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The Principle of Subsidiarity and the Law of the Family Business

*Scott FitzGibbon**

ABSTRACT

There is a considerable incongruity between the ends and aims of the business association, on the one hand, and the ends and aims of the family—and thus of most family businesses—on the other. This article proposes a principle for the guidance of the law in such matters. This is the principle of subsidiarity, which instructs government and the law to recognize the smaller organizations of society and to foster their functioning along lines appropriate to their purposes and along the lines intended by their principals.

This article develops an especially rich account of the principle of subsidiarity, according to which that principle calls for a presumption, in matters concerning family businesses, that the principals intend the normativity of the family to dominate. Vigorous application of this enriched principle, it is here proposed, will lead to important doctrinal developments, and also to courts reorienting their general attitude towards the development of the theory and policy of business associations.

I. INTRODUCTION

A family business is one which is owned and controlled by members of the same family, which is closely identified with the family, and which is directed towards the furtherance of its goods.

Businesses generally are hybrids. On the one hand, they are social organizations: networks of affiliations, governed by norms established by the participants.¹ On the other hand, they are entities structured in accordance with the law of business associations. The family busi-

*Professor, Boston College Law School. J.D., Harvard. B.C.L., Oxford. Member, Massachusetts Bar. This article is copyright 2015 by the author. All right reserved.

1. It is appropriate to call the social organization, as distinguished from the business organization, a “firm.” A firm may exist oblivious to its legal status and invisibly to the law (like many a country store and farm). A firm may endure and retain its character while passing from one legal form to another (for example from general partnership to corporation to limited liability company). Contrariwise, a business entity may exist without encompassing a firm, as in the instance of a shell corporation or a corporation whose participants recognize few affiliation-al bonds other than those prescribed by the law.

ness is a hybrid in a special way. On the one hand, there is the family. On the other, there is the business.

The hybrid character of the family business gives rise to doctrinal conflicts and dislocations. This article proposes that the normativity of the family should generally prevail, owing to the principle of subsidiarity.

II. PREVALENCE AND STRENGTHS OF THE FAMILY BUSINESS

Family businesses constitute a large percentage of enterprises in the United States.² They generate more than half of the nation's gross domestic product and employ about half of its workforce³ (statistics for other countries are also impressive⁴). They are not all mom-and-pop grocery stores. Among American businesses with sales of over a billion dollars a year, family businesses constitute thirty percent.⁵ Ford Motor Company,⁶ The New York Times Company,⁷ and

2. See Sherry Robinson & Hans Acton Stubberud, *All in the Family: Entrepreneurship as a Family Tradition*, 16 INT'L J. ENTREPRENEURSHIP 19 (2012) ("Family businesses are an important part of most economies. In the United States, they account for 90% of all businesses (Small Business Association, 2011) and are said to generate approximately 64% of the nation's GDP (Laird Norton Tyee, 2007).").

3. DWIGHT J. DRAKE, BUSINESS PLANNING: CLOSELY HELD ENTERPRISES 334 (4th ed. 2013).

4. See Robinson & Stubberud, *supra* note 3 ("Across Europe, 70–80% of businesses are family businesses").

5. Nicholas Kachanar, George Stalk & Alain Bloch, *What You Can Learn from Family Business: Focus on Resilience, Not Short-Term Performance*, HARV. BUS. REV., Nov. 2012, at 103, 103.

6. Ford Class B common stock has 40% of the voting power and is entirely held, directly or indirectly, by the Ford family. See Deepa Seetharaman, *Ford Chairman Nearly Doubles Stake in Supervoting Shares - Filing*, REUTERS (June 26, 2013, 5:11 PM), <http://www.reuters.com/article/2013/06/26/autos-ford-family-idUSL2N0F219I20130626>.

