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PRACTICAL REASON AND SUBSIDIARITY: RESPONSE TO ROBERT K. VISCHER, *CONSCIENCE AND THE COMMON GOOD*

CONSCIENCE AND THE COMMON GOOD: RECLAIMING THE SPACE BETWEEN PERSON AND STATE. By Robert K. Vischer. Cambridge University Press. 2010.

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INTRODUCTION

What are we talking about when we talk about conscience? Part of the confusion about conscience, I think, is on account of a certain picture that emerges when one thinks about conscience—that of a faculty or power residing somewhere in one’s mind that acts as a sort of judge in moral decisions one confronts. Consider the contrast between that picture and John Henry Newman’s classic description of conscience in his *Letter to the Duke of Norfolk*, responding to the charge by William Gladstone that Catholics were incapable of exercising intellectual freedom in an authoritarian Church:

I say, then, that the Supreme Being is of a certain character, which, expressed in human language, we call ethical. He has the attributes of justice, truth, wisdom, sanctity, benevolence and mercy, as eternal characteristics in His nature, the very Law of His being, identical with Himself; and next, when He became Creator, He implanted this Law, which is Himself, in the intelligence of all His rational creatures. The Divine Law, then, is the rule of ethical truth, the standard of right and wrong, a sovereign, irreversible, absolute authority in the presence of men and Angels. “The eternal law,” says St. Augustine, “is the Divine Reason or Will of God, commanding the observance, forbidding the disturbance, of the natural order of things.” “The natural law,” says St. Thomas, “is an impression of the Divine Light in us, a participation of the eternal law in the rational creature.”... This law, as

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apprehended in the minds of individual men, is called “conscience;” and though it may suffer refraction in passing into the intellectual medium of each, it is not therefore so affected as to lose its character of being the Divine Law, but still has, as such, the prerogative of commanding obedience.¹

Robert Vischer’s book *Conscience and the Common Good* is a timely and important contribution to a vexed question in law and public policy: How should claims of conscience by individuals or groups be reconciled with the authority of the state? Vischer’s book admirably sets forth some of the philosophical and theological aspects of conscience before engaging a range of concrete legal questions and the relation of claims of conscience to the rights of association, pharmacists, families, and even wedding photographers. The book is a model of interdisciplinary scholarship.

But perhaps we should wonder why conscience poses such a set of legal problems in the first place. Conscience and the common good—the two focal themes of Vischer’s book—are, as he acknowledges, notoriously slippery terms, unmoored in our contemporary discourse from the philosophical frameworks within which they were originally articulated. Their meaning now frequently seems elusive and just beyond our grasp. Part of the problem is the rhetorical use to which they are put; conscience too often becomes the ghostly inner voice telling an individual what he or she should or should not do, and the common good is, as Vischer notes, often invoked in political debates to justify whatever position a politician happens to hold for other reasons.²

Conscience and the Common Good presents a subtle argument from within the Catholic intellectual tradition for the enduring significance of conscience and the common good, notwithstanding the dangers noted above. As Vischer frames his central thesis, “[c]ultivating and maintaining the conditions necessary for these [morally expressive and formative] relationships to thrive should be a priority for our society if we are serious about freedom of conscience.”³ My comments on

¹ A Letter Addressed to the Duke of Norfolk on Occasion of Mr. Gladstone’s Recent Expostulation, in 2 JOHN HENRY NEWMAN, CERTAIN DIFFICULTIES FELT BY ANGLICANS IN CATHOLIC TEACHING 179, 246–47 (1900), available at <http://www.newmanreader.org/works/anglicans/volume2/gladstone/index.html#contents>.

² See ROBERT K. VISCHER, CONSCIENCE AND THE COMMON GOOD 101–02 (2010).

³ *Id.* at 4.

Vischer's project are clustered around the concern, signaled above, that we frequently do not know what we are talking about when we talk about conscience or the common good. Vischer's book is, of course, partly taken up with trying to achieve some clarity about conscience and the common good, but I am uncertain if he has succeeded in bringing complete order to the confusion. In these brief remarks, I will make one brief point with respect to conscience and a more extended comment with respect to the common good.

