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Subsidiarity in the EU: Rhetoric or Reality? A Critical Assessment of Its Legal and Political Impact

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ABSTRACT: This paper offers a critical assessment of the EU principle of subsidiarity, tracing its intellectual roots from nineteenth-century Catholic social teaching through its codification in the Treaties and procedural reinforcement via the Lisbon-era Early Warning System (EWS). It first reconstructs subsidiarity's theological and Christian Democratic origins and distinguishes it from competence delimitation and proportionality in the Union's constitutional architecture. It then analyses the operation of Protocols No. 1 and 2, detailing the EWS's yellow and orange card thresholds and the limited scope of parliamentary scrutiny over draft legislation. Drawing on over a decade of practice, including more than 1,200 reasoned opinions and only three yellow cards, and on key Court of Justice rulings that have never annulled an EU act solely on subsidiarity grounds, the paper demonstrates that the principle primarily serves as a symbolic deference that legitimizes continued supranational expansion. A comparative examination of United States federalism, with its enumerated powers and judicially enforced limits under the Commerce Clause and anti-commandeering doctrine, highlights the EU's confederal ambiguity and the weakness of subsidiarity as a justiciable safeguard. The paper concludes by advocating treaty reform toward explicit, federal-style

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competence catalogues in core areas such as defense, fiscal policy, and foreign affairs, arguing that recent developments—from the Recovery and Resilience Facility to Ukraine-related joint borrowing—already transcend subsidiarity and reveal a de facto federal trajectory that should be constitutionalized to ensure democratic legitimacy and geopolitical effectiveness.

Keywords: *Subsidiarity Principle, European Union Constitutional Law, Early Warning System (EWS), National Parliaments, Supranational Governance, Federalism and Competence Allocation, Judicial Review in the EU.*

INTRODUCTION

Is subsidiarity meaningful or merely rhetorical? Subsidiarity in the EU operates far more as rhetorical reassurance than as a truly meaningful constitutional constraint. In this essay, I will argue that its empirical track record justifies moving towards a clearer, federal-style division of competences.

To fully determine whether the EU's principle of subsidiarity is meaningful or merely rhetorical, we must first understand what it is and where it came from. This principle of subsidiarity occupies a central but vague position in the European Union's constitutional architecture. It safeguards Member State autonomy versus EU/supranational overreach while at the same time facilitating integration where and when scale advantages occur. Article 5(3) of the Treaty of the European Union (TEU) codifies this as a binding legal standard where it states “in areas of non-exclusive competence, the Union may act "only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level”.

This statement presumes action must be commensurate at the lowest effective governance tier—local, regional, national, or EU—and consistent with Treaty objectives. However, it explicitly excludes areas that are of EU exclusive competence (Art. 3 TFEU), which includes customs union, monetary policy for euro

states, fisheries/marine conservation, competition rules necessary for the internal market, and common commercial policy.

Catholic Origins of Subsidiarity

In my own research, I traced subsidiarity to its 19th-century Catholic social teaching—particularly Jesuit Luigi Taparelli's Saggio Teorico di Diritto Naturale (1840) and papal encyclicals like Rerum Novarum (1891). Luigi Taparelli's Saggio Teorico di Diritto.

Naturale (Theoretical Essay on Natural Law, 1840) and Leo XIII's Rerum Novarum (New Things, 1891) form the foundations of subsidiarity. Its core idea is that of a hierarchical social order where higher authorities (superiori) aid (subsidium) but never supplant the lower ones (inferiori), directly moulding the EU principle's vertical governance logic of subsidiarity. It's not some abstract theory; it's a practical ethic born from real historical pushback.

