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FEDERALISM, SUBSIDIARITY, AND THE ROLE OF LOCAL GOVERNMENTS IN AN AGE OF GLOBAL MULTILEVEL GOVERNANCE

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INTRODUCTION

One of the hallmarks of our age is a realization—a product of objective discoveries and of ideological transformations—that a growing number of contemporary problems and challenges require decision-making and implementation at different territorial spheres and by different governmental (and political) levels.[1] Immigration, climate change, labor standards, and the economic crisis are high-profile examples of the fact that it is no longer possible—nor is it desirable—to think, decide, and implement rules and policies *only* at the federal level *or* at the state level *or* at the local level; rather, it has become necessary to govern them at many levels of government—sub-national, national, and supra-national—simultaneously. Yet, our legal systems and political institutions have not yet adapted themselves to this realization and they do not reflect it fully or sufficiently. Furthermore, as I argue in this Article, the two most dominant political theories that are supposed to offer a solution to this growing need of, and belief in, multilevel governance—federalism and subsidiarity—are inadequate and incapable of doing so. And while both theories are invaluable sources for inspiration for the creation of a legal (and political) system that will better fit our changing realization regarding the multi-spheral (global, national, regional, and local) nature of human conflicts and contemporary challenges, I claim two things regarding them: first, that they should be understood as distinct from each other (despite the fact that they are often confused and not theorized as distinct political theories); and second, that subsidiarity is better fit for the task of articulating multilevel governance, even if only as a tool for loosening the grip of federalism over our political and legal theory.

The growing understanding of the need to govern and solve problems at various territorial spheres and by multi-tiered governmental institutions should be read as manifesting three processes that have become emblematic of our times: globalization, urbanization, and the shift from government to governance. These three tectonic shifts involve fundamental material and ideological transformations that are reconfiguring individuals, societies, and governments all over the world. And it is indeed the intersection of these three phenomena that this Article identifies as the source of the need to rethink our current political-legal models. Together, these processes require not only a new division of power between different levels of governments in order to manage various resources more effectively, or

1. By the term "realization" I do not suggest that the need for multilevel governance is an objective requirement or a purely scientific discovery. As I elaborate below, the interconnectedness of natural- and man-made phenomena is a product of objective discoveries, technological innovations, and ideological constructions. *See* discussion *infra* Parts I.A, I.C.

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in order to tackle different challenges more efficiently; they suggest that it is imperative that we conceptualize afresh the relationship between different territorial spheres—and therefore between competing identities and political affiliations—and that we form new legal principles in order to govern and regulate these new relationships. In this Article, I suggest that the theory of subsidiarity, problematic and incomplete as it may be, might include some important ideas regarding the desirable relations between different spheres of government, between different territorial spheres, and between different sites of identification (subjective and collective).

Federalism and subsidiarity are the two dominant theories that are currently being implemented globally in order to organize and theorize the relationship between different levels of government and different spheres of political action and identification.[2] While both advocate a division of labor between lower and upper governmental levels, they also radically differ from each other. This Article explores the differences and similarities between federalism and subsidiarity as legal and political regimes and points to important areas of departure between them, especially regarding the relationship between states and their territorial sub-divisions, with particular interest in cities. There are three major differences between federalism and subsidiarity. First, federalism privileges one jurisdiction over the rest: the state is the only truly "recognized" or "privileged" territorial sphere, over the rest of the spheres, especially over localities; in subsidiarity, on the contrary, there is no preferred or privileged level of government: each sphere has its own advantages and disadvantages for various purposes.[3] Furthermore, despite the belief that subsidiarity somehow advocates the delegation of decision-making powers to local governments (being "closest to the people"), according to the theory, cities are actually no more privileged than any other level of government. Second, while federalism is mainly focused on the protection of the constituent units from federal intervention (negative autonomy), subsidiarity promotes duties of assistance of the various levels of government towards each other (positive autonomy). Third, federalism is more theoretically committed and historically attached to nationalism, and is therefore more hostile to international and global entities and cooperation.[4] Subsidiarity, on the other hand, is Catholic in its origins as well as in its theory, and is therefore friendlier to global governance schemes.[5]

2. Advocates of the need to create a "world government" often use the framework of a federal regime. *See* GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS (James N. Rosenau & Ernst-Otto Czempiel eds., 1992).

3. *See* discussion *infra* Parts II.A.1, II.B.

4. *See* discussion *infra* Part II.A.2.

5. *See* discussion *infra* Part II.B.2.

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As a result of these differences, I argue, subsidiarity is a better model for the politics and administration of problems that require multilevel or multi-sphere involvement. I map the various approaches that are currently articulated in discussions about the changing role of cities in the era of global governance and on the need to allow for more "autonomy" to cities, on one hand, and to enable more coordinative powers to states and international entities, on the other. I conclude by saying that federalism is an inapt theory of government with respect to the changing world structure and emergence of global governance as a radically decentralized mode of power. In its stead, I argue, the principle of subsidiarity is better fit for understanding how power currently works, and how cities can operate in an environment of competing and multilayered jurisdictions. It especially enables the integration of cities and other localities into the emerging political organization of the world, given their unique position as preferred locations of democracy, efficiency, and normative mediation.

I end, however, on a more ambivalent note: despite the fact that subsidiarity should be seen as a better theoretical model for understanding city power and for articulating the possible—and actual—relations between central and local governments, it should not be understood as a comprehensive theory that will resolve all tensions between power centers and social groups and which will provide a method of ruling the world. On the contrary, many of the arguments I make throughout the Article against federalism can also be easily applied to subsidiarity. My preference for subsidiarity should therefore be seen mostly as an antidote to the pervasive federalist mode of thinking, with its idealized and stylized conceptualization of multilevel governance. It should also be read as another articulation of the argument I have been making elsewhere, that central and local powers should not be theorized or legally defined as operating at the expense of one another. Rather, they ought to be viewed as often working in tandem, and therefore regulated as overlapping and cooperating rather than as negating one another. It reminds us, in other words, that the terms "centralization" and "decentralization"—like federalism and subsidiarity—are often mostly ideological markers and not determinant or fixed structures; as such, they fail to tell us much about a concrete result, a specific case or the desired rule. Viewed this way, subsidiarity is a way on expanding a critical theory of multilevel governance, not merely a normative ideal.

I. GLOBALIZATION, URBANIZATION, AND GLOBAL GOVERNANCE: THE EMERGENCE OF MULTI-LEVEL GLOBAL GOVERNANCE

In this section, I briefly summarize the three processes that have contributed to the emergence of an ideology and practice according to which a

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growing number of aspects of human affairs require the involvement of multiple territorial units, multiple political communities, and hence, multiple governing entities. The processes are, as I suggested earlier, globalization, urbanization, and the move to governance. Each of these complicated processes clearly justifies more than an article for itself; for the purposes of this Article, however, I shall talk only about the major developments in each trend and how these three developments helped to bring about the idea of multi-level global governance, in which local governments—cities in particular—appear as important agents.

A. Globalization

Globalization is probably one of the most discussed phenomena of our times. It describes not only a material condition, but an ideology and a subjective state of mind—a mode of being in the world. Materially, globalization is often described as the process by which capital, commodities, and persons are travelling throughout the globe in an unprecedented, and growing, rate and pace.[6] It is thus understood to be closely linked with technological innovation, especially new means of communication and transportation that make the dissemination of these elements cheaper, quicker, and easier.

Ideologically, globalization is conceptualized in very different ways that often compete with each other. First, it is sometimes theorized as a natural and desirable evolution of late twentieth-century capitalism and its need to constantly cross borders in order to find cheaper and more efficient locations for production.[7] For others, it represents another stage in the colonization of the global south by the global north, with the United States leading the colonization process; hence, globalization is occasionally understood as "Americanization."[8] Thirdly, globalization is sometimes conceptualized as the necessary and logical unfolding of liberal humanism, the refusal to accept anymore the "compromise" that nationalism imposed

6. For one of the most exhaustive presentations of the topic see DAVID HELD ET AL., GLOBAL TRANSFORMATIONS: POLITICS, ECONOMICS AND CULTURE (1999).

7. This process can be seen as positive or negative, often depending on the empirical evidence that one finds, and whether it supports the notion that globalization is also distributing wealth from the global north to the global south, or merely enlarging the global pie. For a critical evaluation of this process, see ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONSEQUENCES (1998); *see also* ULRICH BECK, POWER IN THE GLOBAL AGE (2005). For a favorable evaluation of globalization as economically efficient and socially desirable for its distributive impact, see GEORGE REISMAN, GLOBALIZATION: THE LONG-RUN BIG PICTURE (2006).

8. *See generally* MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2000).

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on it, thus turning into a global, or cosmopolitan, humanism.[9] This conceptualization of globalization bears close affinity to some scholars' understanding of contemporary developments in international law, according to which the Westphalian paradigm—that dominated international law and international relations for the past three centuries—is waning, and is being replaced by a paradigm more fit to the age of globalization.[10] Hence, the new paradigm, the "transnational law" or "transnational conflict" paradigm, is centered on the role and regulation of sub- and supra-state entities in international relations, and less on state sovereignty and on the state as the sole actor in international relations. Fourth, globalization is also understood as a cultural process in which not only persons, capital, and commodities are being disseminated all around the globe, but also cultural images and identities.[11] Though it is often depicted as a process of cultural imperialism by the United States, globalization is clearly more complicated, as has been pointed out by scholars that have identified the process of "glocalization" (the enmeshing of the global with the local, the local articulations of "global" commodities, images, and ideas), and as the dissemination of non-American and non-European cultural values and cultural artifacts to the global north suggests.[12]

The process of globalization also operates at the level of subjective identification and social configuration. It has been suggested that a new global class has emerged, with fewer attachments to the nation state, and with weaker bonds and loyalty to national constituencies.[13] In other words, if globalization is a real material and ideological condition, it restructures not only the economy and the system of international (or transnational) law, but also the individuals and the societies that operate in it. The process of the creation of the nation-state has been a project of establishing extremely strong identification of individuals and groups with an imagined nation[14]—spatialized in the territory of the state and represented by the nation-state—and therefore, its undoing is both dependent on, and conducive to, the un-

9. *See generally* ULRICH BECK, COSMOPOLITAN VISION (2006); SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS (2004).

10. *See, e.g.*, Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 169 (1999); Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF. Sept.-Oct. 1997, at 183, 183-84.

11. *See* ARJUN APPADURAI, MODERNITY AT LARGE: CULTURAL DIMENSIONS OF GLOBALIZATION (1996).

12. *See* ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE (1992).

13. *See, e.g.*, Benvenisti, *supra* note 10.

14. For a seminal work on the creation of imagined national communities, see BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1983).

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doing of these strong identifications. This undoing of national identification creates deracinated elites that feel less obligated to their societies, and are thus said to be evading their previous responsibilities as national elites; however, it also allows for the creation of new identities and new identifications. A global identity—in which individuals actually identify with, and feel connected to, and affiliated with, persons in other nations—is one such alternative identity that appears of late; local and regional identities, by which people feel attached to persons of their locale or region, are another.

With the emergence of these competing identities and identifications, it is becoming clearer that the existing models for managing the relations between the different spheres within the nation-state are no longer reflecting the social composition of the territory populated by the people. Furthermore, an exclusive national identity no longer manifests the professed ideals of the state, after the state has disavowed its presumption to create a solidified and unified nation, given the pressures posed by immigration and growing internal plurality (of religions, cultures, ethnicities, and belief systems).

Indeed, the newness of globalization is derived from the *theoretical* and *ideological* structures that are part and parcel of it, even if many of the *material* phenomena attributed to globalization are not as new as some scholars seem to suggest (migration always existed, importing and exporting goods and commodities seems to have been a trait of humans for millennia, and cultural and religious influences across borders seem intractable characteristics of human societies). The categories with which we, in the globalization era, deal with old phenomena are new, and the social, ideological, economic, legal, and political contexts have changed in ways that transform the meaning of ever-existing phenomena. Thus, for example, even if people's mobility across national borders might have actually declined over the past century, the way we now think about immigration (no longer called "migration") has changed dramatically due to a set of structural and ideological reasons: the congealment of the once more fluid national citizenship, the thicker legal entitlements that states give their citizens,[15] the emergence of more elaborate and mutually exclusive national identities,[16] the articulation and dissemination of identity politics, and new technologies of surveillance and population management.[17]

15. Yishai Blank, *The Spheres of Citizenship*, 8 THEORETICAL INQUIRIES L. 411, 417-19 (2007).

16. *See* ANDERSON, *supra* note 14.

17. *See* MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED: LECTURES AT THE COLLEGE DE FRANCE, 1975-1976 241 (2003).

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Therefore, in order to fully grasp the meaning of globalization, it is clearly not enough to document the movement of persons, capital, commodities, and so on. The meaning of such movements and of other physical activities is inextricably wound up with ideological structures that enable it, facilitate it, which in turn give it meaning. Such structures are political, ideological, and undoubtedly legal. Hence, figuring out the legal structures that accompany globalization—in this Article, the legal reworking of mechanisms of multilevel governance—are a crucial part of critically evaluating globalization and its impact.