I. CONSCIENCE AND PRACTICAL REASON

Claims of conscience cannot avoid judgments of practical reason, for that is, on the classical account, precisely what conscience is in the first place. The substance of moral judgments matters, whether we are talking about abortion, same-sex marriage, racial discrimination, or the duties of attorneys toward their clients. Disagreements about the role of conscience, then, cannot help but be disagreements about moral judgments. To talk about conscience is, on this view, to take on the major questions of moral philosophy and theology: What is the nature of practical reasonableness? What is the basis for moral judgment in particular cases? What roles do intention, consequences, rules, and other concepts play in moral judgment? As John Finnis notes, one rarely invokes *conscience* when deciding *what to do*: "[W]hen you are considering what to do, here and now, the question simply is 'What is the right thing to do?' There is no separate question 'What do I in conscience think is the right thing to do?' or 'What does my conscience tell me to do?'"⁴ Conscience is not, then, something else apart from simply our best, considered moral judgment in a case.

Notwithstanding the elegant summary Vischer provides of the historical development of conscience in moral theory, from Saint Paul to today, we risk minimizing the difficulties of giving an account that takes seriously the articulation of conscience in the Christian moral tradition. As Herbert McCabe remarks, conscience played a surprisingly small part in the Christian moral tradition until about 1700.⁵ "Aquinas does use the word

⁴ John M. Finnis, *Conscience, Infallibility and Contraception*, 11 THE MONTH 410, 410 (1978).

⁵ See Herbert McCabe, *Aquinas on Good Sense*, 67 NEW BLACKFRIARS 419, 420 (1986).

conscientia,” McCabe writes, “but for him it is not a faculty or power which we exercise, nor a disposition of any power, nor an innate moral code, but simply the judgment that we may come to on a piece of our behavior in the light of various rational considerations.”⁶

It seems to me that the Christian moral tradition has roughly two ways of understanding conscience. For the earlier tradition, including Aquinas, conscience is a form of *knowledge*.⁷ For Aquinas, conscience is knowledge of good and evil by *synderesis*—the basic capacity to know good and evil—and the specification of principles for action.⁸ A person is said, then, to act in accord with a good conscience with truthful knowledge, which, in turn, habituates one into the cardinal virtues of justice, temperance, fortitude, and especially prudence.⁹ The link between conscience—applying the general principles of practical reasonableness to specific circumstances—and the virtues is crucial for Aquinas and the Christian tradition on conscience more generally.

A more recent tradition treats conscience as a *faculty* or as an inner moral voice directing a person.¹⁰ It may be that our confusions about conscience and when it should or should not be accorded “rights” reflects a deeper and more pervasive philosophical confusion about the very notion of “conscience” in this modern sense. In a series of articles, Steven Smith has echoed this concern and expressed skepticism about conscience. In his article *The Tenuous Case for Conscience*, for example, Smith concludes that “the modern invocation of freedom of conscience is partly parasitic on older ways of thinking that many of those who invoke conscience today might find problematic [I]f we look closely at the modern invocations of conscience we will find uncertainty, confusion, and perhaps even a kind of degradation.”¹¹ Or as Nietzsche remarks enigmatically

⁶ *Id.*

⁷ *Id.*

⁸ SAINT THOMAS AQUINAS, THE CARDINAL VIRTUES: PRUDENCE, JUSTICE, FORTITUDE, AND TEMPERANCE 4–5, 164 (Richard J. Reagan ed., 2005).

⁹ Richard J. Reagan, *Introduction to SAINT THOMAS AQUINAS, THE CARDINAL VIRTUES: PRUDENCE, JUSTICE, FORTITUDE, AND TEMPERANCE* vii, xii (Richard J. Reagan ed., 2005).

¹⁰ See Steven Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325, 328 (2005); McCabe, *supra* note 5, at 420–21.