Luigi Taparelli's Saggio Teorico di Diritto Naturale (1840), introduced "diritto ipotattico" or hypotactic right. This can be explained as the hierarchical framework of rights and duties that arises from the natural subordination within society's organic associations—such as family, community, and state—all oriented toward the common good. Higher authorities (superiors) hold a duty to provide aid (subsidium) only when lower ones (inferiors) prove insufficient, ensuring cooperative order without usurpation. The term draws from Greek hypotaxis (subordination or arrangement under), evoking grammatical or military structures of dependency. This anti-centralist concept countered revolutionary individualism and absolutism during the French Revolution. It lays the foundation for modern subsidiarity by emphasizing that rights flow from interdependent social relations rather than abstract equality or contracts. Taparelli's anti-centralist ethic found expression in papal encyclicals. Leo XIII's Rerum Novarum (1891) applied it to industrial-era labor by affirming workers' associations and limiting state interference to supportive roles, while Pius XI's Quadragesimo Anno (1931) explicitly named subsidiarity, warning against assigning to higher associations what lower ones can accomplish, as in the quote: "just as it is gravely wrong to take from individuals what they can accomplish by their own

initiative... so also it is an injustice... to assign to a greater and higher association what lesser and subordinate organizations can do." This formulation directly prefigures Article 5(3) TEU's dual tests of necessity (can Member States suffice?) and added value (is EU action superior?).

Institutional Evolution

Christian Democratic thinkers integrated subsidiarity into EU treaty drafting, from the 1984 European Parliament resolution through its formalization as a political guideline at Maastricht (1992) and judicial enforcement via Lisbon Treaty's Protocols No. 1 and 2 (2009), which introduced national parliamentary oversight and Court of Justice review under a "manifest error" standard. Distinct from competence delimitation (legal authority) and proportionality (measure intensity under Article 5(4) TEU), subsidiarity evaluates whether Member States can achieve objectives sufficiently and if Union scale provides added value—a test elaborated in the 1997 Protocol through criteria like transnational dimensions, internal market coherence, and regional sensitivities. This framework applies broadly to EU action beyond legislation, yet its interpretive flexibility enables policy discretion, raising questions about whether it substantively constrains supranational authority or merely symbolizes deference to Member States.

Theoretical and Regional Implications

Subsidiarity's evolution from Catholic theology to constitutional principle reflects a compromise between integration aspirations and sovereignty concerns: postwar Christian Democrats secularized its ethic of hierarchical aid, bolstered by German Länder advocacy at Maastricht, transforming a declarative norm into enforceable procedure. Neofunctionalists interpret it as a check on spillover dynamics, limiting EU action to cross-border challenges like Rhine pollution that overwhelm national capacities; liberal intergovernmentalists view it as a bargaining outcome for sovereignty-sensitive states such as Germany and the Netherlands. While ostensibly advancing citizen proximity to governance, its case-by-case application undermines predictability relative to rigid competence catalogues.

From a border studies perspective, this tension manifests acutely in cross-border regions like Saar-Lor-Lux or Frankfurt im Oder/Słubice, which test subsidiarity's capacity to empower local actors amid supranational pressures. The principle's confederal ambiguity thus appears a remnant of the EU's earlier, looser cooperative phase, preceding its trajectory toward deeper federal integration.

The Early Warning System (EWS)

Protocol No. 1 mandates fast-sharing of draft laws, giving national parliaments eight weeks to scrutinize before Council agendas—no deals unless it's urgent. Ex ante input, no veto. Protocol No. 2 zeros in on subsidiarity: any chamber can flag breaches in Commission proposals (regs, directives, decisions under Art. 289 TFEU co-decision or special procedures). Thresholds aggregate votes (two per unicameral state, one per bicameral chamber). A yellow card is activated when one-third of total allocated votes (19 out of 56 under standard conditions, dropping to 14/56 for justice and home affairs proposals under Art. 76 TFEU), where votes count as two per unicameral Member State parliament or one per chamber in bicameral systems; the Commission then must review the proposal and issue a justification for maintaining, amending, or withdrawing it. Consequently, an orange card is triggered with a simple majority (29/56 votes). This prompts Commission reassessment. And if maintained, the proposal advances to the European Parliament (requiring simple majority rejection) or Council (55% qualified majority voting threshold) for potential subsidiarity-based blockage. Non-legislative acts—delegated (Art. 290 TFEU), implementing (Art. 291), Common Foreign and Security Policy decisions, communications, or green papers—escape this procedure despite nominal subsidiarity applicability, limiting Early Warning System (EWS) scope, but designed to balance obstruction and creep.

