In what ways does the legal environment facilitate or hinder solidarity and subsidiarity in business?

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In light of Cardinal George’s absence, I am going to take a little of my time to touch on his topic. The interdependence of the principles of solidarity and subsidiarity is important. I have, therefore, taken a very small part of a presentation I had given on another occasion to demonstrate how the two principles relate to each other.

The paradigm presented in the PowerPoint slides demonstrate how solidarity and subsidiarity are both rooted in the dignity of the human person. At times, policies and practices that seem to further human solidarity may clash with the goals of subsidiarity. And, at other times, the principle of subsidiarity may so isolate people that solidarity is lost. In short, the principles must be carefully balanced in practice to best promote human dignity and the common good.

My topic seeks to determine how the legal environment of the United States fosters or hinders solidarity and subsidiarity. This is most challenging at many levels. To begin with, implicit in my slide presentation, the question ultimately devolves into whether or not the legal environment fosters and respects the human dignity of all who are subject to the law. No legal system could pass that test. No government made up of human beings has the capacity, knowledge, or inclination to create a perfect legal order.

The complexity of the issue we are considering is magnified by the notion of the “legal environment.” It encompasses too much to be dealt with in a short presentation. The laws, treaties, executive orders, judicial decisions, regulations, and ordinances of the United States and it numerous state and subdivisions touch virtually all aspects of society and culture. They control much of modern life with directives, incentives, rewards, sanctions, and punishments. Each person in this room
could identify laws and policies that either foster or impede an ideal Catholic social order. The United States’ immigration policies present problems from the perspective of the principle of solidarity. Traditional welfare programs seem to satisfy solidarity, but often do so at the expense of subsidiarity. They meet human needs, but leave the recipients dependent. The examples are numerous and in most instances the “right” answer to complex social issues will depend on prudential judgments about which reasonable people can differ.

Let me move to an issue that most people think of in the context of the law as it relates to business organizations: the legal obligation of corporate management to maximize the owner/shareholders’ value. While this is an accurate generalization of corporate law, it is not without exceptions and is frequently avoided in fact. I am not going to explain the rationale for the rule, which makes sense if not applied with unyielding rigidity. The challenge to this rule from a Catholic perspective is that it fails to recognize that a business enterprise is a community of human beings—stakeholders—who must exist in some sort of relationship of solidarity. Everyone’s valid interests merit consideration in the operation of the enterprise. The legal answer to this issue has generally been the adoption of “stakeholder statutes,” which impose a duty on management to consider the interests of all parties who are affected by corporate decisions. Courts, moreover, have been quite ready to find particular charitable and social corporate activities to be economically justified. We do expect businesses to be good citizens now days.

Generally, this newer legal emphasis on some mandated form of solidarity in the business world has not been too impressive. As already noted, profit-maximizing decision-making has in fact considered many of the social factors that influence a firm’s relationships with workers, suppliers, distributors, consumers, and the communities in which they exist. Charitable giving can be justified on economic as well as moral grounds. My ultimate point here follows the theme introduced by Sean Fieler yesterday. Business enterprises are allowed by corporate law to do good things if they are run by men and women who bring sound moral values to their work as directors and managers. The profit-maximizing norm certainly justifies what may be a greed-based managerial imperative, but it is not mandatory.

Let me turn now to an issue that many people associate clearly with solidarity, labor unions. Law and Catholic social policy had coalesced in the adoption of American labor laws. One of the most critical missives of Rerum Novarum
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The development of the labor movement in the United States was quite turbulent during the early 20th century. The growth of the union movement in the U.S. was rocky and violent. Some union leaders were too radical, but mainly the economic and political elites of the era were threatened by labor organizations and collective bargaining. President Roosevelt's New Deal, which was influenced by Pope Leo XIII’s *Rerum Novarum* through the work of Monsignor John Ryan and the American Catholic hierarchy, established the legal foundation for unions, their rights to organize and to bargain with employers. The National Labor Relations Board was established to regulate the relationship between workers (unions) and management. Other statutes, federal and state, have been enacted to protect the rights of workers to adequate compensation; protection against invidious discrimination, and safe working conditions, but none since the NLRA have relied on the rights of workers to join in solidarity to bargain for their wages and working conditions.

There is a lesson and a challenge, however, in the development of union-centered labor laws. For whatever reasons, unions have diminished significantly in size and influence in recent years. For example, CNN reported in 2012 that “American unions already have a fraction of the influence they did a few decades ago. Only about 12% of workers are union members, down from 20% in 1983, according to federal data. In the private sector, the plunge has been even steeper: union membership has dropped from 17% in 1983 to 7% today.”