7. See Joe Nocera, *How Punch Protected The Times*, N.Y. TIMES (October 1, 2012), http://www.nytimes.com/2012/10/02/opinion/nocera-how-punch-protected-the-times.html?_r=0:

The Class B shares, held largely in a family trust, still gave the Sulzbergers the power to elect around 70 percent of the board. . . . [T]he Sulzbergers have remained steadfast in their belief that they were put on this earth to preserve and protect The New York Times. . . . As a red-blooded capitalist, I understand why dual classes of stock are frowned upon. They deprive ordinary shareholders of the chance to have any say in how a company is run or who sits on its board. . . . It is likely that Times Company stock is lower than it would be if shareholders knew they could 'put it in play,' as they say on Wall Street. . . . [B]ut . . . [i]f you buy News York Times stock, you are buying into the notion that you'll let the family run the show, as it has done for more than a century. And the Sulzbergers will put The Times's journalism ahead of all else, because that is what is in the family's DNA. . . . The protection afforded them

Mars Incorporated (the candy company)⁸ are family owned. A recent article in the *Economist* notes:

[F]amily companies are likely to remain a significant feature of global capitalism for the foreseeable future, thanks to a combination of two factors. Family companies in general are getting better at managing themselves: they are learning how to minimise their weaknesses while capitalising on their strengths. At the same time the centre of the modern economy is shifting to parts of the world—most notably Asia—where family companies remain dominant. McKinsey, a consultancy, calculates that by 2025 an extra 4,000 founder- or family-owned companies could hit sales of \$1 billion. If this proves correct, family firms in emerging markets might then make up nearly 40% of the world's large companies, compared with 15% in 2010. . . .

Since family companies are not just surviving but flourishing, many assumptions about the nature of modernity will have to be rethought. Classical sociologists and classical economists both predicted that family businesses would retreat as societies became more rational and bureaucratic. Families themselves would become nothing more than 'havens in a heartless world,' as Christopher Lasch, a historian, put it. But that orthodoxy is crumbling in the face of growing evidence that family dynasties can do well in even the most sophisticated modern societies.⁹

III. THE GOODS AND PURPOSES OF FAMILIES AND THEIR BUSINESSES

A. Families

American law has not developed a canonical definition of the family, nor has it endorsed a stable and comprehensive account of its

by the dual-class structure has allowed the current chairman, Arthur Sulzberger, Jr., and the rest of the family to take the long view without worrying about corporate raiders or hedge fund managers.

8. See David A. Kaplan, *Mars Incorporated: A pretty sweet place to work*, FORTUNE (Jan. 17, 2013) <http://fortune.com/2013/01/17/mars-incorporated-a-pretty-sweet-place-to-work/> ("They also have the luxury of catering to the whims of the owners: Every Christmas season, the factory churns out a few hundred tubs of private-stock Dove Peppermint Bark ice cream. It's just for the family.").

9. *Family companies: To have and to hold*, ECONOMIST (April 18, 2015), <http://www.economist.com/news/special-report/21648171-far-declining-family-firms-will-remain-important-feature-global-capitalism>.

purposes and goods. Nevertheless, one can construct such an account based on authorities which expound upon the goods of marriage, since marriage is, as the Supreme Court once stated, “the foundation of family.”¹⁰ Marriage, the early court decisions emphasize, is directed towards the begetting, protection and rearing of children, and their integration as worthy citizens into the civil society. It has as its “paramount purpose,” the Pennsylvania Supreme Court stated in *Matchin v. Matchin*, “the procreation and protection of legitimate children, the institution of families, and the creation of natural relations among mankind; from which proceed all the civilization, virtue, and happiness to be found in the world.”¹¹ Judicial opinions also emphasize fidelity and love. They extol “the happiness of the domestic circle, the preservation of . . . concord and confidence . . . [the] mutual confidence of the parties in the chastity and fidelity of each other”¹² They note the goods of intimacy and harmonious living.¹³ Marriage is, as the Supreme Court stated in *Maynard v. Hill*, a cause of “the happiness of individuals,” and is “the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.”¹⁴ These goods are reflected in doctrines which require parents to support their children and spouses to support one another, and which prohibit adultery and the alienation of affections. They can be found in family relations generally: not just that of marriage.

Social science research supports the conclusion that the ends of the family described above really are beneficial and widely pursued. Families beget and rear the young, educate them, and prepare them for marriage and for life in society.¹⁵ Grandparents increasingly pitch

10. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

11. 6 Pa. 332, 337 (1847). See *Reynolds v. Reynolds*, 85 Mass. 605, 607 (1862) (“The great object of marriage in a civilized and Christian community is to secure the existence and permanence of the family relation, and to insure the legitimacy of offspring.”).

12. *Masterman v. Masterman*, 51 P. 277, 280 (Kan. 1897).

13. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (“Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.”).

14. *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (quoting with approval *Adams v. Palmer*, 51 Me. 480, 485 (1863)).

