Theorizing subsidiarity: Towards an ontology-sensitive approach

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In the context of definitional confusion, it might seem recklessly counterproductive to suggest that what we agree on in relation to subsidiarity is perhaps more problematic than what we disagree on. Nonetheless, the purpose of this article is to challenge the uncontroversial starting-point of much subsidiarity analysis: that subsidiarity allocates functions between “higher” and “lower” levels. Recent scholarship on subsidiarity in political philosophy expresses a frank concern about a decontextualized and dogmatic use of those terms and reminds us that subsidiarity is premised on a preexisting social ontology. In order to recognize subsidiarity’s ontological commitments, this paper proposes an ontology-sensitive approach to subsidiarity, and the use of the terms primary units (in place of “lower levels”) and subsidiary units (in place of “higher levels”). Through the fictional example of the Good Fight Club, the practical implications of an ontology-sensitive theory of subsidiarity are discussed, revealing four precepts which direct the interaction between primary and subsidiary units. These four precepts are then used as benchmarks against which to appraise the European principle of subsidiarity.

1. Introduction

The European principle of subsidiarity is remarkably light on philosophical commitments. That is not to say that it avoids the opacities about its meaning and disagreements about its status that the presupposition of such commitments might evoke: on the contrary, the literature is replete with conflicting ideas about what subsidiarity is and how it impacts on the European project. In the context of such definitional confusion and obscurity, it might seem recklessly counter-productive to suggest that what we agree on in relation to subsidiarity is perhaps more problematic than what we disagree on. Nonetheless, the basic purpose of this article is to challenge an inconspicuous and uncontroversial starting-point of much subsidiarity scholarship in the EU context: that

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subsidiarity allocates functions between “higher” and “lower” levels, according to given criteria. The reasons why an unreflective and unquestioning acceptance of the terminology of “higher” and “lower” levels is unhelpful are laid out in Section 2. Section 3 presents an alternative approach by recourse to contemporary scholarship on subsidiarity in the fields of political and legal philosophy; in particular, three strands thereof which are united in emphasizing that subsidiarity is always premised on an existing ontology. Their insight—that subsidiarity is ontology-sensitive—allows for a less dogmatic and more contextualized attitude to subsidiarity, which recovers the depth of meaning lost by the narrow focus on “higher” and “lower” levels. Section 4 sketches how an ontology-sensitive approach to subsidiarity works in practice, and lays out four precepts that it implies. Finally, Section 5 discusses the European principle of subsidiarity in the light of these four precepts garnered from the ontology-sensitive approach.

2. The problem of “higher” and “lower” levels

Many scholars of subsidiarity in the European context accept that the notion is “a cloudy and ambiguous concept,” which is vulnerable to “instrumental use,” and even go so far as to suggest that it was chosen to be a “weasel word.” There is no consensus, even, on the type of thing that it is. Various suggestions have been canvassed: “a rule and a principle”; “a legal principle”; “a political guideline” which is too vague to be justiciable; “a principle of economic efficiency” which is justiciable as such; “a normative requirement”; and “a conceptual space . . . and language” in which negotiations about the balance between progressing integration and respecting the diversity of the member states can be conducted. Strikingly contrasting images are employed as metaphors also: calculus; “a vessel loaded with many hopes and dreams”; and

8 de Búrca, supra note 2.
9 Paul Craig, Subsidiarity: A Political and Legal Analysis, 50 J. COMMON MKT STUD. 72, 83 (2012).
even Cinderella. There is some convergence in descriptions of what the principle is designed to achieve since many commentators understand subsidiarity as a mechanism to prevent centralization at the European level and to protect the position of the member states: Marquardt, for example, remarks that subsidiarity is often portrayed as “a front-line weapon of the battle in defense of national identity” and on this basis Toth criticizes subsidiarity as “a retrograde step” which undermines the federalization of Europe. Yet, at the same time, contrary views are strongly defended both by Barber, who maintains that subsidiarity is “a principle of democratic structuring” which offers no special protection for the nation state and by Davies, who argues that it operates as “a masking principle, presenting a centralizing polity in a decentralizing light,” since, in reality, it undermines the position of the member states.

These diverging positions are all derived from the same starting-point: that subsidiarity is concerned with the distribution of decision-making authority between “higher” and “lower” levels, according to certain criteria. Whence does this formulation come? Most scholars of subsidiarity in the context of European integration reference the social encyclicals of the Catholic Church in discussing the origins of the concept of subsidiarity (and rightly so, although it should be recognized that the Catholic encyclicals only offer a neologism to describe a political concept that predates them by thousands of years). Many recognize those foundations in passing, and some others engage with them in a more fulsome way, albeit with varying levels of

16 See text accompanying notes 45–53 infra.
sympathy. The quote that is referenced and reproduced most often, and which seems neatly to encapsulate what contemporary European scholarship can capture from the Catholic tradition is taken from the 1931 Papal Encyclical *Quadragesimo Anno*:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.\(^\text{19}\)

The influence of Catholic social thought seeped into the discussions about references to subsidiarity in the 1992 Treaty of Maastricht,\(^\text{20}\) and even into the wording of article 3b itself, in which the Community level is presented as the higher association and the member states as the lesser organizations:

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.\(^\text{21}\)

Echoes of the encyclical language can also be heard in political rhetoric ranging from the words of former President of the Commission Jacques Delors, who remarked that the subsidiarity principle exhorts one “never to entrust to a bigger structure what can be implemented by a smaller one,”\(^\text{22}\) to those of current Commission President Jean-Claude Juncker: “in applying the principle of subsidiarity . . . [we must] ensure that the European Commission—and the European Union—concerns itself with the really major European issues instead of interfering from all angles in every detail of people’s lives.”\(^\text{23}\) As far as scholarship is concerned, the encyclical language of “higher” and “lesser”/“lower” has seeped so well into academic discourse that Horsley, for example, without any reference to *Quadragesimo Anno*, explicitly interprets the European principle of subsidiarity using that language when he describes it as “a negative, rebuttable, presumption [which] restricts intervention by the higher entity (entities) in areas of shared competence to those tasks that the lower unit(s) is (are) unable to realize independently.”\(^\text{24}\)

Read this way, the innovative aspect of the European principle of subsidiarity introduced by the Maastricht Treaty (and later restyled by the Treaty of Lisbon as article

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\(^{19}\) Encyclical Letter of Pope Pius XI on Reconstruction of the Social Order, *Quadragesimo Anno*, ¶ 79 (May 15, 1931) [hereinafter *Quadragesimo Anno*] (emphasis added).

\(^{20}\) Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1 [hereinafter TEU]. See Bermann, supra note 17; von Borries & Houschild, supra note 17; Cass, supra note 18; Emiliou, supra note 2; van Kersbergen & Verbeek, supra note 18.

\(^{21}\) Treaty establishing the European Community (consolidated version 1992), Aug. 31, 1992, art. 3b, 1992 O.J. (C 224) as inserted by TEU.

