

GLOBAL INSTITUTIONAL CHOICE

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The world faces collective action problems that are global in nature and scope, rendering nation-states unable to achieve desired goods individually. Issues such as global climate change and systemic financial risk create externalities that impel the existence and intervention of a world government to avoid suboptimal market equilibria, free-riding, and moral hazards. I submit the European Union's principle of subsidiarity as an organic, legitimizing framework for global governance that both compels and cabins a world government. Subsidiarity optimizes social welfare by enabling a world government to achieve desired goods that nation-states would be otherwise unable to obtain individually because of collective action problems. But subsidiarity also limits a world government through a presumption in favor of local regulation as a matter of national autonomy and efficiency. The efficiency concern also enables subsidiarity to be an expansive principle for global governance because it accommodates both public and private forms of collective action. Public forms of collective action include public regulations, treaties between nations, and public institutions like the World Trade Organization. Private forms of collective action include free-market Coasian bargaining between private parties and the efforts of private international institutions like Greenpeace. Because subsidiarity accounts for these diverse institutions in a large and complex world, it is an ideal balancing principle for global institutional choice.

INTRODUCTION

A vexing problem arises from this simple fact: The world is divided into different political units, but the scope and effect of the problems that they seek to address often transcend those political boundaries.¹ The challenge of solving problems whose scope is incommensurate with political boundaries impels the first-order question of which level of body politic should solve which problem.² The existence of different levels of government implicitly suggests that certain poli-

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¹ See E. Donald Elliott, Bruce A. Ackerman & John C. Millian, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 329 (1985) (describing this problem as “almost inevitable” result of “dividing the nation into fifty geographic zones”); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 587 (1996) (discussing structural mismatch between scope of problem and regulator’s jurisdiction in terms of negative and positive externalities).

² See Samuel Issacharoff, *Democracy and Collective Decision Making*, 6 INT’L J. CONST. L. 231, 233 (2008) (examining attempted secession of Quebec as example of need for “a controlling principle for determining what is the right level of aggregation for collective decision making”).

ties are better equipped to solve certain problems. And the notion that government intervention is not necessarily the default response to a problem suggests that in some cases other forms of collective decisionmaking may be more appropriate. So when does the scope and effect of a problem necessitate the existence and intervention of a higher-level polity?

I propose that the world needs some form of world government. In the face of global collective action problems such as global climate change,³ systemic risk in capital markets,⁴ and cross-border commercial regulation,⁵ nation-states are ill-equipped to optimize social welfare individually.⁶ Moreover, existing international institutions, such as the United Nations (UN), World Trade Organization (WTO), and International Monetary Fund (IMF), are unable to achieve the necessary collective action because they are underinclusive and fundamentally lack the coercive force of a true world government. This balkanized state of the world morally compels global governance to coordinate and enforce collective action and optimize social welfare.⁷

³ See, e.g., Jonathan H. Adler, *Hothouse Flowers: The Vices and Virtues of Climate Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 443, 448 (2008) (discussing climate change as “archetypal ‘commons’ problem” where emission reduction efforts by individual states do not result in equal benefit and thus encourage free-riding and discourage reduction efforts).

⁴ See, e.g., Thomas W. Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48, 66 (1992) (“[C]hange in Japanese interest rates, or a speculative frenzy of short-selling on the Chicago Futures Exchange, can literally make the difference between life and death for large numbers of people half a world away”); Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 206 (2008) (“[E]xternalities caused by systemic risk would not be prevented or internalized because the motivation of market participants ‘is to protect themselves but not the system as a whole’” (quoting PRESIDENT’S WORKING GROUP ON FIN. MKTS., HEDGE FUNDS, LEVERAGE, AND THE LESSONS OF LONG-TERM CAPITAL MANAGEMENT 31 (1999))).

⁵ See, e.g., Victor Fleischer, *A Theory of Taxing Sovereign Wealth*, 84 N.Y.U. L. REV. 440, 480–94 (2009) (describing positive and negative externalities of sovereign wealth funds). The negative externalities Fleischer describes, such as foreign influence in American policymaking, are created by collective action problems, as the recipients of sovereign wealth fund dollars each benefit individually from foreign investment. *Id.* at 486–88.

⁶ See generally A. C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1962) (arguing that individual actors are ill-equipped to internalize all negative externalities of their activities due to collective action problems); R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (same).

⁷ See Pogge, *supra* note 4, at 66 (“[T]he fact that what a population does within its own national borders . . . now often imposes very significant harms and risks upon outsiders brings into play the political human rights of these outsiders, thereby morally undermining the conventional insistence on absolute state autonomy . . . [and requiring] democratic centralization of decision making”); see also *infra* Part I.B (applying consequentialist justification for overcoming collective action problems).

Although few object to this idea initially, most reject it ultimately for two reasons.⁸ First, critics claim that a world government would result in “global despotism”⁹ because it would require a monopoly on force to be truly effective, posing a threat to national sovereignty.¹⁰ Alternatively, critics claim it would be “a fragile empire torn by frequent civil strife” because to alleviate such sovereignty concerns, a world government would have to lack the teeth necessary to achieve sufficient collective action.¹¹

I argue that a world government need not fall into either extreme. I offer the European Union’s principle of subsidiarity¹² as a balancing principle that both impels and limits global governance, achieving collective action while respecting national sovereignty.¹³ Subsidiarity requires a world government to let local regulation solve local problems, protecting sovereignty and promoting efficiency. If, however, local action is insufficient to overcome a collective action problem, subsidiarity requires the intervention of a centralized authority. Subsidiarity’s dual function of both legitimizing and limiting higher governmental intervention is morally desirable and economically efficient. Furthermore, in contrast to federalism writ large,¹⁴ sub-

⁸ See, e.g., JOHN RAWLS, *THE LAW OF PEOPLES* 36 & n.40 (1999) (joining other philosophers in rejecting desirability of world government).

⁹ *Id.* at 36. But see Pogge, *supra* note 4, at 63 (recognizing that world state “poses significant risks of oppression,” but could also “lead to significant progress in terms of peace and economic justice”).

¹⁰ See Pogge, *supra* note 4, at 57–58 (noting that “the idea of the autonomous territorial state as the preeminent mode of political organization” is “[c]entral to contemporary political thought and reality”).

¹¹ RAWLS, *supra* note 8, at 36 & n.40; see also Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 136–37 (2005) (“Resistance to the erosion of sovereignty has resulted in the U.S. refusal to join the Kyoto Treaty on atmospheric emissions and the International Criminal Court, decisions that have been widely criticized.”).

¹² Consolidated Version of the Treaty Establishing the European Community art. 5, Dec. 29, 2006, 2006 O.J. (C 321E) 46 [hereinafter EC Treaty].

¹³ For a similar theory, although one not based on subsidiarity, see Pogge, *supra* note 4, at 57–58. Pogge proposes a multilayered scheme of vertical sovereignty that would both centralize and decentralize world governmental authority. *Id.* He suggests that instead of owing their primary political allegiance to a single nation-state, persons “should be citizens of, and govern themselves through, a number of political units of various sizes, without any one political unit being dominant.” *Id.* at 58. To disperse and allocate political authority, Pogge proposes that “decision making should be decentralized as far as possible,” but that externalities would compel centralization in specific instances. *Id.* at 65–67. To choose between the two options, Pogge suggests that the guiding principle should be democratic representation—that is, ensuring that those affected by a problem are the ones to decide whether and how to regulate it. *Id.* at 63–64, 67–68.

¹⁴ See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1356 n.8 (2006) (noting significant international implications, given “increasing globalization of commercial relations,” of argument that Supreme Court uses preemption and forum-allocation cases to “federalize” certain areas of law in response to negative externalities imposed on states by other states’ actions).

sidiarity does not prescribe the form of local collective action, allowing for both public and private forms.¹⁵ Public forms of collective action involve government action, such as public regulation, treaties between nations, or participation in public international institutions such as the WTO. Private collective action includes Coasian bargaining between private parties or the efforts of private international institutions such as Greenpeace. This institutional flexibility is ideal in a large, diverse world and allows subsidiarity to assume an expansive role as an organic, legitimizing framework for global institutional choice and to demarcate a world government's sphere of responsibility.

This Note proceeds in three parts. Part I briefly reviews the economic and moral dimensions of collective action problems, explaining why lower-level polities are ill-equipped to handle certain collective action problems and the corollary moral imperative to overcome these limitations. Part II examines how governments can solve collective action problems through coordination and centralized decision-making. It introduces the principle of subsidiarity as a constitutional mechanism to allocate and legitimize different levels of political authority and gives examples of its use in the European Union. Part III applies these ideas on a global scale, explaining how a world government would operate under subsidiarity and anticipating possible criticisms to its implementation.

I

COLLECTIVE ACTION PROBLEMS

Collective action problems arise when individuals act rationally to maximize their own private welfare and yet fail to achieve a socially optimal result. Collective action problems lead to economically inefficient and morally undesirable results because they stand as a direct bar to the maximization of aggregate welfare. This Part demonstrates the negative consequences of these problems and explains the economic and moral justifications for their resolution.

¹⁵ For more on the subtle but real differences between federalism and subsidiarity, see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 404 (1994) (“[A]lthough federalism conveys a general sense of a vertical distribution, or balance, of power, it is not generally understood as expressing a preference for any particular distribution of that power In this respect, federalism and subsidiarity, though of course closely related, are quite different.”).

