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Lessons From The Social Charter: State, Corporation, and the Meaning of Subsidiarity

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LESSONS FROM THE SOCIAL CHARTER:
STATE, CORPORATION, AND THE
MEANING OF SUBSIDIARITY†

A great democratic revolution is taking place in our midst; everybody sees it, but by no means everybody judges it in the same way. Some think it a new thing and, supposing it an accident, hope that they can still check it; others think it irresistible, because it seems to them the most continuous, ancient, and permanent tendency known to history.¹

– Alexis de Tocqueville

We are well underway toward recognition that property used in production must conform to conceptions of civilization worked out through democratic processes of American constitutional government. Few American enterprises, and no large corporations, can take the view that their plants, tools and organizations are their own, and that they can do what they please with their own. There is increasing recognition of the fact that collective operations, and those predominantly conducted by large corporations, are like operations carried on by the state itself. Corporations are essentially political constructs ... an adjunct of the state itself.²

– Adolphe Berle

We may be approaching full circle in the West, from the distant era when decentralized economic power was strategic to the emergence of personal freedom and the birth of a 'new kind of community [the Greek city-state, that] rested on economic independence' to the present stage of evolution where economic freedom has produced an environment dominated by vast, impersonal organizations that pride themselves on their rootlessness (the 'international' corporations) and

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1 Alexis de Tocqueville *Democracy in America* (13th ed. 1850) J.P. Mayer (ed.) George Lawrence (trans.) (Anchor Books 1969) 9

2 Adolph Berle 'Preface' in Adolph Berle and Gardiner Means *The Modern Corporation and Private Property* rev. ed. (1967) xxvi. In the portion of the quote deleted above, Berle states: 'Their [the business corporations'] perpetual life, their capacity to accumulate tens of billions of assets, and to draw profit from their productions and roles, has made them part of the service of supply of the United States. Informally, they are an adjunct of the state itself.' In 1989, Cyril Siewart, the chief financial officer of the Colgate-Palmolive Co., stated that '[t]he United States does not have an automatic call on our resources. There is no mind set that puts this country first.' Uchitelle 'U.S. Business Loosens Link to Mother Country' *N.Y. Times* 21 May 1989. See also Robert B. Reich 'Who Is Them?' (March–April 1991) *Harv. Bus. Rev.* 77.

that respond only to material incentives. These corporations have helped created enormous wealth, but in the process they have broken down traditional community links and brought forth new problems ... Governments have grown large and potent along with large firms, but they continue to lose the power of initiative in a world of increasingly rapid change, international mobility of resources, and internal political conflict and stalemates.³

– Edward Herman

In his 1990 Chorley Lecture, Lord Wedderburn declared that ‘it is time for British labour law to take a good look at itself, to examine its own structure.’⁴ Observing Freud’s advice, Lord Wedderburn notes that a premature invitation to self-analysis ‘risks a response of “resistance, rejection and indignation.”’⁵ The impending single market in Western Europe, the ongoing metamorphoses of what used to be the Eastern Bloc, and the increasing internationalization of the world’s economy make clear that the time for self-examination is ripe and can be avoided no longer. This self-analysis, Lord Wedderburn adds, must include a comparative dimension, which involves ‘not the foolish search for institutions to import from elsewhere but the stretching of the imagination and of the agenda by inquiry into unfamiliar legal treatments of familiar social problems and in so doing to follow the argument wherever it leads.’⁶

Lord Wedderburn’s advice equally aptly can be directed to the United States – and possibly to Canada as well. Moreover, his call for critical self-analysis might with similar appropriateness be extended from employment law to the law that structures the corporate entities that do the employing. For reasons of curricular convenience as well as many others, labour and corporate law are treated as distinct functional specialties. Nevertheless, as we all know, the two areas are mutually conditioning. Challenges to, and changes in one, necessarily affect the other. Likewise, neither field stands in isolation from the sorts of issues that confront political and social culture generally. As F.W. Maitland long ago observed, when all is said, there seems to be a genus of which state and corporation are species. They seem to be permanently organized groups of men; they seem to be group units; we seem to attribute acts and intents, rights or wrongs, to these groups, to these units.⁷

³ Edward Herman *Corporate Control, Corporate Power* (1981) 301 (footnote omitted)

⁴ Lord Wedderburn of Charlton ‘The Social Charter in Britain – Labour Law and Labour Courts?’ (Chorley Lecture 1990) (1991) 54 *Mod. LR* 1.

⁵ *Ibid.*

⁶ *Ibid.*

⁷ Frederick W. Maitland ‘Translator’s Introduction’ in Otto Gierke *Political Theories of the Middle Age* (1900) ix. Maitland continues by observing, ‘Let it be allowed that

The permanence of the sovereign, juridical nation-state seems open to question. Many have declared it an institution in eclipse,⁸ and the New Europe hopefully envisioned through the events of 1992 lends that judgment some real credence. The business corporation, in contrast, seems more robust than ever. A fictive creature whose existence supposedly depends upon the sovereign's recognition and sufferance,⁹ the corporation increasingly appears to have transcended both the nation-state's boundaries and powers. This does not mean – *pace* Marx – that government is about to wither away. It does mean that the patterns

the State is a highly peculiar group unit; still it may be asked whether we ourselves are not the slaves of a jurist's theory and a little behind the age of Darwin if between the State and all other groups we fix an unmeasurable gulf ...' Ibid. Of course, while the term corporation includes the business corporation, Gierke means it to encompass other sorts of corporate groups as well.