\(^{22}\) Jacques Delors, President, European Commission. Address to mark the opening of the 40th Academic Year of the College of Europe, Bruges (Oct. 17, 1989).


\(^{24}\) Horsley, supra note 4, at 268.
5.3 of the Treaty on the European Union, TEU) was simply that it specified the technocratic criteria on which the presumption may be rebutted as those of sufficiency of achievement and comparative achievement. Subsequently, the 1999 Protocol appended to the Treaty of Amsterdam provided that substantiating reasons should accompany each legislative proposal demonstrating that the objective sought could be “better achieved” at Community level, and required that those substantiating reasons should be accompanied by “qualitative or, wherever possible, quantitative indicators.” The 2007 Protocol appended to the Treaty of Lisbon narrowed the technocratic focus further still by specifically requiring that the statement accompanying any draft legislative act should include reference to the proposal’s “financial impact.”

The only textual hint that subsidiarity is concerned with values or linked to principles of good government is present in the preambular commitment 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.” As a preambular clause, it is a bold statement of purpose which presumes that the reconciliation of the trajectory of ever closer union with its seeming endorsement of stronger supranational institutions, on the one hand, and the commitment to decision-making as close as possible to the citizen, on the other hand, is possible, without specifying how that might be achieved. MacCormick and Barber both read the principle of subsidiarity as having deep democratic commitments, which would seem to be broadly in line with the preamble, but not the actual text of article 5.3 TEU since the democratic credentials of the respective national and European institutions are not even taken into consideration in the determination of where decision-making power should lie. As a result, the under-specified theoretical commitments to be found in the preambular exhortation cannot easily influence the shape that the principle of subsidiarity might take in practice.

If subsidiarity cannot therefore be neatly bound to democracy, is it allied to sovereignty? When subsidiarity was introduced by the Treaty of Maastricht, part of the reason for its inclusion was the strategic political exigence of placating those nationalists or Euroskeptics who worried that too much power was being transferred to the European institutions. That, too, militated against the articulation of a clear set of

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27 TEU, supra note 21, Preamble.

28 Barber, supra note 14; Neil MacCormick, Questioning Sovereignty: Law, State and Nation in the European Commonwealth 137–156 (2002) (focusing on subsidiarity only in the context of the exercise of public power at different levels, without implying that families, businesses, civic associations, and so on, should be organized according to democratic principles).

29 This question is probed more fully in Maria Cahill, Sovereignty and Subsidiarity in Europe: Allies or Opposites? (forthcoming).

30 Emiliou, supra note 2; Marquardt, supra note 12; van Kersbergen & Verbeck, supra note 18; Anthony Teasdale, Subsidiarity in Post-Maastricht Europe, 64 Pol. Q. 187 (1993).
principles or reasons justifying why certain decisions should be made at certain levels. After all, to appease the sentimental nationalist it was unnecessary and even counter-productive to give a reason justifying why the national institutions were the more apposite decision-makers—one should simply presume that the national level should take certain decisions on the basis of the historical reality that the national level did formerly make those decisions. Moreover, to lay down a principle or enshrine a set of reasons why the national level was the more suitable decision-maker in certain areas would be to set up an obstacle that would impede the smooth future transfer of competences from the national level to the European institutions. Thus, even if it looked, at the beginning, as if national sovereignty had found a comrade in subsidiarity, the two were never going to be anything more than fair-weather friends. Certainly many of those who act as apologists for subsidiarity are not beguiled by the rhetoric of state sovereignty, but failing to fall for sovereignty—for the idea that the national level is the final arbiter because of an inherent indefeasible claim to authority—leaves them once more bereft of a theoretical paradigm with which to engage the principle of subsidiarity.

In this context, where subsidiarity’s influence in European law is subject to ever more technocratic considerations, and where its connections to democracy and sovereignty are tentative at best, it cannot be surprising that discussion of the European principle of subsidiarity lacks a theoretical substratum. Neither can it be surprising that many scholars work on the basis that it has no philosophical commitments, nor that, among all the differing views as to the status of subsidiarity noted above—a principle, a rule, a guideline, an instrument, a normative requirement—there is no author who refers to subsidiarity as a theory. Thus, the language of “higher” and “lower” level comes to be understood dogmatically: we repeat the mantra of rebuttable presumption in favor of the lower level over the higher level without concern for the reasons behind it, thereby denying or abdicating the responsibility of intellectual and scholarly effort in the face of a technocratic imperative. Without a theory, however, we have no reason to accept that there should be a presumption in favor of lower levels in the first place. Indeed, the language of “higher” and “lower” levels seems to make a preference for the lower units counter-intuitive: if there is a higher level, should not decisions at that higher level prima facie count as more authoritative than decisions at a lower level? Without a theory, we also have no reason to justify why a presumption in favor of the lower levels should be rebuttable: if it is inappropriate to allow the higher level to be the decision-maker in the first instance, what makes it an appropriate fallback option? All this is to say that if subsidiarity has no deeper theoretical commitments and no philosophical underpinnings, if it is simply a dogma or a mantra, then it is unintelligible. Without a theory, it is no wonder that there is such a wide range of wildly discordant views about its meaning. A coherent theory of the European principle of subsidiarity would require that reasons be given as to why it is a good thing that decisions are made at national level, and then, whatever those reasons are, why those reasons can be trumped by

31 Marquardt, supra note 12.
recourse to financial impacts, quantitative indicators and concerns of efficiency. Unquestioning acceptance of the terminology of “higher” and “lower” levels makes it difficult even to see those questions and impossible to answer them.

3. The case for an ontology-sensitive theory of subsidiarity

In sharp contrast to the manner in which the terminology of “higher” and “lower” levels has been accepted by specialists in European law, contemporary scholarship on the meaning of subsidiarity in political philosophy expresses a very forthright concern about the use of such terminology. Hittinger, for example, writes that “[t]he notion of a “lowest” level perverts the concept of subsidiarity” and that there have been “significant misunderstandings” because subsidiarity has been “evacuated of much of normative meaning (sic)” and “reduced to a flat, rule-of-thumb preference for administrative decentralization,” which, he thinks, is “a travesty of its real point.” The contextualized reasons that these different scholars give for rejecting the “higher” and “lower” level approach to subsidiarity come in three strands: one reflects on the etymological meaning of the term subsidiarium; a second draws on the ancient and medieval roots of subsidiarity by examining the political philosophy of Aristotle as developed by John of Salisbury and Thomas Aquinas; and a third recalls the contribution of Calvinist Johannes Althusius and the development of subsidiarity’s sister-concept, sphere sovereignty. By whichever method, these contributions converge on the conclusion that subsidiarity—unlike administrative decentralization or devolution—presupposes that decision-making authority over certain matters belongs, in principle, to certain groups (the so-called “lower” levels) such that, in principle, and as far as those matters are concerned, there is no other appropriate decision-making authority.


Id. at 71.


