

# Subsidiarity

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AS ADDED BY the Maastricht Treaty in 1993, Article 3b of the Treaty Establishing the European Community provides 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 in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States ... .

A similar provision appears in Article 72(2) of the German Basic Law:

On matters within the concurrent legislative power ... [t]he Federation has the right to legislate ... if and to the extent that the establishment of equal living conditions throughout the Federal Republic or the maintenance of legal or economic unity renders federal regulation necessary in the national interest.

An exotic Old World conceit, foreign to the American experience? *Au contraire*; subsidiarity is the guiding principle of federalism in the United States.

As the above quotations suggest, for present purposes the subsidiarity principle requires that political decisions be made at the lowest level of government that is capable of making them effectively. In the American context this means that the federal government should not do what the states can adequately do for themselves.<sup>1</sup>

That of course was the explicit boundary between federal and state authority proposed to the Constitutional Convention by Edmund Randolph in the famous Virginia Plan:

Resolved ... that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to

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<sup>1</sup> By extension subsidiarity also entails a principle of limited government: The state should do only what cannot effectively be done by private action, and whenever possible the individual should make his own decisions. See generally Thomas Oppermann, *Subsidiarität als Bestandteil des Grundgesetzes*, 1996 *Juristische Schulung* 569 and authorities cited.

which the several States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation ... .<sup>2</sup>

The Committee of Detail, deputed to draft a Constitution based upon the principles of this plan as modified on the floor of the Convention, reduced Randolph's principle to a list of enumerated powers representing the committee's judgment as to which areas of legislation the states could not effectively handle.<sup>3</sup> After further tinkering this list became Article I, § 8 of the present Constitution. It is a concretization of the subsidiarity principle.

Subsidiarity, in short, was an American principle long before either the European Community or the Federal Republic of Germany was established. Indeed it was the Americans who insisted that it be written into the German constitution.<sup>4</sup>

That the Framers chose to phrase congressional authority in terms of specific topics instead of general principle means that it is neither necessary nor sufficient, in contesting the validity of a federal statute, to argue that the matter might as well have been left to the states.<sup>5</sup> But the subsidiarity principle that

underlies the enumeration has influenced the actions of Congress since the Constitution was adopted.

In 1813, for example, with little attention to the source of its authority, Congress created an agency to preserve and distribute smallpox vaccine.<sup>6</sup> In subsequent controversies over strengthening or eliminating the federal program, critics insisted the states could perform the task at least as well; supporters argued they could not.<sup>7</sup> Again, one of the recurring themes in arguments in favor of federal spending for internal improvements was that individual states could not adequately do the job;<sup>8</sup> while Virginia's Philip Barbour – a future Supreme Court Justice who denied federal authority over improvements – argued that the subsidiarity principle was “the best guide” to interpretation of the powers actually given to Congress.<sup>9</sup>

Similarly, Congress was never tempted to regulate interstate rail rates until the Supreme Court held the states without authority to do so;<sup>10</sup> and Congress made no serious effort to meddle with agricultural or industrial production until the Great Depression convinced it that was the only road to economic recovery.

2 Max Farrand, *1 Records of the Federal Convention 21* (Yale, rev ed 1937).

3 See 2 *id.* at 21, 85, 131, 181-82.

4 See David P. Currie, *The Constitution of the Federal Republic of Germany 43* (1994). The Civil War Amendments represent an exception to this principle, a decision to override state autonomy in the interest of a moral imperative that the states could have effectuated had they wished.

5 The Supreme Court expressly held in *McCulloch v Maryland*, 17 US 316, 424 (1819), that the existence of state banks did not prevent a national bank from being “necessary and proper” to the exercise of a variety of enumerated powers. See also *Carter v Carter Coal Co*, 298 US 238, 291 (1936): “[T]he proposition ... that the power of the federal government inherently extends to purposes affecting the Nation as a whole with which the states severally cannot deal ... [has been] definitely rejected by this court.”