- 8 For one recent account of the rise and decline of the modern nation-state, see Steven Toulmin *Cosmopolis: The Hidden Agenda of Modernity* (1990) arguing in part that the modern notion of the sovereign nation-state was a product of the 'quest for certainty' characteristic of 17th-century nationalism that also produced the split between the human and natural sciences – or, as it is sometimes spoken of, the distinction between *verstehen* and *erklären* (in short, that notion that the human sciences, at best, only understand, but the natural sciences explain). Characteristic of the 'post-modern' era, Toulmin predicts, will be an emphasis both on subnational mediating groups as well as transnational institutions, accompanied by a recovery of practical (praxis) philosophy, which can consider the 'concrete, timely and the particular.' For one classic account of the origins of state absolutism and the development of the modern juridical state, see John Neville Figgis *Studies of Political Thought from Gerson to Grotius, 1414–1625* (1907). On the rise and development of modernity generally, see Leo Strauss 'The Three Waves of Modernity' in Hilail Golden (ed.) *An Introduction to Political Philosophy: Ten Essays by Leo Strauss* (Wayne State 1989). For a powerfully insightful and comprehensive critique of postmodernism generally, and the implications for liberal democracy, see Thomas Pangle *The Ennobling of Democracy: The Challenge of the Postmodern Era* (1992).
- 9 This is the theory in Anglo-American law, e.g., '*Dartmouth College v. Woodward*' 17 US (4 Wheat) 518, 636 (1819). This notion has been extended to various other forms of corporate bodies, e.g., labor unions. See, e.g., *International Longshoremen's Assoc. v. Allied Int. Inc.* 456 US 212, 225–6 (1982) (stating that 'the considerable powers of a "national labor union" and "its locals" are derived ... under federal laws'). The *Dartmouth College* case is representative of the 'fiction' theory of corporations, while the *Allied* case reflects a 'concession' theory. The fiction theory posits that only individuals are real persons in law, and all other institutions simply represent an 'artificial person' (this includes the state – which Thomas Hobbes, whose voluntarist account of association has had enormous influence in our legal and political theory, described as 'that great LEVIATHAN called a COMMON-WEALTH, or STATE, (in latine CIVITAS) which is but an Artificiall Man'). T. Hobbes *Leviathan* (1657) C.B. McPherson (ed.) (1984) 81. The concession theory, in contrast, posits that rights and powers granted to fictive persons are concessions made to them by the state. For two classic critiques of the fiction and concession theories, see John Neville Figgis *Churches in the Modern State* (1913) and Otto Gierke, *supra* note 7. On the business corporation and US legal and social policy, see James Willard Hurst *The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970* (1970).

through which we order our lives together are changing, and that law and lawyers face new circumstances that call for new ways of thinking and acting.

Certainly, American judges and lawyers are not at all accustomed to looking abroad for examples or for sources of inspiration. Like American business, American law, until quite recently, has tended to remain inward-looking. We have assumed that the rest of the world had little to tell us, and that others would simply follow our lead. Indeed, we rarely have bothered even to read the opinions of courts in our sister common law jurisdictions, much less pay attention to what anyone else might be doing. As a result, our treatment of various issues frequently has staked out a place at the far end of the spectrum.¹⁰ American exceptionalism has not been without its blessings. But, marching to the beat of a different drummer is not necessarily a sign that the marcher is either a genius or the graced recipient of some special revelation. It may simply indicate the marcher's need for a reality check. The dangers inherent in the smug assumption that our way is always best are too clear to be ignored.

As Maitland points out, state and corporation are species of the same genus. Both represent forms of community. As such, either institution will flourish only so long as people hold judgments, aims, and meanings in common. That community sets the conditions for willing cooperation, which in turn forms the basis of legitimate power.¹¹ Cooperation, however, is not simply a derivative of specific individual consent. Hence, its achievement represents more than the voluntary aggregation of individual wills. People are by nature social beings. Consequently, cooperation in a real sense is a transcendent characteristic. We are constituted to do it; hence, it represents an activity to which we are spontaneously inclined.¹²

Nevertheless, we don't blindly cooperate with just anybody, nor dumbly go along with just any scheme. We may be social, but even more powerfully, we are intelligent beings. We want reasons for what we do. We don't undertake any activity until we have at least implicitly decided that it's in some way worthwhile. Consequently, whether and the extent

10 For an extended analysis of this tendency, see Mary Ann Glendon *Abortion and Divorce in Western Law* (1987).

11 On this topic, see Bernard J.F. Lonergan *Insight: A Study of Human Understanding* (1958) (Harper & Row 1978) 173-244; Bernard J.F. Lonergan 'Dialectic of Authority' in Frederick E. Crowe (ed.) *A Third Collection: Papers by Bernard J.F. Lonergan* (1985) 5.

12 On the spontaneous character of human sociality, see sources cited in note 11, *supra*. Also see the discussion of this topic in Frederick A. Hayek *Law, Legislation and Liberty: Rules and Order* vol. 1 (University of Chicago 1973) 35-54.

to which we will conform our actions and subordinate our personal interests to the rules of some social order depends upon our judgment that the order is a reasonable one. Political regimes, social institutions, and economic orders that don't make sense eventually collapse. As the wreckage from Eastern and Central Europe attests, counter-positions do indeed eventually reverse themselves. The old song notwithstanding, fairy tales don't come true – despite sustained efforts to transmute fictions into fact. The pretenses of what Eric Voegelin called second realities¹³ cannot permanently keep actuality from stubbornly popping back into view.

None of this denies that reason and good intentions can be and often are subverted, that mistakes are made, or that biases not infrequently displace responsible judgment. It simply suggests that none of these conditions is enduring. Our need to make sense out of what we are doing forces us to face up to the inconsistencies and incoherence that are the products of our rationalizations. Nonsensical programs, institutions and social orders thereby eventually lose their supporters.

Consequently, the organization of governmental, corporate, and like social institutions encounter the same challenge: To flourish, they need to take advantage of our spontaneous sociality in a way that can satisfy our innate demand for reasonable living. This involves more than top-down structural concerns. Individuals and institutions stand in a reflexive, mutually conditioning relationship.¹⁴ Human institutions function no better than do the people who operate within them. Yet, those institutions set the conditions and establish the norms for our day-to-day performance. Over time, the one will be not better than the other. A decline in either puts the other at risk. Thus, the trick lies in coming up with flexible patterns of ordering that give individuals the greatest possible opportunity to make decisions and that also require them to live with the results. In other words, the challenge is to find patterns of ordering that promote and sustain authentically responsible and reasonable habits of living.

Because state and corporation comprise people, there is a horizontal aspect to this problem as well. Our natural sociality inclines us towards cooperation, but some commonality of understandings, judgments, sentiments, and aims is the glue that sustains it. Getting out of touch with one another puts that commonality at risk and ultimately throws the

13 Eric Voegelin 'The Eclipse of Reality' in Maurice Natanson (ed.) *Phenomenology and Social Reality: Essays in Memory of Alfred Schütz* (1970) 185

14 Perhaps the best-known exposition of this point is contained in Alexis de Tocqueville, *supra* note 1, *passim*. The point is of ancient lineage; see, e.g., Aristotle *Politics*, Books I, III, V, and VI.

legitimacy of the authority of our organizations into question. By sustaining the relationship among the members of a group, webs of conversation support and refresh the commonality and consensus that cooperation requires. But, that is not the only benefit. There is a normativity to conversation. It displays itself in the way people engaged in conversation attempt to explain and to justify to one another their decisions, judgments, and plans. Get your opponent talking, Plato advised, and soon enough the problems in his position will evince themselves. Conversations act like a gyroscope. By continually exposing individuals and activities to the test of reasonableness and intelligibility, they increase the likelihood that individuals and their institutions will stay on track and authentically make sense, both in small terms and large.

