

Review Essay: *Global Perspectives on Subsidiarity: On the Relationship of Faith to Citizenship, Culture, and the Structure of the Public Sphere*

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We inhabit a *nomos*—a normative universe. ... This *nomos* is as much ‘our world’ as is the physical universe of mass, energy, and momentum. Indeed, our apprehension of the structure of the normative world is no less fundamental than our appreciation of the structure of the physical world. ... A great legal civilization is marked by the richness of the *nomos* in which it is located and which it helps to constitute. The varied and complex materials of that *nomos* establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to *live* in it.¹

There is a strange, almost eerie, quality to debates over the role that faith — and faithful people — should play in debates over human rights, democratic self-government, and international relations. It makes very little difference what the specific issue is, or which society provides the social, political, and legal context for the discussion. The ‘received wisdom’ in this post-modern age is that religious involvement in the public sphere is problematic.

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¹ Robert M. Cover, ‘The Supreme Court 1982 Term, Foreword, *Nomos & Narrative*’ (1983) 97 *Harvard Law Review* 4, 2 (emphasis in the original) (footnotes omitted). The late Professor Cover’s concept of *nomos* draws on a variety of sources cited in the omitted footnote. ‘On the idea of ‘world building’ with its normative implications,’ he recommended, that the reader consult the following sources, among others. Peter Berger, *The Sacred Canopy* (Doubleday, 1967); P. Berger & T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Doubleday, 1st ed., 1966), 19 and *passim*; John Gager, *Kingdom and Community* (Prentice-Hall, 1975); Karl Mannheim, *Ideology and Utopia* (Routledge & Kegan Paul, 1936); *cf.* (invoking the idea of a ‘nomos’, or ‘meaningful order’).

The breadth and depth of the topics discussed in *Global Perspectives on Subsidiarity*² show just how short-sighted the naysayers are. The essays in this volume provide a wealth of material for: serious scholars of the relationship between democratic self-governance and Catholic Social Teaching; for scholars and diplomats involved in interfaith dialogues with government officials from other faith traditions; for political directors looking for innovative campaign themes; for constitutional lawyers; and for hardboiled practitioners of the dark arts of *Realpolitik*.

The themes discussed in these essays are both universal and timely. All of the writers point out that the very *concept* of democratic self-governance is under pressure from a variety of factors, ranging from the demands of the contemporary welfare state, to questionable assumptions about the efficacy of centralizing power in the hands of remote bureaucracies. Readers living in federal republics like the United States, Australia, and Germany will gain fresh insights on federalism, both ‘in theory’ and ‘as applied’. Readers living in republics that reserve ‘a preferential role for the state in society, [and] plac[e] the state as the principal agent of socio-economic transformation’³ will also find a wealth of material readily adaptable to a critique of both state policy, and the tendency of individuals to view the right of every citizen to self-government as bargaining chip to be exchanged for a variety of security and financial benefits.

But perhaps the most important contribution of this book is the common ground it creates for serious discussion of the important role that religion — and religious believers — play in shaping the ‘deep structures’ of the public sphere.⁴ Religion has always played an important normative role in both domestic and foreign affairs, but only recently is it beginning to dawn on some policy-makers that they need to pay closer attention to what each of the authors in this volume described as the ‘lesser’ communities that serve as the constituent parts of every nation-state. The concept of subsidiarity explains why policy makers *must* engage with these communities.

Two preliminary examples from the American experience in the Middle East are worth mentioning here.

- U.S. ignorance of the religious climate and unrest in Iran prior to the Islamic Revolution of 1979 was the primary reason that the American foreign policy experts describe the overthrow of the Shah’s secular

² Evans & Zimmermann above n 1.

³ Augusto Zimmermann, *Subsidiarity, Democracy and Individual Liberty in Brazil* (Chapter 6), above n 1, 93.

⁴ ‘The term “deep structure” is borrowed from linguistics, where the term is used to indicate the meaning or logic of a sentence, as distinct from the words and syntax, which are indicated by the surface structure.’ See Jeff Conklin, ‘Growing a Global Issue Base: An Issue-based Approach to Policy Deliberations’ at http://www.publicsphereproject.org/events/diac08/proceedings/21.Global_Issue_Base.Conklin.pdf (accessed April 1, 2014).

regime as sudden and unexpected.⁵ Even though Western journalists were reporting unrest in Iran as early as 1977-1978,⁶ the American foreign policy establishment was insufficiently engaged 'on the ground' in Iran to recognise the movement for what it was at the time: a broadly-based reform movement that crossed gender, education and economic lines.⁷

- U.S. ignorance of importance of the rift between Sunnis and Shia Muslims, and of the role that religious leaders play in a Shia society led to a civilian bloodbath in Iraq in the aftermath of the 2006 Al-Qaeda bombing of the Golden Mosque in Iraq. The Golden Mosque is the burial place of two of the twelve imams of Shiism, and the site where Twelver Shias believe the Twelfth Imam disappeared as a child.⁸ Six-hundred Sunnis were killed in retaliation.⁹ By September, 2006, the civilian death toll had reached nearly 3800 *per month*.¹⁰ It was not until 2007, *four years into the war* in Iraq, that United States officials began consulting with local religious figures.¹¹

The point here is straightforward: *Global Perspectives on Subsidiarity* lays a firm foundation for a long-overdue, interfaith discussion of international *political* affairs. I have already recommended this book to the human rights officials at the U.S. Department of State, to scholars of Islamic Law (*Shari'a*) who are seeking to understand how the principles of equal citizenship under law and subsidiarity in the Christian faith traditions comport with Islamic concepts of Justice in the social and political order,¹² and to several colleagues actively involved in efforts to highlight the important role that religion plays in foreign affairs.

⁵ Madeline Albright, *The Mighty and the Almighty*, (Harper Collins Publishers, 2006) 40.

⁶ Tom Ricks, 'Iranian People Challenge Pahlavi Arms and American Support', 10 *MERIP Reports* 18 (June 1978).