A. *The Economics of Collective Action Problems*

Collective action problems can lead to suboptimal social welfare, which is economically inefficient.¹⁶ The iconic example is the prisoner's dilemma from game theory.¹⁷ The game's key concept is that a group of actors, each acting rationally in her individual self-interest, will not reach a socially optimal result without cooperation. The problem stems from the fact that each individual fails to incur the full cost or benefit of her action, thus skewing her immediate incentive to continue or discontinue an activity.¹⁸ This failure to internalize the full cost or benefit of an activity often occurs because certain activities have externalities that affect other agents.¹⁹

The paradigmatic example of an externality is air and water pollution, where air and water currents export pollution away from the producer while the producer still reaps the full benefit of her pollution-generating activity.²⁰ Thus, the negative externality results in the overproduction of a harmful activity, which is an inefficient outcome, or a market failure.

The opposite problem of positive externalities, where an actor fails to realize the full benefit of her activity, can also inhibit the attainment of optimal social welfare. A canonical example is vaccina-

¹⁶ See generally PIGOU, *supra* note 6; Coase, *supra* note 6.

¹⁷ See generally DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* (1994). The prisoner's dilemma proceeds as follows: Two prisoners complicit in a crime are in separate interrogation rooms and must choose whether to confess. If one confesses and the other does not, then the prosecutor will drop the confessor's charges, and the nonconfessor will receive a harsh punishment. If both confess, then each will receive a moderate punishment. If, however, neither confesses, then each will receive only a light punishment. A representative payoff matrix could be as follows:

		Prisoner 2	
		Not confess	Confess
Prisoner 1	Not confess	-1, -1	-5, 0
	Confess	0, -5	-3, -3

Even though collectively both are better off not confessing, because the other might confess each party has the incentive to confess to ensure that she does not receive the harshest punishment. The "dilemma" is that, as compared to the result if neither had confessed, this equilibrium is the suboptimal result for the two prisoners.

¹⁸ Francis M. Bator, *The Anatomy of Market Failure*, 72 Q.J. ECON. 351, 351 (1958) (describing market failure as "the failure of a more or less idealized system of price-market institutions to sustain 'desirable' activities or to estop 'undesirable' activities").

¹⁹ PIGOU, *supra* note 6, at 184-86 (describing externality as situation in which effects of using resource fall on someone other than direct user). In the prisoner's dilemma, the externality is one prisoner's decision whether to confess affecting the other prisoner's punishment.

²⁰ See *id.* at 185-86 (providing example of construction of factory in residential zone causing decrease in value of residential land).

tions, where the benefit of an individual actor not contracting a disease accrues also to others who might have caught it from her.²¹ Here, the market failure occurs when an individual forgoes a vaccination because the personal benefits are not great enough to outweigh the personal costs, leading to an inefficient loss of a benefit whose marginal gain to society outweighs the marginal social cost.

Free-rider problems also result from positive externalities, which further inhibit optimal social welfare. The actor who does not get a vaccination because everyone else will is a free rider of a public good. Such public goods are nonexcludable and nonrivalrous—that is, no one can exclude the individual from benefiting from the public good and an individual's consumption of the benefit does not inhibit or restrict another's consumption.²² Therefore, the free rider can reap the benefit without incurring the cost. But because everyone else will come to the same conclusion, no one will pay, and no one will get the benefit. Virtually any public good will impose acute costs on discrete groups but provide diffuse benefits to less defined groups, or vice versa.²³ These differential costs and benefits result in actors failing to internalize the full costs and benefits of their actions, leading to suboptimal market results.²⁴

B. The Moral Dimensions of Collective Action Problems

The previous section demonstrates that collective action problems lead to suboptimal and economically inefficient results. But who cares? A political theory that legitimizes higher-order governmental intervention needs a normative justification for overcoming collective action problems beyond the achievement of economic efficiency. This Note's underlying premise is that optimizing social wel-

²¹ Dorothy Puzio, *An Overview of Public Health in the New Millenium: Individual Liberty vs. Public Safety*, 18 J.L. & HEALTH 173, 184 n.77 (2004) (“The underlying impetus for mandatory immunization is really an externality principle. It is not as much for the individual child's benefit . . . as it is for the broader public good. When children are vaccinated, it provides great benefits to all those they come into contact with. This is a positive externality.”).

²² See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416 (1956) (defining public goods as those “which all enjoy in common in the sense that each individual's consumption of such a good leads to no subtraction from any other individual's consumption of that good” (quoting Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 35 REV. ECON. & STAT. 387, 387 (1954))).

²³ JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 291 (1962) (“Almost any conceivable collective action will provide more benefits to some citizens than to others, and almost any conceivable distribution of a given cost sum will bear more heavily on some individuals and groups than on others.”).

²⁴ *Id.* at 292.

fare is morally desirable. Under consequentialism,²⁵ or, more precisely, under certain versions of consequentialism such as welfarism, social welfare is a moral good that we ought to maximize. Thus, I argue that at least one of the potentially many roles of government is to maximize social welfare.²⁶ To the extent that collective action problems stand as a bar to that goal, it is fair to assert that it is morally incumbent upon governments to overcome them.

Externalities often harm people. Negative externalities like pollution reduce social welfare because, for example, dirty air is worse than clean air. Thus, consequentialism might require the state, as a powerful collective decisionmaker, to impose coercive force in the form of sanctions to mitigate undesirable behavior by “internalizing” externalities and thereby bring social welfare back to its preexisting level. Conceivably, consequentialism is not necessary to make this argument, as a harm principle²⁷ could also morally impel government intervention in this situation. A harm principle, however, does not effectively address the problem of positive externalities.

Again, consider vaccinations. The positive externalities and free-rider problems that lead someone not to get vaccinated do not reduce her welfare from her status quo, but rather prevent her from achieving a positive good for society over and above her own personal welfare. Here, consequentialism can require the state to intervene and mandate vaccinations in order to maximize social welfare. To justify intervention under a harm principle, however, would require recharacterizing the harm from the common notion of reducing welfare to the notion of failing to achieve higher welfare. In other words, it would require moving the baseline of comparison and defining anything less than socially optimal behavior as a harm. Consequentialism is superior here because it sets optimal social welfare as its goal from the outset, and thereby provides a clear and straightforward moral

²⁵ Consequentialism is the broad ethical theory that the consequences of an action determine its moral rightness or wrongness. The appropriate metric for measuring what consequences are good or bad is an important question, and utility is perhaps the most well-known and controversial metric among many other possibilities. In this Note, I use social welfare as the metric. I do not delve into deeper questions about what welfare actually is, nor do I address how to measure welfare. For more on consequentialism, see generally SHELLY KAGAN, *THE LIMITS OF MORALITY* (1989).

²⁶ Cf. ROBERT E. GOODIN, *UTILITARIANISM AS A PUBLIC PHILOSOPHY* (1995) (defending utilitarianism as social policy). Social policy is corollary to the welfare-based principle I espouse. See generally INTERPERSONAL COMPARISONS OF WELL-BEING (Jon Elster & John E. Roemer eds., 1991) (surveying role of welfare in political philosophy and welfare economics).

²⁷ For more on the normative principle that governments should prevent harms, see generally JOEL FEINBERG, *HARM TO SELF* (1989), available at <http://www.oxfordscholarship.com/oso/public/content/philosophy/9780195059236/toc.html>.

imperative for governments to overcome collective action problems posed by both negative and positive externalities.

Of course, consequentialism is not immune to criticism. Peter Singer is famous for pushing consequentialism to its limits, arguing that it requires that we always do the best that we can,²⁸ leading many to criticize the theory as too demanding.²⁹ Liam Murphy, however, is keen to point out that consequentialism's apparent ability to over-demand stems from a collective action problem.³⁰ As the world is now, few of us do anything close to as much as we can to promote social welfare. But if everyone did their part, then the demand on any one person would be considerably less.³¹

Murphy's insight highlights the moral role of governments with respect to collective action problems. Governments have the ability to optimize social welfare by acting as centralized decisionmakers to compel collective action and achieve otherwise unattainable goods. Consequentialism morally requires such intervention. Nevertheless, government intervention is not always the most efficient means of obtaining optimal social welfare. The next Part introduces the principle of subsidiarity as a way to decide when governments should act to solve collective action problems—namely, when centralization is the most effective and efficient means of achieving otherwise unobtainable goods. Although this argument has proceeded under consequentialism thus far, Part III argues that subsidiarity also limits centralization so as to preserve other moral values such as sovereignty and self-determination.³²

²⁸ Peter Singer, *Famine, Affluence and Morality*, 1 PHIL. & PUB. AFF. 229, 230–31 (1972). See generally PETER UNGER, *LIVING HIGH & LETTING DIE: OUR ILLUSION OF INNOCENCE* (1996) (making similar argument that one has moral duty to do best one can by, for example, making large donations to life-saving charities).

²⁹ See, e.g., Richard W. Miller, *Beneficence, Duty, and Distance*, 32 PHIL. & PUB. AFF. 357, 370–72 (2004) (arguing that moral significance arises out of sympathy for, not actual harm to, other individuals); David Schmitz, *Islands in a Sea of Obligation: Limits of the Duty To Rescue*, 19 L. & PHIL. 683, 684 (2000) (citing uncertainty in results, selective focus on particular harms, and conflicting social constraints as reasons to question consequentialist claims). See generally KAGAN, *supra* note 25 (offering indirect defense of consequentialism by critiquing claims that consequentialism demands and permits too much).

