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Summary

The problem of task-assignment, ineliminable in any moderately complex polity, is to determine the normative justifiable principles upon which the functions of government should be allocated to different levels. This paper reviews three approaches to this problem in the literature drawn from political theory. The first is pure proceduralism; the second the principle of subsidiarity; and the third the principle of functional competence. It is argued that there are problems involved in the first two. Proceduralism cannot stand on its own, and subsidiarity contains a bias to the near that it is difficult to defend. Functionality can be politically controversial to apply. None of the principles can be regarded as logically equivalent to one another, and democratic reflexivity suggests that all will be contested.

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I. The Problem

The problem of task-assignment is to determine the principles by which the functions of government ought to be divided among differing levels of political authority. A political system, even of moderate size, faces a problem of task-assignment, since, except in face to face communities in which all political decisions can be made at the same level, there is a need to assign governmental functions between centre and locality. John Stuart Mill discussed the problem with his customary clarity over one hundred and forty years ago, in connection with the place of local government in the overall system of representative government:

‘... after subtracting from the functions performed by most European governments, those which ought not to be undertaken by public authorities at all, there still remains so great and various aggregate of duties, that, if only on the principle of the division of labour, it is indispensable to share them between central and local authorities. Not only are separate executive officers required for purely local duties (an amount of separation that exists under all governments), but the popular control over those officers can only advantageously be exerted through a separate organ. Their original appointment, the function of watching and checking them, the duty of providing, or the discretion of withholding, the supplies necessary for their operations, should rest, not with the national Parliament or the national executive, but with the people of the locality.’ (Mill, 1861, pp.411-12)

In this passage Mill locates the rationale of local government within his broader democratic principles, and in particular within an account of how the members of a community can best act together to promote their common advantage. He also noted a distinction that has persisted in subsequent discussions, namely that between allocating powers between different levels of government on the one hand and allocating powers between government and non-governmental actors on the other.

The issue is made especially difficult in the EU for a number of reasons. Within existing federations, the most obvious example of multi-level polities that we have, the normal pattern of task-assignment is to give the centre responsibility for defence, foreign affairs, macro-economic management, criminal and civil law and – to varying degrees – some aspects of social protection, including social insurance and environmental protection. This reflects the history of federations in which units of government join together, typically for defence purposes, in order to secure their continued existence (McKay, 2001). Thus, the first areas for common action are in defence and foreign policy as well as a customs union. The more domestic in character the policy sector, the less likely it is to be given up from the lower to the higher level of political organisation.

However, the essence of the Monnet method of European integration was to focus on matters of low politics, rather than to try to tackle the core competences of the nation-state in foreign and security policy. Moreover, European integration developed at a period in the middle of the twentieth century when in historical terms there was an unusually high clustering of policy responsibilities at the national level (Weale, 2005, pp. 3-9), so it was difficult to secure an upwards transfer of decision making power unless there were special reasons why national governments saw some advantage in such transfer. For these historical reasons, the accumulation of competences within the EU does not sit easily with the more general pattern that we should expect to find from other cases of multi-level political authority.

Now it might seem, from the viewpoint of federalist theory at least, that the obvious way to deal with this situation would be through a series of renegotiations of competences in succes-

sive treaty revisions, with agreements that the EU should give up some of its competence in areas of public policy that more normally would be dealt with at a lower level of governance, in exchange for an increase in powers at the highest level of competence. However, the *acquis communautaire*, which has been a central principle recognised in successive treaty revisions has been a barrier to this exchange taking place. Moreover, the character of European integration is such that it is an illusion to think that the division of powers and responsibilities can be settled once and for all in a definitive constitutional convention. As has often been noted, part of the success of European integration lies in its dynamic and open-ended character.

However, we should not be too pessimistic, even if we accept the limitations that the historic processes of integration force us to recognise. Although a decisive settlement may not be available to us, it should be possible to define a plausible set of principles of task-allocation, in the light of which we can seek to modify, if only in a piecemeal way, the assignment of policy responsibility. This is the strategy of the present paper, in which I look at some possible candidate principles. I begin with a discussion of what I call ‘pure proceduralism’, which asserts that tasks should properly be allocated only as the Member States decide. I then go on to look at the much discussed principle of subsidiarity, which requires that functions be allocated to the lowest level of governance feasible, unless there is a clear and decisive reason otherwise. In relation to this bias to the near, I look at some relevant arguments that might support such a presumption. The third approach I then examine is what I shall term the principle of functional capacity, which requires that tasks be allocated in such a way as to enable the system of governance best to achieve the promotion of common interests according to a test of personal indifference. A conclusion looks at the relationship of the principles.

