

SUBSIDIARITY IN GLOBAL GOVERNANCE

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I

INTRODUCTION

Global governance is expanding fast and in different directions, often without a clear or principled framework to guide institutional creation and change. Formal international institutions, intergovernmental networks, and private authorities operate side by side, sometimes in unison, sometimes in conflict, and all of them have close relations with a variety of domestic political actors. Yet the rise of authority on the global level has provoked increasing challenges, and calls for a more principled approach to allocating powers among different sites of governance have grown louder in recent years.

One principle often put forward in this context is “subsidiarity.”¹ Subsidiarity is typically understood as a presumption for local-level decisionmaking, which allows for the centralization of powers only for particular, good reasons. The principle is widely seen as an attractive starting point for thinking about, and designing, the vertical distribution of powers in multilevel systems, as it reflects the idea that self-government is typically more meaningful on a smaller scale.² Yet the indeterminacy of the principle, as well as

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1. See, e.g., *THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY* (Tomer Broude & Yuval Shany eds., 2008); DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* (1995); Andreas Føllesdal, *The Principle of Subsidiarity as a Constitutional Principle in International Law*, 2 *GLOBAL CONSTITUTIONALISM* 37 (2013); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 *EUR. J. INT'L L.* 907 (2004); Robert Howse & Kalypso Nicolaïdis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?*, 16 *GOVERNANCE* 73 (2003).

2. See, e.g., *FEDERALISM AND SUBSIDIARITY* (James E. Fleming & Jacob T. Levy eds., 2014); *GLOBAL PERSPECTIVES ON SUBSIDIARITY* (Michelle Evans & Augusto Zimmermann eds., 2014)

the negative consequences that might flow from leaving decisions at the national level, has also led to vocal critique.

With this symposium, we analyze and evaluate the place and role of subsidiarity as a political and legal norm in global governance. We seek to understand in what contexts subsidiarity and related concepts have emerged and what variation they show across issue areas, institutional contexts, and involved actors. For this purpose, we inquire into different sites of decisionmaking (domestic, regional, transnational, and international) in the design of: new institutions; political and regulatory normmaking; and adjudication. Bringing together scholars from law, political science, and political philosophy, we seek to map the emerging landscape of subsidiarity, understand factors behind its shape, assess the status of subsidiarity as a legal or political norm, trace the effects of the use of subsidiarity, and evaluate its suitability as a guiding principle in the different contexts under analysis.

In this framing article, we set the scene for this inquiry in five steps. We begin by outlining the rise of international authority and situating subsidiarity among alternative principles that might guide the allocation of powers between different levels of governance (part II). We then set out different possible versions of subsidiarity and clarify in which way we use the concept here (part III). Next, we draw on the literatures of comparative politics and law, as well as European Union (EU) studies, to assess experiences with subsidiarity in the context of other multilevel systems (part IV). We use these, as well as insights from the contributions to this symposium, to generate a number of hypotheses about the prevalence, potential, and limitations of subsidiarity in the context of global governance (part V). Finally, we assess to what extent, and in what circumstances, subsidiarity might be desirable as a guiding principle (part VI). We conclude in part VII by offering some final thoughts on what role subsidiarity should ultimately play in practice.

The picture that emerges from this inquiry is not a homogeneous one. As reflected in this framing article and in the other contributions to this symposium, both analytically and normatively, there is significant variation across issue areas and institutional contexts. Yet even though subsidiarity may not provide all the answers to the challenge of allocating powers in global governance, it represents a useful starting point. Reflecting a general preference for local decisionmaking, subsidiarity is a suitable default rule for many areas of global governance and can, if properly specified and institutionalized, help to channel the activities of global institutions into areas in which they can be justified on a principled basis.

II

THE ALLOCATION OF POWERS IN GLOBAL GOVERNANCE

The period since World War II has been characterized by the constant rise of international authority. Bilateral and multilateral treaties as well as international organizations have been growing in number and scope, and they have come to affect most fields of governance in one way or another. International authority has also become stronger and more independent of the preferences of individual states. States have delegated increasing authority to international institutions and international courts, many international bodies have evolved well beyond initial expectations, and new forms of transnational and private authority have emerged outside of formal delegation structures altogether.³

For long, many scholars of international law and international relations viewed the rise of global authority in a positive light, as having increased the collective problem-solving capacity in an interdependent world.⁴ In recent years, however, several negative effects have been noticed more widely. These effects relate, in the first place, to a greater politicization of international authority,⁵ opening up new cleavages in domestic politics, with an increase in political groups characterized by pronounced skepticism of all things international. The greater attention to global governance has also led to stronger critiques based on its democratic deficit, weak accountability mechanisms, and lack of judicial control. Additionally, calls for checks along the lines of domestic models have grown over the years.⁶ Such critiques are especially pronounced among developing countries where, for years, many have perceived international institutions—especially the international financial institutions and the United Nations (UN) Security Council—as tools of domination for the Global North and have sought to create greater autonomous policy space.⁷

These developments have provoked calls for a more principled approach to the definition and allocation of powers to institutions beyond the state. Such an approach should not be overly restrictive: international authority, despite its recent expansion, is still comparatively weak, especially in light of the magnitude of transboundary challenges. Yet this principled approach would need to balance a strong demand for international authority with concerns about politicization, democracy and the rule of law, and Western dominance.

3. See, e.g., WHO GOVERNS THE GLOBE? (Deborah D. Avant, Martha Finnemore & Susan K. Sell eds., 2010).

4. See David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841 (1987).

5. See Michael Zürn, Martin Binder & Matthias Ecker-Ehrhardt, *International Authority and Its Politicization*, 4 INT'L THEORY 69 (2012).

6. See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. no. 3, 2005, at 15.

7. See Amitav Acharya, *Norm Subsidiarity and Regional Orders: Sovereignty, Regionalism, and Rule-Making in the Third World*, 55 INT'L STUD. Q. 95 (2011); Bhupinder Singh Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EUR. J. INT'L L. 1 (2004).

A variety of normative principles have been proposed to guide the allocation of global authority. The classical criterion is the *consent* of contracting states: if states consensually decide to jointly exercise authority in a given issue area, their consent also establishes the appropriateness of the newly constituted international authority.⁸ This principle is easy to operationalize, but it does not offer any substantive guidance. Further, it fails to address situations in which consensual procedures are too slow and cumbersome to adapt the powers of international institutions to changing circumstances. As institutional action operates with increasing distance from initial delegation, or is not based on delegation at all, the usefulness of consent declines further.⁹

Weighing *utilitarian considerations*—sometimes based on the criterion of “comparative benefit,”¹⁰ the idea of global public goods, or the Pareto principle—provides an alternative normative principle that suggests decisions should be allocated to the institution that can ensure the most effective provision of welfare.¹¹ Utility or efficiency is difficult to assess, however: assessments tend to suffer from significant cognitive uncertainty, and utility, a social construction, tends to vary strongly among the participants of global governance institutions.

Other approaches have a *democratic* origin. Some of these approaches suggest that the possibility of democratic self-governance exists only on the national level and thus favor national decisionmaking and control over international cooperation. Others emphasize democratic quality—the potential for participation, communication, and inclusiveness—and tend to be skeptical about global institutions for this reason.¹² Cosmopolitan democrats, on the other hand, argue that the scope of decisions and those who are affected by them should be as congruent as possible.¹³ Moving decisions from domestic to international institutions is then regarded as warranted if policy problems extend beyond state borders, often resulting in calls for a substantial transfer of powers from the domestic to the international sphere.¹⁴

8. For an emphasis on consent in the political philosophy debate, see Tom Christiano, *The Legitimacy of International Institutions*, in *THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW* 380 (Andrei Marmor ed., 2012).

9. See Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 *AM. J. INT'L L.* 1 (2014).

10. Allen Buchanan & Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20 *ETHICS & INT'L AFF.* 405, 422 (2006).

11. See WALLACE E. OATES, *FISCAL FEDERALISM* 35–38 (1972) (discussing this theory in the federal context).

12. See JÜRGEN HABERMAS, *THE DIVIDED WEST* 69 (2004); Robert A. Dahl, *Can International Organizations Be Democratic? A Skeptic's View*, in *DEMOCRACY'S EDGES* 19 (Ian Shapiro & Casiano Hacker-Cordon eds., 1999).

