

PROTECTING COMMONERS’ GOODS
PLURALIST COEXISTENCE THROUGH THE COMMON
GOOD CONSTITUTION’S SUBSIDIARITY MUNICIPALISM

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ABSTRACT

Proceeding from the assumption that Harvard Law Professor Adrian Vermeule’s theory of common good constitutionalism must ultimately prevail in the debate about what Anglo-American law is, this Article contributes to the discussion by proposing how his skeletal theory can serve the interests of outsiders. Building on the perspective informing the author’s previous essay The Jurisprudence of Trousered Apes, the Article focuses on what common law constitutionalism means for commoners. It seeks to anticipate and allay that natural anxiety which the revival of Tradition provokes for outsiders by demonstrating how common good constitutionalism can be employed to advance pluralism. For this demonstration, it sketches a constitutional framework for producing pluralist outcomes based on the principle of subsidiarity, a pillar of the classical legal tradition. It contends that classical subsidiarity can produce a constitutionalism, one that the Article denominates subsidiarity municipalism, to assist commoners and other dissenters from Tradition in protecting their temporal gains.

KEYWORDS

common good constitution; municipalism; subsidiarity; legal pluralism

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I. INTRODUCTION: PANEGYRIC, POINT, AND PLAN

Having previously claimed legal positivism and textualism as the methods of commoners, my cohort,¹ I undertake this argument with a considerable handicap. Not only am I to explain how a commoner can find Adrian Vermeule's revival of the classical legal tradition to merit affirmation. Worse, I also am left to square such praise with the jurisprudence of trousered apes. With much to cover in addition to doing the job that the title promises, I turn to addressing the first issue post haste.

First, the exaltation. Simply stated, Adrian Vermeule's theory of common good constitutionalism is a genius excavation of the Anglo-American legal tradition's sheer breadth. CGC's thesis that the Anglo-American common law system is best interpreted as a local variant of the classical legal tradition² consiliently raises and builds upon the same genealogy that an outsider—a Chinese jurist from a civil law system—grasped 70 years ago.³ At this Article's conclusion, I will elaborate how common good constitutionalism (CGC) aligns with the jurisprudence of trousered apes. But for now, I must concede that CGC is a better way of broadening the law toward including others than the legal positivism and textualism I so fervently defended for reasons that Vermeule perceptively identified.⁴ Such a shift is best explained by elaborating what CGC does well.

As my previous essay framed the issue, asking what the law is amounts to the practical question of which exercises of power are good.⁵ Engaging with the pandemic eviction ban case and seeking to defend a sweeping exercise of executive power protecting the disenfranchised, I there invoked legal positivism and textualism as answers better suited to protecting commoners against force.⁶ I argued that law understood as a plain statement of power contained in a text and interpreted according to the rules of English grammar would be less apt to harm commoners' interests than an understanding of law as a patrimony from which commoners are estranged.⁷

But as Vermeule identifies in his CGC Monograph, legal positivism and textualism do not explain which exercises of power are legitimate.⁸ To say that the law is text to be read in its ordinary grammatical sense does not address whether a

¹ Gregory Louis, *The Jurisprudence of Trousered Apes*, 69 UCLA L. Rev. Discourse 146 (2022).

² ADRIAN VERMEULE, COMMON GOOD CONSTITUTIONALISM: RECOVERING THE CLASSICAL LEGAL TRADITION 1 (2022) [hereinafter "CGC MONOGRAPH"].

³ JOHN C.H. WU, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW 59, 102-106, 125-131 (1955) (arguing that Anglo-American common law is rooted in natural law understanding of power and rights correlated with responsibility and duties, citing examples from English and U.S. jurisprudence). For a background to that author and his study, see John T. Noonan, Jr., *Fountain of Justice*, 69 HARV. L. REV. 1519-1522 (1956); Herbert W. Titus, *God's Revelation: Foundation For the Common Law*, 4 REGENT. U. L. REV. 1-2 (1994). On his being an outsider, see Wu at 55, 57.

⁴ The concern animating such a defense is abuse of power to the detriment of the weak. Vermeule speaks to this in CGC MONOGRAPH, *supra* note 2, at 13.

⁵ Louis, *supra* note 1, at 149-150.

⁶ *Id.* at 149-150.

⁷ *Id.* at 159-162.

⁸ CGC MONOGRAPH, *supra* note 2, at 6, 16.

given exercise of state power based on that meaning is good.⁹ Put differently, all legal questions raise a question of practical morality: they are always a matter of whether some imposition of government power qualifies as law because it corresponds to an account of what is just.¹⁰ Vermeule's semantic excursion on the difference between law (*lex*) and justice (*ius*)¹¹—that which this legal tradition has also phrased as a question of higher law versus ordinary law¹²—highlights how much English suffers from a single word covering both the descriptive and normative.

CGC is a superior account of the law because it harmonizes both the Left and the Right's instincts about the good. It does so because it focuses on structures and institutions—the role of government—rather than various accounts of rights. With such an approach, Vermeule's CGC theory answers questions that other legal theories fail to account for. For example, progressive constitutionalism has long suffered from an inability to answer why the famous footnote 4 to *United States v. Carolene Products Co.*¹³ should remain the standard for wielding government power, with its unexplained proposition that commercial activity can freely be regulated while the regulation of social activity stands constrained, no matter the harm.¹⁴ This longstanding concern is become even more pronounced when, as the Patient Protection and Affordable Care Act litigation shows, progressives have come to recognize that free human movement has real economic consequences for everyone.¹⁵ As for conservatives, CGC provides a more sensible account of the U.S. Constitution's Ninth Amendment (and state equivalents)¹⁶ as a textual acknowledgement of U.S. Constitutionalism's natural law background¹⁷ than

⁹ *Id.* at 16.

¹⁰ *Id.* at 183. This same point is made in my prior essay. See Louis, *supra* note 1, at 150-151.

¹¹ *Id.* at 3-4.

¹² Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 154 (1928) (noting the ambiguity of "law" historically encompassing both a higher and lower content).

¹³ 304 U.S. 144, 153 n.4 (1938).

¹⁴ For this critique, see Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 THE SUPREME COURT REV. 397, 428 (1987) (contending that the political theory informing Carolene Products needs to be updated because it allowed special interest litigation resulting in a harmful product being sold solely to dairy farmers' benefit).

¹⁵ The core argument that the Obama Administration raised in its defense of using the U.S. Constitution's commerce clause as a basis for the Patient Protection and Affordable Care Act. Brief for Respondents at 7-8, 18-21, *Nat'l Fed. of Independent Business v. Sebelius Brief of Respondents*, 2012 WL 37168 (2012) (contending that commerce clause supports individual coverage mandate because millions of uninsured people participate in the health care market based on state and federal laws, reflecting deeply rooted societal values, mandating that they be treated).

¹⁶ That state constitutions have long contained comparable clauses, see generally ANTHONY B. SANDERS, *BABY NINTH AMENDMENTS: HOW AMERICANS EMBRACED UNENUMERATED RIGHTS AND WHY IT MATTERS* 15 – 19 (2023); NEIL H. COGAN, *THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, & ORIGINS* 635 – 662 (1997).

¹⁷ Cf. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 119-122, 298-299 (2000) (connecting U.S. Constitution's Ninth Amendment to Preamble's notion of popular sovereignty building on Declaration of Independence and Anglo-American charters of liberty such as the Magna Charta and English Bill of Rights). In addition, a 1902 Iowa Supreme Court decision relevant to the first principle discussed below in Section III.B references language such as that in the Ninth Amendment and its state equivalents as authority supporting unenumerated natural rights. See *State ex rel. White v. Barker*, 89 NW 204, 207 (Io. 1902) ("Some of the cases we have cited hold

a redundant “ink blot” to be overlooked.¹⁸ Or even, for that matter, the Left’s conceit that it merely represents an alternative basis for rights previously based on substantive due process.¹⁹

But most relevant during the early days of the second Trump Administration apparently powered by Project 2025,²⁰ CGC answers the Left’s perennial solicitude about what the opposition is up to. In this vein, I acknowledge that Professor Vermeule insists that CGC is a “third way,” neither progressive nor conservative.²¹ But in elsewhere promoting it as the defeasance of liberalism, he gives up the ghost,²² supporting accusations that CGC is an authoritarian program.²³ So, one may imagine that Leftist pluralists fearfully approach CGC as yet another program in line with that observation of American conservatism’s essence as the exercise of power protecting but not binding the U.S. polity’s intended beneficiaries while binding and yet exposing its outsiders.²⁴

All this finally brings up this Article’s contribution to the discussion. Proceeding from Vermeule’s own prediction that CGC must ultimately prevail²⁵ — that we must all become common good constitutionalists²⁶ — this Article accepts

to the doctrine that the rights of the inhabitants of a municipal corporation to local self-government is one of the rights retained by the people.”)

¹⁸ See, e.g., Sheldon L. Richman, *Dissolving the Inkblot: Privacy as Property Right*, CATO INSTITUTE (January/February 1993), <https://www.cato.org/policy-report/january/february-1993/dissolving-inkblot-privacy-property-right> (criticizing the inkblot dismissal stated in ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 183-85 (1990)).

¹⁹ See Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1223-1224 (1990) (referencing scholarship making this argument).

²⁰ See, e.g., Faith Wardwell, *The Key Project 2025 Authors Now Staffing the Trump Administration*, NBC NEWS (March 12, 2025), <https://www.nbcnews.com/politics/trump-administration/key-project-2025-authors-now-staffing-trump-administration-rcna195107>.

²¹ Adrian Vermeule, *Liberalism’s Good and Faithful Servants*, COMPACT MAGAZINE (February 28, 2023), <https://www.compactmag.com/article/liberalism-s-good-and-faithful-servants/> [hereinafter “Vermeule Compact Magazine”].

²² See also Adrian Vermeule, *Why I Lost Interest in the Liberalism Debate: On Science-Fictional Political Theory*, THE NEW DIGEST (February 3, 2024), <https://thenewdigest.substack.com/p/why-i-lost-interest-in-the-liberalism> [hereinafter “Vermeule Liberalism Debate”] (arguing that political liberalism is unsustainable and that law must turn into sacramental liberationism or the reassertion of tradition values holding “unchosen moral, political and legal constraints as legitimate constraints on individual and social action”).

²³ See, e.g., Michael A. Wilkinson, *The Authoritarian Nature of Common Good Constitutionalism*, 69 AM. J. OF JURISPRUDENCE 89-106 (2024).

²⁴ Henry Grabar, *The Pithiest Critique of Modern Conservatism Keeps Getting Credited to the Wrong Man*, SLATE (June 3, 2022), <https://slate.com/business/2022/06/wilhoits-law-conservatives-frank-wilhoit.html> (quoting Ohio classical music composer Frank Wilhoit’s aphorism “summing up the modern Republican party’s hypocrisy and moral bankruptcy”).

²⁵ CGC MONOGRAPH, *supra* note 2, at 184.

²⁶ A reference to Elena Kagan’s remark that “We are all originalists now” during her 2010 confirmation hearing, one that she more recently contends has been taken out of context. See Josh Gerstein, *Kagan Hopes Supreme Court’s Ideological Divide on Precedent Isn’t Permanent*, POLITICO (September 22, 2023), <https://www.politico.com/news/2023/09/22/elena-kagan-supreme-court-precedent-speech-00117760>.

Professor Vermeule’s invitation to build upon his sketch.²⁷ Consistent with the perspective informing the jurisprudence of trousered apes, the Article focuses on what CGC means for commoners. It seeks to anticipate and allay that natural anxiety which the revival of Tradition provokes for outsiders by demonstrating how CGC can be employed to advance pluralism. For this demonstration, it sketches a constitutional framework for producing pluralist outcomes based on the principle of subsidiarity, a pillar of the classical legal tradition.²⁸ It contends that classical subsidiarity can produce a constitutionalism, denominated here as subsidiarity municipalism, serving to assist commoners and other dissenters from Tradition to protect their temporal gains.

The Article argues for subsidiarity municipalism in four additional sections. In section II, the Article identifies the problem that CGC fails to resolve: what happens to outsiders like myself under Tradition. The Article explains that at least Professor Vermeule’s formulation of CGC suffers from glibness about Tradition’s hostility to outsiders, an aspect that even conservative sympathizers recognize.²⁹ After identifying this problem, in Section III the Article promotes the municipal corporation as the way Tradition can protect pluralism. To make this argument, the Article excavates the classical legal tradition’s principle of subsidiarity and then applies it to develop a constitutionalism that empowers outsiders to protect their interests through the formation of inclusive communities mediated by higher structures. It identifies classical subsidiarity’s five implications for U.S. constitutionalism and then applies these five principles to three live controversies arising from the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*³⁰: those about abortion, same-sex couples, and sex work. Following Vermeule’s argument in his book, in Section IV the Article defends pluralist coexistence as what the Roberts Court has been advancing through its jurisprudence about the conflict between association rights and general law. It ends, in Section V, with a conclusion summarizing the argument and ending with some reflections about how subsidiarity municipalism aligns with the jurisprudence of trousered apes.

II. LACKING SOLIDARITY: CGC’S BLIND SPOT

However compendious, Professor Vermeule’s sweep of Anglo-American law is largely disinterested in its treatment of what my previous essay termed commoners. His monograph says nothing about what CGC means for people who will live outside of Tradition’s conception of the good life. One commentator has found such indifference to be characteristic of integralism, the political theory that CGC most resembles.³¹ In a pluralistic society where many dissent from Tradition to

²⁷ CGC MONOGRAPH, *supra* note 2, at 25 (“I hope to spark enough interest that others will explore similar themes[.]”).

²⁸ *See infra*, Section III.A.

²⁹ *See infra*, note 32.

³⁰ 597 U.S. 215 (2022).

³¹ *See, e.g.*, Terence Sweeney, *Integralism’s False Promise: In Search of Politics That Enables the Good*, COMMONWEAL (February 6, 2024), <https://www.commonwealmagazine.org/sweeney-vallier-integralism-liberalism-dorothy-day> (in reviewing KEVIN VALLIER,

varying degrees, this is a significant gap oppugning its practicality. Indeed, it is one of the reasons why many conservatives who disagree with the Roman Catholic Church's interpretation of Tradition have expressed reservations about CGC.³²

Before elaborating this problem, this observation should not be regarded as a criticism of CGC for a simple reason. Because Professor Vermeule frames his CGC Monograph as a broad sketch,³³ readers should take this at face value and not fault its omissions. He is within his rights, as claimed in the book, to have devoted seventy-thousand rather than seven hundred thousand words on the core idea, so leaving specifics for further elaboration.³⁴ That said, I acknowledge extrinsic evidence suggesting that Professor Vermeule's omission reflects principled disinterest. This Article already mentioned Professor Vermeule's recent statement about arresting and uprooting liberalism,³⁵ an apparent admission to what a New Yorker article comparing CGC to integralism had suspected.³⁶ In a more recent writing, Professor Vermeule also justified his silence on pluralistic compromise with skepticism that it is attainable in principle, insinuating that conversion might be the ultimate goal.³⁷

ALL THE KINGDOMS OF THE WORLD: ON RADICAL RELIGIOUS ALTERNATIVES TO LIBERALISM (2023), defining integralism as a postliberal politics centered on directing people to their natural good and showing little care for the poor). For the connection between CGC and integralism, see Garrett Epps, *Common-Good Constitutionalism Is an Idea as Dangerous as They Come*, THE ATLANTIC (April 3, 2020), <https://www.theatlantic.com/ideas/archive/2020/04/common-good-constitutionalism-dangerous-idea/609385/>.

- ³² See, e.g., George F. Will, *When American Conservatism Becomes Un-American*, THE WASHINGTON POST (May 29, 2020), https://www.washingtonpost.com/opinions/when-american-conservatism-becomes-un-american/2020/05/28/336a953a-a0f6-11ea-b5c9-570a91917d8d_story.html; Rob Dreher, *The Grand Inquisitor Option*, THE AMERICAN CONSERVATIVE (Feb. 26, 2023), <https://www.theamericanconservative.com/the-grand-inquisitor-option/>.

This is where the integralists give me the hives. To govern a people against their will is tyranny. I would prefer to live in a tyranny like Assad's Syria if the alternative was an Islamist tyranny. But tyranny is not a good thing. The only way Catholic integralists like [Sohrab] Ahmari could achieve what they want in post-Christian America -- or even in an America in which Catholics were the minority, as they are now, and would be even if everybody who professed Christianity was in church every Sunday -- is by tyranny. I don't think this bothers them. Indeed, Adrian Vermeule, the tribal leader of American integralists, has written that right-thinking Catholics should march through the institutions of liberalism in order to set themselves up to make the state integrally Catholic.

- ³³ CGC MONOGRAPH, *supra* note 2, at 25.

- ³⁴ *Id.*

- ³⁵ *Supra* note 22 and accompanying text.

- ³⁶ Benjamin Wallace-Wells, *What American Conservatives See in Hungary's Leader*, THE NEW YORKER (September 13, 2021), <https://www.newyorker.com/news/annals-of-inquiry/what-rod-dreher-sees-in-viktor-orban>.

- ³⁷ Vermeule Liberalism Debate, *supra* note 22: ("I believe that there can be no such thing as liberal pluralism even in principle, because liberal pluralism is, as [Ryszard] Legutko explains, just another monism — the special case of monism that relentlessly drives non-liberal comprehensive views from the public sphere, by coercion and the force of law if necessary, including coercion effected indirectly through employment relationships and the structure of the 'free' market.").

This certainly seems to support an assessment of CGC as authoritarian.³⁸

Despite this extrinsic proof, this Article refrains from reading malevolence into the CGC Monograph's silence on outsiders. But no matter how well intended, this Article is clear that Vermeule's formation of CGC presents a grave challenge to outsiders' existence within a CGC polity. This conclusion is rooted not in Professor Vermeule's own thoughts on the CGC project but rather in his framing of Tradition. The problem is evident in the very example that Professor Vermeule adduces to dispel concerns that CGC is hostile to openness.