One result of this change in the character and power of unions is that “labor law” has become “employment law” which minimizes the role of one of the main

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The fundamental principles of the Church’s social doctrine, founded on the dignity of the person, are the principles of solidarity and subsidiarity. According to the first principle, each individual is called upon to contribute to the common good of society; according to the second, the State cannot substitute for the free initiatives and responsibility either of individuals or intermediary social groups on the level where each is able to act.
mediating subsidiary bodies in the relationship between employers and employees. This presents a challenge to both society and the Church with regard to the application of a critical social principle in the real world. Traditional unions no longer represent the major subsidiary organization for working people. Solidarity among working peoples must find new structures; as well as new subsidiary organizations to prevent the government or the market from assuming total responsibility for working conditions.

The point is not that traditional unions do not provide a concrete example of solidarity in action. Many of us stand on the shoulders of men and women who provided well for our health and education with salaries that unions made possible. The point, rather, is that the old system does not seem to be working well in today's economic environment. Given the nature of much contemporary business, many American workers are well situated to negotiate their own benefits. In some types of industries or services, workers may benefit from the types of organizations that are less tied to a single industry. It is possible that some forms of syndicalist or corporatist models of cooperation will work in some industries. For those many, many workers who remain in positions where individual bargaining and profession-based collective negotiations are not possible, the government is more likely to have to provide for minimum standards of safety, health, and income. That poses its own set of problems.

Let me now move on to something more abstract and in my judgment important. Let us focus primarily on what is more an American economic ethos rather than the details of specific laws. To put it bluntly, and over simplistically, we are a robustly individualistic society. Our national lore is one of self-made men and women who achieve wealth and satisfaction through hard work, innovation, and risk taking. In the economic world of the United States, markets serve as the major mediator between individual needs and wants. To be sure, regulations of economic relationships are ubiquitous. But, by and large, most regulation is intended to correct for market failures and imperfections.

The founding documents of our nation set the tone. We have an inalienable right to liberty, the Declaration of Independence tells us, and the Constitution provides protection for private property and contracts. Our constitutional jurisprudence has wavered but fairly consistently opted for market-based transactions, in the context of speech as well as material goods. American economic law—again I am using the term very loosely—came is several waves. Private monopolies were recognized as problematic to a market-based economy in the late 1800s. The initial response recognized as valid by the U.S. Supreme Court involved the regulation of rates for grain elevators and warehouses by Illinois. With language that resonates with Catholic teaching, the Supreme Court held that “[p]roperty does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.” The first major federal regulatory enactment, The Interstate Commerce Act of 1887, was intended to control the rates of railroads. So, the precedent was set for government to intervene in markets when the structure of the industry would not support free market transactions.

**Solidarity**

- Derived from common shared dignity of the person.
- Explicit in Scripture.
- Reciprocal social rights and duties.
- Focused on the other, but as an equal.
- Communitarian impulse.
- Collectivity has duty to help individuals develop and leave authority where it can best be executed.

**Subsidiarity**

- Expresses the dignity of the individual and the obligation to develop self.
- Accepts need for collective action, but seeks to keep it at the smallest effective unit.
- Person has right and duty to develop self and then to practice the virtue of solidarity to aid others, as individuals and collectively.
“Business enterprises are allowed by corporate law to do good things if they are run by men and women who bring sound moral values to their work as directors and managers.”

The “Magna Carta of free enterprise system” was the Sherman Antitrust Act of 1890. It dealt generically with the problem of monopolist power. Combinations to restrain trade (cartels) and single firm monopolization were made criminal. Without going into too much detail, economic law in the United States has been left to antitrust law where markets are feasible and regulation where markets cannot work.

The antitrust laws have gone through a more-or-less populist enforcement era; where “big” business was suspect if not outright bad. One of the earliest interpretations of the Sherman Act showed remarkable sympathy for “small dealers and worthy men” even if protecting them would result in higher prices for consumers. Much of the history of antitrust jurisprudence attempted to strike some balance between the “freedom of traders” and economic efficiency. For several decades following World War II, the law tended to favor per se rules that leaned in the direction of the populist paradigm. Since the 1970s, however, antitrust law has been largely remade by the Courts in the image of an economic model most often associated with the University of Chicago. Efficiency is good. Large size and various types of controls on suppliers and distributors make economic sense. The freedom of these dealers and suppliers to deal on their own terms was no longer protected. Consumer surplus would be enhanced if businesses were allowed to achieve economies of scale and distribution.