³⁰ See Liam B. Murphy, *The Demands of Beneficence*, 22 PHIL. & PUB. AFF. 267, 272 (1993) (arguing that consequentialism is less demanding when there is full compliance by all actors as opposed to situations of partial compliance).

³¹ *Id.*

³² See generally Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591 (1983) (discussing continuing moral force of national sovereignty); Thomas Hurka, *The Justification of National Partiality*, in *THE MORALITY OF NATIONALISM* 139 (Robert McKim & Jeff McMahan eds., 1997) (discussing moral justifications for national partiality); David Miller, *The Ethical Significance of Nationality*, 98 ETHICS 647 (1988) (arguing that national boundaries are ethically significant). But see Robert E. Goodin,

II CENTRALIZED DECISIONMAKING AND THE PRINCIPLE OF SUBSIDIARITY

Part I established that it is economically and morally imperative to overcome collective action problems. This Part demonstrates how to do so. Section A demonstrates that governments can induce parties to internalize externalities by creating incentives and disincentives through the sword and purse of the state. There are, however, other ways by which people cooperate to overcome collective action problems, such as free-market Coasian bargaining and acting through private institutions, that may prove more efficient than government intervention. Thus, Section B introduces the principle of subsidiarity from the European Union to ascertain when government intervention—and ultimately, a world government’s intervention—is appropriate and explains how its application both optimizes social welfare and preserves national sovereignty. Section C gives examples of subsidiarity’s short history in the European Union and highlights the need and potential for subsidiarity to develop into a robust, justiciable principle of constitutional law.

A. Coordination by the Government as a Centralized Decisionmaker

Governments play a key role in solving collective action problems by imposing costs or conferring benefits on parties, forcing them to internalize costs or benefits that would otherwise fall upon society as a whole.³³ For example, a government can force actors to internalize negative externalities by criminalizing activities,³⁴ providing penalties through tort law,³⁵ or imposing a Pigouvian tax.³⁶ In the case of posi-

What Is So Special About Our Fellow Countrymen?, 98 *ETHICS* 663 (1988) (questioning shared nationality as exclusive basis of moral duties to compatriots).

³³ PIGOU, *supra* note 6, at 194–95; *see also supra* Part I.A (detailing economics of collective action problem).

³⁴ *See, e.g.*, Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 *DUKE L.J.* 1, 35 (“The prosecution of crimes is conducted by the government because this facilitates the preference-shaping process and no single individual has sufficient interest in society’s preference-shaping policy to undertake the task.”).

³⁵ *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 167 (6th ed. 2003) (explaining that civil remedies can overcome transaction costs and produce optimal precautions); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499, 500–01 (1961) (discussing justifications for enterprise liability); Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 *CAL. L. REV.* 1, 3–11 (1985) (“[A] simple negligence rule creates a condition in which each party bears the costs of the harm caused by a small decrease in his precaution.”).

³⁶ *See* PIGOU, *supra* note 6, at 192 (describing taxation of undesirable activity as one way to internalize negative externalities).

tive externalities, the government can simply provide the under-produced public good itself—as with roads, education, or national defense³⁷—and essentially force the redistribution of resources through the taxation of its citizens. Alternatively, the government can subsidize an activity, which effectively allows individuals to internalize the benefits of their behavior.³⁸

The power of the state, however, is not the only possible source of coordination to solve collective action problems. In the context of property rights, Ronald Coase famously argued that if transaction costs were sufficiently low, parties would naturally reach a market-efficient and socially optimal result regardless of the initial distribution of entitlements and liabilities.³⁹ He argued that parties affected by externalities would bargain with the offending parties such that, over time, the party able to bear the costs most cheaply would end up with the resource.⁴⁰ The key assumption underlying Coasian bargaining, however, is low transaction costs.⁴¹ The inherent difficulties in identifying the affected parties and accurately measuring the costs of widespread externalities stand as potential bars to efficient bargaining.⁴² Thus, as externalities grow in scale, groups tend to self-organize and to form neighborhood organizations, labor unions, or other private institutions to overcome the mounting costs of bilateral contracting.⁴³ When the number and complexity of resource users and affected parties reach a certain threshold, however, government regulation may become the most efficient, and possibly only, practical

³⁷ See *id.* at 193 (“A more extreme form of bounty, in which a governmental authority provides *all* the funds required, is given upon such services as the planning of towns, police administration, and, sometimes, the clearing of slum areas.”).

³⁸ See *id.* (noting that paying actors for desirable activity can internalize positive externalities).

³⁹ Coase, *supra* note 6, at 4–6, 12–19.

⁴⁰ Coase used the example of a cattle-raiser whose cattle stray onto a neighboring farmer’s land and destroy his crops. The cattle-raiser would pay the farmer to leave the land uncultivated or rent the land himself. *Id.* at 2–5.

⁴¹ *Id.* at 15 (Coasian bargaining operates “on the assumption . . . that there are no costs involved in carrying out market transactions. This is, of course, a very unrealistic assumption.”).

⁴² See *id.* at 15–16 (describing complications introduced by transaction costs); see also Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 555, 557 n.3 (2001) (“For large-scale and complex environmental problems, such as air pollution covering a large area, Coasian bargaining is unlikely because uncertainty about pollution’s geographic impact bars transactions.”); Jeremy Ledger Ross, *An Economic Analysis of Aquilian Liability*, 14 TUL. J. INT’L & COMP. L. 521, 522 (2006) (“[T]he Coase Theorem is somewhat limited in tort, where . . . the costs of bargaining for a right can be so high as to render them prohibitive.”).

⁴³ See Coase, *supra* note 6, at 16 (noting that alternative forms of collective action “could achieve the same result at less cost than would be incurred by using the market [and] would enable the value of production to be raised”).

means of overcoming a collective action problem.⁴⁴ The possibility of private, nongovernmental forms of cooperation and collective action raises the crucial question of institutional choice: When should a government let free-market bargaining solve collective action problems, and when should it step in with the force of the state?⁴⁵ The next Section introduces the European Union's principle of subsidiarity as a guiding principle for institutional choice that embodies this efficiency concern while simultaneously preserving national sovereignty.

B. *The Principle of Subsidiarity and Its History*

The principle of subsidiarity is an obscure term in the U.S. political lexicon,⁴⁶ but it has quickly become the "mainstay of European Community law."⁴⁷ The Treaty of Maastricht ("EC Treaty"), which established the the European Community, expresses the principle of subsidiarity as follows:

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 insofar 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.⁴⁸

Subsidiarity traces its roots to classical Greece in the teachings of Aristotle and later in the writings of Thomas Aquinas and other medieval scholastics.⁴⁹ At the U.S. Constitutional Convention, it saw a brief appearance in Edmund Randolph's Virginia Plan, but the framers ultimately rejected it after debate.⁵⁰ Subsidiarity emerged

⁴⁴ *Id.* at 17 ("[A]dministrative costs might well be so high as to make any attempt to deal with the problem within the confines of a single firm impossible. An alternative solution is direct Government regulation.").

⁴⁵ *See id.* at 18 ("[T]he problem is one of choosing the appropriate social arrangement for dealing with the harmful effects."); *see also* BUCHANAN & TULLOCK, *supra* note 23, at 5 ("The important choice that the group must make, willy-nilly, is: How shall the dividing line between collective action and private action be drawn? What is the realm for social and for private or individual choice?").

⁴⁶ Gregory R. Beabout, *Challenges to Using the Principle of Subsidiarity for Environmental Policy*, 5 U. ST. THOMAS L.J. 210, 211 (2008) ("[T]he principle of subsidiarity is not well known in North America . . .").

⁴⁷ Issacharoff, *supra* note 2, at 235.

⁴⁸ EC Treaty, *supra* note 12, art. 5.

⁴⁹ Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40–41 (2003); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 620 (2007).

⁵⁰ David P. Currie, *Subsidiarity*, 1 GREEN BAG 2d 359, 359–60 (1998) (quoting Virginia Plan's resolution that national legislature would have power to legislate when states were incompetent or too conflicting to be harmonious). Although the federalism that the United

most prominently in nineteenth-century Catholic social doctrine amid tension between laissez-faire capitalism and Marxist socialism. In the first papal encyclical *Rerum Novarum*, Pope Leo XIII implicitly invoked the principle of subsidiarity in the context of ensuring adequate working conditions for laborers.⁵¹ Leo first argued that a “public authority must step in” when a particular social harm “can in no other way be met or prevented.”⁵² This articulation suggests that a government has a moral duty to abate social harms perpetuated by collective action problems.

Leo XIII, however, also limited that authority: The scope of government intervention “must be determined by the nature of the occasion which calls for the law’s interference—the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil.”⁵³

In secularizing the concept, the European Community’s expression of subsidiarity retains three key concepts from the Catholic iteration. First, both establish conditions under which the state must exercise authority. Leo XIII mandated that the state “*must* step in” when individuals cannot prevent harms.⁵⁴ Similarly, the EC Treaty stipulates that the Community “*shall* take action” if its member states cannot achieve the desired objectives by themselves.⁵⁵ In doing so, both express a moral imperative for government action: to achieve otherwise unattainable goods, which is a socially optimal and economically efficient result.