⁷ *Ibid.*

⁸ R. Scott Appleby, 'Engaging Religious Communities Abroad: An New Imperative for U.S. Foreign Policy' (2010) 15, *The Chicago Council on Global Affairs*.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² See eg Richard Miller Bird & Robert D. Ebel (eds), *Fiscal Fragmentation in Decentralized Countries: Subsidiarity, Solidarity, and Asymmetry* (Edward Elgar Pub, 2007) 290 (noting that 'In the post-9/11, post-Soviet world, the growing strength of Islamic cultural and religious movements worldwide has created new centrifugal forces, which presents a particular problem in Xinjiang given that the Uighurs are Moslems and that Xinjiang [is] located on the edge of Central Asia, making it a likely trouble spot for the indefinite future. With past policies of assimilation through economic growth and industrialization having failed, more explicit gestures to ensure inclusiveness and solidarity will be required.');

Nasim Ahmad Jawed, *Islam's Political Culture: Religion and Politics in Predivided Pakistan* (University of Texas

I. Subsidiarity and the structure of the social order

Consider Jonathan Chaplin's discussion of 'Subsidiarity and Social Pluralism' (Chapter 4). In Chaplin's view, the concept of subsidiarity is unduly limited by a 'spatial metaphor'. For Chaplin, subsidiarity is not simply (or only) 'a general norm of decentralization'. Rather, it should be understood as a natural outgrowth of the social and cultural pluralism that arises when 'lesser communities originate from the inclinations of human nature'.¹³ Because communities are *themselves* natural outgrowths of human activity, they, like the individuals who form them, 'possess, by "nature", original rights of self-governance'.

So too, of course, do the 'greater' communities, as the concept of subsidiarity is concerned the behaviour of these greater communities. Like the 'lesser' communities from which they are built, 'greater' communities are also defined by the 'bonds of interdependence' — or duties — that arise from the human relationships that create them.¹⁴ Thus, while 'the principle [of subsidiarity] operates within a graduated order in which the larger and higher is superior in authority, and the state is supreme among all', the *measure* of duty at each level is defined by the 'bonds of interdependence' that define its character as a community: 'For *every social activity* ought of its very nature to furnish help [*subsidium*] to the members of the body social ...'.¹⁵

A reference Robert Cover's masterful exploration of the *Halakhic* (Jewish law) concept of *mitzvah*¹⁶ is helpful here:

When I am asked to reflect upon Judaism and human rights ...
the first thought that comes to mind is that the categories are
wrong. I do not mean, of course, that basic ideas of human

Press, 1999) (noting that 'Debates and discussions in Pakistan on the desirability and nature of the Islamic state have covered several political topics, four of which have engaged the most attention: (1) the functions of the state; (2) democratic values; (3) the character and form of government; (4) law and legislation.'). Muḥammad Sa'īd *Ashmāwī, Islam and the Political Order* (Council for Research in Values & Philosophy, 1993).

¹³ Jonathan Chaplin, *Subsidiarity and Social Pluralism* (Chapter 4), above n 1, 71.

¹⁴ Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church*, Part VI(a) ¶192 at http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html#a. **Meaning and value**

¹⁵ Pius XI, *Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order* (May 15, 1931) ¶79 at http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html (emphasis added).

¹⁶ There are three types of *mitzvot*: 1) *mitzvot d'oraita* (Aramaic: 'from the Torah'); 2) *ormitzvot d'rabbanan* (Aramaic for 'from the rabbis'); and 3) a *mitzvah* that arises from custom (a *minhag*). In common parlance, the term 'mitzvah' can also refer to any good deed. See Halakha (הלכה) in Judaism 101 at <http://www.jewfaq.org/halakhah.htm> (accessed September 12, 2013).

dignity and worth are not powerfully expressed in the Jewish legal and literary traditions. Rather, I mean that because it is a legal tradition Judaism has its own categories for expressing through law the worth and dignity of each human being. And the categories are not closely analogous to ‘human rights.’ The principal word in Jewish law, which occupies a place equivalent in evocative force to the American legal system’s ‘rights’, is the word ‘mitzvah’ which literally means commandment but has a general meaning closer to ‘incumbent obligation.’¹⁷

The point is as simple as it is profound: *All* human relationships create ‘bonds of interdependence’. The incumbent obligations arising from these bonds define the nature and character of these communities. From the most fundamental and personal of these bonds, we deduce the incumbent obligations of spouses, parents, children, and extended families. As we broaden the scope of social relationships from family to tribe; to neighborhood; to guild and voluntary association; to city, state, province, and nation-state; and, ultimately, to ‘the international community’,¹⁸ we can see quite clearly why, as Chaplin suggests, ‘the exercise of a subsidiary function is itself an act of solidarity’. The baseline of *every* ‘incumbent obligation’ is to *serve*.¹⁹

It follows that unless we have a clear understanding of the ‘incumbent obligations’ assigned to each of the more broadly-based (‘greater’) communities, it will be impossible to elaborate, much less to operationalise, the ‘fuller conception of

¹⁷ Robert M. Cover, ‘Obligation: A Jewish Jurisprudence of the Social Order’ (1987) 65 (5) *Journal of Law & Religion*.

¹⁸ Writing in 2002, Noam Chomsky correctly observed that: ‘The philosopher Ludwig Wittgenstein advised readers to attend to the use of a phrase in order to determine its meaning. Adopting that suggestion, one regularly discovers that terms of political discourse are used with a doctrinal meaning that is crucially different from the literal one...’ One such term is ‘the international community.’ The literal sense is reasonably clear; the U.N. General Assembly, or a substantial majority of it, is a fair first approximation. But the term is regularly used in a technical sense to describe the United States joined by some allies and clients. (Henceforth, I will use the term ‘Intcom,’ in this technical sense.)

Noam Chomsky, ‘The Crimes of Intcom’, *Foreign Policy*, No. 132 (Sep-Oct, 2002), 34-35 at 34, available online at: <http://www.jstor.org/stable/3183448>. For purposes of this essay, I am using the term ‘international community’ in the literal sense: ie the community of nation-states and trans-national organisations that are recognised as important participants in discussions of international affairs. Among these are organisations that have been granted ‘Permanent Observer’ status by the United Nations General Assembly, such as the Holy See, the African Union, the European Union, the Organisation of the Islamic Conference (OIC); Interpol; and the Caribbean Community (CARICOM), and charitable organizations like the International Red Cross. See ‘Permanent Observer’ at

<http://www.un.org/en/members/intergovorg.shtml> (accessed March 28, 2014).

