavailable" and that it was "indispensable to ensure a harmonized minimum level of deposit protection wherever deposits are located in the Community." This shows that, in the Community legislature's view, the aim of its action could, because of the dimensions of the intended action, be best achieved at Community level. . . . [F]rom [this] it is clear that the decision regarding the guarantee scheme which is competent in the event of the insolvency of a branch situated in a Member State other than that in which the credit institution has its head office has repercussions which are felt outside the borders of each Member State.
>
> Furthermore, in the [preamble to the Directive] the Parliament and the Council stated that the action taken by the Member States in response to the Commission's Recommendation has not fully achieved the desired result. The Community legislature therefore found that the objective of its action could not be achieved sufficiently by the Member States.

> Consequently, it is apparent that, on any view, the Parliament and the Council did explain why they considered that their action was in conformity with the principle of subsidiarity and, accordingly, that they complied with the obligation to give reasons as required under Article 190 of the Treaty. An express reference to [the] principle [of subsidiarity] cannot be required.

Does the Court's examination of the justification for central government involvement in this case take subsidiarity seriously? How might that be done? *Cf.* George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 391 (1994); Halberstam, *supra*, at 827–32; Vicki Jackson, *Narratives of Federalism: Of Continuities and Comparative Constitutional Experience*, 51 DUKE L.J. 223, 285 (2001).

6. *Subsidiarity and the politics of federalism.* In *Crown Zellerbach*, the majority and dissent disagree over whether the regulation of marine dumping falls within the P.O.G.G. Clause. There is, of course, a third possibility: to refuse judicial review altogether and rely instead on the political safeguards of federalism.

Most prominently associated with Herbert Wechsler, but followed, modified, and elaborated upon by scholars such as Jesse Choper, Larry Kramer, and Mark Tushnet, the theory of the political safeguards of federalism is based on the following three ideas. First, the formal representation of state interests in the U.S. Senate, the Electoral College, and the informal solicitude of federal politicians for the views of their state counterparts will generally suffice to protect the States against federal overreaching. Second, even if those safeguards allow for the strong assertion of federal power, the Supreme Court lacks the institutional capacity to arbitrate cases of reasonable disagreement among the federal government and the States. Third, the Court, in any event, is not able to stop a determined and unified federal government in cases of serious disagreement and blatant violation of state prerogatives. So far, these theories have been developed with an exclusive focus on the United States. *See, e.g.,* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 123 (1999); Larry D. Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1991); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

A comparative perspective, however, may help inform our assessment of these conclusions. *See generally* Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS (Keith Whittington et al. eds., forthcoming 2008). With the exception of Switzerland, which has a strong tradition of popular referenda, federal systems other than the United States provide for judicial review of federalism disputes. To be sure, in some systems, such as Belgium and the newly devolved United Kingdom (if we count it as a federal system), the political branches have not yet turned to the judiciary for the settlement of federalism disputes. And in other systems, such as Australia, the high court has effectively turned many substantive power issues into a political question. And yet, in many systems, such as Canada, the European Union, and Germany, central review of federalism disputes persists. And this despite the fact that the structural safeguards of federalism are far stronger in some of these systems as compared to those in the United States.

Germany and the European Union, for example, are both "vertical" federal systems, that is, central government laws are largely carried out by the constituent states; constituent state governments are formally represented in an upper house

at the central level of government, and the power of taxation is shared. Contrast this with the "horizontal" systems of federalism in the United States, Canada, and Australia, where central and constituent state governments are independent political organizations sitting alongside one another, each with a full complement of powers. In horizontal systems of federalism, each level of government has an independent democratic base, an independent fiscal base, as well as the ability to formulate, execute, and generally adjudicate its own policies. As a structural matter, vertical systems protect constituent state interests far more robustly than do horizontal systems. *See, e.g.*, Daniel Halberstam and Roderick M. Hills, Jr., *State Autonomy in Germany and the United States*, 574 Annals Am. Acad. Pol. & Soc. Sci. 158 (March 2001). In vertical as compared to horizontal systems, constituent states have greater formal control over the central government's regulatory activity and distribution of resources, as a formal matter as well as informally by virtue of the central government's dependence on the constituent states in the routine implementation of federal policies.

The German Federal Constitutional Court originally abdicated judicial review of federal compliance with the German constitution's "necessity clause," which had imposed subsidiarity considerations as a side constraint on the federal exercise of concurrent powers. In response, Germany's *Länder* (the constituent states)—especially the *Länder* parliaments—lobbied for over 20 years until, finally, in 1994 the *Grundgesetz* (Germany's constitution) was amended to include a new, justiciable necessity clause. In 2005, the German Federal Constitutional Court rendered its first decision striking down a federal law for failure to make out the necessity for a particular piece of federal legislation.

In the European Union, in which constituent state control over the central level of governance is even stronger than in Germany, dissatisfaction with the current state of subsidiarity control led to the inclusion of a specific subsidiarity protocol in the proposed constitutional treaty. *See* Draft Treaty Establishing a Constitution for Europe, Protocol on the Application of the Principles of Subsidiarity and Proportionality (not ratified). The new protocol would have established an early warning system by which one-third of the Member State parliaments could force the Commission to reconsider its legislative proposal in light of the principle of subsidiarity. Although the Commission could still proceed with the proposed legislation, such a "yellow card" system, as it has been called, raises the political stakes considerably. Derrick Wyatt, *Could a "Yellow card" for national parliaments strengthen judicial as well as political policing of subsidiarity?*, 2 Croatian Y.B. Eur. L. & Pol'y 1 (2006); Stephen Weatherill, *Using national parliaments to improve scrutiny of the limits of EU action*, 28 Eur. L. Rev. 909 (2003). After the defeat of the constitutional treaty, a similar protocol was included in the Treaty of Lisbon (not yet ratified).

Do the German and European examples suggest that some form of judicial involvement or at least some specific procedural mechanism to address federal compliance with the principle of subsidiarity is desirable in all federal systems to prevent the federal government from overreaching? Would an EU style "early warning system" be useful in the United States? If there is to be judicial involvement, should the judiciary ultimately adjudicate the subsidiarity question or merely insist on the democratic transparency of the legislature's consideration of subidiarity by enforcing clear statement rules? For further discussion, *see* Wyatt, *supra;* Weatherill, *supra*; Halberstam, *Comparative Federalism and the Role of the Judiciary*, *supra*; Bermann, *supra*; Jackson, *supra*.