In the CGC Monograph, Professor Vermeule's devotes a section to moral wrongs enacted in the name of Tradition. He takes this problem up in his criticism of the U.S. Supreme Court's decision in *Obergefell v. Hodges*.³⁹ To work around the question that *Obergefell* raises—whether mandating states to recognize same-sex marriage on equal protection grounds is a legitimate development of the U.S. Supreme Court's marriage jurisprudence extending the right to interracial couples, child-support debtors, and prison inmates⁴⁰—Vermeule invokes John Henry Newman's theory of developing Tradition.⁴¹ He argues that unlike same-sex marriage, the bigotry at issue in those other cases represents misunderstandings of Tradition. Specifically, he contends that the criteria of Tradition were correctly applied to prohibit those forms of bigotry because the courts “invalidated legislative or administrative action that tacked on arbitrary and artificial criteria that were extrinsic to marriage properly understood, and were thus unreasonable in just the way that classical law condemns.”⁴² To him, excluding interracial unions from marriage “cripple[d] or mutilate[d] the institution by grafting onto it naturally irrelevant or arbitrary accidents.”⁴³ He argues that race is irrelevant but sex matters because marriage is fundamentally about procreation, a point he makes by quoting from Chief Justice John Roberts' *Obergefell* dissent.⁴⁴

For all its perspicacity and earnestness – this Article acknowledges that Professor Vermeule himself is in a marriage that likely would have been unlawful before *Loving*⁴⁵ – his argument from Newman's theory does not address lurking

³⁸ See *supra*, note 23.

³⁹ 576 U.S. 644 (2015).

⁴⁰ CGC MONOGRAPH, *supra* note 2, at 131 (citing *Loving v. Virginia*, 338 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safely*, 482 U.S. 78 (1987)).

⁴¹ CGC MONOGRAPH, *supra* note 2, at 23, 123-24 (citing JOHN HENRY NEWMAN, THE GRAMMAR OF ASSENT (1870) for proposition that authentic Tradition develops by assimilating new data into its framework through the process of determination and adopting Newman's seven principles of authentic development).

⁴² *Id.* at 132.

⁴³ *Id.*

⁴⁴ *Id.* at 132-133.

⁴⁵ He is married to Yun Soo, an Asian-American woman. For much of U.S. History, a union between a White man and Asian woman would have been prohibited under anti-miscegenation laws banning marriages between Whites and various types of Asians. See, e.g., Peggy Pascoe, *Miscegenation Law, Court Cases, and Ideologies of “Race,” in SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY* 467-68 and n. 13 (Martha Hodes ed., 1999) (noting jurisdictions whose laws banned marriages between Whites and Asian Americans or “Malays”); William D. Zabel, *Interracial Marriage and the Law, in* *INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW* 57 (Werner Sollors ed., 2000).

concerns for two reasons.

First, Tradition is inherently exclusionary. Professor Vermeule is clear that the Anglo-American legal tradition is a local variant of the broader Western legal tradition rooted in Roman law and developed by the Roman Catholic Church.⁴⁶ Professor Vermeule's chief partner and common co-author Professor Conor Casey has consistently described common good constitutionalism as grounded in a classical legal tradition that is "the stew of Roman law, canon law, and the other legal sources that formed the matrix within which European legal systems developed—and regional adaptations of the *ius commune* like the Anglo-American common law tradition."⁴⁷ For all the Roman Empire's universalist pretensions, a view with which this Article shares some sympathy,⁴⁸ its sensibilities are insuperably particular. Though purporting to have developed a *ius gentium*, or a law of the nations, it is unquestionable that this "universal" law was based on Mediterranean practices.⁴⁹ Ultimately, the Roman magistrate who determined law was a particular type of human being rooted in a particular culture resolving disputes between specific peoples thousands of years ago. Their specific conclusions embedded within a patrimony handed down the centuries and assimilated into various European and American legal systems represents values, morals, and modes of reasoning that other people, including many contemporary Europeans and Americans, do not hold or share. Because of this, the Western legal tradition, at a certain level of specificity, will seem hostile to members of multiethnic society. If I have read Vermeule correctly and understand his familiarity with Chinese civilization and law,⁵⁰ I understand him to agree with C.S. Lewis's argument in the *Abolition of Man* that the Western natural law is itself a local variant of the universal *Tao*.⁵¹ But Western Law must still be a conception of the *Tao* reflecting an outlook unique to certain peoples. To make this point by reference to one variety of Western law, we can analogize to the particularly of *laïcité*, one of the French constitution's pillars.⁵² The term, often translated as "secularism,"⁵³ is nonetheless distinct even among European experiences with religion,⁵⁴ and for reasons particular to France's constitutional development.⁵⁵

⁴⁶ See *supra*, note 1.

⁴⁷ Conor Casey, *Common Good Constitutionalism and Constitutional Change* (August 10, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4939257 [hereinafter "Casey Const. Change"].

⁴⁸ See *infra*, Section III.A.

⁴⁹ See *infra* note 127 (citing DE ZULUETA).

⁵⁰ He took his undergraduate degree from Harvard *summa cum laude* in East Asian Languages and Civilization. For evidence of this familiarity, see also Vermeule Dominus Mundi, *infra* note 92 (citing Chinese Tradition in defense of empire as a great unity that promises universal piece).

⁵¹ See CGC MONOGRAPH *supra* note 2, at 3. For C.S. Lewis' notion of the *Tao*, see C.S. LEWIS, THE COMPLETE C.S. LEWIS SIGNATURE CLASSICS 472-473 (2002).

⁵² Rachel Donadio, *Why Is France so Afraid of God: How the Country Came to View Religion as a Threat to National Identity*, THE ATLANTIC (November 22, 2021), <https://www.theatlantic.com/magazine/archive/2021/12/france-god-religion-secularism/620528/>.

⁵³ Michel Troper, *French Secularism, or Laïcité*, 1 CARDOZO L. REV. 1267 (2000).

⁵⁴ Donadio, *supra* note 52 ("The term has come to express a uniquely French insistence that religion, along with religious symbols and dress, should be absent from the public sphere. No other country in Europe has followed this path").

⁵⁵ Troper, *supra* note 53, at 1272 – 1276 (describing this history).

So that the point is not lost in abstraction, let us take up the concrete implications of Tradition's limits. Hard cases, or those involving clashes of absolute values, ultimately must be resolved with principles of *ius* reflecting United States custom.⁵⁶ This is the sense in which Professor Vermeule is correct to classify Ronald Dworkin and his legal philosophy as moral as opposed to positivistic.⁵⁷ For Dworkin's Judge Hercules⁵⁸ arrives at the right answer by knowing and applying the legal order's foundational moral axioms to a specific dispute as part of a narrative chain he terms law as integrity.⁵⁹ However, various people around the world disagree about the constitutive axioms of morality. We can best appreciate how mundane this disagreement is by taking up an example from contracts, one of the boring topics that I teach. There, various understandings of what counts as a promise leads many societies to differ on which the law will recognize and enforce.⁶⁰ Islamic societies, once the center of global finance, refused to enforce obligations to pay excess interest, stimulating reliance on trust partnerships rather than contracts to make good on debt transactions.⁶¹

Moral particularity points to the second reason why Vermeule's reassurances fail to persuade. The argument overlooks the record of how Western thought has treated outsiders. Tradition has been openly bigoted. For all his liberalism that Vermeule decries,⁶² even John Stuart Mill described Anglo-American liberty as a doctrine for "civilized" people. In his famous essay, Mill states that the doctrine leaves "out of consideration those backward states of society in which the race itself may be considered as in its nonage." He adds that until a people are "become capable of being improved by free and equal discussion [...]" there is nothing for them but implicit obedience to an Akbar or a Charlemagne if they are so fortunate as to find one."⁶³ White supremacy has persisted and transmuted because it is steeped in Tradition's good sense. To demonstrate this with the very example Vermeule applies Newman's developmental criteria to, Black codes and the deprecation of miscegenation were rooted in an understanding of marriage as an engagement among equals for the rearing of children and well-being of the couple. For example,

⁵⁶ See Casey Const. Change, *supra* note 47, at 17-18 (noting that scholars of the classical natural law tradition like Aquinas counselled "putting great weight on the settled ways of doing things within a particular community. [...] Laws rooted in the mores and patterns of living of a particular people were thought to inspire greater veneration and diligence in adherence; that is, at least compared to laws promulgated by a ruling authority which lacked a firm anchor in communal sentiments, norms, or practices.")

⁵⁷ CGC MONOGRAPH, *supra* note 2, at 4.

⁵⁸ For Vermeule's reference to Dworkin's heuristic, see CGC MONOGRAPH, *supra* note 2, at 106-07.

⁵⁹ RONALD DWORKIN, LAW'S EMPIRE 238-244 (1986) (describing Judge Hercules' process of determination).

⁶⁰ Cf. RESTATEMENT (SECOND) OF CONTRACTS § 1.

⁶¹ See ANTHONY M. ANNETT, CATHONOMICS: HOW CATHOLIC TRADITION CAN CREATE A MORE JUST ECONOMY 105-106 (2000) (citing DAVID GRAEBER, DEBT: THE FIRST 5000 YEARS (2011)).

⁶² For Vermeule's critique of Mill's harm principle, see CGC Monograph, *supra* note 2, at 171 (imputing a U.S. Supreme Court decision invalidating a federal law banning child pornography to it).

⁶³ JOHN STUART MILL, ON LIBERTY: AND OTHER ESSAYS 14-15 (Oxford World Classics ed. 1991)

the first systematic presentation of American marriage law, Joel P. Bishop's 1852 *Commentaries on the Law of Marriage and Divorce*, explained prohibitions on interracial marriage by analogy to an English precedent denying that a countess could marry her footman.⁶⁴ The implication of this analogy – that no legitimate marriage occurs between two people of unequal station – is one of the arguments that the Commonwealth of Virginia cited in its *Loving* brief. There, it cites Roman Catholic Jesuit Priest John LaFarge's 1943 book to argue that the law against interracial unions amounted to a moral prohibition based on the great difference of condition between the groups, including Black people's cultural inferiority, that renders such unions undesirable for child-rearing.⁶⁵ Tradition's conclusions about the cultural inferiority of Blacks, ranging from Thomas Jefferson's 1781 *Notes on the State of Virginia*⁶⁶ to Josiah C. Nott's 1844 *Two Lectures on the Natural History of the Caucasian and Negro Races*⁶⁷ as well as, more contemporaneously, Richard J. Herrnstein and Charles Murray's 1994 *The Bell Curve: Intelligence and Class Structure in American Life*⁶⁸ and reflections on how immigration from the Global South threatens Western civilization,⁶⁹ produce the same outcome that laws against miscegenation sought. Indeed, these views are the very prejudice that allowed many states to dispense with anti-miscegenation laws.⁷⁰

In sum, Tradition's body of conclusions about social phenomena can undermine social peace. This is because those conclusions, formed in specific historical contexts and events, exclude other possibilities developed in other contexts and informed by other events. In sketching the contours of classical revival, Vermeule's CGC Monograph is too glib about this limitation.

⁶⁴ Michael Grossberg, *Physiological Restrictions and the Rise of State Intervention in Matrimony*, 26 AM. J. OF LEGAL HISTORY 198, 201-202 (1982) (citing JOEL P. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE (1852)).

⁶⁵ Brief and Appendix on Behalf of Appellee at 45, *Loving v. Virginia*, 1967 WL 113931 (1967) (citing JOHN LAFARGE, THE RACE QUESTION AND THE NEGRO: A STUDY OF THE CATHOLIC DOCTRINE ON INTERRACIAL JUSTICE (1943)).

⁶⁶ THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 238-243 (Adrienne Koch & William Peden eds., 1993) (arguing that unlike their European counterparts noted in the writings from antiquity, enslaved Blacks are too dull, idle, and sensual for U.S. citizenship).

⁶⁷ THE IDEOLOGY OF SLAVERY: PROSLAVERY THOUGHT IN THE ANTEBELLUM SOUTH, 1830–1860 208-238 (Drew Gilpin Faust ed., 1981) (arguing general cultural inferiority of Blacks and Native Americans ruling out intermixing).

⁶⁸ Arguing that intelligence is a predictor of social outcomes and is tied to race, with Blacks being the least intelligent.

⁶⁹ To take one example from an author that a New York Times article described as “gregarious and personable” and “looking like an aging hipster,” see Rob Dreher, *Of Sh*tholes and Second Thoughts*, THE AMERICAN CONSERVATIVE (January 19, 2018), <https://www.theamericanconservative.com/of-shitholes-and-second-thoughts/> (citing former Peace Corps volunteer's observations that west African nations are “shitholes” based on cultural practices of open defecation in public, bureaucratic kleptocracy, and inertia). For the New York Times article so characterizing Dreher, see Elizabeth Zerofsky, *How the American Right Fell in Love with Hungary*, N.Y. TIMES (October 19, 2021), <https://www.nytimes.com/2021/10/19/magazine/viktor-orban-rod-dreher.html>.

⁷⁰ Grossberg, *supra* note 64, at 200 (“The most racially conscious states formally banned such [interracial] unions, the rest made the more common antebellum assumption that private prejudice would accomplish the same result.”)

III. TUTELARY SUBSIDIARITY: PLURALIST COEXISTENCE THROUGH MUNICIPALISM

Lest the foregoing discussion imply that Tradition is irredeemably hostile to pluralist coexistence, this Article turns to some rehabilitation. Like every great legal theory, Vermeule's CGC offers the solution to its problem, albeit one that Vermeule likely rejects.⁷¹ That CGC does so is due to Vermeule's aforementioned genius for articulating the natural law Traditions' breadth, *pace* popular takes such as George F. Will's.⁷² The vastness point came up on the Introduction: Vermeule's theory posits that our legal tradition accepts broad exercises of power to advance the common good limited only by natural law.⁷³ He grasps that the classical legal tradition represents a mere body of principles channeling power and instructing those charged with legal determination in resolving disputes about the use of power. Classically informed judges determining a case should permit appropriate officials to exercise such broad power by reading Tradition's account of structure into constitutional and legislative text. In a word, CGC, in reviving the classical legal tradition, reminds the Anglo-American tradition that using power to advance the common good is proper and what government exists to do.⁷⁴

Vermeule's genius brings us to the Article's main argument. Here, I draw upon such vastness to claim that the Tradition's principle of subsidiarity can secure a place for dissenters even within a Traditionalist legal order. Because this central argument departs from Vermeule's own treatment of subsidiarity in the CGC Monograph,⁷⁵ it must be thoroughly developed. That occurs in four (4) subsections. The first, subsection A, explains what subsidiarity is in the classical legal tradition. The second, subsection B, lays out what subsidiarity would mean for the U.S. constitutional order. Relying on Steven G. Calabresi and Lucy Bickford's 2014 paper, it explains how subsidiarity generally fits into the U.S. constitutional scheme. Then it posits five principles that subsidiarity implies into the U.S. constitutionalism: the right of municipal association, the simplification of dormant commerce clause and preemption doctrines, the municipal norm of regulatory specificity, the replacement of Dillon's rule with Cooley's rule, and the federal and state norm of regulatory generality. In subsection C, the Article concretizes how this subsidiarity structure can advance progressive interests amid live legal controversies about Tradition's effect on dissenters provoked by the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.⁷⁶ It ends, in subsection D, with some observations on how subsidiarity municipalism is a legitimate expression of Tradition in that it is consistent with Tradition's virtue regulation.

⁷¹ See *supra*, notes 21 and 22 and accompanying text.

⁷² *Supra*, note 32.

⁷³ CGC MONOGRAPH, *supra* note 2, at 42 (citing ADRIAN VERMEULE, LAW'S ABNEGATION: FROM ADMINISTRATIVE LAW TO THE ADMINISTRATIVE STATE (2016)).

⁷⁴ On this as a revival, see CGC Monograph, *supra* note 2, ch. 2 generally (surveying history of legal classicism in U.S. law).

⁷⁵ *Id.* at 154-158.

⁷⁶ 597 U.S. 215 (2022).

A. SUBSIDIARITY ACCORDING TO TRADITION: PLURALIST LOCALISM

In chapter 5 of the CGC Monograph, Vermeule engages with subsidiarity toward indicating one way that CGC applies to U.S. constitutionalism. His treatment largely frames the concept as a synonym for the libertarian conception of limited government.⁷⁷ He contrasts this conception, which he characterizes as negative, with a positive version. The positive version provides that limitations on any higher sphere's power are prudential rather than formalistic. By prudential, he means that higher orders remain available to assume localities' functions during what he terms states of exception.⁷⁸ Because he focuses on positive subsidiarity largely as a corrective to libertarianism, he omits the full measure of what subsidiarity affords under the Western legal tradition. This subsection develops what he omits.

In Western legal tradition, subsidiarity has long stood as a natural law⁷⁹ principle of ordering authority according to a preference for proximity, or rule by authoritative bodies closest to people on the ground.⁸⁰ As scholarship has emphasized, it is a principle, not a hard and fast restriction;⁸¹ therefore, it allows myriad applications. Subsidiarity's diverse manifestations are reflected in the dispute among Western theorists about why subsidiarity governs: whether it is a principle born of social reality or efficiency.⁸² But as Maria Cahill's scholarship makes clear, this debate can be framed as Tradition's understanding of subsidiarity versus the contemporary understanding in European Union, North American, and South American constitutional debate.⁸³ Since it is the contemporary view that has produced the most varied manifestations, including applications appearing to contradict subsidiarity's commitment to proximity,⁸⁴ this subsection elaborates what Tradition provides about subsidiarity. As such, it departs from Vermeule's treatment of subsidiarity but follows his broader CGC method of providing modern law's classical genealogy.

Scholars agree that the word "subsidiarity" comes from the Roman Catholic Church's social doctrine, specifically Pope Pius XI's 1931 encyclical

⁷⁷ CGC MONOGRAPH, *supra* note 2, at 154-155.

⁷⁸ *Id.* at 156-157. The distinction between positive and negative subsidiarity also is discussed in Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, 44 HOKKAIDO L. REV. 652, 642-643 (1992).

⁷⁹ That subsidiarity is a part of the natural law, see John M. Finnis, *Subsidiarity's Roots and History: Some Observations*, 61 AM. J. OF JURISPRUDENCE 133, 135 [hereinafter "Finnis Sub. Roots"] (citing JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980)).

⁸⁰ Maria Cahill, *Subsidiarity as the Preference for Proximity*, 66 AM. J. OF JURISPRUDENCE 129, 130-133 (2021) [hereinafter "Cahill 2021"].

⁸¹ *Id.* at 133-134.

⁸² Finnis Sub. Roots, *supra* note 79, at 141 (2016); Cahill 2021, *supra* note 80, at 131.

⁸³ Maria Cahill, *The Origins of Anti-Subsidiarity Trends in the Regulation of the Family*, 4 INT'L J. OF THE JURISPRUDENCE OF THE FAMILY 85, 89-91 (2013) [hereinafter "Cahill 2013"] (identifying subsidiarity as rooted in pre-existing social ontology recognizing "a collection of naturally occurring primary units for the sake of offering assistance to which the subsidiarity units come into being."); Cahill 2021, *supra* note 80, at 130-31 (explaining confusion about subsidiarity's centripetal or centrifugal explanations and lack of consensus about why it should be).