States ultimately adopted is very similar to subsidiarity—both are fundamentally about the allocation of power—there are subtle but important differences. *See supra* note 15 and accompanying text (describing differences between subsidiarity and federalism).

⁵¹ Carozza, *supra* note 49, at 41.

⁵² Pope Leo XIII, *Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor*, in 2 THE PAPAL ENCYCLICALS 1878–1903, at 250 (Claudia Carlen ed., 1981) [hereinafter *Rerum Novarum*].

⁵³ *Id.* at 250–51. Forty years later, Pope Pius XI reformulated the principle more explicitly in the encyclical *Quadragesimo Anno*:

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

Pope Pius XI, *Quadragesimo Anno: Encyclical of Pope Pius XI on Reconstruction of the Social Order*, in 3 THE PAPAL ENCYCLICALS 1903–1939, at 415, 428 (Claudia Carlen ed., 1981) [hereinafter *Quadragesimo Anno*].

⁵⁴ *Rerum Novarum*, *supra* note 52, at 250 (emphasis added).

⁵⁵ EC Treaty, *supra* note 12, art. 5 (emphasis added).

Second, both establish strict limits on state action, creating an inherent tension in their mandates.⁵⁶ Catholic doctrine cautions that the law “must not undertake more” than necessary,⁵⁷ and that it would be a “grave evil and disturbance [sic]” for a higher polity to infringe upon what a lower polity could accomplish on its own.⁵⁸ The EC Treaty sets up the same tension in Article 3b by prescribing that “[t]he Community *shall* act *within* the limits of the powers conferred upon it” and by allowing Community action “only if and *insofar as*” it is necessary to achieve the otherwise unattainable objective.⁵⁹

Third, both proceduralize a concern for self-determination “by creating a presumption of local regulatory autonomy.”⁶⁰ Under Catholic doctrine, the state was merely subsidiary to—that is, supplemental to—the individual.⁶¹ Similarly, one of the animating reasons for subsidiarity’s incorporation into the Treaty of Maastricht was the fear that the European Union would erode national sovereignty.⁶²

I propose subsidiarity as an organic⁶³ framework for global governance—which is normatively and functionally desirable in light of the various collective action problems plaguing the world—that maximizes aggregate welfare and promotes efficiency while preserving national sovereignty. As demonstrated by the EC Treaty’s requirement that the Community take action when member states cannot achieve a desired good “by reason of the scale or effects of the proposed action,” subsidiarity justifies intervention from higher levels of governance when transnational collective action problems are pre-

⁵⁶ See Carozza, *supra* note 49, at 41, 44 (“Subsidiarity is therefore a somewhat paradoxical principle. It limits the state, yet empowers and justifies it. It limits intervention, yet requires it. It expresses both a positive and a negative vision of the role of the state with respect to society and the individual.”); see also Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 118 (2001) (“This dual negative/positive meaning—imposing both limitations and affirmative duties on the government—is apparent in the Church’s teachings on subsidiarity.”).

⁵⁷ *Rerum Novarum*, *supra* note 52, at 251.

⁵⁸ *Quadragesimo Anno*, *supra* note 53, at 428.

⁵⁹ EC Treaty, *supra* note 12, art. 5 (emphases added).

⁶⁰ Issacharoff, *supra* note 2, at 235.

⁶¹ See Carozza, *supra* note 49, at 42 (“[Under subsidiarity,] the value of the individual human person is ontologically and morally prior to the state or other social groupings. Because of this value, all other forms of society, from the family to the state and the international order, ought ultimately to be at the service of the human person.”).

⁶² See Reimer von Borries & Malte Hauschild, *Implementing the Subsidiarity Principle*, 5 COLUM. J. EUR. L. 369, 371 (1999) (describing historical incorporation of subsidiarity as caused by “fears that the Community could develop an excessively strong centralist dynamic”).

⁶³ I use the term “organic” as lawyers use it in administrative law—that is, as the underlying principle that lends authority. In administrative law the underlying organic statute creating the agency grants it its authority. Similarly, I propose subsidiarity as the underlying constitutional principle that would give a world government its authority.

sent.⁶⁴ Thus, subsidiarity embodies the moral imperative for a world government to achieve socially optimal and economically efficient results while protecting national sovereignty through a presumption in favor of local regulation. The next Section reviews the history of subsidiarity in practice in the European Union and emphasizes its potential to develop into a robust constitutional principle for global governance.

C. Examples of Subsidiarity in Practice

Subsidiarity has yet to develop into a robust, justiciable principle, but it holds much promise. Since the principle's promulgation in the 1992 Treaty of Maastricht, the Court of Justice of the European Communities (ECJ)⁶⁵ has addressed a federal law's compliance with subsidiarity in a few cases but has yet to delineate a clear standard of review.⁶⁶ Subsidiarity has also made scattered appearances in the constitutional law of Germany,⁶⁷ Poland,⁶⁸ and Italy.⁶⁹

⁶⁴ EC Treaty, *supra* note 12, art. 5; *see also* Christian Kirchner, *The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics*, 6 TUL. J. INT'L & COMP. L. 291, 306 (1998) ("The wording of the provision, 'by reason of scale or effects of the proposed action,' binds together the issue of economies of scale on the one hand and the issue of externalities on the other.").

⁶⁵ The Court of Justice of the European Communities (ECJ) is the highest court in the European Union in matters of Community law. Court of Justice Presentation, http://curia.europa.eu/jcms/jcms/Jo2_7024/ (last visited Jan. 31, 2010).

⁶⁶ *See, e.g.*, Case C-210/03, *Swedish Match AB v. Sec'y of State for Health*, 2004 E.C.R. I-11893 (manufacture and sale of tobacco products); Case C-491/01, *The Queen v. Sec'y of State for Health ex parte British Am. Tobacco (Invs.) Ltd.*, 2002 E.C.R. I-11453 [hereinafter *B.A.T. Case*] (manufacture and sale of tobacco products); Case C-377/98, *Netherlands v. Parliament & Council*, 2001 E.C.R. I-7079 (protection of biotechnological inventions); Case C-376/98, *Germany v. Parliament & Council*, 2000 E.C.R. I-8419 (manufacture and sale of tobacco products); Case C-233/94, *Germany v. Parliament & Council*, 1997 E.C.R. I-2405 (bank deposit guarantee schemes); Case C-84/94, *United Kingdom v. Council*, 1996 E.C.R. I-5755 (working conditions).

⁶⁷ GRUNDGESETZ [GG] [Constitution] art. 72(2) (F.R.G.), *translated in* GERMAN BUNDESTAG, BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY 44 (Christian Tomuschat & David P. Currie trans., 2008), *available at* <https://www.btg-bestellservice.de/pdf/80201000.pdf>; *see also* Greg Taylor, *Germany: The Subsidiarity Principle*, 4 INT'L J. CONST. L. 115 (2006) (evaluating impact of art. 72(2)).

⁶⁸ KONSTYTUCJA RZECZYPOSPOLITEJ POLSKIEJ [Constitution] pmbl. (Pol.), *available at* <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm> (English translation); *see also* Ewa Poplawska, *The Principle of Subsidiarity Under the 1997 Constitution of Poland*, 1997 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 107, 114–18 (1997) (discussing inclusion of subsidiarity in Polish Constitution).

⁶⁹ COSTITUZIONE [Constitution] art. 118(1) (Italy), *available at* http://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (English translation) ("Administrative functions are attributed to the Municipalities, unless they are attributed to the provinces, metropolitan cities and regions or to the State, pursuant to the principles of subsidiarity, differentiation and proportionality, to ensure their uniform implementa-

Currently, in the European Union, the subsidiarity inquiry first falls upon the European Commission, which is responsible for drafting and proposing legislation.⁷⁰ The Commission must perform a subsidiarity impact analysis and address the following in an explanatory memorandum: (1) the purpose of the proposed Community action, (2) “the Community dimension of the problem (i.e., how many member states are involved and what solution has been applied to date),” (3) “the most effective solution, given the means available to the Community and to Member States,” and (4) “the specific added value of the proposed Community action and the cost of failing to act.”⁷¹ The Commission must confer with member states on the subsidiarity impact analysis and publish the memorandum in the Official Journal for comment before passing legislation to the European Council and the European Parliament for a vote.⁷² In voting on legislation, the European Council and European Parliament must also independently conduct a subsidiarity analysis.⁷³ Although one can criticize these procedures as soft political guidelines, they help establish a legislative record for review and enhance transparency.⁷⁴ Moreover, in performing this analysis, the Commission may determine that member states are capable of achieving a desired goal without Community intervention, and, in fact, the Commission has reported that these procedures have resulted in fewer legislative submissions to the Council and Parliament.⁷⁵

Subsidiarity’s development as a principle for judicial review has not been as substantive. The ECJ has heard few cases challenging

tion.”); *see also* Tania Groppi & Nicoletta Scattone, *Italy: The Subsidiarity Principle*, 4 INT’L J. CONST. L. 131, 134–35 (2006) (evaluating adoption and impact of subsidiarity).

⁷⁰ George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 379 (1994).

⁷¹ *Id.* at 380–81.

⁷² *Id.* at 381.