¹⁹ For a definition of the concept of ‘servant leadership’, see Robert K. Greenleaf Center for Servant Leadership, ‘What is Servant Leadership?’, <https://www.greenleaf.org/what-is-servant-leadership/> (accessed July 10, 2013).

subsidiarity’ that is the focus of Nicholas Aroney’s essay ‘Subsidiarity in the Writings of Aristotle and Aquinas’:

[A] community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to coordinate its activity with the activities of the rest of society, always with a view to the common good.²⁰

And thus, as Patrick Brennan observes in his essay on ‘Subsidiarity in Catholic Social Theory’: ‘[t]he modern mind must resist, as [Luigi] Taparelli [D’Azeglio] did, the philosophical prejudice according to which only individual rational substances, *but not groups or societies*, are the subject of right and of rights.’²¹

II. Subsidiarity as respect for individuals in social context

Andreas Follesdal’s essay on ‘Subsidiarity and Global Governance’ shows just how difficult — and important — it is to resist the temptation to assume that only individuals ‘are the subject of right and of rights.’²² Follesdal observes that ‘the rampant value pluralism and variations in natural and social conditions across states globally does counsel a certain leeway concerning how states should best respect and promote various objectives — including human rights’.²³ It’s a fair observation — and an important one. Let us briefly consider its implications.

‘Rampant value pluralism’ is a natural state of affairs because it is the *result* of ‘variations in natural and social conditions across states globally’. It arises, in some cases, because ‘foundation’ (or ‘lesser’) communities — families, tribes, unions, towns, cities, churches, synagogues, mosques, and states in federal systems — are the crucibles in which the ‘values’ (or moral norms) of the nations that coalesce around them are elaborated and refined. Rampant value pluralism is also a feature of large nations whose ‘foundation’ communities were integrated into the nation state by central authorities.²⁴ As Augusto Zimmermann’s essay on ‘Subsidiarity, Democracy and Individual Liberty in Brazil’ observes: ‘The needs and issues of somebody living in Porto Alegre will never be the same as those of someone living in Rio de Janeiro,

²⁰ Nicholas Aroney, ‘Subsidiarity in the Writings of Aristotle and Aquinas’ (Chapter 2) above n 1, 10, quoting John Paul II, *Centesimus Annus: Encyclical Letter on the Hundredth Anniversary of Rerum Novarum* (May 1, 1991) 48.

²¹ Patrick McKinley Brennan, ‘Subsidiarity in Catholic Social Teaching’ (Chapter 3) above n 1, 34.

²² Andreas Follesdal, ‘Subsidiarity and Global Governance’ (Chapter 10) at 208.

²³ *Ibid* 217.

²⁴ Zimmermann notes that the ‘statist’ orientation of contemporary Brazil is ‘product of an old ‘spoils-system’ inherited from Portugal, a country where the monarch granted to his staff, and preferred subjects, all sorts of graces and favours at the expense of fairness and the rule of law’, above n 1, 94.

and it is simply unrealistic to expect a bureaucrat in Brasília to be responsive to these differing local concerns.²⁵

However organised at the national or regional level, respect for the human dignity of the members of these more homogeneous, ‘foundation’ communities requires recognition that the moral norms that guide their behaviour are, by definition, norms of self-governance. It is precisely *because* these norms organise the behaviour of individuals and associations within these foundation communities, that they must be viewed as an integral aspect of the ‘original rights of self-governance’ with which any robust concept of subsidiarity — or of human rights — must be concerned.

III. Preserving political and associational autonomy

For those who have been raised or socialised in systems that prize decentralisation, preserving the political autonomy of ‘foundation’ communities is, or ought to be, a major role of constitutional courts, such as the High Court of Australia, Germany’s Federal Constitutional Court, and the Supreme Court of the United States.²⁶ For those who have been raised or socialised in systems that prize centralisation, or which have has ‘been historically highly interventionist’ like Brazil, the task is far more difficult. Zimmermann writes:

Since the state in Brazil is the ultimate provider of all meaningful resources, ‘the citizenry expects to live at government expense and under full protection’. As a result, Brazilian-style statism has been fully supported by old-fashioned socialists, neo-mercantilist businesspeople, conservatives who oppose social change, the nationalistic military, privileged bureaucrats, intellectuals who seek after state subvention, and all sorts of ‘compassionate’ individuals who think the state is the only entity with power to eradicate poverty and promote ‘social justice’.²⁷

In any environment in which the ‘government is ... widely regarded as being the ultimate provider of society and individuals’,²⁸ it should not be surprising that

²⁵ Ibid 87.

²⁶ See Jürgen Bröhmer, ‘Subsidiarity and the German Constitution’ (Chapter 8); Michelle Evans, ‘Subsidiarity and Federalism: A Case Study of the Australian Constitution and its Interpretation’ (Chapter 10); Gabriël A Moens and John Trone, ‘Subsidiarity as Judicial and Legislative Review Principles in the European Union’ (Chapter 9), above n 1.

²⁷ Zimmermann, above n 1, Chapter 6, at 93, quoting Heitor de Paula, *The Concept of Democracy in Latin America*, Hispanic American Center for Economic Research (HACER), Arlington, Virginia, July 2006, at: http://www.heitordepaola.com/publicacoes_materia.asp?id_artigo=45 (accessed March 30, 2014).

²⁸ Ibid 97.

public authorities will fail ‘to recognise the role played by the individual and social groups ... in the realisation of the common good’.²⁹

Rev. Robert Sirico’s essay, ‘Can Subsidiarity Reform the Modern Welfare State?’, explores the tensions between these two positions.³⁰ Recounting at length the ways in which the ‘modern, central state’ has moved relentlessly to supplant the types of private charity that flourish in local communities with a state-controlled, welfare bureaucracy that ‘grows at the expense of a dynamic exchange economy’, Sirico notes that ‘the largest danger of all’ is the moral hazard associated with increasing dependence on the state.³¹ Quoting the late Mary Conyngton, whose book, *How to Help: A Manual of Practical Charity*,³² was a standard reference in the early Twentieth Century, Sirico observes:

Many people, Conyngton writes, ‘are inclined to look upon public help as a right and to apply for it without hesitation, while they would regard themselves as a losing caste if they appealed to private aid.’ That is the good thing about private charity, and the essential moral hazard associated with public charity.³³

And thus, we return to the point made above: When the authority to decide important questions of self-governance at a ‘lower’ level is ceded to, or assumed by, the political community, the legitimacy of that cession (or assumption) depends on the ‘greater’ level’s ability (and willingness) faithfully to comply with all of its incumbent obligations to both individuals and *to the communities they form*. From this perspective ‘[s]ubsidiarity means the same as ‘assistance’ or ‘help’, implying, among other things, that the state has an obligation to help or assist citizens and social groups to flourish, not to swamp or absorb them.’³⁴

IV. Violating the principle of subsidiarity

A violation of the principle of subsidiarity can thus occur at two points. A violation occurs, in the first instance, whenever a transfer of authority makes it difficult, if not impossible to hold the ‘greater’ level accountable to the citizens of the ‘lesser’ communities.³⁵ The second type of violation occurs when the ‘greater’ level breaches

²⁹ Ibid 84.