6 See David P. Currie, *The Vaccine Agent*, 1 *Green Bag 2d* 245 (1998).

7 E.g., 36 *Annals of Congress* [hereafter cited as *Annals*] at 2447; 39 *Annals* at 1545-46. The critics prevailed. See Currie, *The Vaccine Agent* at 248-49 (cited in note 6).

8 E.g., 30 *Annals* at 171 (Rep. Hardin); *id.* at 899 (Rep. Wilson); 31 *Annals* at 1193 (Rep. Cushman) (arguing that because the states could not effectively build roads and canals of national importance the federal government must have the power). See also Treasury Secretary Gallatin's celebrated report on the subject, 1 *Am St Papers* (Misc) 724, 725 (1808).

9 41 *Annals* at 1006 (1824).

10 *Wabash, St L & Pac Ry v Illinois*, 118 US 557 (1886); *Interstate Commerce Act*, 24 Stat 379 (1887).

After *Wickard v Filburn* upheld one of the more extreme New Deal measures,<sup>11</sup> it was often said that the Court had interpreted the enumerated powers so broadly that Congress could regulate anything it pleased. One commentator went so far as to complain that federalism had died as a constitutional principle in 1937.<sup>12</sup> It has since been revived, though the lower courts seem not to know about it.<sup>13</sup> But even in the dark days before *Lopez*, *Flores*, and *Printz*<sup>14</sup> federalism was alive and well as a political principle.<sup>15</sup> And the name of that principle, though not in common usage in this country, was subsidiarity.

Congress may have had authority to regulate pretty nearly everything, but it did not do so. Sixty years after the “death” of constitutional federalism most private law is still state law. There is no federal code of domestic relations, of property, of contracts or torts – not even of corporations or commercial law, although there never could have been any doubt of Congress’s authority to regulate commerce among the states. As *Lopez* illustrates, federal incursions into the criminal field are more common, but the great preponderance of prosecutions are still brought under state law. It remains true, as Herbert Wechsler wrote in 1954, that “federal law is still a largely

interstitial product”;<sup>16</sup> the bulk of our law remains state law.

Why? Because leaving the matter to the states promotes self-determination, permits diversity, and encourages experimentation – the familiar benefits of federalism – and because in most cases there is no need for federal intervention. Occasional choice-of-law problems are a small price to pay for permitting states to adopt varying schemes of marital property or responsibility of negligent drivers to their guests. No federal corporation code is necessary, because other states have tacitly agreed to let Delaware make law for all of them. The need for a federal commercial law was obviated by the Uniform Commercial Code. To quote Wechsler once again:

[National action has] always been regarded as exceptional in our polity, an intrusion to be justified by some necessity, the special rather than the ordinary case. ... National power may be quite unquestioned in a given situation; those who would advocate its exercise must none the less answer the preliminary question why the matter should not be left to the states.<sup>17</sup>

That is the first part of the subsidiarity principle.

11 317 US 111 (1942).

12 David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888-1986* 238 (1990).

13 See, e.g., *United States v Harrington*, 108 F3d 1460, 1466 (DC Cir 1997) (upholding a federal prosecution for robbery of a restaurant on the ground that the stolen money might otherwise have been transferred to another state or used to buy goods from afar); *Brzonkala v Virginia Polytechnic Institute*, 132 F3d 949 (4th Cir 1997) (upholding a federal law affording damages for rape because rape victims produce less for commerce and the risk of attack deters interstate travel). Successful invocations of *Lopez* against outlandish federal statutes are astonishingly rare.

14 *United States v Lopez*, 115 S Ct 1624 (1995); *City of Boerne v Flores*, 117 S Ct 2157 (1997); *Printz v United States*, 117 S Ct 2365 (1997).

15 For example, in an interview published elsewhere in this issue of the *Green Bag*, Judge James Buckley describes how, as a Senator in the 1970s, he “consciously appl[ied] the federalist principle to new legislation, in terms ... of the rule of subsidiarity.” James L. Buckley, *Dialogue: Reflections on Law & Public Life*, 1 *Green Bag* 2d 391 (1998).