⁷³ *Id.* at 382 & n.217; Christoph Henkel, *The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity*, 20 BERKELEY J. INT’L L. 359, 372–73 (2002).

⁷⁴ *See* Bermann, *supra* note 70, at 379–80 (“The [subsidiarity impact] analysis might of course produce much less conclusive results. In any event, the Commission’s impact analysis could constitute the record on which the other institutions . . . base their own initial assessments of any Commission proposal.”); Henkel, *supra* note 73, at 372–73 (arguing that European Council’s attempt to establish procedures for subsidiarity analysis in Community legislation at least provides transparency and may lead to more formal analysis).

⁷⁵ *Commission Report to the European Council on the Adaptation of Community Legislation to the Subsidiarity Principle*, at 4, COM (1993) 545 final (Nov. 24, 1993), available at http://aei.pitt.edu/919/01/subsidiarity_1993_report_COM_93_545.pdf (“Detailed examination of the subsidiarity principle has already led to a reduction in the number of proposals put forward by the Commission in 1993 compared with previous years.”).

Community legislation under subsidiarity, and each time it has brushed over the question in broad, deferential language with little substantive analysis.⁷⁶ For example, in *The Queen v. Secretary of State for Health ex parte British American Tobacco (Investors) Ltd.*, a Community law replaced the differing member states' laws on the manufacture and sale of tobacco products with a single standard.⁷⁷ These varying laws had inhibited public health⁷⁸ and had created barriers to free trade,⁷⁹ as one jurisdiction's less stringent requirements imposed externalities on other jurisdictions. These differences made it difficult for a member state to implement higher standards in the interest of public health and consumer protection because of the economic consequences of doing so, such as a company deciding to withdraw its products from that state's market. Thus, the lack of coordination created a race to the bottom where states adopted less stringent standards than otherwise would be optimal, detrimentally affecting public health and leaving consumers uninformed.

The plaintiff tobacco companies claimed that the law violated the principle of subsidiarity because the member states could have achieved the objective of harmonization on their own.⁸⁰ In addressing the issue, the court asked "whether the objective of the proposed action could be better achieved at the Community level,"⁸¹ and in a single sentence held that "[s]uch an objective cannot be sufficiently achieved by the Member States individually and calls for action at the Community level, as demonstrated by the multifarious development

⁷⁶ See Henkel, *supra* note 73, at 382 (discussing ECJ's "restraint in interpreting the Principle of Subsidiarity in more detail or in establishing additional justiciable standards"); Mattias Kumm, *Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union*, 12 EUR. L.J. 503, 504 (2006) ("[I]n *Swedish Match* in particular the Court of Justice struggles to find a way to translate the EU's commitments to both a functioning internal market and the principle of subsidiarity and proportionality into a plausible legal test."); Florian Sander, *Subsidiarity Infringements Before the European Court of Justice: Futile Interference with Politics or a Substantial Step Towards EU Federalism?*, 12 COLUM. J. EUR. L. 517, 541 (2006) ("The general pattern of subsidiarity in ECJ adjudication appears to be quite inane. Several decisions illustrate that the ECJ abstains from a substantive approach.").

⁷⁷ *B.A.T. Case*, *supra* note 66, ¶¶ 6–22.

⁷⁸ *Id.* ¶ 14 ("The aim of this Directive is to approximate the laws, regulations and administrative provisions of the Member States concerning the maximum tar, nicotine and carbon monoxide yields of cigarettes . . . taking as a basis a high level of health protection.").

⁷⁹ *Id.* ¶¶ 9–12, 14 (finding various differences "likely to constitute barriers to trade and to impede the smooth operation of the internal market").

⁸⁰ See *id.* (describing claimants' argument "that no evidence has been adduced to show that the Member States could not adopt the measures of public health protection they considered necessary").

⁸¹ *Id.* ¶ 180.

of national laws in this case.”⁸² In other words, the court recognized a collective action problem and, on that basis, validated the Community’s intervention under subsidiarity. The ECJ, in every other relevant case so far, has given the same deference to the legislature’s conclusory statement that harmonizing differing member states’ laws on a particular subject necessitates Community action⁸³ and has failed to establish a rigorous legal standard of review.⁸⁴

Still, the court’s holding in *Ex parte British American Tobacco* is admirable. For the first time since subsidiarity’s adoption in 1992, the court explicitly employed subsidiarity as a justiciable constitutional principle, albeit with painful generality, against which Community laws must withstand scrutiny.⁸⁵ Furthermore, the court began to explore the contours of a proportionality test for subsidiarity by noting that the law “did not go beyond what was necessary to achieve the objective pursued.”⁸⁶ In other words, the court recognized that the scope of the government action must be commensurate with the scope of the problem in order to avoid an abuse of power. Several commentators have endorsed proportionality as showing promise as a way to develop subsidiarity into a robust, justiciable principle.⁸⁷

Poland, Italy, and Germany have also adopted expressions of subsidiarity that mirror the EU version.⁸⁸ For example, the 1994 amendment to Article 72(2) of the German Basic Law states that the German Federation has “the power to enact legislation if, and to the extent that, federal legislation is necessary . . . for the maintenance of legal or economic unity in the interests of the whole state.”⁸⁹ In 2002, the state of Bavaria challenged Germany’s Federal Geriatric Care Act

⁸² *Id.* ¶ 182 (internal citation omitted).

⁸³ See cases cited *supra* note 66.

⁸⁴ See, e.g., Case C-377/98, *Netherlands v. Parliament & Council*, 2001 E.C.R. I-7079 ¶ 33 (rejecting plea that Community law on biotechnological inventions violated subsidiarity); Case C-84/94, *United Kingdom v. Council*, 1996 E.C.R. I-5755 ¶ 66 (finding “Council did not commit any manifest error” in upholding its harmonization of labor conditions legislation).

⁸⁵ Sander, *supra* note 76, at 542. Previous cases had only addressed whether the legislature had given sufficient grounds to demonstrate its compliance with subsidiarity pursuant to the procedural requirements of Article 253 of the EC Treaty, not whether a challenged law actually violated subsidiarity. *Id.* at 537–41; Henkel, *supra* note 73, at 378–82.

⁸⁶ *B.A.T. Case*, *supra* note 66, ¶ 184.

⁸⁷ See, e.g., Kumm, *supra* note 76, at 519, 522–24 (arguing for three-pronged subsidiarity test including legitimate purpose, necessity in sense of narrow tailoring, and proportionality); see also Henkel, *supra* note 73, at 378 (arguing for necessary interplay between subsidiarity and proportionality to enhance justiciability).

⁸⁸ See *supra* notes 67–69 and accompanying text.

⁸⁹ Taylor, *supra* note 67, at 115–16 (translating Article 72(2) from German into English).

as inconsistent with subsidiarity.⁹⁰ The Act, which replaced various state laws on the training of geriatric care specialists, was intended to improve geriatric care by bringing deficient states up to a uniform national standard.⁹¹ The Federal Constitutional Court upheld the Act under subsidiarity, reciting the legislature's stated justification of harmonization just as the ECJ's cases did.⁹² In contrast to the ECJ, however, the German court expressly held that "there is no absolute legislative discretion" under subsidiarity review.⁹³ Struggling to make subsidiarity review more rigorous, the court refused to defer to the legislature's unilateral legal determination that it had complied with subsidiarity but did defer to the underlying factual determinations on which the legislature based its decision. The court recognized that the legislature needs "room to maneuver" in determining the "'concept and detail' of the law,"⁹⁴ and thus implicitly recognized the need to find a balance between rigorous review of legislation on the one hand and deference to the legislature's institutional competency on the other. While it remains to be seen whether the court's distinction will influence the outcome of future subsidiarity cases in Germany, the German court's effort to make subsidiarity a justiciable principle with real weight is admirable in itself.⁹⁵ Moreover, its jurisprudence may influence or guide future ECJ decisions on subsidiarity.

In sum, subsidiarity has existed as a constitutional principle in Europe only since the early 1990s, and the European courts addressing it have yet to articulate a clear justiciable standard for subsidiarity review. Still, subsidiarity already shows promise. First, in the

⁹⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 24, 2002, 2 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 1/01 (F.R.G.) [hereinafter *Geriatric Care Case*], available at http://www.bundesverfassungsgericht.de/entscheidungen/fs20021024_2bvf000101.html; see also Taylor, *supra* note 67, at 122 (summarizing case in English).

⁹¹ Gesetz über die Berufung in der Altenpflege [AltPflG] [Geriatric Care Act], Nov. 17, 2000, BGBl. I at 1990 (F.R.G.), available at <http://www.gesetze-im-internet.de/bundesrecht/altpflg/gesamt.pdf>; see also Taylor, *supra* note 67, at 122 (describing law in English). Presumably, the Act assumed states could not achieve this higher standard on their own.

⁹² But the court struck down part of the Act on other grounds. *Geriatric Care Case*, *supra* note 90, ¶ 166.

⁹³ Taylor, *supra* note 67, at 123 (quoting *Geriatric Care Case*, *supra* note 90, ¶ 135).

⁹⁴ *Id.* at 124 (same); cf. Berman, *supra* note 70, at 393 ("It is clear that the Court should not in any event conduct a de novo inquiry into the comparative efficacy of Community and Member State action in achieving the Community's objectives. The Court should not even conduct a de novo review of the existing legislative 'record.'").