Chaplin, supra note 33 (criticizing the idea that subsidiarity and decentralization are coextensive). See also Hittinger, supra note 32, at 94–105.
The etymological studies expose layers of meaning. Subsidiarity is related to the old Latin word *subsidiurn*, which conveys both “assistance, help, support” and also “a body of troops withheld from action as a reinforcement for the frontline” i.e., “the reserves.”

The phrase used in *Quadragesimo Anno* by Pope Pius XI “servato hoc ‘subsidiarii officii principio’” (in observance of the principle of “subsidiary” function), though clearly connected to that existing noun *subsidiurn*, implied a further noun *subsidiarium*, which was a neologism. Although no attribution was given for this neologism, a first-hand report on the various influences behind *Quadragesimo Anno* provided by Oswald von Nell-Breuning credits the work of Luigi Taparelli D’Azeglio. *Subsidiarium* seems to be an alternate to Taparelli’s own neologism *ipotattico*, which was borrowed from the Greek *hypo taxis*, since *hypo taxis* “can be rendered directly in Latin as sub sedeo” [to sit below].

Taparelli’s philosophical insight was that *hypotaxis*—a grammatical term which governed “the modalities of coordination between clauses, specifically, the arrangement of inferior clauses within the functioning of the whole sentence”—was a good way of explaining social pluralism. Like all sentences, he thought, “all societies, other than the most basic ones such as family or simple partnerships, are always composed of other societies, and there exist social rules governing the relations among such nested and overlapping societies.”

The richness of these etymological roots is incisively revealed through the two metaphors of the army and the complex sentence. A reserve army exists to offer support to the standing army making it militarily stronger, while subordinate or dependent clauses bring greater nuance to independent clauses by adding a greater depth of complexity and meaning. These metaphors intuitively convey why the terminology of “higher” and “lower” levels is fraught with potential misunderstanding: whilst the reserve army and the subordinate clause add greater strength or greater complexity respectively, and correspond to the so-called “higher level,” it makes no sense to think of the standing army or the simple but complete sentence as inferior in status, even though they correspond to the so-called “lower” level. Similarly, it is absurd to think that a reserve army could replace or usurp the function of a standing army, or to believe that a subordinate clause can be an effective substitute for an independent clause even though it does not express a complete thought. Reflection on the etymological beginnings of subsidiarity therefore helpfully highlights the idea that any assistance (*subsidiurn*) given does not detract from the primary status of the preexisting units which receive such assistance; on the contrary, it affirms their primary position. When we understand subsidiarity in this etymological context, we at last have a reason to argue

40 Oswald von Nell-Breuning, The Drafting of Quadragesimo Anno, in Readings in Moral Theology No. 5: Official Catholic Social Teaching 60 (Charles E. Curran & Richard A. McCormick eds., 1986).
41 This is corroborated by the fact that Pope Pius XI had taken the unusual step of recommending Luigi Taparelli D’Azeglio’s book Saggio teoretico il difetto natural appoggiato sul fatto (1900) in a prior encyclical Divini Illus, written two years before Quadragesimo Anno.
42 Behr, supra note 35, at 105 (approving the papal neologism on the grounds that: “subsidiarity was a mellifluous choice over hypotactics”).
43 Id. at 105.
44 Brennan, supra note 35, at 34.
that decision priority should presumptively belong to the so-called “lower” level, because it is the “lower” level which is in the primary position as the principal actor, whereas the so-called “higher” level is actually only useful insofar as it props up the “lower” level by offering *subsidium*. In other words, and although it jars with our contemporary rhetoric and assumptions, the “higher” level is actually *subsidiary* to the primary position of the “lower” level.

The second strand of literature affirms that it is a mistake to think of subsidiarity either as an exclusively Catholic idea or as a recent modern invention; to the contrary, when *Quadragesimo Anno* introduces the neologism in the twentieth century and when *Rerum Novarum* speaks of subsidiarity in all but name in the nineteenth century, they are articulating a concept that they take to have existed for thousands of years. The Taparelli-inspired *subsidiarium* is “not a free-standing concept,” but one which is embedded in society and “presupposes a plurality of . . . persons, each having distinct common ends, kinds of united action, and modes of authority,” and thereby relies on classical and medieval thought on social pluralism. Aristotle’s *Politics* described how a family—“the association established by nature”—gives rise, together with other families, to the village, which in turn gives rise, together with other villages, to the city-state.

As Aroney explains, this means that the city-state or “[t]he *polis* . . . is a composition two smaller categories of community [sic], the household (*oikia*) and the village (*kome*).” The classical image of the body politic, in which city-states are comprised of villages which are comprised of families or households such that each part has a specific function although together they are one whole, was proposed by Aristotle and later endorsed by the patristic and scholastic writers. Mueller notes that John of Salisbury was “probably the first scholastic writer to employ a detailed organismic analogy in the explanation of the nature of society,” and later Thomas Aquinas also accepted and developed the analogy, understanding society “not . . . as a homogenous mass but as an articulated whole . . . not a mere aggregation of single human beings, but an ordered unity of associations.” An interesting point of difference arose from the fact that, for Aristotle, since “[h]ouseholds and villages are formed to secure the bare necessities of life, whereas the *polis* is fully self-sufficient (*autarkeia*) in securing the necessities of life,” the city-state was the only political community with self-governing authority. Aquinas took a different view, affirming that since households and villages have self-sufficiency in certain aspects, they too exercise “degrees of self-government.” His modified version of the classical image of the body politic—an organismic of unities

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46 Hittinger, supra note 32, at 109.
48 Nicholas Aroney, *Subsidiarity in the Writings of Aristotle and Aquinas, in GLOBAL PERSPECTIVES*, supra note 33, 9, at 13.
49 Mueller, supra note 36, at 146.
50 Id. at 147.
51 Aroney, supra note 48, at 13.
52 Aroney, supra note 36, at 221.
nested within unities but retaining functional and decisional autonomy—held sway during that period. As medieval historian Otto von Gierke explains: “what is genuinely medieval starts from the Whole, but ascribes an intrinsic value to every Partial Whole down to and including the Individual.” For these scholars, subsidiarity is simply a twentieth century neologism that captures a long-standing politico-philosophical system and historical reality.

The third strand of literature comes into the picture at an angle because it focuses on the similarities between subsidiarity and sphere sovereignty despite the fact that the latter emerged in “deliberate opposition” both to organicism and to sovereignty. Sphere sovereignty, as articulated by Johannes Althusius in the sixteenth and seventeenth centuries (and more recently restated by Abraham Kuyper), is grounded “in the Calvinist metaphysics that each association must fulfill the given responsibilities assigned to it according to its calling,” and expresses the idea that:

[S]ymbiotic associations in human societies, such as families, cities, languages, provinces, states, businesses, sciences, arts, nations, and jurisprudence, are sovereign wholes in themselves. They do not relate hierarchically to one another . . . do not glue together as pieces in a mosaic, and do not constitute a unity out of diversity.