³⁰ Rev. Robert A. Sirico, ‘Subsidiarity and the Reform of the Welfare of the Nation State’ (Chapter 7), 1.

³¹ Ibid 120.

³² Mary Covington, *How to Help: A Manual of Practical Charity* (The MacMillan Company, 1909).

³³ Sirico, above n 31, 120, quoting Conyngton.

³⁴ Zimmermann, above n 1, 84.

³⁵ See, eg, *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408 (1992) (‘... where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their

its obligation to preserve the ‘original rights of self-governance’ that inhere in foundational communities.³⁶

But how do we know when ‘greater’ structures fail to comply with their ‘incumbent obligations’ to their constituent foundational communities? Unfortunately, the answer to this question depends upon how broadly we define their duties. Several chapters in the book present compelling evidence from the case law and experience of Germany,³⁷ Australia,³⁸ and the European Court of Human Rights³⁹ that the rate at which the ‘lesser’ communities are ‘absorbed and destroyed’⁴⁰ may be inversely proportional to the level of generality at which we define the duties of the ‘greater’ communities. If the definition is gauzy, foundational communities are in for a rough ride. If it is specific, there will be room for greater deference to lower level entities.

Let us briefly consider two concrete examples: 1) the duty that governments owe persons who form associations; and 2) the duty that governments, as associations of their citizens, owe to one another in the sphere of public international law. As we consider these examples, we assume, as Follesdal suggests at the end of his essay, ‘that political authority must be justified in terms of the effects on individuals’ best interests, as units of ultimate moral concern in the global order.’⁴¹

V. The duty of government to persons who form associations

It is often forgotten that nation states are, themselves, political associations. In Aristotle’s conception, the *polis* is not only composed of households and villages, it is

decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.’ citing Deborah Jones Merrit, ‘The Guarantee Clause and State Autonomy: Federalism for a Third Century’, (1988) 88 *Columbia Law Review* 1, 61-62; D. Bruce La Pierre, ‘Political Accountability in the National Political Process — The Alternative to Judicial Review of Federalism Issues’ (1985) 80 *North Western University Law Review* 577, 639–665.

³⁶ See, eg, *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566 (2012) (federalism; invalidating federal law that coerces states into accepting modifications to federal health care cost-sharing formulas); *United States v. Morrison*, 529 U.S. 598, 618–619, 120 S.Ct. 1740 (2000) (federalism, invalidating federal attempt to provide a civil remedy for alleged rape that does not occur within any of the bases for federal jurisdiction).

³⁷ Jürgen Bröhmer, ‘Subsidiarity and the German Constitution’, above n 1, Chapter 8.

³⁸ Michelle Evans, ‘Subsidiarity and Federalism: A Case Study of the Australian Constitution and its Interpretation’, above n 1, Chapter 10.

³⁹ Gabriël A Moens and John Trone. ‘Subsidiarity as Judicial and Legislative Review Principles in the European Union’, above n 1, Chapter 9.

⁴⁰ Pius XI, above n 16, 79.

⁴¹ Andreas Follesdal, ‘Subsidiarity and the Global Order’ (Chapter 11) above n 1, 218.

‘fundamentally comprised of individual citizens (*politai*), formed into a self-sufficing unity.’⁴²

The United States Constitution proceeds from the same assumptions. Its famous Preamble ‘We, the People of the United States’ begins with the collective pronoun, ‘We’ — a reference to a collection of individual citizens — ‘the People’ — who have formed *themselves* to ‘a self-sufficing unity’ of *communities*: the several states, whose union is ‘the United States’. The phrase refers, not to the citizens of a unitary nation-state, but rather to the citizens of the several states whose civil and political rights and obligations are defined, first and foremost, by the constitutions and laws of the states ‘in which they reside.’⁴³

In article after article, the United States Constitution affirms not only the importance and integrity of the States themselves,⁴⁴ but also the need to protect the ‘lesser’, ‘foundational’ communities that exist within their boundaries, whether formed by contract,⁴⁵ commercial enterprise,⁴⁶ religion,⁴⁷ or politics.⁴⁸ But the words of those

⁴² Aroney, above n 201 at 14, quoting Aristotle (*Politics*, III.1) Chapter 2; See H. Jaffa, ‘Aristotle’, in L. Strauss and J. Cropsey (eds) *History of Political Philosophy*, (Chicago, 2nd. Ed, 1972) 94-96; and compare Plato, *Republic*, II, 369a-c. On the composition of the *polis* in terms of households and villages as well as individuals, see also Newman, *Politics of Aristotle*, Vol. II, pp. 111, 114; Vol. III, pp. 130, 132, 208. There may not altogether be a contradiction as between the individual citizen and the household, since although Aristotle referred to free women as well as free men as citizens, he seems generally to have assumed that the citizen who participates in the rule of the city will typically be an adult, male, head of a household. On this assumption, each citizen represents a household, and thus the city might be viewed quite consistently as both a composition of individual citizens and a composition of households.

⁴³ U.S. Const. amend. XIV §1, cl. 1 (1868) ‘All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside.’ See U.S. Const. art. I §2, cl. 2 (‘The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.’)

⁴⁴ U.S. Const. art. IV §§ 3-4 (1787) (§3: ‘New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.’; §4: ‘The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.’)

⁴⁵ U.S. Const. art. I §10, cl. 8 (1787) (‘No State shall ... pass any Law impairing the Obligation of Contracts ...’)