13. See, e.g., HELD, *supra* note 1; Robert E. Goodin, *Enfranchising All Affected Interests, and Its Alternatives*, 35 *PHIL. & PUB. AFF.* 40, 65–66 (2007).

14. See Michael Zürn, *Democratic Governance Beyond the Nation-State: The EU and Other International Institutions*, 6 *EUR. J. INT'L REL.* 183 (2000).

A fourth set of substantive approaches builds on conceptions of *justice*. Defenders of cosmopolitan justice—with a strong emphasis of moral obligations beyond borders—often favor global authority: they justify the creation of strong supra-state institutions as instrumentally necessary in order to ensure compliance with transboundary obligations of justice, including obligations of distributive justice.¹⁵ The idea of national responsibility has the opposite effect. It does accept international authority in certain areas, most notably for the protection of basic rights. It is much more skeptical, however, of transboundary moral obligations and instead espouses the idea that national communities should normally govern their own fate autonomously.¹⁶

Subsidiarity shares with the latter approach a general presumption for decisionmaking at the local level, but it can also be read as linked to other, more centralizing approaches. In the next part, we trace some of these linkages and clarify how the concept of “subsidiarity” as it is used throughout this issue.

III

THE CONCEPT OF SUBSIDIARITY

Subsidiarity has long had a variety of meanings, and the resulting vagueness has only contributed to the appeal of the concept. As observers have noted, it is a “slippery, multifaceted, and polysemic concept,”¹⁷ and the apparent consensus on the importance of subsidiarity among a wide range of social and political actors “has been gained only by obfuscation.”¹⁸ Although the most prominent subsidiarity discourse today, that in the EU, mainly concerns the allocation of powers between national and European institutions, other variants have focused on the relation between state and society.

Catholic social thought, often seen as central to the modern rise of subsidiarity as a political principle,¹⁹ employed subsidiarity to delineate spheres in which government can and should act, while at the same time protecting individuals and societal associations from what was regarded as excessive intervention. And whereas this latter variant drew its inspiration from principles of justice, others have drawn on ideas of liberty or economic efficiency in order to justify the primacy of lower-level decisionmaking.²⁰ Subsidiarity has been conceptualized as part of very different approaches to allocating powers

15. See, e.g., SIMON CANEY, *JUSTICE BEYOND BORDERS: A GLOBAL POLITICAL THEORY* 148–88 (2005). On approaches to global distributive justice with other institutional consequences, see Michael Blake & Patrick Taylor Smith, *International Distributive Justice*, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY*, <http://plato.stanford.edu/archives/win2013/entries/international-justice/> (last visited Feb. 26, 2016).

16. DAVID MILLER, *NATIONAL RESPONSIBILITY AND GLOBAL JUSTICE* 111–34 (2007).

17. Pierpaolo Donati, *What Does “Subsidiarity” Mean? The Relational Perspective*, 12 *J. MKTS. & MORALITY* 211, 211 (2009).

18. Andreas Føllesdal, *Survey Article: Subsidiarity*, 6 *J. POL. PHIL.* 190, 190 (1998).

19. David Golemboski, *Federalism and the Catholic Principle of Subsidiarity*, 45 *PUBLIUS: J. FEDERALISM* 526 (2015).

20. See Føllesdal, *supra* note 18, at 200–07.

between spheres of authority, and the divergence in foundations has also led to significant divergence in interpretation. As a result, contestation reigns over not only the strength and beneficiaries of subsidiarity but also the kinds of demands subsidiarity makes on actors.

A. A Rebuttable Presumption for the Local

In order to retain conceptual clarity and make the concept of subsidiarity useful both for analytical purposes and for normative guidance, we need to specify in which sense we are using it here. The concept is unhelpful if it is generically seen to include any principled allocation of powers between levels of governance requiring “that powers should be allocated to the individual or institution that can best exercise them” or if it is interpreted as merely an unspecific preference for local action.²¹ These interpretations largely shift the allocation of authority over to other approaches that consider where such exercise might be “best” and thus deny subsidiarity an independent role. A meaningful concept of subsidiarity needs multiple criteria for allocating authority.²²

As a starting point, we understand subsidiarity as a *rebuttable presumption for the local*²³—as a principle that requires decisionmaking to take place at a lower level unless good reasons exist for shifting it upward. Our focus is on *vertical relations between governance institutions*, that is, relations between institutions with a different scope of authority. Because we are primarily interested in the operation of subsidiarity in global governance, the most obvious application is to the relations between national and (regional as well as global) international institutions. Most contributions to this symposium adopt this focus. Yet in principle, subsidiarity can also extend to relations with sub-state governments in federal states, local institutions (such as cities),²⁴ and private forms of governance. For example, Peer Zumbansen’s article in this issue focuses specifically on the problems created by applying subsidiarity in the context of transnational private regulation.²⁵ We exclude, however, relations of a merely horizontal or lateral nature, such as between different international

21. Michelle Evans, *The Principle of Subsidiarity as a Social and Political Principle in Catholic Social Teaching*, 3 SOLIDARITY: J. CATH. SOC. THOUGHT & SECULAR ETHICS 44, 54 (2013); see also Robert Howse & Kalypso Nicolaïdis, *Toward a Global Ethics of Trade Governance: Subsidiarity Writ Large*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 259 (arguing subsidiarity is mainly about deference to institutions with superior credentials).

22. See Thomas M. Franck, *The Centripete and the Centrifuge: Principles for the Centralisation and Decentralisation of Governance*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW: CONSIDERING SOVEREIGNTY, SUPREMACY AND SUBSIDIARITY 19, 26–31 (Tomer Broude & Yuval Shany eds., 2008).

23. Andreas Føllesdal, *Subsidiarity and International Human-Rights Courts: Respecting Self-Governance and Protecting Human Rights—Or Neither?*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 147, 148.

24. See Loren King, *Cities, Subsidiarity, and Federalism*, in FEDERALISM AND SUBSIDIARITY, *supra* note 2, at 291.

25. See Peer Zumbansen, *Happy Spells? Constructing and Deconstructing a Private-Law Perspective on Subsidiarity*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 215.

institutions, between states, or between institutions of private governance.²⁶ The directionality of the subsidiarity relation in such instances is less clear, and the reasons for deference to one or the other institution (often taken to be geographical or functional proximity) differ from those typically adduced for vertical relationships.

Although subsidiarity generally favors local action, it can also turn into a justification for higher-level decisionmaking.²⁷ In this issue, Tomer Broude focuses on this risk in the context of the World Trade Organization (WTO).²⁸ In contrast with absolute principles of allocation, such as sovereignty, subsidiarity contains only a presumption that can be rebutted with good reasons. The lower the threshold for such “good reasons,” the more subsidiarity will facilitate centralization; the higher the threshold, the more it will push toward decentralization.

What counts as a good reason is, unsurprisingly, disputed between the different versions of subsidiarity. Many approaches require greater effectiveness in problemsolving—they require desired results to be better achieved on the higher level, or action on the lower level to not be able to (sufficiently) achieve them. Low administrative, financial, legal, or political capacities of states may thus lead to calls for stronger involvement of international institutions.²⁹ The EU conception of subsidiarity follows this line.

Yet everything then hinges on the definition of the “desired results.”³⁰ Models of fiscal federalism, for example, accept only Pareto-improving central measures that address negative externalities, while the Catholic social tradition allows for measures that pursue goals of distributive justice and may leave certain units worse off. Some approaches leave the definition of goals to the sub-units, and others grant the central level a stronger role in this respect.³¹ As a result, the principle of subsidiarity, if insufficiently specified, can appear to do little actual work, being a mere placeholder for substantive conceptions of the proper distribution of powers between different levels of government.

26. *But see* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW 211–26 (2008); Claus Kress, *Universal Jurisdiction over International Crimes and the Institut de Droit international*, 4 J. INT’L CRIM. JUST. 561, 579 (2006).

27. *See* Gareth Davies, *Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time*, 43 COMMON MKT L. REV. 63, 67–72 (2006).