In this view, the role of politics is simply to preserve the already-existing sovereignty of the symbiotic associations within particular spheres. A political system operating on this basis works to prevent one sovereign sphere from encroaching on the sovereignty of another sphere. This model departs from Hobbesian sovereignty since it recognizes the sovereignty of the individual spheres, and it diverges from the organicism of Aristotle and the medieval scholars since it rejects the idea of an over-arching unity. That being the case, how does sphere sovereignty help to illuminate the meaning of subsidiarity? Two contemporary scholars, Ossewaarde and Weinberger, argue that sphere sovereignty buttresses subsidiarity by emphasizing that both, in contrast to sovereignty, are premised on a preexisting social ontology. Ossewaarde makes clear that: “[u]nlike sovereignty . . . subsidiarity is not an attribute of statehood, but of nature,” while Weinberger expounds that:

Subsidiarity as a social ontology tells us that society is made up of many levels and layers of human interaction and sociability. Sphere sovereignty does the same thing. . . . Subsidiarity emphasizes the importance of social pluralism on the vertical axis. . . . Sphere sovereignty emphasizes the importance of social pluralism on the horizontal axis.

These three strands of contemporary literature on subsidiarity converge on the same point—that subsidiarity exists for the sake of a preexisting social ontology and that it

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53 OTTO VON GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES 7 (1900).
54 Ossewaarde, supra note 37, at 111.
55 See also Ken Endo, The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors, 44 HOKKAIDO L. REV. 553 (1994) (discussing how sphere sovereignty influenced the emergence of the European principle of subsidiarity).
56 Ossewaarde, supra note 37, at 107–108.
57 Id. at 113. Emphasis in original.
58 Id. at 107. Emphasis in original.
59 Weinberger, supra note 37, at 57.
has ontological commitments—and together explain why a dogmatic, de-contextualized focus on the terminology of “higher” and “lower” levels of decision-making as if subsidiarity were indifferent to where decision-making authority should lie is indeed a perversion of the real purpose of subsidiarity. Since this contemporary scholarship of Hittinger, Aroney, Mueller, Brennan, Ossewaarde, Weinberger, and others simply recalls ideas that were readily available to and in some cases relied on by those who introduced the term “subsidiarity,” it would be naïve to suppose that the encyclical use of the language of “higher” and “lower” levels proceeded in ignorance of these considerations, or that those words were intended to be taken out of the context of these long centuries of settled political philosophy. Indeed, the writing of nineteenth century philosophers such as Proudhon, Tocqueville, and Cattaneo signal a general revival of interest in the theory of subsidiarity during the century before Quadragesimo Anno was written. It would also be to contradict the very words that introduce that sound-bite quote from Quadragesimo Anno which is so often interpreted atheoretically, words describing subsidiarity as “that most weighty principle, which cannot be set aside or changed, [but] remains fixed and unshaken in social philosophy.”

The encyclical thereby invites us to remain sensitive to subsidiarity’s philosophical heritage and its ontological commitments. At this point, it is important to point out that there are certain subsidiarity scholars who are not oblivious to those ontological commitments. Echoes of the ontology-sensitive approach can be seen in the work of writers as diverse as Paolo Carozza discussing international human rights law, Alessandro Colombo discoursing the Lombardy Model, Benjamin Gussen commenting on the Treaty of Waitangi, Elinor Ostrom who proposes a principle of nested governance in the context of environmental issues as adapted by Graham Marshall in Australia, Carlos Maldonado in discussing the “triangle” subsidiarity forms with human rights and solidarity, Karen Jordan in the context of education, Meghan Clark on care-giving, and Domèneç Melé on structures of corporate organization.

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60 Pierre-Joseph Proudhon, Du principe fédéral et de la nécessité de reconstituer le parti de la révolution (1863).
61 Alexis de Tocqueville, Democracy in America (Harvey Mansfield trans., 2002).
63 See text accompanying note 19, supra.
64 Quadragesimo Anno, supra note 19, at 79.
71 Meghan Clark, Crisis in Care: Family, Society and the Need for Subsidiarity in Caregiving, 7 J. Catholic Soc. Thought 63 (2010).
All this is to say that the references to “higher” and “lower” level in the encyclicals cannot be read dogmatically, as if there is no reason behind the preference for lower level and as if one can simply read that preference as a mantra without engaging with the reasons by which it was informed and shaped. In fact, the most important thing to know about subsidiarity is that those at the “lower” levels should be the presumptive decision-makers because they have the primary responsibility for achieving the good that is sought at that level, while those at the “higher levels” should not be presumptive decision-makers because they merely offer *subsidium* to the “lower” levels. In other words, counter-intuitive as it might seem, subsidiarity holds that, in principle, the decisional authority of the lower levels is greater than the decisional authority of the higher levels! The problem is that our use of the terms “higher” and “lower” levels confuses our understanding of subsidiarity by occluding the insights that we learn from the ontology-sensitive approach. In order therefore to create some distance from the problem of the dogmatization of “higher” and “lower” levels and to reinforce the basic insights of the ontology-sensitive approach to subsidiarity, the terminology of “higher” and “lower” levels will be eschewed for the remainder of this article, and a new terminology employed. This ontology-sensitive approach to subsidiarity impels us to describe the “lower” levels as *primary units* in deference to their status as naturally occurring groups with primary and presumptive responsibility for making decisions for the good of the group. The “higher levels” also need to be re-designated as *subsidiary units* for the reason that they offer *subsidium* to primary units when primary units are in need of help, and are therefore subsidiary to the primary units in terms of the decisional authority. The advantage of this new terminology is that it is faithful to the insights that we can learn from an ontology-sensitive approach to subsidiarity and indicates more clearly what subsidiarity was always intended to convey. A helpful parallel can be drawn with the typical connotation of subsidiary in company law: subsidiary companies offer additional revenue streams but do not deny and cannot displace the primary responsibility of the holding company. In the same way, subsidiary units offer assistance to the primary units, without denying or displacing their primary authority.

4. The ontology-sensitive approach in practice

The core of the ontology-sensitive approach to subsidiarity is, as Brennan puts it, that:

[Subsidiarity] does not purport to create a social ontology. Instead, the principle of subsidiarity recognizes, and thus honors, the ontological facts about how individuals associate for the performance of unique functions. . . . It recognizes, specifically, that not just individuals have functions to perform, but so too groups.\(^{73}\)

Partly, the reason for recognizing groups is to protect individuals. By honoring existing groups, subsidiarity provides the best guarantee that an individual’s right of freedom of association is vindicated. It also honors the agency and liberty of individuals in their social interaction, as individuals-within-groups. If the state would refuse to recognize