⁴⁶ U.S. Const. art. I §9, cl. 5-6 (‘No Tax or Duty shall be laid on Articles exported from any State. No Preference shall be given by any Regulation of Commerce or Revenue

provisions are almost never unpacked in light of the language and structure of the Constitution itself.⁴⁹ They are construed, instead, to authorise a massive transfer of power from the States *and the Congress* to the branch of the federal government that has, over time, been *least* responsive to the needs and demands of these ‘foundational’ communities: The Supreme Court of the United States.⁵⁰

It should come as no surprise, therefore, that one of the most heated, current, constitutional controversies in recent years arose in 2010, when the Court held that non-profit corporations (and, by implication, political parties) have the same first amendment right to unfettered political speech as individuals and for-profit, media corporations.⁵¹ While the specific issue in the case was whether the federal government could assert the ‘corrupting’ influence of corporate spending its justification for banning the distribution of a video that was critical of then-Senator Hillary Clinton,⁵² the underlying issue is fairly simple: Do individuals lose their right to first amendment protection when they organise themselves as a corporation? The Court said ‘no’ — and has provoked a sense of political outrage so intense and so sustained that we need an analytical model with sufficient candle-power to illuminate every nook and cranny of the controversy.

to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.’)

⁴⁷ U.S. Const. art. VI cl. 3 (1787) (‘... no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.’); U.S. Const. amend. I, cl. 1 (1791) (‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...’).

⁴⁸ U.S. Const. amend. I, cl. 2 (‘Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’)

⁴⁹ See generally, Robert A. Destro, *Federalism, Human Rights, and the Realpolitik of Footnote Four*, 12 *Widener Law Journal* 373, 379 (Winter, 2003) (arguing that ‘the Founders ‘vision of a “compound” American republic was lost when the Supreme Court of the United States used the New Deal controversy over the limits of judicial review to accomplish one of the most far-reaching power grabs in the history of the Republic.’)

⁵⁰ *Ibid* 12. *Widener Law Journal* 440-450 (discussing the Court’s abysmal record on race, sex, and religious discrimination issues).

⁵¹ *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876 (2010), overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct.1391 (1990).

⁵² Brief for Appellant, *Citizens United v. Federal Election Commission*, 2009 WL 61467 (U.S.) at 29. (‘If there existed a substantial governmental anti-corruption interest in prohibiting the Video On Demand distribution of biographical documentary films, it would not extend to films, like Hillary, that are funded overwhelmingly by individuals.’)

Read together, the essays dealing with national variants of the concept of separation of powers — or what Lael Daniel Weinberger calls ‘sphere sovereignty’⁵³ — suggest that there is one: The principle of subsidiarity. ‘With the concept of sphere sovereignty, Kuyper in effect argued for the separation of powers, not primarily within government, but across the entire society:

God established institutions of various kinds, and to each of these He awarded a certain measure of power. He thus divided the power that He had available for distribution. He did not give all his power to one single institution but gave to every one of these institutions the power that coincided with its nature and calling.⁵⁴

Kuyper’s observation that: ‘God ... gave to every one of these institutions *the power that coincided with its nature and calling*’ shows us where to begin: ie with the basic unit of the *polis* — the individual citizen *as person and as elector*.

And it is here that we can see the wisdom of Patrick Brennan’s observation that ‘[t]he modern mind must resist, as [Luigi] Taparelli [D’Azeglio] did, the philosophical prejudice according to which only individual rational substances, *but not groups or societies*, are the subject of right and of rights.’⁵⁵ Why? Because a philosophical or political orientation that denies the social nature of human beings is inconsistent with the very concept of *human rights*.

Human beings are, by nature, social. Our formation as persons, citizens, and electors is accomplished in close association with others: parents, siblings, extended family, friends, teachers and mentors, to name only a few. So too is the expression of our most sincerely-held opinions about faith, politics, economics, and one-another. *Each* of the freedoms guaranteed by the first amendment presupposes a *social* context in which they can be enjoyed. Without that social context, they are meaningless words on a page.

Citizens who elect to organise themselves as an association do so because joint effort is conducive to attaining their otherwise-lawful purposes. They understand that associations create complex webs of personal relationships, and that these relationships are dynamic. A *community* emerges from that interaction, with its own organisational identity, with its own ‘original rights of self-governance’,⁵⁶ and becomes a constituent

⁵³ Lael Daniel Weinberger, ‘The Relationship between Subsidiarity and Sphere Sovereignty’, (Chapter 4) above n 1.

⁵⁴ Ibid 54, quoted in Johan D. van der Vyver, ‘The Jurisprudential Legacy of Abraham Kuyper and Leo XIII,’ *Journal of Markets and Morality* 5:211-249 (2002), 214.

⁵⁵ Patrick McKinley Brennan, ‘Subsidiary in Catholic Social Teaching’ (Chapter 3) above n 1, 34.

⁵⁶ Indeed, *all* of the interests protected by the First Amendment and No Religious Test Clause are among these aspects of ‘self-governance’: freedom of religious exercise, and from the impositions of ‘an Establishment of religion, Test Oaths, freedom to

part of the larger community — the *polis*. Chaplin's essay thus correctly suggests that state intervention in the internal decision-making of private associations is legitimate only insofar as it is designed to protect the rights that the members of the association *have given themselves* to participate in its self-governance.⁵⁷

By starting with the individual constituents who create and sustain the 'lesser' communities of the *polis*, we can see why the Federal government was so committed to its argument that that *associational* 'expenditures [must] reflect actual public support for the political ideas [they] espouse'⁵⁸ Prior restraints come in many guises. Unless the members of an association can prove to the satisfaction of a government agency (or bureaucrat) that a majority *of the public* supports the political ideas they espouse, they are free to talk among themselves, but forbidden to spend the money it takes to reach the rest of us.

VI. The duty that governments owe to one another in the sphere of public international law

The rise of Islam as a political force in the Middle East and South Asia offers a useful opportunity to explore the 'incumbent obligations' that *governments* owe to one another in the sphere of public international law. Whether the issue is the legitimacy of the government of the Islamic Republic of Iran, the rise of the Muslim Brotherhood as a political force in the Middle East and North Africa,⁵⁹ or the religious dimensions of

assemble into public and private associations, and to petition the government for a redress of grievances'. U.S. Const. art. VI, cl. 3 (1787); amend. I (1791).

⁵⁷ In *Pembina Consol. Silver Min. & Milling Co. v. Commonwealth of Pennsylvania*, 125 U.S. 181, 189 (1888), the Supreme Court of the United States observed that corporations are 'merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution.' It has also called them 'artificial entities.' *Gulf, C. & S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897).

⁵⁸ *Citizens United v. Federal Election Commission*, 558 U.S. at 348-359, 130 S.Ct. at 903-908 (Stevens, Ginsburg, Souter & Sotomayor, JJ., dissenting), quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660, 110 S.Ct. 1391, 1398 (1990) (emphasis added).