Empirical Assessment: Rhetorical Symbolism Prevails

The EWS's decade-plus record exposes subsidiarity's performative character. In my own research, I found out that amid thousands of legislative proposals since 2010–over 1,200 reasoned opinions issued by national parliaments, often from opposition parties or upper houses, triggered yellow cards only THREE TIMES, with NO

orange cards and NO judicial invalidations. Commission responses exemplify this ritualistic deference: two-thirds of yellow card proposals proceeded post-review with cosmetic adjustments, while annual subsidiarity reports repackage opinions as evidence of lively and engaged constitutional dialogue. These rare activations of the Early Warning System (EWS) highlight subsidiarity's symbolic role, as proposals advanced despite scrutiny, often with minimal changes.

The three cases underscore this symbolism. Let's examine them:

Case	**Proposal (Date)**	**Key Objection**	**Parliaments Involved (Votes)**	**Commission Response**	**Outcome**
Monti II Regulation	COM(2012)130 (Apr 2012); EU-wide strike minimum services for free movement (Art. 56 TFEU)	Subsidiarity breach + social policy exclusion (Art. 153(5) TFEU)	12 parliaments (19 votes)	Review prompted; maintained subsidiarity compliance	Withdrawn Sep 2012 due to Council unanimity deadlock, not enforcement
European Public Prosecutor's Office (EPPO)	COM(2013)534 (Jun 2013); centralize anti-fraud probes	National judiciaries sufficient	14 parliaments (19 votes; incl. UK, French Senate)	COM(2013)851 justified via cross-borde r value	Regulation 2017/1939 via enhanced cooperation (17+ states); opt-ins and coordination added

Posted Workers Directive Revision	COM(2016)128 (Mar 2016); host-state wages for mobile labor	Social policy subsidiarity	14 chambers (19 votes; Poland, Czechia, Hungary, Latvia)	COM(2016)505 upheld for internal market needs	Directive 2018/957 with remuneration tweaks, core intact

In addition, the CJEU jurisprudence further strengthens subsidiarity's rhetorical character through consistent deference under the "manifest error" standard. In United Kingdom v Council (C-84/94, 1996), pre-Lisbon review upheld an environmental measure by deferring to legislative scale assessments; post-Lisbon, United Kingdom v Council (C-209/13, 2014) dismissed challenges to the Europol Regulation despite national sufficiency claims, while Slovak Republic v Council (C-589/17, 2019) rejected Posted Workers objections citing internal market justification. Most recently, Germany v Parliament & Council (C-217/19) dismissed EPPO Regulation challenges, reinforcing institutional discretion on "added value." Across these four cases—spanning environmental policy, law enforcement cooperation, labor mobility, and fraud investigation—the Court has never annulled legislation solely on subsidiarity grounds, underscoring that even when triggered, EWS scrutiny yields no binding judicial restraint.

Case	**Year**	**Challenge**	**CJEU Outcome**	**Key Reasoning**
United Kingdom v Council	1996 (C-84/94)	Environmental measure	Upheld EU action	Deferred to legislature's scale assessment
United Kingdom v Council	2014 (C-209/13)	Europol Regulation	Challenge dismissed	No manifest error; national sufficiency argument rejected

Slovak Republic & Others v Council	2019 (C-589/17)	Posted Workers cases	Claims rejected	Adequate internal market justification found
Germany v Parliament & Council	Recent (C-217/19)	EPPO Regulation	Challenges dismissed	Reinforced institutional deference

Comparative Lens: US Federalism's Superior Clarity

The United States federalism offers a sharper contrast to EU subsidiarity's vagueness through clear enumerated powers in Article I, Section 8 (commerce, taxation, defense) paired with the 10th Amendment's reservation of undelegated authority to states.

