Subsidiarity and the Allocation of Governmental Powers

[Note: This is an author's accepted manuscript for a forthcoming piece in the Canadian Journal of Law & Jurisprudence.]

Abstract: Every country must allocate final decision-making authority over different issues/subjects within its boundaries. Historically, many scholars working on this topic implicitly assumed that identifying the features providing entities with justified claims for authority and the entities possessing those features would also identify which groups should have which powers (or vice versa). However, many candidate allocative principles select multiple entities as candidates for *some* sub-state authority and yet fail to explain *which* powers each should possess. Further work must explain which groups should possess which powers when and what to do when two groups can make equally-valid authority claims using the same principle. Subsidiarity, the principle under which authority should presumptively belong to the entity representing those 'most affected' by its exercise and capable of addressing underlying problems, is one of the few principles focused on identifying which groups should have which powers. Unfortunately, subsidiarity alone does not provide guidance on many issues/subjects. Useful subsidiarity-related guidance relies on balancing underlying justificatory interests, which do the real allocative work. Another allocative principle remains necessary. A deflationary account of subsidiarity's allocative potential nonetheless provides insights into how to articulate a new principle and accounts of subsidiarity that can fulfill other moral roles.

Subsidiarity and the Allocation of Governmental Powers

Every country must make decisions about how to allocate governmental powers. Each faces a host of questions ranging from the existential (e.g., 'When should a person be able to immigrate?') to the prosaic ('Should a barbershop to be allowed to open on this street?'). Countries who claim legitimate rule should provide a principled basis for identifying who can answer these questions. The 'authority allocation problem' examines how to justifiably allocate decision-making authority, understood as the power to make decisions free from direct interference (substituting decisions, fines, etc.) from others.[1] While often framed as an issue for federations, all countries, including centralized ones, must decide which entities will have authority over which issues (viz., discrete questions at given times, like 'Should we approve this licence?') and subjects (viz., law/policymaking domains, like 'healthcare'). The government in Paris cannot address every pressing or prosaic far-away issue in classically centralized France.

Many scholars working on these issues assume that identifying the features providing entities with justified claims for different kinds of authority and entities possessing those features would also identify who should have which powers when (or vice versa). Yet developments below highlight the need to distinguish the features necessary to make something a candidate authority and the factors that fully justify allocating particular powers to particular candidates. Many purportedly allocative principles select multiple entities as justifiably able to claim *some* 'sub-state' powers and yet fail to explain *which* powers they should possess or what to do when two groups have equally-valid claims under that principle. Most candidate principles cannot, for example, explain when and why a province, rather than a city, should control healthcare policy.[2]

This article demonstrates the need to distinguish 'ontological' features that can identify candidate authorities and genuinely 'allocative' principles needed to specify who should have authority over which issues and subjects. It then explores the allocative potential of subsidiarity, the principle under which authority should presumptively belong to the entity representing those 'most affected' by its exercise and capable of addressing underlying problems. Subsidiarity is

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[1] See also Jonathan Rodden, *Hamilton's Paradox: The Promise and Peril of Fiscal Federalism* (CUP, 2006)'s federalism-specific "assignment problem." 'Authority' here does not perfectly mirror use in Raz, Dworkin, Wolff, Simmons, Green, et al. It does not focus on whether those allocated de facto 'authority' provide reasons or duties to obey them. Yet my approach fits traditional use in federalism studies and politics. Also, questions about the moral reasons justify allocating decision-making 'powers' within states relate to those in Raz et al. Many principles that would make something a candidate for 'powers' here mirror those that would make it a classical 'authority.'

[2] Details appear below.

one of the few candidate allocative principles in international law, European Union [E.U.] law, domestic constitutional laws, and legal/political philosophy.[3] It purports to appropriately allocate authority within countries and shows some promise for doing so. If, e.g., a province and city are both candidates for a power under a principle whereby unique cultural entities can be authorities, subsidiarity could allocate it to the 'closer' municipality. 'Most affected' and 'closeness' are, of course, contested, possibly non-equivalent terms. Yet rough understandings guide real-world allocations. Subsidiarity is thus a good test case for analyzing allocative principles. Identifying allocative 'work' subsidiarity can or cannot do also identifies its strengths and limitations, thereby contributing to subsidiarity studies. If, e.g., subsidiarity must be fundamentally linked to communitarian interests to serve any allocative function, interpretations of the principle justifying it on communitarian grounds will be preferable.[4] If subsidiarity-based allocations are then consistently plausible, subsidiarity is valuable: it resolves a common, persistently challenging problem. Exploring competing conceptions' allocative potential could help us choose between them or highlight the need for other ways to establish subsidiarity's value.

My analysis ultimately demonstrates that subsidiarity as such is not a useful allocative principle. Subsidiarity does not provide guidance on many issues/subjects, especially regarding divisions of constitutional powers. Useful subsidiarity-related guidance balances underlying

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[3] Any 'modern' conception of subsidiarity originates in E.U. law, including European Council, "Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Signed at Lisbon, 13 December 2007," *Official Journal of the European Union*, vol. 50, no. 2007/C 306/01, 2007 [EC]. For subsidiarity's use in Canada, see Andreas Føllesdal & Victor Muñiz Fraticelli, "The Principle of Subsidiarity as a Constitutional Principle in the EU and Canada" (2015) 10(2) Ethics Forum 89; Hoi Kong, "Republicanism and the Division of Powers in Canada" (2014) 64 UTLJ 259; Hoi Kong "Subsidiarity, Republicanism, and the Division of Powers in Canada" (2015) 45 RDUS 13; Ran Hirschl, *City, State: Constitutionalism and the Megacity* (OUP, 2020) at 223. For use in the U.S., see Andreas Føllesdal, "The Principle of Subsidiarity as a Constitutional Principle in International Law" (2013) 2(1) Global Constitutionalism 37 at 37. For use in international law, see Paolo G Carozza, "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 Am J Int'l L 38 [Carozza, "IHRL"]; Samantha Besson, "Subsidiarity in International Human Rights Law—What is Subsidiary about Human Rights?" (2016) 61 Am J Juris 69 (noting critiques in Paolo G Carozza, "The Problematic Applicability of Subsidiarity to International Law and Institutions" (2016) 61 Am J Juris 51).

[4] Andreas Føllesdal, "Survey Article: Subsidiarity" (1998) 6(2) Journal of Political Philosophy 190 at 200-203 (on 'Althusian' accounts); Loren King "Cities, Subsidiarity, and Federalism" in James E Fleming & Jacob T Levy, eds, *Federalism and Subsidiarity* (NYUP, 2014) 291; Maria Cahill, "Theorizing Subsidiarity: Towards an Ontology-Sensitive Approach" (2017) 15(1) ICON 201; John Finnis, "Subsidiarity's Roots and History: Some Observations" (2016) 61 Am J Juris 134. On Cahill's account, Althusius presents a version connected to 'sphere sovereignty,' the view on which institutions (federal governments, churches, etc.) have natural domains of authority; subsidiarity is valuable insofar as it helps promote that natural order. Føllesdal and Robert K Vischer, "Subsidiarity as a Principle of Governance: Beyond Devolution" (2001) 35 Indiana LR 142 view Althusius as liberty-focused.

justificatory interests, which do the real allocative work. At least one other allocative principle is accordingly necessary, and proponents must justify subsidiarity's value in other ways.

To establish this conclusion, I first outline the need for allocative principles and how conceptions of subsidiarity purport to allocate authority within countries. I then argue that no existing conceptions of subsidiarity fulfill desiderata of a plausible allocative principle– namely the need to provide concrete, intuitively acceptable guidance on which entities should possess authority over particular subjects when that can at least apply in liberal-democracies and to explain at least a de minimus number of real-world allocations of final decision-making powers – *and* subsidiarity's characteristic feature, a presumptive allocation of authority to the 'closest' level of governance. I further argue that any account of subsidiarity that appears plausibly capable of providing concrete guidance collapses into a commitment to supporting principles that make the further appeal to subsidiarity redundant – and could lead to a misallocation of authority where supporting principles do not actually support 'close' rule. Despite this deflationary conclusion, analyzing subsidiarity's allocative potential remains valuable. It explains why and when the principle seems compelling (and, consequently, why one may wish to identify another moral role it could fulfill) and highlights the need for and desiderata of another allocative principle, pitfalls candidate principles may face, and a method for identifying a better principle.

The Importance of Scrutinizing Potential Allocative Principles

Contrary to present scholarly trends,[5] questions about how to allocate authority within countries should not be confined to federal and provincial (including canton, länder, U.S. state, etc.) governments, federations, or constitutional moments. A compelling allocative principle should guide decisions about which powers should rest with which government in federations, but this need not apply to federal and provincial governments alone. For instance, cities may also

[5] As noted above/below, works increasingly recognize that other entities could possess powers. Fleming & Levy, *ibid* and NW Barber, *The Principles of Constitutionalism* (OUP, 2018) stress that some allocative principles, including subsidiarity, can be *rivals* to federalism. The authority allocation problem also figures in debates about the separation of powers. The somewhat-simplified generalization nonetheless reflects (at worst) many relevant scholars' primary focus. Even Fleming & Levy self-identifies as philosophy of federalism. Placement of many works in law journals is also notable. Many leading philosophical works specifically focus on federalism; e.g., Dimitrios Karmis & Wayne Norman, eds, *Theories of Federalism: A Reader* (Palgrave, 2005); Wayne Norman, *Negotiating Nationalism: Nation-building, Federalism and Secession in the Multinational State* (OUP, 2006). Allocative principles appear under the 'federalism' banner in Andreas Føllesdal, "Federalism" *Stanford Encyclopedia of Philosophy* (2003/2018), https://plato.stanford.edu/entries/federalism/ [SEP].

be relevant.[6] Moreover, countries need principles for when authority should rest with which groups for their everyday functioning. Central governments require principles for which powers they should delegate to others when. A plausible authority allocation principle should provide guidance on the subjects over which entities should have authority in constitutional divisions of powers, where authority over issues should rest, and, by extension, when one should delegate it. It should allocate authority over subjects and issues in centralized and federal countries.