⁵⁹ See, eg, Brian Starks, 'Book Review' (2012) 55 *Rev. of Religious Research* 381-383, reviewing Nancy Davis and Robert Robinson, *Claiming Society for God: Religious Movements and Social Welfare in Egypt, Israel, Italy, and the United States* (Indiana University Press, 2012) (observing that 'the most prominent and successful religiously orthodox movements, rather than using armed struggle or terrorism, as much of post-9/11 thinking suggests, use a patient strategy of 'bypassing the state' — building vast grassroots networks of religiously based social service agencies, hospitals, schools, worship centers, and businesses — to make religion the cornerstone of society.');

Katarina Pevná, 'Revolutions in Tunisia and Egypt and Political Participation of Islamists,' 20.2 *International Issues & Slovak Foreign Policy Affairs* 35-55 (2011) ('In order to understand the potential role of the Islamists in the political systems of the MENA countries, it is crucial to examine the tenets of their political ideology. Hence, it is worth noting that political Islam as such is by no

the ongoing humanitarian and political crisis in Syria, both the ‘international community’⁶⁰ and the ‘mainstream’ (or ‘traditional’) media *seem* to share the view that citizens of other countries who take religion seriously — *as lived experience*, and who organise their political affairs according to its precepts, present a ‘clear and present danger’ to the international social order.

Consider President Barak Obama’s comments about religious education in Northern Ireland: ‘... [I]f Catholics have their schools and buildings, and Protestants have theirs’ the inevitable result is that we will not be able to ‘see ourselves in one another, if fear or resentment are [stet] allowed to harden, that encourages division. It discourages cooperation.’⁶¹ Though reasonable minds can differ about the meaning of his words,⁶² there is little doubt that they were carefully chosen, and reflect the longstanding view of many in American politics that the government, rather than parents and private associations, should bear the primary responsibility for socializing children.

Like many contemporary politicians, President Obama views religion as a divisive force in both domestic and international politics. Even though the existence of

means a monolith, rather it encompasses a broad array of movements, groups, political parties and intellectual trends.’); Quintain Wiktorowicz, ‘Book Review’ (2001) 33 *International Journal of Middle Eastern Studies* 154-156, reviewing Mahmud A. Faksh, *The Future of Islam in the Middle East: Fundamentalism in Egypt, Algeria, and Saudi Arabia* (Praeger, 1997) and Mahmood Monshipouri, *Islamism, Secularism, and Human Rights in the Middle East* (Lynne Rienner, 1998) (observing that the ‘clash of civilizations’ narrative and ‘its portrayal of Islamists and secularists as engaged in an irreconcilable struggle for dominance in society is misleading’ because, among other things, ‘it ignores commonalities between their underlying ethical systems.’)

⁶⁰ For a definition of the term, see above n 19.

⁶¹ Remarks by President Obama and Mrs. Obama in Town Hall with Youth of Northern Ireland, Belfast Waterfront, Belfast, Northern Ireland, June 17, 2013, at: <http://www.whitehouse.gov/the-press-office/2013/06/17/remarks-president-obama-and-mrs-obama-town-hall-youth-northern-ireland> (accessed July 9, 2013): ‘Because issues like segregated schools and housing, lack of jobs and opportunity — symbols of history that are a source of pride for some and pain for others — these are not tangential to peace; they’re essential to it. If towns remain divided — if Catholics have their schools and buildings, and Protestants have theirs — if we can’t see ourselves in one another, if fear or resentment are allowed to harden, that encourages division. It discourages cooperation.’

⁶² Compare, eg, Ian Dunn, ‘US President undermines Catholic schools after Vatican Prefect praised them’, *Scottish Catholic Observer*, June 17, 2013 at: <http://www.sconews.co.uk/news/29253/us-president-undermines-catholic-schools-after-vatican-prefect-praised-them/> (accessed, July 9, 2013), with Michael McGourgh, ‘Did Obama diss Catholic schools in Belfast?’, *Los Angeles Times*, June 20, 2013 at: <http://www.latimes.com/news/opinion/opinion-la/la-ol-obama-catholic-schools-20130620.0,4557606.story> (accessed July 9, 2013) (arguing that ‘Context matters here. Northern Ireland is not the United States’).

a relationship between faith, culture, and national policy is one of those ‘fundamental value assumptions unconsciously presupposed⁶³ by ordinary citizens’;⁶⁴ there appears to be an unwritten rule that, except as a useful photo opportunity, ‘serious’ statecraft and political commentary should avoid direct engagement with religion or religious leaders. The result is a paucity of incisive analysis by the media, and near-paralysis when it is suggested that governments engage *directly* with key religious elements in nations where religion plays an important — if not determinative — role in the formulation of foreign policy.

Ordinary Americans understand that the faith traditions of a people or culture play an integral role in the development of its structural and behavioural norms.⁶⁵ Most

⁶³ Roger Cramton, ‘The Ordinary Religion of the Law School Classroom’, 29 *Journal of Legal Education* 247 (1978). Dean Cramton acknowledges that the phrase ‘ordinary religion’ is a ‘rhetorical device’ that is not intended to convey any impression that the ‘current intellectual framework of legal education is not a developed philosophy of life much less a theology.’ Ibid 247.

⁶⁴ See generally, *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (‘We are a religious people whose institutions presuppose a Supreme Being.’); James Davison Hunter and Os Guinness (eds), *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy* (Washington: The Brookings Institution, 1990); Marion Maddux, ‘“With Hope in God”: Religion, the Preamble Debate and Public Values in Australia’, in Brian Howe, Alan Nichols (eds), *Spirit of Australia: Religion in Citizenship and National Life* (Australian Theological Forum, Hindmarsh, SA: 2001); Camil Ungureanu, ‘The European Constitution-Making and the Question of Religion’, European University Institute Working Papers, SPS 2007/01, at 5,

http://cadmus.eui.eu/bitstream/handle/1814/6663/SPS_2007_01.pdf?sequence=3

(accessed July 9, 2013) (discussing Joseph Weiler’s observation in *Un Europa Christiana: Un saggio esplorativo, prefazione di Augusto Barbera* (2nd ed., Bur Biblioteca Univ. Rizzoli: 2003) that ‘the exclusion of any reference to Europe’s “Christian roots” would represent a “thunderous silence” (*silenzio tuonante*)’ [hereafter Ungureanu]; Marián Kuna, ‘God, Christian Values and the European Constitution: Should the Latter Refer to the Former and Why?’, in Rebecca Blocksome, Nagypál Szabolcs & Peter Šajda (eds.), *medi(t)ations, (re)conciliations: Conflict Resolution and European Integration, Ecumenical Anthology III* (Bratislava: BGÖI & WSCF-CESR, 2004) 104, at: www.koed.hu/medit/marian.pdf (accessed July 5, 2013) (observing that ‘faith in God and Christian values ... permeated the European culture so profoundly that they are not only fundamental to our moral and political convictions, but they are also at least implicitly present in many of our cultural principles, habits, and institutions.’; Michael Axworthy, *A History of Iran: Empire of the Mind* (Basic Books, 2010).