Key Supreme Court cases demonstrate robust enforcement without the EU-style Early Warning System rituals.

Doctrine/Case	**Core Limit**	**Outcome**	**Contrast to EU Subsidiarity**
Commerce Clause: NFIB v. Sebelius (2012)[23]	Federal overreach into state-regulated insurance markets	Struck Medicaid expansion coercion; upheld only as voluntary incentive	Direct judicial invalidation vs. EU's "manifest error" deference and no annulments
Anti-Commandeering: Printz v. United States (1997)	Federal mandates on state officials (Brady Act)	Ruled unconstitutional; states cannot be conscripted	Swift injunctions via state suits vs. EU parliamentary theater yielding three yellow cards in 1,200+ opinions

US dual sovereignty prioritizes state diversity with decisive interstate scaling, unencumbered by subsidiarity's instrumental "added value" presumption—exposing the EU principle as rhetorical symbolism that legitimizes expansion without veto power. This confederal ambiguity demands federal evolution toward explicit competence delineation for a geopolitically viable

450-million-strong Union.

Conclusion

Advocating Federal Evolution for a Stronger Union.

Subsidiarity's empirical failure–THREE YELLOW CARDS amid 1,200+ opinions, Commission dominance using the ADDED VALUE argument, and CJEU's judicial deference confirms this rhetorical primacy. It is just a symbolic empowerment or consolation for Eurosceptics, which facilitates functional spillover without genuine decentralisation. This quasi-federal paralysis hampers crisis response, from COVID-19 vaccine procurement to Ukraine aid amid Russian threats.

As a federalist, I advocate treaty reform towards pragmatic federalism, echoing Mario Draghi's2025 report and Emmanuel Macron's Sorbonne speeches. Delineate competences explicitly. Exclusive EU domains (defence, foreign policy, fiscal transfers), shared competencies (environment, internal market), and residual Member State powers—in black-and-white constitutional terms mirroring the US model. Enhanced European Parliament powers, Committee of the Regions empowerment, and citizen-led initiatives from the Conference on the Future of Europe (2021–2022) would ensure democratic legitimacy. I also think that in the last 5-7 years, the EU is inexorably moving towards federalism as this mirrors historical precedents with US federal taxation, which enabled independence war finance (Articles of Confederation failure to the 1789 Constitution); and also Germany's 1949 Basic Law, which centralized fiscal powers post-Weimar chaos. Recent EU evolution echoes this: COVID-19 Recovery Facility (€750bn shared debt, 2020), post-2022 financial crises' increasing EU loans, and 2025 Ukraine aid (€35bn via EU bonds/loans—not bilateral) demonstrate the necessity driving centralization, transcending subsidiarity via scale. Per Draghi (2025) and Macron, treaty reform should delineate competences

in black and white, exclusive EU (defence, fiscal union), shared, residual, like the US model, with strengthened EP/Committee of the Regions. Geopolitical imperatives further compel EU federalization amid uncertainty over transatlantic alliance reliability under President Trump's second term. Recent US preoccupation with Greenland acquisition (escalating 2026 rhetoric toward military options despite Danish autonomy) and direct military actions in Venezuela (late 2025 interventions against the Maduro regime) underscore Washington's pivot toward unilateral hemispheric priorities, diminishing focus on European security. This strategic vacuum—compounded by Trump's 2025 tariff threats, Russian asymmetric warfare and NATO burden-sharing demands—necessitates autonomous EU defense capacity, common foreign policy execution, and fiscal instruments like Eurobonds to counterbalance US/China rivalry without bilateral fragmentation. Such evolution aligns with Draghi's pragmatic federalism and Macron's sovereignty vision, ensuring the Union speaks decisively for 450 million rather than 27 discordant voices.

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