B. Urbanization

Though urbanization might look to some observers from the global north as a process that happened during the nineteenth century or early twentieth century, it is nonetheless one of the most dominant changes in the developing world. The move of vast numbers of people from rural habitations to densely populated urban areas is the single most radical change in places like China, east Asia, sub-Saharan Africa, and some areas of Latin America.[18] More than globalization, but obviously indistinguishable from it since the easy move of capital and commodities enables it, urbanization is transforming societies and their states across the world in the most profound manner, not unlike what the industrial and urban revolutions achieved in Europe and the United States at least a century ago. It is therefore only this year that the majority of humanity will live, for the first time in human history, in urban areas. And these new urban areas are not small towns but large metropolises, populated by millions of people.

The creation of large, heavily populated urban areas throughout the world has various consequences as far as political theory and reality go: it enables a shift of economic and social power to the local governments that manage these areas. And even though it is still possible for strong central governments to control these places, the conditions are such that they open the possibility—and the pressure—to shift power to these larger locales. Clearly, not every large city becomes an important city in its national economy or in the global economy, let alone legally empowered vis-à-vis the central government. On the contrary, only few cities can indeed live up to the hypothesis of John Friedmann and become "world cities."[19] Other ci-

18. For a description of these transitions see, for example, GLOBALIZATION AND THE WORLD OF LARGE CITIES (Fu-Chen Lo & Yue-Man Yeung eds., 1998); and WORLD CITIES BEYOND THE WEST: GLOBALIZATION, DEVELOPMENT AND INEQUALITY (Joseph Gugler ed., 2004).

19. *See* John Friedmann, *The World Cities Hypothesis*, *in* WORLD CITIES IN A WORLD-SYSTEM 21, 25-26 (Paul L. Knox & Peter J. Taylor eds., 1995).

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ties fall behind, left only with a set of mounting problems. Indeed, many of those cities—whether entirely new, or simply much larger than before—face a set of problems and challenges entirely unknown to them: internal migration and external immigration, rising crime, increased environmental problems, cultural tensions, massive need for housing, the collapse of various social services, and more. And their national legal systems often do not equip them with the means to deal with these problems.[20] Yet, the emergence of urban centers serves as a facilitator to the appearance of new identities, new power centers, and therefore new political entities.

It is important to note that urbanization by no means implies greater unification, coordination, or cooperation within the metropolitan areas. On the contrary, with urbanization often appears the fragmentation of the metropolitan area into splinters: suburbs, gated communities, edge cities, and other spatial phenomena that plague large urban areas. And with the weakening of the central state, competition between and within emerging urban centers is rising.[21] Indeed, the problems of inter-local competition are often more difficult—and in need of resolution—than the power struggle between local and central governments. Accordingly, the need to develop a critical theory and a legal regime of multi-level governance is not merely about properly describing, assessing, and resolving conflicts between hierarchical governmental tiers, but also—perhaps more often—about evaluating and setting the bounds of one locality in relation to another locality.

C. Global Governance

The move to governance has been observed in many fields of human activity where the state carried a significant role as regulator, owner, provider, monopole, etc. over the past century.[22] This shift is often understood to be the result of a critique of both the economic efficiency and moral legitimacy of the traditional centrist welfare state (even in its rather minimalist American version).[23] Over the past few decades, the centrist state has been attacked from the right, center, and left for its inability to efficiently man-

20. *See* Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875 (2006) [hereinafter Blank, *The City and the World*].

21. *See* GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 144-64 (2008).

22. For an exhaustive overview of new governance trends in the United States, see Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 405 (2004); *see also* Donald F. Kettl, *The Transformation of Governance: Globalization, Devolution, and the Role of Government*, 60 PUB. ADMIN. REV. 488, 495 (2000).

23. Lobel, *supra* note 22, at 362.

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age resources and provide services,[24] its susceptibility to capture by rent-seeking elites,[25] its lack of responsiveness to citizen preferences, its turning into an all-powerful bureaucratic apparatus which hinders its democratic legitimacy, its want of creativity and flexibility, its coercive legislation and regulation, its oppression towards various minorities (national, ethnic, cultural, religious, linguistic, etc.), and its infringement on the basic negative liberties.[26]

The transition from regulation (or from government) to governance thus implies an attempt to construct new relationships between the state and the components of society—individuals, communities, corporations, religions, and other associations—and revamp the ingredients of the civil society vis-à-vis the state. It uses various existing institutions—those of the state (such as local governments) and those of civil society (for example, churches and families)—in order to advance the basic liberal values of liberty and equality through procedures that emphasize voluntariness, cooperation, responsiveness, flexibility, efficiency, partnership, and participation.[27] Decentralization—the dispersal of power from the state to societal entities—thus occupies a unique place in the regime of governance due to a combination of ideological and pragmatic reasons.[28]

Consequently, it is only expected that cities, too, have become part and parcel of the phenomenon of global governance: a new pattern of power, influence, and governing of affairs, which seems to have replaced the previous mode of power. Without over-emphasizing the weakening of states, it has become clear that cities are part of an emerging new global order in which different actors—and not just states—play increasingly important roles in managing important aspects of human life and natural affairs.[29]

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24. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GOODS (1965); Richard A. Musgrave, *The Voluntary Exchange Theory of Public Economy*, 52 Q.J. ECON. 213 (1939); Paul A. Samuelson, *The Pure Theory of Public Expenditures*, 36 REV. ECON. & STAT. 387 (1954).

25. *See* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 46-60 (1951); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 10-17 (1971). For an overview on global governance trends, see David Kennedy, *The Mystery of Global Governance*, 34 OHIO N.U. L. REV. 827 (2008).

26. ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974).

27. Lobel, *supra* note 22, at 403.

28. Please note that decentralization, though often understood in spatial terms, can also be understood as a practice of devolving powers or authorities to non-spatially defined entities, such as autonomous governmental entities, special agencies, or even private entities. Decentralization in the spatial sense is one instance of the dispersal of previously concentrated power.

29. Seminal works that have documented the rise of city importance in the global economy include, among many others: GLOBAL NETWORKS, LINKED CITIES (Saskia Sassen ed., 2002); PETER HALL, THE WORLD CITIES (1984); SASKIA SASSEN, THE GLOBAL CITY: NEW

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These changes are propelled from above and below: activities that redefine city powers, city duties, and city activities are brought about by city actors (private and governmental), national players, and international and transnational entities. These various actors seem to be both responding to—but also initiating themselves—pressures "to globalize," that is, to participate in the creation of a global market or a global political community. Globalization, indeed, is not just an economic activity, a creation of a global market, or a movement of people across the world; it is a mode of being, an understanding by individuals of their place in the world, and a restructuring of their basic affiliations and identifications.[30]

Such activities and changes—economic, social, cultural, and even psychological—have their legal counterparts. The law is enabling many of the appearances of globalization (trade, immigration, information dissemination, etc.) and also responding to them after the fact. And "the law" to which I am referring here is international law, transnational law, national law, and local government law. It is thus interesting to observe that the *legal* transformations that accompany the change in cities' structure, role, wealth, and strength can be seen in *local* and *national* legal systems as well as in *international* legal documents, and in *transnational* legal activities.[31] Thus, the radical reconfiguration that cities undergo is felt by mayors, council members, and citizens in small towns across the United States, but also by U.N. and European Union officials, and international NGOs. Recent research suggests that the activities at these various political and social spheres are often done without coordination, with each level of government—local, national, regional, international—trying to pursue its own goals and to advance its own vision.[32] Indeed, part of the mysterious na-

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YORK, LONDON, TOKYO (1991); H. V. SAVITCH AND PAUL KANTOR, CITIES IN THE INTERNATIONAL MARKETPLACE: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT IN NORTH AMERICA AND WESTERN EUROPE (2002); WORLD CITIES BEYOND THE WEST: GLOBALIZATION, DEVELOPMENT AND INEQUALITY (Josef Gugler ed., 2004); WORLD CITIES IN A WORLD-SYSTEM (Paul L. Knox & Peter J. Taylor eds., 1995).

30. ZYGMUNT BAUMAN, GLOBALIZATION: THE HUMAN CONSEQUENCES (1998); JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS (2001).

31. For a comprehensive study of these developments, see Blank, *The City and the World*, *supra* note 20, at 886-90; Yishai Blank, *Localism in the New Global Legal Order*, 47 HARV. INT'L L.J. 263, 264 (2006) [hereinafter Blank, *Localism*]; Gerald E. Frug & David J. Barron, *International Local Government Law*, 38 URB. LAW. 1 (2006).

32. This is the proposition that many scholars dealing with globalization make, especially when they compare it to the concept of "internationalization." For them, while the classical model of internationalization (and of international law) was that of the coordinated and orchestrated action between states and international entities, globalization often means lack of such coordination. *See, e.g.*, Benvenisti, *supra* note 10, at 171-81; Slaughter, *supra* note 10, at 192.

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ture of global governance[33] is the fact that it is hard to put one's finger on where the changes in contemporary issues are coming from, and who is leading them: changes seems to come from nowhere and everywhere, they are propelled by many agents, organizations, and individuals, but by no one dominant actor, and it is therefore difficult to find the Archimedean point from which to oppose them. As I argue below, a unique challenge of globalization and global governance is that it calls into question our most basic modes of political engagements and organization.

Indeed, global governance is not some kind of all powerful "world government" which decides (directly or indirectly) on the rules and policies, implements them, and adjudicates them; there is no single (or even few) powerful agent that coordinates and orchestrates the current "new world order." On the contrary, what marks global governance is that various policies emerge in different locations, in the global north and the global south, in national settings and in international organizations (such as the U.N., the World Bank, the World Trade Organization etc.), and by private actors and public ones.

Seen from the perspective of a power theory, global governance can be theorized as a challenge to what I term the "resource model of power." According to the resource model, power is a resource that one has or that one lacks. Power is thus possessed by individuals or associations and can be "used" in order to achieve various goals. The resource model is shared by liberals, conservatives, and Marxists, and is indeed the most prevalent model of power that exists in social and political theory—hence, the idea that "separation of powers" is the sharing of the resource that government has—power—between its different branches (or levels), and hence the idea that the central state "holds" power which it then applies for the benefit of the people.

Governance offers a different idea about power, one which can be termed "the field model of power." Global governance suggests such a radical dispersal of power that it is no longer plausible to talk about power as a resource; rather, power becomes a force field which operates outside of any of its particular objects and subjects, exerting influence *on them*. Much like a magnetic field which is "everywhere" and not in any centralized source, power, too, is "everywhere" and not at the hands of any centralized government, national or international. The various entities within the field of power are of course exposed to changing degrees of "power" (depending on their location within the force field); but even those that are relatively better off should not be seen as those possessing the power. Even the rela-

33. Kennedy, *supra* note 25, at 827.

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tively powerful positions within the force field are subject to "power" and are impacted by it.[34] If power is seen in this way, it is easier to understand why in global governance power seems to "disappear" and is held by no one. Some might worry that this model has a covert conservative slant inasmuch as it implies that even the most powerful agents are mere subjects of power, not its possessors. Indeed, if no one holds power, who can be held accountable to the all the wrongs and all the injustices of the world? And indeed, one of the signs of the age of global governance is precisely this fact: that no one source which is responsible for how the world is run can truly be found. While the United States is seen by many as the current empire which controls many of the world's affairs, it is rather clear that it, too, is far from being outside the field of power that it supposedly fully controls. And though the United States might benefit tremendously from the current constellation of the force field of power, it is far from being in full control over it or from holding it in its hands.

To my mind, acknowledging the reality of global governance is not conservative nor does it imply that no entity—public or private—is responsible for current atrocities or harms. It merely means that we need to accompany our resource model of power with the field model, and realize that power exists not only where someone clearly holds it and forces it on a receiving end, but also where volition and cooperation seem to exist. In other words, far from being reactionary or conservative, resisting the resource model as the only way to conceptualize power opens up room for a critique of legal power; understanding global governance is thus a way of figuring out where power lies even if no one seems to be in full control over the way things are run.

An important part of global governance is theorized through a set of concepts—decentralization, devolution, federalism, and subsidiarity—aimed at describing the loss of monopoly of central decision-making entities such as states, and their weakened ability to galvanize political identification and muster political will to rule. As a result, these various concepts are an attempt to find a theoretical framework that will organize the relationship between different levels of government (or between operational governance activities) at a time of profound restructuring of our political institutions and affiliations. Cities, regions, and other sub-national (and also supra-national) territorial units serve as the main targets for such devolutionary or decentralizing schemes, since they seem to embody many of the values that global governance wishes to advance: decentralization of pow-

34. This alternative model of power is influenced by Michel Foucault's opposition to the Marxist notion of power as property, or as something that one "has." Rather, suggests Foucault, power is a force field which works through and on subjects.

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er, voluntariness, participation, and responsiveness. I will return to this point later.

I now turn to examine the two principles of decentralized government structures that I wish to explore: federalism and subsidiarity. As I explained earlier, these two theories are the main ideas that are currently being circulated as proposals to reorganize our globalizing, urbanizing, and new-governed world. However, while federalism enjoys plenty of attention and is debated seriously, subsidiarity is seen as just another form of federalism or as a rule of thumb as to how to decentralize power ("Hand it over to the smallest possible governmental unit"[35]). In the next section I explain why these conceptions are wrong.

II. FEDERALISM AND SUBSIDIARITY AS PRINCIPLES OF GOVERNMENT

Two main principles of government are the current competing alternatives to the principle of the unitary government: federalism and subsidiarity. Each of these principles presents a different view of the state and its relationship with society; each manifests a distinct approach to the role of cities in the act of government; each advocates different sets of political identification and relationships among spheres of human existence; and each is organized through different legal principles, institutions, and procedures.