⁹⁵ Indeed, Germany amended Article 72(2) in 1994 with stronger wording because the Court had struck down a previous version as nonjusticiable. The amendment's legislative history indicated that its purpose was to make subsidiarity "more justiciable." Taylor, *supra* note 67, at 118–19; *id.* at 116 (noting that subsidiarity in Germany is "a principle of domestic constitutional law that seeks to be justiciable").

EU, subsidiarity is more than just a judicial inquiry; it also engages the legislature and the member states. Second, both the ECJ and the German courts have squarely asserted subsidiarity as a justiciable principle that facilitates scrutiny, although both have yet to develop the substance of that scrutiny. The ECJ has begun to flesh out the contours of a proportionality test, and Germany has recognized that it needs to attain a balance between engaging in rigorous review and giving complete discretion to the legislature's institutional competency.

The next Part applies these lessons to the idea of a world government. It demonstrates how subsidiarity could both legitimize and limit a world government in the face of global collective action problems.

III

APPLICATION TO THE GLOBAL ORDER

I propose that the world needs a world government because it faces collective action problems that transcend national boundaries. That proposal alone is innocuous, but few advocate it seriously because of the fear that it would entail the destruction of national sovereignty.⁹⁶ Such a consequence, however, is not the inevitable result of a world government.⁹⁷ Subsidiarity could be an organizing principle for global governance that both legitimizes and limits a world government,⁹⁸ demanding and allowing higher order governance only when lower level polities are unable to resolve problems on their own and preserving a reasonable degree of national sovereignty by favoring local regulation because of its preference for efficiency, autonomy, and self-determination. Section A demonstrates that many collective action problems, such as climate change, now exist globally because nation-states and existing international institutions are unable to overcome them by themselves and that subsidiarity impels the crea-

⁹⁶ See *supra* notes 9–11 and accompanying text (discussing objections to world government).

⁹⁷ My proposal ultimately remains theoretical in arguing that subsidiarity can operate to protect national sovereignty. Of course, it requires the underlying premise that a world government would in fact obey subsidiarity and that it would be enforceable. This discussion is important but lies outside the scope of this Note.

⁹⁸ Professor Thomas Nagel interestingly argues in the opposite analytical direction: that political authority must exist prior to questions of its legitimacy. See Nagel, *supra* note 11, at 146 (“While it is conceivable in theory that political authority should be created in response to an antecedent demand for legitimacy, I believe this is unlikely to happen in practice.”). Although I do not necessarily disagree with Nagel’s position, I do think it is important to entertain when global governance might be justified as an abstract matter.

tion of a world government as the most efficient and effective solution available.⁹⁹

Section B attempts to allay the natural but unmerited fear of a global monopoly on force by examining the distinct limits that subsidiarity would impose on a world government. I stress not only subsidiarity's original, motivating predicate of autonomy and self-determination, but also its consequentialist mandate to promote efficiency, both of which would preserve national sovereignty to a reasonable degree. Section C anticipates potential criticisms of implementing subsidiarity in practice, provides some preliminary responses, and invites additional discussion.

A. *The Need for a World Government*

The world faces collective action problems that transcend national boundaries and require a global solution.¹⁰⁰ Climate change is the paradigmatic example of a global collective action problem because every individual on the planet has the capacity to export the costs of pollution to every other individual,¹⁰¹ thus skewing the private incentive toward further pollution.¹⁰² Furthermore, environmentally sustainable activities are nonexcludable and nonrivalrous goods,¹⁰³ and they therefore suffer from underproduction because of their attendant positive externalities and free-rider problems.¹⁰⁴ Thus, because of the scope and effects of climate change, a single nation cannot solve the problem unilaterally and groups of states have proven unable to solve it multilaterally.¹⁰⁵ Existing international insti-

⁹⁹ At this stage, I am less concerned with global governance's practicability and more concerned with its desirability; therefore, I eschew all questions of practicality.

¹⁰⁰ See *supra* notes 3–5 (citing examples of global externalities).

¹⁰¹ See Adler, *supra* note 3, at 448 (“The global climate is a vast global commons to which everyone contributes greenhouse gas emissions.”); Paul G. Harris, *Collective Action on Climate Change: The Logic of Regime Failure*, 47 NAT. RESOURCES J. 195, 196 (2007) (“Climate change is a collective action problem *par excellence*.”); Jedediah Purdy, *Climate Change and the Limits of the Possible*, 18 DUKE ENVTL. L. & POL'Y F. 289, 292 (2008) (“Within a year of emission, carbon dioxide is uniformly distributed throughout the global atmosphere.”).

¹⁰² See Purdy, *supra* note 101, at 292 (“That is a ratio of benefit to harm guaranteed to create overindulgence.”).

¹⁰³ See *supra* note 22 and accompanying text (explaining nonexcludable and nonrivalrous public goods).

¹⁰⁴ Just as it is technologically infeasible to exclude pollution from a nation's air and water, it is not possible to exclude other nations from benefiting from a nation's sound environmental policies.

¹⁰⁵ See Alexandra Knight, Note, *Global Environmental Threats: Can the Security Council Protect Our Earth?*, 80 N.Y.U. L. REV. 1549, 1555 (2005) (noting that binding environmental treaties are “entirely voluntary,” bear “high costs of collective action,” suffer from states having insufficient “diplomatic firepower,” and are simply “ineffective” against uncooperative states).

tutions are incapable of achieving the necessary collective action for at least two fundamental reasons. First, they are underinclusive because not all nations participate. Second, such institutions fundamentally operate on incentives and voluntary participation, and thus they lack the ability to enforce their mandates.¹⁰⁶ As a result, only the coercive force of a world government could compel the collective action of all the offending nations to bring about the socially optimal result.¹⁰⁷

By their very nature, collective action problems stem from the scope and effects of activities that transcend standard boundaries of jurisdictional responsibility.¹⁰⁸ As a legitimating principle for global governance, subsidiarity requires a world government to remedy these sorts of global collective action problems.¹⁰⁹ Subsidiarity is tailored to the reality that a global problem needs a global solution. Thus, by compelling the existence and intervention of a world government in these situations, subsidiarity furthers the economically efficient and morally desirable goal of optimizing social welfare.¹¹⁰

B. *The Limits of a World Government*

The proposition that a world government ought to optimize social welfare by solving collective action problems is hardly controversial. What is controversial, however, is that a world government would in fact do so.¹¹¹ A natural and fundamental concern that arises with the

¹⁰⁶ See, e.g., Paul H. Brietzke, *Playing Poker at the U.N.*, 26 PENN ST. INT'L L. REV. 317, 377 (2007) ("Many U.N. institutions are thin, unbalanced, and thus incapable of promoting . . . legality and justice generally as solutions to collective action problems."); Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792, 814 (2001) ("The biggest problem with WTO sanctions is that the teeth bite the country imposing the sanction."); Montserrat Gorina-Ysern, *World Ocean Public Trust: High Seas Fisheries After Grotius—Towards a New Ocean Ethos?*, 34 GOLDEN GATE U. L. REV. 645, 707 (2004) ("[T]he key institutions with environmental mandates . . . are ineffective, as they lack enforcement powers.").

¹⁰⁷ Cf. Purdy, *supra* note 101, at 293 ("National-level action is likely to be both politically unattractive and environmentally ineffective The scale of a political fix will have to be that of the problem: all the earth.").

¹⁰⁸ See *supra* note 1 and accompanying text (describing nature of externalities as problems whose scope transcends artificial political boundaries).

¹⁰⁹ See Daniel C. Esty, *Breaking the Environmental Law Logjam: The International Dimension*, 17 N.Y.U. ENVTL. L.J. 836, 842 (2008) ("[S]ubsidiarity [is] a commitment to undertaking environmental decisionmaking at the most decentralized level possible, but not past the point where externalities are fully internalized; and not so rigidly that the benefits of more centralized (even global) regulatory capacity are lost.").

¹¹⁰ Allowing those affected by a problem to be the ones to dictate its solution also promotes democratic values. See *supra* note 13 (describing Pogge's argument that persons have right to institutional order in which affected parties have equal ability to influence political decisionmaking).

¹¹¹ See, e.g., Pierre-Hugues Verdier, 34 YALE J. INT'L L. 113 (2009) ("[W]orld government is 'both infeasible and undesirable,' as it would not only fail to provide meaningful

creation of any centralized authority is the abuse of power under a virtuous pretext.¹¹² In creating an avenue to justify global governance when collective action problems are present, subsidiarity becomes prone to the threat that a world government would cast any problem as a collective action problem, thereby allowing it to overstep the limits of its conferred powers.¹¹³ This concern guides the debate toward the limits that subsidiarity would impose on a world government.

Under a rigorous principle of subsidiarity, a world government would not eviscerate national sovereignty. Instead, it would protect sovereignty to a reasonable extent by recognizing it as morally valuable as a matter of autonomy and instrumentally valuable as a matter of efficiency. The EU's experience with implementing subsidiarity as a guiding principle demonstrates how this is possible. While supplying a justification for higher-level governance, the EC Treaty simultaneously imposes concrete limits: The Community can act "only if and in so far as" member states cannot achieve a desired good individually and the desired good can "be better achieved by the Community."¹¹⁴ There are three distinct limits in this expression of subsidiarity.