Recent developments challenge traditional allocations and allocative principles in ways that highlight the importance of and require further work on authority allocation. Rawlsian political philosophy initially assumed unitary countries and only gradually explored how minority rights and federalism impact the structure of just societies.[7] Theoretical discussions of authority allocation thus often occurred in law and political science; focus on constitutional divisions of power was common.[8] While some works addressed basic allocative concerns, common emphases on narrower issues (e.g., areas of 'overlapping' federal and provincial jurisdiction) was understandable given the low chances of constitutional change and generation of plausible allocative principles that explained real, prima facie justified decisions.[9]

Yet recent events challenge the allocative status quo. For example, sanctuary city debates and demographic differences between municipal and rural residents led to calls for greater authority for cities.[10] For another, cities, Indigenous nations, and other sub-state 'national'

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[6] See theoretical arguments for providing powers to cities/sub-state nations below. See also comparative scholarship on different power-sharing forms; e.g., Michael Burgess & John Pinder, eds, *Multinational Federations* (Routledge, 2011); Alan Fenna & Thomas O Hueglin, *Comparative Federalism: A Systematic Inquiry*, 2d ed (UTP, 2015); Francesco Palermo & Karl Kössler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Hart, 2017); Nicholas Aroney & John Kincaid, eds, *Courts in Federal Countries: Federalists of Unitarists?* (UTP, 2017).

[7] The dates of publication of John Rawls, *A Theory of Justice* (Harvard UP, 1971), Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (OUP, 1995), and Norman, note 5 remains remarkable (though some works between them addressed some sub-state allocative concerns).

[8] Recalling earlier caveats about simplification, note e.g., the locations of many publications (and homes of many authors in) sources above/below (and cited anthologies like Fleming & Levy, note 4 or SEP, note 5). The major 'federalism' journal, Publius, publishes philosophy but more often features work in other fields. Texts cited throughout this work (or entries therein) support these generalizations.

[9] Hoi Kong, "Toward a Federal Legal Theory of the City" (2012) 57(3) McGill LJ 473 at 476 thus views these issues against a backdrop of constitutional realities. Yet even works focused on such realities suggest expanding accounts of allocation to consider municipal and/or sub-state national claims. E.g., Heather Gerken stresses the importance of addressing a broader array of claims to and seeming exercises of authority ("Dissenting by Deciding" (2005) 57 Stanford LR 1745; "Foreword: Federalism All the Way Down" (2010) 124(1) Harvard LJ 6; "Federalism as the New Nationalism: An Overview (2014) 123 Yale LJ 1889).

[10] While these claims often appear in the press (e.g., Nilanjana Roy, "Cities Offer Sanctuary Against the Insularity of Nationalism" (4 April 2017) *The Financial Times*), sanctuary cities appear as tools for protecting against 'Trumpism' in Ilya Somin, "Making Federalism Great Again: How the Trump Administration's Attack on Sanctuary

groups demanded increased authority over public health management after purportedly unresponsive or otherwise problematic central/federal/provincial actions related to COVID-19.[11] At the same time, political philosophers increasingly recognize that principles 'justifying' provincial control over some topics equally 'justify' control by other entities. Per Daniel Weinstock, such principles (analyzed below) equally, if not better, justify municipal authority.[12] So, countries that "incorporate … [decentralizing principles] should on pain of arbitrariness apply them to cities."[13] Avner de-Shalit, Ran Hirschl, and others make similar claims; per Hirschl, the principles also justify 'rural' authority.[14] Helder De Schutter et al. then argue that even sub-state 'nations' who lack their territory still possess unique cultures that could justify forms of non-territorial autonomy (and thus sub-state authority) on the self-determination-based grounds justifying provincial control in some countries.[15] Accounts of authority (and political justice at large) should explain if, why, and when these demands should be fulfilled.

Cities Unintentionally Strengthened Judicial Protection for State Autonomy" (2019) 97 Texas LR 1247. On demographic sorting, see Jonathan Rodden, *Why Cities Lose: The Deep Roots of the Urban-Rural Political Divide* (Basic, 2019). For sorting-related proposals, see Benjamin R Barber's *If Mayors Rules the World: Dysfunctional Nations, Rising Cities* (Yale UP, 2013)/*Cool Cities: Urban Sovereignty and the Fix for Global Warming* (Yale UP, 2014); David Miller, *Solved: How the World's Great Cities Are Fixing the Climate Crisis* (UTP, 2020).

[11] Michael Da Silva, "COVID-19 and Health-Related Authority Allocation Puzzles" (2021) 30(1) Cambridge Quarterly Journal of Healthcare Ethics 25 suggests COVID-19 even led to 'decentralization' demands in France.

[12] "Cities and Federalism" in Fleming & Levy, note 4, 259 [Weinstock, "Cities"]; "Pour une philosophie politique de la ville" (2009) 63(1) Rue Descartes 63; "Self-Determination for (Some) Cities?" in Axel Gosseries & Yannick Vanderborght, eds, *Arguing About Justice: Essays for Philippe Van Parijs* (PU Louvain, 2011) 377.

[13] Weinstock, "Cities," *ibid* at 265. 'Decentralized' here means 'allocated to entities other than global/central/federal governments.' Its 'proper' meaning is beyond my scope of inquiry but see Paolo Dardanelli, "De-centralization" in John Kincaid, ed, *A Research Agenda for Federalism Studies* (Northampton: Edward Elgar, 2019) 106.

[14] Hirschl, note 3 at 219-229; Daniel A Bell & Avner de-Shalit, *The Spirit of Cities: Why the Identity of a City Matters in a Global Age* (Princeton UP, 2011); Avner de-Shalit, *Cities and Immigration: Political and Moral Dilemmas in the New Era of Migration* (OUP, 2019). See also Rainer Bauböck, "Reinventing Urban Citizenship" (2003) 7 Citizenship Studies 139. Jurisdiction-specific arguments for municipal 'authority' include Ron Levi & Mariana Valverde, "Freedom of the City: Canadian Cities and the Quest for Governmental Status" (2006) 44(3) OHLJ 409; Roger Keil & Douglas Young, "A Charter for the People? A Research Note on the Debate About Municipal Autonomy in Toronto" (2003) 39(1) Urban Affairs Review 87; Alexandra Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019) 56(2) OHLJ 271; and Kong's works above. Loren King & Michael Blake, "Global Cities, Global Justice?" (2018) 14(3) Journal of Global Ethics 332 discuss their status in global authority allocation. Others (e.g., King, note 4; Richard Briffault, "'What About the "Ism"?' Normative and Formal Concerns in Contemporary Federalism" (1994) 47(5) Vand LR 1303) notice the parity of reasoning but believe further principles make provinces *better* candidates.

[15] Helder De Schutter, "Territoriality and Personality: Concepts and Normative Considerations" in Jean-François Grégoire & Michael Jewkes, eds, *Recognition and Redistribution in Multinational Federations* (Leuven UP, 2015); Ephraim Nimni, ed, *National Cultural Autonomy and its Contemporary Critics* (Routledge, 2005); Ghislain Otis, "Territorialite, personnalite et gouvernance autochtone" (2006) 47(4) Cahiers de Droit 781; Ephraim Nimni et al., eds, *The Challenge of Non-Territorial Autonomy: Theory and Practice* (Peter Lang, 2013). See also John Croakley, "Approaches to the Resolution of Ethnic Conflict: The Strategy of Non-territorial Autonomy" (1994) 15(3) IPSR 297. *Cf*. Rainer Bauböck, Multinational Federalism: Territorial or Cultural Autonomy?" (2001) Willy Brandt Working Paper 2/01.

These developments also highlight an often-overlooked distinction between features providing entities with justified claims for authority and factors specifying which groups should have which powers. For instance, self-determination is often discussed as if it answers the ontological question 'What entities can justifiably possess powers in a country?,' which addresses the features that make groups valuable in ways that could justify providing them with some authority, and the more specific allocative question 'Which entity should possess a specific decision-making power?'[16] Yet if, e.g., a province and city each have self-determination-based claims to control language policy, another principle must allocate authority between them. Several scholars view parallel arguments for provincial and municipal control as evidence that those who allocate powers to provinces should allocate them to cities too.[17] Yet they might just make both the kinds of things that could have *some* authority. Other considerations should explain which powers each should possess when. They may not require more constitutional powers for cities. But a complete account of authority allocation should address municipal claims.

We must accordingly separate the ontological and allocative questions and scrutinize the genuinely allocative potential of candidate principles for resolving the latter. Detailing issues with existing principles clarifies the problem. To begin, most existing principles fail to specify the precise powers entities should possess. For instance, the scope of moral self-determination rights is contested. Claims that they should entail powers over cultural policy for unique cultural groups are plausible.[18] Yet institutional forms other than sub-state autonomy may best protect cultures.[19] Moreover, even a 'right' to authority (in the sense at issue) could be defeasible. Self-

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[16] See e.g., Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP, 2006) (on self-determination); Barber, note 5 at 187; Føllesdal, note 4 at 212 (on subsidiarity). As discussed below, subsidiarity need not answer the ontological question to be morally valuable. Like many major philosophical terms, 'ontological' and 'allocative' have multiple meanings in different literatures. In the subsidiarity literature, one 'ontological' approach holds that subsidiarity can help protect the value of groups; e.g., Cahill, *supra* note 4. Our ontological question asks what features of entities make them candidate authorities. The value of groups may answer that question, but my use of the term 'ontological' relates to, but is non-identical with, use in Cahill et al.

[17] Recall note 12 sources; Hirschl, note 3; etc.

[18] Many thus allow exceptions to general allocative rules for cultural policy. This dates to at least Kymlicka, note 7. It continues. E.g., Anna Stilz, *Territorial Sovereignty: A Philosophical Exploration* (OUP, 2019) at 116, 232 argues that territorial control is necessary to justifiably exercise most 'powers' but (deferring to De Schutter) permits possible exceptions for cultural policy, education, and natural resource management. Allen Buchanan, "Uncoupling Secession from Nationalism and Intrastate Autonomy from Secession" in Hurst Hannum & Eileen F Babbitt, eds, *Negotiating Self-Determination* (Lexington Books, 2006) 81's account also distinguishes our questions.