Institutions organized to promote conversation offer yet a further benefit. They encourage and can take advantage of the insights of all their members about the most effective ways to achieve the organizations' purposes. They recognize that innovations are likely to come from the man or woman on the spot, who actually performs the work or provides the service. These last points, all of which have been adopted by participative management theory,¹⁵ need no further elaboration. What such theories implicitly recognize is that the capacity for insight is the most distinctly human of abilities.

Briefly stated, Maitland was right: state and corporation are members of the same 'family.' As such, they face the same sorts of challenges and are prone to the same types of ills. To succeed, their organizational arrangements need to be consistent with our character as free, intelligent, and responsible beings. To the extent our organizational patterns fall short of this, they retard rather than promote the common good and waste assets, both human and material. The widespread and continuing dissatisfaction with the adequacy of the corporate governance structure to account for stakeholders' interests, the growing uncertainty about the character and direction of employment law, and the mounting evidence that US business cannot flexibly respond to changes in the world economy all suggest the same conclusion: Maybe we need a new and more comprehensive way to think about organizations generally, one that is more consistent with our character as humans. Such a principle would permit us to reconsider not only the relationship between the corporation and

15 On participative management theories and their sources, see Thomas C. Kohler 'Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)' (1986) 27 *BCLR* 499, 499-518. Also see Julius Getman and Thomas C. Kohler 'Mécanismes de Participation des Travailleurs aux États-Unis' (1983) *Journées de la Société de Législation Comparée* 55.

employees as stakeholders, but the relation between the corporation and the society at large. Following Lord Wedderburn's advice, this paper will pursue that question in comparative perspective. It will examine the new Social Charter of the European Community and its principle of subsidiarity, by which all manner of institutional arrangements are to be patterned.

The Social Charter and the principle of subsidiarity

In December 1989, the European Community adopted its Charter on the Fundamental Social Rights of Workers - the Social Charter.¹⁶ It sets forth a comprehensive stipulation of twelve basic rights and policies that address the 'social dimension' of the Community's internal market program.¹⁷ As its preamble makes clear, the principles of the Social Charter constitute an integral and organic part of the single market scheme. Thus, the preamble declares 'solemnly that the implementation of the Single European Act must take full account of the social dimension of the Community.'¹⁸ The preamble further states that 'the same importance must be attached to the social aspects as to the economic aspects'¹⁹ in establishing the single market, and requires that these two dimensions 'must be developed in a balanced manner.'²⁰

16 Social Charter, Com (89) 471 (final) (hereinafter Social Charter or Charter). (Of the twelve member nations, only the United Kingdom refused to sign the Charter.) The literature on the Charter is rather extensive. See Philippa Watson 'The Community Social Charter' (1991) 28 *Common Mkt. LR* 37 and sources collected in n1; Lord Wedderburn of Charlton, *supra* note 4, and sources cited therein; Brian Bercusson 'The European Community's Charter of Fundamental Social Rights of Workers' (1990) 53 *Mod. LR* 624; Bob Hepple 'The Implementation of the Community Charter of Fundamental Social Rights' (1990) 53 *Mod. LR* 643. See also sources cited in notes 21 and 25, *infra*.

17 Those rights and policies include: (1) freedom of movement; (2) policies concerning fair remuneration; (3) improvement of living and working standards, including rights to annual and weekly leaves; (4) social protections; (5) the right to freedom of association and collective bargaining; (6) vocational training policies; (7) equal treatment of the sexes; (8) worker's right to information and to participation in decision-making; (9) health and safety protections; (10) adequate retirement income; (11) child work protections; and (12) policies to integrate the disabled into the workplace. A useful summary of the Social Charter's provisions can be found in Declan Costello 'Social Policy' in Peter Ludlow (ed.) *The Annual Review of European Community Affairs, 1990* (Centre for European Policy Studies 1991) 118.

18 Social Charter, Preamble, paragraph 14

19 *Ibid.* Preamble, paragraph 2

20 *Ibid.*

The principles announced in the Social Charter grew out of an informal 'social dialogue' between European-level trade union and employers' organizations.²¹ The discussions between these 'social partners' were supplemented and formalized by Commission actions that resulted in the promulgation of the present Charter.²² Despite its formal adoption, however, the Social Charter has no legally binding effect. As the preamble states, the Charter simply constitutes 'the solemn proclamation of fundamental social rights.'²³ The responsibility for implementing the Charter's policies remains with the member states. The manner of their implementation, however, is to be in accord with the 'principle of subsidiarity.'²⁴

Subsidiarity constitutes one of the Social Charter's core principles, and it illuminates much of the Charter's meaning. Subsidiarity not only states a norm for structuring the relationship between the EC and its member states, but suggests a principle for arranging the order of all sorts of corporate social institutions. 'Subsidiarity is a term that has become part of Eurospeak,' Guenther Schaefer observes.²⁵ 'A few years ago hardly anyone, outside perhaps some German politicians and legal experts, used the term ... Nowadays everyone is talking about subsidiarity and everyone uses a different definition.'²⁶ Perhaps it is the term's relative novelty plus the welter of uses to which it's been put that led Lord Wedderburn to describe subsidiarity as 'that principle of feline inscrutability and political subtlety.'²⁷

Subsidiarity may be a subtle principle, but it is hardly an inscrutable one. Its likeness to cats rests only in its flexibility. Simply put, subsidiarity is an organizational norm: It recommends that social institutions of all

21 On the development of this dialogue, see Commission of the European Communities *Social Europe: The Social Dimension of the Internal Market* (1988) 188 (Annex 10: Note on the Implementation of the Community Social Dialogue). This informal dialogue was instituted in 1985. It was acknowledged and institutionalized by the addition (through Article 22 of the Single European Act) of Article 118B of the Treaty Establishing the European Economic Community [EEC Treaty], which provides: 'The Commission shall endeavor to develop the dialogue between management and labor at [the] European level which could, if the two sides consider it desirable, lead to relations based on agreement.' On these points, also see the discussion in John T. Addison and W. Stanley Siebert 'The Social Charter of the European Community: Evolution and Controversies' (1991) 44 *Industrial & Lab. Rel. Rev.* 597.

22 On these subsequent Commission actions, see Bercusson, *supra* note 16, 624.

23 Social Charter, Preamble, paragraph 17

24 *Ibid.* Preamble, paragraph 16

25 Guenther Schaefer 'Institutional Choices: The Rise and Fall of Subsidiarity' (1991) 23 *Futures* 681, 687

26 *Ibid.*

27 Lord Wedderburn, *supra* note 4, 14

types be ordered so that decision-making can occur at the lowest capable level. The principle insists that the state and all other forms of community exist for the individual. Thus, corporate bodies should not take up what individuals can do, nor should larger groups assume what smaller associations can accomplish. Conversely, the state and other large corporate bodies have the responsibility to undertake those tasks that neither individuals nor smaller associations can perform.²⁸ On this view, communities and social relationships exist to supply help (*subsidium*) to individuals in assuming self-responsibility. The subsidiary function of community rests not in displacing but in setting the conditions for authentic self-rule.