¹¹ Smith, *supra* note 10, at 358.

in *Twilight of the Idols*, “How much has conscience had to chew on in the past! And what excellent teeth it had! And today—what is lacking?” A dentist’s question.”¹² Modern discussion of conscience cannot help but assume what Stephen Darwall terms an “autonomist internalist” account of morality, by which he means the view that “a free rational agent can only be bound by constraints emanating from his own will,” with Bishop Butler being merely one among many figures to give such an account.¹³ But as Elizabeth Anscombe remarked in her famous 1958 paper *Modern Moral Philosophy*, “Butler exalts conscience, but appears ignorant that a man’s conscience may tell him to do the vilest things. . . . [J]ust as one cannot be impressed by Butler when one reflects what conscience can tell people to do, so, I think, one cannot be impressed by this idea if one reflects what the ‘norms’ of a society can be like.”¹⁴

For Vischer, the “moral marketplace” is the site of competing claims of conscience in a variety of professional contexts—pharmacists, lawyers, and physicians.¹⁵ But we need an account of which claims of conscience are *reasonable* and which are not. We cannot evade the necessity of moral judgment in particular cases—indeed, that is precisely what conscience is or does. Apart from such an account, talk of conscience will remain elusive and malleable. Lurking in the background is a concern that invocations of conscience can too easily become situational, driven less by considerations of practical reasonableness and obedience to moral law and more by occasional emotional feelings. It is the great virtue of Vischer’s book that he opens up these questions for discussion and refuses to provide easy answers, but it is a sign of how much work remains to be done that anything like an adequate account of conscience would need to take on virtually the whole of contemporary moral theory.

¹² Friedrich Nietzsche, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 463, 470 (Walter Kaufmann trans., 1954).

¹³ Stephen Darwall, *Autonomist Internalism and the Justification of Morals*, 24 NOUS 257, 263 (1990); see also STEPHEN DARWALL, BRITISH MORALISTS AND THE INTERNAL “OUGHT”: 1640–1740, at 16–20 (1995).

¹⁴ G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHILOSOPHY 1–2, 13 (1958).

¹⁵ VISCHER, *supra* note 2, at 4–5.

II. THE COMMON GOOD AND SUBSIDIARITY

In his discussion of the common good, Vischer rightly signals the importance of the principle of subsidiarity and avoids the danger of either totalizing or devolutionary interpretations of subsidiarity. Vischer follows recent work on the principle of subsidiarity that has helpfully clarified that the enterprise of treating subsidiarity as a devolutionary principle is misguided. “[T]he point of subsidiarity,” writes Russell Hittinger, “is a normative structure of plural social forms, not necessarily a trickling down of power or aid.”¹⁶ Although “subsidiarity is often described and deployed in a defensive sense—as to what the state may *not* do or try to accomplish,” continues Hittinger, “the principle is not so much a theory about state institutions or of checks and balances, as it is an account of the pluralism and sociality of society.”¹⁷ By bringing subsidiarity to bear on the range of questions concerned with the common good—including families, schools, and professional relationships, Vischer both broadens and sharpens the role of subsidiarity. As Joshua Hochschild notes, “Insofar as it recommends a pattern of organizing social life in general, and not just that part of social life which touches the state, the principle has implications for the choices of families, neighborhoods, and commercial enterprises, indeed for all social agents, individual and corporate.”¹⁸

Vischer’s argument about the common good and subsidiarity is—and here, I think, is the importance of the moral marketplace metaphor that recurs throughout the book—a powerful rejoinder to a certain Hobbesian picture of sovereignty.¹⁹ For Hobbes, the sovereignty of Leviathan is absolute, so subsidiary units of the

¹⁶ Russell Hittinger, *Society, Subsidiarity, and Authority in Catholic Social Thought*, in *CIVILIZING AUTHORITY: SOCIETY, STATE, AND CHURCH* 119, 135 (Patrick McKinley Brennan ed., 2007).

¹⁷ *Id.* at 136.

¹⁸ Joshua P. Hochschild, *The Principle of Subsidiarity and the Agrarian Ideal*, in *FAITH, MORALITY, AND CIVIL SOCIETY* 37, 37 (Dale McConkey & Peter Augustine Lawler eds., 2003).

¹⁹ See THOMAS HOBBS, *LEVIATHAN* 134 (Forgotten Books 2008) (1651).

In bodies politic the power of the representative is always limited; and that which prescribeth the limits thereof is the power sovereign. For power unlimited is absolute sovereignty. And the sovereign, in every commonwealth, is the absolute representative of all the subjects; and therefore no other can be representative of any part of them, but so far forth as he shall give leave.