Before looking at these different approaches, however, I shall make one point about terminology. Should we be talking about the functions of ‘government’ or referring to patterns of ‘governance’? There is a flourishing sub-discipline in political science at present pushing the merits of the governance approach as the best way of conceptualising changing patterns of public authority. According to this view, governance involves the decentralisation of political functions and the rise of networks of policy making influence and capacity. There is a lot to be said for this approach, but it is essentially concerned with seeking an accurate description of the changes that are taking place in the way that governments exercise their functions. I cannot see that there is anything in the governance approach that prevents our sensibly discussing the principles for assigning functions to governments, as distinct from characterising how easy or difficult they will find it to exercise those functions under different conditions. In short, governments have functions that they exercise in the processes of governance. That is at least how I propose to use the two terms.

II. Pure Proceduralism

In general, pure proceduralism, when applied to public choice and public policy, is the view that outcomes are to be evaluated solely by reference to the processes or procedures that led to them (Rawls, 1999, p. 74, citing Barry, 1965, chapter 6). According to this view, procedural conditions are thus both necessary *and* sufficient for determining when an outcome is the right one. In the context of task-assignment, this means, *inter alia*, that a change of assignment can take place by the delegation of authority downwards, through the devolution of powers from a legitimate body that previously held them, or the delegation of powers upwards from legitimate lower-level political entities. According to the pure proceduralist, provided the processes of change involved meet certain conditions, then we have all the evidence that we need to say that the delegation is legitimate.

An obvious example of such a view is the principle that higher levels of political authority derive their just powers through a process of consent given by lower level authorities. A version of proceduralism in this sense is provided by the tenth amendment to the US constitution, which runs as follows:

‘The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.’

Such a principle is in effect a statement of historic entitlement on the part of constituent political units, which can only be overcome by explicit agreement among the relevant parties. A similar logic is captured in the draft Constitution for Europe in its principle of conferral:

‘Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States.’ (Article I-11(2)).

The UK House of Lords (2003: 15) pointed out that the first part of this wording (in the version they examined) corresponded to the established principle of the TEC. It is the second part that is new. With this formulation, conferral and the US Tenth Amendment draw upon a similar logic, despite the difference of exact wording. That logic is that task assignment is to be based upon agreement among the Member States and can only be changed with the agreement of the Member States.

In this form of proceduralism the legitimate structure of policy making competences in the European Union grows out of inter-governmental agreement among the Member States. It corresponds to the present legal basis of the treaties, although the draft constitution gives it explicit recognition for the first time (Dobson, 2004: 116). Note, however, that proceduralism in this sense does *not* imply that all such agreements take place in the form of major ‘constitutional’ change of the sort represented in renegotiations of the treaties or the constitutional convention. Consider for example the growth of competences in environmental policy before the Single European Act (Weale *et al.*, 2000, pp. 40-2). This growth took place without any treaty changes, but it was significant and resulted from a willingness of the Member States to use existing treaty provisions to develop a new set of powers. What is essential to the proceduralist view is that legitimacy arises through procedures producing outcomes acceptable to those actors who might otherwise veto the agreement. So, although as a normative theory proceduralism might seem to have most obvious affinity with liberal inter-governmentalist accounts of the EU (e.g., Moravcsik, 1998), which stress the central role of governments in the process of integration, it is not limited to such accounts.

Why should anyone think that pure proceduralism is the right principle to govern task-assignment in the EU? Although I do not know of anywhere where the argument is explicitly and systematically set out, I imagine that, among those who hold to the doctrine, it works something as follows. Governments within the EU are legitimate governments. As the legitimate representatives of their peoples, they have the power to commit a national political community to international agreements and the powers and obligations they imply. The allocation of political functions to different tiers of authority within Europe is a subject of international agreement. Therefore, there is no reason why legitimate national governments should not agree on behalf of their peoples a structure of political authority within the EU, and in particular no reason why they should not commit their peoples to any allocation of competences and powers that they deem fit within the set that can be feasibly negotiated.