⁸⁴ Cahill 2021, *supra* note 80, at 130-131.

Quadragesimo Anno.⁸⁵ The scholarly consensus is also that the term “traces its origins as far back as classical Greece, and was later taken up by Thomas Aquinas and medieval scholasticism.”⁸⁶ From these origins, scholarship has identified that, as Tradition has understood it, subsidiarity describes an understanding of how coercive authority should be exercised. It holds that certain social matters should be resolved at the most local and proximate level of authority – units as small as the nuclear family – as a matter of justice. This point about justice is what most distinguishes classical subsidiarity from the contemporary form found in debates about the European Union. For the classical understanding regards local control as the natural order, a reflection of Aristotelian anthropology holding that human beings, as social animals, form natural associations as a conative endeavor.⁸⁷ Such Aristotelian anthropology as later developed by scholastics, most prominently Thomas Aquinas and later commentators on his view such as Luigi Taparelli, came to regard government as another type of human association, one whose function is to be auxiliary support for more proximate associations.⁸⁸

Classical subsidiarity explains why local government exists. It is so that an association of human beings can live the common good as an everyday reality. To express what classical subsidiarity grasps through Vermeule’s metaphor,⁸⁹ a giant may well possess the power to carry out the same functions as a local government. But it cannot *genuinely* rule without knowledge of circumstances that presuppose proximity and immediacy. In other terms, subsidiarity ensures that government serves its ultimate role in natural law theory of securing temporal tranquility⁹⁰ by tying the exercise of government authority to the most natural bonds.

For this reason, classical subsidiarity has conceptualized higher orders—national and state governments—as necessary aspects of localism.⁹¹ This is a point Vermeule also makes,⁹² but again without sufficient elaboration of the specific. For

⁸⁵ E.g., THOMAS C. BEHR, *SOCIAL JUSTICE AND SUBSIDIARITY: LUIGI TAPARELLI AND THE ORIGINS OF MODERN CATHOLIC SOCIAL THOUGHT* 92 (2019). Accord Steven G. Calabresi & Lucy D. Bickford, *Federalism and Subsidiarity: Perspectives From U.S. Constitutional Law in Federalism and Subsidiarity*, in *FEDERALISM AND SUBSIDIARITY* NOMOS LV 126-127 (James D. Fleming & Jacob T. Levy eds., 2010).

⁸⁶ Calabresi & Bickford, *supra* note 85, at 126. See also CHANTAL MILLOL-DELSON, *LE PRINCIPE DE SUBSIDIARITÉ* 9 (1993); Finnis Sub. Roots, *supra* note 76, at 133-38; BEHR, *supra* note 85, at 98-99.

⁸⁷ Cahill 2013, *supra* note 79, at 90-91.

⁸⁸ BEHR, *supra* note 85, at 102-107 (linking subsidiarity to Taparelli’s use of the Hellenistic term “hypostatic association” for the role of government, a term drawn from Roman legionary battle formations and tactics where forces were connected and interrelated to support the common purpose of the cohort, century, and legion).

⁸⁹ See CGC MONOGRAPH, *supra* note 2, at 154.

⁹⁰ JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 222-224 (1998) [hereinafter “FINNIS AQUINAS”].

⁹¹ Cahill 2013, *supra* note 83, at 90-93.

⁹² CGC MONOGRAPH, *supra* note 2, at 158-159. Recently, Vermeule has more strongly asserted that empire exists to protect what he terms due subsidiarity. See Adrian Vermeule, *Dominus Mundi: the Law, Politics and Theology of Empire: A Catalogue Raisonné*, THE NEW DIGEST (June 18, 2024), <https://thenewdigest.substack.com/p/dominus-mundi-the-law-politics-and> [hereinafter “Vermeule Dominus Mundi”]:

It is a simple mistake, both conceptually and historically, to understand [empire] as intrinsically homogenizing, as hostile to the distinctiveness of peoples (*gentes*),

according to Tradition, strong government exists to sustain local bodies: this is what the term “subsidiarity” means to get at. Again, to borrow his metaphor, the giant is a tutelary matrix for human society, which exists at the local level. To follow Vermeule in explaining this legal principle by reference to Catholic doctrine, the local parish⁹³ presupposes and requires the Universal Church by whose support it can exist and through which it stands as a church rather than a community center. This is because a local parish is both a part of a whole as well as the entirety of the Universal Church where individuals, occupying their bits of space-time, can ever meet.⁹⁴ That last point must be emphasized: local government, say, a police officer, the Post Office, and the DMV, are each both branches of greater reality but also the entire experience of government for many citizens. It is this existential proximity that especially demands them to be socially inclusive so that all citizens can receive the benefit of government.

That classical subsidiarity advances a pluralistic social order is further clarified by one of its precedents: Roman practice of allowing local laws to govern local communities' affairs.⁹⁵ Before elaborating the content of this practice, it is essential to explain why it informs the understanding of classical subsidiarity. Scholarship on subsidiarity's origins has omitted Roman practice because it has elided over what its theorists drew upon to develop the concept. For example, John Finnis cites the third book of Aquinas' *Summa Contra Gentiles* as one of subsidiarity's sources, quoting a passage where Aquinas argues that God respects the free will of human beings even if it should lead them to do wrong in the same way that government authority is bound to respect the free will of people to the same consequences.⁹⁶ The comparison appears to infuse subsidiarity with moralism, so appearing to support Finnis' contention elsewhere that subsidiarity is more a moral than legal principle in that it reflects Aquinas' view that one becomes virtuous by doing, not merely by receiving.⁹⁷ But the structure of the analogy actually points to Aquinas' political pragmatism, the art of administration. Aquinas' explanation of how divine providence is compatible with permitting evil to occur relies upon his contemporaries' familiarity with how government authority had been exercised.

nations in the classical sense (*nationes*), and cultures. Rather, empire rightly understood is itself founded upon appropriate subsidiarity that respects the particular peoples, histories, organic cultures, and political forms determined in particular societies; and empire rightly understood is itself the overarching structure needed to protect local variation and local cultures.

⁹³ Interestingly, its rough equivalent in the Church of England, the parish council, is a microunit of local government in English and Welsh Law. See Cahill 2021, *supra* note 80, at 141 (citing N.W. BARBER, THE PRINCIPLES OF CONSTITUTIONALISM (2018)).

⁹⁴ CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Letter to the Bishops of the Catholic Church on Some Aspects of the Church Understood as Communio*, ¶ 10 (May 28, 1992), https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_28051992_communionis-notio_en.html?ref=fivebooksforcatholics.com.

⁹⁵ Clifford Endo, *Legal Pluralism in Practice*, in THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY 298 (Paul J. du Plessis, Clifford Ando, & Kaius Tuori eds., 2016) [hereinafter “Endo 2016”] (citing Trajan's correspondence with Pliny and the papyrus records of judicial proceedings from the reign of Trajan to show that Roman law authorized local polities to exercise legislative authority over particular landscapes).

⁹⁶ FINNIS AQUINAS, *supra* note 90, at 138.

⁹⁷ *Id.* at 147.

What they would have been familiar with was Roman practice, a clear influence on Aquinas' thinking that can be determined not only by reference to the intellectual climate in which he wrote⁹⁸ but also forensically. To marshal the forensic evidence, in Aquinas' *De Regno*, his sole tract on government,⁹⁹ he argues based on Roman examples. For instance, he warns that monarchy is tempted to tyranny by citing incidents discussed in Sallust's *Bellum Catilinae*.¹⁰⁰ Elsewhere, he cautions against worse tyranny by further citing Tarquin the Proud and Domitian.¹⁰¹ Especially in view of John Finnis' observation that contemporary events "leave almost no palpable trace in Thomas's writings,"¹⁰² Aquinas' reliance on Roman practice in his government theory renders such essential to understanding his legal thought. For it sources what another scholar describes as one of his principles: that government and legislation is more an art than ethics, an issue of practice, not theory, particular in nature, and contingent on events.¹⁰³

Similarly, Finnis' engagement with Luigi Taparelli's treatise that informs *Quadragesimo Anno* omits Roman practice as its source.¹⁰⁴ Amply citing its passages, Finnis frames Taparelli's discussion of subsidiarity as a normative ethical-social theory¹⁰⁵ but omits the historical facts upon which the discussion is based. As review of footnotes in Taparelli's treatise establish, some of these facts are examples from Rome and Athens showing the necessity of dividing society into lesser consortia.¹⁰⁶ They also include historians' sense that during the fall of imperial Rome, cities survived as bodies of public order based on their origins as natural human associations.¹⁰⁷

Having established that understanding Roman practice unlocks subsidiarity, this subsection now turns to elaborating its content. At a broad level, the Roman Empire "had a clear practice of conceding so-called 'autonomy' to conquered populations. In Greek and Roman practice, 'autonomy' consisted of the right of a politically consisted community 'to use its own laws' in regulating private-law affairs among those dwelling in its territory."¹⁰⁸ "Local communities held an essential position in the government of the Roman empire: most of the daily business of governing was left to the hands of magistrates of the local communities[.]"¹⁰⁹ Governors, representatives of the imperial order within such communities, delegated administration to local government where it was found and encouraged local government where there was none.¹¹⁰ Local government was a presupposition

⁹⁸ THOMAS GILBY, *THE POLITICAL THOUGHT OF THOMAS AQUINAS* xxvi, 2 (1958) [hereinafter "GILBY POLY. THOUGHT"] (contending that the revival of Roman Law was among the events and ideas that Aquinas contended with).

⁹⁹ FINNIS AQUINAS, *supra* note 90, at 140.

¹⁰⁰ DE REGNO, I, ch. 5, 31, 32, and 33.

¹⁰¹ *Id.* at ch. 7, 49.

¹⁰² FINNIS AQUINAS, *supra* note 90, at 3.

¹⁰³ GILBY POLY. THOUGHT, *supra* note 98, at xxiv.

¹⁰⁴ Finnis Sub. Roots, *supra* note 76, at 139-140.

¹⁰⁵ *Id.*

¹⁰⁶ BEHR, *supra* note 85, at 205, fn. 3.

¹⁰⁷ *Id.* at 208, fn. 8.

¹⁰⁸ Endo 2016, *supra* note 95, at 284.

¹⁰⁹ Saskia T. Roselaar, *Local Administration*, in *THE OXFORD HANDBOOK OF ROMAN LAW AND SOCIETY* 124 (Paul J. du Plessis, Clifford Ando, & Kaius Tuori eds., 2016)

¹¹⁰ ANDREW LINTOTT, *IMPERIUM ROMANUM: POLITICS AND ADMINISTRATION* 54 (1993).

of the Roman model of provincial authority, one that gave governors limited duties and jurisdiction.¹¹¹ For the various peoples living within the empire, their everyday rights were determined by the *civitas* where they were born, a term encompassing what we call a town, territory, or group of rural communities.¹¹² Roman law referred to this idea as the law's personality.¹¹³

This principle of localism extended to jurisdiction, or the question of who was to administer legal order. This produced variety on which matters a governor administered toward centralizing Roman authority and which a governor deferred to local communes.¹¹⁴ The variety produced different jurisdictional practices. For example, Roman Sicily was governed by a gubernatorial decree that allowed use of Sicilians' local law for disputes arising between members of the same *civitas*.¹¹⁵ For Greeks within Roman Asia, Roman Governor Scaevola's edict of the first century before the common era allowed them to sue another according to their own laws, so sorting out a jumble of inconsistent practices.¹¹⁶ Roman Cyrene, by contrast, was governed by gubernatorial edicts subjecting even local disputes to Roman officials' determination, a reality suggesting the use of Roman law.¹¹⁷ The practice of more gubernatorial involvement in Cyrene than in other provinces likely was because of Cyrene's smaller size relative to larger cities in other provinces,¹¹⁸ an apparent state of exception inviting a higher order's more active management.

Localism was how the Roman empire governed as a matter of crude pragmatism since "ancient states generally lacked the infrastructural power to universalize their metropolitan culture."¹¹⁹ In addition, a cultural consideration informed the practice: governors and their staff also were "not conditioned to believe that they should carry out the comprehensive regulation of the life of the people subject to them."¹²⁰ Since Roman law recognized the imperial order's power of intervention,¹²¹ local deference must be understood as a matter of constitutional principle. To put it differently, because the practical necessity was so obvious as a matter of human limitation, it amounted to a political preference foundational to maintaining peace and order in vast and diverse territory.¹²²

¹¹¹ *Id.* at 129.

¹¹² *Id.* Clifford Endo notes how *civitas* also can mean a juridically constituted community. See Endo 2016, *supra* note 95, at 289.

¹¹³ BARRY NICHOLS, AN INTRODUCTION TO ROMAN LAW 57 (1962); José Luis Alonso, *Constitutio Antoniniana in the Eastern Empire*, in LAW IN THE ROMAN PROVINCES 56 (Kimberly Czajkowski & Benedikt Eckhardt eds., 2020).

¹¹⁴ LINTOTT, *supra* note 110, at 57.

¹¹⁵ *Id.* at 59.

¹¹⁶ *Id.* at 62-63.

¹¹⁷ *Id.* at 64-65.

¹¹⁸ *Id.* at 65.

¹¹⁹ Clifford Ando, *Pluralism and Empire: From Rome to Robert Cover*, 1 CRITICAL ANALYSIS OF LAW: AN INTERNATIONAL & INTERDISCIPLINARY LAW REVIEW 1, 2, & 9 (2014) [hereinafter "Endo 2014"].

¹²⁰ LINTOTT, *supra* note 110, at 54.

¹²¹ *Id.* at 132. See also FRITZ SCHULZ, PRINCIPLES OF ROMAN LAW 163 (1936).

¹²² NICHOLS, *supra* note 113, at 9 (arguing that the Roman Empire also cultivated and managed difference "toward constraining the social and economic activity of conquered populations within specific geographical parameters")

To state local deference as a preference must not obscure its status as law, however. It is articulated in Gaius' Institutes, the only surviving legal textbook from antiquity.¹²³ The law of local deference also stated the basis for central authority based on its principle of two orders. Gaius' Institutes states that Roman subjects are governed both by particular civil law, which they establish for themselves or their specific *civitas*, and the *ius gentium*, based on principles common to humankind and so universally observed.¹²⁴ Since Gaius' statement was published in the common era's second century, centuries after the apex of Roman territorial conquest, scholarship assumes it reflects long-developed practice¹²⁵ and is firmly established in the era's imperial thinking.¹²⁶

More important than its antiquity is its substance. The legal distinction between *ius civile* and *ius gentium* produced local deference on private law matters—family law and matters relating to a specific community—and centralized, Roman law governing relations between members of the empire.¹²⁷ Some examples from peripheral, local communities help characterize which fell into which. José Luis Alonso has observed that for the 250 years spanning its annexation into Rome and extension of full citizenship to its members, Roman Egypt was governed by a constitution consistently endorsing the use of local private law in disputes involving “peregrines,” or non-citizen locals.¹²⁸ As examples of how this applied, Alonso mentioned Roman courts' wholesale application of local laws despite their incompatibility with Roman legal principles. Conveying the extent to which this was a strong practice of localism requires full quotation:

In the absence of autonomous courts, peregrine private law would not have kept its hold in Egypt without the consistent endorsement of the Roman jurisdiction. The surviving court documentation confirms this assumption. The usual term “tolerance” is insufficient here. Peregrine law was not merely tolerated but unfailingly applied by the Roman courts, even when it challenged the most basic Roman principles. And thus: (a) sibling marriage; practices close to (b) *materna potestas* and (c) maternal

¹²³ *Id.* at 8, 34-35.

¹²⁴ *Id.* at 8.

¹²⁵ *Id.*

¹²⁶ See *supra*, note 95 (citing Trajan's correspondence and papyrus records of judicial proceedings during Trajan's reign).

¹²⁷ NICHOLS, *supra* note 113, at 57-58 (noting Roman deference to local laws on family and succession matters, and noting *ius gentium* governing interactions between foreigners and Roman citizens and between foreigners). See also SCHULZ, *supra* note 121, at 145-47 (explaining private law individualism contained in Roman liberty); LINTOTT, *supra* note 110, at 156-57 (noting various examples throughout Roman empire of family law deference); FRANCIS DE ZULUETA, THE INSTITUTES OF GAIUS: PART II: COMMENTARY 12-13 (1953) (noting that *ius gentium* was a common law for all Roman subjects regardless of their *civitas*, especially a common commercial law based on the common sense and practice of the Mediterranean world).

¹²⁸ José Luis Alonso, *The Status of Peregrine Law in Egypt: “Customary Law” and Legal Pluralism in the Roman Empire*, 43 JOURNAL OF JURISTIC PAPHROLOGY 351, 352-54 (2013) [hereinafter “Alonso 2013”]; José Luis Alonso, *Constitutio Antoniniana in the Eastern Empire*, in LAW IN THE ROMAN PROVINCES 44, 56 (Kimberly Czajkowski & Benedikt Eckhardt eds., 2020)

guardianship; (d) succession in stirpes in the female line; (e) contractual mortis causa arrangements; (f) *divisio parentis inter liberos* covering the whole inheritance: all this persisted under Roman rule among peregrines, and was, as long as Romans were not involved, accepted as fully valid by the Roman administration.¹²⁹

As another example from Cédric Brélaz's scholarship, the Council of Hierapolis, a local community in Roman Asia that never attained the status of a free city, was permitted to regulate the law enforcement activities of certain local officials called *paraphylakes*. As these officials "were in charge of patrolling the countryside and preventing misconducts and crimes in the rural territory belonging to cities,"¹³⁰ they were officially part of the imperial order protecting public security. Despite this, that local council was allowed to specify, under penalty of fines payable to its treasury and sanctions such as the deprivation of all local honors, which forms of material support such officials could request from villagers. The local council enacted such regulation to prevent abuse that villagers had complained about to Roman authorities, demonstrating imperial sanction of the local measure.¹³¹

To demonstrate that both the practice and law of local deference are rooted in the Aristotelian anthropology driving classical subsidiarity, I here cite three sources. The first two are Barry Nichols' 1962 introduction to Roman Law professing to "draw out the fundamental assumptions and distinctions of Roman law"¹³² and H.F. Jolowicz's 1965 study of Roman law claiming to supplement legal textbooks by providing students with "everything they need to know about Roman law."¹³³ Nichols observes that the first principle of Gaius' Institutes distinguishing between "man-made law, which is particular to one state, and natural law, which is universal" is substantially the same proposition that Aristotle propounded.¹³⁴ Jolowicz claims that Gaius' first principle articulates a stream of Roman juridical thought also derived from Aristotelian theory: the same distinction between natural law that is universal and so common to all humankind and "man-made" law governing matters where, Nature being indifferent, a community was free to lay down its own rules.¹³⁵ Like Nichols,¹³⁶ Jolowicz's discussion focuses on the natural law rather than the civil law. And he similarly contends that the Institutes' foundational principle is "almost in the words of Aristotle."¹³⁷ As for the third source, Peter Stein more recently observed that the Romans' "philosophy of law was borrowed from the Greeks," as, unlike Greek speculation about the nature of law and its place in society, Roman law was far more interested in rules and proceedings.¹³⁸ From all

¹²⁹ Alonso 2013, *supra* note 128, at 352-353. Lintott also notes Roman tolerance of "endogamy, especially brother-sister marriage – a fundamental breach of [Roman] law and tradition." LINTOTT, *supra* note 110, at 157.