In this section, I present both of these principles, focusing on the place they give to local governments, within their internal structure and according to their internal logic. Though I exemplify some of my claims about subsidiarity based on the European Union ("E.U."), let me clarify from the outset that I analyze subsidiarity as a general political theory and not its current application and usage in this particular context. As I show below, the present use of the principle of subsidiarity in the E.U.—as a principle organizing the relations between the Union and its member states[36]—is blurring the important differences between it and federalism.[37] Current

35. Such is the assumption of various contemporary supporters of subsidiarity, especially economists and communitarians. *See infra* notes 107-111 and accompanying text.

36. The principle of subsidiarity as organizing the relations between the Union and its member states is enshrined in the founding documents of the European Union:

> [T]he Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Treaty on European Union art. 3b, Feb. 7, 1992, 1992 O.J. (C 191) 1.

37. George Bermann, for example, equates the principle of subsidiarity with that of federalism since both deal with power-sharing between levels of government. He is thus able to say that, "In a federal system . . . the power-sharing at issue will commonly be between the central government and the constituent states. In the European Community context, this

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attempts to argue that the E.U. has de facto created a federal structure (that is organized around the concept of subsidiarity) have further blurred the distinction.[38] In order to avoid collapsing federalism and subsidiarity, I refrain from analyzing subsidiarity according to its current E.U. version and I do not view it as a variation of the general theory of federalism. Instead, I argue that despite obvious similarities, there exist important differences between subsidiarity and federalism, and they present distinct visions of government and its relationship to society, and also of the relationships between different territorial spheres within the national territory. More importantly, each principle gives local governments—at least in theory—a different role within the greater scheme of government, and mandates a different mode of authorization and a different logic of operation.

A. Federalism: A Theory of Two Recognized Jurisdictions

Federalism, one of the most prevalent political and legal regimes of our time,[39] is often seen as a model for multilevel governance, and thus as a proper response to the realization I just described. Yet, I argue, properly analyzed, federalism is incapable of being a proper or desirable response. Before I detail the theory of federalism, I want to clarify that I will not be discussing here U.S. federalism (or any other existing federalism), but the theoretical concept, its premises and its possible (not necessarily actual) ramifications.[40] The reason to have this rather abstract discussion is to oppose federalism, in its *ideal* form, to the theory of subsidiarity in order to depict the two as opposing modes of thinking about the relationship between levels of government in a multilevel system of governance, and more specifically about cities and other governmental entities.[41] Once seen as

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essentially means Brussels and the Member States, respectively." George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332, 338-39 (1994).

38. *See generally* MICHAEL BURGESS, FEDERALISM AND THE EUROPEAN UNION: THE BUILDING OF EUROPE, 1950-2000 (2000).

39. Feeley and Rubin point out that in the early twenty-first century, two-thirds of the world's population is governed by federal regimes. *See* MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 1 (2008).

40. In their recent seminal work on federalism, Feeley and Rubin rightly observe that despite the voluminous academic writing on federalism, very little effort has been made to rigorously analyze it as a political theory (with the exception of William Riker). *See id.* at 1-3; *see also* WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE (1964).

41. In reality, there are huge variations in how this principle is executed in different national settings. In different federal regimes, power is allocated differently between the levels of government; in some, the federal government has only a secondary role with strictly construed enumerated powers and extremely powerful states, while in others, the reverse is true; there are jurisdictions where the states are characterized by strong local identities,

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two alternatives, it becomes easier to disaggregate the different components of the two theories, and I will be able to evaluate the relative advantages and disadvantages as global principles of government, descriptively and normatively.

According to the typical depiction of federalism as a political theory translated into an elaborate legal regime, it is a political theory in which sovereignty is composed of two layers of government, each of which is only partly sovereign, with a constitution that protects the division of powers between the two layers.[42] The building blocks of the federal structure are the state (or province) and the federation, both recognized by the constitution, but also limited in their powers by it. Spatially speaking, the national territory is divided between the states (or provinces, etc.), each of which occupies a piece of land and is semi-sovereign within it, while the federal government holds the entire territory, but no specific area of its own (except for the federal capital or other exceptional federal territories). Therefore, the division between the levels of government is not territorial—the federal government is nowhere and everywhere—but functional, with each in charge of different governmental functions. In fact, labeling the federal government an "upper level" of government is inaccurate, since theoretically speaking, the federal government is not necessarily superior to the states: the functions of the federation are not inherently more important or more basic than those of the states; the federation does not metaphysically precede the states; nor is the federation a pre-condition of the states. If anything, many argue that the federal government is, by principle, weaker than the states and metaphysically inferior to them, since they are the foundations of the federation. Indeed, in many federal regimes, the states are vested with primary (or residual) powers, while the federal entity is vested only with specific and finite powers—those that are supposed to enable the functioning of the union as a whole (and in some cases, the protection of basic rights).

1. The Characteristics of Federalism

Though the aforementioned succinct presentation of federalism is accurate, I want to point to five additional and crucial characteristics of federal-

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while in others the states (or provinces) are hardly noticeable as important sources of identity and community.

42. Vernon Bogdanor, *Federalism and the Nature of the European Union*, *in* WHOSE EUROPE? NATIONAL MODELS AND THE NATURE OF THE EUROPEAN UNION 45 (Kalypso Nicolidis & Stephen Wheterill eds., 2003). For classical work on federalism, see also A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1961); K.L. WHEARE, FEDERAL GOVERNMENT (1963). For a comprehensive contemporary analysis of U.S. federalism, see FEELEY & RUBIN, *supra* note 39.

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ism, which will later enable me to posit it as radically distinct from subsidiarity. First, federalism is a theory of only two recognized types of jurisdictions. Second, federalism defines states' sovereignty in negative terms, in a way that is analogous to negative conceptions of liberty. Third, federalism is a theory of unification or centralization, rather than of decentralization. Fourth, the terms between the levels of government in federalism are of exclusive competences, generally speaking. Fifth, federalism is a theory of modern nation states.

Two Recognized Types of Jurisdictions: The theoretical lack of hierarchy between the federation and states, or the argued superiority of one of the jurisdictions over the other, which I discussed earlier, manifests the idea that federalism is *a theory of only two recognized types of jurisdictions*—the federal and the constituent units (states, provinces, etc.) of the federation. And while many argue that one of the jurisdictional types should be understood as superior to the other, or as "primary," it is foundational to federalism that it acknowledges only two types of jurisdictions, and that other types, like cities or regions, for example, are by definition inferior and hence unrecognized theoretically and constitutionally.

The reasons for this are numerous. First, historically, federalism evolved in places where states actually preceded the creation of the federation, and the only way to facilitate the states' agreement to cede powers to the new federal entity was to give them a unique standing in the political system.[43] Second, and perhaps more importantly, this is a result of the historical-traditional understanding of the concept of sovereignty as allowing a sphere of action immune from exterior intervention.[44] Since the federation and the constituent units are understood to *share* the sovereignty over the entire population and territory, federalism means that the constituent units must enjoy full (or near full) discretion over their own populace and territory, including any constituent units it might have, such as cities. In other words, the same way that sovereign countries are individually seen as a "black box" as far as traditional international law goes (at least according to the Westphaian model[45]), and they can internally divide and arrange themselves as they please, so can states divide themselves (or not) and control their internal affairs within a federation, without the intervention of the

43. This understanding analogizes sovereignty, autonomy, and property, all understood in negative terms: allowing a sphere of non-intervention by exterior forces. Classically, this articulation is one of Kant's most basic ideas, but it is shared by many liberal theorists, such as Locke and Mill.

44. Blank, *Localism*, *supra* note 31, at 277.

45. For a discussion of the state as a "black box" in international law and the transformation that this notion is undergoing today, see Blank, *The City and the World*, *supra* note 20, at 924.

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federation. It is no coincidence, therefore, that in many federalist regimes, the status of cities and other jurisdictions is, generally and theoretically speaking, fully determined by the states.[46] Third, elevating more jurisdictional types to the level of a recognized jurisdiction will upset the careful balance of power between the union and its constitutive units. It will introduce into the dynamics of states-federation another element and will turn the already-complicated dyadic relationship into a chaotic trinity. Indeed, one needs to take into account the fact that federalism is not just a legal principle which grants each jurisdiction powers and obligations; it is also an intricate political-institutional arrangement, which operates in tandem with the legal regime. For example, the U.S. Senate represents the states (rather than the populace at large), and the balance of powers between the House of Representatives, the Senate, and the President reflects the power struggle and the balance struck at each and every moment. Recognizing more jurisdictions would require, therefore, an institutional configuration, not merely a novel legal principle.

Negative Autonomy: The relationship between the federation and the states is typically theorized as affording the latter the primary ability to act, and a degree of autonomy from federal "intervention," thus creating a sphere of autonomy in which the states can define for themselves a significant degree of their normative organization. In other words, the autonomy of the states is understood as something that protects them from federal intervention in their affairs. The duties of the federation towards the constituent units are primarily negative duties, duties not to intervene and competences to defend the entire federation. This is not to say that the federation has no positive commitments vis-à-vis the states at all,[47] but that the center of gravity in their relationship is non-intervention and non-interference rather than solidarity and positive obligations or commitments.[48]

Federalism as Centralization: Historically speaking, federalism is a theory developed and applied to allow for the centralization of various governmental functions.[49] Indeed, this centralization goes hand-in-hand with a decentralization of other governmental functions in the sense that some

46. This is the rule declared in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907).

47. In theory and in practice, the federal government has a clear duty to protect the entirety of the federation, including the duty to protect states under threat.

48. Note that I am not discussing the duties of the federal government to protect basic rights of individuals who live within the constituent units. Clearly, these duties sometimes justify the intervention in state affairs. What I am discussing here are the duties of the federal regime towards the states.

49. Again, this element is evident and almost presupposed in Riker's theory of federalism, which stresses the "bargain" struck between the emerging federation and the constituent units that are ceding power and control to the former in order to obtain some benefits, such as security. *See* RIKER, *supra* note 40, at 12.

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remain with the states (or are given to them). But mostly, centralization is preoccupied with justifying and enabling distinct political units to integrate some of their activities (such as protection of the borders, commerce, and so on) and hand them over to a central entity. This is why federalism has usually been implemented in areas where separate and already-existing political units wished to consolidate and create a new union, rather than in settings where an already-existing centralized government wished to decentralize itself.[50] And although federalism is seen as more decentralized than unitary systems of government, it is still a theory that justifies the centralization of various governmental functions. As with the other characteristics, there are examples that demonstrate the opposite; as a general trait, however, federalism is a political theory of centralization and unification rather than of decentralization.

I do not wish to claim that any particular federal regime *should* be more centralized than it already is, or to take a side in specific debates around states' rights versus federal power in any concrete setting (such as the one in the United States). My argument is that the theory of federalism creates a semiotics in which arguments—and legal principles—supporting centralization are more central to the system and more developed, partly because the basic conditions of federalism are of a decentralized governmental powers and those who wish to centralize any specific function need to justify themselves. Clearly, there are also competing arguments supporting decentralization, yet, paradoxically, due to the assumption of decentralization, these are less developed.

Federal Exclusivity: An important aspect of the relationship between the federal government and the states is that each has exclusive functions that only it can perform, and that these exclusive functions are, by and large, fixed and set in the constitution. Though the list of functions might be a source for controversy and disagreement, it is part of the theory that such a list should exist in order to protect each sphere from encroachment by the other sphere. Indeed, it can be seen as an extension of the negative autonomy principle and of the idea that federalism is about centralization of some of the functions by the federal government. Functions that are posited as exclusive to the federal government are foreign affairs, protection of the borders, immigration, and the facilitation of federal commerce or the market. Clearly, the list of exclusive federal functions changes in different countries, but they usually reflect the principle that there should be a fairly firm division of powers and functions between the federal government and the states; and even though in reality there are many areas of activity in

50. The examples are numerous: the United States, Canada, Australia, Germany, India, and more.

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which there are competing competences of the federal and state levels, the ideal is that these areas of overlapping jurisdictions should be minimized.[51]

National Totality: It is important to stress one obvious point about federalism, which is its emergence as a powerful political theory in the modern era of nation-states. It therefore envisions and facilitates the creation—and maintenance—of a totality: that of the nation-state. And despite the fact that federalism is supposedly less focused on the unity of the nation than unitary regimes, at its heart lies an attempt to mitigate the tension between national unity and societal diversity, in order to enable the creation of the nation and its representation by the federal government. Federalism, as I indicated earlier, is a political structure that allows for a dual identification within the system of the nation state: one with the nation, through federal institutions and the federal sphere, and the second with a smaller community—be it linguistic, ethnic, racial, religious, or other.

Before going to the next step, I want to emphasize that my claims should not be understood as prescriptive, but rather as critical. In other words, I am not arguing that these characteristics of federalism are desirable or should be kept in any particular system. On the contrary, I argue that federalism, despite its many appeals, and due to the characteristics that I have just described, is not the best fit for a globalizing world (or for any other world).[52] As Feeley and Rubin convincingly show, it is also no longer an operative theory in the United States,[53] given the changes that the United States has undergone and the challenges it now faces. Indeed, if one examines the United States, it is easy to observe the appearance of myriad jurisdictions that exist within it, the constant flux of the competences of the levels of government, and the fact that much of American political struggles are not about the federal government versus states, but about states competing against each other. Therefore, I claim that federalism holds little promise for those who wish to adopt it as a "silver bullet" structural solution to contemporary problems plaguing societies and states.