It is possible to give this line of argument some support within the overall theory of political representation and its associated logic of assurance. We are accustomed to think of political representation in terms of a bottom-up movement of influence and preference aggregation. Indeed, liberal inter-governmentalist accounts of the EU reinforce this by depicting inter-governmental agreements as resting upon a prior aggregation of domestic preferences and interests. However, representation has another, and quite different, rationale in some circumstances, particularly when we are talking about agreements among legal persons like Member States in the EU. This is the role of representation in enabling commitments to be made on behalf of collectivities. Representation is important in this context because in order for various parties to take on potentially costly commitments, they will need assurance from others from whom they desire cooperation that those others will play their part. Having the political representatives of a collectivity make a commitment provides some assurance that the agreement will be put into practice to common advantage.

To these general arguments there could be added a more specific consideration that arises from the institutional structure of the EU. One of the reasons for being doubtful about proceduralism in politics generally stems from worries about the ability of some parties engaged in the procedure to exploit bargaining advantages to the detriment of others in the process. The EU, however, has an elaborate set of institutional arrangements intended to restrict the exploitation of power advantages in this way. The use of unanimity or qualified majority in the Council of Ministers, the rotation of responsibility for chairing the Council of Ministers among members who are formally equal despite the size of their respective populations and the requirement of unanimity to secure treaty changes can all be regarded as devices to even out the inequalities of bargaining advantage that would otherwise arise from differences in population size or economic development. Of course, countries may still exploit their bargaining strength, such as it is, to their own advantage. But by comparison with the general practice of international negotiation, the ability to deploy bargaining advantages within the institutional framework of the EU is severely limited. In these circumstances, some of the worries that might attach to pure proceduralism in general do not apply to the case of negotiation between Member States in the EU.

Does this mean that we should accept the proceduralist argument when applied to negotiations over the allocation of functions within the EU? Pure proceduralism is distinguished by the claim that Member State agreement is necessary *and sufficient* for legitimate task-assignment. However, we can agree that it is necessary without agreeing that it is sufficient. That is to say, we can concur with the view that no task re-assignment should take place unless the Member States agree, without concurring with the view that it is only such agreement that matters.

Why might we want to make such a distinction? Part of the answer turns on the concept of democratic representation. Representation, as I have already noted, is tied to the logic of commitment, but in its democratic form it is also tied to the logic of accountability. The combining of these two elements can be understood in terms of the normative logic of a two-level game (Savage and Weale, 2006). In the standard account of the logic of two-level games in international negotiation (Putnam, 1988), the crucial feature is that negotiators are simultaneously seeking to satisfy two sets of constraints, those deriving from their international partners and those deriving from their domestic constituents. Only those agreements that are in the win-sets of the status quo for both sets of parties are going to emerge as outcomes of the game, although the existence of two sets of actors may in practice allow outcomes that would not occur in just one level of negotiation were involved.

By parallel reasoning, the normative logic of two-level games is that governments have obligations to other governments, which are best understood in terms of the duties of fair play, but they also have obligations of accountability to their domestic constituents derivable from democratic principles. It is possible to understand the international obligations in purely procedural terms, since there is a notion of fair play that can be spelt out largely in terms of constraints on what governments should not do. (It is a separate question whether this account of fair play is adequate to characterise the sort of supranationalism to which the EU aspires. There are reasons for thinking not, but that is for another day.) However, and by contrast, it is not possible to understand the duties of accountability in purely procedural terms, since accountability means the giving of reasons, and judging whether a cited reason constitutes sufficient justification is an irreducibly substantive matter of political evaluation.

What this means in practice is that, in discharging its obligations of accountability, it is never sufficient for a government to say that an international agreement is a good one simply because governments have agreed it. Rather governments have to be able to identify some point or purpose of the agreement that is consistent with the interests of the political community whom they are representing. Of course, the putative benefits of an agreement that flow to the political community may be disputed (indeed, in any vigorous democratic society they will be), but the demands of accountability are such that it is necessary for a government to explain to those whom it represents what good is secured by the agreement.

If this is so in the case of any international agreement, it will be doubly so in the case of agreements intended to transfer decision making powers, for once such powers have been transferred it will be difficult, if not impossible, for a democratic people to restore them to itself. In such a case, the substantive arguments, and the principles to which they appeal, need to be strong and consistent with underlying democratic values.