¹³⁰ Cédric Brélaz, *Roman Criminal Law and Procedure in Asia Minor*, in LAW IN THE ROMAN PROVINCES, *supra* note 113, at 159.

¹³¹ *Id.* at 164-166.

¹³² NICHOLS, *supra* note 113, at v.

¹³³ H.L. JOLOWICZ, HISTORICAL INTRODUCTION TO THE ROMAN LAW xvii (1965).

¹³⁴ NICHOLS, *supra* note 113, at 54-55.

¹³⁵ JOLOWICZ, *supra* note 133, at 103-04.

¹³⁶ NICHOLS, *supra* note 113, at 65-56.

¹³⁷ JOLOWICZ, *supra* note 133, at 104.

¹³⁸ PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY i (1999).

this, we can conclude that Roman law's pluralist localism comes from Aristotle's thought.

The strength of pluralist localism within the classical legal tradition is evidenced by its most begrudging form—Christendom's practice with Jews. Even in a society explicitly organized to produce Christian faithful¹³⁹—a notion in great tension with religious dissent—Roman subsidiarity can be discerned. The Papal States, the portion of Christendom most committed to Christendom's aim, nonetheless embraced a legal doctrine allowing Jewish outsiders to maintain some form of autonomous communities under administrative protection, including a right to maintain synagogues.¹⁴⁰ This was a part of Christendom's commitment to maintaining Roman practice hailing from its inception.¹⁴¹ Of course, the rank discrimination¹⁴² and sordid record of hostility and pogroms that also characterize Christendom's relationships with Jews¹⁴³—ones absent from classical Rome¹⁴⁴—serve as a reminder of how disruptive prejudice can be to social peace, as noted at the end of Section II. The problem of violence seems to stem from the begrudging aspect. Christendom only tolerated Jews based on a respect for precedent with the hope of their conversion, either immediately or during the final judgment,¹⁴⁵ rather than Roman pragmatic pluralism.¹⁴⁶ However fatuous it may be to reduce centuries of history to a single proposition, the comparison to imperial Rome shows that mere difference does not foment violence. Rather, a resistance to pluralist coexistence appears to do so, as the treatment of minorities is the acid test of democracy.¹⁴⁷ So, Christendom's treatment of Jews also serves to reinforce how the embrace of subsidiarity, and not the mere incantation of precedent, is essential to social peace.

B. THE STRUCTURE OF CLASSICAL SUBSIDIARITY: FIVE IMPLICATIONS FOR U.S. CONSTITUTIONALISM

This subsection addresses classical subsidiarity's mechanics and their implications for U.S. constitutionalism. It offers a framework for domesticating subsidiarity into U.S. constitutionalism so that municipalism might advance pluralist coexistence.

¹³⁹ See, e.g., Colin Morris, *Christian Civilization*, in THE OXFORD HISTORY OF CHRISTIANITY 208 (John McManners ed., 1993) (describing Christendom as “the conscious elaboration of a programme which was to bring mankind under the law of Christ.”).

¹⁴⁰ EDWARD A. SYNAN, THE PEOPLES AND THE JEWS IN THE MIDDLE AGES 19 (1965); SOLOMON GRAYZEL, THE CHURCH AND THE JEWS IN THE XIIITH CENTURY. VOLUME II: 1254-1314 3-5 (Kenneth R. Stow ed., 1989); SHLOMO SIMONSOHN, THE APOSTOLIC SEE AND THE JEWS, HISTORY 39 – 45 (1991). That is derives from Roman practice, see LINTOTT, *supra* note 110, at 158 (noting that Romans accepted Jews as a nation with their own religion and forms of private law until the fourth century C.E.).

¹⁴¹ SIMONSOHN, *supra* note 140, at 38-41 (observing imperial roots of Christendom's protection of Jews).

¹⁴² *Id.* at 7-8 (describing various civil restraints on Jews' rights such as prohibiting mixed marriages and the denial of their right to admit evidence).

¹⁴³ SYNAN, *supra* note 140, at 1.

¹⁴⁴ *Id.* at 18-19.

¹⁴⁵ SIMONSOHN, *supra* note 140, at 4.

¹⁴⁶ See *supra* notes 108 through 122 and accompanying text.

¹⁴⁷ THOMAS GILBY, BETWEEN COMMUNITY AND SOCIETY: A PHILOSOPHY AND THEOLOGY OF THE STATE 8 (1953).

The argument here first identifies how subsidiarity fits into the general U.S. constitutional scheme, drawing on Steven G. Calabresi and Lucy D. Bickford's 2014 paper.¹⁴⁸ It then builds on their argument by positing five principles that classical subsidiarity incorporates into U.S. constitution, elaborating how each is grounded in the Roman localism discussed above Section III.A.¹⁴⁹

At a high level of generality, subsidiarity accounts for some basic features of U.S. federalism. I agree with Calabresi and Bickford that George A. Bermann's contention during debates about including subsidiarity in the European Union's constitution¹⁵⁰ is wrong.¹⁵¹ Contrary to Bermann's observation, subsidiarity does have a normative role in U.S. constitutionalism; it explains how popular sovereignty endures through the paradox of omnipotent limited governments.¹⁵² Although U.S. constitutional law has not used the term subsidiarity, as Bermann observed,¹⁵³ it better accounts for the operation of U.S. government's federalist structure for reasons Calabresi and Bickford elaborate.¹⁵⁴ They amply lay out how constitutional enforcement through judicial review and the Rehnquist Court's commerce clause, dormant commerce clause, preemption, federal jurisdiction, and conflicts of laws jurisprudence are how the U.S. constitutional system has accommodated subsidiarity demands.¹⁵⁵ Here, we can summarize the gist. Consistent with the dual federalism ostensibly established in the constitutional text,¹⁵⁶ each governmental sphere possesses absolute power within its role. But the way U.S. constitutionalism has ensured that such raw power advances the general welfare is through checks-and-balances coordination.¹⁵⁷ The emergence of this coordination, denominated as the cooperative federalism that emerged during New Deal and Great Society policymaking,¹⁵⁸ is archetypal classical subsidiarity. To take

¹⁴⁸ See *supra*, note 85.

¹⁴⁹ See *supra*, notes 108 through 122 and accompanying text.

¹⁵⁰ George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 70 COLUM. L. REV. 331, 403-404 (1994) (arguing that subsidiarity has little role in U.S. constitutional order.).

¹⁵¹ See Calabresi & Bickford, *supra* note 85, at 127 (explaining disagreement with Bermann's argument).

¹⁵² See *id.* at 145.

¹⁵³ See *supra*, note 150.

¹⁵⁴ Calabresi & Bickford, *supra* note 85, at 127-128. Accord Daniel Halberstam, *Federal Powers and the Principle of Subsidiarity*, in GLOBAL PERSPECTIVES ON CONSTITUTIONAL LAW 35 (Vikram David Amar & Mark V. Tushnet eds., 2009).

¹⁵⁵ *Id.* at 137 – 159.

¹⁵⁶ Michael S. Grieve, *Federalism*, in THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 437-438 (Mark Tushnet, Mark A. Graber, & Sanford Levinson eds., 2015)

¹⁵⁷ See, e.g., Joshua D. Sarnoff, *Cooperative Federalism, The Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 212-214 (1997) (noting that federal legislators enact schemes of cooperative federalism because state implementation may produce better outcomes, including overcoming political resistance and producing better tailored regulation).

¹⁵⁸ See, e.g., Philip J. Weiser, *Towards A Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668 – 670 (2001) (citing New Deal's Aid to Families with Dependent Children and Great Society's Medicaid schemes as sign points of cooperative federalism, which envisions a sharing of regulatory authority between the federal government and the states that allows states to regulate within a framework delineated by federal law).

one example, the history of U.S. affordable housing policy serves as a microcosm of U.S. constitutional development from dual to cooperative federalism. For that history is a movement from the federal government owning and operating such housing to supporting local bodies doing so and then to embracing a system where the higher orders of government subsidize private developers to do so with funding and under standards administered by local bodies.¹⁵⁹ This movement has reflected the reality that government operates locally—there is scarcely any other way in so vast a polity.¹⁶⁰ But local government, in turn, is powerless to be effective without a giant’s mediation, support, and protection. From this comes civics’ description of the U.S. federalist order as one where local government primarily provides services and carries out operations and state and federal government primarily funds and regulates with coordinated overlap.¹⁶¹ As sketched above in Section III.A, this basically corresponds to the complementary roles of the imperial and provincial governments under the Roman constitution.¹⁶²

Such pragmatic operation helps us to see how classical subsidiarity explains the endurance of the federalist order under the 1787 U.S. Constitution. It is important to remember the current constitutional order is not the United States’ first. The order under Articles of Confederation was the first and is conventionally understood to have failed because it left the national government unable to protect local governments.¹⁶³ To put this in terms of both Vermeule’s and Casey Conon’s more recent arguments,¹⁶⁴ the problem with the United States’ first attempted constitutional order was its inability to ensure that the spheres worked together toward the common good. Without omnipotent spheres mediating and checking warring factions in a transcontinental polity,¹⁶⁵ the social tranquility that government exists to ensure is unachievable.¹⁶⁶

¹⁵⁹ MAGGIE MCCARTY, LIBBY PERL & KATIE JONES, CONG. RSCH SERV., RL34591, OVERVIEW OF FEDERAL HOUSING ASSISTANCE PROGRAMS AND POLICY 1–10 (2019), <https://crsreports.congress.gov/product/pdf/RL/RL34591>.

¹⁶⁰ See, e.g., Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1504, 1507–1510 (1987) (arguing that U.S. constitutional framers believed that republican government can occur only in small jurisdictions because legal compliance depends on voluntary compliance presupposing governmental units small and close to the people and that public virtue can only be cultivated in local communities as it depends on the natural sentiment of benevolence.)

¹⁶¹ See, e.g., GERALD A. FISHER, LOCAL GOVERNMENT LAW: A PRACTICAL GUIDEBOOK FOR PUBLIC OFFICIALS ON CITY COUNCILS, COMMUNITY BOARDS, AND PLANNING COMMISSIONS 3–10 (2021); *State and Local Government*, THE WHITE HOUSE, <https://bidenwhitehouse.archives.gov/about-the-white-house/our-government/state-local-government/> (last visited March 15, 2025).

¹⁶² See *supra*, notes 127 through 131 and accompanying text.

¹⁶³ This is the conclusion in a recent study of the decline and fall of the Articles of Confederation. See GEORGE WILLIAM VAN CLEVE, WE HAVE NOT A GOVERNMENT: THE ARTICLES OF CONFEDERATION AND THE ROAD TO THE CONSTITUTION 8 (2017).

¹⁶⁴ Vermeule Dominus Mundi, *supra* note 92 (arguing that empire exists to provide universal peace); Casey Const. Change, *supra* note 47, at 8–9 (citing John Finnis, *Limited Government*, in HUMAN RIGHTS & COMMON GOOD 83–101 (2011) in arguing that classical legal tradition regards excessively limited government unable to address private abuses as a threat to the common good).

¹⁶⁵ Federalist No. 10.

¹⁶⁶ See *supra*, note 90.

Applying classical subsidiarity to the U.S. constitutional order implies five principles correcting or clarifying prevailing deviations from the classical legal tradition in U.S. constitutionalism. They are as follows: (1) people enjoy a foundational right to local government rooted in their right of association; (2) municipal government governs local affairs; (3) subsidiarity imposes on municipalities and municipal officials a duty to regulate based on transparent, publicly declared findings of local facts and circumstances; (4) the interpretation of municipal charters and other putative sources of municipal power should be according to Cooley's rule instead of the prevailing Dillon's rule; and (5) higher orders' powers should be understood as broad principles of order and justice consistent with lower bodies' adaptation to particular circumstances. The following paragraphs elaborate the content of each in opposition to its antithesis.

First: The Right of Municipal Association. Against the prevailing notion that local government exists by the grace of State government,¹⁶⁷ classical subsidiarity empowers communities to form municipalities by implying a right of municipal home rule into U.S. constitutionalism. The principle empowers communities to form municipalities even in jurisdictions lacking a formal mechanism or legislative scheme for such. This right derives from the first principle of Gaius' Institutes, specifically the right of a *civitas* to form its own law. To express this in more familiar terms, the right to municipal home rule is an extension of association rights. As we saw above in Section III.A, Western legal theory understands municipalities as collections of families, the right to self-govern being rooted in pre-political anthropology.¹⁶⁸

When applied to U.S. constitutionalism, the classical legal tradition's principle of subsidiarity cleanses the order of ideology and roots it in human practice. As might be expected of a form rooted in free association, local government is anterior to any other form of government in the U.S.¹⁶⁹ This is one reason why it remains odd to conceive of self-governing local communities as depending upon, or deriving consent from, States to exist, a view that became dominant only in the twentieth century.¹⁷⁰ Saying "administrative subdivision" to convey some dependence on state authority to exist is a mistake that subsidiarity cures. As elaborated below in the fourth principle's discussion of Cooley's rule, classical subsidiarity supplies the correct understanding of how municipalities are administrative subdivisions of higher orders. Since *all* government exists to advance the common good, all

¹⁶⁷ See, e.g., FISHER, *supra* note 161, at 9-10 (2021) (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907) and *City of New York v. State of New York*, 86 NY2d 286 (N.Y. 1995) in explaining that local governments are understood as extensions or subdivisions of state government structure and subject to state power delegation.)

¹⁶⁸ See *supra*, notes 88 and 89 and accompanying text. See also Erika Arban, *An Intellectual History of Federalism: The City and the "Unit" Question*, in CITIES IN FEDERAL CONSTITUTIONAL THEORY 16-19, 25-26 (Erika Arban ed., 2022) (discussing Swiss theologian Heinrich Bullinger covenant theory of federations and German Calvinist theologian Johannes Althusius' theory of politics as the art of associating through families, collegia, cities, provinces, and the commonwealth and their influences on U.S. and continental European federalism).

¹⁶⁹ See *infra*, note 188.

¹⁷⁰ See OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 81-85 (3d. Ed. 2009) (explaining the doctrine of inherent home rule that some states had adopted and its near universal rejection by the 1930s).

serve the same basic ends. And so, consistent with Vermeule’s argument,¹⁷¹ higher government orders such as states have a role in the regulation of local affairs. But local government is the form best suited to the ordinary regulation of such affairs based on the anthropology discussed above in Section III.A.¹⁷² This fit makes it part of what is due to people in specific communities.¹⁷³

Second: The Presumption in Favor of Municipal Regulation of Local Affairs. Against the prevailing doctrines of the dormant commerce clause¹⁷⁴ and field preemption,¹⁷⁵ classical subsidiarity settles that municipal government is the proper organ of local regulation consistent with the first principle of Gaius’ Institutes. The most significant implication of this is not for the municipality’s powers as such but rather federal and state constitutional law. This principle mandates simplified and narrowed doctrines of dormant commerce clause and preemption that focus on sphere.

Explaining this change requires a brief overview of their prevailing understandings as applied to municipalities. Unless Congress approves the enactment or it is one where the locality seeks to favor its residents for its own programs or for access to government-owned businesses, dormant commerce clause outcomes turn on whether a local government is discriminating against foreigners. If yes, then an enactment is largely suspect. If no, then the enactment will be upheld unless the federal government has a more compelling interest, a test that has produced unpredictable outcomes.¹⁷⁶ As for field preemption, the doctrine holds that any area where state authority dominates precludes local regulation on the same. As a recent example illustrating the prevailing misunderstanding, a state trial court nullified New York City ordinances collectively providing for a local housing subsidy for shelter residents on the basis that state law indicated exclusive regulation of social services.¹⁷⁷ It did so despite the entire Anglo-American tradition of public assistance requiring local officials at the lowest level to provide assistance to those in need,¹⁷⁸ a tradition reflected in the text of New York’s own public assistance scheme.¹⁷⁹

¹⁷¹ See *supra*, notes 77 and 78 and accompanying text.

¹⁷² See *supra*, notes 87 and 88 and accompanying text. See also Maria Cahill & Garry O’Sullivan, *Subsidiarity and the City: The Case for Mutual Strengthening*, in CITIES IN FEDERAL CONSTITUTIONAL THEORY 58 – 61 (Erika Arban ed., 2022) (discussing Daniel Weinstock’s expertise argument for local autonomy and its relationship to subsidiarity’s efficiency principle).

¹⁷³ Cf. *infra*, note 323 (Ulpian’s principle).

¹⁷⁴ This prohibits state and local laws that place an undue burden on interstate commerce on the basis that the U.S. Constitution grants Congress the power to regulate commerce among the states. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 462 (6th ed. 2019).

¹⁷⁵ Field preemption refers to the judicial determination that Congress or a state legislature has expressed an intent that the federal or state government should exclusively regulate an area. See *id.* at 440 for the federal version. For an overview of the state version, see REYNOLDS, *supra* note 170, at 140-144.

¹⁷⁶ CHERMERINSKY, *supra* note 174, at 486 – 92.

¹⁷⁷ *Vincent v. Adams*, 2024 WL 3635003 at *2 - *3 (N.Y. Co. Sup. Ct.)

¹⁷⁸ WALTER I. TRATTNER, FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA 9-12 (6TH ED. 1999) (describing 1536 Henry VIII’s Poor Law and its successor, the 1601 Elizabethan Poor Law, and noting that it “provided the pattern for the poor laws in the American colonies, in the original thirteen states, and in the subsequent ones as they entered the union.”)