The seemingly exotic aura about subsidiarity that Lord Wedderburn's description suggests may stem more from the provenance of the principle than its substance. As Guenther Schaefer points out, the principle has its roots in Catholic social thought.²⁹ The Catholic social tradition received its start in the mid-nineteenth Century in Germany,³⁰ which remained an

28 One commentator has described subsidiarity as consisting of the following nine elements: '(1) The priority of the person as the origin and purpose of society: *civitas propter cives, non cives propter civitatem*. (2) At the same time, the human person is naturally social, only able to achieve self-realization in and through social relationships – what is sometimes called the 'principle of solidarity.' (3) Social relationships and communities exist to provide help (*subsidium*) to individuals in their free but obligatory assumption of responsibility for their own self-realization. This 'subsidiary' function of society is not a matter, except in exceptional circumstances, of substituting or supplying for individual self-responsibility, but of providing the sets of conditions necessary for personal self-realization. (4) Larger, 'higher' communities exist to perform the same subsidiary roles toward smaller, 'lower' communities. (5) The principle of subsidiarity requires *positively* that all communities not only permit but enable and encourage individuals to exercise their own self-responsibility and that larger communities do the same for smaller ones. (6) It requires *negatively* that communities not deprive individuals and smaller communities of their right to exercise their self-responsibility. Intervention, in other words, is only appropriate as 'helping people help themselves.' (7) Subsidiarity, therefore, serves as the principle by which to regulate competencies between individuals and communities and between smaller and larger communities. (8) It is a formal principle, needing determination in virtue of the nature of a community and of particular circumstances. (9) Because it is grounded in the metaphysics of the person, it applies to the life of every society.' Joseph A. Komonchak 'Subsidiarity in the Church: The State of the Question' (1988) 48 *Jurist* 298, 301. For further descriptions of the subsidiarity principle, see Schaefer, *supra* note 23, 687–91; Thomas C. Kohler 'Quadragesimo Anno' in George Weigel and Robert Royal (eds) *A Century of Catholic Social Thought: Essays on Rerum Novarum and Nine Other Key Documents* (1991) 27. Cf. Mary Ann Glendon 'A Challenge to the Human Sciences' in George Weigel (ed.) *A New Worldly Order: John Paul II and Human Freedom* (1992) 79.

29 Schaefer, *supra* note 25, 687. See also Markus Heintzen 'Subsidiaritätsprinzip und Europäische Gemeinschaft' 1991 *Juristen Zeitung* 317.

30 On the development of the social teachings, see Richard Camp *The Papal Ideology of Social Reform: A Study in Historical Development, 1878–1967* (1969). See also the frequently cited work of Jean-Yves Calvez sj and Jacques Perrin sj *The Church and Social Justice:*

important centre for social Catholicism until the mid-1930s, when the Nazis silenced its leading thinkers.³¹ Social Catholicism arose in response to two developments: The severe social dislocations and urban poverty that attended the rise of the industrial revolution, and the challenges posed by critical social philosophy, particularly that of Marx. The social teachings might be described as meliorist. They early accepted market economies and social institutions like private property, but go on to characterize the sorts of responsibilities that the teachings stipulate are attached to the ownership of property and capital.³² From the start, the social tradition has been concerned with establishing the conditions for

The Social Teachings of the Popes from Leo XIII to Pius XII (1878–1958) J.R. Kirwin (trans.) (1961). On the early background and development of social Catholicism, see Paul Misner *Social Catholicism in Europe: From the Onset of Industrialization to the First World War* (1991); Ralph H. Bowen *German Theories of the Corporative State, with Special Reference to the Period 1870–1919* (1947) 75–118. Also helpful is the well-balanced study of William L. Patch Jr *Christian Trade Unions in the Weimar Republic, 1918–1933: The Failure of Corporate Pluralism* (1985). For an impressively concise but comprehensive overview, see Franz H. Mueller *The Church and the Social Question* (American Enterprise Institute for Public Policy Research 1984).

- 31 Many of these persons went into hiding or exile. One who did not was Oswald von Nell-Breuning, the leading theorist of social Catholicism. He was officially silenced and his works banned in 1936; later he was arrested and sentenced to prison. Nell-Breuning was responsible both for giving the subsidiarity principle its name as well as its comprehensive formulation. Having survived the war, Nell-Breuning exerted an enormous influence on the social and economic structure of postwar Germany. Nell-Breuning was a long-time adviser to the (West) German economics ministry (1948–65) and to the *Deutsche Gewerkschaftsbund* (DGB), the German trade-union movement (who awarded him their highest honour, the Hans Böckler prize). Much of Nell-Breuning's thought also was adopted by the Social Democratic Party (SPD) and integrated into its 1959 Bad Godesburg Program, in which the party dropped its Marxist orientation and accepted a market economy. (As one commentator remarked, 'Nell-Breuning is so often quoted in [SPD] party discussions ... that he has become something of a focal point of party theorizing.' Douglas A. Chalmers *The Social Democratic Party of Germany: From Working-Class Movement to Modern Political Party* (1964) 218 n39. As an extension of the subsidiarity principle, Nell-Breuning also became an important theorist of, and a leading advocate for, worker co-determination (*Mitbestimmung*). For a brief account in English of the development of the co-determination principle, see Herbert J. Spiro *The Politics of German Codetermination* (1958).
- 32 In so doing, the social teachings work an important qualification in the right to private property developed by John Locke in chapter 5 of *The Second Treatise of Government* (1689–90). As C.B. Macpherson points out, 'Locke's astonishing achievement was to base the property right on natural right, and then to remove all the natural law limits from property rights.' C.B. Macpherson *The Political Theory of Possessive Individualism: Hobbes to Locke* (1962) 199. These limits included traditional notions of obligations and stewardship that were conceived to run with property ownership. On this point, also see Thomas Pangle *The Spirit of Modern Republicanism: The Moral Vision of the American Founders and the Philosophy of Locke* (1988) 141–71. Also helpful is the incisive study by Ernest L. Fortin "'Sacred and Inviolable": *Rerum Novarum* and Natural Rights' (1992) 53 *Theological Studies* 203.

authentic individual self-determination. Consequently, social Catholicism consistently has urged self-help through labour unions, producers' cooperatives, and other employee associations, supported by a limited program of social legislation. Likewise, the social teachings long have emphasized the properly delimited role of major corporate bodies, as well as the importance of intermediate (or subsidiary) groups in the social order.³³ The principle of subsidiarity was integral to the first papal social encyclical, *Rerum Novarum*, which was issued in 1891. It was not until the 1931 encyclical, *Quadragesimo Anno*, however, that the principle received either its name or a comprehensive formulation. The principle subsequently has been invoked in the social encyclicals of every pope.