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\(^{73}\) Brennan, *supra* note 35, at 36 (emphasis in original).
the capacity of a group to self-govern, the danger to the individual, as McIlroy sees it, is that that “amounts to a restriction or at worst a denial of choice” by those individuals because it pushes the decision-making process upwards out of the reach of their agency and voice, whereas freedom of choice should require that small groups of individuals should not be deprived of “the opportunity to live their lives as they see fit.” But subsidiarity not only protects groups for the sake of individuals—after all, the language of human rights can be marshaled in order to defend liberty, individual agency, and freedom of association—it also protects groups for the sake of the groups. The idea here is that families, universities, sporting organizations, businesses, charities, and so on are not only instrumentally good, because they allow individuals to exercise freedom, but also essentially good, because they each contribute something irreplaceable to the common good. For this reason, subsidiarity is invested in the continuing existence of naturally occurring groups in society, and the specific insight that it offers is that there is a deep connection between the continuing existence of a group and respect for its internal authority structures. Hittinger explains this by highlighting that if an external body refuses to recognize the capacity of a group to self-govern according to its own internal authority structures, then, within that group “common action will depend entirely on spontaneous unanimity.” Nobody who has ever participated in a group needs Hittinger to tell her that spontaneous unanimity is “hardly possible in a family, much less in an economic corporation, a university faculty, a church, or even a sports team.” Failure to honor the internal authority structures of such a primary unit puts that primary unit in the position where, when the members fail to make unanimous decisions, the group disintegrates or becomes subsumed. In this way, the ontology-sensitive theory of subsidiarity proposes that in order to assure the continued existence of primary units, we need to ensure that subsidiary units respect internal authority structures of primary units.

Subsidiarity is therefore closely connected to authority, but it conceives of authority in a very particular way which I elsewhere describe as an embedded theory of authority to distinguish it from the model of authority entailed by sovereignty, which is a disembedded theory of authority. The key insight is that authority is embedded in the primary units because of their particular nature and purpose, and subsidiarity units can intervene in relation to primary units not because of a superior claim to authority but because of a superior capacity to help the primary unit achieve its goals. Thus authority is differentiated and its various forms are incommensurable, since the type and scope and extent of authority exercised in a family is fundamentally not the same as the type and scope and extent of authority exercised in a trade union. Moreover, the type and scope and extent of assistance offered by a particular subsidiary unit to a particular primary unit will be specific to the kinds of units involved. That is, although the ontology-sensitive vision of subsidiarity would require that primary units like families,
businesses, trade unions, sporting and charitable organizations, churches, regional
governments, and so on, must have their internal authority structures respected
even though they are nested within subsidiary units such as the state and receiving
assistance therefrom, that is not to say that the assistance they receive will treat them
all in the same way. The assistance that the state, as subsidiary unit, will offer to a
family or a commercial enterprise or a city council will differ precisely because the
assistance will addressed to those specific groups, recognizing their organic authority,
and ordered to the good of the family, the commercial enterprise and the city coun-
cil, respectively. Moreover, the assistance offered by the state to one particular family
should be differentiated according to the needs of that particular family. Here again
the point is that subsidiarity’s vision of authority is atypical: it is one in which the role
of the subsidiary unit (formerly the “higher” level) is responsive to and subservient to
the needs of the primary unit (formerly the “lower” level).

To elaborate briefly in the context of a particular example: imagine that a box-
ing club has been established in a deprived area of your town by a policeman who
knows that teenagers who box develop fitness and confidence, learn to respect rules
and authority figures, and, having a controlled environment in which to express their
agression, are far less likely to engage in street violence. The policeman becomes
President of the Good Fight Club and Chair of the Good Fight Organizing Committee
(GFOC). He hires one full-time trainer and two others who work alternate weekends,
all of whom become members of the GFOC. Since the training takes place in a school
gym, the principal teacher and Chair of the Parents’ Association are also on the GFOC.
So far, this is a perfect example of the organic development of a primary unit which
establishes its own authority structures. If the Club President discovered that some
of the kids have no money for boots or gloves, he might call on the assistance of the
Parents’ Association for fundraising help; if the trainers became worried that some
of the kids who come to training are dealing drugs on the side, they could call the
police; if they realized that outdoor lighting was needed to make the grounds safe for
the students who were leaving after dusk, the GFOC might apply for a grant from the
Department of Education; if they learned that two of the students had Olympic poten-
tial, they might seek assistance from the National Sports Council for the upgrading of
facilities and equipment. In all these ways, the primary authority would be actively
seeking assistance from subsidiary units in the face of specific challenges. The assist-
ance required would sometimes be very temporary, to deal with a particular crisis, and
sometimes more enduring, to redress a more lasting deficiency, but the primary unit
would always retain its own original authority and responsibility.

It is obvious in this example that the Parents’ Association, the police, the Sports
Council and the Department of Education should not have a general right of initiative
to intervene in the internal authority structures of the Club: the Parents’ Association
should not be entitled to require that the Club also give ballet classes; the Sports
Council should not be entitled to require that the Club focus all its attention only on

78 This example is inspired by the establishment of the Club de Boxe l’Espoir [The Hope Boxing Club] by Police
Officer Evens Guercy in Montréal in 2006.
the two students with Olympic potential to the neglect of the others; the Department of Education should not be entitled to subsume this extra-curricular activity under its purview, and so on. Nonetheless, there should be an override mechanism, which would, in exceptional circumstances, mandate intervention by the subsidiary authority even if that intervention was not requested by or acceptable to the primary authority. For example, the Department of Education may rightly decide to refuse access to the gym during the summer in order to repair some structural damage even if the GFOC protests that decision; the Parents’ Association may justly require that child protection policies be put in place or reviewed even if the trainers object that this is unnecessarily bureaucratic, and so on. At all times, however, the driving force should be original laudable aims of the Club President to promote the flourishing of these students and not any conflicting aims that the school might have to make a profit, that the Sports Council might have to make the Club more competition-focused, and so forth. In order to ensure that it is the good of the Good Fight Club which is being promoted at all times, compliance and review mechanisms can be established with the dual functions of both monitoring compliance with subsidiarity generally in order to ensure that the GFOC is not becoming dependent on any of the subsidiary units and that those subsidiary units do not overbear the GFOC, and also reviewing particular forms of assistance being received, with the presumption against continuing assistance unless the GFOC or the override mechanism indicate that such is still required.