2. *The Merits of Federalism and Its Appeal for Global Governance*

Federalism is highly influential as a mode of governance in contemporary political theory across the globe. It is seen as addressing many of the

51. Arguments around the exclusivity principle are paramount to understanding the current crisis of federalism, given the increasing number of issues that require the involvement of many levels of government. *See* discussion *infra* Part III.B.

52. FEELEY & RUBIN, *supra* note 39, at ix.

53. In fact, I think that in its contemporary readings, federalism is not a desirable political theory even in non-globalizing settings, due to the various values it arguably advances: negative autonomy, strict separation between central and sub-national spheres, and permanent "constitutional designs" that supposedly serve as defenses against politics.

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shortcomings of the unitary nation state, and as one of the reasons for the economic and political success of the United States[54] and of other western democracies (such as Canada, Switzerland, Australia, and Germany). Federalism is understood as necessary for economic success due to the economic integration it enables; it is said to be a safeguard against all-too-powerful central governments; it is defended as enhancing the ability of governments to detect and maximize the preferences of its citizens; it is seen as necessary if one wishes to maintain democracy in "geographically large or ethnically diverse political entities,"[55] since it enables a desirable degree of pluralism and multicultural accommodation;[56] it is theorized as a more democratic structure in that it affords for more participatory schemes and better representation;[57] it has been argued that it allows for the flourishing of experimentalist spirit and liberty; and federalism is also explained by recourse to history and to quasi-nationalistic sentiments, arguing that the autonomy of the constituent units is as legitimate as that of the nation as a whole, given their history ("the states have agreed to form the union and thus they are its foundational building blocks") and identity ("we *recognize* the identity of the constituent units by giving them a privileged and constitutionally-protected status in the structure of the state"[58]).

Yet with time, federal governments have become targets of the very critiques that were once launched against unitary states. First, with the massive increase in population, most states became larger than what the entire union was a hundred years ago.[59] Second, the homogeneity (religious, cul-

54. It is one of the themes advanced by early law and development scholars that the United States's decentralized political structure is one of the major reasons that the country has been so successful economically and so progressive socially. *See* LAWRENCE FRIEDMAN, THE CONSTITUTION OF FREEDOM (2000). Riker was highly critical of the assertion that federalism is a guarantee of economic success, as is evident from looking at places like Mexico, Yugoslavia, and even the southern United States. *See* RIKER, *supra* note 40.

55. FEELEY & RUBIN, *supra* note 39, at 1.

56. In Canada, for example, federalism is seen as the governmental structure that enables French and Anglo Canadians to share the same polity. This is also the case in places where religious tensions exist (or existed, such as Germany).

57. Roderick Hills argues that U.S. federalism allows different levels of government to exercise popular participation such as lay participation in decision making and more electoral processes. *See* Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQUIRIES L. 113, 114 (2005).

58. FEELEY & RUBIN, *supra* note 39, at 12-17.

59. In 1776, the population size of the entire United States was about 2.5 million. *See* Press Release, U.S. Census Bureau, Facts for Features: The Fourth of July 2005 (June 27, 2005), *available at* http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/004772.html. Today, most states in the United States have more residents than this number. For more details, see Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin,*

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tural, ethnic, etc.), that supposedly once characterized states and that thus meant that federalism equaled multiculturalism (or cultural toleration and accommodation), was replaced by immense heterogeneity within states (partly due to globalization), which implies that states are now faced with multicultural tensions from within.[60] Third, and despite populist mechanisms such as elected judges and popular ballots, the crisis in representative democracy at the state level has now become almost as catastrophic as at the federal level, due to population increase and voter apathy.[61] In addition, with the rising need to cooperate and synchronize policies by multi-governmental levels with respect to various challenges in a globalizing world, the competitive mindset of federalism and its negative-autonomy focus become an obstacle to unification and collaboration, rather than a tool in their promotion. If every sphere is "autonomous" (or semi-sovereign) in relation to its upper level, the upper levels of government very quickly lose control over the lower levels and cannot really achieve their goals through the lower levels.[62] In other words, the idea that there are only *two* meaningful territorial governmental levels is hardwired into federalism: the premise is that the smaller unit is a "black box" vis-à-vis the larger one, and is therefore free to set its internal governmental structure as it wills. This, is turn, exacerbates collective-action problems and hampers attempts to harmonize and orchestrate policies, even when such collaboration is imperative.

Despite these obvious problems, federalism still serves—perhaps more than ever before—as a paradigm for good governance. European countries, once the epitome of unitarism, are adopting federal structures internally

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1970 to 1990, for Large Cities and Other Urban Places in the United States (U.S. Census Bureau, Working Paper No. 76, 2005), *available at* http://www.census.gov/population/www/documentation/twps0076/twps0076.html.

60. For example, Cristina Rodriguez shows that immigration, previously the problem of only a few very large cities, has now become prevalent throughout the United States. *See* Cristina M. Rodriguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008). Ulrich Beck argues that internal tensions and cultural rifts within states is what defines the novel cosmopolitan situation which we currently inhabit. *See* ULRICH BECK, THE COSMOPOLITAN VISION (2006).

61. This problem is shared by many western democracies. In Germany, for example, voter turnout in local and state elections has been declining for decades. *See* Nadine Wojcik, *German Parties Struggle with Voter Apathy in Key State and Municipal Elections*, DEUTSCHE WELLE, Aug. 30, 2009, http://www.dw-world.de/dw/article/0,,4605096,00.html. For an example of discussion of voter apathy in the United States and comparative data regarding voter turnout at the state level, see David H. Everson, *The Effects of Initiatives on Voter Turnout: A Comparative State Analysis*, 34 POL. RES. Q. 415 (1981).

62. *U.S. v. Lopez* is an example of such difficulties in imposing federal gun control measures on a local government. *See* U.S. v. Lopez, 514 U.S. 549 (1995).

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(and not just by joining the European Union).[63] They are doing so in order to address internal national and linguistic tensions (Spain, Belgium), economic disparities (Italy), and religious and cultural differences (Germany).[64] Side by side with their federalization, however, states are also parting from the federal principle and taking a more radical decentralizing route: they splinter themselves into regions and other sub-territorial entities and they empower local governments to operate in ways unknown before.[65]

Though at first glance these processes seem to work in tandem—they are all aimed at decentralizing and devolving central power to sub-national territorial units—these processes are also contradictory, if we think about the characteristics of federalism: the emergence of cities and regions as recognized entities threatens the federal dual (rather than multiple) tier system, the autonomy of the states and their ability to decide on their internal division of power,[66] and on the hermetic territorial and functional division of powers between the federal government and the constituent units. Indeed, even if federalism might operate differently at the first stages when it is implemented as a centralizing tool and when it is utilized as a decentralizing method, it is unclear whether it actually matters in the long run. Every centralization is also decentralization, and vice versa: for every mechanism that cedes power there is (usually) attached a mechanism to retain power, control, supervision, and centralization of power. And since federalism has both aspects—it centralizes some functions and activities and gives them to the federal government, but also delegates others to the constituent units—it might matter greatly as an ideological marker of a political-legal system and as a rhetorical tool for the advocates of some policies, but it often says very little about concrete cases and desirable legal rules. Simply stating that a system is (or should be) federal hardly tells one what the exact legal arrangements are (or should be) in any specific governmental function. What matters more is the way these legal (and political) mechanisms and structures operate in a concrete setting, how they are interpreted, and how

63. JOHN HOPKINS, DEVOLUTION IN CONTEXT: REGIONAL, FEDERAL AND DEVOLVED GOVERNMENT IN THE EUROPEAN UNION (2002). Even France, perhaps the most well-known unitary republic, has recently amended its Constitution, and is defined as "decentralized." *See* 1958 CONST. 2 (Fr.)

64. *See* HOPKINS, *supra* note 63.

65. *See id.*

66. This is yet another way to articulate the principle that local governments are creatures of their state, which alone decides their existence, powers, authorities, and duties. As stated above, in the U.S. context, this principle was declared in *Hunter v. Pittsburgh* and it has parallels in many federations (and in unitary regimes) all over the world. *See* Hunter v. Pittsburgh, 207 U.S. 161 (1907). In addition, this principle also has its reverse in the form of Home Rule, which grants local governments wide ranging powers. Yet, Home Rule is an optional and voluntarily-adopted state principle while *Hunter* is the federal rule.

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they are adjudicated. And while it is crucial to observe the status quo from which it emerges, whether it is a unitary state deciding to splinter itself or whether these are sovereign states deciding to unite under a federal regime, it is more important to see the "career" of the scheme afterwards.

There is, therefore, something promising about federalism: it holds a promise for central government skeptics, for efficiency maximizers, for multiculturalists, and for democratic theory supporters. But there is also something obsolete about it, almost unfit for a globalizing world: federalism is fixated on territorial units which are rather large and which often seem to have a historical meaning and weight, not a present one; it is not flexible or functional enough since it sanctifies the already-existing constituent units and does not give the same importance to other, more significant and newly emerging units, such as large cities or other regions; and it obeys a logic similar to that of nationalism, but often with less gravitas since state identity is usually not as powerful an identification mechanism as national identity. An intricate, functional multi-level governmental structure becomes extremely complicated to run when federalism is the conceptual model.

Thus I now turn to the principle of subsidiarity—in its economic interpretation and its religious construction—in order to explore the more contemporary form of understanding and constructing multi-level governments.

B. The Principle of Subsidiarity

Subsidiarity has become an extremely influential concept in global governance and in decentralization schemes in Europe[67] and elsewhere. It is hailed and advanced in U.N. documents and policies,[68] World Bank reports and action plans,[69] and NGO reports.[70] Subsidiarity has also been adopted

67. The principle of subsidiarity is one of the most important operative concepts in the construction of the European Union. *See* Denis J. Edwards, *Fearing Federalism's Failure: Subsidiarity in the European Union*, 44 AM. J. COMP. L. 537 (1996); *see also* Blank, *The City and the World*, *supra* note 20, at 911-15 (discussing the principles of subsidiarity as applied to localities in E.U. documents). Subsidiarity also served as an inspiration to the 1985 European Charter of Local Self-Governments signed by the members of the Council of Europe.

68. *See, e.g.*, UN-HABITAT, THE GLOBAL CAMPAIGN ON URBAN GOVERNANCE CONCEPT PAPER 12-13 (2d ed. 2002); Blank, *The City and the World*, *supra* note 20, at 907-15; United Nations Centre for Human Settlements (Habitat) & World Association of Cities and Local Authorities Coordination (WACLAC), Towards a World Charter of Local Self-Government (1998), http://www.gdrc.org/u-gov/charter.html [hereinafter UNCHS & WACLAC, Charter].

69. *See* FISCAL FRAGMENTATION IN DECENTRALIZED COUNTRIES: SUBSIDIARITY, SOLIDARITY AND ASYMMETRY (Richard M. Bird & Robert D. Ebel eds., 2007); The World Bank

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by conservatives in the United States, particularly under the Bush administration and the "compassionate conservatism" program it had advanced.[71] According to a common-place presentation of this theory, subsidiarity is a principle of government which roughly says: governments need to delegate their powers, authorities, and duties to the smallest (or to the closest-to-the-citizens) jurisdiction that can efficiently perform them. A similar, though slightly different version, is that subsidiarity mandates that "action should be taken at the lowest level of government at which particular objectives can adequately be achieved."[72]

Some might argue that subsidiarity is not a political theory, but merely a principle of decentralization, or that it is nothing more than an example or sub-category of federalism (a European version of federalism, perhaps). I argue, alternatively, that despite the fact that it is indeed harder to see subsidiarity as a political theory or a political regime—since there aren't any countries (save for the European Union) that understand themselves as operating according to this principle—it can serve as an alternative to federalism on important accounts.[73] Most important for our discussion, subsidiarity better fits, and is more normatively desirable for, global governance and our global age: first, it is more receptive to the idea that there can be more than two types of recognized jurisdictions; second, it promotes a notion of positive autonomy, or positive duties of the central government towards the constituent units, and even duties among the units themselves; third, subsidiarity is less married to principles of strict exclusive competences; and fourth, the totality that subsidiarity creates is not nationalistic, historically or conceptually.

Yet, despite those common characteristics, subsidiarity has two rather different—and even contradicting—readings which render it somewhat confusing and incoherent. The first is the economic interpretation, and the second is a religiously-inspired one. In addition, subsidiarity is often mistaken with the E.U.'s particular application of it, which further adds to the confusion. In this section, I present the different readings and point to their

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Group, Intergovernmental Fiscal Relations, http://www1.worldbank.org/publicsector/decentralization/fiscal.htm (last visited Mar. 16, 2010).

70. *See* INT'L COUNCIL ON HUM. RTS. POL'Y, LOCAL RULE: DECENTRALISATION AND HUMAN RIGHTS (2002), *available at* http://ichrp.org/files/reports/13/116_report.pdf.

71. Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 103-07 (2001).

72. Bermann, *supra* note 37, at 338.

73. Robert Howse and Kalypso Nicolaidis, for example, offer subsidiarity as an alternative to the current constitutionalist drive of the World Trade Organization, due to what they understand as its three principles: institutional sensitivity, political inclusiveness, and top-down empowerment. *See* Robert Howse & Kalypso Nicolaidis, *Enhancing WTO Legitimacy: Constitutionalization or Global Subsidiarity?* 16 GOVERNANCE 73, 86-90 (2003).