15. On the benefit to children of being reared in intact families, see Ursula C. Basset, *The Changing Standard of the “Best Interests of the Child” and its Impact on the Exercise of Parenting and on Children*, 2 INT’L J. JUR. FAM. 407, 414 (2011) (“the most relevant studies from diverse countries show that children of intact families, compared to their peers in de facto unions or

in.¹⁶ Families care for their elderly, their sick, and their weak. They ground social solidarity, since each familial role (mother, father, son, daughter, grandparent) is a social office, respected and replicated throughout the social order. They are fields of close affiliation; *nexti* of friendships. They transmit moral and religious goods. They have wisely been referred to as seedbeds of the virtues.

The accounts of the goods and purposes of family described above reflect a virtue-based morality, derived from Aristotelean,

broken families, generally do better.”); Kristin Anderson Moore, Susan M. Jekielek & Carol Emig, *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD TRENDS (June, 2002), at 6, <http://www.childtrends.org/wp-content/uploads/2013/03/MarriageRB602.pdf>:

[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes than do children in intact families headed by two biological parents. Parental divorce is also linked to a range of poorer academic and behavioral outcomes among children.

See generally JUDITH S. WALLERSTEIN, JULIA M. LEWIS & SANDRA BLAKESLEE, *THE UNEXPECTED LEGACY OF DIVORCE: THE 25 YEAR LANDMARK STUDY* (2000); Lynn D. Wardle, *The Fall of the Marital Stability and the Rise of Juvenile Delinquency*, 10 J.L. & FAM. STUD. 83 (2007). Cf. ELIZABETH MARQUARDT, *BETWEEN TWO WORLDS: THE INNER LIVES OF CHILDREN OF DIVORCE* (2006); Suzana Krali, *Emotional Violence Caused to Children by their Parents' Divorce*, 1 INT'L J. JUR. FAM. 133 (2010) (noting at page 144, with special attention to Slovenia, that “[p]arental divorce, as a form of psychological violence against children, often leads to children’s poorer educational achievement, emotional functioning, and self-respect. Consequences can also include poor appetite, feelings of guilt, lying, low self-esteem, reduced emotional response, inability to become independent, distrust of others, depression, autistic behaviour, drug use, prostitution, and sometimes suicidal tendencies and bullying.”)(notes omitted).

16. On the contribution of grandparents to the rearing of the young, see Paul Galea, *Grandparenting and Extended-Family Support: The Silent Generation*, 3 INT'L J. JUR. FAM. 283, 291–97 (2012). In the United States, more than 2.5 million grandparents have full or partial responsibility for a grandchild’s care. See U.S. Census Bureau, *Statistical Abstract of the United States, 2012, Population: Households, Families, Group Quarters* 59, (Table 70), <http://www.census.gov/compendia/statab/2012/tables/12s0070.pdf>. Increasingly, grandparents care for grandchildren in a household from which the parents are absent. Bert Hayslip & Patricia Kaminsky, *Grandparents Raising Their Grandchildren*, 37 MARRIAGE & FAM. REV. 147, 151 (2005). See Ross D. Parke, *Foreword*, in *PARENTING THE CUSTODIAL GRANDCHILD: IMPLICATIONS FOR CLINICAL PRACTICE*, xv (Bert Hayslip & Patricia Kaminsky eds., 2008). Cf. Andrew Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403–19 (2010). Comparable findings for Europe are reported in Karsten Hank & Isabella Buber, *Grandparents Caring for their Grandchildren: Findings from the 2004 Survey of Health, Ageing, and Retirement in Europe*, 30 J. FAM. ISSUES 53–73 (2009). See generally European Commission, Eurostat, issue number 50/2010, http://eurostat.ec.europa.eu/portal/page/portal/income_social_inclusion_living_conditions/publications/statistics_in_focus (reporting that in 2008, about 46% of persons aged 18–34 in EU countries lived with at least one of their parents); Christine Chambaz, *Lone-parent Families in Europe: A Variety of Economic and Social Circumstances*, 35 SOC. POL'Y & ADMIN. 658–71 (2001).

Christian, and Jewish authorities; a morality fundamentally different from that which underlies most analysis of business policy and law.

B. Family Businesses

Family businesses reflect family purposes. They earn the money which funds family activities and contributes to the fulfillment of family purposes. If families are seedbeds of virtue, wealth is the fertilizer.