[19] Indeed, while United Nations, *International Covenant on Economic, Social and Cultural Rights,* 16 December 1966, 993 UNTS 3, art 1 provides self-determination rights to all persons, United Nations, Committee on Economic,

determination rights can be constrained by, e.g., the need for broader state stability.[20] Relationships between features grounding self-determination rights and particular issues/subjects are also unclear, leaving self-determination underspecified as allocative guidance. For instance, while some claim that self-determination rights-holders should control health policy,[21] culture and health are hard to link absent controversial posits about health's cultural determinateness and considerations above seemingly support central control.[22] International law's minimalist commitments on the scope and institutional forms of cultural autonomy are thus unsurprising.[23]

Other candidate allocative principles also raise problems. 'Decentralizing' ones appeal to entities' unique interests/values or challenges; democratic benefits of providing authority to the entity 'closest' to the citizens capable of addressing it or best reflecting the interests of the 'most affected'; or epistemic benefits of 'local' control.[24] Yet provinces, cities, and sub-state nations could receive some authority under each. No principle clearly specifies which entity should possess which powers where multiple entities possess equal claims under that principle. Attempts to break justificatory 'ties' then often beg questions. Groups may, for instance, disagree on how to draw the boundaries of 'most affected' groups or importance of territory for protecting cultures.[25] 'Most affected' status or geography cannot then be justificatory tiebreakers.

The prima facie justification of various authority allocations further suggests that the ontological features of candidate authorities cannot determine all allocative questions. There is, for instance, wide variance on where healthcare authority resides in federations: self-determination-based decentralization decisions and coordination-based centralization decisions each seem legitimate in some contexts.[26] At best, one must scrutinize the underlying principles to

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Social and Cultural Rights, *General Comment 3: The Nature of States Parties' Obligations,* 5th Sess, UN Doc E/1991/23, (1990) at para 8 clarifies that all rights do not require or preclude any form of government.

[20] Further to arguments surveyed in Buchanan, note 16, note that the legal right in *ibid* is itself subject to limitations in arts 4-5 and self-determination rights must be consistent with realization of other rights.

[21] For a recent example, see Aimée Craft et al., "COVID-19 and First Nations' Responses" in Colleen M Flood et al., eds, *Vulnerable: The Law, Policy and Ethics of COVID-19* (U Ottawa P, 2020) 51. Indigenous claims may raise unique concerns. But many national minorities have claimed general rights to control social policy (Daniel Béland & André Lecours, *Nationalism and Social Policy* (OUP, 2008)).

[22] See [redacted for review].

[23] See e.g., sources in notes 19-20.

[24] King, note 4; Weinstock, "Cities", note 12.

[25] Recall e.g., notes 14-15, 21.

[26] See comparative federalism works above. See also Patricia Popelier & Bea Cantillon, "Bipolar Federalism and the Social Welfare State" (2013) 43(4) Publius 626 on the broader range of social policy power choices.

explain why prima facie justified choices are not *fully* justified.[27] The features of entities with prima facie justified authority claims alone cannot resolve these issues. A theory is likely better if it explains how the features that make an entity ontologically valuable could justify allocating powers to it, but different principles may apply at each stage. While self-determination and subsidiarity are discussed as competing principles,[28] subsidiarity could guide allocating powers amongst entities with equally compelling self-determination 'rights'-based claims. A province and city could both have extraordinarily strong self-determination rights with an epistemic understanding of subsidiarity best distinguishing their claims to particular powers.

A genuine allocative principle capable of addressing the preceding should provide guidance on which powers should belong to which entities in federations where powers are formally separated, what federations should do in areas of shared jurisdiction, when authorities in all countries should devolve to other entities, and where authority should rest where no entity possesses explicit powers. Ideally, it should also specify which powers should belong to which entities in a way that secures stability, but it should *at least* explain when decisions should rest with each entity. A fully action-guiding principle should explain why and when particular entities should possess decision-making powers. To play an oft-intended "democratic structuring" role,[29] it should explain which entities should have authority over which subjects, not merely when it should be able to decide an issue. This need not require that all parties to a debate share one understanding of a principle or its implications. It only requires that the principle have some basic features that present distinct moral reasons favouring particular allocations. For instance, while self-determination admits several interpretations and its application in real cases will often be contested, self-determination-based claims are usually grounded in moral reasons particular groups should possess particular powers for common ends.[30] These reasons appear distinct from appeals to, e.g., the epistemic value of particular allocations even absent perfect specifications of when and how the related arguments differ.[31]

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[27] Work on this topic is minimal, but see Douglas MacKay & Marion Danis, "Federalism and Responsibility for Healthcare" (2016) 30(1) Public Affairs Quarterly 1 for one philosophical discussion of some choices.
[28] Barber, note 5 at 188.
[29] Nicholas W Barber, "The Limited Modesty of Subsidiarity" (2005) 11 European LJ 308.
[30] Compare, e.g., works by Buchanan, Kymlicka, and Norman above (and related legal texts).
[31] For a strong epistemic argument, see Yann Allard-Tremblay, "Divide and Rule Better: On Subsidiarity, Legitimacy and the Epistemic Aim of Political Decision-Making" (2017) 34(5) Journal of Applied Philosophy 696.

It is possible, even probable, that no one principle plausibly answers all allocative questions. Even then, one should explain the restricted scope of any principle one invokes. For instance, if different considerations apply to devolution and federal divisions of power, one should explain why this is so and why narrowly-tailored principles applying only to one are desirable. If, in other words, asking one principle to answer all allocative questions is unfair, we should still examine which candidates offer distinct, intuitively compelling results such that they should be operative principles stakeholders can validly raise to support particular claims in a context. I will now demonstrate that appeals to subsidiarity do not establish a general presumption the most local entity should possess authority as claims and the presumption's seeming plausibility in some cases is best explained by other (e.g., democracy- or epistemic authority-based) principles. Moreover, real-world applications do not provide intuitively compelling results favouring local control. Subsidiarity, then, should not be even one of our standalone allocative principles. Any value that the concept may have will stem from other potential moral roles.

Subsidiarity's Allocative Potential

Subsidiarity, again, holds that authority should presumptively belong to the entity representing those 'most affected' by its exercise and capable of addressing underlying problems. Subsidiarity too admits multiple interpretations.[32] Yet this provisional understanding refers to an influential concept. The E.U.'s power-sharing rules reflects its basic features. [33] Subsidiarity is also oft-discussed as a means of structuring divisions of governmental powers at international and domestic levels.[34] While it could fulfill other functions[35]– and the best theory thereof may answer questions about, e.g., how to allocate powers between state and non-state

[32] *Cf*. Føllesdal, note 4; Cahill, note 4. If it is "essentially contested" (WB Gallie, "Essentially Contested Concepts" (1956) 56 Proceedings of the Aristotelian Society 167), conceptions should still reflect use in restricted domains.
[33] EC, note 3, art 5.3.
[34] The authors in e.g., note 32 agree on this. See also Føllesdal & Muñiz Fraticelli, note 3; Hirschl, note 3 at 219-229; Fleming & Levy, note 4; Barber, note 5; Barber, note 29. Even those who say it originated in E.U. law (e.g., Levi & Valverde, note 14) or also view it as a transnational principle (e.g., Yishai Blank, "Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance" (2010) 37 Fordham Urb LJ 510) recognize that its domestic structuring role is now central.
[35] Per Føllesdal, note 4 at 191; Barber, note 5; David Miller, "Boundaries, Democracy, and Territory" (2016) 61 Am J Juris 33; and Joseph Drew & Masato Miyazaki, "Subsidiarity and the Moral Justification of Intergovernmental Equalization Grants to Decentralized Governments" (2020) 50(4) Publius 698, it could answer ontological questions, structure international law, establish boundaries of transnational authority, constitute state boundaries, keep peace, or justify transfers of funds between entities. Private law uses are less common; Peer Zumbansen, "Happy Spells?: Constructing and Deconstructing a Private-Law Perspective on Subsidiarity" (2016) 79(2) Law & Contemporary Problems 215; Matt Campbell "Subsidiarity in Private Law?" (2020) 24(1) Edinburgh LR 1.

entities, rather than allocating constitutional powers within states or state-like entities like the E.U[36] –subsidiarity is often discussed as the best principle for allocating authority within countries.[37] Its application to this task is often taken as self-evident: its "most obvious implications are for constitutional ordering within" countries.[38] Subsidiarity promises to allocate authority over issues and subjects.[39] While it is viewed as most compelling for dividing powers during constitutional transition,[40] its allocative potential within countries is supposed to extend to any allocative moment, constitutional or otherwise, such that it identifies when it is appropriate to delegate constitutional authority and create quasi-constitutional forms of revocable authority.[41]

Subsidiarity is thus a plausible starting point for addressing authority allocation questions. Addressing subsidiarity's allocative potential should also contribute to subsidiarity studies: if subsidiarity cannot fulfill this role, accounts should attend to its other possible roles (e.g., its ability to plausibly resolve state v. non-state conflicts).[42] Cataloguing subsidiarity's forms and purported justifications suggests that subsidiarity could guide authority allocation in several ways. Evaluating each conception's ability to fulfill the allocative role could help us choose between them. While some believe subsidiarity should identify candidate authorities *and* the issues/subjects over which they should possess authority,[43] subsidiarity would be valuable if it only could allocate authority over particular issues/subjects amongst groups previously-identified as having good claims to *some* authority. Recall the case of a province and city with equal self-determination-based claims. If subsidiarity-based allocations are consistently plausible, subsidiarity beneficially resolves a problem common to all countries. If it cannot plausibly allocate authority, we may seek an account that can fulfill another moral role.