In rejecting pure proceduralism as a method for discovering principles for the allocation of functions to tiers of government, I should make it clear that I am not denying that procedural elements play a role in the construction of legitimate systems of political authority. Even good substantive arguments that are valid in the abstract need to be accepted by those who are to be governed according to democratic principles. To suppose that substantive arguments were sufficient to legitimise authority would be consistent with permitting the imposition of a putatively justifiable structure of authority on an unwilling people, and this no democratic political theory could countenance. However, just as substantive arguments cannot substitute for procedure, so procedural arrangements cannot substitute for substantive justification. A procedural account of authority can be only part of the story of how legitimacy is secured, even if an essential part.

III. The Principle of Subsidiarity

Undoubtedly, the most extensively discussed and debated principle of task-allocation is the principle of subsidiarity. This principle was given expression in the following terms in the Treaty on European Union:

'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.'
(Treaty on European Union, article 3b).

In the draft Constitution, the formulation is rather more complex:

'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended 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 the Union level.' (Article I-11(3)).

Neither formulation is clear or unambiguous in practical terms. Functions that do not fall to the exclusive competence of the EU can cover a wide range of policy sectors. Yet, public policies adopted in these spheres may operate at a variety of levels of social organisation, and one would expect inevitable boundary problems to arise when action at one level of government has implications for action at another, as when, for example, measures to protect consumers at the national level have implications for the maintenance of the single market at the European level. However, similar points could be made about any political principle (see below), and we should not reject a principle solely on the basis that its effects in practice cannot be fully predicted.

There is, however, a different and potentially stronger legally based argument for not giving a central place to subsidiarity when considering task assignment. Legally speaking subsidiarity does not function as a principle of task assignment. At the very earliest stages of the discussion of the principle, the Commission issued a communication in which it was clearly stated that the principle of subsidiarity did not determine which competences were to be attributed to the Union. Competence assignment, on this analysis, was settled by the treaties, not by reference to the principle of subsidiarity. This is, in effect, the pure proceduralist position I discussed in the previous section. Of course, as a matter of legal interpretation, the Commission is correct. The European Court of Justice could not derogate from the powers of the EU solely on the grounds that it held that the assignment of those competences was inconsistent with the principle of subsidiarity. To take a rather fanciful example, the Court could not say that the Union had no competence in relation to agriculture merely because there might be an intellectually coherent argument embodying the principle of subsidiarity to the effect that agricultural policy was inappropriately assigned to the Union level.

In the same communication, the Commission distinguished between the assignment of competences and their exercise. It was the latter that was governed by the principle of subsidiarity, and this distinction is clearly written into the clauses in both the TEC and the draft Constitution. One way of making sense of this distinction is to consider the degree of intervention that the exercise of a competence introduces into the conduct of public policy in Member States. For example, if an objective can be achieved through voluntary agreements rather than by means of a directive or regulation, then the principle of subsidiarity would enjoin use of the voluntary measure, since it would be less disruptive to the public policies of the Member States. Indeed, Brendan Flynn (2004, chapter 5) has shown, in the field of environmental policy, that in practice in the 1990s, the way in which the principle of subsidiarity was applied by the Commission was in terms of a preference for soft law instruments, like voluntary agreements, over increasing directives or regulations.

Although, from the legal point of view, the principle of subsidiarity does not provide a legal basis for the assignment of competences, it would be unduly formalistic to impose the same requirement in a discussion in political theory. As we shall see later in the next section, this is how the principle has been interpreted within the history of political thought, and it has been clearly important in relation to the issue of the centralisation of power within the EU to vari-

ous governments who have wanted at different times (usually unsuccessfully) to use the principle as the rationale for rolling back the competences of the EU. This for example was the stance of the UK government in the early 1990s over the issue of the EU's competence to regulate the quality of bathing waters. Even Jacques Delors once said that the principle of subsidiarity can be applied to 'the repartition of tasks between the different levels of political power. Hence, whatever restrictions of scope may be assumed in the legal use of the principle, we should feel free to appraise it as a free-standing normative principle of task-assignment.