For many a family, its business affords much of its sense of mission. The business is often a foundation of the family's social position, and the principal vehicle for passing along to the next generation the family's assets, its sources of income, its good will, and some measure, at least, of its accumulation of knowledge and wisdom.

Furthermore, family businesses are in many cases seedbeds of *vocation*. They transmit skills to the next generation, supplementing them, in many instances, with inculcation in the morality and solidarity of trade and craft. The bonds of the hearth may be supplemented by the fraternities of the shop.

IV. THE GOODS AND PURPOSES OF BUSINESS COMPANIES

Business law and theory proposes that a business is to be run for the good of the equity holders and, specifically, for their economic gain.¹⁷ The leading recent case is *EBay Domestic Holdings, Inc. v. Newmark*,¹⁸ which drew into question the "community service" culture of craigslist, described by the court as follows:¹⁹

Nearly all classified advertisements are placed on craigslist free of charge. Moreover, craigslist does not sell advertising space on its website to third parties. Nor does craigslist advertise or otherwise market its services, craigslist's revenue stream consists solely of fees for online job postings in certain cities and apartment listings in New York City. . . .[C]raigslist operates as a small business. It is

17. The discussion which here follows relies on corporate law. Over the last decade, limited liability companies have become the favored form for most organizers of new businesses. Limited liability law is still a largely blank slate, since LLC statutes are cryptic and LLC case law is sparse. It is likely that corporate law and theory will be highly influential in identifying the purposes of LLCs.

18. 16 A.3d 1 (Del. Ch. 2010). The classic case has been *Dodge v. Ford*, 170 N.W. 668 (Mich. 1919).

19. *Id.* at 9 (notes omitted; brackets as in the original).

headquartered in an old Victorian house in a residential San Francisco neighborhood. It employs approximately thirty-four employees. It is privately held and has never been owned by more than three stockholders at a time.

The relatively small amount of monetization craigslist has pursued (for select job postings and apartment listings) does not approach what many craigslist competitors would consider an optimal or even minimally acceptable level. . . . [C]raigslist does not expend any great effort seeking to maximize its profits or to monitor its competition or its market share.

The two controlling shareholders sought to protect this service culture from the minority shareholder, eBay. They engaged in what one scholar describes as “a series of maneuvers seeking to limit eBay’s influence in Craigslist, and to assure that control of the company remained in their hands [They] defended their machinations as necessary to protect the public-service orientation of craigslist and keep it from becoming too focused on profit-making.”²⁰

The Delaware Court of Chancery struck down some of the defensive measures, stating:²¹

Jim and Craig did prove that they personally believe Craigslist should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire Jim’s and Craig’s desire to be of service to communities. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. *Those standards include acting to promote the value of the corporation for the benefit of its stockholders.* The “Inc.” after the company name has to mean at least that.

20. David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. J. 181, 193 (2014).

21. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010) (footnote omitted; second set of emphases added).

Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce. * * *

Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duty under Delaware law.²²

These principles are now orthodox in Delaware and probably in most jurisdictions. They likely also apply to limited liability companies.

Shareholders and other principals of business companies often concur with the law's understanding. The Delaware Chancery Court has observed: "Stockholders invest to make moolah, cash, ching, green, scratch, cabbage, benjamins—to obtain that which Americans have more words for than Eskimos have for snow—money."²³ The view that the corporation should be run for the economic benefit of the shareholders is endorsed by the American Law Institute's Principles of Corporate Governance²⁴ and is reflected in the statements of purpose of some major corporations.

The view that profit or the maximization of utility is the dominant human motive and the basis for ethics in economic matters has its foundations in Enlightenment thought. It diverges considerably from the ethical tradition, which grounds the morality of the family.

V. THE INCONGRUITY BETWEEN THE NORMATIVITIES OF FAMILY AND BUSINESS

The incongruities are obvious, and reach from matters of practice and attitude, through doctrine, down to the most fundamental tectonic plates of legal culture and principle. I here note two doctrinal dimensions.

22. In addition, the court noted: "If Jim and Craig were the only stockholders affected by their decisions, then there would be no one to object. eBay, however, holds a significant stake in craigslist, and Jim and Craig's actions affect others besides themselves." *Id.*

23. *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786, 819 (Del.Ch. 2007).

24. PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 6.01 (AM. LAW INST. 1994) provides that, subject to some exceptions, "a corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."