Subsidiarity could guide authority allocation at several stages in a country's development and in several ways but all uses of subsidiarity for authority allocation purposes seek to establish

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[36] Recall e.g., note 4's discussion of sphere sovereignty.
[37] Barber, note 29. The E.U.'s 'modern' conception was introduced to allocate powers in an association without set legislative powers. Yet subsidiarity is most often invoked outside that context as a means of allocating authority (including legislative authority) *within* countries; Føllesdal, note 4 at 191.
[38] NW Barber & Richard Ekins, "Situating Subsidiarity" (2016) 61(1) Am J Juris 5 at 5.
[39] Barber, note 5 at 205 views the issues as 'primary.' Scholars above/below disagree on the 'primary' issue subsidiarity should address but most agree that issues and subjects are both relevant.
[40] *Ibid* at 191; Andreas Føllesdal, "Subsidiarity, Democracy, and Human Rights in the Constitutional Treaty of Europe" (2006) 37(1) Journal of Social Philosophy 61 at 64.
[41] Recall notes 32-38.
[42] Recall note 35.
[43] Recall note 16.

a presumption favouring decentralization. Subsidiarity could, for instance, guide decisions about how to allocate powers at constitutional moments (e.g., an initial constituent assembly, moments of reform) or when entities decide when to devolve their powers to other entities. Realpolitik proponents may question whether abstract principles actually influence either type of decision. Yet decision-makers in both contexts normatively should and often are politically required to provide reasons for their decisions. Subsidiarity is at least proffered as a reason for decisions in both relevant contexts and subsidiarity's advocates claim that subsidiarity can create a default presumption for local control over many issues/subjects.[44] Even if, moreover, decision-makers did not appeal to principles to justify their decisions, a set of normative principles we can use to judge allocative decisions remains desirable. Subsidiarity is at least a good candidate for that role. It may also play a role in evaluating how entities understand their powers– e.g., highlighting how the powers should be understood as necessarily enmeshed with decision-making at other levels –or create a presumption of common devolution of those powers to more local levels.[45]

Subsidiarity could also and purportedly does guide judicial decision-making about constitutionally-entrenched powers.[46] Courts use the principle to resolve jurisdictional disputes to clarify explicit allocations of authority and to fill jurisdictional gaps. One can examine whether subsidiarity provides adequate guidance on how to do so and whether invoking it actually provides intuitively compelling allocations to local authorities. Even if one is primarily interested in how to allocate authority for constitutional divisions of powers or devolution, literature on judicial decision-making helps clarify how the concept can be understood in practice and offers another way in which subsidiarity could guide decisions. I accordingly discuss some judicial decisions even when focused on other allocative moments below.

I make no assumptions here on whether an inability to allocate authority within countries will challenge its ability to fulfill other tasks. The question 'What makes entities candidate authorities?' is largely taken as answered to explore subsidiarity's allocative potential. The next section (surprisingly) demonstrates that *no* form of subsidiarity as such provides proper allocative guidance but attending to its forms/justifications clarifies its potential and limits. It

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[44] Recall note 3. See also overviews in note 4 sources and the comparative treatises in note 6.
[45] See e.g., Flynn, note 14 (on how it should frame provincial decision-making); Éléonore Gauthier, "Spending Power, Social Policy, and the Principle of Subsidiarity" (2017) 22(2) Rev Const Stud 261 (on how it should frame federal decision-making). Both suggest that even a non-justiciable subsidiarity principle could fulfill this role.
[46] I thank [redacted] for pushing me on this point. The sources mentioned in note 44 also establish the use of subsidiarity for this purpose. I discuss examples of legal application in the E.U. and Canada below.

demonstrates that arguments for subsidiarity either fail to provide specific, definite guidance on how to allocate powers, provides guidance that is unintuitive and at odds with prima facie acceptable existing authority allocations, or only presents plausible guidance at the expense of subsidiarity's most fundamental commitments or collapsing it into other principles. To be clear, my concern is not that subsidiarity is not a panacea. Rather, my concern is that no plausible specification of subsidiarity fulfills (at least one of) the concept's primary task(s), providing normatively acceptable guidance on how to allocate authority based on a defeasible presumption of local control. This is so of each form of authority allocation in the preceding paragraphs.

Further detailing different conceptions of subsidiarity that aim to guide authority allocation within countries and claim consistency with liberal-democratic norms clarifies the issue. For instance, Andreas Føllesdal's prominent E.U.-influenced view holds that "powers or tasks should rest with the lower-level sub-units … unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving" state aims.[47] Others remove or add features. Hirschl does not appeal to comparative efficiency or effectiveness; his version "refers to the norm favoring the preservation or allocation of power to local authorities."[48] N.W. Barber requires allocation to those 'most affected' by a policy, not the 'lower' unit alone: subsidiarity "does not *just* embody a preference for smaller units over large ones: it allocates powers to the states containing the people who will be affected."[49] Still others connect E.U.-influenced and earlier 'communitarian' conceptions focused on protecting all 'local' groups, including trade unions and religious groups. John Finnis's subsidiarity principle holds "that it is unjust for a higher authority to usurp the self-governing authority that lower authorities, acting in the service of their own members … rightly have over those members."[50]

These definitions share features (permitting provisional definitions) but disagree on core issues. Føllesdal echoes Barber in invoking a most affected principle.[51] Yet authors disagree on subsidiarity's scope of application. While the E.U. views it as applying in areas of "shared"

[47] Føllesdal, note 4 at 190. See also SEP, note 5; Carozza, "IHRL", note 3; Allard-Tremblay, note 31.
[48] Hirschl, note 3 at 221.
[49] Barber, note 5 at 191.
[50] Finnis, note 4. Dominic Burbidge, "The Inherently Political Nature of Subsidiarity" (2017) 62(2) Am J Juris 143 has another virtue-theoretic take that cites Finnis. Cahill, note 4 adds that alternatives assume an unsustainable geographical hierarchy. She thus discusses 'primary' and 'subsidiary' authorities, not 'local' and 'central' ones.
[51] Føllesdal, note 40 at 64.

authority,[52] it is also offered as a principle for allocating *unique* powers in the first place.[53] While Barber characterizes subsidiarity as a principle of "constitutionalism" in the sense that it applies to all countries at all times and should be implemented in the institutional structure of all 'constitutional' countries,[54] others treat it as an allocative *option*.[55] Subsidiarity's relationship to federalism and self-determination also differs across accounts, leading to different outcomes.[56]

Subsidiarity is also alternatively discussed as creating a presumption in favour of 'local' control,[57] a burden that must be met before powers can be allocated to more central authorities,[58] a duty to "aid" others in exercising their powers,[59] and/or a duty to assist them in fulfilling their self-defined ends.[60] Views on what can defeat subsidiarity's presumptive decentralizing tendency vary. Even Føllesdal notes that his "*comparative efficiency*" condition can be understood as a necessity condition or an effectiveness condition.[61] Whether federal governments are justified in acting when provinces will not act or only when they cannot do so also arises in the constitutional law of countries adopting subsidiarity or functionally equivalent principles.[62]

Moreover, while extant definitions view subsidiarity as a decentralizing principle favouring allocating powers to the most 'local' unit possible, they may not always establish subsidiarity as decentralizing. The *Treaty of the European Union* states that decisions should be made "as closely as possible to the citizen."[63] This could make decentralization a necessary component of accounts of subsidiarity that seek to reflect E.U. law.[64] Yet subsidiarity may not decentralize if the burden for overcoming its presumption is low.[65] Many powers could be

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[52] Føllesdal, note 3 at 38.
[53] Further to points in Barber and others above, Føllesdal, note 40 at 63-64 argues that it is necessary to foster the 'dual loyalty' characteristic of federalism (and key to Jacob T Levy, "Federalism, Liberalism, and the Separation of Loyalties" (2007) 101(3) APSR 459).
[54] Barber, note 5.
[55] E.g., Weinstock, "Cities," note 12.
[56] *Cf. ibid*; Barber, note 7 at 215; Canadian caselaw in note 5 sources.
[57] Allard-Tremblay, note 31 (also stressing the burden needed to overcome it); Trevor Latimer, "Against Subsidiarity" (2018) 26(3) Journal of Political Philosophy 282 (arguing against the E.U.-related version).
[58] Føllesdal, note 4; Føllesdal & Muñiz Fraticelli, note 3.
[59] Barber & Ekins, note 38 at 5, 8.
[60] Allard-Tremblay, note 31 at 697.
[61] Føllesdal, note 4 at 193 (also noting that it can proscribe or require central action).
[62] *Ibid*. Compare Canadian caselaw discussed in Føllesdal & Muñiz Fraticelli, note 3 and detailed further below.
[63] EC, note 3, art 1.
[64] E.g., Hirschl, note 3 (though at 222 he suggests 'decentralization' is itself a principle of efficiency and democratic control that justifies subsidiary).
[65] [Redacted] thus suggests its 'decentralizing' tendency is a matter of presentation.

allocated to federal governments due to comparative efficiency. Indeed, subsidiarity centralizes power in existing countries' legal practice (*at least* when applied to 'residuary' powers).[66]

Subsidiarity's purported status as a decentralizing principle likely stems from frequent 'justifications' based on purportedly decentralizing (sub-)principles. Arguments appealing to those most affected by an issue/subject, democratic concerns, and/or unique local interests or knowledge each purport to justify decentralization.[67] The 'most affected' principle is challenged for being too vague (viz., it is often unclear who is most affected by what issues, let alone subjects),[68] but its emphasis on stakeholder status appears important.[69] Stakeholder status also grounds democratic arguments for decentralization and subsidiarity:[70] local self-governance purportedly ensures the greatest representation possible in decisions affecting you (e.g., under subsidiarity, decisions are made by the group in which one's vote has its greatest impact).[71]

Protecting unique local interests is likewise proffered to justify decentralization and subsidiarity. Subsidiarity is sometimes discussed as an efficient way to sort interests.[72] It may best protect unique interests.[73] The E.U. version is purportedly justified by a need to protect local interests and defeasible presumption that 'local' groups best protect them.[74] Arguments for decentralization speaking to the unique interests and challenges of local entities or epistemic value of local knowledge could also support subsidiarity if the 'closest' groups can be expected to protect the interests or are epistemically well-positioned to address given issues/subjects.[75]

Justifications for non-E.U.-based conceptions of subsidiarity likewise appeal to decentralization. Two 'liberty'-based views are representative.[76] The 'confederalist' view highlights the need for sub-state groups to whom citizens remain loyal as 'bulwarks' against