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similarities as well as differences. And even though I examine the European experience to better understand the theory of subsidiarity, I also refrain from adopting such a position so as not to collapse the theory into this particular practice of it. The argument I make for subsidiarity over federalism should not be mistaken for an adoption of the latter as the desirable political theory or as the ideal legal regime. Subsidiarity, too, is subject to numerous fundamental critiques, which I elaborate later. However, subsidiarity exposes the weaknesses of federalism, especially as a theory fit—descriptively and normatively—for an age of global governance.

1. The Economic Interpretation of Subsidiarity: The Theory of an Infinite Number of Fully Replaceable and Flexible Political Units

Over the past few decades, economic theory has been one of the main engines for decentralization measures and schemes all over the world. Since Charles Tiebout's famous justification of the U.S. system of local governments as creating a market for public goods in which local governments compete against each other in providing such goods to freely-moving "consumer-voters," the main economic theory has been supportive of a decentralized governmental structure.[74] Tiebout's theory has been elaborated and interpreted as a grand theory for allocating powers between central governments and constituent units and as generally mandating a default rule which favors local governments over central ones, and thus a theory of federalism.[75] Central governments' role, according to this theory, is limited to resources or functions which require "economic integration" due to negative externalities or economies of scale.[76]

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74. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Tiebout's theory has been criticized by many, yet its appeal, descriptively and normatively, almost refuses to wane. For a concise summary of the critiques of Tiebout's model, see GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS (1999); *see also* Lee Anne Fennell, *Book Review: Homes Rule*, 112 YALE L.J. 617, 621-24 (2002) (reviewing WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001)).

75. *See, e.g.*, James M. Buchanan, *Rent-Seeking Under External Diseconomies*, *in* TOWARD THE THEORY OF A RENT-SEEKING SOCIETY 183 (James M. Buchanan et al. eds., 1980); ROBERT D. COOTER, THE STRATEGIC CONSTITUTION (2000); WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE AND LAND-USE POLICIES (2001); Clayton P. Gillette, *Public Service: Opting Out of Public Provision*, 73 DENV. U. L. REV. 1185 (1996). For a comprehensive presentation of economic theory's interpretation of federalism and decentralization, see William W. Bratton & Joseph A. McCahery, *The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World*, 86 GEO. L.J. 201 (1997).

76. Evidence of this conception can be found in the Draft World Charter which states that "in accordance with the principle of subsidiarity, public responsibilities shall generally be exercised by those authorities which are closest to the citizens. In the same spirit, any

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Given the general rule of subsidiarity—powers need to be generally vested in the smallest unit—it is rather obvious why subsidiarity was quickly and wholeheartedly adopted by economists.[77] For them, subsidiarity captures the essence of decentralization as efficiency since it balances between the general imperative to delegate every governmental function to the smallest possible unit—to create competitive pressure, maximize preference satisfaction, and minimize circularity problems—with the need to centralize functions that involve externalizations and that require economic integration, in order to enjoy the benefits of economies of scale.[78] According to the economic interpretation of subsidiarity, there is a potentially-unlimited number of social and political entities that can take on responsibilities and perform various governmental functions. First, there already are in place a huge number of such units, especially if we take into account non-governmental entities. Second, one can always come up with new entities such as special purpose governments ("SPG"s), regions, neighborhoods, quarters, private groups, and more. Here, the expectation is that along the scale that runs from the individual to the "whole world," we can actually stop at any point and decide that in order to most efficiently manage some resource in a particular area, we will create a new entity (say, a new SPG) that will govern x people and y number of acres, and it will be in charge of this resource only.

Pre-existing social organizations and already-existing governmental structures are mere conveniences that can sometimes be used to run things, but that should not deter a rational decision-maker from inventing more and more governing units.[79] For this rather radical conception, there is no de-

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allocation of responsibility to another authority must be based on the requirement of technical or economic efficiency." UNCHS & WACLAC, Charter, *supra* note 68, art. 4. Note that the only reason to let central authorities perform a function is "technical or economic efficiency." *Id.*

77. *See* COOTER, *supra* note 75.

78. This is one of Tiebout's basic premises, and is repeated by his contemporary followers. *See* Tiebout, *supra* note 74; *see also* COOTER, *supra* note 75.

79. This tension between the economic theory and practice is nicely articulated in a World Bank document discussing fiscal decentralization:

> Many would argue that decision-making should occur according to the principal of "subsidiarity"—that is at the lowest level of government consistent with allocative efficiency (e.g., the geographic area that internalizes the benefits and costs of decision-making for a particular public service). The optimal size of jurisdiction for each service could theoretically differ, but in practice economies of administration and transactions costs lead to "grouping" of roughly congruent services at local (e.g., street lighting, refuse removal), regional (rural-urban roads, refuse disposal), and national (intercity highways, environmental policy) levels. Decentralized decision-making enlarges possibilities for local participation in development.

The World Bank Group, *supra* note 69.

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fault rule or preferred unit to begin with, theoretically speaking. Each and every service, function, or responsibility needs to be thought of afresh. True, some already-existing units—such as states or local governments—might serve as fallback or default governmental entities due to network advantages, economy of size benefits, or lower transaction costs; but sometimes their size will actually work to their detriment. In addition, one could make the argument for a finite and determined "list" of governments which will minimize the costs associated with erecting new governments: the constant need to reevaluate the efficiency of the existing governmental units, the loss of expertise and know-how of the existing units, the price of establishing new bureaucracies and institutions, the need to make their existence known, etc. Yet it seems that in theory, the economic interpretation dictates a radical fragmentation of the political and social space into a possibly infinite number of entities. The decision of how to allocate powers among government levels is, under this view, a technical one that needs to be examined by experts, on the basis of a scientific exploration into efficiency-based calculus. Hence, in this view, the legal or political forms are not *reflecting* the social order but advancing an efficient management of things; and they constitute governance units according to changing needs and shifting calculations, not on the basis of political debate or relative power.

I will not get into an elaborate critique of the economic conception, since I want to emphasize the alternative, religiously-inspired interpretation of subsidiarity. However, I will mention some of its major shortcomings and blind spots. First, despite its appearance as a rational, easy-to-use rule, it is extremely hard to apply in a world of ever-expanding levels of governmental and semi-governmental entities: once we move away from a two-tier system (such as a federal system) in which subsidiarity only determines which of the two is more "efficient" than the other (and assumes that the lower one is, unless there are negative externalities involved in the activity or unless other problems of cooperation arise), it becomes much harder to use it as an easy heuristic device.[80] Take, for instance, a situation in which there are in place not just two levels of government—the federal government and the states—but five or six governmental levels: a city quarter committee, a local government, a regional entity, a state, the federation, some supra-national regional arrangement (such as NAFTA or the E.U.), a transnational body (the WTO, for example), and other international bodies.

80. Indeed, even in the context of the E.U., with only two levels of government competing over jurisdiction, it has often been argued that subsidiarity is too vague to be an effective principle. *See, e.g.*, Derrick Wyatt, *Subsidiarity: Is it Too Vague to be Effective as a Legal Principle?*, *in* EUROPEAN STUDIES AT OXFORD: WHOSE EUROPE? NATIONAL MODELS AND THE CONSTITUTION OF THE EUROPEAN UNION (Kalypso Nicolaidis & Stephen Weatherill eds., 2003).

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Such a complicated web of entities, governmental agencies and bodies is, to be sure, not a rarity. In real-life situations, matters are even more complicated due to the existence of a multitude of special governmental bodies such as SPGs, to which some of the functions can also be delegated.[81] And even if this hypothetical multi-level governmental structure does not exist in all (or even in most) cases, the problems that are associated with globalization—immigration, trade, labor, environmental concerns, and the like—actually usually involve a multitude of governmental bodies, each of which has at least some responsibility or some jurisdiction over the matter.[82] Clearly, it is possible that, in reality, none of them will want to obtain full control and the struggle between the levels of government will be who *escapes* responsibility rather than who obtains full control over the affair. The point is, however, that in important situations, subsidiarity will provide a very inapt tool to decide which level of government is most appropriate.

Beyond the problem of the ever-expanding list of governmental entities to which the criterion of subsidiarity can apply, there is the murkiness or indeterminacy of the efficiency criteria in situations which are multifaceted, complicated, and political in nature. Indeed, what constitutes "efficient" management of immigration or climate change is a profound question, and the power to set the parameters for measuring it is what the principle of subsidiarity is actually trying to decide. For subsidiarity to be able to scientifically balance the advantages of smallness with the requirements of economic integration, there needs to be a scientific answer determining which externalities need to be internalized (and which should be ignored), the costs of each activity, and other political questions. In other words, in the most important cases, subsidiarity does not provide the answer to the basic *political* dilemma: who should decide what? The presumptive answer: "the one that can most efficiently do it" is only helpful when all other things are equal and when it is clear what efficiency means in a concrete situation. But in many cases, the problem is that there is a

81. The increased volume of SPGs and other special governmental entities that perform various governmental functions is indeed another aspect of the move from government to governance. It is another manifestation of the fragmentation of the unitary, centralized, top-down governmental structure into distinct components.

82. Take, for instance, the example of environmental management. Recent work demonstrates the multitude of governmental agencies—local, regional, national, and international—that are dealing with it. *See* Colin Crawford, *Our Bandit Future—Cities, Shantytowns, and Climate Change Governance*, 36 FORDHAM URB. L.J. 211 (2009); Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253 (2009); Ileana M. Porras, *The City and International Law: In Pursuit of Sustainable Development*, 36 FORDHAM URB. L.J. 537 (2009); Heike Schroeder and Harriet Bulkeley, *Global Cities and the Governance of Climate Change: What is the Role of Law in Cities?*, 36 FORDHAM URB. L.J. 313 (2009).

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disagreement on whether all other things are indeed equal, and in determining what efficiency means and whether efficiency should be the determining factor. Therefore, unless the matter at hand is highly technical (and technical questions, can always turn into difficult political and ideological ones), the principle of efficiency only begs the question.

Third, the assumption that the number of governmental levels is finite and pre-existing is probably false insofar as economic theory goes. In reality, the economic version of subsidiarity might actually *produce* new levels of government that will be better suited to deal with the specific challenge.[83] Indeed, it is economic thinking that often recommends forming new governmental units (such as SPGs) that will most effectively address a problem or perform a function. Once we factor in the creative aspect of the principle of subsidiarity (especially in its economic interpretation, but also in the religious reading[84]), meaning that it does not merely empower already-existing units but also constructs, at least in principle, new levels of government (functional or territorial), the usefulness and simplicity of it is highly doubtful. If, in addition to pre-existing governmental entities, one needs to consider whether it would be more efficient to fashion new jurisdictions and novel institutions, the situation becomes even more complicated than we realized before.

Fourth, a byproduct of the economic interpretation of subsidiarity is an almost infinite splintering of the political sphere and of the location of political activism. If every resource, each service, and every decision is managed, and decided upon, by a different governmental level, and the number of governments is, at least theoretically, infinite, then the result is a radical splintering of our political arena. This has to do with the institutional structure of our politics. Currently, most political decisions are taken in a fairly small and limited number of institutions. In federalism, there exist three such spheres—the federal, the state, and the locality—while only two of them are constitutionally recognized. As citizens, we know that we should pay attention to those political spheres, and to the institutions that represent them if we want to impact decision making in our polity. To that

83. The problem that a legal principle not only "recognizes" but also "constructs" jurisdiction is not unique to subsidiarity. Richard Ford demonstrated this problem with regard to the entire realm of local government law and the way in which legal recognition of communities in the form of a charter of incorporation and legal powers also constitutes and constructs these very communities. *See* Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843 (1999). Here, however, I am arguing about a much more concrete construction of jurisdictions: that the principle actually recommends establishing completely new levels of government and not that it merely reinforces and re-shapes identities and affiliations.

84. For a critique of the productive power of the religious reading, see *infra* notes 95-97 and accompanying text.

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end, citizens need to have information on the issues that are being decided upon, to form opinions regarding them, to know which issues are being discussed and when, to know what their representatives are doing, and to be able to think about the compromises that are sometimes required due to the nature of the political process. If instead of a small number of well-known political units and institutions, each with well-known functions and powers, there were a large number of governmental units, each of which was flexible and replaceable, the citizenry would find itself in a chaotic environment where it would be impossible to follow what political choices need to be made, let alone to form opinions in their regard.

Another aspect of the same problem is that dividing our government into too many levels and too many institutions that are not centralized makes political compromise much harder, and therefore hinders our ability to live democratically with each other. If the same political entity is responsible for many governmental functions, it can reflect the political compromise by "trading" in the goods that it allocates to the different social groups that exist within it. Dividing resources and decision-making powers between too many governments and changing the political units themselves in such a way prevents them from making deals with one another—since each is responsible for another function and for another constituency—and obstructs the way in which citizens make political deals by trading in supposedly unrelated resources.[85]

Fifth, if we believe that our political institutions should represent our political communities and that they, in turn, are supposed to reflect—as well as construct—our subjective and collective identities, then the infinite multiplication of governments and their full flexibility and transience weaken, if not altogether eliminate, the connection between identity and politics. In fact, it is the function of political institutions not only to reflect our identity but also to construct it, enhance it, and maintain it. Countries not only reflect a pre-existing collective identity but they also construct it; subnational governments perform similarly. Indeed, local governments, much like states, are not mere administrative agencies but also repositories for collective identities. They can build communities and create (or at least

85. For example, some citizens might value clean water highly and think less of public school; yet another group of citizens has the opposite preference. If both these topics are controlled by the same government, the government can strike a balance in which both groups compromise but still get some of their preferences met. If, on the other hand, public schools and water are not governed by the same entity, political compromise becomes much harder and more expensive. Furthermore, if the political unit that manages water is not the same as the one controlling schools—since the economic calculus suggests that each needs to be managed by a different sphere altogether—compromise becomes virtually impossible.