1. *Ownership.* Families expect their businesses to remain in family hands, and are likely to be disconcerted if a stranger appears on the scene holding an important stake and a claim to participation or control. Corporate law, however, makes free transferability of shares its default principle. A shareholder can usually sell shares without securing approval from other participants in the business. Anyone—any stranger—can buy shares, attend shareholder meetings, advance resolutions, vote on major matters, and seek election to the board. Control is in the hand of whoever has the votes.

To be sure, share transfer may be restricted by charter or by agreement. A family corporation can therefore assuage its concerns by adopting properly drafted provisions, and is likely to do so if someone—probably their lawyer—thinks of the problem and drafts the necessary clause. Cause for apprehension remains, however, even if a transfer restriction is put in place, because the law may require that it be waived. The fiduciary duty of directors and officers, and the fiduciary duty of shareholders in a closely held corporation, may require them to waive the restriction where they can adduce no business justification for keeping the stock tied up. If the only acceptable business justifications are those which look to the maximization of shareholder economic gain, nothing may stand in the way of a stockholder's selling to a nonfamily member. Indeed, legal policy may support the sale of stock to someone who, like eBay in the craigslist case, intends to shake things up and make the company more profitable, albeit less familial.

2. *Membership on the Board.* Families appoint family members to leadership positions. The founding grandparent is often an eminent member of the board. Other respected family members are often also elected. Not all of them have MBAs or possess expertise in financial matters. Some of them may even lack a good head for business but are elected owing to their wisdom in family relations and the respect they command. Principles of corporate law raise a concern that such persons are unqualified and therefore expose themselves, and perhaps those who elect them, to liability for assuming fiduciary positions they are not, in a conventional sense, qualified to fulfill.²⁵

25. *Id.* at § 4.01 (implying an objective standard for the level of care required of a director). Illustration 6 to this provision states:

C, who is rich and charming, has been a director of Y corporation for several years. C's only significant contribution has been a willingness to entertain important customers. C has said "I do not have the capacity to oversee Y's business," and has made

VI. WHICH NORMATIVITY IS TO PREVAIL?

As the above indicates, the normativity of the family has been subordinated in legal doctrine, without much reflection, to the normativity of business. The matter deserves reconsideration. This article proposes a basic principle to guide improvement.²⁶

no attempt to oversee it. Y corporation has gone into bankruptcy because of mismanagement. C, as a result of the failure to oversee the conduct of Y's business, has committed a breach of the duty of care.

The American Legal Institute states, near this point in its commentary:

The use of the words "ordinarily prudent person" is intended to convey the image of a generalist *who has the capacity* to perform a given corporate assignment The fact that C may not have the capacity of an "ordinary prudent person" is no defense. C will be held to an objective standard."

(emphasis added). The Massachusetts statute also implies an objective standard. MASS. GEN. LAWS ch. 156D § 8.30 (2015). The Official Comment to this provision states that this provision "*does not excuse a director lacking business experience or particular expertise* from exercising the common sense, practical wisdom, and informed judgment of a reasonably careful person" (emphasis added).

26. Note that this article focuses on one basic principle. Others might be added. Notably, courts might be guided by the principle of furthering the best interests of the child. Among many authorities supporting this principle, *see* Article 18 of the United Nations Convention on the Rights of the Child, which provides, in relevant part:

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

U.N. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. For further authorities, *see* Ursula C. Basset, *The Changing Standard of the "Best Interests of the Child" and its Impact on the Exercise of Parenting and on Children*, 2 INT'L J. JUR. FAM. 407, 414 (2011). Another principle, likely to weigh *against* placing a high value on the normativity of the family, is that which looks to the exigencies of public policy. *See generally* David G. Yosifon, *Is Corporate Patriotism a Virtue?*, 13 SANTA CLARA J. INT'L L. (forthcoming); David G. Yosifon, *Corporate Aid to Governmental Authority: History and Analysis of an Obscure Power in Delaware Corporate Law*, 10 U. ST. THOMAS L. J. 1087 (2013). The Ford Motor Company during World War II furnishes an example, since it was then engaged in defense production. Principles based on public policy might also be applied to common carriers and other semi-public organizations.