28. *See* Tomer Broude, *Selective Subsidiarity and Dialectic Deference in the World Trade Organization*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 53.

29. *See* Isobel Roele, *Sidelining Subsidiarity: United Nations Security Council “Legislation” and Its Infra-Law*, 79 LAW & CONTEMP. PROBS., no. 2, 2016.

30. On this problem in the EU context, *see* Nicholas W. Barber, *The Limited Modesty of Subsidiarity*, 11 EUR. L. J. 308, 318 (2005); Davies, *supra* note 27, at 78.

31. *See* Andreas Føllesdal, *Competing Conceptions of Subsidiarity*, in FEDERALISM AND SUBSIDIARITY, *supra* note 2, at 214, 219–24.

B. Subsidiarity, Weak and Strong

In order to avoid such a conflation, it is useful to think of two ideal types of subsidiarity with very dissimilar degrees of analytical independence. A *weak version* is characterized by an easily rebuttable presumption—a presumption for the local that provides a low threshold and can be overcome by any reason that makes action on a higher level appear advantageous, be it for the sake of efficiency, efficacy, or justice. A *strong version* of subsidiarity, in contrast, is characterized by a high threshold—a presumption in favor of local governance that can be rebutted only by strong reasons in exceptional cases. Such reasons may lie in qualified negative externalities or justice considerations that may apply to certain circumscribed situations. It is only in such a strong version that subsidiarity remains relatively independent from other principles for the allocation of powers between different levels of governance.

Subsidiarity is distinctive only when it acts as a trump—when it trumps certain good reasons for scaling governance up—and, as part V explains, the principle has a significant impact only when it is treated as such a trump. Practically, a strong version of subsidiarity might be grounded in the risk of abuse by higher-level institutions; normatively, it may find its basis in considerations of democracy or self-determination that may be seen to outweigh other reasons in normal circumstances.

Thinking of subsidiarity in such strong terms may mean that it is not appropriate for all issue areas—as discussed in part VI, there may be areas in which a strong presumption in favor of the local is undesirable. Both empirically and normatively, subsidiarity may play varying roles across the fields of global governance: In some fields, it may come in a strong version; in others, it may come in a weak version; in yet others, it may not come at all.

C. Bounded and Unbounded Contexts

Operationalizing subsidiarity depends largely on the institutional context in which it operates. So far we have treated it as operating in an *unbounded* fashion—as a principle for attributing powers to certain levels of government in the abstract. Given the inevitable disagreement about the legitimate aims against which reasons for scaling decisionmaking up could be measured, however, the principle of subsidiarity will often be difficult to apply in such unbounded contexts. It may operate more as a broad constitutional principle with little scope for direct specification.

We may find the subsidiarity principle to be more effective in *bounded* contexts: in situations in which the legitimate aims are institutionally predefined, and in which subsidiarity operates within an existing frame (rather than shoulders the construction of the frame itself). This is the typical context of subsidiarity in federal and quasi-federal systems, where it is meant to guide the exercise of certain, often-enumerated powers of the central level. The more clearly specified the potential aims of centralization, the easier it is to apply

subsidiarity, because the effects of decisionmaking at different levels can be compared with a view to those aims.

Most contributions to this issue focus on cases of bounded subsidiarity. The definition of the frame in which subsidiarity operates here will typically follow principles other than subsidiarity. Procedurally, they may operate on a strict-consent basis; substantively, they may be guided by substantive principles without any operation of a default rule. Subsidiarity's scope is then limited to filling the gaps in that frame.

The most heavily bounded context in which subsidiarity operates is that of *interpretation* in judicial or quasi-judicial fora. Rather than weighing reasons for one or the other site of decisionmaking, it is usually understood as implying deference to the local level when the relevant norms leave room for competing interpretations. The most prominent example in an international context is probably the margin-of-appreciation doctrine used by the European Court of Human Rights, yet we encounter similar techniques in other settings.³² Interpreting an open text is usually not a technical enterprise, but one that requires recourse to substantive arguments about "right" answers. Subsidiarity thus may be seen to provide a presumption that fills the interpretative space, but one that retains its rebuttable character as other reasons may, exceptionally, militate against deference. Here, too, subsidiarity is limited to filling a frame—an open-textured legal norm—constructed on the basis of other principles.

D. Allocation, Exercise, Interaction

Subsidiarity is typically understood primarily as a principle for allocating powers to different levels of governance, yet it may also provide guidance on how powers are to be exercised. For example, subsidiarity can be thought to include an element of proportionality that requires powers to be exercised in a way that is not more intrusive for lower levels than alternative ways to achieve the same aim.³³ Subsidiarity may also find expression in procedural mechanisms, such as the involvement of national parliaments in the application of subsidiarity in the EU legislative process, or certain forms of veto rights for lower levels as against potential encroachments.³⁴ Robert Howse and Kalypso Nicolaïdis, in their contribution to this issue,³⁵ highlight a significant number of potential promoters of subsidiarity in the context of world trade law. If the

32. See, e.g., DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION (Lukasz Gruszczynski & Wouter Werner eds., 2014); Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT'L L. 907 (2005); see also Broude, *supra* note 28; Føllesdal, *supra* note 23 at 147; Howse & Nicolaïdis *supra* note 21; René Urueña, *Subsidiarity and the Public-Private Distinction in Investment Treaty Arbitration*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 99.

33. Isabel Feichtner, *Subsidiarity*, in 9 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 653, 653 (Rüdiger Wolfrum ed., 2007).

34. See *supra* Part III.B; see also Xavier Groussot & Sanja Bogojević, *Subsidiarity as a Procedural Safeguard of Federalism*, in THE QUESTION OF COMPETENCE IN THE EUROPEAN UNION 234 (Loïc Azoulay ed., 2014) (providing discussion related to the EU).

35. See generally Howse & Nicolaïdis, *supra* at note 21.

concept is to retain a distinctive shape, however, it should not include in its purview all organizational and procedural devices that might favor the local level, or that might facilitate interaction and dialogue between levels of governance. As a default rule for the distribution of decision-making powers, subsidiarity is primarily an allocative principle.

IV

EXPERIENCES WITH SUBSIDIARITY: FEDERAL STATES AND THE EUROPEAN UNION

Although the discussion on subsidiarity in global governance is only beginning, it is tempting to look at the experiences of federal states and the EU. These systems have a longer history of conflicts over the allocation, exercise, and adjudication of powers and should therefore be sources of inspiration for the application of subsidiarity in global governance. In federal states, however, subsidiarity, understood as an explicit constitutional principle that can be enforced by courts, plays a surprisingly marginal role. The Australian, Brazilian, Canadian, and U.S. constitutions do not contain explicit references to subsidiarity. The German constitution mentions subsidiarity only with respect to German participation in the EU, but not explicitly as an organizing principle for domestic federalism.³⁶ However, it does contain a functionally equivalent provision, which links the adoption of federal legislation in areas of concurrent powers to criteria such as “the establishment of equivalent living conditions” or “the maintenance of legal or economic unity.”³⁷ Only the Swiss federal constitution, as revised in 1999 and later, mentions subsidiarity both as a broad general principle and in a specific article on the powers of the federal level.³⁸ On the whole, therefore, subsidiarity seems to play only a small role in constitutions of federal states.³⁹

There are several potential reasons for this relatively low number of explicit appearances of subsidiarity in federal constitutions. Many suggest that subsidiarity is not a specific principle achieving a clearly defined goal that could be contrasted with other such principles. Instead, it is a way of expressing the fundamental *problématique* of federalism itself: how to balance unity and diversity, with a preference for diversity rather than unity, in order to make federations more democratic, more effective, and more adaptive. In that sense, subsidiarity is “the soul of federalism.”⁴⁰ In this view, however, subsidiarity is

36. GRUNDGESETZ [CONSTITUTION] May 23, 1949, art. 23, ¶ 1, (Ger.), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html.

37. *Id.* art. 72, ¶ 2.

38. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 5a, 43a ¶ 1 (Switz.).