How then are we to understand the rationale and force of the principle? There have been many complaints uttered about the vagueness of the principle, but these complaints seem to me to be much overdone, for a number of reasons. In the first place, those complaining of its flexible meaning forget or exclude from consideration all those issues on which there is tacit agreement about the appropriate level of responsibility for government functions, agreement that may well be rationalised in terms of the principle of subsidiarity. Thus, no one is saying that county councils ought to be responsible for defence matters raising their own regiments which could then be federated into national or international brigades, just as no one is saying that the EU should be responsible for deciding the placement of street lighting or the repair for cracked pavements. There is a background of understanding that is largely taken for granted among those who may be disputing the meaning of the principle for any particular case.

A more measured argument states not that the principle of subsidiarity is meaningless but that it is so ambiguous when applied to disputable cases that it offers no practical guidance to the decision maker or constitution builder. Between the position of the British government on the competence of the EU and the (falsified) prediction of Jacques Delors that by the turn of the century eighty per cent of economic and social legislation would be decided by the EU there is clearly a wide gulf. If we cannot narrow the width of this gulf by application of the principle of subsidiarity, then if not meaningless in a strict semantic sense the principle of subsidiarity provides no practical purchase on the relevant issues.

Here, however, we must distinguish two quite different ways in which the principle of subsidiarity may not offer practical purchase. In the first case, those disputing the scope of EU functions may define the principle of subsidiarity in conflicting ways and be unable to resolve their agreement. Subsidiarity would be a 'principle to suit any vision' (Peterson, 1994). In this sort of case the principle lacks purchase. But this does not seem to me to be the standard or paradigm problem. Standardly, those who dispute the scope of European competence agree on the criteria that are relevant, for example that there should be scale advantages or effects, but disagree as an empirical matter whether there is a scale problem or whether the scale problem is sufficiently serious to warrant Community policy. This has been the argument over environmental policy within the EU for example. The British government's opposition to measures like the Bathing Waters Directive or the Wastewater Directive has not been an opposition to the principle that international scale effects should be regulated at a higher level than the nation state; instead it has rested on the claim that the pollution effects being controlled are primarily local and do not spill over into the waters of other countries. Whatever the merits or demerits of this and other similar disputes, it is clear that a clear meaning to the principle of subsidiarity is being presupposed in this case, and that what is in dispute is the question of what activities fall within its scope.

Of course the fact that such disputes have a strong empirical component does not mean that they are easy to resolve politically. For all the reasons set out in Locke's (1690, paragraph 13) account of the state of nature, we should not expect agents in international affairs to be good judges in their own cause, and so some authoritative determination is needed in cases where

there is dispute about whether a practice or policy satisfies the criteria implicit in a policy principle. Even with agreement on the relevance and definition of a principle like subsidiarity, we should still expect a large penumbra of uncertainty in application to particular cases.

This open-textured quality is something that is common to all significant constitutional principles. Consider, as a parallel, a principle like the Fourteenth Amendment to the US constitution which guarantees to all citizens the 'equal protection of the laws', or the principle of proportionality which operates in German administrative and constitutional courts. The meaning of these principles is not given in a list of necessary and sufficient conditions that must be satisfied if a practice or policy is to fall within their scope. Instead it is given partly through the jurisprudence of the courts who develop the understanding of the principles through appeal to precedent, legislative intent, constitutional doctrine and theoretical argument, and partly through the processes of political dialogue that go on within any democratic society. This is to say no more than that constitutional principles have an inevitably conventional character in their application to particular cases, and that political and juridical processes are necessary to fix the boundaries of these conventions. To say that the principle of subsidiarity is vague is often to say no more than that these political and juridical processes have not had the time to develop the appropriate jurisprudential and political understanding.

Taking the formulations of the Maastricht Treaty and the draft Constitution as clues to the developing understanding of subsidiarity, it looks as if the principle can be given something like the following meaning. Within a political system in which authority over a range of decision making can be exercised at different levels of society and government, the principle of subsidiarity requires that authority be exercised at the lowest level possible, compatible with the purposes of the authority being (reasonably) achieved. This concept, taken on its own, implies at least three requirements to be satisfied in any constitutional theory that allocates powers to different levels of government. First, between two levels, each of which is equal in performance, authority should be given to the lower level. Second, if the higher power can act in reserve to support the activities of the lower level without diminishing the authority of the lower level, then it should do so. Third, mere superiority of performance in the discharge of functions is not sufficient for the higher level to claim the function as its own; the claimed superiority must pass a certain threshold. This last requirement thus incorporates the view that there is a presumption, within the principle of subsidiarity, towards allocating authority to lower rather than to higher levels of government.