A. The Principle of Subsidiarity

1. What the Principle of Subsidiarity is, its foundations, and major implications

The principle of subsidiarity is endorsed in the Treaty on European Union,²⁷ in the Preamble to the Council of Europe's Convention on the Protection of Human Rights and Fundamental Freedoms,²⁸ and in important jurisprudential writings.²⁹ The principle encourages governments and other organizations to eschew interference with the associations of society, to recognize and applaud them, and to support them in doing their work. The principle has special applicability to government and to governmental legal systems:

The 'subsidiary function of the state' means that, as supreme guardian of the common good, the state has a duty to offer lesser communities (and persons) such 'help' as is needed for them to realize their distinctive ends and pursue their unique goods, when failure to do so might harm the common good. . . . [A]s it acts to promote the common good, the state must correctly discern, and defer to, its

27. Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191), (commonly known as the Maastricht Treaty). Title II Article 3b states:

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

For an extensive review of European authorities endorsing the principle of subsidiarity, see Gabriël A. Moens & John Trone, *Subsidiarity as Judicial and Legislative Review Principles in the European Union*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY 157 (Michelle Evans & Augusto Zimmermann, eds., 2014).

28. Protocol No. 15 amending the Convention on the Protection of Human Rights and Fundamental Freedoms, July 24, 2013, C.E.T.S. No 213:

Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.

29. E.g. GLOBAL PERSPECTIVES ON SUBSIDIARITY (Michelle Evans & Augusto Zimmermann, eds., 2014); Maria Cahill, *The Origin of Anti-Subsidiarity Trends in the Regulation of the Family*, 4 INT'L J. JUR. FAM. 85 (2013) (setting forth, in notes 7 and 8, extensive citations to scholarly works on subsidiarity).

complexly differentiated components. It must honour the freedom of persons and lesser communities³⁰

Why subsidiarity? One account invokes efficiency: many tasks are most effectively executed by the people “on the ground.” A more fundamental justification relies on the goods of freedom and self-actualization. Individual members of society lead more fulsome lives—flourish better—when they make their own way. Being social and political animals, men and women do this in major part through associations. When a large organization recognizes them, acknowledges their places in the social order, and in general treats them well, it promotes flourishing.

Thus, the principle of subsidiarity emphasizes the role of the State as trustee for and guardian of civil society. Neighborhood associations, schools, colleges, dining clubs, political parties, ethnic associations, families, and economic organizations are all part of the social fabric which the State and the law have in their care. Business companies are an important component. The principle proposes a basic orientation—for some courts a *reorientation*—in the law’s approach to business associations. It adjures the State to resist the perennial temptation to subsume into itself the civil institutions which are within its care, or to attribute to them purposes and ends which, while perhaps serving macro goods and resonating with dominant political ideologies, are incongruent with the purposes of the participants.

The principle of subsidiarity encourages the State to acknowledge the importance of the civic order, preserve it, and facilitate its development. It has been said that Western civilization has experienced a crisis of solidarity:³¹ a “great disruption” which has “weakened the bonds holding families, neighborhoods, and nations together.”³² The principle of subsidiarity commends an important, if partial, remedy.

What policies does the principle of subsidiarity recommend? One

30. Jonathan Chaplin, *Subsidiarity and Social Pluralism*, in GLOBAL PERSPECTIVES ON SUBSIDIARITY 65, 73 (Michelle Evans & Augusto Zimmermann, eds., 2014).

31. John Paul II, *Instrumentum Laboris for the Synod of Bishops—Second Special Assembly for Europe*, L’OSSERVATORE ROMANO, (Weekly Edition in English), Nov. 18, 1999. See John Paul II, *Message to Prof. Sergio Zaninalli, Rector Magnificent of the Catholic University of the Sacred Heart*, L’OSSERVATORE ROMANO, (Weekly Edition in English), May 24, 2000 at 9 (“The value of solidarity is in crisis.”).

32. FRANCIS FUKUYAMA, THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER 6 (1999).

is that of abstemiousness. The principle instructs governments and other large associations to minimize their interference with smaller ones. A French philosopher, Chantal Delsol, articulates this dimension of the principle as follows:³³

[L]’autorité en général et l’Etat en particulier ne doivent pas empêcher les personnes ou groupes sociaux de conduire leurs actions propres, c’est-à-dire déployer autant que possible leur énergie, leur imagination, leur persévérance, dans les oeuvres par lesquelles ils se réalisent tant au profit de l’intérêt général que de l’intérêt particulier

Reluctance to interfere implies the attribution of purposes and ends only to the extent that they are embraced by the participants. It weighs against doctrines and principles that might redefine and reorient a smaller association so as to recruit it into the service of national goods (though competing principles might justify such an approach during an exigency such as war or national emergency).³⁴

Further, the principle suggests that government and the law *recognize* the important affiliations of civil society. Recognition—a cognitive activity which comprises much more than just seeing something, and extends to “getting the idea of it” and identifying its meaning and place in a social and moral order—is expressed by government and the law in their official discourse. It is extended to an institution when the law articulates its identity—calls it by its true name—acknowledges its presence, its importance, and its, so-to-speak, “location.”³⁵ Obliviousness is inconsistent with subsidiarity; misunderstanding and mischaracterization are still more dissonant.