Id.

social order—churches, groups, smaller units of government—exist merely at the sufferance of the sovereign.²⁰ By contrast, for Catholic social theory, politics is essentially pluralistic. Subsidiarity is not merely a “formal principle,” as Johannes Messner notes in his classic work *Social Ethics*, but “because it is rooted in the order of being and of ends, [it] assigns quite definite and concrete responsibilities, competencies, and rights to definite narrower social units.”²¹

But the principle of subsidiarity is often taken to be a procedural norm, counseling “small is better” regardless of the underlying substantive question to which one would apply the principle of subsidiarity. It is only through an adequate examination of concrete policy issues that subsidiarity’s import can be fully measured and appreciated. It is only by asking what the common good requires in particular instances through the exercise of political prudence that the proper distribution of authority can be determined, and Vischer’s book is an important contribution to the literature on subsidiarity precisely because he undertakes such an examination of concrete legal and public policy questions.

One such set of legal and policy issues is clustered around freedom of association, which Vischer takes up in chapter five in an especially lucid and provocative section of the book. Vischer helpfully emphasizes that associations are not mere coincidental aggregations of individuals, though a more extended discussion of the difference between group personality and other understandings of associations would have buttressed his case. The important difference made by framing the right to association as a *group* right rather than an aggregated *individual* right is spelled out by John Garvey in his book *What Are Freedoms For?*²² The “aggregation of individuals” view is reflected in *Roberts v. Jaycees*,²³ which Vischer discusses critically. The *Roberts* Court reflects what Garvey terms the “individualist” view: “[G]roup action has value because it is an aggregate of valued individual actions. . . . People form groups in

²⁰ *See id.*

²¹ JOHANNES MESSNER, *SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD* 210–11 (J.J. Doherty trans., 1965).

²² *See generally* JOHN H. GARVEY, *WHAT ARE FREEDOMS FOR?* (1996).

²³ 468 U.S. 609, 618–19 (1984).

order to advance their own interests more effectively.”²⁴ The alternative to such individualism is group personality as suggested by such cases as *Boy Scouts of America v. Dale*,²⁵ which Vischer discusses in a more favorable light. *Dale* and similar cases emphasize the potential for genuine *group* action. Surveying examples drawn from family life and team sports, Garvey concludes:

What distinguishes these cases from the individualist view is that in each of them members see in the group a good more important than their own self-interest. In each case the good is interpersonal, a kind that can only be enjoyed by a group: victory for the team, love, peace, grace. Love, for example, is a relation between persons. It cannot be divided (like a baked Alaska) into separate shares and handed around for individual enjoyment.²⁶

The insistence upon the possibility of “group personality” is also found in an earlier tradition as reflected in F.W. Maitland’s classic essay *Moral Personality and Legal Personality*.²⁷ “If the law allows men to form permanently organised groups,” Maitland writes, “those groups will be for common opinion right-and-duty-bearing units.”²⁸ As summarized by Russell Hittinger, “[i]n the case of a real group-person, common action is an intrinsic aspect of the common end or purpose. . . . False Achievement of a mutually agreeable result is not enough. . . . [F]or each of these groups, their respective corporate unity is one of *reasons for action*—unity is one of the goods being aimed at.”²⁹

By underscoring the importance of genuinely group personality and group activity, the case law surrounding freedom of association and commentators such as Garvey, Maitland, Hittinger, and Vischer provide an elaboration of Pius XI’s central insight in *Quadragesimo Anno* regarding the nature of subsidiary function: “For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.”³⁰ There are points at which I wonder if

²⁴ GARVEY, *supra* note 22, at 133.

²⁵ 530 U.S. 640, 648 (2000).

²⁶ GARVEY, *supra* note 22, at 137.

²⁷ F.W. Maitland, *Moral Personality and Legal Personality*, in STATE, TRUST, AND CORPORATION 62 (David Runciman & Magnus Ryan eds., 2003).

²⁸ *Id.* at 68.

²⁹ Hittinger, *supra* note 16, at 122.

³⁰ PIUS XI, *QUADRAGESIMO ANNO* ¶ 79 (1931).