First, the Community can act "only if" its constituent states cannot achieve a desired good themselves. Similarly, subsidiarity would justify a world government's intervention only if nation-states could not achieve certain goods individually, such as in the case of global collective action problems like climate change. If a lower-level polity had the capacity to achieve a certain good by itself, then a world government would have no jurisdiction, even if it could also solve the problem.

Second, the Community can act only "in so far as" member states cannot achieve a desired good individually—that is, the Community's action must be proportional to the good it seeks to achieve.¹¹⁵ In the same vein, once a collective action problem legitimated global governance via subsidiarity, there would not be free license for the world government to regulate everything; instead, subsidiarity would cabin a

democratic representation but could also ultimately threaten individual freedoms." (quoting ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 8 (2004)).

¹¹² See *supra* notes 9, 56 and accompanying text (highlighting tension between need for and fear of government).

¹¹³ See Vischer, *supra* note 56, at 126 (noting subsidiarity "is prone to manipulation by whoever enlists it").

¹¹⁴ EC Treaty, *supra* note 12, art. 5.

¹¹⁵ See *supra* notes 85–86 and accompanying text (describing ECJ's tentative steps towards adding proportionality to subsidiarity review).

world government's actions within the scope of the problem.¹¹⁶ For example, if global climate change triggered a world government's intervention, it could not begin regulating the banana trade without some significant connection to climate change.¹¹⁷ Likewise, under the concept of proportionality, a world government could not regulate CO₂ emissions more than would be necessary to protect the ozone layer. The world government's prerogative to regulate would both begin and end with the scope and effect of the collective action problem.

Third, the Community can act only if the desired good can "be better achieved by the Community." Centralized governmental intervention is not the only form of collective action.¹¹⁸ Free-market Coasian bargaining and private institutions are other mechanisms through which parties cooperate to overcome collective action problems. Globally, such self-ordering already exists with networks of private contracts that operate like public regulation¹¹⁹ and private international institutions like Greenpeace and Amnesty International. Additionally, nation-states can engage in Coasian bargaining by signing treaties like the Kyoto Protocol and NAFTA, or by becoming members of institutions like the WTO and the IMF.¹²⁰ To the extent that such self-ordering can effectively and efficiently solve collective action problems, a global government has no jurisdiction under subsidiarity.¹²¹ But if a world government could "better" address collective action—that is, more effectively and efficiently—then its intervention would be justified.¹²² By stressing efficiency, subsidiarity offers a guiding principle for choosing between private, self-motivated solutions and public, institutionally-imposed collective action. Pro-

¹¹⁶ See Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907, 921 (2004) (arguing that, under subsidiarity, only solving collective action problem is legitimate reason for higher governmental intervention).

¹¹⁷ See *infra* Part III.C.2 (describing necessity prong of possible legal test for subsidiarity review derived from ECJ's proportionality test).

¹¹⁸ See *supra* Part II.A (discussing private solutions to collective action problems).

¹¹⁹ See generally Michael P. Vandenbergh, *The New Wal-Mart Effect: The Role of Private Contracting in Global Governance*, 54 UCLA L. REV. 913 (2007) (using empirical data to show that private contracting reduces externalities in manner preferable to several alternatives).

¹²⁰ See *supra* notes 14–15 and accompanying text (describing how collective action can take multiple forms, including both public and private action).

¹²¹ But see *supra* note 106 (describing how such international organizations and private contracting are inadequate to solve some global collective action problems).

¹²² Note that I essentially have equated a world government's superior ability to address a problem with the lower states' inability to address a problem. Because I have used efficiency as a metric and argued that a local solution is always more efficient, world government action always will be a case of last resort. Of course, this is a debatable assumption.

moting efficiency enables a world government under subsidiarity to achieve the most good for the least cost, which optimizes social welfare—a morally desirable goal.

The limits that subsidiarity would place on a world government reflect a fundamental concern for national sovereignty and an instrumental concern for efficiency. The concern for sovereignty is evident in the first two limits, which establish a presumption in favor of local regulation.¹²³ By diffusing political power, subsidiarity protects national sovereignty and maintains the nation-state as its own independent political forum.¹²⁴ By aligning political boundaries with the scope of the collective action problem, subsidiarity allows the affected parties to be the ones to initiate and dictate change-enhancing political participation,¹²⁵ increasing democratic accountability¹²⁶ and preserving local identity.¹²⁷ Moreover, subsidiarity would enhance democracy: If externalities spill across national boundaries, having a world government to encapsulate the scope of the problem also ensures that the affected parties have a voice.¹²⁸

Subsidiarity's third limit requires the higher-level government to "better" achieve desired goods and substantiates the value of efficiency in local regulation. Efficiency offers a more concrete mechanism than democratic representation for making decisions between centralization and decentralization and enables subsidiarity to act as a

¹²³ Federalism, by contrast, does not contain this presumption, or if it does, it does so only implicitly. See *supra* notes 14–15 and accompanying text (describing the differences between federalism and subsidiarity).

¹²⁴ See Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 402–05 (1997) ("The point is that the states serve as an independent means of calling forth the voice of the people, if and when this is necessary. Despite well-meaning arguments about how government operates best from the national level, the people's voice is not always heard there."). That preserving sovereignty allows the nation-state to remain a vehicle for the voice of the people is a commonality between federalism and subsidiarity. See *supra* note 15.

¹²⁵ See Kumm, *supra* note 76, at 518 ("Ranging from the relative weight of each individual vote, access to representatives, or publishing a letter in a newspaper of wide circulation in the constituency, local political processes tend to provide more opportunities to have a meaningful say in the political process than more centralised processes.").

¹²⁶ See Friedman, *supra* note 124, at 394–96 ("Officials at the local level are likelier to be available, and thus are likelier to be held accountable.").

¹²⁷ See *id.* at 401–02 ("[C]ultural and local diversity are threatened by uniformity, whether legislatively enacted or judicially imposed."); cf. Kumm, *supra* note 76, at 518 ("[T]he identities of citizens of Member States, the result of a long history, shot through with national triumphs and tribulations, tend to be eroded as more and more regulation takes place on the European level.").

¹²⁸ See *supra* note 13 (describing Pogge's theory that ensuring democratic accountability compels centralization).

guiding principle for optimizing social welfare by achieving the most good for the least cost.¹²⁹

Local regulation can be more efficient than global governance in several respects. First, under the classic “laboratories of democracy” argument, different localities can experiment with different policies at relatively low cost, encouraging efficient innovation.¹³⁰ Second, local politics may engage in intergovernmental competition for residents who “vote with their feet,” leading to a more efficient tailoring of policies to local preferences.¹³¹ Third, as a matter of common sense, localities often have specialized expertise that makes them the most capable and efficient problem solvers. Thus, subsidiarity justifies world governmental intervention only when it can “better” overcome collective action problems—that is, when the scope and effect of a problem make a world government the most efficient institutional choice.

C. *Suggestions for a World Government in Practice*

The world is far from having a true world government, and I do not have definitive answers for how it or subsidiarity would work in practice. This Section, however, offers suggestions for how subsidiarity might work globally by addressing some potential criticisms.

1. *Structural Mismatching*

Despite subsidiarity’s attempt to align political boundaries with the scope and effect of collective action problems, one might object that perfect alignment would be impossible in practice. This objection is important because if the size of the jurisdiction does not match the scope of the problem, the regulating entity may fail to account for all the relevant costs and benefits when deciding whether and how to reg-

¹²⁹ See *supra* notes 44–45 and accompanying text (arguing that proper institutional choice requires analysis of alternative forms of collective action to find most efficient institution).

¹³⁰ See Friedman, *supra* note 124, at 397–400 (“Countless state and local governments, remote from one another but facing similar problems, develop numerous twists on solving them. At conferences, and through observation, governments learn of techniques employed elsewhere. The ones that seem sensible, that work, survive; many other ideas die on the vine.”). See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (identifying “democratic experimentalism” as form of government with decentralized power and local problem-solving but higher-order coordinating bodies).

¹³¹ See *infra* notes 141–45 and accompanying text; see also Nestor M. Davidson, *Cooperative Federalism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1006–07 (2007) (describing Tiebout’s argument that intergovernmental competition may increase efficiency).

ulate.¹³² By skewing the cost-benefit analysis, this structural mismatch may result in either too much or too little regulation.¹³³ For example, if the jurisdiction is too narrow, the regulating entity may fail to account for, or simply not care about, all of the costs or benefits of an activity, leading to underregulation. If the jurisdiction is too broad, then it may impose regulatory costs on people unaffected by a problem. Furthermore, even if a regulating entity both accounted for and cared about all of the costs and benefits of its activity, its regulation may simply be ineffective: If the jurisdiction is underinclusive, it will be unable to exercise control over the full scope of the problem, and if the jurisdiction is overinclusive, it may be too costly to regulate.

There are two ways this structural mismatch might occur. First, there is the threshold difficulty of defining the scope of a collective action problem. There may be too much uncertainty in ascertaining the affected parties of complex problems that cover large geographic areas, especially in the case of pollution problems with latent effects.¹³⁴ Second, there are a potentially infinite number of collective action problems of varying scope, but only a finite number of political units. This disparity means that there inevitably will be some collective action problems without a commensurately sized political unit to address them.