Further still, subsidiarity has an important *proactive* implication (this is suggested by that term’s etymology: its root is “*subsidiium*,” the Latin word for reserve forces available as reinforcements³⁶). Again to quote Chantal Delsol: subsidiarity has “*un aspect positif : chaque auto-*

33. CHANTAL MILLON-DELSOL, LE PRINCIPE DE SUBSIDIARITÉ 7 (1993), available at http://www.asmp.fr/fiches_academiciens/textacad/delsol/principe_subsidiarite.pdf. This translates:

Authorities in general and the State in particular should not prevent persons or social groups from engaging in their appropriate actions, that is to say, deploying, as much as possible, their energy, their imagination, and their perseverance in the works by which they contribute to the general and the particular interest

34. See authorities cited in *supra* note 27.

35. See generally Scott FitzGibbon, *Parent, Child, Husband, Wife: When Recognition Fails, Tragedy Ensues*, 25 B.Y.U. J. PUB. L. 203 (2011) (commending the goods of political and legal recognition and expounding on their meaning).

36. That word—“*subsidiium*”—referred to “a body of troops withheld from action as a reinforcement for the frontline.” *Subsidiium*, Oxford Latin Dictionary (2d ed. 2010).

rité à pour mission d'inciter, de soutenir, et en dernier lieu, de suppléer s'il le faut, les acteurs insuffisants."³⁷ The principle commends supporting the affiliations of civil society and the projects that they undertake.³⁸

Two major extensions of the principle of subsidiarity are proposed immediately after the next subsection.

2. *What sorts of associations are supported by the Principle of Subsidiarity in support of families and businesses*

The scope and reach of the principle of subsidiarity are suggested by the goods it serves. An organization that is really important to its members—one located centrally in the structure of their lives—presents the strongest case. An association that is held dear by its members and is loyally supported by them—one directed towards ends that are basic to their lives—calls most strongly for recognition and support. Organizations that are only of instrumental value present a weaker case. No case worth considering is presented by a conglomerate that is incoherent or pointless.

The family is the strongest case for application of the principle. Business companies present a more difficult case. Many are of instrumental good only and are treated as such by all involved; memberships are created and discarded as efficiency and profit require. Family businesses, on the other hand, are usually deeply embedded in the lives of participants.³⁹

37. MILLON-DELSOL, *supra* note 34. This may be loosely translated: "a positive aspect: each authority's mission is to encourage, to support, and ultimately to supplement, if necessary, the efforts of those in need of assistance."

38. The first and third of these dimensions are reflected, for example, in a prominent Roman Catholic authority:

Subsidiarity, understood *in the positive sense* as economic, institutional or juridical assistance offered to lesser social entities, entails a corresponding series of *negative* implications that require the State to refrain from anything that would de facto restrict the existential space of the smaller essential cells of society. Their initiative, freedom and responsibility must not be supplanted.

PONTIFICAL COUNCIL OF JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 186 (2004), available at http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html.

39. The principle of subsidiarity deserves consideration in many other areas of private law. For example, it can be enlightening in instances in which the participants in a business, though not members of the same family, are closely bonded. See generally Scott FitzGibbon, "True Human Community": *Catholic Social Thought, Aristotelean Ethics, and the Moral Order of the Business Company*, 45 ST. LOUIS U. L. J. 1243 (2001).

*B. Two Major Extensions of the Principle of Subsidiarity**1. Fostering close affiliations*

An enriched account of the principle of subsidiarity recommends that government not only recognize and support those worthy associations which already exist but also encourage the emergence of new ones. It suggests that government and the law discourage the degradation of a valuable association into a connection of more distant, chilly, and instrumentalist sort.

Government and the law should promote an ethic friendly to close affiliations. They should promote an ethical system that makes a prominent place for the affiliational virtues. For example, loyalty, steadiness, and a capacity for enduring commitment, for example, should be—as in the law they traditionally have been—recognized, endorsed, and encouraged.