Vischer's account of rights of conscience and their relation to the common good is still too indebted to liberal accounts of procedural fairness,³¹ but I think he and I agree that the appropriate way to frame the relation between the principle of subsidiarity and contemporary American constitutional law is nothing as abstract or useless as "small is beautiful" or a principle of devolution.

I would extend the point to argue that subsidiarity challenges dominant accounts of individual rights and provides a theoretical basis for "institutional" theories of rights advocated recently by legal scholars. As developed variously by Roderick Hills and John McGinnis, such institutional theories supplant anticoercion or other liberal accounts of rights that fail to account for significant aspects of constitutional jurisprudence. As summarized by Hills, "[a]nticoercion theories of constitutional rights maintain that the interest being protected by rights is simply the individual's best interest in being free from 'coercive' pressure imposed by institutions for collective self-governance."³² With some qualification, examples of such anticoercion accounts are Ronald Dworkin's and John Rawls's.³³ Hills argues, though, that such anticoercion theories cannot justify ascribing rights to institutions.³⁴ Along the way, Hills performs a valuable task by

³¹ See generally JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

³² Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 156 (2003).

³³ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); RAWLS, *supra* note 31, at 134–40; see also Richard H. Pildes, *Dworkin's Two Conceptions of Rights*, 29 J. LEGAL STUD. 309 (2000). As Hills shows, it is easier to ascribe the anticoercion label to Dworkin than to Rawls:

If political participation merely secures some sort of entitlement to basic social goods consistent with the Difference Principle, then it might constitute a version of anticoercion theory, as the interest is a jurisdictionally indifferent and remedially simple private good—an entitlement to some share of social goods plus an interest in being left alone. In theory, such entitlements could be satisfied in a benevolent bureaucratic despotism with lots of public hearings, a merit-based civil service, and stringently enforced freedom for solitary free-lance journalists, soap-box orators, etc. The abstract requirement of equal political participation can be guaranteed just as easily by abolishing elective office equally as by giving everyone an equal right to vote for such offices. Given that Rawls leaves most specific institutional questions to later stages of his "four stages" of analysis, which he himself does not discuss, it is probably best to be agnostic about what precisely Rawls's theory implies.

Hills, *supra* note 32, at 159 n.36.

³⁴ Hills, *supra* note 32, at 156–75.

calling into serious doubt the easy public/private distinction and the distinction between constitutional structure—federalism, separation of powers—and constitutional rights. More importantly and in ways that Hills mentions only briefly in his article on the topic but where Vischer's chapter on voluntary associations is helpful, institutions act as "private governments" because they legitimately possess *authority*. For his part, Hills justifies the importance of institutions by arguing for their essentially instrumental value. In contrast to Justice Brennan's views in *Roberts* that freedom of association is based on the rights of the individual members' rights to free speech, Hills argues that

[m]any organizations may (because of their incentives, structure, etc.) be better suited for advancing First Amendment values than the federal, state, and local governments themselves. It is this special "expertise" (for lack of a better word) that entitles them to preempt other governments' regulation, not the members' desire, however sincere, to express themselves.³⁵

Similarly, in his article defending a Tocquevillian interpretation of the Rehnquist Court's jurisprudence in a range of areas—federalism, freedom of association, the Establishment Clause, and the scope of the right to trial by jury—John McGinnis argues for the unifying theme of "social discovery" through associational rights,³⁶ which is similar to Vischer's account of the moral marketplace's operations. In contrast to the Warren Court's enthusiasm for centralized federal power balanced by areas of hypertrophied individual autonomy in areas such as privacy and criminal procedure, McGinnis argues that the Rehnquist Court has substituted an enthusiasm for decentralized associational and localized "social discovery."³⁷

McGinnis underscores the recent acknowledgment of the influence of the English political philosopher Michael Oakeshott on Chief Justice William Rehnquist. Rehnquist wrote an M.A. thesis at Stanford on competing theories of rights, which was

³⁵ *Id.* at 218.