Despite its development, subsidiarity properly has been described as 'neither a theological nor even really a philosophical principle, but a piece of congealed historical wisdom.'³⁴ The noted philosopher and commentator Josef Pieper has termed it simply a 'German legal principle' ('*deutsch-rechtlichen Grundsatz*'),³⁵ while the man who coined the term, Oswald von Nell-Breuning, stated that 'the principle is ancient' ('*Die Sache ist uralte*').³⁶ More than one commentator has traced the roots of the subsidiarity principle to, among others, Aristotle, Montesquieu, and Abraham Lincoln.³⁷ Certainly, the principle's themes are consistent with the insights of Tocqueville³⁸ and John Dewey³⁹ on the sorts of

33 These intermediate groups begin with the family and include unions and employers' associations, as well as other economic, political, social, and cultural groups.

34 John Coleman SJ 'Development of Church Social Teaching' in Charles Curran and Richard A. McCormick SJ (eds) *Readings in Moral Theology No. 5: Official Catholic Social Teaching* (1986) 169, 183

35 Ewald Link *Das Subsidiaritätsprinzip: Sein Wesen und seine Bedeutung für die Sozialethik* v, quoted in Komonchak, supra note 28, 300

36 Oswald von Nell-Breuning SJ 'Subsidiaritätsprinzip' 7 *Staatslexikon* 826, 826 (6th ed., 1962)

37 Komonchak, supra note 28, 298 n1 (collecting sources). Indeed, Lincoln states that: 'The legitimate object of government is to do for a community of people whatever they need to have done but cannot do at all, or cannot so well do for themselves in their separate and individual capacities. In all that the people can individually do as well for themselves, government ought not to interfere.' Nell-Breuning, supra note 36, 838

38 Supra note 1. The parallels between Tocqueville's insights and those of the subsidiarity principle are very strong, particularly the emphasis both place on mediating groups, civil discourse, and the role mediating groups play in functioning as what Tocqueville called 'schools for democracy.' On these points, see Thomas C. Kohler 'Setting the Conditions for Self-Rule: Unions, Associations, Our First Amendment Discourse and the Problem of *DeBartolo*' 1990 *Wis. LR* 149, 200-9.

39 Robert Westbrook provides the following summary of Dewey's thought: 'Among liberal intellectuals of the twentieth century, Dewey was the most important advocate of participatory democracy, that is, of the belief that democracy as an ethical ideal

arrangements that promote social cooperation and responsible self-rule.⁴⁰

The historical wisdom that subsidiarity embodies stems from its practical understanding of human character. The principle stresses the primacy of individuals as free, reasonable, and responsible beings. Consequently, it understands that deliberating, judging, and choosing are the most characteristically human activities. The principle also understands that as humans, we constitute ourselves by what we value, and even more importantly, by what we do.

The link between our values and our actions is crucial. Our values orient and direct our activities, and our spontaneous demand to live reasonably subjects both of these elements to its scrutiny. As a result, we can't long countenance behaviour in ourselves that contradicts or falls short of our principles. We either clean up our act, attempt to rationalize our shortcomings, or come up with a new slate of values.⁴¹ The last-mentioned possibility, however, hardly constitutes an escape route. What truly is valuable also is intelligible. Hence, 'values' that don't make sense, and the institutions that embody and transmit them eventually succumb or are transformed.

The second element of the anthropology of subsidiarity lies in its understanding of humans as situated beings.⁴² We do not reflect, choose, or act in isolation. As humans, we exist only in communities, and this fact fundamentally conditions the scope of our effective freedom. The communities in which we live and perform our tasks give us an orientation and an identity. They tell us not only who we are, but what our lives,

calls upon men and women to build communities in which the necessary opportunities and resources are available for every individual to realize fully his or her particular capacities and powers through participation in political, social and cultural life. This ideal rested on a "faith in the capacity of human beings for intelligent judgment and action if proper conditions are furnished," a faith, Dewey argued, "so deeply embedded in the methods which are intrinsic to democracy that when a professed democrat denies the faith he convicts himself of treachery to his profession." Robert B. Westbrook *John Dewey and American Democracy* (1991) xiv-xv (footnote omitted)

40 These themes also have appeal to a rather wide spectrum of views, e.g., Ernst F. Schumacher *Small is Beautiful: Economics as if People Mattered* (1973); Peter L. Berger and Richard John Neuhaus *To Empower People: The Role of Mediating Structures in Public Policy* (American Enterprise Institute Studies 139, 1977); Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (1984).

41 On these points, see Lonergan *Insight: A Study in Human Understanding*, supra note 11.

42 The term is Michael Sandel's; Michael J. Sandel *Liberalism and the Limits of Justice* (1982) 21.

and thereby our work, mean.⁴³ Consequently, the sorts of questions we raise, whether and how clearly we recognize the ramifications that flow from our choices, and what kinds of roles are open to us in life, all are affected to a large degree by the various communities that pattern the meaning of our lives. Briefly stated, subsidiarity recognizes that individuals, corporate bodies of every sort, and culture exist in a normative and mutually conditioning relationship. Each influences the others, and over time all rise and decline together. Subsidiarity seeks to enhance the full development of human personality by promoting conditions in organizations of every sort that give individuals the greatest possible opportunity to reflect, choose, and act for themselves, and to take responsibility for the outcomes. The principle is in the best sense democratic. It exposes the actions and the rationale of individuals and institutions alike to the widest possible discussion and examination. It thereby activates and makes use of the most valuable of assets: the normativity of the human mind as expressed through common sense and insight. The principle helps to diffuse tendencies towards the totalitarian, the needlessly bureaucratic and the silly by providing endless checks against policies, principles, and programs that simply are not reasonable.