¹⁷⁹ N.Y. SOCIAL SERV. L § 62[1] (McKinney’s 2024): “Responsibility for public assistance and care. 1. Subject to reimbursement in the cases hereinafter provided for, each public

Working in tandem with the requirement of factual specificity noted below, classical subsidiarity simplifies the inquiries to authorize municipal regulation of any local matter. The obvious exceptions would be where local authority clearly infringes upon some other municipality or encroaches upon the common spaces that higher authorities must mediate for the common good. And even in such exceptional situations, classical subsidiarity cautions the law to allow a higher order to regulate only that aspect of a local matter causing broader difficulties. As such, there would be no area of the law over which a municipality would lack authority as local affairs touch upon everything. Only the scope of its authority would be subject to judicial determination and refinement.

The general framework raises the question of what counts as a local matter. This subsection submits that the distinction largely tracks Roman law's understanding of *ius gentium* versus *ius civile*. Implying such Roman wisdom into the U.S. constitutional scheme crystallizes the basic distinction between commercial versus social regulation. As state constitutions' home rule texts state,¹⁸⁰ matters solely affecting people resident, things situated, and phenomena solely occurring, within municipal limits, are likelier to be social than commercial. Thinking of them as local is consistent with Roman law's local deference on family law and centralization of commercial matters.¹⁸¹ Understanding the law in such terms, courts also can resolve disputes about commercial municipal regulations raising issues of infringement and encroachment in such a way as to preserve local rule. Consistent with the role of determination central to CGC, classical subsidiarity authorizes a court to require that a municipality fashion an accommodation for non-residents to avoid infringement and encroachment, like the United States Supreme Court required of the federal government with the contraception mandate to avoid a free exercise problem.¹⁸²

Third: Specificity as a Formal Requirement. Against the conventional rational basis rule that upholds regulation based on any conceivable sound reason and not actual stated ones,¹⁸³ classical subsidiarity's deference to localities comes at a cost: a formal requirement enabling higher bodies to confirm local regulation's propriety. The formal requirement is that municipalities regulate¹⁸⁴ based on published

welfare district shall be responsible for the assistance and care of any person who resides or is found in its territory and who is in need of public assistance and care which he is unable to provide for himself."

¹⁸⁰ See, e.g., N.Y. STATE CONST., ART. IX, § 2(c)(10) (authorizing local government to adopt laws relating to the government, protection, order, conduct, safety, health and well-being of persons or property within the municipality).

¹⁸¹ See *supra*, notes 127 through 131 and accompanying text.

¹⁸² *Zubik v. Burwell*, 578 U.S. 403, 408 (2016).

¹⁸³ *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487-488 (1955) (upholding state law regulating activities of opticians based on speculation about what the state legislature might have concluded). See also *Carolene Products*, *supra* note 13, 304 U.S. at 152-153 (stating that regulatory legislation affecting ordinary commercial transactions is to be upheld unless "in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators").

¹⁸⁴ I use the term "regulate" to encompass all possible forms through which local government can exercise power, whether legislation or executive orders, memoranda, or directives by local officials such as mayors, district attorneys, or administrative agencies. I seek to be comprehensive to avoid the argument here being bogged down by how the U.S. concept of separation of powers applies to the classical legal tradition. That is a matter beyond the

findings of facts about a local community's specific regulatory circumstances. Such statements serve two purposes. The first is that it reflects the actual exercise of subsidiarity, which is circumstantial. As one scholar has articulated this aspect,

[s]ubsidiarity by its very terms refers to the need for more contextual, fact-specific decisions, and it necessarily works, if at all, as much more through rhetoric and politics as through formal doctrine. The detailed criteria by which subsidiarity operates are not suited to abstract reasoning ex ante, but instead need to be worked out over time, and the conclusions to which it leads will always be contextual and dynamic, containing the fluidity and flexibility of [practical judgment].¹⁸⁵

Second, factual specificity also circumscribes the limits of municipal regulation, ensuring that it stays within the limits imposed by higher spheres' regulatory remit. Such limits are what the doctrines of the dormant commerce clause and preemption appear to capture. To concretize this, where a municipality regulates a matter based on its declared empirical effect on a local affair, there can be no genuine concern that the regulation encroaches on other communities' rights, or infringes on matters that are to be mediated by a higher order. Specified particular facts ensure that the municipality is regulating for the benefit of the common good rather than usurping a function more properly exercised by a higher order. As such, it follows the Roman principle that *ius civile* – a community's rules regulating local affairs – be published, as was the case with Roman law's foundational Twelve Tables at the demand of commoners.¹⁸⁶

Fourth: Cooley's Rule as the Standard for Interpreting Municipal Authority. Against *Dillon's Rule*, the prevailing standard for interpreting the scope of municipal authority, classical subsidiarity promotes the more accurate formulation found in *Cooley's Rule*. Explanation again requires an overview of the current understanding. In the study of local government, *Dillon's Rule* refers to a doctrine that has served two purposes. First, it has reinforced the notion that local governments have no inherent power, the prevailing doctrine within the U.S. legal systems¹⁸⁷ wholly premised on the ahistorical notion that local governments are creatures of States¹⁸⁸ discussed above with the second principle. Second, it reinforces

scope of this Article but one that Vermeule weighs in on. See CGC MONOGRAPH, *supra* note 2, at 47; Adrian Vermeule, *The Rule of Law Without Separation of Powers: Legality in the Classical Tradition* (Harv. L. Sch. Pub. L. Working Paper, Paper No. 23-29, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4587125#:~:text=On%20the%20classical%20view%2C%20no,general%20welfare%20or%20common%20good.

¹⁸⁵ Cahill & O'Sullivan, *supra* note 172, at 57 (quoting Paolo Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. OF INTL L. 38, 79 (2003)).

¹⁸⁶ See BARRY NICHOLS, AN INTRODUCTION TO ROMAN LAW 15 (1962) (explaining that Twelve Tables, early source of Roman civil law, was published in response to Plebian demand toward ensuring that the law not remain the personal knowledge of Patrician magistrates). That Romans had a general practice of publishing statutory law, see ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 3 (1999).

¹⁸⁷ REYNOLDS, *supra* note 170, at 83 (2009) ("The doctrine of inherent home rule has now been clearly rejected in almost all U.S. jurisdictions and may thus be considered of little contemporary significance.")

¹⁸⁸ *Id.* at 168 (citing EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, VOL. 1

such entrenchment by limiting local governments to exercising only those powers (1) expressly conferred by the sole sources of local government authority under prevailing doctrine such as state constitutions, statutes, or home rule charters, (2) necessarily or fairly implied in the expressly granted powers, or (3) essential to what the municipality or quasi-corporation was established for.¹⁸⁹

By contrast, *Cooley's Rule* provides an equally broad statement of municipal power rooted in subsidiarity. For it provides that

[i]t is axiomatic that the management of purely local affairs belongs to the people concerned, not only because of being their own affairs, but because they will best understand, and be most competent to manage them. The continued and permanent existence of local government is, therefore, assumed in all the state constitutions, and is matter of constitutional right, even when not in terms expressly provided for. It would not be competent to dispense with it by statute. [...T]he local community is entitled to local government, [but] it cannot claim, as against the State, any particular charter or form of local government.¹⁹⁰

That municipal power is rooted in localities' superior competence over local affairs is reflected in other limits that *Cooley* prescribes on states' powers: the inability to coerce localities in matters of purely local convenience, their powerlessness to appoint officers to take charge of local affairs, and the illegality of state law authorizations to tax residents over matters not of local interests or to regulate individuals outside the municipality.¹⁹¹ In a word, *Cooley's Rule* is one of plenary authority within the local sphere, consistent with the discussion above.¹⁹²

In endorsing *Cooley's Rule* over *Dillon's*, this Article nonetheless submits that subsidiarity municipalism serves to refine our understanding of it. This is because the traditional formulation of *Cooley's Rule* remains steeped in the sort of sovereignty stuff that, as Vermeule rightly holds, is beside the point.¹⁹³ Rather than some text's formulation of whether a municipal government should be understood to have the inherent power, local power should be understood as omnipotence within a sphere of competence and for the sake of sound order. As stated above with the second principle, matters that have no local dimension – that are about regional or national relations – must be left for resolution by higher orders of government. So too must the regional or national dimensions of local matters. This segues neatly to the final principle.

Fifth: Generality as a Standard for Interpreting Higher Orders' Power.

§ 1.09 (ed. Rev. Ed. 1999) in observing that “Despite some lack of historical accuracy, the theory in the United States has been that the state pre-dates the municipal corporation and that the state, in granting a charter to a municipality, thereby delegates, for the purposes of local state government, a portion of the state’s powers.”)

¹⁸⁹ *Id.* at 169-70 (citing JOHN FORREST DILLON, *THE LAW OF MUNICIPAL CORPORATIONS* 173 (1873 2d. Ed.)).

¹⁹⁰ THOMAS M. COLLEY & ALEXIS C. ANGELL, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES* 358-59 (2d Ed. 1891).

¹⁹¹ *Id.* at 360.

¹⁹² See *supra*, notes 91 through 93 and accompanying text.

¹⁹³ CGC MONOGRAPH, *supra* note 2, at 154.

Finally, against federal and state governments increasingly granular regulation,¹⁹⁴ classical subsidiarity empowers inferior bodies to regulate in service of humanity, albeit indirectly. Consistent with the cooperative federalism it explains,¹⁹⁵ classical subsidiarity implies into U.S. constitutionalism an understanding of higher orders' enactments as broad statements of order and justice adaptable to local circumstances.¹⁹⁶ Such an understanding corresponds to Roman law's distinction between *ius gentium* for imperial matters and *ius civile* for muddling through the everyday discussed above in Section III.A.¹⁹⁷ So when incorporated into U.S. Constitution, the principle does two things. Not only does it reinforce the understanding of the federal government as sovereign over certain areas without possessing general police power,¹⁹⁸ even where its enumerated authority encroaches on local affairs such as, say, grain production or roadside motel operations.¹⁹⁹ It also corrects how we are to understand states' exercise of broad police powers in relation to local communities. In the light of classical subsidiarity, even verbose, detailed state regulatory schemes must be understood as default standards or norms that local orders can adapt to local circumstances. In other terms, it further clarifies field preemption by centering on what aspects are regulated rather than how much a state purports to regulate.²⁰⁰ And consistent with Roman practice, it treats elaborate state schemes as local models guiding local regulation but not precluding local variation.²⁰¹

C. HOW SUBSIDIARITY CAN SERVE DISSENTERS' INTERESTS

Touring legal history brings us to the Article's central point of how subsidiarity helps commoners to coexist under the CGC. Preceding from an understanding of municipal government as an instrument of the common good, this subsection elaborates how subsidiarity municipalism allows localities to be spaces where outsiders can live their lives and enjoy temporal goods within a Traditional polity. Put another way, subsidiarity municipalism represents the proper balance between Tradition's sense that all law exists to provide "the peaceful condition needed to get

¹⁹⁴ See, e.g., Neil Gorsuch and Janie Nitze, *America Has Too Many Laws*, THE ATLANTIC (August 5, 2024), <https://www.theatlantic.com/ideas/archive/2024/08/america-has-too-many-laws-neil-gorsuch/679237/> (lamenting increased volume and length of federal legislation in connection with release of book NEIL GORSUCH & JANIE NITZE, *OVER RULED: THE HUMAN TOLL OF TOO MUCH LAW* (2024)).

¹⁹⁵ See *supra*, note 158.

¹⁹⁶ *Id.*

¹⁹⁷ See *supra*, note 127 through 131 and accompanying text.

¹⁹⁸ See, e.g., *Nat'l Federation of Independent Businesses*, *supra* note 15, at 532-538.

¹⁹⁹ See *Wickard v. Filburn*, 317 U.S. 111 (1942) (holding that U.S. constitution's commerce clause authorizes U.S. government to regulate local grain production according to the substantial effects principle); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (holding that U.S. constitution's commerce clause authorizes the U.S. government to enforce anti-discrimination legislation against motel operations because of its location and clientele placed it within interstate commerce stream).

²⁰⁰ For the prevailing understanding of field preemption, see *supra* note 176 and accompanying text.

²⁰¹ LINTOTT, *supra* note 110, at 132-144 (discussing Roman practices in imposing or encouraging local constitutions modelled in Rome).

the benefits of social life and avoid the burdens of contention”²⁰² and the practical difficulties resulting from diverse interpretations of what achieves this.²⁰³ In a polity so vast as to be made up of regions that, in one account, amount to nations onto themselves,²⁰⁴ Roman wisdom is vital.

Because the concept described here is better explained concretely, this Article applies the framework elaborated above in Section III.B to live controversies. The aim is to demonstrate that subsidiarity advances a practical and prudential pluralism that even Vermeule concedes.²⁰⁵ To show what difference subsidiarity municipalism can make to how dissenters can live their lives, it engages issues of human sexuality – abortion, same-sex existence, and nonmarital sex – that legal commentary regards *Dobbs* to threaten.²⁰⁶ So that this subsection’s approach can be received properly, the subsection first contextualizes the discussion for progressives.

For them, some clarity is needed about the type of municipal progressivism that can solve the problems that the *Dobbs* decision is thought to have created. This subsection argues that subsidiarity municipalism can advance a progressivism closer to the conceptualization that Vermeule deprecates as liturgical:²⁰⁷ law’s recognition that, consistent with Roman practice, people should enjoy a measure of freedom with private matters.²⁰⁸ It wholly prescind from a conception of municipal progressivism as a space for sweeping exercises of government power producing broad socioeconomic egalitarianism; that is, the conception of progressivism as the use of authority “to regulate economic problems [and] ameliorate social ills.”²⁰⁹ It skips over this for two interrelated reasons informed by Roman practice. It first does so as a matter of precedent. As elaborated above in Section III.A,²¹⁰ the classical legal tradition afforded more local liberty with private law matters than with commercial ones.²¹¹ Roman reflection and practice segue to the second reason,

²⁰² FINNIS AQUINAS, *supra* note 90, at 227. *Accord* CGC MONOGRAPH, *supra* note 2, at 1, 7-8 (stating promotion of common good as legal order’s objective and defining common good as peace, justice, and abundance).

²⁰³ Conor Casey, *Common Good Constitutionalism: An Introduction*, ELGAR CONCISE ENCYCLOPEDIA OF LEGAL THEORY AND PHILOSOPHY (forthcoming 2025) [hereinafter “Casey CGC Intro”].

²⁰⁴ COLIN WOODWARD, *AMERICAN NATIONS: A HISTORY OF THE ELEVEN RIVAL REGIONAL CULTURES OF NORTH AMERICA* (2011).

²⁰⁵ Vermeule Liberalism Debate, *supra* note 22 (“Of course this does not mean that there cannot be a second-best, pragmatic and prudential form of pluralism, rooted in the understanding that, as J.F. Stephen emphasized, it is often unwise to attempt to use the rough instruments of the law to lead citizens and society to true beliefs and virtuous habits, at least not too quickly.”).

²⁰⁶ See, e.g., Amanda Hainsworth, *Dobbs and the Post-Roe Landscape*, BOSTON BAR JOURNAL (November 7, 2022), <https://bostonbar.org/journal/dobbs-and-the-post-roeland-landscape/> (arguing that *Dobbs* threatens constitutional privacy rights such as the free use of contraception and same-sex marriage).

²⁰⁷ CGC MONOGRAPH, *supra* note 2, at 118-119 (citing Adrian Vermeule, *Liturgy of Liberalism*, FIRST THINGS (Jan. 2017), <https://www.firstthings.com/article/2017/01/liturgy-of-liberalism>).

²⁰⁸ See generally *supra*, Section III.A.

²⁰⁹ WALTER NUGENT, *PROGRESSIVISM: A VERY SHORT INTRODUCTION* 3 (2010).

²¹⁰ See *supra*, notes 127 through 131 and accompanying text.

²¹¹ Janne Pölonen, *The Case for a Sociology of Roman Law*, in *LAW & SOCIOLOGY* 409 (Michael D.A. Freeman ed., 2006) (citing SCHULZ, *supra* note 121, at 140-63 (1936)).

one in the spirit of Roman pragmatism. This subsection omits the use of subsidiarity municipalism for broad socioeconomic regulation because it agrees with local government law expert Richard Briffault that such is not achievable. Well before he wrote about “the new preemption” even further constraining local government regulatory authority,²¹² Professor Briffault critiqued his peers’ Charles M. Tiebout and Gerald E. Frug’s progressive vision of municipal power. Tiebout and Frug had argued that municipalities can advance various progressive policy goals such as operating banks as well as insurance companies, providing housing, creating cooperatives, and running profit-making business in such a manner as to empower workers, the poor, and consumers.²¹³ Briffault rejected this based on the practical reality that municipalities are often afflicted with ungovernable multiplicity and residents’ free movement can dissipate the tax base such measures require.²¹⁴ So, while the framework developed above is in principle amenable to some forms of local economic regulation, such is unlikely to work in practice.

With this clarification, this subsection picks back up the thread of concretizing. Let us consider higher orders such as the State of Alabama that have enshrined, as constitutional lodestars, a right to life from conception until natural death,²¹⁵ or others that take up Project 2025’s exhortation to so elevate traditional marriage²¹⁶ and the welfare of the nuclear family.²¹⁷ Let us even suppose that, as Project 2025 further threatens,²¹⁸ the federal government adopts or is sued into adopting²¹⁹ policies elevating these to the same. How might subsidiarity municipalism apply to defend the existence of ordinary people with unwanted pregnancies, in same-

²¹² Richard Briffault, *The New Preemption: Placing Cities in American Federalism*, in CITIES IN FEDERAL CONSTITUTIONAL THEORY 99-100 (Erika Arban ed., 2022) (explaining the new preemption as States preventing localities from regulating subject matters and threatening fines for, civil liability of, and the withholding of State aid from, local officials and governments violating the restrictions).

²¹³ Richard Briffault, *Our Localism, Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 346, 405-08 (1990).

²¹⁴ *Id.*

²¹⁵ As stated in Chief Justice Parker’s concurrence in Alabama Supreme Court’s decision on whether the owners of embryos created through in-vitro fertilization have a rightful death claim, *LePage v. The Center for Reproductive Medicine, P.C.*, 2024 WL 656591 at *9 (2024);

[The Alabama] state Constitution contains the following declaration of public policy: “This state acknowledges, declares, and affirms that it is the public policy of this state to recognize and support the sanctity of unborn life and the rights of unborn children, including the right to life.” Art. I, § 36.06(a), Ala. Const. 2022 (adopted Nov. 6, 2018) (sometimes referred to as “the Sanctity of Unborn Life Amendment”).