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maintain) identities.[86] If, again, we divide governmental functions and decision-making powers amongst a multitude of entities, some of which do not even overlap territorially or population-wise, our political identities and our communities that depend upon them might also disintegrate.

Despite these shortcomings, it is clearer why subsidiarity has become such a powerful and integral part of the global governance toolkit. It is general enough to fit into almost every governmental structure and it obeys the basic imperatives of the new governance by being flexible, responsive, bottom-up, participatory, and supposedly less coercive.[87] And who can disagree with the idea that every decision or governmental function should be given to the "smallest" and "closest-to-the-citizen" jurisdiction, under the condition that such jurisdiction can perform it efficiently?

I now turn to what I see as an even more innovative—and radical—interpretation of subsidiarity, one which really stands in stark opposition to the principle of federalism. This interpretation is the Catholic-inspired interpretation, which I will term the religious interpretation, for reasons I will shortly explain. I want to say from the outset, that I present this interpretation in order to create a sharp contrast to the economic interpretation. I do this in order to demonstrate the alternative—which, to my mind, is viable and even animating some pro-decentralization theorists on both the left and the right—to both the economic interpretation of subsidiarity and federalism.

2. *The Religious Interpretation of Subsidiarity: The Uniqueness of Every Sphere of Human Activity*[88]

The economic interpretation just described is fairly recent. Originally, the notion of subsidiarity was not an economic idea but rather a philosophical one, originating in ancient Greece (in Aristotle's thought), developed by Thomas Aquinas, and further articulated in Catholic social thought of the nineteenth century.[89] According to the religious interpretation of the prin-

86. This point was most famously made by Jerry Frug and Richard Ford. *See* FRUG, supra note 74; Ford, *supra* note 83, at 857-58; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

87. Lobel, *supra* note 22, at 407-08.

88. I call this understanding religious for two reasons: first, since it originates in Catholic theology; second, since it reflects a profoundly religious way of understanding the world, in the sense that the world is divided into spheres, each of which has a distinct logic and a distinct role in human life.

89. Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40-42 (2003); *see also* Nicholas Aroney, *Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire*, 26(2) L. & PHIL. 161, 163 (2007); Vischer, *supra* note 71, at 108-15.

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ciple of subsidiarity, the entities to which authority and powers are given—those smaller or closer-to-the-citizen units—are pre-legal social associations, whose existence precedes, historically and even ontologically, that of the state or even of the church.[90] The principle of subsidiarity aims to recognize the singularity and uniqueness of every social sphere and its place in the total social structure. As such, it means that the powers given to every sphere should match its essence and purpose. Here, efficient or "appropriate" management of an activity is not a technical term aimed at measuring the effective use of means and the most instrumental-rational way of getting to those desired goals. Rather, it marks the natural capacity of each sphere—or each governmental level—and it merely explains why this sphere is given a certain role. Subsidiarity is a way of *understanding* the proper relationship between the various segments of society, based on their distinct character and according to their place in the general social (or even metaphysical) scheme, more than it is a political or legal principle.

Unlike the economic interpretation, which imagines a continuum of the social world stretching from the individual to the whole of humanity, with the ability to group any amount of people and make them a valid political entity, this interpretation envisions "quantum leaps" between pre-existing and distinct spheres, with governments reflecting those spheres. According to the religious conception, there are a limited number of entities to which one can decentralize power, responsibilities, or authorities, and their size can vary immensely. Such entities include already-existing governmental units such as states, provinces, and cities. In some instances, the entities can be non-governmental and non-territorially-defined such as workplaces, families, churches, or NGOs. In the draft of a world charter of local self-government that the UN-Habitat agency drafted some years ago, local governments are the primary agents of such a subsidiarity principle.[91] In Catholic teaching it is sometimes the parish (the smallest religious unit) or the household.[92] Subsidiarity is a legal formulation that reflects the social world, not aimed at transforming it. And if we imagine a scale that goes from the individual on the smallest end of the scale to the "world" as the biggest end of the scale, there is a finite—and not too large—number of "stops" at which the distributor of power can stop and cede power.

Since subsidiarity has been adopted by political systems and is currently used as a *legal and political principle*, interpreting it in light of the religious understanding makes a big difference: it is not as flexible and as gen-

90. For analyses that emphasize this element in subsidiarity, see Aroney, *supra* note 89; Carozza, *supra* note 89; Vischer, *supra* note 71, at 111.

91. Blank, *The City and the World*, *supra* note 20, at 907-15.

92. Aroney, *supra* note 89.

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eral as the economic interpretation; and the "fit" between a sphere and an activity (or a function) is a result of the essence of the sphere and the nature of the activity at hand. And though it is true that decision-making powers need to be given to the "closest" level possible to the citizen, one cannot understand proximity as an absolute or technical term (that is, geographically or population-wise); rather, it is a substantive term which attempts to capture the unique contribution that each human association can make toward the common good. Thus, a city is different in essence from a village; the household is distinct from a manor; a province cannot be equated with an empire. Each of these social entities (or human associations) has its own uniqueness, its own capacities, and its own abilities and potential.[93] None is superior to the other, and together they form a whole, a totality (which is not necessarily the totality of the nation). This interpretation provides an important—and much needed—antidote to the often crude instrumental and utilitarian economic conception of the principle of subsidiarity, which imagines the entire social world as completely freely forming and obeying only one law: that of efficient management of affairs and wealth maximization.

Another important element which is emphasized by students of the Catholic understanding of subsidiarity is that unlike the federal principle which stresses the *negative* rights of the components vis-à-vis the federation (i.e., that the upper level should not intervene in their affairs), the principle of subsidiarity has a *positive* aspect to it, which is added to the negative one: it mandates that each association should be allowed to make its contribution without intervention from other associations, but that it should also be assisted by the rest of the social structure if it cannot achieve its goals by itself.[94] Clearly, there is an inherent tension between the negative and the positive aspects of subsidiarity, and I will not deal with it here. Suffice it to say, however, that in federalism, even if there is de-facto solidarity between the federation and its components (be it a result of goodwill or political pressure), it is not one of the tenets of the federal principle.

Despite its appeal, the religious reading of subsidiarity poses major normative and practical difficulties. First, it is rather hard to fathom or accept, given its almost cosmological and mystical overtones. For those who do not share its theological underpinnings and who do not accept its metaphysical belief in the distinct nature or essence of each human association, it is virtually impossible to accept or apply the principle of subsidiarity. Indeed, this reading "re-enchants" the world, so to speak. It tries to recreate a natural order of things, in which social institutions are seen as natural, organic,

93. *Id.*

94. Carozza, *supra* note 89, at 44-45.

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Godly-ordained and, most importantly, non-political. This reading attempts to re-invent a universe in which human actions are seen as stemming not from technical-reason and instrumental-rationality but rather, in their stead, from divine, natural, and non-human wisdom.

Second, the religious reading is inherently socially conservative since it sanctifies and congeals the social institutions and associations that already exist. Even without the theological understanding of each institution, preferring them over less traditional political units and novel social organization reinforces the status quo. It is not a coincidence that social conservatives in the United States were quick to adopt this reading of subsidiarity, and to interpret it as supporting programs utilizing families, churches, and religious institutions for the provision of various governmental services.[95] Granting existing social institutions and spheres the status of recognized political units worthy of performing governmental functions (for example, providing welfare services) and refusing the same status to non-traditional (some might even refer to them as non-natural) forms of human association runs the risk of entrenching social institutions regardless of their perceived social value; it de-politicizes human decisions since every such act of recognition (of one social sphere over another) always involves a decision, a normative or political choice; and it curbs experimental, fluid and organically-evolving societal developments that stem, in part, from the need of social associations to be responsive to their members and to better represent their needs.[96] Furthermore, analogous to the critique of multiculturalism, recognizing existing human associations gives power to dominant actors within such spheres and might put their internal minorities in a disadvantageous position.[97] Indeed, this is a recurring problem with theories that pretend to merely "recognize" the existing organization and therefore have little impact on it: they entrench the status quo, prevent (or slow down) the dynamic and less-planned flux of social dynamics, they ignore the political (or at least normative) nature of any act of supposedly merely "recognizing" a social entity and granting it powers, and deny their productive power by asserting that they only reflect it.

Third, even if one abandons the essential undertone of the religious conception, and tries to give it a more rationalist-functionalist interpretation, according to which every sphere and human association has a unique ca-

95. This was the case in the "compassionate conservatism" advocated by officials in the Bush administration. *See* Vischer, supra note 71, at 103-07.

96. *See* BRIAN BARRY, CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM (2001).

97. This is Susan Okin's famous point regarding the predicament of women under multicultural schemes. *See* SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN? (1999).

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pacity in light of the values that we associate with it and its objective characteristics (the household, for instance is a place of intimacy; the workplace is one of production; the city is one of social integration[98]), one is still left with the problem that subsidiarity has a highly fragmentary vision of society: there is no political "building block," no preferred jurisdiction, no clear hierarchical structure, and no constitution that will serve as the arbiter when jurisdictional conflicts arise. This religious reading—when stripped from the cosmology that holds together the distinct components of society in harmony—is actually the realization of the worst fears of some students of globalization: that we are marching towards the new middle ages, of utter disintegration, fragmentation, cacophony, and uncontrollable competition.[99] If we think of cities in this regard, the thought of powerful and autonomous cities is titillating but also frightening: it promises new possibilities of political activity, of distribution, and of social justice, but also of exclusion, discrimination, violent competition, and lack of coordination.

Even if subsidiarity also includes principles of positive autonomy and solidarity among the constituent units, principles which might mitigate the possibly fierce competition, the religious reading undoubtedly splits the individual into his distinct parts—his religious self, his familial self, his working self, his national self, and more—and projects each of them onto a separate sphere. In other words, religious subsidiarity reflects and reinforces what Marx called (following Feuerbach,)[100] the "religious form of alienation": man becomes alienated from his different parts since he projects each of them onto another sphere, and he never understands that all these elements are his, and that he is all of them at once.[101] This structural

98. This is, for example, the point that Rodriguez is making regarding the role of localities in immigration. *See* Rodriguez, *supra* note 60, at 581-82.

99. Slaughter and Benvenisti both describe the fear that in an era of globalization, and with the dismantling of the Westphalian paradigm and the sovereign states that held it firm, a great fragmentation will result. *See* Benvenisti, *supra* note 10, at 169; Slaughter, *supra* note 10, at 183-84.

100. LUDWIG FEUERBACH, THE ESSENCE OF CHRISTIANITY (George Eliot trans., Harper & Row 1957) (1841).

101. This is the way Marx analyzed the problem of the religious nature of liberalism, which splits the individual into his "heavenly" self and his "earthly" self. The heavenly part is projected onto the political sphere where all men are equal in their liberties and rights and where solidarity is the norm; the earthly part is projected onto the civil society where men compete against each other, discriminate against one another, and behave fully egotistically. Marx does not deny that both parts exist in each person. On the contrary, he argues that what liberalism allows is the fantasy that we are either that or the other, and that in each sphere we are a different person. For him, this is the essence of the religious alienation which imagines a heaven and an earth. *See* Karl Marx, *On the Jewish Question*, *in* EARLY WRITINGS 211 (1992).

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alienation is not only a source for subjective feelings of detachment and alienation, but also of a bifurcated behavior in the spheres, in which our tendencies become extreme in each sphere, instead of being mitigated by each other.

3. *Subsidiarity and Global Governance*

Despite the differences between the two readings of subsidiarity, and in spite of their shortcomings, they share some important traits as against the federal theory. These shared traits, I argue, can explain the normative appeal and descriptive power of subsidiarity as the political theory of the age of global governance. First, subsidiarity doesn't insist on a two-tiered governmental structure or on the preferred status of any "primary" constituent unit (such as the state or the province). It is far more open to a multitude of political spheres and governments that represent those spheres. Both readings share this in common, and even though the religious reading does not go as far as imagining governments of every size and every function, they both agree that a two-tiered system—or only two recognized levels of government—is normatively undesirable and descriptively off the mark.[102]

In this respect, it is important to note that looking at the E.U. at this moment in history can be confusing. In the E.U., subsidiarity has been applied, until very recently, to regulate the relations between the Union and its member states, thus making the false impression that subsidiarity is rather similar to federalism, and that it, too, recognizes only two levels of government.[103] Yet, it is only a contingency that the European subsidiarity structure is two-tiered, not a theoretical or a principled decision. As is evident from various reform proposals, policy debates, and institutional arrangements, the E.U. has been more than receptive to the idea that subsidiarity can—and indeed should—be extended to sub-national governmental entities such as regional and local governments. Already in the Draft Constitution of 2004 (which was later rejected),[104] the principle of subsidiarity

102. Feeley and Rubin claim that federalism does not adequately describe the United States any longer. Indeed, they argue, the real current structure of U.S. local and state governments is hardly two-tiered and far from being that of a negative autonomy of the states vis-à-vis the federal government. Far more entities take part in government and their horizontal relationship—on which federalism says very little—which is much more crucial to understanding the political arrangements than their relations with the central governments. *See* FEELEY & RUBIN, *supra* note 39.