Subsidiarity also recognizes that our capacity for speech grounds the specifically human character of our natural sociality. This understanding of humans as 'conversational' beings is the third element of subsidiarity's anthropology. Once again, it is an insight with a long lineage. For example, as Aristotle observes in the *Politics*,⁴⁴ unlike other animals, whose utterances are restricted to registering pleasure or pain, the human voice conveys some apprehension of the desirable and the hurtful. In fact, human community constitutes itself through agreement over these issues. However vaguely, people invoke notions of fairness or desirability whenever they attempt to achieve consensus or settle on the way to accomplish some task. Since speech is the vehicle by which we reveal our understandings and judgments; conversation is a normative activity. Our involvement in what the ancients termed the *civilis conversatio* thus actuates our capacity for self-rule. Of course, conversations are not conducted in a vacuum. Through its emphasis on mediating groups and its insistence in vesting authority at the lowest competent level, sub-

43 These points are treated extensively in Charles Taylor *Sources of the Self: The Making of the Modern Identity* (1989) (see especially 3–52) and Alasdair MacIntyre *After Virtue: A Study in Moral Theory* 2d ed. (1984) (see especially 204–25). Also see Bernard J.F. Lonergan 'Natural Right and Historical Mindedness' in Frederic E. Crowe (ed.) *A Third Collection: Papers by Bernard J.F. Lonergan* (1985) 169.

44 Book 1, ch. 2, 1253a 5–20

sidiarity seeks to engage and take advantage of our natural sociality in a way that is consistent with our character as reasonable beings.

In brief, the human good is both individual and social.⁴⁵ Because humans live in groups, most of our operations as individuals take the form of cooperating with others. We work together in various ways to produce diverse goods that meet the needs of particular individuals. These particular goods are brought about through institutional frameworks. Our social institutions – families, business organizations, the economy, the law, and the state – fix the patterns by which our cooperative efforts regularly recur. Besides the particular goods produced through our cooperative efforts, the order that patterns and sustains our cooperation is itself a good. This good can be called the good of order.

A well-constituted order does two things: It patterns our operations in a cooperative way, thereby ensuring the continuous supply of the particular goods that people desire. Additionally, it enhances and sustains the commonality of understandings, sentiments, judgments, and goals that recurrent cooperation requires. Institutions represent the good of order, but the order itself results from the insight and resourcefulness of people as they attempt to work out common solutions to the ever-changing circumstances of life together. People in a well-constituted order are joined by their needs and a common good of order that satisfies those needs. Among those needs is the drive to live and act reasonably, in the light of values that truly make sense. An order that sets the conditions for responsible individual self-rule promotes flexible and progressive cooperation. Such an order is a common good. It enhances the likelihood that choices about particular goods or activities will be made in the context of the whole. It thereby assists in keeping the individual and the social good aligned, and in ensuring that institutions serve rather than dominate individuals.

Subsidiarity provides a maxim for devising well-constituted institutional orders. The principle, however, is formal rather than substantive. It represents a kind of heuristic device that guides deliberation, but does not attempt to stipulate the content of the results. Consistent with its view of the person, subsidiarity depends upon common sense and dialogue for its application. It is flexible rather than dogmatic, and emphasizes practice over programmatic versions of theoretical certainty and structural uniformity.⁴⁶ Having described something of the character and

45 For a further explication of these points, see Bernard J.F. Lonergan *Method in Theology* (Toronto: University of Toronto Press 1990) 47–59.

46 On uniformity as an element of rationalism, and the rationalist distrust of practice and experience as sources of knowledge, see Michael Oakeshott 'Rationalism in

meaning of subsidiarity, it is appropriate briefly to sketch a few of the ways the Social Charter uses the principle.

Subsidiarity in the Social Charter: The principle at work

Since the adoption of the Social Charter, nearly all the discussion of subsidiarity has concentrated on the way the principle might function as a norm for structuring the relationship among the Community, the member nations, and their states or administrative regions.⁴⁷ Because of this narrow focus on subsidiarity as a principle of Community federalism, remarkably little attention has been paid to the rich and nuanced manner in which the principle suffuses the Social Charter itself. Giving at best a thumbnail account of a few of these features, particularly as they affect corporate governance and employee voice, is the task of this section.

To an American's eyes at least, one of the most striking things about the Social Charter is its strong affirmation and acceptance of the institution of collective bargaining. At a time when unions appear to be in a nearly irreversible state of decline in the United States,⁴⁸ and when many American liberals and conservatives alike have declared collective bargaining a failed or irrelevant experiment, Europe's endorsement of the institution seems nothing less than extraordinary. Even more surprising is the extent to which the Community has expressed its willingness to rely on collective bargaining as a means both for implementing the Social Charter's principles as well as developing the substantive conditions of life in the social sphere. Thus, not only does the Charter guarantee the right of employers and workers to constitute trade organizations 'for defense of their economic and social interests.'⁴⁹ This idea is not wholly foreign to Americans, who typically are accustomed to thinking of collective bargaining strictly as an adversarial means through which employees pursue their monetary self-interest. The Social Charter and

Politics' in Timothy Fuller (ed.) *Rationalism in Politics and Other Essays* (Liberty Press 1991) 5.

47 See, e.g., Bercusson, *supra* note 16; Hepple, *supra* note 16; Heintzen, *supra* note 29; Schaefer, *supra* note 25; Watson, *supra* note 16.

48 At present, only 11.9 per cent of the private sector workforce in the United States is organized. In 1930, with the depression in full swing and five years before the passage of the National Labor Relations Act (29 USC: §§ 151-64) (1982 & Supp. v 1987), the rate stood at 10.2 per cent. See I. Bernstein *The New Deal Collective Bargaining Policy* (1950) 2. On the decline in union membership, see Richard Freeman and James Medoff *What Do Unions Do?* (1984) 221-45.

49 Social Charter, Article 11

the Action Program⁵⁰ that has been promulgated to implement the Charter's policies go further. They encourage 'social dialogue' – that is, collective bargaining – between the social partners at both the European level and within the member states. At the European level, this 'dialogue' may be on any topic⁵¹ and can, 'if the two sides consider it desirable, lead to relations based on agreement.'⁵² In short, collective bargaining can act as a source of Community law. Moreover, both the Social Charter and the Community's Action Plan see collective bargaining as having a central place in the implementation and the further elaboration of the fundamental rights and policies stated in the Charter.⁵³ Indeed, the Action Program specifically recognizes that implementation of the Social Charter's policies through collective agreements makes 'it possible to adapt to particular situations and enable[s] the two sides of industry to be actively involved.'⁵⁴

The continuous and active involvement of those directly affected in an ongoing discourse about the way their lives should be ordered is a key feature of subsidiarity, as is the policy of encouraging the shift of responsibility to the lowest grass-roots level possible. Similarly reflective of the subsidiarity principle is the Social Charter's explicit recognition that 'social consensus contributes to the strengthening of the competitive-

50 Title II of the Social Charter addresses the Charter's implementation. The pertinent articles provide as follows. Article 27: 'It is more particularly the responsibility of the Member States, in accordance with national practices, notably through legislative measures or collective agreements, to guarantee the fundamental social rights in this Charter and to implement the social measures indispensable to the smooth operation of the internal market as part of a strategy of economic and social cohesion.' Article 28: 'The European Council invites the Commission to submit as soon as possible initiatives which fall within its powers, as provided for in the Treaties, with a view to the adoption of legal instruments for the effective implementation, as and when the internal market is completed, of those rights which come within the Community's area of competence.' The Action Plan (Com (89) 568) was promulgated pursuant to Article 28. For a summary of the Action Plan, see 'Social Charter: Action Programme Released' (January 1990) *Eur. Industrial Rel. Rev.* 11.