³⁶ See generally John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

³⁷ *Id.*

posthumously published in the *Stanford Law Review*,³⁸ and began an M.A. thesis on Oakeshott at Harvard. From Oakeshott, Rehnquist adopted a measure of skepticism toward politics that reflected deeper epistemological commitments by Oakeshott remotely derived from Oakeshott's qualified appreciation for Hobbes.³⁹ In turn and as argued by Douglas Kmiec, this skepticism or anti-utopianism led Rehnquist to adopt a suspicion of national power that, soon upon his confirmation to the Supreme Court, stood in marked contrast to the Warren Court's federalism jurisprudence and the *Wickard* high-water mark of the New Deal Court's view of national power.⁴⁰

For his part, McGinnis looks to Tocqueville and Hayek as the remote intellectual forces on the Rehnquist Court. Regardless of their source, however, the decisions surveyed by McGinnis that evince a commitment to social discovery are justified, according to McGinnis, by the instrumental ends served by such social discovery. So it is that, for McGinnis, associations "are independently valuable because they themselves generate potentially beneficial norms for society through their competition. The norms that survive this market test have some claim to being beneficial."⁴¹ Later in his article when defending the Court's decision in *Dale*, McGinnis argues that

the advantage of having a full range of civil associations lies in society's enjoyment of a range and intensity of views on an issue pressed from different perspectives. An alternative constitutional world, which provides special solicitude only for the autonomy of groups with an express political agenda and neglects that of civil association, is one where contentious political advocacy alone supplements the norms encouraged by the government.⁴²

³⁸ William Hubbs Rehnquist, *Contemporary Theories of Rights*, 58 STAN. L. REV. 1997 (2006).

³⁹ See MICHAEL OAKESHOTT, *HOBBS ON CIVIL ASSOCIATION* (2000).

⁴⁰ See *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring) (arguing that Congress's already broad Commerce Clause power should not be expanded to allow federal regulation of activities that do not substantially affect interstate commerce); Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827, 1828 (2006).

⁴¹ McGinnis, *supra* note 36, at 505.

⁴² *Id.* at 534.

Elaborating on the theses advanced by Hills and McGinnis to defend the role of associations and the states and local governments in the American constitutional order, I would extend Vischer's account of subsidiarity in *Conscience and the Common Good* and argue that subsidiarity offers a more adequate and complete justification for the ordering of associations and the common good. On my view, subsidiarity is a principle reflecting what we might term "functional pluralism" in the social order. By "functional," I mean to denote that subsidiarity focuses upon the *ends* of political societies—families, towns, civic organizations—and thereby seeks to determine the goods they pursue and the means that are properly adapted to those ends. By "pluralistic," I merely suggest that different ends are pursued by different social forms. So, for example, the ends served by Villanova University are different than the ends served by the federal government, the Commonwealth of Pennsylvania, the Boy Scouts of America, or the family. Note that this view of functional pluralism need not contradict the instrumentalist accounts variously offered by Hills, McGinnis, and others. One can proceed from an agnosticism about the worthiness of ends served by the Church of Jesus Christ of Latter-Day Saints or by the Rotary Club but still believe it may well be beneficial, understood instrumentally, to the larger society if there are a multitude of such groups and if their associational rights are duly protected by constitutional doctrine.

One advantage of understanding subsidiarity as functional pluralism is that one need not be committed to adopting an agnosticism toward the ends pursued by different groups, thereby deflecting the charge that advocates of associational rights cannot offer principled grounds for distinguishing between, say, the Episcopal Church and the Ku Klux Klan. Scholars have, for example, either wrung their hands over squaring the Court's rulings in *Roberts* or *Runyon v. McCrary*⁴³ with *Dale* or have argued simply that *Dale* was wrongly decided.⁴⁴ Such confusion is sown by adopting an agnosticism

⁴³ 427 U.S. 160 (1976) (holding that § 1981 prohibition on racial discrimination was applicable to private, commercially operated, nonsectarian school).

⁴⁴ See David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619 (2001); Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595 (2001); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001).

toward the ends served by any form of expressive association, whether for the purposes of gathering for religious worship, camping, organizing a parade, or engaging in racially motivated violence. But functional pluralism permits—indeed requires—some such scrutiny of the reasons for which the group is engaging in expressive association or has come together in the first place, even if not for purely expressive purposes.