39. See also Jürgen Bröhmer, *Subsidiarity and the German Constitution*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY, *supra* note 2, at 129; Michelle Evans, *Subsidiarity and Federalism: A Case Study of the Australian Constitution and Its Interpretation*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY, *supra* note 2, at 185; Augusto Zimmermann, *Subsidiarity, Democracy and Individual Liberty in Brazil*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY, *supra* note 2, at 85.

40. See Jenna Bednar, *Subsidiarity and Robustness: Building the Adaptive Efficiency of Federal*

merely an expression of a preference for the local that leaves open how this is to be achieved. In federal constitutions, other means seem to be more promising, most notably the enumeration of powers for each level of government.

In the EU, subsidiarity has occupied an increasingly prominent place. Introduced as a formal principle for the first time in the 1992 Maastricht Treaty,⁴¹ it has since been constantly refined and extended with a view to strengthening it. The EU is a highly interesting case for assessing the potential of subsidiarity in global governance. Its legislative powers have continuously increased in both scope and depth during the last six decades, even during the “Eurocrisis.”⁴² At the same time, the EU has probably made a larger effort than any other polity to put subsidiarity into practice.⁴³

The discovery of subsidiarity in the EU during the 1990s and the increased attention given to it at least in some federal states might have been caused by uneasiness with the steady growth of powers of the center. Germany has embarked on a broader reform of its federal system in order to strengthen the *Länder*.⁴⁴ In Switzerland, the constitutional reforms of 1999 and subsequent years were aimed at strengthening federal diversity, and it is in this context that subsidiarity received greater attention. However, this broad movement also shows the problems and limits of subsidiarity.

One possible function of subsidiarity is to guide the legislator. This is most clearly the case in Switzerland and Germany.⁴⁵ It is also Bermann’s interpretation of U.S. constitutional traditions.⁴⁶ The underlying rationale is that subsidiarity essentially deals with political questions of power-sharing, which should be left to the political process and should normally not be used by constitutional courts to review legislative activity. The pervasive centralizing tendencies in many federations as well as in the EU, however, indicate that legislators at the higher level are not easy to tame. The logic here is the same as in domestic or international “constitutional moments”: If decisionmakers have the required majorities and the desire to strengthen central institutions, a

Systems, in FEDERALISM AND SUBSIDIARITY, *supra* note 2, at 231. This is also the main thrust of the argument in THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION (Kalypso Nicolaïdis & Robert Howse eds., 2001).

41. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 224) 1, 31 I.L.M. 247.

42. Philipp Genschel & Markus Jachtenfuchs, *Conflict-Minimising Integration: How the EU Achieves Massive Integration Despite Massive Protest*, in THE END OF THE EUROCRATS’ DREAM: ADJUSTING TO EUROPEAN DIVERSITY 166 (Damian Chalmers, Markus Jachtenfuchs & Christian Joerges eds., 2016).

43. For overviews, see Gabriel A. Moens & John Trone, *Subsidiarity as Judicial and Legislative Review Principles in the European Union*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY, *supra* note 2, at 157; ANTONIO ESTELLA, THE EU PRINCIPLE OF SUBSIDIARITY AND ITS CRITIQUE (2002).

44. See generally FRITZ W. SCHARPF, FÖDERALISMUSREFORM: KEIN AUSWEG AUS DER POLITIKVERFLECHTUNGSFALLE? (2009).

45. Bröhmer, *supra* note 39, at 132.

46. See George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 403 (1994).

decentralizing principle such as subsidiarity needs independent safeguards in order to be effective.

Courts are classical safeguards. By the very nature of their function, however, courts enter the process very late. On the whole, they seem to be rather reluctant to use the subsidiarity principle for striking down federal legislation. The Supreme Court of Canada has on a few occasions referred to the principle of subsidiarity, but its jurisprudence is often regarded as strengthening the central government rather than the provinces, most notably because it accords the criterion of efficiency a prominent place in operationalizing subsidiarity.⁴⁷ Since the mid-1990s, the U.S. Supreme Court has become more active in adjudicating such issues.⁴⁸ Still, the debate is about the extent of limited Supreme Court involvement, not about a strong subsidiarity watchdog. Even in the EU, which, contrary to the United States, has a legally enforceable subsidiarity principle, scrutiny by the European Court of Justice has not led to many practical results. According to Paul Craig, slightly over ten cases in nearly twenty years presented a “real subsidiarity challenge.”⁴⁹ Overall, the assessment is rather skeptical.⁵⁰

Supreme courts in federations and in the EU are central-level institutions and may have an inbuilt centralizing bias. For this reason, “safeguard subsidiarity”⁵¹—decentralized safeguards—often appears to be an attractive option. The EU has tried to implement this idea by empowering national parliaments. The most significant recent innovations are the “yellow card” and “orange card” procedures, by which a third (and at a second stage, half) of member-state parliaments can temporarily block a legislative proposal and force the Commission to review it on the basis of concerns about subsidiarity.⁵²

The most important result so far is the withdrawal of a Commission proposal for a Council regulation on the exercise of the right to take collective action after objections by twelve national parliaments.⁵³ But one should be cautious in expecting too much from this safeguard: In parliamentary systems, which are the overwhelming majority in the EU, cases in which the parliamentary majority will not support “its” government are likely to be rare

47. See Jean Leclair, *The Supreme Court of Canada's Understanding of Federalism: Efficiency at the Expense of Diversity*, 28 QUEEN'S L.J. 411 (2003); see also Eugénie Brouillet, *Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?*, 54 SUP. CT. L. REV. 601 (2011).

48. See Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives from U.S. Constitutional Law*, in FEDERALISM AND SUBSIDIARITY, *supra* note 2, at 123.

49. Paul P. Craig, *Subsidiarity, a Political and Legal Analysis*, 50 J. COMMON MKT. STUD. (SPECIAL ISSUE) 72, 80 (2012).

50. *Id.* at 84.

51. Bednar, *supra* note 40, at 241–50.

52. For a comprehensive evaluation of the experiences with these procedures see PHILIPP KIIVER, *THE EARLY WARNING SYSTEM FOR THE PRINCIPLE OF SUBSIDIARITY* (2012).

53. Proposal for a Council Regulation on the Exercise of the Right to Take Collective Action within the Context of the Freedom of Establishment and the Freedom to Provide Services, COM (2012) 130 final (Mar. 21, 2012).

and limited to extreme cases.⁵⁴ Still, because these procedures are relatively new and entail a partial substantive change from established practices, participants find their way into them slowly. On the whole, it seems the EU's involvement of national parliaments is moderately successful, and more successful than entrusting the European Court of Justice with subsidiarity control.⁵⁵

The wording of the subsidiarity principle in the EU is also problematic. The Treaty on European Union, in its current version, provides: "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States."⁵⁶ It implies that there is agreement about the goals or objectives of a planned action and, by making effectiveness the main criterion for the allocation of tasks to a specific level, reflects a weak version of the subsidiarity principle.⁵⁷ But in a heterogeneous social and institutional setting, goals will often be neither clear nor consensual. If central European institutions have the last word in defining these goals, their institutional self-interests in increasing powers and resources may well prevail. Moreover, if effectiveness of (potential) problemsolving is chosen as the primary criterion, this will likely have a centralizing effect because many policy externalities and collective goals can indeed be better dealt with at the higher level—especially the EU's prime goal, the completion of the internal market.⁵⁸ The Swiss constitution adopts much stronger wording according to which "[t]he Federation only undertakes tasks that the Cantons are unable to perform or which require uniform regulation by the Federation."⁵⁹ Still, it is uncertain whether this really limits federal encroachment upon cantonal powers.⁶⁰

From this short discussion of federal states and the EU, we learn several things. First, subsidiarity is only one among several devices for assuring a preference for lower-level decisionmaking. Its practical scope in federal states as well as in the EU—which has spent enormous energy in implementing it—is limited, and it needs to be coupled with other safeguards in order to be effective. Second, courts are of limited use in "enforcing" the subsidiarity principle upon legislators because the courts tend to consider subsidiarity to be a political question outside of their scope for adjudication and because the criteria for the application of subsidiarity are often vaguely defined. Third, lower-level parliaments may be rather effective in limiting higher-level legislative activity but are also bound by their interest to support their own

54. SERGIO FABBRINI, *WHICH EUROPEAN UNION? EUROPE AFTER THE EURO CRISIS* 145 (2015).

55. KIIVER, *supra* note 52, at 148.

56. Treaty on European Union, *supra* note 41.

57. On the distinction between weak and strong versions, see Part III.B *supra*.

58. A point made forcefully by Davies, *supra* note 27.

59. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 43a, ¶ 1 (Switz.).