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[66] Føllesdal & Muñiz Fraticelli, note 3 at 100 (admittedly only discussing cases where most 'powers' are already defined but a new issue does not fall under the ambit of existing specified powers). I return to this point below.
[67] Barber, note 5; Hirschl, note 3 at 222 (also discussing other (e.g., 'Republican') accounts).
[68] Robert Goodin, "Enfranchising All Affected Interests, and Its Alternatives" (2007) 35(1) Philosophy & Public Affairs 40 at 68.
[69] Hirschl, note 3 at 220.
[70] Weinstock, "Cities," note 12; King, note 4 (to some extent). *Cf.* Føllesdal, note 4 at 198. Subsidiarity could present tensions with democracy; Cahill, note 4 at 205-206; Føllesdal, note 40 at 69-70, 72-74. This is likely true of any allocative principle other than the democracy principle itself.
[71] Weinstock, "Cities," *ibid*; Hirschl, note 3 at 219-220. *Cf.* Trevor Latimer, "The Principle of Subsidiarity: A Democratic Reinterpretation" (2018) 25(4) Constellations 586.
[72] Føllesdal, note 4.
[73] Allard-Tremblay, note 31 hints at this possibility.
[74] *Ibid* and Føllesdal, note 4 read it this way. See also Barber, note 5 at 192-193.
[75] Hirschl, note 5; Weinstock, "Cities," note 12; King, note 4 (to some extent).
[76] Føllesdal, notes 4-5.

tyranny.[77] Loyalty to a sub-state group of a sufficient size counter-balances central power, justifying local control to protect against unchecked central authority.[78] The existence of too many groups will leave no group strong enough to check power, requiring allocation only to some groups, but a subsidiarity principle limited to a small number could protect against tyranny.[79] The Calvinist/communitarian view alternatively posits that local groups have unique values that must be protected from state interference.[80] Finnis suggests that these communitarian goods are so important so as to justify subsidiarity even if it generates inefficiencies.[81]

Subsidiarity, then, admits several forms grounded in compelling (sub-)principles. Nearly every form produces many prima facie plausible results, explaining why, e.g., military and foreign policy powers often belong to central/federal governments while zoning powers often belong or are delegated to 'local' units.[82] If one form *best* allocates powers, it best fulfills subsidiarity's primary task. This will resolve the authority allocation problem and identify subsidiarity's best conception. Unfortunately, as we will now see, each modern conception of subsidiarity leaves important allocative questions unaddressed or relies on other principles to justify their conclusions, undermining the case for subsidiarity itself as an allocative principle.

The Case Against Subsidiarity as a Genuine Allocative Principle

Subsidiarity is prima facie compelling and has broad support, but its appeal rests on underlying (sub-)principles such that "apparent consensus on it has been gained only by obfuscation."[83] Subsidiarity shorn of its underlying justifications is a mere stipulation.[84] Using it as an allocative principle requires attending to its justifications and accepting its institutional implications. Yet existing conceptions underdetermine authority allocations. Even plausible

[77] *Ibid*. *Cf.* Barber, note 5.
[78] Føllesdal, note 40 at 63-64.
[79] See Føllesdal's accounts above.
[80] *Ibid*. See also Cahill, note 4; Finnis, note 4 (with the latter also discussing a Catholic conception).
[81] Per Føllesdal, note 4, other historical conceptions, like the Catholic one, likewise speak to local interest protection. This helps explain why Cahill, *ibid* denies the existence of a new 'modern' conception. Yet the conception found in modern constitutional, E.U., and international at least purports to break from tradition and address a different question. The Catholic conception often addresses questions related to sphere sovereignty, which may not be identical with the authority issues addressed here – though, as discussed above and below, it may offer a better understanding of a unique role subsidiarity *can* play in moral theory. On the Catholic conception, see e.g., Finnis, *ibid*; Russell Hittinger, "The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation" in Margaret S Archer & Pierpaolo Donati eds, *Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together* (Pontifical Academy of Social Sciences, 2008) 75, and the first three chapters of Michelle Evans & Augusto Zimmermann, eds, *Global Perspectives on Subsidiarity* (Springer, 2014).
[82] See e.g., comparative federalism texts, law review articles above.
[83] Føllesdal, note 4 at 190.
[84] Cahill, note 4 at 206, 212. Føllesdal & Muñiz Fraticelli, note 3 at 102 make a similar claim.

allocative decisions that subsidiarity *could* generate rest on underlying principles that do the real allocative work. They may not make local control a presumptive norm and could even lead to centralization. Subsidiarity *does* produce centralization in practice. Subsidiarity, then, is not merely an incomplete allocative principle.[85] It is not a standalone allocative principle at all.

The first issue with subsidiarity as a standalone authority allocation principle relates to familiar boundary-based considerations. Subsidiarity does not provide univocal, consistently compelling understanding of 'closest'/'most local'/'most affected.' 'Close' and 'local' can be geographically-defined. Yet the plausibility of municipal control suggests that subsidiarity as a geographically-defined principle should presumptively favour cities.[86] Even if the principle need not extend further to neighbourhoods, which some contest,[87] this account struggles to explain the lack of municipal constitutional powers in most federations or the inconsistent history of delegation of authority to cities, which suggests that even historical decisions to provide (revocable) powers to cities are not viewed as even presumptively compelling.[88] An often-overturned 'presumption' favouring the 'most' local is barely a presumption. While one may argue that this is just evidence that existing allocations do not meet basic theoretical standards, the large explanatory gap remains problematic absent some heretofore-absent explanation of why present realities seem intuitively problematic grounded in subsidiary-related concerns.

'Closeness' is, moreover, difficult to specify absent a potentially undermotivated geographical stipulation.[89] This is a clear issue for accounts of subsidiarity that require group identities to track boundaries.[90] It is likely an issue for any account where allocative principles should be able to address real claims with some plausibility. Claims by non-territorial groups on self-determination-based grounds cannot be rendered implausible by geographical fiat. Even geographical boundaries can be split further. Maria Cahill's "primary" groups possessing presumptive decisional authority include non-governmental associations, like boxing clubs.[91] While clubs need not have authority if there are other reasons to bar them from possessing it (e.g., illiberalism), concerns about how to specify the 'local' raise questions about whether a

[85] This would be consistent with Levy, note 53; Allard-Tremblay, note 31.
[86] See municipal authority-focused sources above.
[87] E.g., Jerry Frug, "Decentering Decentralization" (1993) 60 U Chicago LR 253.
[88] Weinstock, "Cities," note 12 is inspired by many states' failure to provide powers to cities.
[89] This explains Cahill's point in note 50.
[90] Miller, note 10.
[91] Cahill, note 4 at 223-224.

presumption should favour greater authority for all 'local' groups. Subsidiarity at least struggles to *explain* existing authority allocations on any account that identifies anything 'closer' than provinces as candidate authorities. Border-drawing concerns will often make it difficult to apply.

Appeals to the 'most affected' entity require greater specification of the domain of an issue or subjects and may not present a uniformly compelling answer favouring any entity, let alone presumptively favour decentralization. This issue is most acute with respect to division of powers-based concerns regarding authority over subjects. It is hard to establish the entity most affected by immigration or healthcare.[92] COVID-19 demonstrated public health policies' differential impacts, but the entity 'most affected' by public health law is non-obvious.[93] A most affected principle could select two entities. It may not even provide clean answers in otherwise-easy cases favouring local control.[94] Consider municipal highways/roads. Should commuters have more say on a related policy because they use roads (supporting provincial control) or less because they do not pay property taxes?[95] 'Most affected' principles underdetermine this point. This problem extends to authority over issues. Consider a provincially-owned/-operated park within city limits but most often used by suburban residents. Who is 'most affected' by decisions to close that park to protect public health? Subsidiarity alone provides no answer.

These problems do not arise only because cities or sub-state nations have prima facie compelling claims. The claims' prima facie plausibility establishes the need for a further allocative principle and difficulties addressing them are problematic, but the larger issue is that subsidiarity alone has difficulty explaining when it should apply. Perhaps cities, sub-state nations, et al. will never justifiably receive power or one can justify only providing authority to central, federal, or provincial governments. Subsidiarity could be useful where the only entities recognized as even candidate authorities are federal and provincial governments (though this would tie subsidiarity's plausibility to a substantive response to the ontological question and limit its application to a small number of cases, retaining the need for another allocative principle). Even then, difficulties identifying which powers must belong to more 'local' groups

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[92] Central/federal governments usually control immigration. Yet, per de-Shalit, note 14, most immigration is to cities, whose residents are 'most affected' by it. Similarly, see [redacted] on healthcare.
[93] Da Silva, note 11.
[94] Similar worries motivate Burbidge, note 50's claim that subsidiarity is inherently 'political' and debates about its scope of application must be resolved through democratic processes.
[95] *Cf.* Hirschl, note 3 at 220-221; Lior Glick, "Commuters, Located Life interests, and the City's Demos" (2021) 29(4) Journal of Political Philosophy 480.

and when and how the presumption can be overcome would remain. Whether *subsidiarity* as such can plausibly set the relevant standards is at best debatable (as further demonstrated below).

Even stable meanings of 'closest'/'most local'/'most affected' do not uniformly favour subsidiary entities as authorities over discrete decisions, let alone constitutional powers. It is non-obvious that, e.g., 'local' cities should presumptively possess many powers. Arguments for municipal control over immigration and healthcare powers remain controversial. It is difficult to accept that the burden is on others to disprove them. Similar problems occur even where we only analyze federal and provincial governments. Whether national or local cultures are most affected by immigration decisions is debatable.[96] Mere stipulations that, e.g., provinces should control healthcare policy are difficult to justify, especially given distributional inequities across provinces who possess it.[97] While provincial control may be best in both cases, a stipulated presumption cannot justify provincial control. Treating subsidiarity as a principle for allocating authority over issues, rather than subjects, cannot avoid these concerns. For instance, even greater knowledge of where people are most likely to want to get tested for an illness during a pandemic may not make cities even epistemically-best-positioned to place them.

Even if one treats subsidiarity's purported justificatory sub-principles as fundamentally decentralizing, they may not uniformly allocate powers to the *most* local entity. Sub-principles include a most affected principle, democratic principles, principles stressing the import of unique local interests, challenges, or knowledge, and/or principles appealing to the need for bulwarks against tyranny. Many cannot identify which 'local' entity should possess which powers. Parallel arguments for provinces and cities should lead to more municipal powers on a subsidiarity-based view favouring most local control.[98] Yet subsidiarity's justificatory sub-principles may not produce this result. Even appeals to combinations of sub-principles could produce justificatory ties. For instance, both entities may secure equal 'loyalty' from members and be equally knowledgeable about the implications of a decision related to whether the parks above should be closed. Considerations that could break ties, like institutional capacity, are not always available. Available considerations likely favour provincial control, defeating presumptions favouring control by the *most* 'local' city, and again suggesting that subsidiarity is at best a strong

[96] de-Shalit, note 14's conclusion can also be generated by noting different patterns across provinces.
[97] E.g., Jamila Michener, *Fragmented Democracy* (CUP, 2018) (on the U.S.).
[98] See notes 14-15.

candidate authority for allocating powers between federal and provincial governments alone. Even then, the decisions are likely only plausible regarding issues, not subjects. Strong cases for 'local' control over subjects, like land management or mining, will (at best) prove rare.