Hills captures an aspect of this point in his discussion of Joseph Raz's argument for political authority in *The Morality of Freedom* and in Hills's discussion of "jurisdictional limits" to associational rights.⁴⁵ As summarized by Hills, "[i]n contrast to anticoercion theories, which are jurisdictionally indifferent, under Raz's theory, authorities are limited by jurisdiction."⁴⁶ By "jurisdictionally indifferent," Hills means that anticoercion accounts of rights "do not make the definition of impermissible 'coercion' depend on the identity of the allegedly coercive jurisdiction."⁴⁷ An implication of such jurisdictional indifference, according to Hills, is that "rights are not entitlements to any particular institutions for collective self-governance."⁴⁸ By contrast, in the account of authority offered by Raz, "[a]n authority is entitled to deference only on those questions where deference to the authority's views will improve the consistency of the decision with the appropriate social norm."⁴⁹ For my purposes, the key step in the argument by Hills and of importance for synthesizing his theory of institutional rights and the principle of subsidiarity is the need for reasoned justification for authority.

Razian authority, in other words, is critically connected to the justifications for decisions rather than the acts or consequences that result from the decision. Since the institutional rights of private government that I defend are a species of Razian authority, they depend on reasons as well. Thus, private organizations have rights to make decisions if their justifications are the proper ones for the sphere in which those organizations have jurisdiction. This creates a certain symmetry between rights of private organizations and powers of government: Both are invalid if they are based on improper

⁴⁵ See Hills, *supra* note 32, at 195–96.

⁴⁶ *Id.* at 196.

⁴⁷ *Id.* at 157.

⁴⁸ *Id.*

⁴⁹ *Id.* at 196.

reasons. Such symmetry should hardly be surprising. Under my theory, the institutional rights of private organizations are, as a matter of principle, indistinguishable from the powers of the state. Both are simply instruments of self-government.⁵⁰

Though the justification for authority in the Catholic social tradition would, once again, emphasize the common good more than mere instrumentalism, the jurisdictional limits for which Hills argues are consonant with that tradition. As Johannes Messner argues in *Social Ethics*, “[b]ecause the subsidiary function principle protects the particular rights of the natural and the free associations against the state’s claim to omnicompetence, it is a *fundamental principle of the pluralistic society*.”⁵¹

This account of subsidiarity as functional pluralism and its role in American constitutional law prompts an important question, though: Are the states and local governments appropriately considered such subsidiary institutions? The argument for a consonance between the associational right recognized in such cases as *Dale* and functional pluralism is easy to see. Indeed, the documents from the Catholic social tradition that initially formulated the principle of subsidiarity and then later elaborated upon it spoke of precisely such associations as reflecting subsidiarity—families (preeminently), unions, guilds, civic associations, and the like. The more difficult issue is how to square functional pluralism with the apparently random boundaries of geographically determined political units in a federal system.

Even if the states and local governments are not “natural” forms of association in the sense in which families are or are not “voluntary” associations in the way that the Rotary Club is, they exist as a matter of positive constitutional, or sub-constitutional, law. Following the same account of functional pluralism and applying it to the states and local governments, we can describe the ends of such political units as those powers that are assigned them by positive law. Furthermore, for reasons famously articulated by Mancur Olson in *The Logic of Collective Action*, there is a relation between the size of any group or organization

⁵⁰ *Id.*

⁵¹ JOHANNES MESSNER, *SOCIAL ETHICS: NATURAL LAW IN THE WESTERN WORLD* 213 (J.J. Doherty trans., 1949).

and the provision of some collective good.⁵² The collective action problems associated with large groups are often overcome in smaller units.⁵³ Both positive law and arguments regarding the scale of authority and the provision of collective goods offer a way to reconcile the *jurisdictional* pluralism of American government—federal, state, and local—with the *functional* pluralism of subsidiarity.

CONCLUSION

Vischer's book is a deft combination of law, political theory, and Catholic social ethics that sets an agenda for future work on conscience and the common good in American law and legal scholarship. In particular, by pointing toward how conscience relates to practical reasonableness and how the common good relates to subsidiarity—topics I have explored briefly in this essay—Vischer has put those of us who work at the intersection of Catholic social thought and the law much in his debt.

⁵² See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965). See also Jeremy Waldron, *Can Communal Goods be Human Rights?*, in *LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991*, at 339, 344–54 (1993).

⁵³ See STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* 34–36 (2008).