²¹⁶ See Kevin D. Roberts, *Foreword: A Promise to America*, in THE HERITAGE, FOUNDATION MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 6 (Paul Dans & Steven Groves eds., 2023).

²¹⁷ *Id.* at 4.

²¹⁸ *Id.* at 6.

²¹⁹ See Gerald V. Bradley, *Life After Dobbs*, FIRST THINGS (August 2023), <https://www.firstthings.com/article/2023/08/life-after-dobbs> (contending that Dobbs is a pro-life holding based on five aspects and contending that, based on its apparent recognition of potential life is a fact distinguishing it from other privacy decisions, it has opened the way for pro-life litigation).

sex marriages, or engaging in a variety of nonmarital sex within such polities? This subsection elaborates a path based on the framework stated above in Section III.B.

Step One: Forming Dissenting Communities. As a preliminary matter, the framework affords communities of likeminded dissenters the right to form their own municipalities within such a polity. Think of counties within states or cities, towns, or villages within counties formed to enfranchise communities of dissidents by granting them control and administration of their quotidian affairs. Under the framework, dissenters can do so even within polities appearing to require state commissions or bodies to approve or reject proposed municipalities.²²⁰ One can anticipate the main controversy being some higher order – likely the state itself or some governor – seeking to hamstring or prevent the formation of such a municipality, presumably by repealing any positive law formation procedure that current law presupposes²²¹ or pursuing one of the new preemption measures referenced above.²²² Happily, even in such a situation, the classical legal tradition also supplies the solution: the default principle of *lex majoris partis* for any deliberate collection of people.²²³ According to this, a simple majority within a defined territorial space can declare a new municipality, aiding likeminded dissidents to group and organize themselves under their own rule. The classical default is even more beneficial than *Cooley's Rule* discussed above in Section III.B. For in recognizing the inherent right to local government, *Cooley's Rule* nonetheless concedes that the higher order of a State has the power to prescribe the form of government.²²⁴ Since this also means that states can specify the procedures by which communities can form a municipality, *Cooley's Rule* affords fodder for obstruction that is absent from the default principle. Of course, where the polity contains a procedure for formation, dissidents can simply use it and organize themselves around supermajority requirements or other procedural hurdles.

Steps Two and Three: Using Municipal Government to Pass Local Laws Protecting Dissenters' Liberties. Here, the requirements of factual specificity and the presumption in favor of regulating local affairs are merged because, on the ground, they are seamless, as my above framing suggests. Continuing with our case of progressive municipality within a prolife polity, subsidiarity affords options that need not look like open defiance, or some formal doctrine of nullification. Rather, subsidiarity municipalism affords local space for liberty rooted in genuine common-good concerns. So, for instance, a municipality can, consistent with a Right to Life constitution, adopt a policy declining to prosecute domestic matters. Such a policy based on findings of fact about causes of resident hospitalizations or the limited

²²⁰ REYNOLDS, *supra* note 170, at 248-249.

²²¹ *Id.* at 242.

²²² *See supra*, note 212.

²²³ Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 COLORADO L. REV. 763 (1994) (citing papers of James Madison in arguing that “the vital principle of republican government is the *lex majoris partis*, the will of the majority”); Akhil Reed Amar, *Lex Majoris Partis: How the Senate Can End the Filibuster on Any Day by Simple Majority Rule*, 63 DUKE L. J. 1483, 1485 (2014) (citing Locke’s Second Treatise on Government that majority rule is the natural default principle of all assemblies).

²²⁴ *See supra*, note 190 and accompanying text.

resources meets a natural law criterion.²²⁵ Such an enactment passes the mark for two reasons.

First, as covered above in Section III.B with reference to Cédric Brélaz's scholarship,²²⁶ Roman law's classical subsidiarity recognized a right to local criminal administration. The Roman structure afforded localities the power to create offices such as *paraphylakes*, to give them a distinct role in law enforcement toward protecting local interests, and to regulate the manner and scope of their exercising power.²²⁷ So, a local government determining to limit the circumstances where local law enforcement power can be exercised would be well within what the classical legal tradition has recognized.

Second, whatever Tradition's views on whether a polity committed to the defense of life from conception until natural death must criminalize abortion, the law understands the protection of unborn life to be complicated by its dependence upon another and her cooperation.²²⁸ This insuperable complexity has led to the issue to be regulated outside the criminal justice system. This is the narrow sense, recognized both in Part VI of Justice Blackmun's *Roe v. Wade* majority opinion²²⁹ and in Wolfgang P. Müller's study,²³⁰ that even during Christendom, the *de facto* decriminalization of abortion was thought perfectly consistent with the sanctity of human life. For example, Müller's study notes that amid the expansion of scholastic theology's denunciation of abortion and classification of it as a felony, juries determining the secular prosecution of abortion in modern Czechia and England widely refused to convict.²³¹ Emphasizing this refusal's roots in subsidiarity, Müller's study observes that such lay jurors came to reject scholasticism's equation of abortion with criminal prosecution based on local concerns. The following passage from his study conveys this spirit:

In view of learned recognition and prosecutorial indications suggesting that induced miscarriages stopped being a felony in English common law from early in the reign of Edward III, what factors were responsible for the swift abandonment of judicial rigors after the thirteenth century? At some distance and in a different legal context, lay jurors meeting at Brno [Czechia] around 1353 produced important evidence to the effect that the scholastic equation of abortion with homicidium did not enjoy the unanimous support of ordinary Christians and was resented especially by groups concerned with their honorable status and standing

²²⁵ Cf. CGC MONOGRAPH, *supra* note 2, at 148, n. 390 (discussing resource allocation as a fundamental principle of *ius* independent of positive law that administrative agencies draw upon).

²²⁶ See *supra*, notes 130 and 131 and accompanying text.

²²⁷ *Id.*

²²⁸ See, e.g., Judith Jarvis Thomson, *A Defense of Abortion*, in THE PHILOSOPHY OF LAW 112 – 128 (Ronald W. Dworkin ed., 1977) (arguing that even if a fetus is recognized as human from moment of conception, parasitical nature of its development justifies abortion as an act of self-defense).

²²⁹ *Roe v. Wade*, 410 U.S. 113, 129-147 (1973), overruled by *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022).

²³⁰ WOLFGANG P. MÜLLER, THE CRIMINALIZATION OF ABORTION IN THE WEST: ITS ORIGINS IN MEDIEVAL LAW (2012).

²³¹ *Id.* at 140-142, 154-155.

in the community. One faction of the Moravian Schöffén [judicial panel] pointed out that, by custom, the killing of unborn and newborn humans was to be left to the discretion of the delivering mothers. That panel members appointed to return criminal verdicts in England were similarly inclined to regard the death and survival of nascent children as properly pertaining to the domain of parenthood, in spite of the supervisory claims advanced by secular authorities, can also be inferred from a wider selection of court data.²³²

In a similar vein, a municipality can respect a higher sphere's principle of Traditional marriage while also dealing with the perennial dilemma of sex work. To take an example of what such a policy can look like, consider local regulation modeled on New York County District Attorney Alvin Bragg's January 3, 2022 Policy and Procedure Memorandum. That policy disclaims or narrows the prosecution of prostitution, among other crimes, in the interest of safety and fairness.²³³ As explained in that memorandum, the District Attorney adopted such a policy toward focusing resources to incarcerate only for offenses causing the most significant harm, on the logic that such would make the population safer in view of sociological data.²³⁴ Such regulatory practice follows even Christendom's practice with sex work, which was recognized and regulated as a necessary evil.²³⁵ Reflecting subsidiarity, municipal authorities throughout medieval Europe placed it under strict control without abolishing it; and it was they, not central authorities, who were charged with regulating it.²³⁶ Such control amounted to establishing licensed and occasionally municipally owned brothels and red-light districts.²³⁷ In England, even an ecclesiastical figure, the Bishop of Winchester, regulated brothels in his capacity as a property owner, subjecting disputes arising out of their operation to the jurisdiction of his court.²³⁸ The sanction and regulation of sex work was rooted in a pragmatism that we should now recognize as misogynistic. It was a response to activity meeting male demand that helped preserve social order by "preventing homosexuality, rape, and seduction" consistent with the prevention of spreading disease.²³⁹ This misogynistic pragmatism accounts for one of its salient features common to all regulatory regimes across continental Europe: its restriction to specified areas within a municipality.²⁴⁰ Christendom's practice of regulated acceptance seamlessly carried over into the United States, where it was a common practice from the latter half of the nineteenth century into the early twentieth.²⁴¹

²³² *Id.* at 154. Müller proceeds to cite Barbara Hanawalt's study of judicial records from 1300 to 1348 showing virtually no convictions for infanticide and prenatal homicide.

²³³ Alvin J. Bragg, Jr., *Day One Letter and Policy and Procedure Memorandum*, DISTRICT ATTORNEY: COUNTY OF NEW YORK (January 3, 2022), <https://manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf>.

²³⁴ *Id.* at 1.

²³⁵ Ruth Mazo Karras, *The Regulation of Brothels in Later Medieval England*, 14 J. OF WOMEN IN CULTURE AND SOCIETY 399 (1989).

²³⁶ *Id.* at 401, 406.

²³⁷ *Id.* at 401.

²³⁸ *Id.* at 423-424.

²³⁹ *Id.* at 402, 405-406, and 420.

²⁴⁰ *Id.* at 403.

²⁴¹ As established by the opening paragraph of Neil Larry Shumsky, *Tacit Acceptance*:

So, municipal pragmatism about human sexuality amid general norms promoting chastity²⁴² is part of a venerable tradition.

To take yet a third example emerging in the wake of *Dobbs*, subsidiarity would also allow municipalities to protect the practical gains of same-sex marriage at a local level, where people live. If *Obergefell* were to be overturned,²⁴³ and if higher orders were to adopt constitutional provisions enshrining Traditional marriage, subsidiarity would still allow municipalities to recognize and register same-sex marriages. Such ordinances might be a regulatory scheme extending to same-sex couples all rights such as visitation and inheritance associated with their status and offering them a local credit or subsidy offsetting the absence of federal and state tax benefits. Allowing this would be wholly consistent with what José Luis Alonso's scholarship observes of Roman Egypt²⁴⁴ and justified by Ulpian's principle²⁴⁵ in putting similarly situated same-sex residents in the same position as their similarly situated neighbors, so advancing tranquility. And within the U.S. constitutional order, it seems unavoidable that such local same-sex marriages must be entitled to export such social rights throughout the country incidental to the couples' fundamental right of travel.²⁴⁶

Steps Four and Five: Judicial Affirmation of Municipal Pragmatism: The last point of concretization is to imagine how courts should determine the inevitable lawsuits that some higher order will bring challenging the municipality's local regulation as undermining the polity's norms. Or, as illustrated by the recent

Respectable Americans and Segregated Prostitution, 1870-1910, 19 J. OF SOCIAL HISTORY 665 (1986):

During the latter half of the nineteenth century and early years of the twentieth, American cities experimented with the informal legalization of prostitution. While laws against prostitution, solicitation, and pandering remained on the books, they were selectively enforced. Women who confined their activities to certain "segregated" or "tolerated" districts were generally left alone, and allowed to practice their profession. By 1900, nearly every large American city, and many smaller ones, too, possessed and recognized a well-known red-light district where prostitution flourished.

²⁴² E.g., Karras, *supra* note 235, at 404 ("Despite the recognition that prostitution was a necessary feature of society, the municipalities of continental Europe still paid lip service to the Church's ideals of sexual purity. Regulations from municipal brothels in Languedoc and in Germany provide that the houses should not be open for business on holy days or that the women should all leave the brothel during Holy Week. During Lent and especially during Holy Week the prostitutes were to listen to sermons intended to sway them from their life of sin.") The article adds that, with those governing Southwark, London, regulations did not even pay this lip service, so revealing little interest in sexual morality. *Id.* at 422.

²⁴³ See *supra*, note 206.

²⁴⁴ See *supra*, notes 128 and 129 and accompanying text.

²⁴⁵ See *infra*, note 323.

²⁴⁶ Mark Strasser's argument in *The Privileges of National Citizenship: On Saenz, Same-Sex Couples, and the Right to Travel*, 52 RUTGERS L. REV. 553, 582 – 588 (2000) goes further and argues that *Loving's* understanding of marriage as a fundamental right means that other jurisdictions must recognize same-sex marriages of residents who move to a jurisdiction, not merely visit. Because visiting is a less invasive form of travel, this argument at least supports recognizing social rights for those passing through.

imbroglia involving a Florida State Attorney,²⁴⁷ we can anticipate higher authorities threatening to suspend or remove local officers exercising administrative discretion in favor of liberty. As with steps two and three, these steps are merged because the application of *Cooley's Rule* and the principle of higher generality flow together. Let us suppose that the municipality or municipal official enacting the nondisturbance policy suggested above has stated it provocatively or unartfully, pontificating liturgically or purporting to arrogate general authority that they lack. A court should still uphold such a local regulation or prevent the suspension or removal of the issuing municipal officer so long as the regulation can be cabined to local affairs and subjects. The point can be stated more strongly: a court should cabin a local law toward upholding it or preserving the local officers' prerogatives. Even if a local municipality's nondisturbance policy goes one step further than *nolle prosequi* and purports to create obligations—consider a local law with the same requirements as those in the Emergency Medical Treatment and Labor Act (EMTALA)²⁴⁸ at issue in the recent Idaho abortion litigation²⁴⁹—that dispute should still be resolved in favor of such local regulation. The key would be to construe the measure as a regulation governing hospitals administering emergency care to local residents, and not a general regulation of hospitals that just so happen to be located within municipal limits. *Ius* lies in the difference between the two. When refined as a pronouncement upon local matters, such an ordinance can properly and sensibly be understood as a local regulation on emergency care, not some local opinion on a broader societal question committed to a higher order. In this sense, a “Right to Life” constitutional precept can be disregarded as irrelevant to such regulation where it focuses on issues prescinding from the lofty question. It is precisely because a higher orders' enactments are understood as general and instructive in contrast to lower orders' specific and functional solutions to identified problems that apparent conflicts can be avoided.

In a similar vein, both that local policy of Red-Light Districts and that sort of local ordinance providing for local same-sex couples' companionship rights described above in steps two and three are also compatible with a regime of Traditional marriage. With these, the key is again understanding them as provisions for local residents solving identified social problems and not as a general statement of liberation from Tradition norms.

D. HOW SUBSIDIARITY MUNICIPALISM IS CONSISTENT WITH NATURAL LAW'S VIRTUE REGULATION

So far, this Article's argument has largely been addressed to the Left in arguing that subsidiarity municipalism can protect dissenters' right of coexistence. But one last aspect of subsidiarity municipalism must be taken up and is directed to Traditionalists: the matter of whether it represents a legitimate interpretation of the classical legal tradition. Because the classical legal tradition holds that law exists

²⁴⁷ As recounted in *Warren v. DeSantis*, 90 F.4th 1115, 1119-1124 (11th Cir. 2024) (reinstating lawsuit, on U.S. Constitution First Amendment grounds, by state attorney suspended by governor for statements on intended exercise of prosecutorial discretion and advocacy for exercise of abortion rights).

²⁴⁸ 42 U.S.C. §1395bb[b].

²⁴⁹ *Moyle v. United States*, 144 S. Ct 2015 (2024).

to encourage human flourishing ordered to humans' supernatural end, including by inculcating virtue and right beliefs,²⁵⁰ this subsection must address whether subsidiarity municipalism undermines that commitment. In essence, the question is whether municipalities, in this Article's framings, are the very zones of disorder Vermeule's notion of positive subsidiarity is meant to combat.²⁵¹ If they are merely that, then subsidiarity municipalism is some counterfeit version of a natural law legalism.

To address this question, this subsection develops two points. Before doing so, however, it frames how we should think about what Tradition ordains. A book Vermeule's CGC heavily relies on²⁵² acknowledges that natural law reasoning is perfectly consistent with outcomes that can be considered progressive in the sense mentioned above in Section III.B. Indeed, the natural law was cited as a source for the right to privacy that Traditionalist legal scholars have long decried.²⁵³ Even more to the point, Vermeule's invocation of Ronald Dworkin's arguments²⁵⁴ shows that natural law principles are susceptible to a diversity of conclusions, a point that Conor Casey explicitly makes.²⁵⁵ So, the two points developed here account for how Tradition is open to what we may classify as progressive outcomes, a natural consequence of Vermeule's point that legal problems require determination because principles must be concretized.²⁵⁶

Turning now to the points, Aquinas' political thought, so instrumental to CGC, supplies the foundation for progressive outcomes. As this Article itself illustrates, Aquinas has been cited both for liberal democracy and for sharp authoritarianism because he maintained two ideas in tension.²⁵⁷ The first is the Aristotelian notion that human beings, as social animals, are better together in community and society, where they can acquire virtue through socialization.²⁵⁸ The second is the notion, based on Augustine of Hippo's political thought, that the human person must not

²⁵⁰ CGC MONOGRAPH, *supra* note 2, at 28-29 (citing also WALTER FARRELL, *THE NATURAL LAW ACCORDING TO AQUINAS AND SUÁREZ* (Cajetan Cuddy ed., 2019); Casey CGC Intro, *supra* note 203, at *1, *5 (stating that CGC is grounded in classical legal tradition and stating that it holds law can be used to inculcate desires, habits, and beliefs conducive to flourishing).

²⁵¹ CGC MONOGRAPH, *supra* note 2, at 155-156 (citing JOHANNES MESSNER, *SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD* (1965) in describing subsidiarity as principle authorizing a higher order to intervene during a state of exception). *Cf.* SCHULZ, *supra* note 121, at 140 (nothing limitations inherent in the Roman conception of liberty).

²⁵² *See* CGC MONOGRAPH, *supra* note 2, at 5, n. 10.

²⁵³ STUART BANNER, *THE DECLINE OF NATURAL LAW* 23 (2021) ("As late as 1905, when the Georgia Supreme Court become one of the first courts to recognize a right of privacy, the court declared that 'the right of privacy has its foundation in the instincts of nature. It is recognized intuitively.' Natural law was the subject of a learned tradition, but it was also commonly said to be a subject for which no learning was necessary"). On the longstanding conservative criticism of a right to privacy, *see* Jamal Greene, *The So-Called Right to Privacy*, 43 U.C. DAVIS L.J. 715, 719-720 (2010).

²⁵⁴ CGC MONOGRAPH, *supra* note 2, at 5-6.

²⁵⁵ Casey CGC Intro, *supra* note 203, at *3 (explaining how CGC is eminently pluralist.)