Where an affiliation is of an ambiguous character, the law should presume that it is of a close and basic sort: the sort worthy of the application of the principle of subsidiarity. Such a presumption will usually reflect the deeper purposes of the participants.

2. Fostering affiliational networking

A further extension is suggested by the insight, tellingly expressed by Chantal Delsol, that the basic groups in society are “nested in one another.”⁴⁰ Each is fully itself when it participates with the others, enjoying their support and reflecting, in some degree, their goods. The parent-child relationship flourishes among grandparents, cousins, uncles, and aunts; law firms are associated with bar associations and are connected with other law firms as fellow members of the legal profession. Subsidiarity, therefore, goes beyond the respect and support of each association considered in isolation. The principle also commends respecting and supporting the—so to speak—associations of the associations. It commends attention to their embeddedness in the social fabric.

A well-directed State and a wise legal system can do much to orchestrate this complex symphony. Where an affiliation is of an am-

40. “[E]mboîtés les uns dans les autres.” MILLON-DELSOL, *supra* note 34.

biguous character, the law should presume that it possesses those characteristics which conduce to its joining with other associations in lasting ways.

VII. IMPLICATIONS FOR A FAMILY'S BUSINESS

Suppose, then, you are the Chief Judge of a court that is presented with a matter involving a business that has important connections with a family. Perhaps someone aims to sell a block of stock to an outsider and demands a waiver of restrictions on transfer. Perhaps an election of a family elder is challenged owing to her lack of financial training. There are no binding precedents or applicable statutes, so you face a blank doctrinal slate. You look for guidance to the principle of subsidiarity. It suggests:

First and foremost, the principle presses you to look deeply into the intentions of the major participants. Where they are clear and consistent they ought to prevail. If the principals regard the entity as just a business like any other and treat profit as its major aim, regarding the family's involvement as coincidental, established doctrines of business law as described above would likely fill the bill.

If, on the other hand, the principals treat the business as an extension of the family and deploy it for familial ends beyond the narrowly economic, you can identify it as fully a family business, and accept the guidance of the principle of subsidiarity in proceeding to adjudicate about it. The principle then directs that the business be recognized for what it is: familial in nature and purposes. It directs you to articulate this conclusion, and it suggests that your legal system as a whole characterize the business and acknowledge its location in the social order accordingly. It presses you to disfavor misleading legal categories and characterizations which might lead people to think of the entity as a business like any other, possessing goals and purposes derived from systems of ethics alien to those of the participants.

If the business is a family business, the principle of subsidiarity calls for doctrines that facilitate the achievement of those ends. Restrictions on the sale of stock to non-family members fit right in and can be presumed when not explicit. Electing senior family members to the board furthers familial purposes and can be justified even when the electees are not financial wizards.

What where the intentions of the participants are inchoate or un-

clear? Because family businesses are hybrids, principals are pulled in opposing directions. Some family members—those with small children, for example—may feel more strongly than others about making the business serve the family's goods; others may think of themselves as tight-lipped finance people with a mission to bring discipline to the enterprise. If you as Chief Judge are puzzled as to how to respond, you may look to the two major extensions of the principle of subsidiarity proposed above.

Both of these extensions direct you towards preferring the normativity of the family. The first extension—proposing a presumption in favor of the closer, non-instrumental sort of affiliation—will usually lead in this direction owing to the fact that family bonds are almost always more intense and basic to life than those of business (for this reason, the proposed presumption likely reflects many of the deeper inclinations of the principals).

The second extension—proposing that the State and law foster the affiliational character of organizations, presses in this direction as well. When successful and stable, a family business achieves a symbiosis in which each association—family and business—is guided by principles and traditions which comport with the well-being and flourishing of the other. Subsidiarity commends assisting the two organizations to work well with one another. It requires government and the law not to estrange the associations from one another. It commends an approach which encourages congruence between the two composite elements: in the case of the family business, subsidiary means encouraging and justifying the cooperation of business and family. Most dimensions of family normativity have this character and ought therefore to be preferred.

Presuming the dominance of the normativity of the family, you should, in these cases of mixed purposes, apply the restriction on transfer—not require that it be waived so as to permit the introduction of nonfamily shareholders—and you should countenance the election of senior family members to the board notwithstanding their lack of financial expertise.