16 Herbert Wechsler, *The Political Safeguards of Federalism*, 54 *Colum L Rev* 543, 545 (1954).

17 *Id* at 544.

But the operation of that principle in the United States is not limited to cases in which Congress elects not to act at all. As Wechsler wrote,

Even when Congress acts, its tendency has been to frame enactments on an ad hoc basis to accomplish limited objectives, supplanting state-created norms only so far as may be necessary for the purpose.<sup>18</sup>

Two examples will illustrate this second aspect of the subsidiarity principle.

In 1917, in *Southern Pacific Co v Jensen*, the Supreme Court held that a state workers' compensation law could not constitutionally be applied to the case of a longshoreman injured aboard a vessel in navigable waters because, among other things, it "interfere[d] with the proper harmony and uniformity" of the general maritime law developed by federal courts in admiralty cases under Article III.<sup>19</sup> Desirous of permitting extension of nonfault liability to maritime workers but reluctant to displace state law, Congress responded by enacting two successive statutes saving to maritime suitors, in addition to the "common law remedies" that had been preserved since 1789, their remedies under state workers' compensation laws. The Supreme Court, in

its infinite wisdom, struck them both down: The Constitution itself demanded uniformity, and Congress could not alter it by delegating its lawmaking powers to the states.<sup>20</sup> At the same time, however, the Court had held that the states *could* provide compensation to injured workers in an obscure category of cases it categorized as "maritime but local."<sup>21</sup> Still determined to leave as much as possible to the states, Congress accordingly provided federal compensation for those cases in which recovery "may not validly be provided by state law."<sup>22</sup> This is pure subsidiarity; as Justice Stewart later wrote, Congress's purpose "was only to provide compensation for those whom this Court's decisions had barred from the benefits of state workmen's compensation laws."<sup>23</sup>

The second example comes from the field of pollution control. The common law of nuisance, adequate to deal with the pigsty next door, could not cope with modern problems of regional pollution.<sup>24</sup> Smoke-control ordinances began cropping up at the local level before 1900; the states followed with regulatory programs for water and then air pollution that transcended municipal limits.<sup>25</sup> Apart from the problem of maritime oil spills,<sup>26</sup> Congress first entered the fray after

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18 *Id.* at 545.

19 244 US 205, 216 (1917).

20 *Knickerbocker Ice Co v Stewart*, 253 US 149 (1920); *Washington v W.C. Dawson & Co*, 264 US 219 (1924). See David P. Currie, *Federalism and the Admiralty: The Devil's Own Mess*, 1960 SCt Rev 158, 189-90.

21 E.g., *Sultan Ry & Timber Co v Department of Labor*, 277 US 135 (1928).

22 44 Stat 1426 (1927). Over the signature of Justice Brennan, the Supreme Court later read this limitation out of the statute over a blistering dissent by Stewart and Harlan, *Calbeck v Travelers Ins Co*, 370 US 114, 126-27 (1962). Congress finally gave up and repealed the moribund limitation, 86 Stat 1251, 33 USC § 90x (1972).

23 *Calbeck*, 370 US at 132-33.

24 See *Diamond v General Motors Corp*, 20 Cal App 3d 374, 97 Cal Rptr 639 (2d Dist 1971).

25 David P. Currie, *Pollution: Cases and Materials* 82 (West, 1975).

26 *Oil Pollution Act of 1924*, 43 Stat 604. See also the *Rivers and Harbors Act of 1899*, 30 Stat 1151, § 13 (now 33 USC § 401), a statute designed to prevent the obstruction of navigable waterways, which the Supreme Court many years later discovered to have outlawed water pollution as well. *United States v Pennsylvania Industrial Chem Corp*, 411 US 655 (1973).