²⁵⁶ CGC MONOGRAPH, *supra* note 2, at 44-47

²⁵⁷ THOMAS GILBY, *BETWEEN COMMUNITY AND SOCIETY: A PHILOSOPHY AND THEOLOGY OF THE STATE* 203-204 (1953).

²⁵⁸ *Id.*

be swallowed up in the group and retains an independence from society.²⁵⁹ From this flows the two ways in which the subsidiarity municipalism sketched here is consistent with the classical legal tradition developed by Aquinas.

First, simply as regulated structures, municipalities advance the common good through the idea of sound public order. In their actual function, they bring dissenters under Tradition solely through ordering them into community and requiring that they operate according to sound reason. This inculcates virtues of stability and community. This basic virtue-as-socialization is what Aquinas' political thought seemed to have aimed for, eschewing the notion that law should regulate all aspects of morality.²⁶⁰

Second, subsidiarity municipalism provides concrete answers to the question of what is to be done with many people outside norms such as people who do not assume the health risks and toll of pregnancy despite optimism about adoption.²⁶¹ Or gay people who are and have been in committed long term relationships such as Edith Windsor and Thea Speyr.²⁶² Or people who, for a variety of reasons, buy and sell sex.²⁶³ To put this question from the perspective of Tradition seeking to inculcate respect for life and public order, there remains the issue of how exactly unborn lives are to be saved when they require the cooperation of women's wombs. Or what to do with committed and stable couples who happen not to be heterosexual. Or what to do about human passions such as sexual desire, desperation, and economic necessity whose confluence can produce public health and safety problems. Tradition allows for progressive solutions because, as discussed above in Section III.A, governments closest to human communities have the role that Vermeule assigns to administrative agencies in CGC: that of determining how immutable principles of justice apply to specific situations.²⁶⁴ The only difference between the argument here and Vermeule's is this: whereas common good administrative agencies determine how general laws apply to specific factual circumstances under the Administrative Procedure Act (APA)'s various categories,²⁶⁵ municipalities and municipal officials issue ordinances and adopt policies adapting the entire natural law framework to particular, discrete communities. In other terms, municipalities

²⁵⁹ *Id.*

²⁶⁰ *Id.* at 236-238.

²⁶¹ *Dobbs*, *supra* note 30, 597 U.S. at 258-259 (discussing states' "Safe Haven" laws).

²⁶² *U.S. v. Windsor*, 570 U.S. 744, 763 (2013).

²⁶³ WE TOO: ESSAYS ON SEX WORK AND SURVIVAL 11-12 (Natalie West ed., 2021) (from a decriminalization perspective on sex work, framing sex worker as one compelled by same economic necessity as any other and who seeks to improve the material conditions of their work).

²⁶⁴ See CGC MONOGRAPH, *supra* note 2, at 151-162. Vermeule's recent article returns to the theme that executives enjoy broad authority constrained only by natural law. See Adrian Vermeule *The Constitution of Hierarchy*, FUDAN J. OF HUMANITIES AND SOCIAL SCIENCES 6-7 (2024), <https://doi.org/10.1007/s40647-024-00401-8> [hereinafter "Vermeule Const. of Hierarchy"] (explaining that under classical tradition, the sovereign's exercise of power is not jurisdictionally limited but rather substantively so, by natural and divine law, and citing Jean Bodin Baldus in referring to the emperor as a "they," a "complex of officials, advisors, and bureaucrats.").

²⁶⁵ I mean the internal coherence of adjudication, rulemaking, orders, etc. that Vermeule grasps. See CGC MONOGRAPH, *supra* note 2, at 152-153.

administer broad justice at a more intimate level, regulating the mundane.²⁶⁶ As such, subsidiarity municipalism can produce a dynamic and developing constitutional structure and order without ceasing to be law as a rational ordering.²⁶⁷

So, progressive *modi vivendi* are admissible outcomes within a classical polity because dissenters are Aristotelian natural human communities. If the takeaway from George Chancey's history is that gay culture emerges from urbanity,²⁶⁸ for instance, then we can fairly conclude that there have been gay communities so long as there have been cities. This is a conclusion only reinforced by gay and Roman Catholic social historian John Boswell's hypothesis of same-sex unions in antiquity and Christendom.²⁶⁹ Even that scholarship rejecting the notion that these were same sex marriages in the modern sense nonetheless recognizes that they were at least some form of natural human community.²⁷⁰ It is such a same-sex human community that John Henry Newman appears to have been sustained by,²⁷¹ showing how organic human communities are among the common goods²⁷² that subsidiarity municipalism as a natural law concept should further.

Free human movement also raises practical questions that can rationally be worked out progressively, such as with schemes guaranteeing confidentiality and immunity to conduce cooperation and local tranquility. One of higher authorities' most prominent challenges is their inability to effectively enforce criminal laws against aspects of human existence absent local authorities' assistance.²⁷³ Without

²⁶⁶ Hence Vermeule's point that, even under subsidiarity, higher orders should intervene to regulate during states of exception. *See supra*, note 78 and accompanying text. He does not elaborate this concept, merely citing Carl Schmitt's work. But the reference to Schmitt is enough for us to recognize that states of exception are extraordinary, and therefore are matters beyond local bodies' competence to regulate.

²⁶⁷ *Cf.* Vermeule Const. of Hierarchy, *supra* note 264, at 8-9.

²⁶⁸ GEORGE CHANCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940* 2-3, 355 (1994) (framing account as challenging the myths of isolation and invisibility, which obscures extensive gay society before the postwar gay liberation movement).

²⁶⁹ A theory elaborated over two texts: JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* (1981) and JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994).

²⁷⁰ *See, e.g.,* Claudia Rapp, *Ritual Brotherhood in Byzantium*, 52 *TRADITIO* 285 (1997) (disputing Boswell's thesis that spiritual marriages between men and women were romantic but nonetheless concluding that they were, along with marriage, social networking strategies, sometimes used in combination, to create friendly ties and obligations for the exchange of gifts and favors, promotions, or military assistance).

²⁷¹ Barbara Bradley Hagerty, *Was Cardinal John Henry Newman Gay?*, NPR (Sept. 17, 2010), <https://www.npr.org/2010/09/17/129930850/was-cardinal-john-henry-newman-gay> (referencing John Henry Newman's 32 year relationship with fellow Roman Catholic Priest Ambrose St. John, who helped Newman with his scholarship, translations, and general care.)

²⁷² For this as a good, *see* JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 88 (2d ed., 2011) (contending that basic human goods include "the value of that sociability which in its weakest form is realized by a minimum of peace and harmony amongst persons, and which ranges through the forms of human community to its strongest form in the flowering of full friendship").

²⁷³ This is the practical limitation to the concern about Donald Trump weaponizing the federal government stated in a recent article. *See* Ronald Brownstein, *Trump's 'Knock*

local buy-in and information from people on the ground, the higher orders cannot enforce norms.²⁷⁴ Human movement always presents operational challenges that prevent higher orders from fulfilling their remit without local assistance, if for no other reason that they lack information required for enforcement. To be clear, this subsection acknowledges that higher governmental authorities have devised scaled systems of surveillance, arrest, and pressure. For example, the racistly named “Operation Wetback,” or post-war grand scale deportation of actually and apparently undocumented Mexicans, was such a moment.²⁷⁵ So too is the present moment during these early days of the Trump Administration. But the story of that infamous operation also illustrates the reality. It worked only because it had ground support,²⁷⁶ the type providing reliable inside information sufficient to establish probable cause.²⁷⁷

With all that said, the argument here readily acknowledges that the practical liberty available under subsidiarity municipalism costs what *Obergefell* provides: dignity understood to mean the social reality of others’ acceptance and affirmation, or actual lived equality.²⁷⁸ The subsection acknowledges that the reproductive freedom available under subsidiarity municipalism is steeped in the indignity of stigma as it seems to revive the notion that abortions should be safe, legal, and rare,²⁷⁹ and not a part of equal citizenship.²⁸⁰ Or it undermines the dignity of sex work as work by confining it to municipal margins. In response, this subsection points out that one principled way to read Vermeule’s objection to the liturgical aspect of progressive constitutionalism²⁸¹ is as a rejection of dignity as law’s business. So understood, subsidiarity municipalism would change nothing because, in this sense, dignity has always been beyond the law’s scope. Law lacks jurisdiction over hearts and

on the Door’ The former president and his aides are formulating plans to deport millions of migrants, THE ATLANTIC (Feb. 8, 2024), <https://www.theatlantic.com/politics/archive/2024/02/trumps-immigration-plan-is-even-more-aggressive-now/677385/>.

²⁷⁴ See, e.g., ADAM GOODMAN, THE DEPORTATION MACHINE: AMERICA’S LONG HISTORY OF EXPELLING IMMIGRANTS 52-70 (2020).

²⁷⁵ *Id.* at 53-54 (describing expulsion effort as relying on immigrants’ self-removal by fear and noting that it involved coordination with local officials and relied on tips and informants to carry out piecemeal deportation campaigns).

²⁷⁶ *Id.*

²⁷⁷ On the probable cause standard, see, e.g., *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964) (stating it as “whether at that moment the facts and circumstances within [a police officer’s] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.”).

²⁷⁸ *Obergefell*, *supra* note 39, 576 U.S. at 668-672 (noting that exclusion of same-sex couples from marriage stigmatizes children of such unions by making their families somehow lesser and stigmatizes and injures same-sex couples themselves).

²⁷⁹ See Anna North, *How the Abortion Debate Moved Away From “Safe, Legal, And Rare,”* VOX (Oct. 18, 2019), <https://www.vox.com/2019/10/18/20917406/abortion-safe-legal-and-rare-tulsi-gabbard>.

²⁸⁰ See, e.g., Reva B. Siegel, *Equality and Choice: Sex Equality Perspective on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. OF GENDER AND LAW 63, 70-71 (2013) (citing Ginsburg’s 1985 UNC Law Review article stating preference that right to abortion be grounded in equal protection so that women’s claims to reproductive choice are uncoerced and unsteered by the government.).

²⁸¹ See *supra*, note 207.

minds, the reason that school segregation persists throughout the United States despite the enactment of sweeping civil rights frameworks long ago.²⁸² Law is most useful in creating structural conditions favorable to those human interactions that produce conversion.²⁸³ This corrective helps to focus energy and effort where such will be fruitful in protecting commoners' gains rather than futilely leaving vulnerable groups exposed by the pursuit of liturgical conversion rather than concrete outcomes.

What then of a related Traditionalist concern, Conor Casey's description of CGC as recognizing law's role in inculcating virtue and beliefs?²⁸⁴ Subsidiarity municipalism also allows for the law to advance moral virtue but only through its didactic and exemplary dimensions. Building on the salutary sense in which the U.S. local communities are described as laboratories of democracy,²⁸⁵ subsidiarity municipalism allows the law to inculcate moral virtue structurally, through the formation of counterweighing municipalities engaging in Traditionalist regulation. Put somewhat differently, this subsection's argument understands Conor Casey's point to be satisfied by authorizing spaces for organic, human persuasion. To dispel any doubt, just as subsidiarity municipalism allows the formation of communities enabling dissenters to coexist and protect their temporal goods, it also allows space for Traditionalist communities to demonstrate virtuous living and so attract by example. The argument in Section III.C also allows for municipalities like Ave Maria, Florida²⁸⁶ to adopt all forms of social regulation within municipal limits free of the individual rights claims Vermeule rejects as a distortion of natural rights.²⁸⁷ Under the subsidiarity municipalism framework, nothing in the federal constitution's speech clauses would prevent a local community, based on the same

²⁸² See El Kilgore, *Marking 70 Years of White Flight From School Integration*, NEW YORK MAGAZINE: INTELLIGENCER (May 18, 2024), <https://nymag.com/intelligencer/article/marking-70-years-of-white-flight-from-school-integration.html#:~:text=Friday%20was%20the%2070th%20anniversary%20of%20the%20U.S.,the%20Equal%20Protection%20Clause%20of%20the%2014th%20Amendment> (observing widespread school segregation 70 years after the U.S. Supreme Court's decision in *Brown v. Board of Educ.*, 347 U.S. 483 (1954) and attributing it to White opposition to strategies for realizing integration).

²⁸³ See *supra*, note 202. Cf. Sequoia Carrillo and Pooja Salhotra, *The U.S. Student Population Is More Diverse, But Schools Are Still Highly Segregated*, NPR (July 14, 2022), <https://www.npr.org/2022/07/14/1111060299/school-segregation-report> (attributing school segregation to structural factors such as housing discrimination and school district secessions).

²⁸⁴ See *supra*, note 250.

²⁸⁵ See, e.g., *Garber v. Menendez*, 888 F.3d 839, 844 (6th Cir. 2018) (citing McConnell, *supra* note 160, at 1503-1504 in observing that "[s]tates discourage residents from leaving whenever they provide residents with policies they like. That indeed is the point of the benefits. But the States' ability to attract and retain residents through policy choices has long been considered a healthy byproduct of the laboratories of democracy in our federalism-based system of government, not a sign of unconstitutional protectionism.").

²⁸⁶ Pamela López Campos, *Ave Maria, The "Custom-Built" City for Catholics in Florida*, OMNES MAGAZINE (April 29, 2024), <https://omnesmag.com/en/news/ave-maria-ciudad-catolicos-florida/> (describing unincorporated community inspired by Catholicism promoted by Tom Monaghan, the founder of Domino's Pizza).

²⁸⁷ CGC MONOGRAPH, *supra* note 2, at 170-171 (criticizing an understanding of free speech that prohibited federal government from regulating virtual child pornography).

sound findings of fact and local circumstances, from regulating the consumption of pornography within municipal limits.²⁸⁸ Because others can form their own community, can protect the right to consuming pornography based on specific factual circumstances, and can vote with their feet, a municipality engaging in Traditional regulation is within its power.

In arguing this, this subsection acknowledges that, for many Traditionalists, communities of virtue depend on widespread affirmation because many aspects of public morality are difficult. For example, many Traditionalists recognize that marriage and parenthood are moral commitments upon which a social order depends that require social buy-in.²⁸⁹ Under this account, such can be undermined by free movement. But no real alternative is achievable in a pluralist society. Just as, discussed above, progressives must bear indignity to coexist with others, Traditionalists must pay the price of restraint. That people must be left to some measure of independence from coercion represents Western law's reflection on Tradition in light of historical experience, a conclusion that the Roman Catholic Church has reached.²⁹⁰ It is an experience instructing that people must not be compelled to virtue through state apparatus and cautioning to rely on practical and prudential pluralism in teaching natural law so as to maintain peace and order.

IV. A JURISPRUDENCE OF COMMON GOOD PLURALISM: SUBSIDIARITY MUNICIPALISM AS THE ROBERTS COURT'S SOLUTION TO DIFFERENCE

Next, this Article defends its thesis by rooting it in the Roberts Court's jurisprudence about the conflict between general law and associative freedom. To make this point, it examines two cases raising this issue: *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*²⁹¹ and *Fulton v. City of Philadelphia*.²⁹² This section contends that applying the lens of pluralist coexistence resolves the doctrinal difficulties that legal commentary has identified in these cases. To support this contention, the

²⁸⁸ In other terms, subsidiarity municipalism would allow something like the Catherine MacKinnon-Andrea Dworkin model anti-pornography ordinance if based on local findings of fact. For the text and context of that model ordinance, see Claudia Spaulding, *Anti-Pornography Laws as a Claim for Equal Respect: Feminism, Liberalism & Community*, 4 BERKELEY WOMEN'S L. J. 128, 130-31 (1988).

²⁸⁹ See, e.g., Lynn D. Wardle, *A Response to the "Conservative Case" for Same-Sex Marriage: Same-Sex Marriage and "the Tragedy of the Commons,"* 22 B.Y. U. J. OF PUB. L. 441, 462 and 464 (2008) (arguing against same-sex marriage from a conservative standpoint on the basis that same-sex marriage threatens to unloosen the connections, expectations, and responsibilities of traditional marriage, parenting, and families to the institution's detriment).

²⁹⁰ See, e.g., Drew Christiansen, *Commentary on Pacem in Terris (Peace on Earth)*, in MODERN CATHOLIC SOCIAL TEACHING: COMMENTARIES & INTERPRETATIONS 226-228 (Kenneth B. Himes et al. eds., 2004) (arguing that World War II and Cold War developments led Roman Catholic Church's Magisterium to pronounce teaching on individual rights, democracy, and constitutional government subject to the common good based on persuasion rather than fear).

²⁹¹ 584 U.S. 617 (2018).

²⁹² 593 U.S. 522 (2021).

argument here marshals forensic evidence from the opinions themselves, much like Section III.A above did to show that Aquinas' political thought is rooted in Roman practice.

Lest this exercise be misunderstood, an acknowledgement must be foregrounded. This Article has no misgivings about whether the cases discussed below may be counterrevolutionary. The justices voting in the majority might well have been, and likely were, sympathetic to a peculiar viewpoint, evidenced by some of *Obergefell's* dissenting opinions.²⁹³ Further evidence of bias on the part of at least some Roberts Court members is this past summer's secretly recorded remarks of Chief Justice John Roberts and Justice Samuel Alito, where the latter gives up the Christian nationalist ghost.²⁹⁴ So, the point here is not their intention, but rather a public meaning that can be given to the majority opinions.²⁹⁵ The Article contends that their public meaning affirms pluralist coexistence in evincing solicitude for radically different peoples to coexist within a single polity.

Proceeding chronically, we begin with *Masterpiece Cakeshop*, the case about Colorado baker Jack Phillipps' refusal to bake a case for a same-sex couple's wedding because of his religious opposition to same-sex marriage.²⁹⁶ In criticizing Justice Anthony Kennedy's majority opinion holding that the Colorado Human Rights Commission violated the baker's free exercise rights, legal commentary has accused Justice Kennedy of inconsistency and betrayal of his commitment to same-sex dignity expressed in the court's entire gay rights jurisprudence, all of which majority opinions he authored.²⁹⁷ His opinion in *Masterpiece Bakery*, however, suggests that Justice Kennedy's commitment to same-sex couples' place in society is better understood as a part of a larger pluralist commitment.²⁹⁸ For the opinion twice accentuates the Colorado Commission on Human Rights' denigration of the baker's religious views. The point is best made by Justice Kennedy himself, in this extensive excerpt from Part II.B of his majority opinion:

As noted above, on at least three other occasions the [Colorado] Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with

²⁹³ For example, Justice Alito's dissent lamenting that same-sex marriage portends decay of marriage and social estrangement from the connection between marriage and procreation. See *Obergefell*, *supra* note 39, 516 U.S. at 739-740.