It is often said that subsidiarity has both a negative and a positive sense. For example, Kliemt (1997) has pointed out, there are two competing political purposes that can be served by the invocation of the principle of subsidiarity. The first is to restrict the scope of government and the second is to expand it. On the first, negative, use of subsidiarity, the principle restricts government intervention leaving the field open to private enterprise or secondary associations. It was by this use, for example, that the Christian Democrats between 1957 and 1961 in Germany secured preferential treatment in the allocation of public subsidies for the Catholic church in the provision of social service facilities like pre-school child care. On the positive interpretation, the demonstration of superior performance by a higher level of government or by government relative to private enterprise provides at least the occasion when justifiable intervention may take place.

It is certainly true that logically once superior performance at the higher level has been shown, then the adherent of subsidiarity has logically to concede the case for moving power up to a higher level. However, it should be clear that the purpose of invoking the principle is to impose a considerable burden of proof upon the proponent of stronger powers at a higher level of governance, producing what we might call a bias to the near. This emerges from

Follesdal's (1998) review of the theoretical arguments. The effect is to impose a bias against centralisation and in favour of the near. So the question that needs to be posed to the proponent of subsidiarity is why should we think that a bias to the near within a multi-level political system is justifiable?

IV. A Bias to the Near?

In this section I suggest that there are four possible lines of argument, any one of which would support a general case for the bias to the near that is presupposed in the principle of subsidiarity. No doubt there are other possible arguments, though my view would be that if the present four arguments are weak or indecisive, then so are most other arguments likely to be. The arguments are, in turn: from considerations of freedom and dignity; from considerations to do with the dispersal of knowledge; from considerations of democracy; and from considerations of social solidarity.

Freedom and Dignity. According to this argument, human beings find their dignity in the free exercise of their powers, and so any attempt to usurp their choices is an affront that that dignity. One version of this argument is found in the papal encyclical *Quadragesimo Anno* and runs as follows:

‘just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so it is also an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.’ (*Quadragesimo Anno*, 1931, paragraph 79.)

This statement is of course not simply a formulation of the principle but also a statement of its rationale. In particular, with its reference to ‘right order’ it clearly rests upon an Aristotelian/Thomist account of the structure of political authority. Within that Thomist tradition it is possible to identify the general principles of right order in terms of functions and characteristics that are regarded as natural to human beings.

John Finnis expresses the rationale behind this thought clearly:

‘It [subsidiarity] affirms that the proper function of association is to help the participants in the association to help themselves or, more precisely, to constitute themselves through the individual initiatives of choosing commitments (including commitments to friendship and other forms of association) and of realizing these commitments through personal inventiveness and effort in projects (many of which will, of course, be co-operative in execution and even communal in purpose). And since in large organizations the process of decision-making is more remote from the initiative of most of those many members who will carry out the decision, the same principle requires that larger associations should not assume functions which can be performed efficiently by smaller associations.’ (Finnis, 1980, pp.146-7)

In short, since persons constitute themselves through the processes of choice and making commitments, it is wrong for a higher body to usurp the choices that could be made at a lower level.

It should be clear that this account of the value of subsidiarity depends upon a particular conception of the person as a political subject who has the capacity for choice. Within the utilitarian tradition this assumption was shared by John Stuart Mill (1859, chapter 3), who notoriously put the emphasis upon human beings expressing more than the ‘ape-like’ faculty of imitation. Thus, according to both the Thomist and the utilitarian traditions, the devolution of power is justified by reference to this underlying conception of the person.

The problem with this argument is that it is possible to endorse the premiss without inferring the conclusion. That is to say, it is perfectly possible to hold that human dignity is best realised through the free exercise of choice without thereby thinking that political authority is always best lodged at the lowest level possible. The tacit, but crucial, premiss in the argument for lodging power at the lowest level is that the threats to the free exercise of choice come exclusively from political sources rather than from, say, private corporate institutions or governments at the lower level. It is certainly true that states, traditionally holding the legitimate monopoly of coercion, are likely to be powerful sources control. States control armies and large bureaucracies. They have tax-raising powers and they can command land and property. But it is also true that economic corporations can monopolise employment opportunities in specific localities, and they too have considerable resources at their disposal. Moreover, their power can be exercised through routine operating procedures in ways that it can be difficult to detect, so that discrimination in hiring and promotion are not easily identified, let alone controlled.