103. Indeed, the entire jurisprudence of subsidiarity in the E.U. has, until recently, been understood to apply only to E.U.-member-states' relationships, operating together with the concept of "margin of appreciation" that was being left for the states to operate within and of proportionality.

104. The Draft Constitution was drafted by the European Convention and signed by its leaders in October 2004, but was rejected by numerous member states following its popular

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actually mentioned the local and regional levels.[105] And the Treaty of Lisbon also mentions the importance of consultation at the local level for purposes of the application of the principle of subsidiarity.[106]

Second, subsidiarity is not a theory aimed at constructing or maintaining the totality of the nation. Having emerged in a different historical context, and having two dominant anti-nationalistic readings—both economists and Catholic theologians are less committed to the primacy of the nation than most liberal theoreticians—it is easier to incorporate into subsidiarity a built-in pro-global perspective. The totality created by subsidiarity arrangements could be, theoretically speaking, a national one, but unlike federalism, subsidiarity is not biased towards nationalism. This is why subsidiarity is more easily utilized by global governance schemes—which require, of course, a global perspective—as a principle of government. Combined with the first trait just mentioned, subsidiarity is highly susceptible to the idea that political units can recognize and empower more than two governmental levels, and that various activities can be performed by governmental levels as "local" as a neighborhood or as "central" as an international organization.

Third, unlike federalism which is understood to be a centralizing theory rather than a decentralizing one, subsidiarity is more often seen as a method of decentralization. As such, it is more appealing to new governance and global governance advocates who celebrate decentralization for numerous reasons, ranging from efficiency through democracy to liberty and multiculturalism. Sure enough, decentralization has been adopted as the silver bullet against our time's predicaments by proponents of radically opposing

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rejection in referenda. As a result, E.U. leaders had to withdraw it and engage in a renewed dialogue with the opponents. The result was the Lisbon Treaty, which went into effect on December 1, 2009.

105. Title I, Article 3b sets forth the following formulation of the basic principle of subsidiarity:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 50 [hereinafter Treaty of Lisbon].

106. Article 2 of the Protocol on the Application of the Principle of Subsidiarity and Proportionality mandates that: "Before proposing legislative acts, the Commission shall consult widely. Such consultations shall, where appropriate, take into account the regional and local dimension of the action envisaged. In cases of exceptional urgency, the Commission shall not conduct such consultations. It shall give reasons for its decision in its proposal." Treaty of Lisbon, *supra* note 105, at 150.

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ideologies: libertarians,[107] neo-conservatives,[108] neo-liberal economists,[109] communitarians,[110] and radical democrats.[111] The consolidation between such radically different and opposing world views around subsidiarity is what still makes it such a hegemonic tool in global governance schemes. And subsidiarity is seen as the "human face" of decentralization precisely because of the various articulations of it: it is not presented as only about economic efficiency, but as advancing social conservatism as well. And it is not only Catholic or theological; rather, it promotes participatory democracy since it delegates powers to levels of government which are "closest to the citizen."

Fourth, while federalism is a theory that is primarily concerned with inter-governmental competition and which promises mostly freedom from central intervention (negative autonomy), subsidiarity is geared towards enhancing cooperation between all spheres and all levels of government. This is also the meaning of the positive autonomy it advances: the various governmental levels are not obligated to merely refrain from intervention, but to assist each other in building their capacities, fulfilling their potential, and performing their functions. As such, it fits much better with the mindset of the new governance, which is defined by a move from coercion to voluntariness, from conflict to agreement, and from competition to cooperation. Indeed, neither of the readings advocates a simple-minded "autonomy"—self-regulation or self-ordering—to the constituent units. On the contrary: the emergence of powerful sub-national territorial entities (such as cities) comes hand-in-hand with a growing co-dependency between these different levels of governments, and with their increased need to cooperate with each other.

As I argued elsewhere, various international and transnational organizations ("IOs" and "TOs") are already implementing different global agendas and schemes using an assortment of existing associations; subsidiarity indeed allows for greater flexibility in this regard.[112] In addition to flexibility, subsidiarity also correlates with an agenda that is being advanced by

107. NOZICK, *supra* note 26.

108. John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002); Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009 (2000) (book review).

109. *See* COOTER, *supra* note 75; Tiebout, *supra* note 74.

110. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991).

111. *See* BOAVENTURA DE SOUSA SANTOS, THE WORLD SOCIAL FORUM: A USER'S MANUAL (2004), *available at* http://www.ces.uc.pt/bss/documentos/fsm_eng.pdf.

112. Blank, *The City and the World*, *supra* note 20, at 111; Blank, *Localism*, *supra* note 31, at 263.

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many IOs and TOs—democratization and participation—which Kerry Rittich has termed "second generation reforms" in international development policies.[113] Subsidiarity, again, is the perfect conceptual framework for these purposes as it stresses closeness to the citizens, self-rule, and bottom-up solutions (rather than top-down imperatives). According to both interpretations, subsidiarity is also a form that enables mitigating cultural, national, and other group tensions, which is another global concern. Indeed, in many national settings, there are growing internal ethnic and national tensions, caused by various developments associated with globalization—mostly immigration.

Lastly, both readings of subsidiarity seem to depoliticize the decisions regarding which level of government and which political community will control which resource and determine which issue. While the economic reading present these decisions as technical and scientific (based on the criterion of efficiency), the religious reading depicts them as philosophical or theological. Hence, the overt nature of a political battle between competing social-political units over decision-making powers and resources is replaced in subsidiarity by an image of a professionally- and rationally-decided-upon division of powers between governments (the economic reading) or of a divinely-ordained harmonious universe in which every unit is given what it naturally possesses anyway (in the religious reading). The apolitical—and even un-normative—nature of subsidiarity is undoubtedly a source of appeal to some, though others might view it as mere façade. As I argued earlier, I do not think that it is plausible to ignore the hard political and normative choices one must make when one wishes to use either efficiency or proximity as principles for determining the result in a concrete case, or when one tries to decide on a specific course of action in a certain area. Therefore, while to some supporters of subsidiarity it is appealing to depict it as if implementing it involves no human choice or decision I think this is a major risk that arises from the meeting of technical rational-maximizers and romantic re-enchanters around the principle of subsidiarity.

I turn now to examine the relevance of the two competing principles of government—federalism and subsidiarity—to the question of the role of cities (or "the local") in the age of multilevel global governance.

113. Kerry Rittich, *The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social*, 26 MICH. J. INT'L L. 199, 200 (2004).

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III. THE STATUS OF CITIES IN FEDERALISM AND IN GLOBAL SUBSIDIARITY

From what I argued until now arises the following conclusion: it is easier for supra- and sub-national political units to be considered "recognized" governmental levels under subsidiarity than under federalism. And while in practice localities are already partners in the management—substantively and technically—of many global challenges and global governance schemes, theoretically and institutionally there is still a lot of critical work to be done if one wishes to evaluate the specific applications of subsidiarity and if one wants to make some general recommendations for the future regarding its use for local governments. In this section, I analyze in greater detail the reasons for that, and I point to preliminary directions as to the role local governments might have in a global subsidiarity-inspired polity.

A. Cities in Federalism and in Subsidiarity

While the federal principle had no *necessary* place in it for cities (and other local governments), and is actually theoretically averse to it, the principle of subsidiarity is far more receptive to city power and city autonomy (both positive and negative) vis-à-vis the state and the larger political structure. At least in theory, federalism sanctifies one political entity—the state—and it thus mirrors, in a way, the Westphlian paradigm according to which nation-states are "black boxes" and their internal affairs are theirs and should interest no "external" entity.[114] The federal principle does not theorize cities (or local governments); it leaves them to be the internal business of each state (or whatever the basic political unit may be), thus respecting the autonomy of it to decide its own internal structure. This is not to say that in federal regimes there is not much room to acknowledge city importance. On the contrary: many states actually recognize city power and city importance; but it is their choice and their decision, and it is usually a result of the federal structure that allows states to go about it as they please. Clearly, some federal regimes also give special protections to cities (the same way some unitary systems choose to do), yet it is not a part of the federal *principle* or *theory*, and it is not rationalized through the general principle, but rather as an exception to it. Such recognition of city power or autonomy, I argue, represents the fact that in reality, within federal regimes there can be found traces of the principle of subsidiarity.

I do not wish to ignore the enormous jurisprudence developed in federal regimes regarding the role of cities; the entire field of local government law in the United States, Canada, Australia, Germany, and other federal states

114. For a discussion of the Westphalian paradigm, see Benvenisti, *supra* note 10, at 168.

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across the world is precisely an attempt to both respect states' (or provinces') sovereignty by letting them decide what the role of cities should be, but also to set the *federal* limits on this right. And indeed in many cases it turns out that there are federal limitations to the idea that the city is "the creature of the state."[115] Thus, federalism seems to have a lot to say about the role of cities. However, it is precisely the fact that federalism as a principle has nothing to say about cities that causes the neglect of constitutional protection to cities in most federal constitutions, and the oscillation between rendering them powerless and entirely subsumed by their states on the one hand, and between empowering them and giving them authority over crucial matters on the other.[116] Among scholars, there is a parallel debate over the question of whether local governments in the United States are too weak or too powerful, whether they should be given more authority, or whether they should be stripped of some of their decision-making capacities.[117] It is clear, in other words, that despite obvious theoretical similarities, the *legal* terms of the debate of states' rights versus federal powers are entirely different from the legal rules that regulate and organize the debate regarding local government law and city power. And this difference is a result of the basic federal principle: that there is a fixed and preferred political unit which is supreme to all others—the state—while other governmental entities are subsumed by it. And federalism is understood as the constant resolution and re-articulation of the terms of managing the tension, competition, and cooperation between the Union (the federation) and its constituent units; and it is *not* about articulating and resolving the same problems with respect to the federation, the states, and the cities. Contemporary attempts to read the federal principle differently are either influenced by the subsidiarity principle or, even if not influenced by it de facto, simply reflect the idea behind it. They thus become a manifestation of the ideal type of subsidiarity, even if termed "federalism."

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115. This was the famous term coined in *Hunter v. Pittsburgh*, 207 U.S. 161 (1907).

116. *See* Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1843 (1994).

117. Some of the main protagonists in this debate are Gerald E. Frug, David J. Barron, Richard Briffault, and Roderick M. Hillis, Jr. *See* FRUG & BARRON, *supra* note 21 (recommending giving cities more legal powers to control their future); FRUG, *supra* note 74; David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001); David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255 (2003) (advocating a better balance between local power and central control); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) (advocating that local governments in the United States enjoy too much power); Frug, *supra* note 86; Hills, *supra* note 108 (book review advocating the need for more participatory democracy at the local level).

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Subsidiarity, unlike federalism, has no preferred governmental level, but is prone to prefer cities due to either highly instrumental-functional reasons (in its economic interpretation) or to more religiously or Catholic-inspired reasons (in its religious reading) and thus gives high premium to the city as an important location for decision making. The first mode will use cities for the achievement of various goals simply because "they are there" and can often effectively (in relative terms) manage various services or make decisions; the second mode sees the city as a unique location of human association. And while federalism represses all non-state governmental entities in order to privilege the state, subsidiarity actually grabs whichever governmental level it can find and gives it its due role and function. Indeed, this is why even in the E.U., where the concept of subsidiarity was originally used in order to regulate E.U./member-state relations, recent years have seen an effort to extend it to local government as well.[118]

It is rather unclear, however, what the specific mechanisms of authorizing cities might look like under the principle of subsidiarity. Like any abstract principle, subsidiarity might result in empowered cities or in fairly weak ones. There is no guarantee that adopting the principle of subsidiarity will result in any particular legal arrangement. Indeed, one of the risks stemming from decentralization that comes together with regionalization—the establishment of supra-national regional arrangements such as the E.U. and NAFTA—is that the desire to create a borderless region will also be understood as a dismantling of local borders. I argue, however, that this would be a federalist reading of subsidiarity and that it should be avoided. Indeed, subsidiarity should allow for a more plural political arrangement, one which leaves room for more political units—even smaller ones—to assert self-determination and to compete over resources, rather than be subsumed by the greater regions that seem to appear around the world. Yet, it seems reasonable to presume that subsidiarity will end up integrating cities into political unions that will adopt it—rather than federalism—as their organizing principle. This integration will have to be achieved not only through a set of legal rules, but also by institutional and political design. Indeed, federalism is capable of protecting the autonomy of the constituent units not only due to a set of legal rules prohibiting the federal government from doing this or that thing; it grants them a unique location in the political institutions and thus the legal rules are also read against the political power that states have (or lack).

118. *See supra*, notes 104-106 and accompanying text.