To put this schematically, there are four precepts entailed by this approach to subsidiarity. First, the primary unit must have the freedom to establish itself and the responsibility for developing its own internal authority structures. Once established, it must have the opportunity to indicate that assistance is needed from the subsidiary unit in order to enable it to achieve its purposes. Whether the assistance called for is temporary or more enduring, it should not allow the primary unit to abdicate its own presumptive authority or be supplanted by the subsidiary unit. Second, and conversely, the starting-point of the subsidiary unit is that, as a matter of respect for the internal authority structures of the primary unit, it will have no presumptive authority in relation to how the primary unit achieves its aims. It will have no right of initiative to intervene, nor should it be the prerogative of the subsidiary level to unilaterally withdraw assistance. Almost all of its activity will be bound up in responding to the calls for provision and withdrawal of assistance made by the primary unit. In exceptional circumstances, when the authority structures of the primary unit are so weakened or corrupted that either they are manifestly incapable of assessing the need for assistance or they willfully refuse to seek necessary assistance, an override mechanism should be deployed by the subsidiary unit. Third, any assistance requested, offered, and received must be ordered towards the promotion of the objectives and goals of the primary unit and therefore the good for which the primary unit was established, as opposed to ordered towards the aims or objectives of the subsidiary unit and the achievement of its good. That is, the assessment of the need for assistance by the primary unit, the discontinuance of assistance when no longer apposite, and particularly the use of the override mechanism in exceptional circumstances, must all be carried out with the good of the primary unit in mind. Fourth, in order
to prevent the subsidiary unit from undermining the internal authority structures of the primary unit, and to prevent the primary unit from becoming dependent on the assistance received from the subsidiary unit, there should be built-in compliance and review structures providing for periodic review of the assistance of which the primary unit is in receipt. These structures should ensure that the assistance offered is ordered towards the growing strength of the primary unit and guarding against any tendencies of the subsidiary unit to overbear the authority of the primary unit by advocating the withdrawal of forms of assistance that are no longer necessary.

In order to honor the internal authority structures of the primary unit, this periodic review must be conducted with a presumption against continuing assistance, to be rebutted if the internal authority structures of the primary unit indicate that assistance is still required for given reasons or the override mechanism determines that the primary unit is still so compromised that assistance cannot reasonably be withdrawn.

The remaining section of this paper will evaluate the European principle of subsidiarity vis-à-vis these four precepts, but before progressing to that analysis, a further complexity must be acknowledged. This is that subsidiarity may address the same unit as a primary unit in some circumstances and as a subsidiary unit in other circumstances. For example, although a charitable organization, as a primary unit, must have its original authority respected by the state, it may, very properly, wish to organize itself internally in accordance with the principle of subsidiarity, meaning that individual branches of the organization are primary units which receive subsidiary assistance from the organization as a whole. Similarly, while the city council has a function that is subsidiary to the primary authority of the family, it is also a primary unit in receipt of subsidiary assistance from the state. It will be impossible for the family to function as a subsidiary authority since there is no unit more fundamental than it, but one can imagine that large corporations with many firms, trade unions and their many branches, sporting organizations with their local clubs, universities with their discrete departments, would often and rightly function as primary units in their interaction with the state and as subsidiary units in their interaction with their constituent parts. Now the question is whether the state, whilst functioning as the quintessential subsidiary unit—the authority of last resort, if you will—for all matters internal to the nation, could also function as a primary unit in terms of its interaction with international and supranational institutions? The only basis, in principle, for denying that the state could receive subsidiary assistance from these external institutions would be sovereignty. As pure concepts, sovereignty and subsidiarity are irreconcilable because their attendant theories of authority are so deeply incompatible, such that a state that was fully committed to sovereignty and its attendant theory of authority be incapable of endorsing subsidiarity in its internal or its external affairs. However, as a matter of empirical political and legal reality, the European project functions on the basis that the member states are not sovereign and on the basis that subsidiarity can apply between state and super-state levels. Hence this final section

79 Cahill, supra note 77, at 113–123.
proceeds on the assumption that it is possible for the state to function as a primary unit vis-à-vis transnational organizations which offer subsidiary help and therefore that one can justifiably examine the workings of article 5.3 TEU by reference to an ontology-sensitive theory of subsidiarity.

5. Appraising the European principle of subsidiarity

This section looks at the dynamic between the member states and the European Union in the light of the four precepts derived from the example of the Good Fight Club, asking: (i) are the member states responsible for the establishment of their own internal authority structures and do they have opportunities to indicate that assistance is needed from subsidiary units, such as the EU, without abdicating that responsibility? (ii) Does the EU respect the internal authority structures of the member states and respond to their calls for assistance without exercising a right of initiative, barring exceptional cases when an override mechanism is employed? (iii) Is any assistance which is offered and received ordered towards the objectives of the member states and their good, rather than the objectives of the EU and its good? (iv) Are there compliance and review mechanisms in place which periodically review the forms of assistance being offered with a presumption against continuing assistance? Although the ontology-sensitive approach instantiated through the four precepts proposed in this paper offers a new lens through which to view article 5.3 TEU, the most interesting and unexpected finding of this final section is that almost all of the comments and criticisms prompted by the ontology-sensitive approach can already be found in nascent form scattered among existing political and scholarly debates on the European principle of subsidiarity. The ontology-sensitive approach, however, shores up the intellectual strength of these existing critiques, unifying them by providing a theoretical substratum upon which they can now rest.

In relation to the first precept, the starting-point is that member states have established their own internal authority structures, their own institutions of government—legislative, executive, and judicial—through the means of their national constitutions or fundamental laws. The executive branch typically has the power to agree treaties designed to address specific concerns on a bilateral or multilateral basis, and thereby to create institutions outside the state which offer assistance to the state in particular matters. Traditionally, those treaties were enforceable only to the extent determined by national law, which underscored quite well the idea that the primary unit cannot abdicate its own responsibilities by allowing its internal authority structures to be undermined from without. Nonetheless, the self-description of the European institutions, and in particular the Court of Justice of the European Union (CJEU), departs from this traditional approach in favor of putting the interests of the Community/Union before the legal and constitutional authority of the member states. Aside from the Van Gend and Costa decisions, when the CJEU was least reticent to put the interests of economic integration ahead of the internal authority structures of the nation states, the Court, as Bermann notes, “has . . . taken virtually every opportunity that presented itself to enhance the normative supremacy and effectiveness of Community
Yet, the echo of the ontology-sensitive approach to subsidiarity in its concern for the internal authority structures of the primary units can be heard in Schilling’s hesitant suggestion that “[s]ubsidiarity, it might conceivably be claimed, does not allow for the Community courts’ having the last word in subsidiarity questions.”

Turning to the second precept, we can say that whilst the European institutions were established to respond to the initiatives of the member states, it is neither the case that in practice they merely respond to calls for assistance nor that they do not have a general right of initiative. There are two revealing aspects to be tracked in this regard: exclusive competences and the right of legislative initiative. Regarding exclusive competences, the treaty provision on subsidiarity has always made clear that subsidiarity does not apply to areas of exclusive European competence, but only to areas where the member states and the European Union share competences. The valid criticism which this proviso commonly attracted was that since the areas of exclusive competence were not precisely enumerated, it was difficult to ascertain with a satisfactory degree of precision which were the areas to which subsidiarity could and could not apply, meaning that subsidiarity rested on a “muddy foundation.” While this situation has now been ameliorated, at least to a large extent, since the ratification of the Lisbon Treaty, the problem of opacity remains, Davies stridently insists, in the form of the “mop-up clause” which extends the scope of the already-expansive European competences, mandating any legislation that may be necessary “to attain one of the objectives set out in the Treaties.” Since these objectives are vague and aspirational, legislation focused on their attainment may be equally sprawling in scope. These textual ambiguities are real concerns, but a more ontology-sensitive understanding of subsidiarity would draw attention to a deeper problem. Article 5.3 provides that subsidiarity applies only to areas of shared and supporting competences, exclusive competences having been siphoned off. The idea that certain areas should, in principle,
be removed from the decisional influence of the primary units is something that is at odds with the ontology-sensitive approach to subsidiarity because it implies that the primary unit is precluded from achieving its own aims in particular policy fields. In its own way, though, the wording of article 5.3 recognizes that the fact that the member states are denied the opportunity to promote their own aims in particular fields is incompatible with subsidiarity insofar as it provides that where exclusive competences exist, subsidiarity cannot apply.