One of the untoward results of this modern insensitivity to size has been the “too-big-to-fail” phenomenon. This is not an antitrust problem per se, but in the financial industry in particular the government will not let the market penalize firms for their inefficiency or worse. We likely need new ways to deal with the issue when a firm’s size turns into excessive economic and political power. This is particularly true in the regulated sectors of the economy.

The regulatory track has gone through similar changes. Policies that assumed disinterested but knowledgeable regulators found that the agencies were either outright captured by the regulated sector or dependent on its expertise to the point of de facto capture. Regulatory bodies imposed industry-wide remedies on firms that prevented the types of innovation which bring progress. And the net of the regulatory process often went beyond the sections of the regulated sector that operated outside of a competitive market. In the oil and natural gas industries, for example, natural monopoly characteristics exist with regard to transportation, i.e., pipelines. The wellheads, however, where the resources are extracted are many and capable of engaging in healthy competition.

Please allow me to sum up the “legal environment” of the United States, at least in the context of the economic order, as a strong commitment to free markets. Let me then take this one step further and translate it more broadly into a commitment to freedom itself. I am of course abstracting wildly from an immensely complicated legal, social, and cultural environment.

Accepting my construct of the United States as a nation committed to individual freedom in the economic sphere with a strong preference for market transactions among free individuals, how does this relate to the principles of solidarity and subsidiarity? The answer is unsatisfying but consistent with so much we have heard during this conference. The emphasis on freedom ultimately means that individuals will determine how well the communities within which they operate meet the ideals of solidarity and subsidiarity. The answer is unsatisfying but consistent with so much we have heard during this conference. The emphasis on freedom ultimately means that individuals will determine how well the communities within which they operate meet the ideals of solidarity and subsidiarity. The bonds and the allocation of functions will be driven by many factors, not simply economic efficiency. And even economic enterprises can be motivated by the collective good of their members. This again invites further study that goes beyond this short paper. Business endeavors and personal initiative will help to determine how solidarity and subsidiarity fit into the modern global economy. As Pope Benedict stated in Caritas in veritate,
“[w]hat is needed, therefore, is a market that permits the free operation, in conditions of equal opportunity, of enterprises in pursuit of different institutional ends. Alongside profit-oriented private enterprise and the various types of public enterprise, there must be room for commercial entities based on mutualist principles and pursuing social ends to take root and express themselves. It is from their reciprocal encounter in the marketplace that one may expect hybrid forms of commercial behaviour to emerge, and hence an attentiveness to ways of civilizing the economy. Charity in truth, in this case, requires that shape and structure be given to those types of economic initiative which, without rejecting profit, aim at a higher goal than the mere logic of the exchange of equivalents, of profit as an end in itself. [And, further] It is in response to the needs and the dignity of the worker, as well as the needs of society, that there exist various types of business enterprise, over and above the simple distinction between “private” and “public”. Each of them requires and expresses a specific business capacity. In order to construct an economy that will soon be in a position to serve the national and global common good, it is appropriate to take account of this broader significance of business activity. It favours cross-fertilization between different types of business activity, with shifting of competences from the “non-profit” world to the “profit” world and vice versa, from the public world to that of civil society, from advanced economies to developing countries.”

As always in Catholic teaching, freedom comes with responsibilities. The quality of our lives as Americans and of others whose lives are so dependent on U.S. policies will be a function of decisions made by many, many people.

The American legal system, then, seldom directly imposes policies to achieve solidarity or subsidiarity. Other countries are more direct. Japan does so by custom and Germany by law. We by contrast are dependent on people of goodwill and moral standards to provide these goods. The message of Catholic social teaching is, as always, that society will be better when men and women have a change of heart. ★

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ENDNOTES


2 This notion is not alien to Catholic thinking. Pope Pius XI advocated this model and it has been followed with apparent success in Germany since the end of World War II.

3 Munn v. Illinois, 94 U.S. 113, 126 (1876).

4 The Interstate Commerce Commission, which was created by the 1887 Act, had its regulatory jurisdiction expanded substantially over the years, but it could not survive the de-regulatory movement and was eliminated in 1995.


6 United States v. Trans-Missouri Freight Association, 166 US 290, 323.

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