the Second World War with cautious programs of research and financial support, expressly acknowledging that the states retained “primary responsibility” for pollution control.<sup>27</sup> The same statutes authorized the negotiation of interstate compacts that proved no stronger than their weakest link.<sup>28</sup> Recognizing that more needed to be done, Congress next provided for a series of cumbersome federal-state abatement conferences that produced much palaver and virtually no results.<sup>29</sup> In 1965 Congress gave a federal agency authority to set emission standards for new motor vehicles – an obviously efficient step in a national market.<sup>30</sup> The next step was to provide for federal approval of numerical state standards of ambient water and air quality, with weak provisions for ultimate federal enforcement.<sup>31</sup> When that too failed, Congress finally took principal responsibility for pollution control while still permitting the states to play a significant role in the administration of a federal permit system in the case of water pollution and in the development of plans for implementing federal standards for the quality of the ambient air.<sup>32</sup>

As these examples indicate, what the states cannot effectively do has expanded, and congressional authority has expanded

with it; federal control of intrastate pollution would have been inconceivable in 1789. But although there have been exceptions, the central principle remains: However broad its authority, Congress is ordinarily reluctant to supplant state action so long as the states are up to the task.<sup>33</sup>

It also seems fair to suggest that, although the enumeration of congressional powers banishes subsidiarity from most explicit constitutional discourse, that principle has significantly influenced both the political branches and the Court in their interpretation of those powers. It was the pressure of perceived necessity that impelled President Roosevelt, Congress, and ultimately the embattled Court to find room in the miserly enumeration for pervasive regulation of the entire national economy and for federal subsidies to whatever was good for the country. *Lopez* suggests that the converse is equally true: The Court is less likely to strain to find congressional power in areas where there is no need for federal action. The true reason for the *Lopez* decision may be that the states were as capable as the federal government of punishing children who carried guns to school.<sup>34</sup>

In Germany the subsidiarity principle is stated expressly in the constitution, and it has

27 Water Pollution Control Act, 62 Stat 1155 (1948); Air Pollution Control Act, 69 Stat 322 (1955).

28 See Currie, Pollution at 155 n.3 (cited in note 25). The water-pollution statute also authorized the United States after painfully tedious preliminaries to sue to abate interstate contamination, but nothing came of it – not least because suit could be filed only with the consent of the state in which the discharge took place.

29 70 Stat 498 (1956) (water); 77 Stat 392 (1963) (air).

30 79 Stat 992.

31 Water Quality Act of 1965, 79 Stat 903; Air Quality Act of 1967, 81 Stat 485.

32 Clean Air Act of 1970, 84 Stat 1676; Clean Water Act of 1972, 86 Stat 816.

33 I do not suggest that this “political check” be taken as an excuse for limiting judicial review of federal action that invades state authority. The enumeration of limited federal powers makes clear that the Framers believed *constitutional* checks were also needed, and history has proved them right. See, e.g., *Lopez*.

34 The same principle helps to explain the *Printz* decision (cited in note 14), which held Congress could not conscript state or local officers to investigate gun buyers: There was no reason the Federal Government could not enforce its own laws.

been roundly ignored.<sup>35</sup> In the United States the Constitution says nothing about subsidiarity, but it is widely followed in practice.

Both the influence of the states in the selection of members of Congress and the lobbying of interest groups help to explain the continued reluctance of Congress to intrude into

areas the states can handle for themselves. But I am inclined to think something more fundamental is also at work here, both in Congress and in the Supreme Court: Both the people and their agents really believe that whenever practicable matters ought to be left to the states. *GB*

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35 The Constitutional Court refused to enforce an earlier version of the subsidiarity provision, saying the question was committed to legislative discretion. 2 BVerfGE 213, 224 (1953); 78 BVerfGE 249, 270 (1988); see Currie, *The Constitution of the Federal Republic of Germany* 43-46 (cited in note 4). The Basic Law was recently amended to make clear that the question was justiciable (Art 93(1), cl 2a GG), but it remains to be seen whether the horse can be made to drink.