Moreover, the treaties accord a general right of legislative initiative to the European Commission by the terms of article 17.1 TEU, which states that: “The Commission shall promote the general interest of the Union and take appropriate initiatives to that end.” This again is incompatible with an ontology-sensitive approach to subsidiarity since the Commission is an institution of the subsidiary unit and Commissioners are under an explicit obligation not to act to promote the interests of their member states. Nonetheless, a certain awareness of the tension between the protection of the principle of subsidiarity and the vesting of the right of initiative in the subsidiary unit is evidenced by the Amsterdam Protocol on Subsidiarity which required that “[w]ithout prejudice to its right of initiative” and except in urgent or confidential cases, the Commission should “consult widely before proposing legislation.” The Lisbon Protocol on Subsidiarity similarly provides that:

> Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal.

Although these Protocols draw attention to the need to qualify the right of legislative initiative at the European level, as a matter of respect for the principle of subsidiarity, one could imagine other options that might be more satisfactory. Given that the second precept offers the idea that there should be no right of initiative on the part of the subsidiary unit, apart from exceptional circumstances, it might seek a structural arrangement whereby the general right of legislative initiative would in the first instance be vested in the member states (perhaps in the national parliaments) with an override mechanism to allow the European institutions to act in circumstances in which the national authority structures are so weakened or corrupted that they cannot and do not any longer seek the assistance they require.

The third precept, that any assistance which is offered and received ought to be ordered towards the objectives of the member states rather than those of the EU, must be considered by reference to the terms of article 5.3 TEU, which provides that the Community may act “if and only in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States,” and therefore “the proposed action

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87 TEU, supra note 21, art. 17.3.
89 Lisbon Protocol, supra note 26, art. 2.
[may] be better achieved at Union level.” The inter-institutional agreement, the Amsterdam Protocol and the Lisbon Protocol all sought to explicate the terms by which this comparative assessment should be conducted: the Amsterdam Protocol specified that the substantiating reasons (justifying why a measure would be better achieved at European level) should be accompanied by “qualitative, or wherever possible, quantitative indicators” while the Lisbon Protocol required an assessment of the financial impact of the proposed measure and emphasized the need to minimize the financial and administrative burden on national governments and other national actors. This comparative assessment has drawn two kinds of critiques. The first focuses on the fact that it is not clear whether the assessment is to be conducted according to economic or political or legal criteria. Even though the Court of Justice has responsibility for interpreting the terms of article 5.3, Toth issued an early warning that the comparative assessment analysis was one that the Court was particularly ill-suited to conduct because it “exceeds the proper judicial function.” Along with Emiliou, Henkel, and Pernice, he settles for the idea that the comparative assessment must be conducted in political terms, whereas Portuese holds firm to the idea that article 5.3 espouses “the very notion of economic efficiency.” Indeed, with very few exceptions, commentators are highly critical of the Court of Justice’s subsidiarity jurisprudence.

The second critique which is relevant to this third precept is that the structure of the comparative assessment is skewed in favor of the European level, since the assessment evaluates a legislative measure for its capacity to achieve specifically European objectives, such as the promotion of the common market or the harmonization of national standards. Thus, although the text of article 5.3, with its references to “sufficiently achieved” and “better achieved,” seems to pit the achievement of the member states fairly against the achievement of the European institutions, in fact the achievement being measured is the achievement of an objective of the European Union. This is why

Draft Inter-institutional Agreement between the European Parliament, the Council and the Commission on Procedures for Implementing the Principle of Subsidiarity, Dec. 6, 1993, 1993 O. J. (C 329) 135 (specifying that the Commission should take subsidiarity into account in exercising its right of initiative and in formulating the Explanatory Memorandum, that the Council and Parliament should justify any amendments by recourse to subsidiarity, and that the Commission should draw up an Annual Report on compliance with the principle of subsidiarity for the Parliament) [hereinafter Inter-institutional Agreement].

Amsterdam Protocol, supra note 25, ¶ 4.

Lisbon Protocol, supra note 26, art. 5.

Toth, supra note 83, at 283.

Emiliou, supra note 2, at 593 (holding that, on account of its “subjective character,” subsidiarity can be applied only by means of “a policy decision which should be left to political bodies democratically answer able for their decisions”).

Henkel, supra note 5, at 370 (arguing that “comparative assessment might prove to be nothing more than a political question as it might involve delicate political choices”).

Pernice, supra note 12, at 409 (considering subsidiarity to be “a general political guideline to be judged and applied on a case-by-case basis”).

Toth, supra note 13, at 1104 (“a purely political principle”).

Portuese, supra note 6, at 245. Portuese does not criticize the subsidiarity jurisprudence of the Court on this basis—he believes that the case law is “economically sound.” Id. at 261.

Craig, supra note 9; Portuese, supra note 6; Horsley, supra note 4.
Bartl says that: “EU subsidiarity serves to sanction the functionalist understanding of goals as uncontroversial.”100 Since any single national parliament cannot protect the common market or harmonize national standards across the member states, legislative measures aimed towards those objectives will be very difficult to challenge on the grounds of subsidiarity. To borrow a hypothetical example from Davies, let us suppose that, in order to remove obstacles to free movement, a European measure seeks to harmonize national standards in health and safety.101 Although the European measures “look like health and safety measures,” and although the national legislation could strongly compete if “achievement” were to be assessed on the substance of the protection enshrined therein, since the official objective of the European measure is the harmonization of laws for the protection of the common market, a subsidiarity challenge cannot get off the ground because “it is manifestly the case that Member States acting alone cannot harmonize.”102 Both of these critiques—the lack of clarity about the grounds on which the comparative assessment should be conducted and the impartiality which subtly pervades the comparative assessment—need to be taken seriously and can be strengthened by reference to the ontology-sensitive approach. The third precept would challenge, not only the haziness around the criteria on which the comparative assessment should be adjudicated, but also the idea that the primary and subsidiary units compete for decision-making authority as if they are equally qualified to perform the task in principle and the only question to settle is which is more efficient. To the contrary, it would hold that it is only if the primary units (the member states) are incapable of achieving something alone and seek assistance from the subsidiary unit (the European Union) that the latter becomes involved. Building on Davies’s argument, an ontology-sensitive approach would insist that the measure of achievement cannot be an objective of the European Union because the European Union exists to serve the good of the member states, and not the other way around.