Issues like those undermining 'most affected' principles above also apply to 'democratic' and 'local interest' arguments.[99] Necessarily brief comments on each motivate general problems.

Some democratic concerns stem from boundary problems. It is difficult to determine the scope of subjects or most affected parties, making it hard to identify who should have what level of representation in decision-making procedures. Other concerns stem from democratic approaches' lack of clear guidance on which powers should belong to which entities and/or how they provide intuitively problematic guidance. Proponents of municipal authority highlight how cities face unique challenges (re: diversity, homelessness, criminality, etc.) and are uniquely affected by existing federal policies (re: migration, etc.); their lack of decision-making authority in responses to those challenges and/or development of policies is worrisome.[100] Yet cities and sub-state nations are uniquely affected by *many* considerations. Cities face unique issues due to traditional features, like population density, and recent developments, like greater immigration into cities (and, then, development of local cultural groups) and demographic 'sorting' whereby cities tend to be more 'liberal' than rural communities.[101] Their lack of authority over related matters arguably raises democratic issues, which can be acute where cities are more liberal and institutional considerations lead to more conservative federal and provincial governance.[102] If demographic sorting leads cities to consistently 'lose' on matters that uniquely impact them, cities likely lack adequate representation on the matters that most impact them.[103] Parallel arguments apply to sub-state national groups.[104] Yet democratic appeals to subsidiarity struggle to explain which powers must belong to cities or sub-state nations and likely cannot provide intuitively compelling results. Whether 'local' groups' experiences should require municipal control over immigration policy is at best debatable.[105] If one accepts that result, problem cases

[99] Latimer, note 57 suggests that major arguments also face empirical challenges.
[100] Hirschl, note 3 at 224, building on Weinstock, "Cities," note 12, etc.
[101] *Ibid*; de-Shalit, note 14; etc.
[102] Rodden, note 10.
[103] *Ibid*. One may argue that that municipal bodies should set the terms of their powers, but claim that is too strong. Moreover, as discussed below, subsidiarity does not protect municipal control over democratic process in practice.
[104] See note 15.
[105] See note 92.

remain. For instance, higher crime rates in cities suggest that criminal law 'most affects' city-dwellers.[106] A presumption favouring *primary* municipal authority over crime is uncompelling.

The same issues arise with appeals to local interests, challenges, or values divorced from democratic concerns. These principles provide some guidance on when cities or sub-state nations should possess particular powers. If, e.g., one is best-positioned to protect a local culture, providing it with powers over cultural policy is intuitively compelling. Yet the scope of necessary cultural protections is difficult to parse. A presumption that it should, e.g., control all education policy is hard to justify on local interests alone given education's broad societal impact. Moreover, the range of unique interests, challenges, and values is wide enough to again generate justificatory ties between candidates. Entities could, e.g., have equal self-determination-based claims for controlling language policy. A self-determination-based approach to subsidiarity would then be at best an incomplete allocative principle. Finally, even if one could identify which entities have unique interests, challenges, or values, it is hard to know whether and when control over which subjects is necessary to complete them. This could change over time.[107] These 'justificatory' (sub-)principles too at best allocate authority over issues.

Denying that powers should be provided to cities or sub-state nations cannot avoid these concerns. For instance, Loren King discusses parallel arguments for provincial and municipal authority but argues that subsidiarity should not apply to cities.[108] Yet an issue remains even if we grant the substantive ontological account generating that result: King jettisons the presumption favouring *most* local control and limits subsidiarity's application more narrowly than one would desire of a complete allocative principle. Subsidiarity alone cannot explain why cities and sub-state nations' prima facie compelling claims should not be realized if it is justified using features that establish those claims. Another allocative principle remains necessary.[109]

Epistemic arguments better guide when 'local' entities should make decisions but still provide incomplete guidance in division of powers cases. What qualifies as knowledge is contentious and whether more 'local' entities consistently have better knowledge in a way that generates a presumption favouring local decision-making is questionable– local governments may often lack knowledge of a decision's position in a larger decision-making context and

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[106] Hirschl, note 3 at 220-221.
[107] On contingencies, see also Latimer, note 57.
[108] King, note 4.
[109] Indeed, *ibid* may just offer a further, practical allocative principle.

impact elsewhere –but there is, at least, a decision procedure for identifying when local entities should make decisions on epistemic approaches. I cannot, however, accept that local entities generally have more knowledge about policy areas. I do not even know how to judge such claims about epistemic authority over subjects. Even epistemic approaches thus have limited scope. Moreover, epistemic positions may not sustain over time. Even if cities are best-positioned to decide where to place testing units for a particular virus on a particular date, they are not obviously best-positioned to handle public health policy generally and their knowledge may not sustain and warrant long-term delegation over narrow health facilities placement issues.[110]

'Bulwarks'-based arguments explain why most powers should belong to provinces but may not do so in a uniform manner and limit subsidiarity's scope of application more than proponents desire. They hold that non-central/federal powers must be allocated to groups that sustain loyalty over time and do not eliminate concurrent loyalty to the country or splinter authority among so many groups so as to leave none with enough power to be bulwarks.[111] While some think these conditions only apply to provinces,[112] empirical evidence suggests people maintain loyalty to cities and sub-state nations over time and can do so while maintaining commitments to a 'state' identity.[113] Extending authority to many entities may limit any entity's ability to do so, but three or four levels of governance, including municipal or 'sub-state national' levels, could act as bulwarks.[114] Questions about how to allocate powers between provinces and cities, for example, thus remain. Resolutions may not favour 'most local' control. Moreover, bulwarks-based arguments' alone do not address which powers 'lower' authorities require to be bulwarks.[115] Even if we could resolve *those* problems, in turn, the idea that our allocative principle would only apply to central, federal, and provincial governments would still leave it with an undesirably narrow scope, retaining the need for another principle.[116]

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[110] I take inspiration here from Da Silva, note 11.
[111] E.g., Somin, note 10; Levy, note 53.
[112] Levy, *ibid*; King, note 4.
[113] Note 14-15 sources provide examples.
[114] Barber, note 5 at 194n24.
[115] *Ibid* at 191 notes this problem occurs even before bringing in cities. Moreover, other arrangements may be *better* bulwarks; Latimer, note 57 at 289-290.
[116] Sophisticated variants also face issues. E.g., Allard-Tremblay, note 31's epistemic account provides powers to entities best-positioned to address "common" goals. Conditions requiring "common actions" specify when a presumption that the most 'local' entity can be defeated. Yet such goals are often unidentifiable. Allard-Tremblay's value pluralism bars his stipulating them or what groups are most 'local.' Similar issues explain why he views subsidiarity's benefits are largely discursive and does not focus on direct allocative guidance.

Examining each possible justification, then, challenges any case for subsidiarity as a genuine allocative principle. Any presumption favouring local control is likely only plausible regarding issues, not subjects. This is especially bad for the efficiency-based view which is supposed on contingent realities and needs constant updating.[117] But the problem generalizes: No subsidiarity principle appears to provide uniformity on decisions over subjects, leaving questions about e.g., immigration and healthcare reform or what to do in constitutional moments where subsidiarity is supposed to be most compelling unresolved. This claim does not make the "mistake" of viewing subsidiarity as mere efficiency.[118] It just recognizes subsidiarity's limits.

These considerations would be less forceful if subsidiarity consistently guided judicial decision-making in a compelling manner, but problems recur when applying the principle. One may contend that nothing in the forgoing undermines judicial use of the principle for authority allocation purposes.[119] Judicial application of the principle could vindicate its utility in concrete cases. My claim is that subsidiarity fails to create a plausible theoretical presumption favouring local control, but the point underlying this critique is fair: empirical data on the use of the principle is important on any plausible view. However, judicial use of subsidiarity does not consistently support its real-world plausibility (if it does so at all). To wit, European law heavily relies on national parliaments to enforce the subsidiarity principle through political pressure and European judicial treatments of subsidiarity amalgamate points from multiple distinct intellectual traditions, each of which raised the analytic problems undergirding critiques above.[120]

While domestic courts invoke the principle elsewhere, in turn, their results are hardly inspiring. Canadian jurisprudence is instructive. The Constitution of Canada does not contain a subsidiarity principle.[121] This alone raises a challenge for many countries' use of subsidiarity: it is often unclear whether and when judges can validly invoke it.[122] Yet scholars suggest that the

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[117] Føllesdal, note 3 at 207.
[118] Barber & Ekins, note 38 at 11.
[119] I thank [redacted] for this point.
[120] Føllesdal & Muñiz Fraticelli, note 3 at 91 discuss the procedure under which national parliaments monitor E.U. proposals and "give out a 'yellow card'—if they think the decision violates subsidiarity." They also note how E.U. law on this topic combines features of five different traditions. Føllesdal, note 40 at 66-68 further highlights questions and provides an overview of debates about who should apply the European principle. He also discusses how interpretation of the principle has not resolved conflicts or addressed worries about centralization. See Besson, note 3 for similar (albeit admittedly non-identical) points in the international human rights law context.
[121] No principle appears in the constitutional text or the unwritten constitution. Even note 3 sources grant this.
[122] E.g., *Salt Spring Island Local Trust Committee v B & B Ganges Marina Ltd*, 2007 BCSC 892. It also follows *Canada Western Bank v Alberta*, [2007] 2 SCR 3 [*CWB*] in deciding on interjurisdictional immunity grounds.

federal government of Canada's power to legislate with respect to issues of "national concern" should be understood as reflecting a deeper constitutional concern with subsidiarity and that subsidiarity itself is recognized as a valid interpretive principle in Canadian constitutional law.[123] Extant jurisprudence admittedly provides some support for both claims. However, the same case law suggests that subsidiarity is not an action-guiding principle for resolving jurisdictional disputes that can provide intuitively compelling results favouring presumptive local control.