60. Regula Kägi-Diener, *Current Challenges Faced by Swiss Federalism*, in 1 *THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN* 333, 341 (Alberto López-Basaguren & Leire Escajedo San Epifanio eds., 2013).

government. Finally, notions of subsidiarity that assume agreement on the problem to be solved are inherently problematic in heterogeneous systems.

V

TRAJECTORIES OF SUBSIDIARITY IN GLOBAL GOVERNANCE

Subsidiarity is leaving traces in many fields of global governance, but as the contributions to this issue show, these traces have very different strengths in different contexts. It is thus important to get a clearer picture of where and under what conditions subsidiarity is likely to emerge and evolve. This part develops some theoretically grounded conjectures about the trajectories of subsidiarity in global governance, on the basis of a few simple assumptions about the demand for subsidiarity (that is, constellations in which subsidiarity would be useful and may be requested by some actors), its supply (that is, the conditions under which subsidiarity is actually provided), and the conditions for its effectiveness. These conjectures reflect observations advanced in the different contributions to this symposium, but they provide starting points for further work, rather than firm conclusions.

A. The Demand for Subsidiarity in Multilevel Systems

On the most general level, the emergence of subsidiarity in global governance typically responds to a need of finding organizing principles that go “beyond consent” in a world in which policymaking increasingly rests with regional and international bodies. The formal powers of these bodies, often vaguely defined, tend to provide only limited institutional guidance and will often be further diluted as a regime evolves over time. National governments and other domestic actors are likely to demand new safeguards as they evolve. According to René Urueña, the extent to which new safeguards are developed depends more on how actors interpret the rise of international public authority than on international bodies’ “real” authority.⁶¹

Based on these thoughts, our first conjecture is that *the more global governance is considered by states and domestic actors to be a vertical multilevel system, with significant authority located at the global level, the more likely subsidiarity is to be in demand as a tool for containing the expansion of this authority.* Challenges of the UN Security Council’s expanding authority, as discussed in the contributions by Isobel Roele⁶² and Machiko Kanetake,⁶³ exemplify this just as much as the extensive, and still recent, contestation over the international investment regime which, as shown by René Urueña,⁶⁴ is fueled by the increasing recognition of the “public authority” of investment tribunals (and the need to develop a “public law” response).

61. Urueña, *supra* note 32, at 100–01.

62. See Roele, *supra* note 29, at 189.

63. See Machiko Kanetake, *Subsidiarity in the Maintenance of International Peace and Security*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 165.

64. Urueña, *supra* note 32, at 116.

In such multilevel systems, the interest of governments in limiting higher-level decisionmaking through principles such as subsidiarity is likely to depend on the degree of political control they can exercise over outcomes. If member-state unanimity is required, or if states enjoy ample veto power, subsidiarity is not needed, at least from the perspective of national executives. This changes as decisionmaking moves away from member states or becomes subject to (qualified) majority rule. The demand for subsidiarity is thus likely to arise when states pool their powers and exercise them jointly, as occurs, for example, in political bodies such as the UN Security Council or the International Monetary Fund Executive Board.

The demand for subsidiarity will be even greater when states *delegate* authority to independent bodies with substantial discretion to decide.⁶⁵ Similarly, one can expect a stronger demand when institutions that do not operate on the basis of delegation make consequential decisions, as is the case for private authorities. A second conjecture is thus that *demand for subsidiarity grows with the distance from state consent, and that it is higher in cases of delegated authority than in cases of pooled authority*. For example, Andreas von Staden's discussion of regional trade integration in various settings suggests that, in the absence of properly supranational elements, calls for decentralization or subsidiarity tend to remain weak.⁶⁶

Whether a demand is triggered will also depend on the way in which global authority is exercised. Domestic actors, such as parliaments, political parties, business associations, or civil society groups, pay attention to action by international or transnational institutions mainly when they see that their interests or values are directly at stake.⁶⁷ This will often be the case when global institutions not only make rules but also apply them to particular cases, as is typically the case for judicial bodies. In contrast to earlier periods, when international norms provided space for specification by national political and legal systems, the proliferation of international courts and tribunals and their often expansionary, evolutionary interpretation of international rules have reduced this space, provoking counterclaims for self-restraint and deference in order to safeguard national autonomy. A third conjecture is thus that *demand for subsidiarity grows when acts of global governance institutions are highly intrusive and concern specific cases*. The European Court of Human Rights and the WTO Dispute Settlement Body, the focus of the contributions by Andreas Føllesdal⁶⁸ and Tomer Broude,⁶⁹ are prime examples.

65. For a conceptual as well as empirical discussion of pooling and delegation, see Liesbet Hooghe & Gary Marks, *Delegation and Pooling in International Organizations*, 10 REV. INT'L ORGS. 305 (2015).

66. Andreas von Staden, *Subsidiarity in Regional Integration Regimes in Latin America and Africa*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 27, 44 (discussing subsidiarity and the Economic Community of West African States).

67. Zürn, Binder & Ecker-Ehrhardt, *supra* note 5.

68. See Føllesdal, *supra* note 23.

69. See Broude, *supra* note 28.

B. The Limited Supply of Subsidiarity

Yet even where there is demand for subsidiarity, its supply—the actual establishment of a subsidiarity norm in an institutional setting—may be limited. This is due, in part, to the interest structure behind a given regime. When global decisionmaking is giving effect to reciprocal bargains, or seeking to deal with negative externalities of domestic decisionmaking, states interested in the positive effects of the regime will likely resist subsidiarity. This may be the case, for example, in trade and investment, where states that see themselves as overall beneficiaries reject what they see as a loosening of the standards for others through greater deference to domestic policies. Isabel Feichtner's account of the challenges of introducing subsidiarity concerns into the decisionmaking of political bodies in the WTO⁷⁰ draws attention to such constraints.

The situation is different when regimes do not deal with significant externalities, as is the case, for example, for human rights regimes or international criminal justice. In these contexts, states bind themselves rather than others,⁷¹ have a less direct interest in compliance by others, and are less likely to resist subsidiarity as a guiding principle. We thus formulate a fourth conjecture: *The supply of subsidiarity will be higher in regimes dealing with issues without international repercussions than for institutions regulating actual or potential negative externalities.*

The effect of this limitation is greatest when the benefits of a regime accrue asymmetrically to powerful countries. Powerful states may strongly resist the application of the subsidiarity principle in the operation of an institution because they have a vested interest in the constraints it places on other countries' freedom of action. This is apparent, for example, in the international investment protection regime: as long as this regime was perceived to burden primarily developing countries, there was great resistance to subsidiarity by the main beneficiaries—the powerful economies of the Global North. As the latter, too, are increasingly subject to investment disputes, openness to subsidiarity has increased and, as René Urueña demonstrates, struggles over the degree of deference due to local institutions have intensified.⁷² The fifth conjecture suggests that *subsidiarity tends to not be supplied if a powerful actor is strongly interested in the constraints on other countries imposed by a uniform interpretation of the regime's rules.*

70. See Isabel Feichtner, *Subsidiarity in the World Trade Organization: The Promise of Waivers*, 79 LAW & CONTEMP. PROBS., no. 2, 2016, at 75, 82–84.

71. On this distinction, see Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS., no. 4, 2008, at 37. On the self-binding character of the European human rights regime, see Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

72. See, e.g., Julian Arato, *The Margin of Appreciation in International Investment Law*, 54 VA. J. INT'L L. 545, 555–58 (2014); William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35 YALE J. INT'L L. 283, 296 (2010); Urueña, *supra* note 32.