⁶⁵ See, eg Robert N. Bellah, ‘Civil Religion in America’, in *Religion in America*, 96:1 Dædalus 1-21 (Winter, 1967), available online at: http://www.robertbellah.com/articles_5.htm (accessed July 9, 2013) (‘there are, at the same time, certain common elements of religious orientation that the great majority of Americans share. These have played a crucial role in the development of American institutions and still provide a religious dimension for the whole fabric of American life, including the political sphere.’)

American politicians view this ‘social fact’⁶⁶ as a proposition ‘so obvious [to them and to those involved in these debates] that people do not know what they are assuming because no other way of putting things has ever occurred to them.’⁶⁷ Why then do many national leaders seem to ignore these propositions when they step into the international arena?

The answer is as obvious as it is depressingly familiar. The ‘post-Enlightenment presumption [is] that [the] secular and sacred realms should and could be isolated, with political activity uncontrolled by scriptural prescription.’⁶⁸ Generally speaking, this view is reflected in ‘[t]he persistent belief that religion is inherently emotive and irrational, and thus opposed to modernity, precludes clear thinking about the relationship between religion and democracy.’⁶⁹ For modern realists, religion is simply ‘an instrument of power.’⁷⁰ For liberal internationalists, religion is ‘antithetical to human rights and too divisive to contribute to democratic stability’,⁷¹ while for Rawlsians and advocates of *laïcité* ‘[r]eligion can be functionally useful, but it is completely irrelevant to the content and form of public political reason.’⁷²

Consider now a continuum: On the left are the post-Enlightenment, liberal advocates of an aggressive *laïcité*. On the right are those who are, in the words of the late Rev. Richard John Neuhaus, those ‘incorrigibly religious’⁷³ people in society who believe that ‘they *ought* to base their decisions concerning fundamental issues of justice on their religious convictions.’⁷⁴

⁶⁶ George Ritter, *Encyclopedia of Social Theory* (Sage Publications, Inc., 2005) 741: ‘Social Facts’. In his work on *The Rules of Sociological Method* ([1895] 1982), the French sociologist Durkheim defined social facts as ways of acting, thinking, and feeling that were external to individuals and exercised a constraint over them. ... According to Durkheim, social facts are general to the whole society and have a distinctively collective character. They constitute the distinctive subject matter of sociology. They are often embodied in social institutions, such as religions, kinship structures, or legal codes. These institutions are the primary focus of sociology as a science. However, social facts can also appear as social forces of more diffuse type — for example, in the mass behavior of crowds and other forms of collective action or in the collective tendencies manifested in statistical rates of social phenomena such as suicide and crime.

⁶⁷ Cramton, above n 6463.

⁶⁸ Wayne Hudson, ‘Religious Citizenship’, (2003) 49 (3) *Australian Journal of Politics and History*, 425.

⁶⁹ Thomas F. Farr, ‘Diplomacy in an Age of Faith: Religious Freedom and National Security’ (2008) 87(2) *Foreign Affairs* 114.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Camil Ungureanu, ‘The European Constitution-Making and the Question of Religion’, above n65, 9.

⁷³ Richard J. Neuhaus, *The Naked Public Square* 113 (Eerdmans, 1984).

⁷⁴ Nicholas Wolterstorff, ‘The Role of Religion in Decision and Discussion of Political Issues,’ in Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square: The*

Somewhere to the left of the ‘centre’ of that continuum we find those whom contemporary political commentators would describe as ‘moderates.’⁷⁵ These moderates subscribe to an approach to power politics that resonates with the liberal idea that ‘the notion of a direct impact of the religious discourse on the legal-political decision-making is democratically illegitimate’. And so too, it follows, is any ‘regime’ whose claim to power is explicitly based on its resonance with religious belief, tradition, or law.

The result is a paradox on the international stage. The world of international diplomacy is one in which the dark arts of *Realpolitik* (including covert action) are practiced on a daily basis. Notwithstanding their professed allegiance to democratic self-government, the leaders of many liberal democracies refuse, as a matter of principle, to engage fully with religious leaders — or with the ‘lesser’ communities they lead *at any level*.

In a world in which extremism comes in many varieties, including religious ones, one marvels at the self-imposed blindness that arises when the participation of ‘lesser’ communities in the affairs of the *polis* are limited because others find either their message, or the manner in which it is expressed, inappropriate. Although most Western statesmen and women ‘do not regard religious input as a “conversation-stopper”’⁷⁶ in diplomatic affairs, many find references to religious convictions in

Place of Religious Convictions in Political Debate (Rowman and Littlefield, 1997) 105.

⁷⁵ See Kathleen M. Sullivan, ‘The Justices of Rules and Standards’, 106 *Harvard Law Review* 22, 59 (1992) (describing ‘political moderates’ as ‘by definition, difference-splitters’, who prefer ‘standards’ that permit them to ‘take into account all relevant factors or the totality of the circumstances’ when they make decisions. Unlike rules that ‘bind a decision maker to respond in a determinate way to the presence of delimited triggering facts’, ‘standards split differences [and] permit substantive compromises in constitutional controversies: ...permit but discourage, distribute but don’t solicit, encourage but don’t compel, and take but not too far. Compromise is what political moderation is all about.’ See generally, Shawn Treier & D. Sunshine Hillygus, ‘The Nature of Political Ideology in the Contemporary Electorate’, 73:4 *Public Opinion Quarterly* 679–703 (Winter 2009) (arguing that ‘the belief systems of the mass public remain multidimensional, with many in the electorate holding liberal preferences on one dimension and conservative preferences on another’, and that the majority of these [cross-pressured individuals tend to self-identify as moderate (or say “Don’t know”) in response to the standard liberal-conservative scale, thereby jeopardizing the validity of this commonly used measure.’).