The fourth precept—that there should be compliance and review mechanisms in place which periodically review the forms of assistance being offered, in which the internal authority structures of the primary unit take a leading role and with the presumption against continuing assistance—resonates with the fact that, from the beginning, the European institutions have been keen to agree procedural safeguards in order to ensure compliance with the subsidiarity provision. The Edinburgh Presidency Conclusions held shortly after the ratification of the Maastricht Treaty promised that an inter-institutional agreement (between the institutions of the European Union) would follow shortly thereafter.103 This Agreement required that the Commission

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100 Bartl, supra note 10, at 24 (seeking to redress this, she re-focuses attention on “the political legitimacy of goals when interpreting the principle of subsidiarity”).
101 Davies, supra note 15, at 74.
102 Id. (insisting, provocatively, that since language is perhaps “the biggest obstacle to moving abroad . . . the Treaty would provide a prima facie basis for harmonisation of this” and since “it is impossible for Member States to solve this problem on their own at all . . . [s]ubsidiarity provides no reason not to legislate to make English the language of the EU.” Id. at 69).
103 Presidency Conclusions, Edinburgh European Council (Dec. 12, 1992), Annex 1, ¶ 1.4 [hereinafter Presidency Conclusions].
should publish an annual report on compliance with subsidiarity to be made available for the European Parliament to scrutinize and debate.\footnote{Inter-institutional Agreement, supra note 90, 135.} These inter-institutional commitments have been extended in the Amsterdam and Lisbon Protocols, and, for example, the report must now be sent to the Economic and Social Committee as well as the Committee of the Regions. The Committee of the Regions, established by the Maastricht Treaty, successfully lobbied for an amendment of the subsidiarity provision to include a reference to regional and local government, and has a growing self-understanding as subsidiarity watchdog.\footnote{Jackie Jones, The Committee of the Regions, Subsidiarity and a Warning, 22 EUR. L. REV. 312 (1997).} even though its members, while they must be representatives of regional and local bodies in order to be appointable, must be “completely independent in the performance of their duties, in the Union’s general interest.”\footnote{TEU, supra note 21, arts 300.3–300.4.} These compliance mechanisms do allow for making of advisory or binding recommendations, but they are conducted exclusively by European institutions, rather than allowing for the involvement of the internal authority structures of the member states. Echoes of the ontology-sensitive approach can be found in the fact that the Lisbon Protocol on Subsidiarity for the first time included national parliaments in the assessment of compliance with subsidiarity, but unfortunately their role in this ‘Early Warning System’ is limited to giving a reasoned opinion as to why they consider that the draft legislative proposal does not comply with the principle of subsidiarity (still by reference to the criteria of comparative assessment in the achievement of a European objective).\footnote{Lisbon Protocol, supra note 26, art. 6.} Thus the role of national parliaments is conditioned and non-decisive,\footnote{See Nicholas Barber, Subsidiarity in the Draft Constitution, 11 EUR. PUB. L. 197, 203–204 (2005) (arguing for the “red card” system, whereby the Commission would be compelled to withdraw the legislative proposal if a considerable proportion of the Member States’ parliaments were opposed).} and pertains only to new legislation which is being drafted. The Lisbon Protocol thus signals a growing awareness that the primary units ought to be involved in the determination of when and how assistance is given, although it does not nearly meet the requirements of the fourth precept that the internal authority structures of the primary units should play a leading role in periodic review of assistance being offered and received, and that such review should be conducted on the basis of a presumption against continuing assistance.

Aside from compliance and review mechanisms in the legislative domain, it is the CJEU which has ultimate responsibility for interpreting article 5.3 and therefore for judicially reviewing European legislation for compatibility with the principle of subsidiarity. There has been no move to include the national courts in the justiciability of subsidiarity. Indeed, the Edinburgh Presidency Conclusions purported expressly to prohibit national courts even from giving direct effect to the subsidiarity provision.\footnote{Presidency Conclusions, supra note 103, ¶ 1.4} Thus, along with the concerns already noted that a comparative assessment analysis based on political or economic considerations cannot legitimately be done by a court, there is a more pejorative criticism that the CJEU, as a European institution and one of
the great protagonists of European integration, is in a structural position that makes it impossible to discount institutional and ideological bias in the interpretation of the subsidiarity principle.\footnote{Barber, supra note 14, at 198 (calling this the “uncharitable” criticism).} “[T]he spirit of the Court,”\footnote{Id. at 199.} to use Barber’s phrase, is to promote the interests of the Community, and to that end, it has always adopted, to borrow another apt phrase from de Búrca, “a self-conscious teleology of integration.”\footnote{de Búrca, supra note 1, at 232.} On that basis, it is at least arguable that the Court does not have the legitimacy to dispassionately examine if decisional authority might not belong to the Union institutions at all. This “structural bias”\footnote{Davies, supra note 15, at 64.} is augmented by the procedural elision that the Court, in its own (potentially law-making) interpretation of treaty provisions, skirts the safeguards designed to ensure that the legislative institutions uphold the principle of subsidiarity.\footnote{Id. at 222. Cf Horsley, supra note 4 (revisiting the discussion of the Court as institutional actor in its interpretation of subsidiarity).} These just criticisms which the Court has attracted can apply,\footnote{Cf. Horsley , supra note 4 (revisiting the discussion of the Court as institutional actor in its interpretation of subsidiarity).} mutatis mutandis to the compliance mechanisms more generally. It is self-defeating to seek to protect subsidiarity through compliance mechanisms which give the only say, or else the only determinative say, on its application to those who have most to benefit from its contravention. All told, the fourth precept would augment existing criticisms of the implementation of the principle of subsidiarity by insisting that the primary units need to be given a much stronger role in the compliance and review mechanisms, in order to ensure that the internal authority structures of the member states are not being subsumed by the European Union.

6. Conclusion

This article argues that, beneath all our confusion around the meaning of subsidiarity, there is an hapless consensus that subsidiarity is about allocating decision-making authority between “higher” and “lower” levels on the basis of technical criteria as if subsidiarity is indifferent, as a matter of principle, to where that authority should lie. It proposes that, properly understood, subsidiarity is sensitive to preexisting ontology, and, in particular, that subsidiarity requires that the subsidiary units (so-called “higher” levels) should recognize the greater claim to decisional authority of the primary units (so-called “lower” levels). In concrete terms, this entails four precepts: primary units should establish their own authority structures and seek assistance from subsidiary units when they need it; subsidiary units should bestow assistance but should have no right of initiative to intervene, except by means of an override mechanism to be used in exceptional cases; assistance given and received should be ordered to the good of the primary unit; finally, periodic compliance and review mechanisms should discontinue forms of assistance that are no longer necessary and generally ensure that primary unit is not being subsumed by the subsidiary unit. When we
consider the European principle of subsidiarity in this light, it becomes clear that existing critiques of the principle and efforts to improve its function already ring true to these precepts, although the ontology-sensitive approach to subsidiarity unifies these critiques and efforts, putting them on firmer ground and making them more incisive, intelligible, and compelling for having a theoretical basis.