51 See Hepple, *supra* note 16, 651. It is interesting to contrast this attitude towards 'social dialogue' with the American approach to bargaining, which through doctrines like the mandatory-permissive distinction seek to cabin the scope of discussion (on the distinction, see note 56, *infra*). Also demonstrative of the American attitude towards the institution of collective bargaining in the US Supreme Court's opinion in *Longshoremen v. Allied International, Inc.* 456 US 212, 226 (1982). Here, the Court condemned what it admitted was a political protest by a union because such protests 'were far removed from what has traditionally been thought to be the realm of legitimate union activity.' On this matter, see Kohler, *supra* note 38, 193–8.

52 Article 118B, EEC Treaty, *supra* note 21

53 See Bercusson, *supra* note 16, 627–8, 641–2; Hepple, *supra* note 16, 651–2.

54 Action Program, Com (89) 568 Part I, 4

ness of undertakings, of the economy as a whole ... and to the creation of employment [and] is an essential condition for ensuring sustained economic development.⁵⁵

The Charter's emphasis on the discourse and its broad willingness to rely on the 'social dialogue' as a vital means for ordering stands in a sharp contrast to the desiccated and overly juridified shell of what collective bargaining has become in the United States. Indeed, instead of a normative dialogue between 'social partners,' it is much more typical in the United States to regard bargaining as an adversarial contest between wholly self-interested parties which the law seeks to contain and limit through complex and highly technical doctrines such as the distinction between mandatory and permissive topics⁵⁶. European politicians⁵⁷ and scholars⁵⁸ alike long have shown a substantial interest in the US version of 'free'⁵⁹ collective bargaining, which might best be characterized as a system of autonomous self-regulation or, as Gunther Teubner calls it, a system of reflexive law. It is one of history's little ironies that the United States seems intent on abandoning this institution at a time when Europe has begun to experiment with many of its core features. Indeed, rather

55 Social Charter, Preamble, paragraph 5

56 In *NLRB v. Wooster Div. of Borg-Warner Corp.* 356 US 342 (1958) the US Supreme Court construed the National Labor Relations Act to contain a distinction between mandatory and permissive bargaining topics, holding that parties legally are required only to bargain over the former. Consequently, the status of a topic depends ultimately upon its characterization by the judiciary. The real significance of this case does not lie in its impact on the identity of the subjects with which the parties deal. Rather, this case and its progeny have afforded the Court a means to shape for itself – and for the readers of its opinions – a view about the nature of the Labor Act's lawmaking processes and the types of issues capable of being handled within it. Likewise, these cases have influenced views about the types of concerns about which employee associations appropriately and legitimately may speak. To a large extent then, the *Borg-Warner* line of cases has created a vicious circle in which the Court's understanding about the purposes and functions of unions and collective bargaining is based upon its own characterization of them.

57 On France's encouragement of the use of this model in the 'Auroux' laws as an alternative to the previous legal models, see Mary Ann Glendon 'French Labor Law Reform 1982–1983: The Struggle for Collective Bargaining' (1984) 32 *Am. J. Comp. L.* 449. In 1990, the French Labor Ministry reported that bargaining activity – 'social dialogue' – in the previous three years had reached levels that met the aims of the 1982 Auroux laws. For a summary, see 'France: Collective Bargaining in 1990' (July 1991) *Eur. Industrial Rel. Rev.* 17–9.

58 Glendon, *supra* note 57; Gunther Teubner 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law & Soc. Rev.* 239. Also see Gunther Teubner (ed.) *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (1987).

59 That is, characterized by a lack of state intervention in the substantive results of the process

than a 'convergence' of legal systems, something of a 'transference' of orders seems at least potentially to be underway. Thus, the employment relationship in the United States is ever increasingly being subjected to extensive (if piecemeal) direct state regulation, while the stated desire of the Social Charter is to nudge the European Community states in the opposite direction.

The Social Charter's guarantee of information, consultation, and participation in management represents a second area in which the subsidiarity principle can be found at work.⁶⁰ Once again, the emphasis is on promoting discourse and institutional arrangements that furnish individuals with the opportunity and responsibility to take part in making decisions that affect their day-to-day existence. Thus, while the Charter specifies no comprehensive list of topics, it does provide that 'information, consultation and participation' must occur over technological changes, operational restructurings, or mergers that will have an impact on the availability of employment.⁶¹

Consistent with subsidiarity's stress on practice and flexibility over structural uniformity, the Charter dictates no particular form of participation scheme that member states must adopt. Instead, the Charter simply provides that information and participation schemes 'must be developed along appropriate lines, taking into account the practices in force in various Member States.'⁶² Here again, 'practices' appears to imply that collective agreements are an appropriate source of law, and the dialogue between the social partners constitutes a valid and desirable means for making it.⁶³

Although not part of the Social Charter's scheme, the EC's proposed European Company statute represents yet another instance of subsidiarity's application to and influence over corporate arrangements.⁶⁴ Any

60 Social Charter, Articles 17, 18

61 Social Charter, Article 18

62 Social Charter, Article 17

63 See Bercusson, *supra* note 16, 627-8, 641-2; Hepple, *supra* note 15, 651-2. The Council has also prepared a draft Directive on 'European Works Councils' that, if adopted, basically would require undertakings with 1,000 employees and operations in more than one member state to establish a co-determination scheme. See 'EEC: Draft Directive on European Works Councils' (March 1991) *Eur. Industrial Rel. Rev.* 12-4, 29-33. (Under Article 189 of the EEC Treaty, Directives are 'binding as to the results to be achieved,' but 'leave to the national authorities the choice of form and method.')

64 For a summary of the Statute and a substantial extraction of its provisions, see 'EEC: Commission Proposes European Company Statute' (September 1982) *Eur. Industrial Rel. Rev.* 2; 'EEC: European Company Statute' (December 1989) *Eur. Industrial Rel. Rev.* 28-31; (January 1990) 26-8; (February 1990) 29-31.

detailed account of the statute far exceeds the confined limits of this paper. Briefly stated, the statute broadly parallels and supports the worker consultation and participation guarantees stated in the Social Charter.