⁷⁶ Camil Ungureanu, ‘The European Constitution-Making and the Question of Religion’, above n 65, 2, citing Richard Rorty, ‘Religion as a Conversation-Stopper,’ *Common Knowledge* (Duke University Press, 1994); Richard Rorty & Gianni Vattimo, *The Future of Religion* (Polity Press, 2005). But see Jeffrey Stout, *Democracy and Tradition* (Princeton University Press, 2004) ch. 3, at 85-91 (‘Is Religion a Conversation-Stopper?’); Nicholas Wolterstorff, ‘The Role of Religion in Decision and Discussion of Political Issues,’ above n 74, 105 (‘Their religion is not, [a good many religious people in our society believe] about *something other than*

public discourse to be highly problematic. In this view, religion is, at best, a source of ‘potential ... semantic and motivational resources for democratic discourse and practice under certain conditions.’⁷⁷ At worst, it is *terra incognita*. As one high-ranking, American military official put it to this writer: ‘We have separation of church and state in this country. We are not allowed to deal with Ayatollahs.’

The current, Western approach to religion in international affairs has aptly been described as a ‘discursive model’.⁷⁸ Like the exclusionary policy invalidated in *Citizens United*, the exclusion of overtly-religious actors, communities and discourse from the international stage is an attempt by the ‘greater’ communities to control both the content and perspective of the discussion in ‘the decision-oriented public sphere constituted of parliaments, courts, local councils, and so on’.⁷⁹ Religiously motivated citizens can participate in the discussions in that ‘public sphere’ if, and only if, the reasons they give for proposing or opposing a law, policy, or practice are viewed by others as ‘secular reason[s] ... whose normative force does not evidentially depend on the existence of God or on religious considerations, or on the pronouncements of a person or institution qua religious authority.’⁸⁰

Consider, now, how a ‘discursive approach’ actually works in practice. Not only must citizens *speak* in non-religious terms, they must also ensure that nobody can trace their statements or advocacy to anything that originates in religion, to anything that emanates from religious authority, or to anything that *looks or sounds like it does*.

This is a laicist *nomos*. Like the ‘civil religion’ described in Robert N. Bellah’s famous essay,⁸¹ its ‘public ... dimension is expressed in a set of beliefs, symbols, and

their social and political existence; it is *also* about their social and political existence. Accordingly, to require of them that they not base their decisions and discussions concerning political issues on their religion is to infringe, inequitably, on the free exercise of their religion.’) [italics in the original].

⁷⁷ Ibid (emphasis added).

⁷⁸ Ungureanu describes three models of constitution-making: ‘communitarian’, ‘liberal’, and ‘discursive’. For communitarians ‘the communal identity and the values of community [are] foundational for the constitutional project: a constitution is supposed to reflect a pre-political identity and a set of communal goods.’ Ungureanu, above n 65, 1. ‘... [L]iberalism and laicism conceive the relation between democratic and religious discourse as a zero-sum game...’ Ibid 2. The ‘discursive’ view admits that it is possible, under ‘certain favourable conditions’ relating to the community’s ‘broader socio-political self-understanding... can justify the constitutional recognition of religion’, but only if it is clearly understood that the ‘*laws and policies are accept[able if they] are supported by secular democratic reasons.*’ Ibid, 13.

⁷⁹ Ungureanu, above n 65, 13.

⁸⁰ Ibid 13, citing Robert Audi, ‘The Place of Religious Argument in a Free and Democratic Society,’ (1993) 30 *San Diego Law Review* 677; Robert Audi, *Religious Commitment and Secular Reason* (Cambridge University Press, 2000).

⁸¹ Robert N. Bellah, ‘Civil Religion in America’, above n 66. Although Bellah defined ‘civil religion’ as a construct ‘alongside of and rather clearly differentiated from the

rituals⁸² that actively *discourage* all political discourse that calls attention to the *differences* between and among religious and secular approaches to policy questions.

John Murray Cuddihy put it well when he referred to the norms of the laicist model as the core doctrines of a ‘religion of civility’ that, ‘under cover of its prim title [is], in its rites and practices, activist, aggrandizing, subversive, intrusive, [and] incivil.’⁸³ Drawing on the experience of former President Jimmy Carter’s ‘encounter [with] the civil religion that Americans, more and more, practice, whatever they profess’,⁸⁴ Cuddihy observes that:

This complex code of rites instructs us in the ways of being religiously inoffensive, of giving ‘no offense,’ of being *religiously* sensitive to religious differences. To be complexly aware of our religious appearances *to others* is to practice the religion of civility. Thus, civil religion is the social choreography of tolerance. It dances out an attitude.⁸⁵

VII. Conclusion

I began this review with a quotation from the late Robert Cover’s classic discussion of the *Nomos* — the normative universe that embodies ‘not only bodies of rules or doctrine to be understood, but also worlds to be inhabited.’ *Global Perspectives on Subsidiarity* is a timely reminder, drawn from centuries of lived experience and the philosophical and religious traditions that shaped it, that there has never been — nor can there ever be — a single *Nomos*.

There is, instead, ‘a plurality of human communities’, each of which makes its own legitimate contribution to human flourishing by ‘establish[ing] paradigms for dedication, acquiescence, contradiction, and resistance’. Each of these communities is a *nomos*, and socialization is the process by which each of us is taught how we must behave as we venture into the ‘greater’ communities of in which we live, work and raise our children. In Cover’s words, ‘To inhabit a *nomos* is to know how to *live* in it.’

This, in the end, is why ‘each type and instance of such communities legitimately claims a sphere of independent self-governance,’ and why each ‘must resist incorporation by or subordination to other communities, notably the state.’⁸⁶ It is also the best argument that I can think of why *Global Perspectives on Subsidiarity* should be on your reading list.

churches’, Robert N. Bellah, ‘Civil Religion in America’, in *Beyond Belief: Essays on Religion in a Post-Traditional World* (Harper & Row, 1970) 68, the laicist version is a construct that parallels the *state*.

⁸² Ibid 3-4.

⁸³ John Murray Cuddihy, *No Offense: American Civil Religion and Protestant Taste* (Seabury Press, 1978) 1-2.

⁸⁴ Ibid 2.

⁸⁵ Ibid.

⁸⁶ Chaplin, ‘Subsidiarity and Social Pluralism’ (Chapter 5) above n 1, 64.