²⁹⁴ Abbie VanSickle, *In Secret Recordings, Alito Endorses Nation of "Godliness."* *Roberts Talks of Pluralism*, N.Y. TIMES (June 10, 2024) <https://www.nytimes.com/2024/06/10/us/politics/supreme-court-alito.html>.

²⁹⁵ Cf. RANDY E. BARNETT & EVAN D. BERNICK, THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT: ITS LETTER & SPIRIT 2-3 (2021) (describing U.S. legal culture's shift from original intention to original public meaning provoked by Paul Brest's 1980 article on originalism).

²⁹⁶ 584 U.S. at 626-627.

²⁹⁷ See, e.g., Erwin Chemerinsky, *Not a Masterpiece: The Supreme Court's Decision in Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 43 HUM. RTS. 11, 15 (2018).

²⁹⁸ As also observed in William N. Eskridge, Jr. & Robin Fretwell, *Anthony Kennedy Opens New Chapter in American Pluralism*, REAL CLEAR RELIGION (July 18, 2018), https://www.realclearreligion.org/articles/2018/07/18/anthony_kennedy_opens_new_chapter_in_american_pluralism.html.

religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included “wording and images [the baker] deemed derogatory,” *Jack v. Gateaux, Ltd.*, Charge No. P20140071X, at 4; featured “language and images [the baker] deemed hateful,” *Jack v. Le Bakery Sensual, Inc.*, Charge No. P20140070X, at 4; or displayed a message the baker “deemed as discriminatory, *Jack v. Azucar Bakery*, Charge No. P20140069X, at 4.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission’s treatment of Phillips’ objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of [the Colorado Anti-Discrimination Act] in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips’ willingness to sell “birthday cakes, shower cakes, [and] cookies and brownies,” App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips’ case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission’s consideration of Phillips’ religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers’ conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that “[t]his case is distinguishable from the Colorado Civil Rights Division’s recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed” when they refused to create the requested cakes. 370 P.3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because “the Division found that the bakeries ... refuse[d] the patron’s request ... because of the offensive nature of the requested message.” *Ibid.*

A principled rationale for the difference in treatment of these two instances cannot be based on the government’s own assessment of offensiveness. Just as “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See *Matal v. Tam*,

582 U.S. ___, ___ - ___, 137 S.Ct. 1744, 1762-1764, 198 L.Ed.2d 366 (2017) (opinion of ALITO, J.). The Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.²⁹⁹

Because this case was also litigated and resolved as free exercise one, the free speech doctrine that Justice Kennedy's opinion appears to invoke—viewpoint discrimination—did not apply.³⁰⁰ For this reason, his analysis is better understood as fundamentally pluralist. The opinion seeks an outcome where all varieties of conscience can coexist in a polity. Critically, it recognizes the dispute as fundamentally liturgical rather than practical. The liturgical aspect is which beliefs government celebrates as worthy of societal affirmation, or which are upheld as “orthodox.” The case presents no practical question because the baker's “willingness to sell ‘birthday cakes, shower cakes, [and] cookies and brownies’ to gay and lesbian customers”³⁰¹ ensures their general inclusion in goods and services. This gives credence to the opinion's conclusion that the key to resolving this debate must reflect tolerance, respect, and uniform access to goods and services.³⁰²

We can discern the same sensitivity to liturgicism and pragmatism in *Fulton*, a sequel to *Masterpiece Cakeshop* taking up the issue of whether the free exercise clause requires government to grant dissenting religious organizations an accommodation from general standards.³⁰³ This question arose from a dispute between a Roman Catholic foster care agency and the City of Philadelphia. Despite having contracted with the agency for over 50 years for the placement of foster children with foster families, the City of Philadelphia terminated its relationship with the agency. It did so when the foster agency refused, on religious grounds, to certify its compliance with a nondiscrimination provision in its contract that would have required it to place foster children with same-sex couples.³⁰⁴ The City of Philadelphia informed the foster agency that it would not work with it unless it would comply, and declined to grant it any exemption from that requirement. So that the foster agency could continue its role in social services in a manner consistent with its religious objections, the agency and three affiliated foster parents sued the City of Philadelphia.³⁰⁵ The lawsuit sought an injunction directing the City of Philadelphia, through its Department of Human Services, to continue referring children to CSS without requiring the agency to certify same-sex couples as foster recipients.³⁰⁶

²⁹⁹ 584 U.S. 636 – 638.

³⁰⁰ *Id.* at 631, 639 – 640 (noting that Philipps raised free speech arguments but resolving case on free exercise grounds). *But see* CHEMERINSKY, *supra* note 174, at 1322 (citing *Good News Club v. Milford*, 533 U.S. 98 (2001) as establishing that viewpoint discrimination doctrine governs limited-public-forum free exercise jurisprudence).

³⁰¹ *Id.* at 637.

³⁰² *Id.* at 640.

³⁰³ 593 U.S. at 535 – 538.

³⁰⁴ *Id.* at 526 – 530.

³⁰⁵ *Id.* at 531.

³⁰⁶ *Id.*

At the time of his confirmation hearing and early into his tenure, Chief Justice Roberts was thought to be an ally of gay rights like Justice Kennedy, based on his *pro bono* work in private practice.³⁰⁷ In addition, ahead of the U.S. Supreme Court's decision in *Obergefell*, his lesbian cousin Jean Podrasky framed Roberts as someone who understood the public tide in favor of same-sex rights.³⁰⁸ This reputation suffered because of his dissent in *Obergefell*, which made him appear heartless.³⁰⁹ Despite this aspect, legal commentary came to deride his opinion in *Fulton* more as evidence of Christian favoritism than homophobia.³¹⁰ That take is based on its apparent evasion of *Employment Div., Dept. of Human Resources of Ore. v. Smith*,³¹¹ the 1990 precedent establishing that government need not accommodate religion from laws of general applicability³¹² established on the back of an unpopular, minority religion.³¹³

However, Roberts' majority opinion emphasizes points indicating a desire to work out pragmatic and prudential pluralism. Like Justice Kennedy's opinion in *Masterpiece Bakery*, Chief Justice Roberts' opinion marshals facts that distill the dispute into a matter conscience and allay concerns about any material harm. We are assured that the foster agency's objections were only to certifying same-sex couples because of religious doctrine that marriage is "a sacred bond between a man and a woman"; the agency would happily certify gay or lesbian individuals as single foster parents and place gay and lesbian children.³¹⁴ Further, the foster agency had never been asked to certify a same-sex couple and stated that, if asked, it would simply direct any same-sex couple to one of over 20 other agencies in the City that do so.³¹⁵ So framed, the entire dispute was reduced to whether the City of Philadelphia had the right to decline an exemption based on the foster agency's aberrant views, ones in tension with society's "recognition that gay persons and couples cannot be treated as social outcasts or as inferior in dignity and worth."³¹⁶

³⁰⁷ Richard A. Serrano, *Roberts Donated to Help Gay Rights Case*, L.A. TIMES (August 4, 2005), <https://www.latimes.com/archives/la-xpm-2005-aug-04-na-roberts4-story.html>.

³⁰⁸ See Maura Dolan, *Chief Justice's Lesbian Cousin Will Attend Prop. 8 Hearing*, L.A. TIMES (March 24, 2013), <https://www.latimes.com/local/lanow/la-xpm-2013-mar-24-la-me-ln-prop.8-chief-justices-cousin-a-lesbian-will-attend-prop-8-hearing-20130324-story.html>.

³⁰⁹ See, e.g., Richard A. Posner, *Supreme Court Gay Marriage: John Roberts' Dissent in Obergefell Is Heartless*, SLATE (June 27, 2015), <https://slate.com/news-and-politics/2015/06/supreme-court-gay-marriage-john-roberts-dissent-in-obergefell-is-heartless.html>.

³¹⁰ See, e.g., Stephen M. Feldman, *The Roberts Court's Transformative Religious Freedom Cases: The Doctrine and the Politics of Grievance*, 28 CARDOZO J. EQUAL RTS. & SOC. JUST. 507 (2022).

³¹¹ 494 U.S. 872 (1990).

³¹² See *supra*, note 292, 593 U.S. at 543 (Amy Coney Barrett's concurrence in *Fulton* describing the precedent).

³¹³ Employment Division involved the ingestion of peyote as a Native American religious practice. For the perspective that Employment Division turns on the unpopularity of Native American religious practices, see Garrett Epps, *To an Unknown God: The Hidden History of Employment Division v. Smith*, 30 ARIZ. ST. L. J. 954, 1012-15, and 1020 (1998); Feldman, *supra* note 310, at 527-528.

³¹⁴ 593 U.S. at 530.

³¹⁵ *Id.*

³¹⁶ *Id.* at 542 (quoting *Masterpiece Cakeshop*, 584 U.S. at 631).

Chief Justice Roberts' opinion reasoned that, under circumstances where granting the foster agency an exemption would not deny any real services to same-sex couples, would respect the Catholic agency's beliefs that it was not seeking to impose on others, and would only serve to increase the number of available foster parents, it was unjust for the City to refuse.³¹⁷ This reasoning is unmistakably practical pluralist in the Roman mold.

Legal commentary has overlooked these decisions' pluralist pragmatism because it has focused on what they say about what the U.S. Supreme Court thinks of LGBT status: whether the Court imagines it as some second-tier right. The main reason cited for this is comparing sexual orientation to race,³¹⁸ which invites comparing *Masterpiece Cakeshop* and *Fulton* to the U.S. Supreme Court's opinion in *Bob Jones University v. United States*.³¹⁹ That case considered whether "nonprofit private schools that prescribe and enforce racially discriminatory admissions standards on the basis of religious doctrine," qualify as tax-exempt charitable organizations.³²⁰ The majority opinion held that they do not because their practices are at odds with fundamental U.S. policy. But the pluralist lens that CGC offers allows us to reframe the issue in *Bob Jones University* toward grasping what *Masterpiece Cakeshop* and *Fulton* make clearer. Any accommodation of difference cannot undermine the legal order by creating exceptions swallowing the norm. The Court deciding the *Bob Jones University* litigation was aware of a social history marked by widespread, entrenched opposition to integration. Indeed, Chief Justice Warren E. Burger's majority opinion openly observes that

[f]ew social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education. Given the stress and anguish of the history of efforts to escape from the shackles of the 'separate but equal' doctrine of *Plessy v. Ferguson*, 163 U. S. 537 (1896), it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life," *Walz v. Tax Comm'n*, 397 U. S. 664, 673 (1970), or should be encouraged by having all taxpayers share in their support by way of special tax status.³²¹

Another section of the opinion weighing the schools' free exercise rights against the government interest in "eradicating racial discrimination in education" notes that the discrimination at issue "prevailed, with official approval, for the first 165 years of this Nation's constitutional history."³²² Based on this, the Court recognized the issue as whether the free exercise clause would create a loophole enabling dissenters to undermine the whole system. That, and not sententious

³¹⁷ *Id.* at 541 – 542.

³¹⁸ See, e.g., Ria Tabacco Mar, *The Colorado Cake Case Is as Easy as Pie*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/opinion/colorado-cake-first-amendment-gay.html>.

³¹⁹ 461 U.S. 574 (1983).

³²⁰ *Id.* at 577.

³²¹ *Id.* at 595.

³²² *Id.* at 604.

moralizing about the comparative ill of racism versus homophobia, is the enduring takeaway from *Bob Jones University*.

So, the issue in *Masterpiece Cakeshop* and *Fulton* is not whether same-sex couples have any place in society. Rather, it is about whether the law should allow government to use power for cudgeling outliers into orthodoxy. As discussed above in Section III.D, CGC has come to dispute whether this is ever the law's business. Should the facts informing the accommodation of Tradition in view of same-sex coexistence change—should society regress to its sordid recent past denying gay individuals a basic place in society—then CGC allows for different outcomes. Roman jurist Ulpian's principle to give each person their due³²³ would empower all levels of government to wield power to protect same-sex couples in securing basic temporal goods needed for their coexistence. In other terms, if the question is one of whether outsiders or a minority should generally enjoy goods and services, the answer is different. But where the question is merely liturgical, pluralism allows all minorities—including those who had previously been the dominant group—to sing their own tune.

V. CONCLUSION AND RECONCILIATION

The breadth of this Article requires a summary of its argument, and, finally, an explanation of how it aligns with my previous views. This Article is directed to those concerned that the inevitability of CGC, with its revival of the classical legal tradition based on natural law, spells the retrenchment of that pluralism which commoners have relied upon to coexist. It argued that CGC need not portend the end because the classical legal tradition includes a principle of subsidiarity that empowers commoners to form structures through which they can secure their place within a Traditional order. These structures are municipalities, a lower order of government whose role within Tradition is to help individuals commonly secure temporal goods through fact-specific, contextual regulation. This Article termed such a constitutionalism “subsidiary municipalism,” and argued that it provides a better account for the U.S. constitutional order's actual operation. It also identified five principles that subsidiarity implies into U.S. constitutionalism toward enabling municipalism to secure commoners' temporal goods. It applied the five principles to sketch how subsidiarity can forestall the disruption of commoners' gains that U.S. Supreme Court's decision in *Dobbs v. Jackson's Women Health Organization* appears to threaten. Lastly, this Article showed that subsidiary municipalism and its solicitude for pluralist coexistence is how one can better understand what the Roberts Court has been doing in its decisions about the clash of association rights and general order. All this was done to encourage pluralism's champions to focus on local government as a way forward.

What has CGC to do with the jurisprudence of trousered apes? It is here that I finally draw the connection. CGC benefits commoners by altering how U.S. constitutionalism understands law's function. Despite reintroducing broad principles informed by tradition at the expense of textual literalism, CGC restores

³²³ CGC MONOGRAPH, *supra* note 2, at 30. In the classical legal tradition, the ruler does this toward helping members to be part of a flourishing political community. *See id.* at 1.

the understanding of law as a species of practical reasoning rather than moralism. As Vermeule's writing makes clear, CGC accepts the ambition of using law to inculcate virtue.³²⁴ But CGC changes *how* law seeks to produce such. Its movement is away from what Vermeule rightly describes as the liturgicism of *Obergefell*, where law denounces bigotry and seeks to prescribe orthodoxy, and toward a reliance on law to create structures where different peoples can coexist amid varying understandings of how to achieve the good life. This shift makes all the difference for outsiders estranged from Tradition whose goal is to be left alone.

CGC's pragmatism is where alignment is found. The jurisprudence of trousered apes framed positivism and textualism as more accessible means by which the uninitiated can participate in a polity.³²⁵ CGC serves the same purpose by grounding law, displacing the idle sanctimony that my previous essay reacted against³²⁶ with a focus on what achieves sound outcomes, the focus of commoners.³²⁷ It is telling that, for all its engagement with Tradition, CGC unflinchingly upholds the pandemic eviction ban,³²⁸ so advancing *the* exercise of power inspiring my prior essay.³²⁹

In this vein, I point out another instance of consistency between the textualism and positivism defended in my prior essay and Vermeule's CGC framework. Legal principles shorn of what this Article calls moralism and what Vermeule denominates as liturgicism³³⁰ are narrower and therefore more adaptable. They are narrower because they propose structures and institutions rooted in understandings that can be grasped through the study of historical or sociological materials. Vermeule's notion of rational arbitrariness is not the imposition of foreign mores animating the concern articulated in the prior essay.³³¹ Drawing upon the history covered here, an outsider can ascertain these principles and, as this Article submits, apply them to protect their own interests.

CGC's reorientation of the Anglo-American tradition to focus on structural and institutional principles has an added benefit for commoners. It directs them away from constitutional litigation as their salvation to administrative and municipal law for their enfranchisement. Put somewhat differently, it revives local bodies as organs of the common good, restoring legislatures and administrative bodies as the vehicles of social harmony. In so encouraging this approach, this Article acknowledges real differences between rights under liberal constitutionalism and the prudential and pragmatic liberty under subsidiarity municipalism. The practical liberty within municipalities is not the same thing as the universal affirmation of bodily autonomy as a good. A local community's acceptance in is not the same thing as a continental polity's celebration. But this Article submits that subsidiarity municipalism is more stable and enduring because it depends on persuasion through demonstration and dialogue rather than the falsehood of conquest and imposition.

³²⁴ See *supra*, note 250.

³²⁵ Louis, *supra* note 1, at 158-159.

³²⁶ *Id.* at 153.

³²⁷ *Id.* at 165.

³²⁸ CGC MONOGRAPH, *supra* note 2, at 42 (observing that CGC affirms public health measures such as vaccine mandates).

³²⁹ See *supra*, note 6 and the accompanying text.

³³⁰ See *supra*, note 207.

³³¹ Louis, *supra* note 1, at 158.

In a sense, progressive legalism lapsed into liturgicism because it is seductive: ordering orthodoxy through universal injunctions *feels* like victory. But since life happens on the ground,³³² law enlivens only through people, many of whom may not be what we wish but who nonetheless remain the neighbors with whom we live our lives.

Lastly, this Article acknowledges that subsidiary municipalism is the exact practical and prudential pluralism Vermeule regards as temporary, and that other scholars regard as political rather than legal.³³³ Such raises a fear that it replaces solidity with fluid arrangements. But I do not see how pluralistic coexistence can ever avoid such fluidity as it happens by muddling through. In light of human messiness, the difference between an order maintaining peace under factual circumstances and one supposedly based on outcomes frozen in judicial decisions and statutes must be more rhetorical than substantive. For rights must always be interpreted to be applied; and when they are, they are interpreted by people of an age. To explain this sentiment with one final Catholic reference, the current pontificate has been described as the search for unity over conflict.³³⁴ Such unity must be messy because it is the symphony of opposites, or a unity of people as they are, in their initial and apparent incompatibility.³³⁵ The law of a nation whose official seal declares unity out of pluralism³³⁶ will not be anything else. This Article sketches one potential path that legal tradition has taken through our unique mess.

³³² *Id.* at 169.

³³³ *Supra*, note 185 and accompanying text.

³³⁴ MASSIMO BORGHESI, THE MIND OF POPE FRANCIS: JORGE MARIO BERGOGLIO'S INTELLECTUAL JOURNEY 105-06 (2018). *See also* THOMAS GILBY, BETWEEN COMMUNITY AND SOCIETY 14 (1953) (noting need of theory to create a stable balance and synthesis of distinct interests).

³³⁵ BORGHESI, *supra* note 334, at 105-06.

³³⁶ The famous *E Pluribus Unum*. *See* 1 STAT. 68, Chap XIV.