When authority is delegated to, or exercised by, bodies with a certain level of autonomy, the control by states may be limited or indirect.⁷³ This may be especially so for institutions acting as trustees, rather than as agents of states, as is often the case for independent courts or dispute settlement bodies.⁷⁴ The supply of subsidiarity by such institutions will thus follow a different logic and is likely to depend on the degree to which they are vulnerable to, and need to accommodate, challenges by national governments and domestic actors. The European human rights regime, for example, developed its “margin of appreciation” doctrine in the early days when it was weak—well before it found broad recognition and intensified its scrutiny of member states’ policies.⁷⁵

Along these lines, we may formulate a sixth conjecture according to which *central institutions with significant and stable institutional and political autonomy are likely to be reluctant suppliers of subsidiarity*. Andreas Føllesdal notes that this conjecture may not sit well with the continuing use of the margin appreciation by the European Court of Human Rights up until the present—though this use may be due, precisely, to the renewed challenges the Court faces over its expansionary jurisprudence.⁷⁶ On the other hand, Jorge Contesse’s contribution on the inter-American human rights regime describes institutions that, despite their weak authority, refused from the start to accept a subsidiarity principle to maintain the moral high ground over authoritarian governments.⁷⁷ Both accounts urge unpacking the sources of authority on which independent institutions rest in detail.

Although generalizations are difficult, it is clear that subsidiarity’s demand is typically higher than its supply. Subsidiarity is not in demand everywhere. In environmental policy, for instance, most institutions are weak and do not trigger significant challenges. Yet for many other areas in which global authority has grown in strength and scope over the last decades, a demand for subsidiarity will likely be observable, even though its supply may not be forthcoming because of the resistance by strong states or veto players.

73. See Hooghe & Marks, *supra* note 65, at 307. On the informal influence of powerful countries, see, for example, RANDALL W. STONE, *CONTROLLING INSTITUTIONS: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL ECONOMY* (2011); Jacob Katz Cogan, *Representation and Power in International Organization: the Operational Constitution and Its Critics*, 103 AM. J. INT’L L. 209 (2009).

74. See Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT’L REL. 33, 35 (2008).

75. On the evolution of the Court, see Mikael Rask Madsen, *The Protracted Institutionalization of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence*, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* 43 (Jonas Christoffersen & Mikael Rask Madsen eds., 2011).

76. Føllesdal, *supra* note 23 at 162–63.

77. Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, 79 LAW & CONTEMP. PROBS., no. 2, 2016.

C. Effectiveness

Even if subsidiarity is accepted in a given institutional setting, it will not necessarily have a significant effect on the allocation of powers, especially as a tool of decentralization. As we have already seen in the EU context, subsidiarity often appears to observers as a fig leaf, unable to halt centralization processes, yet providing them with a veneer of acceptability.

Whether or not the principle has teeth will depend, in part, on its formulation. As mentioned above, if used in a weak sense—with a low threshold for countervailing, centralizing reasons—subsidiarity is likely to remain relatively inconsequential, simply because it provides too much leeway for actors to employ their own criteria in determining where an issue may be handled most “effectively.” As Tomer Broude notes in his contribution, the flexible principles governing deference in the WTO dispute settlement context represent not so much a rule or principle as a “discursive device of negotiation over power and authority among a multiplicity of actors, pulling and pushing in different directions.”⁷⁸ This impression is yet stronger in those contexts that, like the African regional integration regimes analyzed by Andreas von Staden,⁷⁹ employ explicitly open and vague formulations of subsidiarity. One may thus assume, as a seventh conjecture, that *weak formulations of subsidiarity are unlikely to have a significant decentralizing effect.*

The effects of subsidiarity will largely depend, therefore, on the institutions that interpret the principle and give it meaning. The experience in federal systems, and in the EU, points to a very limited role of central institutions, especially central courts, as guardians of subsidiarity—central bodies tend to protect the authority of the central level.⁸⁰ As a result, the EU has empowered *national* parliaments to exercise this role, with a potentially greater effect. In the global context, similarly complex procedures are unlikely to be established, but domestic bodies such as courts or parliaments may perform similar functions when they hold the keys to compliance with decisions by international bodies. Thus, national and regional courts have pushed central decision-making bodies—the UN Security Council, the WTO dispute settlement system, or the European Court of Human Rights—to move closer to their views.⁸¹ Machiko Kanetake, in her contribution to this symposium, focuses precisely on this mechanism with a view to the UN sanctions regime.⁸² We thus formulate an eighth conjecture that *subsidiarity is likely to have stronger decentralizing effects if lower-level actors play a significant role in its interpretation and policing.*

78. Broude, *supra* note 28, at 73.

79. See von Staden, *supra* note 66, at 39–50.

80. See Daniel Halberstam, *Comparative Federalism and the Role of the Judiciary*, in *THE OXFORD HANDBOOK OF LAW & POLITICS* 142, 160 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008).

81. See NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* (2010).

82. Kanetake, *supra* note 63.

Not all settings are equally suited to the application of principles on the allocation of powers. In multilevel systems, in which different levels of government enjoy formal decision-making powers, such principles find relatively easy application. The situation is more difficult in less clearly defined institutional contexts, in which responsibilities may be shared rather than distributed and in which policymaking does not occur through identifiable decisions but instead occurs in multi-actor processes without clear cut-off points. Many areas of global governance are of this latter character—they are “governance without government,”⁸³ operating through soft tools and through the interaction of multiple, only loosely coupled spheres of authority of a domestic as well as transnational and international kind.⁸⁴

The decision-making structures are not fixed in this case but dynamically adapt to the social and political environment, often resulting in forms of authority that may better be described as “liquid” than “solid.”⁸⁵ In such contexts, subsidiarity can hardly be anchored in an institutional framework or targeted at particular decisions or actors. Informal tools often appear less intrusive than formally binding decisions, but as Isobel Roele’s contribution shows, they may also serve to subvert the constraints imposed by formal structures.⁸⁶ In her account, the UN Security Council’s turn to cooperative implementation and best practices (rather than coercive tools) created “disciplines” for member states that escaped the principled approach of subsidiarity.⁸⁷ Similar challenges exist in many other areas of global governance, from financial regulation to environmental affairs; applying subsidiarity to the formal side of the governance structure might simply miss the target. Building on this argument, our ninth conjecture states that *subsidiarity is likely to be more effective as a principle for formal, concentrated decisionmaking, rather than as guidance for the more liquid contexts of global governance.*

D. Subsidiarity in Law

Even when it is supplied, however, subsidiarity tends to have a different complexion in global governance than in other multilevel systems. In federal states (insofar as subsidiarity exists) and in the EU, subsidiarity can provide an overarching legal principle, a common norm with legal effects on all levels. In the global sphere, however, this is rendered difficult by the very structure of the

83. See generally GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

84. See also Karen J. Alter & Sophie Meunier, *The Politics of International Regime Complexity*, 7 PERSP. ON POL. 13, 15–21 (2009).

85. Nico Krisch, *Authority, Solid and Liquid, in the Postnational Sphere*, in AUTHORITY IN TRANSNATIONAL LEGAL THEORY (R. Cotterrell & M. del Mar, eds.) (forthcoming August 2016)(using “liquidity” to refer to forms of authority that are informal, rely on substantive groundings, and are characterized by multiplicity and dynamism).

86. See Roele, *supra* note 29, at 204–14 (conducting a case study of the Financial Action Task Force and concluding that the resulting disciplinary infra-law hinders national control in some respects).

87. *Id.*

international legal order. Usually conceived of as separate from domestic law, international law cannot directly impose binding rules on domestic actors, nor can domestic law formally impose rules on international institutions. As a result, an international rule for the allocation of powers may sit alongside a competing rule in the domestic legal order, leading to institutional contestation over the general principle guiding the allocation.

This problem is exacerbated because the number of legal orders, and the overlaps between them, are growing even on the international plane, thus sustaining a trend toward fragmentation and a properly “pluralist” postnational legal order.⁸⁸ Subsidiarity may find increasing acceptance as a legal principle, especially in the form of a national margin of appreciation,⁸⁹ but it remains confined to certain issue areas and institutions.