With respect to issues of national concern, Canada's federal government possesses a power to legislate to ensure Canadian "Peace, Order, and good Government" [POGG]; this is a "residuary" power to legislate only where there is a gap in jurisdictions (e.g., neither federal nor provincial governments can explicitly legislate in the domain), in cases of national emergencies, and over issues of national concern.[124] Subsidiarity proponents suggest that this framework operates in a subsidiarity-like manner since the federal power only exists where provincial authority proves inadequate to the task at hand.[125] Yet even if we accept that contentious reading, we will now see that it does not appear to support practical uses of the subsidiarity principle.[126]

Canadian judges have long struggled to develop a clear test for identifying matters of national concern and recent legal developments do not support the use of subsidiarity-like principles.[127] Historical tests were "difficult to apply."[128] The most recent re-articulation of the test, in the Reference re *Greenhouse Gas Pollution Pricing Act* [*Carbon Emissions*], may not

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[123] E.g., Føllesdal & Muñiz Fraticelli, note 3 at 98-101.

[124] On POGG as a general residuary, see *R v Hauser*, [1979] 1 SCR 984 [*Hauser*]. AS Abel, "What Peace, Order and Good Government" (1968) 7 W Ontario LR 1 argues that the federal and provincial governments each possess residuary powers. K Lysyk, "Constitutional Reform and the Introductory Clause of Section 91: Residual and Emergency Law-Making Authority" (1979) LVII Can Bar Rev 531 at s II argues for a parallel "local and private matters" residuary for the provinces. William R Lederman, "Unity and Diversity in Canadian Federalism: Ideals and Methods of Moderation" (1975) Can Bar Rev 597 argues that POGG is primary among federal powers and all enumerated federal powers are examples of this primary power, not unique powers requiring a residuary. Yet POGG remains the canonical residuary power in Canadian constitutional law and *Hauser* is good law. Only the "gap" branch is truly residuary. The national concern and emergency branches do not address topics fully outside specified heads of power, but topics requiring special responses. 'Emergency' and 'national concern' measures need not fill a legislative gap in which no one can legislate, but can, in practice, be exercised concurrently with provincial powers when a subject plausibly falls under both a provincial head and one of these additional POGG branches.

[125] Again, see e.g., Føllesdal & Muñiz Fraticelli, note 3.

[126] See note 124 for why this reading is contentious.

[127] On historical issues, see Peter W Hogg, *Constitutional Law of Canada*, 5th ed, (Toronto: Carswell, 2007) c 17.

[128] Bernard W Funston & Eugene Meehan, *Canada's Constitutional Law in a Nutshell*, 4th ed, (Toronto: Carswell, 2013) at 77, discussing classics like Hogg, *ibid*; Jean Leclair, "The Elusive Quest for the Quintessential 'National Interest'" (2005) 38(2) UBC LR 353; Sujit Choudhry, "Recasting Social Canada: A Reconsideration of Federal Jurisdiction over Social Policy" (2002) 52 UTLJ 163.

clarify matters, maintaining the basic problem.[129] Under that test, the national concern branch of POGG can be validly invoked where there is (i) a "matter is of sufficient concern to the country as a whole to warrant consideration as a possible matter of national concern" that has (ii) "singleness, distinctiveness, and indivisibility" [SDI] that distinguishes it from provincial concerns[130] and (iii) a scale of impact on provincial areas that is reconcilable with the fundamental division of powers.[131] (ii) requires that the legislation concern "a specific and identifiable matter that is qualitatively different from matters of provincial concern" and evidence that "establishes provincial inability to deal with the matter."[132] Provincial inability refers to "matter is of a nature that the provinces cannot address either jointly or severally, because the failure of one or more provinces to cooperate would prevent the other provinces from successfully addressing it, *and* if a province's failure to deal with the matter within its own borders would have grave extraprovincial consequences."[133] Yet this test may not be easier to apply than its predecessors. Indeed, it appears to maintain many problems with historical tests.

SDI issues, for example, remain difficult to identify under the new test. Historically, SDI was supposed to be identifiable through common law reasoning, but past judgments were unhelpful. Why "the control of marine pollution dumping of substances" counts, particularly (and perhaps exclusively) when limited to a particular kind of body of water like saltwater,[134] but laws addressing pollution in a river "not confined to a narrow range of toxic chemical substances … that have a severely harmful effect on human health and the environment whose pollutant effects are diffuse and persist in the environment" does not remains unclear.[135] 'Is this like saltwater or a river?' is more like a gnomic riddle than a legal test. New references to the "extraprovincial and international" nature of many SDI matters may not solve our riddle as well as the majority claims; the statement that international agreements "*may in some cases* indicate qualitative difference" is not terribly action-guiding.[136] Moreover, new statements on provincial inability may not fully resolve questions about which of "political incapacity, political

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[129] 2021 SCC 11 [*Carbon Emissions*].
[130] *R v Crown Zellerbach Canada Ltd*, [1988] 1 SCR 401 at para 33 [*Crown*].
[131] *Carbon Emissions*, note 129 at paras 162-165.
[132] *Ibid*, at para 164. As Choudhry, note 128 at 227-228 notes, the provincial inability lemma introduced in *Crown*, *ibid* at para 33 has its origins in Dale Gibson, "Measuring National Dimensions" (1976) 7 Manitoba LJ 15.
[133] *Carbon Emissions*, note 129 at paras 152-156.
[134] *Ibid*.
[135] *R v Hydro-Québec*, [1997] 3 SCR 213. The majority in *Carbon Emissions*, *ibid* at para 82 admittedly distinguishes its decision from *Hydro-Québec*, albeit in a manner that is likely to be controversial.
[136] *Carbon Emissions*, *ibid* at 148-149 [emphasis added].

unwillingness, or legal inability" suffices to establish true provincial 'inability,' let alone which of these *should* suffice; the reference includes material supporting multiple interpretations of this criterion.[137] The majority judgment also does not resolve historical questions about the meaning of 'reconcilability.'[138] It only offers two paragraphs on how to understand that final stage.[139]

There are, then, reasons to question whether Canadian national concern doctrine is properly action-guiding. The result in the *Carbon Emissions* reference further highlights how the branch itself does not reflect a meaningful presumption of local control. That case concerned a federal emission standards. All parties agreed that the provinces could set their own standards. Several chose not to do so. There was accordingly no sense in which the provinces were literally unable to set the relevant standards. However, the Supreme Court of Canada permitted strong incursions into provincial jurisdiction in the name of national concerns. While an Alberta Court of Appeal decision appealed to the subsidiarity principle to highlight the constitutional problems with the act in question,[140] the Supreme Court of Canada did not even directly engage with subsidiarity arguments.[141] It instead permitted strong incursions into admitted areas of provincial control, which combined with federal paramountcy rules to aid centralization.[142] Any purported presumption favouring local control is, then, apparently very weak. I doubt its existence.

Subsidiarity as a standalone interpretive principle does not fare much better in Canadian constitutional law.[143] Many references to the principle that scholars use to highlight its importance were mere obiter and did not explain how the principle should apply.[144] Even the

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[137] Leclair, note 128 at 365. For a classic case suggesting unwillingness suffices, see *Johannesson v Municipality of West St Paul*, [1952] 1 SCR 292. *Crown*, note 130 suggests unwillingness *or* inability suffices. Yet Choudhry, note 128 at 233-247 notes that provincial inability could have several meanings and outlines three distinct approaches, including what he takes to be the original interpretation whereby one can claim inability whenever governance is necessary, creating a risk that provinces will "race to the bottom" of non-service provision. *Carbon Emissions*, note 129 may not fully resolve the matter. References to the necessity for "collective national and international action" (para 12) and consequent view that the issue cannot be addressed by the provinces by its very nature suggest literal provincial inability is what matters. Yet discussions of the "risk" of "non-cooperation" as key to the finding of provincial inability (at para 195) and application of the test suggests that the possibility of provincial unwillingness is key under the new test. Justice Brown disapproves of this in his dissent (at para 445).

[138] Leclair, *ibid*.

[139] *Carbon Emissions*, note 129 at paras 160-161.

[140] *Reference re Greenhouse Gas Pollution Pricing Act*, 2020 ABCA 74 at paras 129, 137-142.

[141] *Carbon Emissions*, note 129. It did cite some articles that engage with the principle.

[142] *Ibid* permits federal regulations that the provinces could pass under their own powers.

[143] For one of the best discussions of this case law, see Eugénie Brouillet, "Canadian Federalism and the Principle of Subsidiarity: Should We Open Pandora's Box?" (2011) 54 SCLR 601. I update that discussion somewhat here.

[144] Føllesdal & Muñiz Fraticelli, note 3 highlight *CWB*, note 122; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2011 SCC 40 [*Spraytec*h] and Reference re *Assisted Human Reproduction Act*, 2010

most famous case referencing the principle, which upheld a municipal anti-pesticide law while highlighting the need for tri-level governance, was decided on the grounds that the municipal law fell under the terms of a valid provincial law, rather than the importance of local control as such.[145] The first detailed analysis of the subsidiarity principle in Canada was, in turn, part of a 4-4 split with minimal force, again relies on provincial authority for minimal municipal powers, and explicitly states that subsidiarity cannot alter the division of constitutional powers.[146]

More recent attempts to invoke subsidiarity to save local laws largely falter.[147] Appealing to subsidiarity did not, e.g., save local environmental standards that would impede a federal undertaking (viz., a pipeline), undermining suggesting that a concern with environmental regulation best explains the *Carbon Emissions* reference: centralization seemingly trumps environmental concerns in practice.[148] While scholars also argue that democracy- and local interest-based subsidiarity arguments should require that province defer to municipalities on the drawing of electoral boundaries, the Supreme Court of Canada recently held that provinces can unilaterally change district mid-election.[149] Subsidiarity can bolster some attempts to save bylaws in rare case,[150] but the case law does not consistently favour local control. It also may not track intuitions on appropriate local control given its limits on provincial and municipal powers.

If one takes a more sanguine view on the theoretical and jurisdictional issues above, subsidiarity is still at best able to address delegation-based and divisions of powers concerns on a question-by-question basis, leaving large holes in subsidiarity's ability to serve its intended allocative function. But even a uniform 'presumption' in discrete decision-making contexts is unlikely to hold. It is not clear that we should presumptively defer to cities on questions about where to place testing centres within municipal boundaries or when to close a park. Principles that could justify municipal control, including democratic and local control-based arguments, may equally favour provinces. Whether any tiebreaker principles could uniformly establish a presumption favouring subsidiarity as a basic allocative norm is at best unknown. Appeals to

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SCC 61 [*AHRA*] as key examples of the use of the term. But only *AHRA* engages with the principle in detail. Gauthier, note 45 also emphasizes cases where use is largely obiter.