As for the difficulty in defining the scope of a collective action problem, there is no easy answer. Daniel Esty suggests that we may need to find the institution with the technical expertise to best assess the scope and impact of a problem, which will vary depending on the specific nature of the problem.¹³⁵ Tangible, visible problems may be more easily identifiable by numerous eyes on the ground rather than by few observers from a centralized location,¹³⁶ while less tangible problems involving complex scientific interactions like ozone layer depletion may be more easily identifiable with technical sophistication in a centralized location.¹³⁷ Thus, Esty argues that “a mix of decentral-

¹³² Esty, *supra* note 1, at 587.

¹³³ *Id.*

¹³⁴ See Revesz, *supra* note 42, at 557 n.3 (noting that Coasian bargaining is unlikely for large-scale, complex environmental problems covering large areas because of uncertainty regarding their geographic impact).

¹³⁵ See Esty, *supra* note 1, at 614 (discussing problem identification in environmental regulation context).

¹³⁶ *Id.* (“Since many pairs of eyes spread across the land are more likely to see environmental anomalies before a few observers in a centralized location, the diseconomies of scale in problem identification will often be significant.”).

¹³⁷ See *id.* (“[Identification of] [c]omplex scientific interactions such as the depletion of the ozone layer by chlorine compounds (CFCs) . . . depends more on technical sophistication than on geographic coverage.”).

ized and centralized, governmental and nongovernmental problem-identification structures” is best.¹³⁸

As for the problem of infinite collective action problems without commensurately sized political units, there are still reasonable approximations. At the extreme, one could imagine an infinite number of polities, one to address each collective action problem, but this would be vastly inefficient and administratively infeasible.¹³⁹ Political boundaries have to be arbitrary to some degree,¹⁴⁰ but their enduring efficiency lies precisely in the difficulty of changing them. Charles Tiebout famously theorized that local governments compete for citizens by offering different baskets of public goods¹⁴¹ and that “the consumer-voter moves to that community whose local government best satisfies his set of preferences.”¹⁴² Over time, communities will self-organize such that externalities “are minimized in so far as communities reflecting the same socioeconomic preferences are contiguous.”¹⁴³ Thus, political units will roughly approximate the scope of the most important collective action problems because people migrate into those polities for precisely that purpose—to achieve their collective public goods. Of course, these approximations will never be perfect—they will only approximate perfection to the extent that community choice operates as an efficient market.¹⁴⁴ As Tiebout recognized, however, if that market failed and externalities of sufficient importance arose, higher governmental intervention would be necessary.¹⁴⁵

¹³⁸ *Id.* at 614.

¹³⁹ See Tiebout, *supra* note 22, at 421 (noting that having infinite number of communities would “reduce the solution of the problem of allocating public goods to the trite one of making each person his own municipal government”).

¹⁴⁰ See *supra* note 32 (listing sources debating arbitrariness versus moral significance of political boundaries).

¹⁴¹ See Tiebout, *supra* note 22, at 418 (“The availability and quality of such facilities and services as beaches, parks, police protection, roads, and parking facilities will enter into the decision-making process.”).

¹⁴² *Id.* A community, meanwhile, attempts to attract or detract residents to achieve an optimum size in which it can offer its bundle of public goods for the lowest average cost based on its fixed resources, such as land area or a local beach. *Id.* at 419.

¹⁴³ *Id.* at 423.

¹⁴⁴ Tiebout’s model rests on the assumption that consumers are fully mobile and have full knowledge of differences between communities. Despite the apparent unreality of these assumptions, there is “a substantial body of empirical data” that validates Tiebout’s model, at least with regard to smaller, more local communities. Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1608–09 (2005).

¹⁴⁵ Tiebout, *supra* note 22, at 423.

2. Operationalizing Subsidiarity

Another concern about implementing subsidiarity is the question of how to operationalize it as a constitutional principle. Who would decide whether a world government has violated subsidiarity and based on what criteria? First, subsidiarity need not be a solely judicial matter. Other branches of government, lower governments, and the people can all participate in the constitutional dialogue surrounding subsidiarity.¹⁴⁶ In the European Union, for example, subsidiarity requires the legislature to prepare a subsidiarity impact analysis when proposing legislation and to confer with its member states.¹⁴⁷ This organic process is especially important for a world government, which, like the European Union, would need to support a reasonable degree of national sovereignty over a diverse membership. Additionally, there could be debate over the institutional competency of a world court to assess the “complex empirical and normative judgments” involved in a subsidiarity analysis.¹⁴⁸ Making sure that a world court does not have the only or final say on subsidiarity could alleviate these concerns.¹⁴⁹

Ultimately, however, subsidiarity needs a clear legal standard of review if it ever hopes to be more than constitutional rhetoric. In the European Union, the ECJ’s jurisprudence in this area is still undeveloped and largely deferential to the legislature, but it shows promise.¹⁵⁰ Mattias Kumm has proposed a three-pronged legal test based on ECJ jurisprudence to make subsidiarity review more rigorous and less of a rubber stamp.¹⁵¹ Under Kumm’s proposed standard, a court evaluating whether higher-order government action comports with subsidiarity must find (1) a legitimate purpose, (2) necessity, and (3) a balance of interests in favor of higher-order intervention.¹⁵²

¹⁴⁶ Cf. Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1289–98 (2004) (arguing that Supreme Court pronouncement is only one part of constitutional dialogue which includes opinions of other branches of government and, ultimately, individual people); Kumm, *supra* note 76, at 526 (“[T]he American experience suggests that the Supreme Court may have a significant indirect role to play, to help foster deliberation and engagement between other actors.”).

¹⁴⁷ See *supra* notes 70–75 and accompanying text (describing how subsidiarity inquiry in European Union first falls on legislative process and requires conferral with member states).

¹⁴⁸ Kumm, *supra* note 76, at 525.

¹⁴⁹ See *supra* notes 93–94 and accompanying text (describing Germany’s efforts to balance rigorous subsidiarity review against deference to legislative competency).

¹⁵⁰ See *supra* Part II.C (describing largely deferential case law of European Union and Germany and potential developments in square assertion of justiciability, proportionality test, and balancing of legislative deference).

¹⁵¹ Kumm, *supra* note 76, at 518–24.

¹⁵² *Id.*

Kumm argues that solving collective action problems is a legitimate purpose¹⁵³ and would be a prima facie reason for the European Union, or world government, to intervene.¹⁵⁴ For example, in *Ex parte British American Tobacco*, the Community law in question would satisfy the first prong because it sought to harmonize varying member states' laws on tobacco regulation, which posed a collective action problem because the resulting uncoordinated standards created a race to the bottom.¹⁵⁵

The necessity prong stems from the ECJ's proportionality test¹⁵⁶ and requires the specific federal measure to be “*necessary* to further [the legitimate] purpose” and “the *least intrusive of all equally effective* means.”¹⁵⁷ In *Ex parte British American Tobacco*, the ECJ held that the law did not go beyond what was necessary to obtain its objective,¹⁵⁸ thus, it satisfied the second prong as well. Kumm notes that other ECJ cases have struck down federal laws for going beyond what was necessary.¹⁵⁹

Under the balancing prong, the benefit of higher-order government intervention must outweigh the intrusion on member states' autonomy.¹⁶⁰ This prong is the most demanding because it requires “a rich contextual analysis of costs and benefits.”¹⁶¹ On its merits, it is unclear whether the law's public health and free trade objectives in *British American Tobacco* outweighed the infringement of national autonomy. Procedurally, however, the legislature failed to address this point, so the law would fail under this prong and violate subsidiarity under this test. Ultimately, this prong is the most difficult because it strikes at the heart of subsidiarity's purpose: balancing the attainment of optimal social welfare against national sovereignty.

¹⁵³ *Id.* at 520 (“The subsidiarity requirement, appropriately understood, establishes that the EU may act only [] if the action of Member States is structurally tainted by collective action problems. The only situations in which Member States cannot sufficiently achieve the relevant objective are situations involving collective action problems.”).

¹⁵⁴ *See id.* at 504 (analyzing “the kind of concerns that provide a *legitimate purpose*—a *prima facie* reason—for the EU to step in and regulate”).

¹⁵⁵ *See supra* notes 77–87 and accompanying text (describing collective action problem of creating uniform federal standard in *Ex parte British American Tobacco*).

¹⁵⁶ *See supra* notes 86–87, 116–17 and accompanying text (describing proportionality test in which government action must begin and end with scope of legitimate government objective).

¹⁵⁷ Kumm, *supra* note 76, at 521–22 (“Member States regulatory autonomy should not be undermined to a greater extent than necessary to address the relevant collective action problem.”).

¹⁵⁸ *B.A.T. Case*, *supra* note 66, ¶¶ 129–32.

¹⁵⁹ Kumm, *supra* note 76, at 521–22.

¹⁶⁰ *Id.* at 522–23.

¹⁶¹ *Id.* at 522.

Kumm's three-factor subsidiarity test is merely one of many possible tests, but it suggests that subsidiarity has the potential to be a robust, justiciable principle for the allocation of world power.

CONCLUSION

The world needs a world government. Existing political institutions cannot solve global collective action problems like climate change, and the argument that a world government would erode national sovereignty is no longer enough to dismiss it. Subsidiarity as an organic principle for global governance would both legitimize and limit a world government. Its ability to account for diverse forms of public and private collective action make it an ideal guide to global institutional choice that optimizes social welfare while preserving national sovereignty, a balance that is economically efficient and morally desirable.