As the contributions to this symposium show, subsidiarity is strong in the European but not in the inter-American human rights system; it is established, to some extent, in international trade while still highly contested in international investment law; it is a pillar of European integration but hardly present in other regional integration regimes; and it is present in merely limited traces in the context of international security. The trajectories of these issue areas vary widely, and it is unlikely that subsidiarity will consolidate into a general principle of international law any time soon.⁹⁰ Subsidiarity, as any norm governing relations between sites of governance, will then have only partial application—it may regulate the relations of one of those sites to its environment, but it is unable to make a claim to regulating these relations comprehensively for all sites involved—unless one takes a strong normative approach to the interpretation of global law.⁹¹

In this fragmented order, some consolidation may result from an establishment of subsidiarity norms in all these different sites, drawing on “multi-sourced equivalent norms”⁹² and potentially leading to converging

88. See Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1 (2007); Krisch, *supra* note 81.

89. See, e.g., Mireille Delmas-Marty & Marie-Laure Izorche, *Marge nationale d'appréciation et internationalisation du droit: réflexions sur la validité formelle d'un droit commun pluraliste*, 46 MCGILL L.J. 923 (2001) (discussing the emergence and foundations of the margin of appreciation as a guiding principle in a pluralist order); Shany, *supra* note 32 (discussing the status of the margin of appreciation in international law); Andreas von Staden, *The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review*, 10 INT'L J. CONST. L. 1023 (2012) (discussing the margin of appreciation and subsidiarity as principles for determining standards of review in international courts).

90. See DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS, *supra* note 32; Feichtner, *supra* note 33, at 17.

91. For such an approach, see Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and Beyond the State*, in RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE 258 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

92. See MULTI-SOURCED EQUIVALENT NORMS IN INTERNATIONAL LAW (Tomer Broude & Yuval Shany eds., 2011).

interpretations over time.⁹³ Such a convergence will, however, remain contingent and dependent on a cooperative stance of the political and judicial bodies that take part in the interpretative process. Institutionally, convergence is difficult to ensure without a substantial transformation toward a vertically and horizontally integrated, federal-style multilevel system.

VI

THE NORMATIVE CASE FOR SUBSIDIARITY

Subsidiarity has traditionally been defended on a variety of normative grounds. Individual liberty, efficiency, justice, democracy, self-determination, political accountability, and respect for social and cultural diversity have been put forward by different traditions of thought.⁹⁴ These grounds reflect divergent visions of the proper allocation of authority—discussed in part II—and they have widely varying implications for the strength and scope of subsidiarity in global governance.

A. Normative Grounds

Economic efficiency is often put forward as a ground for subsidiarity, based on the assumption that proximity to the issue, availability of local information, lower experimentation costs, and a greater potential for innovation create a preference for lower-level decisionmaking.⁹⁵ Such grounding yields only a weak version of subsidiarity, because the preference for the local can easily be overcome when a higher level is more effective at problem solving, or can solve problems at a lower cost. For transboundary problems, this will often be the case, because the production of externalities, coordination problems, and economies of scale tend to render decentralized action costly. As has been observed even for the relatively weak subsidiarity principle in the EU, a preference for local decisions can have significant negative effects on regulatory efficacy.⁹⁶ Unlike in some domestic contexts, efficiency is hardly appropriate as a key criterion in the global realm where diverse societies and political systems pursue different aims—differences that deserve respect but that a focus on comparative efficiency suppresses.

In contrast, culturalist or nationalist claims, or those based on respect for value pluralism or an idea of self-determination of groups and peoples, tend to ground a strong version of subsidiarity, in which higher-level decisionmaking is admissible only in narrow circumstances. This reflects a more pluralist than solidarist vision of international society, with an emphasis on citizens' interest in realizing their values, ideas, or ways of life free from outside intervention—

93. See, for example, the parallel subsidiarity guarantees in Article 6 of the Treaty on European Union and Article 23 of the German Basic Law regarding European integration.

94. Bermann, *supra* note 46; Føllesdal, *supra* note 18.

95. See generally Aurélian Portuese, *The Principle of Subsidiarity as a Principle of Economic Efficiency*, 17 COLUM. J. EUR. L. 231 (2011); Calabresi & Bickford, *supra* note 48, at 128–37.

96. Craig, *supra* note 49, at 85.

somewhat analogous to multiculturalist theories for diverse domestic societies.⁹⁷ Howse and Nicolaïdis take a similar path with a view to international trade law,⁹⁸ but the thrust of the idea is not limited to this field.⁹⁹

Similar results often stem from democracy arguments that emphasize the greater strength of democratic processes on a smaller scale, given the potential for communication and deliberation and the proximity of decisionmakers and participants in the process.¹⁰⁰ The result is a strong preference for the local in these areas, at least insofar as local decisionmaking can make a good claim to accordance with democratic principles. Along these lines, Contesse calls for a turn toward subsidiarity in the inter-American human rights system in response to the improved democratic pedigree of its member states.¹⁰¹ This strong presumption for the local is mitigated, however, for cosmopolitan democrats whose decisions should, along the lines of the congruence principle, be taken at a level that includes all individuals that are significantly affected by such decisions.¹⁰² In this framework, the case for subsidiarity with respect to transboundary problems may be considerably weaker.¹⁰³

Here, too, the strength of the case for subsidiarity will depend on the quality of decisionmaking at the different levels. For cosmopolitan democrats, the democratic quality of international institutions will calibrate their weight in the overall structure. Also, from other perspectives, institutions with a less inclusive or representative pedigree, even if endowed with formal powers through delegation, will be expected to practice greater deference to the domestic level than those fulfilling higher institutional standards.¹⁰⁴ For most international institutions in existence, with all their deficits regarding responsiveness to the diverse world public, this consideration suggests a strong version of subsidiarity.

B. Countervailing Reasons

On the basis of these considerations, there is a plausible initial case for strong subsidiarity in global governance. Reasons that stem from culturalism

97. See Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209 (1980); BRAD ROTH, SOVEREIGN EQUALITY AND MORAL DISAGREEMENT (2011). On multicultural theory, see WILL KYMLICKA, MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS (1996). On pluralism and solidarism, see ANDREW HURRELL, ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY (2007).

98. See Howse & Nicolaïdis, *supra* note 21, at 262 (exploring a “global trade ethics”).

99. See, e.g., Sheila Jasanoff, *Epistemic Subsidiarity—Coexistence, Cosmopolitanism, Constitutionalism*, 4 EUR. J. RISK REG. 133 (2013) (adopting a pluralist vision of international society in the context of risk governance).

100. See, e.g., Habermas, *supra* note 12; Kumm, *supra* note 91; von Staden, *supra* note 66.

101. See Contesse, *supra* note 77.

102. See *supra* text accompanying notes 12–14.

103. See also Kumm, *supra* note 91; Raffaele Marchetti, *Models of Global Democracy in Defence of Cosmo-federalism*, in GLOBAL DEMOCRACY: NORMATIVE AND EMPIRICAL PERSPECTIVES 22, 39–42 (Daniele Archibugi et al. eds., 2011); Andreas L. Paulus, *Subsidiarity, Fragmentation and Democracy: Towards the Demise of General International Law?*, in THE SHIFTING ALLOCATION OF AUTHORITY IN INTERNATIONAL LAW 193, 195–96 (Tomer Broude & Yuval Shany eds., 2008).

104. For an argument of this kind, see Krisch, *supra* note 81, at 70–105.

and value pluralism typically converge with arguments stemming from democracy, especially accounting for the limited institutional legitimacy of most global institutions. Strong subsidiarity does not imply, however, that decisions should not be taken at the global level at all. Yet allocating powers to the global level, or filling the space opened up by prior delegation, requires strong reasons. A simple reference to greater economic efficiency, effectiveness in problemsolving, or the transboundary character of a problem—as in weak versions of subsidiarity—does not suffice.