[145] *Spraytech*, *ibid*. Recall also how the note 122 cases were decided on interjurisdictional immunity grounds.

[146] *AHRA*, note 144.

[147] E.g., *Rogers Communications Inc c Châteauguay (Ville)*, 2016 SCC 23; *Canada Post Corp v Hamilton (City)*, 2016 ONCA 767.

[148] Reference re *Environmental Management Act (British Columbia)*, 2019 BCCA 181.

[149] *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34. The dissent in that case cites Flynn, note 14.

[150] *Alberta v Latouche*, 2010 ABPC 166.

those 'most affected,' democratic concerns, or local interests or knowledge are unlikely to frequently allocate to the 'closest' level of governance if it is defined territorially– e.g., most stakeholders will seek to move many powers away from cities –and such appeals to those 'most affected' or territoriality likely beg important questions anyway. Attempts to limit the scope of the analysis to central, federal, and provincial governments may not avoid this result and would limit subsidiarity's scope of application in a way that still requires another allocative principle.

Where, in turn, 'justifications' for subsidiarity favour a 'local control' presumption, other (sub-)principles do the allocative work, making subsidiarity (at best) a mechanism for weighing other concerns. If, e.g., communitarian ties justify presuming 'local' control over particular issues and identifies areas (e.g., value-laden areas that are unnecessary for wider state stability, possibly including cultural policy, healthcare, or (more controversially) immigration powers) as best belonging to cities or sub-state nations, the community values principle guides allocation, not subsidiarity. Likewise, appeals to subsidiarity do no extra work where analytically severable democratic principles plausibly justify general allocative decisions.[151] If we are interested in democratic considerations, protecting local interests, leveraging special local knowledge, or bulwarks, we should appeal to those considerations to justify claims and weigh their value against other interests. Appealing to subsidiarity adds nothing to this weighing process.

The issue, then, is not merely that subsidiarity relies on other principles for its purported value. Rather, appeals to 'subsidiarity' either lead to implausible conclusions by the light of those very underlying principles or add nothing distinct to the moral decision-making process. Appeals to subsidiarity may even obscure relevant moral considerations in practice. The Supreme Court of Canada did not need to engage with subsidiarity directly in a municipal bylaw case since subsidiarity is only an interpretative principle.[152] Yet democracy is an even more fundamental principle of Canadian constitutional law.[153] One wonders if concerns about subsidiarity distracted from the important democratic concerns that may have been more important in the case. We cannot know for sure but even that possibility should be worrying.

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[151] These cases too will be subject to limitations. E.g., if providing authority to religious groups would violate liberal norms, Cahill, note 4's approach could be worrisome. This does not uniquely promote subsidiarity. Any problem here is more easily addressed by taking liberal-democratic norms into account at the ontological stage.
[152] *Carbon Emissions*, note 129.
[153] Reference *Re Secession of Quebec*, [1998] 2 SCR 217.

Ultimately, then, subsidiarity is not a unique *allocative* principle and cannot serve its primary intended function. This does not mean that subsidiarity lacks *any* value but makes it less valuable and stresses the need to reflect on other allocative principles, such as the self-determination or epistemic value principles, to see if they play distinct allocative roles as claimed. Even if subsidiarity does not add meaningful content to discourse, it may, e.g., have an important rhetorical role. For instance, some believe that subsidiarity's inability to answer all allocative questions is unproblematic because invoking it occasions reflection on important moral concerns (e.g., the justificatory sub-principles above) and leads to more informed allocative decisions.[154] Appealing to subsidiarity might contribute to legal discourse on authority allocation, which could itself serve valuable ends, like building community in a polis and strengthening the legitimacy of decisions therein.[155] Simply adopting subsidiarity could also promote stability in the face of deep disagreement within countries.[156] Yet these cases for subsidiarity are practical (viz., non-theoretical), empirically contestable, and contingent. Moreover, 'legal discourse' must be ongoing to accrue the benefits. Ongoing constitutional debate is rare, again suggesting that subsidiarity will at best allocate authority over issues. Another allocative principle thus remains necessary on this best-case 'discursive' view. If one finds subsidiarity compelling, I recommend appealing to the underlying principles that make it seem compelling in a case instead. They provide more direct, normatively distinct guidance.

One still should not reject an otherwise valid claim in real-world cases simply because it is couched in subsidiarity language, but we should lament it if valid claims must be couched in that language to succeed. For instance, appeals to subsidiarity have strengthened Indigenous authority claims in Canada in the face of federal matrimonial property laws that would have otherwise applied, thereby serving a community-building role and helping local communities better protect individual rights than the federal government.[157] That case suggests that subsidiarity can be rhetorically valuable for fostering Indigenous self-governance *and* protecting universal rights in local settings. One of these underlying concerns may warrant appealing to subsidiarity despite its deficiencies as a standalone authority allocation principle capable of

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[154] Føllesdal, note 40 at 65ff; Allard-Tremblay, note 31.
[155] Føllesdal & Muñiz Fraticelli, note 3 at 97. Allard-Tremblay, *ibid* says it can add legitimacy to decisions.
[156] Føllesdal & Muñiz Fraticelli, *ibid* at 98. Barber, note 5 at 197 thus supports a federal supervisory 'backstop.'
[157] Christopher Alcantara, "Aboriginal Policy Reform and the Subsidiarity Principle: A Case Study of the Division of Matrimonial Real Property on Canadian Indian Reserves" (2008) 51(2) Canadian Public Administration 317.

fulfilling its intended ends. I do not think we should remove a valuable tool from real-world battles for justice. Yet self-determination, anti-colonialism, and individual human rights protections could justify the Indigenous matrimonial property law absent an appeal to subsidiarity. It is a shame that relevant communities needed to appeal to a problematic subsidiarity principle if their case for authority was already over-determined. I would prefer that direct appeals to the principles underlying subsidiarity's seeming plausibility had more rhetorical force. This would permit more direct weighing of relevant moral interests. But public discourse need not mirror philosophy seminars.

Conclusion

Subsidiarity cannot serve one of its primary intended roles: allocating authority within countries. Its allocative potential is at best limited to cases where there is shared or no clear jurisdiction over issues and relies on justificatory sub-principles. A 'presumption' favouring local control based on those principles likely cannot withstand scrutiny and principles other than subsidiarity do the allocative work when allocating authority to more 'local' entities *is* justified.

Testing subsidiarity's potential as an allocative principle nonetheless furthers discussions in several literatures. Regarding subsidiarity, while the basic concept could be valuable even if it cannot identify all the entities that have prima facie compelling claims to some authority, the forgoing suggests that 'subsidiarity' must serve a function beyond guiding authority allocation in countries to be valuable. One may still argue that this merely creates a burden for future theories of subsidiarity to provide better allocative guidance. The way some conceptions of subsidiarity and underlying principles seemed more compelling than others suggests some paths are more likely to be fruitful and provides reason to prefer those conceptions. Yet even the best conceptions appear unable to serve as wide-scope allocative principles. For instance, while epistemic considerations may do a good job of allocating powers, questions remain about how to specify greater knowledge and epistemic accounts appear to justify wider municipal powers than many are willing to accept. Limiting the principle to federal and provincial governments may better explain observed prima facie justified allocations but limits subsidiarity's application more narrowly than proponents desire. Even then, epistemic value, not subsidiarity, is the guidepost.

Absent more compelling accounts of subsidiarity's allocative value than those above, then, theorists should (surprisingly) no longer view an allocative function within countries as (one of) subsidiarity's key moral role(s). If subsidiarity is to be more than a structuring

framework for democratic decision-making, conceptions that fulfill other moral functions are preferable. Subsidiarity may, for instance, still be valuable as a means of allocating authority at the international level or explaining why associations, like guilds or boxing clubs, are ontologically valuable.[158] Conceptions capable of fulfilling these functions will be preferable.

Regarding authority allocation, the forgoing highlighted the need for a new allocative principle and desiderata thereof. The principles undergirding subsidiarity not only engender discussion,[159] but demonstrate that deferring to central/federal governments is also likely unwarranted as a general rule. Considerations explaining subsidiarity's possible allocative value may not justify a presumption favouring control at the most 'local' level possible, but they are important moral concerns and likely equally defeat presumptions that uniformly favour central/federal governments. Practically, this finding provides reason to question central or federal governments who rarely delegate any authority and divisions of powers that recognize few provincial powers. It also undermines paramountcy, a principle under which federal laws always supersede provincial ones within predetermined areas of shared jurisdiction.[160] It is simply not obvious that federal decisions will always be 'better' in any or all relevant respects.

Finally, regarding method, the need for allocative principles to address real political claims and ways subsidiarity (and now paramountcy) cannot uniformly and plausibly allocate authority within countries stresses the need to examine whether other principles can supplement or replace subsidiarity and more plausibly allocate authority. An acceptable principle should guide each allocative decision above in a way that resolves the cases motivating this work, including conflict cases, and explain what justifies providing specific powers to specific entities (and when it does so). Perhaps no one principle can set general presumptions about how to justifiably, let alone ideally, allocate authority within countries. Decisions may need to be made through democratic processes.[161] Even then, we should seek a small set of principles for evaluating democratic decision-making. Allocations that appeal to features that made entities ontologically capable of making plausible authority claims benefit from simplicity. But separating ontological and allocative concerns permits necessary variation in the decisions.

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[158] Note 35 catalogues other functions.
[159] Føllesdal, note 4; Allard-Tremblay, note 31.
[160] E.g., Canada; *Alberta (Attorney General) v Moloney*, [2015] 3 SCR 327.
[161] Burbidge, supra note 50.

The task moving forward is to identify whether any candidate allocative principles lack subsidiarity's issues. If every principle faces issues like those above, the case against subsidiarity will admittedly have less purchase. One should not, however, assume that result ex ante. The preceding provided tools for assessing candidate principles and suggested that some which purportedly support subsidiarity are more plausible candidates than subsidiarity itself. The next step is to determine whether they and other principles can survive the kind of scrutiny above.