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B. Cities in Global Subsidiarity

With the move to global governance in many areas of activities such as environmental protection, immigration, labor, finance, banking, and more, and with the onward march of globalization, questions pertaining to the level of government adequate to manage these issues have become ever more pressing in jurisdictions all over the world. These dilemmas come at a time in which more people than in any other period in human history move to urban areas and during the rise in the economic and political power of cities, globally.[119] As a result of these ideological and material conditions, the role of local governments has become increasingly important worldwide, and their positioning vis-à-vis their states is reconfiguring. Global governance discourse gives local governments a special, privileged place: they are often seen as the main vehicles for the implementation of various programs, ranging from economic development, through environmental protection, to protection of human rights, and promotion of democracy. Scholars and policy makers throughout the world thus identify localities (and cities in particular) as having a unique capacity to assume governance roles, where states and international entities have failed.[120]

It is time to address a concern: why focus on cities at all? What is unique about them? For those of us who have been students of cities and of local governments, this question seems out of place: "why not?" we reply.[121] Yet there seems to be another answer to this question. This answer is what many local government scholars are actually trying to do throughout their work: to find the unique role of the local, which will help define what local governments do and what they ought to do, and to better define what makes the city a unique social entity and also a unique legal concept. This statement should not be understood as merely a normative one, one which is about "what should be done," but also as a critical one: local governments are interesting and important because they serve both as exemplary sites of human action, ideological operations, power and domination, but are also unique locations which expose elements of our social reality, unseen in other areas. I will now quickly go over some of the reasons why local governments are places worthy of special attention and specific discussion. The discussion will also clarify how one might begin to think

119. *See* discussion on Urbanization, *supra* Part I.B.

120. Blank, *The City and the World*, *supra* note 20, at 10.

121. This answer suggests that the city might not be a privileged place but that it is as worthy of attention and interrogation as any other field of law or area of human activity. This is so, since regardless of one's methodological and normative commitments, local governments are responsible for a wide range of activities, are in charge of many resources, and they make important decisions which impact human lives in significant ways.

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about the role of cities in a global regime of subsidiarity. When I refer to a global regime of subsidiarity I do not mean the establishment of a "world government" but rather to the emerging global order in which, as I already said, many entities are involved in decision making and policy implementation, and which is not organized on the basis of nation-states, but rather on a decentralized web of state and non-state actors, and which is conceived not through the federal framework, but rather through the theory of subsidiarity. I want to stress once more that I do not wish to advocate for a simple adoption of subsidiarity as *the* principle of government that should be adopted everywhere (or in any particular location). Indeed, subsidiarity, too, is plagued with problems which I detailed earlier on. Yet it includes some principles which render it normatively superior to federalism, it exposes the weaknesses and obsoleteness of federalism and it provides a better critical lens through which to observe global developments, exposing power dynamics and distributive effects of various global schemes.

Cities, like other territorial units, have unique traits that render them privileged—even if not singular—sites for sharing power with the central government. First, they are physically closer to the controlled assets, provide services, govern citizens, and can thus collect more easily and efficiently the relevant information and knowledge before making decisions regarding the assets, services, or citizens. Second, often (though not always), they are well-established sites for political deliberation, with democratically elected officials, in contrast to private corporations, families, churches, and other social associations—all possible and actual targets for devolution schemes—which do not operate according to democratic rule and are often absent from a political deliberation culture. Third, they traditionally—and legally—control a wide variety of activities and, hence, already posses the institutional foundations and experience to manage many of the assets and services that are targets for decentralization. In this sense, ignoring the immense institutional power that some cities possess—material, legal, and symbolic—is not only pragmatically unwise, but also amounts to magical realism.[122] Fourth, territoriality is also highly significant and unique for purposes of community building.[123] Even in times where virtual and non-territorial communities are flourishing (such as transnational religious communities and internet communities), it is hard to

122. This is the term that Roberto Unger coined in order to describe the position which proposes that the world can be done and undone by the will of will and imagination alone. The opposite position, also wrong, is of "institutional fetishism," which gives reality full and complete power and refuses to imagine that things could be any different. *See* ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

123. *See* FRUG, *supra* note 74; IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990).

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deny the effect and power that physical proximity, random interactions, and unmediated connections have on individuals and groups.[124] Fifth, in some cases, territoriality is the impetus for decentralization—for example, in cases of a natural resource or a geographically concentrated community. In such instances, the spatial element is of supreme importance and instigates the creation of a special governing entity that will reflect the spatial-geographic realities.[125] Lastly, and perhaps most importantly, cities—not all, but definitely some of them—are versions of the good life: a lasting and paradigmatic example of how humans can live together in solidarity, not necessarily based on sameness, identity, kinship, or the like. Rather, they represent a unique alternative, the possibility to create human solidarity and collectivity that is held by difference, plurality and experimentation.[126]

Recently, legal scholars tried to demonstrate that cities have always had a role in areas where the central (or federal) government claims exclusive powers. Scholars like Sarah Cleveland and Peter Spiro showed that states and cities were always involved in various aspects of international trade and international affairs.[127] Similarly, Cristina Rodriguez convincingly argued that immigration, too, was always regulated by sub-federal governments.[128] These endeavors shatter some of the fantasies about a federal government that speaks in "one voice" about international affairs or that exclusively deals with immigration. And in addition to pointing to the shortcoming of federalism as an adequate theory—both descriptively and normatively—for our globalizing times, they also attempt to explain what

124. The debate surrounding the continuing importance of physicality, materiality, and "real" interactions versus the demise of "reality" and the encroachment of the virtual world is only growing more fierce, as newer technological means appear which seem to offer human ways of interacting with each other without "really" meeting. Indeed, some have argued that the day in which the meaning of "day" and of "space" will no longer exist is approaching us more quickly than we realize. Paul Virilio is one of the most famous theoreticians advancing this point. *See, e.g.*, PAUL VIRILIO, OPEN SKY (1997). Richard Ford has also argued that physical space is no longer as important as it was for the establishment of communities. *See* Richard Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1413-14 (1997). Others have argued that while virtual and non-physical interactions might very well have grown in importance, materiality and physicality still matter greatly for both individuals and communities, especially stressing the disparity between those who are able to "go virtual" and those that remain stuck in the material world for lack of access to new technologies. *See* MARC AUGÉ, NON-PLACES: INTRODUCTION TO AN ANTHROPOLOGY OF SUPERMODERNITY (1995).

125. *See* EYAL BENVENISTI, SHARING TRANSBOUNDARY RESOURCES: INTERNATIONAL LAW AND OPTIMAL RESOURCE USE (2002).

126. *See* FRUG, *supra* note 74; YOUNG, *supra* note 123.

127. Sarah H. Cleveland, *Crosby and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 991-94 (2001); Peter J. Spiro, *Part II: Role of the States in Foreign Affairs: Foreign Relations Federalism*, 70 U. COLO. L. REV. 1223, 1261-70 (1999).

128. Rodriguez, *supra* note 60, at 581-82.

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can be a unique role for localities in managing problems that arise from globalization. Such unique roles for cities vary: Rodriguez claims that in matters of immigration, for example, it is integrating immigrants into the body politics;[129] Ileana Porras argues that in climate change, it can be sustainability that will be best achieved by cities;[130] I have suggested elsewhere that in cultural, ethnic, and national tensions, cities are uniquely situated to serve as "normative mediators" between communities and the general public.[131]

The fact that cities all over the world are already taking part in resolving global and globalization-related problems such as immigration, global economic crisis, climate change, and dealing with foreign policy needs to be compared with an institutional structure that will reflect this fact and will give it the form that it requires. As I suggested elsewhere, international organizations need to give cities standing in decisions that impact them.[132] This standing can be an official vote or advisory powers (like the position of the Committee on the Regions in the European Union); cities need to have standing in international courts and tribunals where their interests or rights have been infringed; cities need to be represented in political processes that affect them. But cities also need to be assisted in performing their functions, and in this respect subsidiarity is far more helpful than federalism. The model of fiscal federalism, where localities (and states) are merely empowered to tax and collect revenues in order to spend money at their will, but are not theoretically (and hence constitutionally) entitled to funding that will enable them to fulfill their discretionary functions is another manifestation of federalism's negative autonomy conception.[133] Global governance, on the other hand, requires a theory that will not only refrain from obstructing fiscal activities; it needs a model that will be enabling and oriented towards capacity-building.

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129. *See id.*

130. *See* Porras, *supra* note 82.

131. *See* Blank, *Localism*, *supra* note 31.

132. *See* Blank, *The City and the World*, *supra* note 20.

133. Fiscal federalism is sometimes the more general term describing the process by which central governments turn back many of their responsibilities to the states and localities in order for the latter to perform them. That is, it is a term used to describe decentralization measures taken mostly for economic-efficiency considerations, following the model of Tiebout and his supporters. *See* FISCAL FEDERALISM IN THEORY AND PRACTICE (Teresa Ter-Minassian ed., 1997); Wallace Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120 (1999). I, however, use this term to refer more specifically to the funding model of sub-national units such as states and cities, which allows these units to collect revenues (often under fairly strict regulation), but does not commit to funding them save for federally-defined purposes (but not for state-defined programs or goals). *See* David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005).

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Despite a global-governance tilt towards cooperation and facilitation, some of the new attempts to solve the tension between the levels of government would have them "cooperate" (as Rodriguez suggests) and remain captive, at least to a certain degree, to the idea that it is possible at all to manage such problems in a system that operates according to the federal principle rather than according to a more subsidiarity-influenced structure.[134] Federalism still projects a false image that each level of government deals with distinct functions, and that international affairs as well as immigration are entirely at the hands of the federal government. In this sense, we also need to take distance from the notion of federal exclusivity and of a fixed competences list, and move to a more flexible understanding of authorization and competences.

In this respect, there is no real difference between subsidiarity and federalism: both assume that there is a rule or a principle that can define which level of government should be given the power to perform a specific task. But a closer look at the dynamics between levels of government reveals that competence is not just a technical thing or a result of pre-legal facts (such as the material nature of the goods or of the resource). As I already said, the question of whether some function involves externalities and therefore needs to be centralized, for example, is hardly merely technical or one of professional expertise (of economists); it is also a normative question and a profoundly political one, one which involves speculations, beliefs, degrees of attachment (meaning, how strongly one feels about a particular activity), and identification. Competence is also often dependent on the status quo since some institutions who already have the legal power and experience are indeed more capable of performing the task; but the proper investment, enough funding, and new legal powers might make other institutions as fit (or even better fit). One other problem with a set of existing functions and competences is that it assumes the thing which is often in flux and in question: the polity or the community. Indeed, one of the things which under globalization becomes a constant question is the identification and affiliation that people experience. It has been pointed out by scholars that globalization is as much about shifting identifications and fluid communities as it is about flows of capital and commodities.[135] Hence, deciding to assign a certain city some functions (since the constituency of the city "is" attached to these values), or deciding that the environment "is" a global matter (since it has externalities), or that immigration "is" a national matter, is under constant empirical challenge (since what we know about

134. *See* Rodriguez, *supra* note 60.

135. For a discussion on globalization, see discussion *supra* Part II.A.

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these matters keeps changing, but also because our ideas about community, belonging, and identity keep transforming).

Two things are required, therefore, in order to construct a better way of deciding which level of government is assigned which role: first, greater sensitivity to the changing nature of the basic terms under which we determine what level of government is assigned primary powers; second, giving up on the notion that it is a strict "either/or" but rather an "and": that multiple jurisdictions can—and should—be involved in deciding on various matters at the same time. And that instead of trying to hermetically seal their powers and see those powers as negating each other, governments should assist each other in performing their functions and engage in constant dialogue that will internalize changing attachments, changing notions of externalities, and different conceptions of community. In this sense, even if subsidiarity has taken us a few steps further than federalism, it is also limited and should be abandoned, due to the critiques mentioned throughout this Article and in light of the following risks.

Indeed, one cannot overestimate the risks that a shift to global subsidiarity might involve. First, elevating cities to a degree of recognizable entities, both in a national setting as well as in international entities, might cause greater fragmentation of identities and a loss of solidarity, and it might weaken the main source for solidarity in our existing world: the nation.[136] Second, growing decentralization might cause greater problems of coordination and cooperation, causing both inefficiency and inequality (since strong locations can be assumed to be able to externalize their cost more easily). Third, a world in which the spheres of government are more separate will likely cause greater difficulties for political action. Fourth, both the economic and the religious interpretations of subsidiarity depoliticize that which is profoundly political. These problems should not be taken lightly. I hope, however, that my conception of subsidiarity made it clear that it should not be equated with "decentralization"; rather, it should be understood to be a new configuration of identities and of governmental levels, part of which is geared towards granting cities more powers, but sometimes it will justify more involvement of central and even global entities.

CONCLUSION

By "going local" all the way, by embracing the principle of subsidiarity as I advocate it—but also by critiquing it and moving past it—the fact of

136. However, as I argued before, one should be careful not to assume that the nation *must* be the major source of solidarity. Indeed, localities can be an alternative source for human solidarity and collectivity.

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our profound co-dependency might become apparent to more individuals and groups who manage to maintain the illusion that the state is still in full control over immigration, labor, trade, the environment, and the like, or that it should regain full control. Federalism—as an idea, even if not as a practice—mystifies the real conditions of our existence: globalization, dependency, penetrability, and solidarity. The delegation of our commonality and solidarity to the federal level affords for the fierce competition among cities that we witness today in so many national settings; paradoxically, it also induces cities to "globalize" themselves and thus produce greater tension with federal institutions and with the federal principle, since cities see the comparative advantages in doing so in a world of growing competition over resources in which central governments have a reduced capacity to manage them.

Local campaigns and local legal measures to protect, or crack down on, immigration or to combat global warming are conducive to the emergence of a global consciousness in small-town America, suburban Canada, or big-city Israel. Though they indeed carry with them the danger of myopia, narrow self-interest, oppression of minorities, and regressive politics—all major risks (that also plague central governments, we should bear in mind)—they have the immense benefit of contributing to the activity of citizens, to their realization that the world has changed, and to their being, more than ever, part of the world.

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