The proposed statute would govern 'European companies' that choose to organize themselves directly under Community law rather than the law of one of the member states. The statute as currently proposed requires such companies to guarantee worker consultation information and participation rights, and provides three participatory models from which to choose. Again, consistent with the subsidiarity principle, the draft statute emphasizes employee participation in decisions which affect one's day-to-day conditions. Hence, the proposed participatory models focus on giving employees voice in strategic decisions, including relocations, mergers, joint ventures, and corporate reorganizations. Once again, the proposed statute affords one form of participation to be established through collective bargaining.

The lessons of subsidiarity

Before briefly considering a few of the lessons subsidiarity holds for us, it might be worth recalling why we value free-market economic arrangements in the first place. Certainly, it is not for the sake of the market or of competition in and of themselves. Instead, it is because free-markets promote individual determination and material well-being, both of which are conditions for political liberty and self-rule. Hence, as Adam Smith observed, there is a reflexive relationship between market arrangements and liberal social institutions. The two need and support one another.⁶⁵ Consequently, Milton Friedman properly warns us that 'capitalism is a necessary condition for political freedom' but 'it is not a sufficient condition.'⁶⁶ Subsidiarity focuses on the sorts of arrangements that suffice to promote the full realization of the common good in all of its aspects, including the economic and the political.

As Maitland observed, the state and corporations of every description consist of the same thing – human beings. Because human character does not change, the subsidiarity principle applies to corporate orders of every sort. However, although human nature is a constant, the situations that

65 This is one of the key teachings of *The Wealth of Nations*. In fact, Smith never refers to capitalism, but to 'the system of natural liberty.' *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) part 1, ch. x. For similar insights, see Alfred Marshall *Principles of Economics: An Introductory Volume* 8th ed. (1948) 1–13.

66 *Capitalism and Freedom* (1982) 10

humans encounter and the contexts within which they operate are ever-changing. As a result, subsidiarity does not represent a defined set of organizational structures or procedural formulations that are ready for off-the-shelf adoption.

So, what does the principle do for us? What does it have to offer? The key idea subsidiarity affords is a more nuanced way to think about human character and the relationship between our institutions and individual well-being. The principle also constantly recalls to us the most basic purpose for which our institutions exist. Briefly stated, subsidiarity's intense practicality lies in the guidance it provides for establishing institutional orders that are consistent with our human character. Thus, the principle gives a new and more flexible starting point for thinking about corporate structures of every type.

In concrete terms, subsidiarity suggests the sorts of contributions that a revived and less adversarially oriented system of collective bargaining (or 'social dialogue') might make to affording employees 'voice,' while advancing the conditions for cooperation and organizational effectiveness. It also implies roles for unions and other sorts of employee associations that go beyond simply acting as economic self-interest groups, while pointing out the possibilities that may inhere in works councils and other forms for employee representation. Moreover, subsidiarity offers a real alternative to the ever-increasing trend in the United States towards state regulation of the employment relationship and the sorts of rigidity that such regulation brings.

The point of this brief recitation is not to engage in 'the foolish search for institutions to import from elsewhere' against which Lord Wedderburn warned, but to stretch our imagination as he counseled. Specific patterns of ordering that work in one place may not fit another. However, the need for new ways of thinking about the good of order never has been more acute.

In the twilight years of this century, we have become well aware of the enervating effects that flow from over-reliance on state institutions. What we frequently tend to miss is that over-reliance on 'private' institutions produces the same effects. We are not different creatures when dealing with the state than we are when dealing with 'private' institutions. Nor does the character of dependence change because that dependence is upon a corporate body rather than the state. As Tocqueville so clearly understood, individuals and society alike become self-governing only by regularly and repeatedly engaging in acts of self-determination. It is the habit that sustains the condition. Consequently a democracy encounters its greatest danger of being perverted when individuals no longer have direct responsibility for making the day-to-day decisions about the order of their lives.

This doesn't mean that corporations must somehow take on the trappings of a representative democracy or put decisions to a vote of the 'citizens.' It does mean that as corporations become increasingly independent of the state, and as the power of initiative becomes more and more theirs, subsidiarity should progressively become a more prominent concern. To overlook its guidance puts at risk all the goods that free markets are intended to achieve, while undermining over the long run the conditions that any organization requires to sustain itself.

Of course, whether the rich potential of the subsidiarity principle will be realized through the Charter's scheme remains an open question. Certainly, it faces some formidable obstacles. First, the Charter and the Action Plan contain some structural weaknesses that may over the long run undermine the existence of autonomous unions on which the effectuation of an authentic regime of subsidiarity depends.⁶⁷ Another, more generalized danger presents itself in the possibility of overreaching on the part of Commission and its now infamous 'technocrats.' It is quite possible for the *libido dominandi* of the bureaucrats to cloak itself in the principle, and in the name of 'subsidiarity' to centralize much decision-making in Brussels on the basis that the tasks so assumed could not be performed effectively by smaller or more localized bodies.

The most formidable and deeply embedded obstacle, however, lies in the strong tendency of modern capitalism to overwhelm and eventually to dissolve the discrete, the local, and the particular. Yet it is these very grass-roots institutions – which Edmund Burke called the 'little platoons' of social life – that ground a democracy.⁶⁸ They are the places where the habits of self-rule are practiced and learned.

In substantial part, the European Community represents an effort to erect the large commercial republic of *The Federalist Papers* – but without the enormous hostility towards intermediate groups that characterizes *The Federalist's* project. In essence, the Social Charter and its subsidiarity principle stand as an attempt to accommodate modern markets to the mediating bodies that root civic life. Achieving that accommodation will be a delicate and constant task and will require the exercise of authentic practical wisdom. Whether local institutions can be preserved in the face

67 See Stephen J. Silva 'The Social Charter of the European Community: A Defeat for European Labor' (1991) 44 *Industrial & Lab. Rel. Rev.* 626; Lord Wedderburn of Charlton 'European Community Law and Workers Rights: Fact or Fake in 1992?' (1991) 13 *U. Dublin LR* 1.

68 Cf. Raymond Aron 'Une Citoyenneté Multinationale est-elle Possible?' (Hiver 1991-92) 56 *Commentaire* 695

of the centripetal forces exerted by modern markets remains unclear.⁶⁹ One thing, however, is certain: Institutional orders inconsistent with human character will not survive. Consequently, the most pressing question of our time is whether, and the degree to which, our notions of the human person are accurate. Everything turns on our answer to this query.

69 On these points, see 'Proceedings of the Symposium on Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations' (1993) *Brigham Young U. LR* (forthcoming).