One reason for upscaling is consent, which leaves defining the frame of cooperation in the hands of the sub-units and may lead to an application of subsidiarity in the interpretation of the terms of that consent. Normatively, the strength of such consent will often depend on the processes used to achieve it; inclusive, participatory processes with a parliamentary focus more strongly justify higher-level decisionmaking than merely executive ones, which still tend to be common in international institutions.¹⁰⁵

Another reason for scaling up decisions is often found in considerations of justice, which are supposed to be removed from the disposition of sub-units. Their extent may be relatively clear when it comes to direct violations of the harm principle through physical transboundary effects, such as violence or environmental harm. Mattias Kumm's article in this symposium elaborates further and shows how "justice-sensitive externalities" challenge claims of states to be bound only with their specific consent.¹⁰⁶ Less clarity reigns when it comes to indirect harm, which may occur, for example, through the establishment of an economic structure with benefits for some and severe costs for others.¹⁰⁷ And yet less agreement exists on questions of global distributive justice—transboundary solidarity obligations, often seen as part of a cosmopolitan framework.¹⁰⁸ Specifying obligations in such controversial cases requires a political process,¹⁰⁹ but one that cannot take place solely on the national or the global level.

C. Different Areas

As becomes apparent from the considerations above, the arguments for subsidiarity vary significantly across issue areas. In some areas they point to lower-level, and in other areas to higher-level, decisionmaking. It thus appears

105. Michael Zürn, *Global Governance and Legitimacy Problems*, 39 *GOV'T & OPPOSITION* 260, 262 (2004).

106. Mattias Kumm, *Sovereignty and the Right to Be Left Alone: Subsidiarity, Justice-Sensitive Externalities, and the Proper Domain of the Consent Requirement in International Law*, 79 *LAW & CONTEMP. PROBS.*, no. 2, 2016.

107. See THOMAS W. POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 97–123 (2008).

108. See Charles R. Beitz, *Justice and International Relations*, 4 *PHIL. & PUB. AFF.* 360 (1975); see also JOHN RAWLS, *THE LAW OF PEOPLES WITH "THE IDEA OF PUBLIC REASON REVISITED"* 113–19 (2001).

109. JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO DISCOURSE THEORY OF LAW AND DEMOCRACY* 82–131 (1992).

sensible to operate with different specifications of subsidiarity—different default rules—for different issue areas, depending on what kind of prima facie case can be made. As always, the general rule may be rebutted in particular circumstances, but subsidiarity can prove its utility by providing an issue-specific argumentation frame that shifts the burden of argument.

If the general default rule is strong subsidiarity, there are still areas that warrant global decisions. This is the case when clear arguments from justice require going beyond national decisions, as in international security or global environmental affairs, insofar as they deal with direct harm inflicted across boundaries. In such areas, one may want to apply a weak version of subsidiarity, with a low threshold for justifying decisionmaking in a particular case. Yet this alleviation of the standard should cover only the core of these areas—policies directly related to transboundary harm—and not adjacent or ancillary questions.

On the other hand, there are areas in which reasons for upscaling decisionmaking are not generally apparent. These concern issues of only local or national concern, or those that affect outsiders in insignificant ways, as in trade or investment where, as Kumm points out, there is little reason to override domestic choices.¹¹⁰ Unless one subscribed to a merely economic case for subsidiarity, upscaling decisionmaking on such matters has to be based primarily on consent and delegation. In interpreting the terms of that consent, a strong subsidiarity principle counsels deference—a point made forcefully in the contributions by Feichtner on the political and by Howse and Nicolaïdis on the quasi-judicial bodies of the WTO.¹¹¹ In cases of interpretive doubt, domestic policies should be granted respect, and trade internationalization should not be regarded as requiring a harmonization of regulatory standards in loosely related fields.

Between these issue areas, distinctions are often not watertight—many questions straddle boundaries. And there are areas in which prima facie considerations turn out to be ambiguous. This is especially the case for human rights (and similarly for international criminal justice). Human rights are not transboundary but instead benefit individuals and minorities *within* a given sub-unit; as a matter of morality, however, they are not at the disposal of (national or international) politics. As with other questions of justice, the definition of their scope and content (beyond a narrow, undisputed core) requires an active process of lawmaking.¹¹²

Yet as Føllesdal argues with a view to the European human rights regime, especially for rights issues that are likely to be affected by biases in the national political process—the rights of disadvantaged individuals and groups—this process can hardly be left to the domestic level alone.¹¹³ This point is also at the

110. See Kumm, *supra* note 106, at 248.

111. See Feichtner, *supra* note 70; Howse & Nicolaïdis, *supra* note 21.

112. See, e.g., JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

113. See Føllesdal, *supra* note 23 at 150–53, 160–63; see also Neus Torbisco Casals, *Multiculturalism*,

core of Zumbansen's contribution, which highlights the dark side of subsidiarity—its role in denying protection to vulnerable groups within the sub-units.¹¹⁴ Zumbansen focuses on labor rights, which, in the global economy, are often left to markets to regulate and police in the absence of strong institutions at the international level (and given the weakness of many countries' domestic institutions vis-à-vis economic actors). The normative limits of applying subsidiarity in areas strongly affected by considerations of rights and justice become exceedingly clear in this context.

Overall, there are good normative reasons for a strong version of subsidiarity as a general principle in global governance, but there is also significant variation across issue areas, suggesting a relaxation of the standard for areas with strong elements of transboundary justice. Moreover, subsidiarity will often apply within a frame defined by consent and delegation, and thus its scope and bounds will depend heavily on the terms of that frame. Subsidiarity in global governance is therefore bound to be a highly variegated affair.

VII CONCLUSION

Subsidiarity is leaving traces in many fields of global governance. Long present in different forms in federal systems and the EU, it is now increasingly invoked in global contexts in order to provide principled guidance for the allocation of powers between different layers of governance. With this framing article—and the symposium as a whole—we aim to reconstruct existing trends and discourses and to identify the place and role subsidiarity has (and should have) in global governance.

As a rebuttable presumption for the local, subsidiarity can be applied “in any polity in which governmental authority is lodged at different vertical levels.”¹¹⁵ It provides an argumentation framework, or a default rule, for regulating the allocation and exercise of powers among the different levels.

Its most typical application concerns the exercise of autonomous institutional powers: We can expect the demand for an inclusion of subsidiarity as a guiding principle to grow with the strength, visibility, and specificity of authority in global governance, and especially with the expansion of authority over time beyond initial (often consensually adopted) frames. The supply of subsidiarity, however, is likely to be uneven: although autonomous global governance institutions may have incentives to respond to subsidiarity demands in order to bolster their position and legitimacy, the inclusion or application of subsidiarity as a decisional principle may be prevented by powerful actors with stakes in the strength of the regime. Subsidiarity demands in global governance have translated into practice in certain areas of international politics—for

Identity Claims and Human Rights: From Politics to Courts, 9 LAW & ETHICS HUM. RTS (forthcoming 2016) (discussing the European Court of Human Rights).

114. See Zumbansen, *supra* note 25.

115. Bermann, *supra* note 46, at 338.

example, the European human rights regime—while they have found less expression in other areas, such as trade and investment. In contrast, more fluid and informal institutional settings typically trigger fewer demands for subsidiarity, and they are also not as well suited to the application of the principle as more formal decisional processes.

The extent and direction of subsidiarity in practice contrast significantly with the normative case for subsidiarity we develop. We argue that strong subsidiarity, based on considerations of self-government and value pluralism, should be seen as a general default rule across issue areas, and that it should apply especially firmly in areas in which weighty, justice-based reasons for upscaling decisionmaking are not easily identifiable. These reasons include, first and foremost, economic domains such as trade and investment, where one would expect political and judicial bodies to practice significant deference to domestic decisionmaking. In other areas, such as international security or environmental regulation, which deal with issues of direct transboundary impact, we advocate for a weak version of subsidiarity—one that retains a general presumption for the local, but lowers the threshold for upscaling decisionmaking. As for human rights, our assessment is more ambivalent because the scope and extent of rights ought to be defined with input from national and international levels, so as to counter potential biases against vulnerable groups in the national political process.

Subsidiarity is not a cure-all for the ills of global governance, but it is beginning to shape different areas and institutional contexts, and it holds significant promise as normative and legal guidance for institutional design and for the exercise of authority in the global realm. The landscape of subsidiarity is bound to remain variegated, but the concept is gaining ground and for many actors holds much appeal as a principled way of balancing the need for strong global cooperation with a continuing emphasis on the value of local self-government.