Similarly, it is perfectly possible for local elites to use the authority of sub-national government to achieve their purposes, thus limiting the freedom and dignity of others. Indeed, one of the arguments that James Madison (1787) used for having a strong federal tier of government in *The Federalist Paper No 10* was the need to avoid the danger that local tyrannous majorities. Extend the sphere and you make it less likely that a majority will tyrannise a minority. If we wish to avoid unfairness in the distribution of the costs of political co-operation, then we shall have to have a system which prevents local majorities from tyrannising over local minorities and one of the ways of doing this is to enlarge the scope of government. Enlargement of scope might also be the way to prevent entrenched rent-seeking groups from dominating the decision-making processes of national policy-making.

The Dispersal of Knowledge. One of the principal lessons to have emerged from the failure of the centrally planned economies is the importance of dispersed knowledge to effective social and economic performance. The collapse of those economies was due to many factors, including corruption, perverse incentives and the technical difficulties of raising capital in cyclical industries. However, a major element in their collapse was the difficulty that central planners had in collecting and analysing information so that feasible and realistic targets could be set. This problem of information deficit was predicted by von Mises and Hayek in the 1930s and their critique never received a satisfactory answer (Hayek, 1935).

A central feature of the problem is contained in the idea of tacit knowledge, or what we might term ‘know how’ rather than ‘know that’ (Ryle, 1949). All social interactions involve agents drawing on more knowledge about the situation they are in than they could possibly formalise in a series of statements. For example, it is a well established feature of rule enforcement and implementation that those responsible for enforcing the rules at the street level never go entirely ‘by the book’. Where there have been pollution incidents, for example, those responsible for policing the matter will make judgements about the culpability or responsibility of those causing the incident and will decide not to prosecute in some cases if they do not feel that the situation warrants it. Discretion is an inevitable part of any administrative system, because those at the centre of the system do not, and cannot, have access to all the relevant in-

formation. Because local circumstances differ, and no central authority can be in command of all the information about those differences, there is always a need to rely upon local knowledge.

It follows from this that any attempt to impose uniform rules across a variety of situations will run the risk of there being perverse effects and counter-productive outcomes. Within the field of environmental policy for instance, it has been argued that the bathing waters directive is poorly constructed from a technical point of view, that EU policy has failed to pay sufficient attention to issues of water quantity in Mediterranean countries and that the cost implications of measures for different countries were insufficiently appreciated. Moreover, it is clear that in the policy formulation stage, Member States prefer to see measures formulated that are based upon their own particular administrative policy style (Héritier, *et al.* 1994) but there is no reason to think that this policy borrowing provides the best solution from the European point of view for the problems that are being tackled.

What is the force of these arguments? At some level, they are irrefutable. Knowledge and information are not free goods at all but are some of the most expensive items to extract from social organisations. Those setting rules centrally cannot be in a position to know the full effects of what their measures will accomplish. There will be both perverse incentives and untoward effects arising from the attempt to deal centrally with a range of problems. Uniform solutions may only be second or third best. However, in some ways, the very strength and generality of these arguments suggests that their implications are less forceful than proponents of generalised decentralisation might wish. They are too powerful for the job at hand. Taken to their logical limits, they would suggest that the *nationalisation* of policy competence, let alone its internationalisation, was likely to be counter-productive, but this would be a mistake. For example, the development of environmental policy in the 1970s and 1980s in many European countries was the creation of national measures which were not *ex nihilo* but were the adoption of uniform rules at the Member State level in place of what previously had been powers exercised by local authorities. The critique from the existence of dispersed knowledge would imply that these trends were likely to be counter-productive, whereas most observers would concur that they were a necessary condition for more effective policies.

Moreover, in addition to dispersed and tacit knowledge, there is also the phenomenon of emergent knowledge, that is to say understanding that can only develop on the basis of comparative experience. If we find similar problems emerging in the context of very different administrative systems, themselves embedded in different cultures and social structures, we have reason to think that some common processes are at work. To take the environmental policy field again, this is precisely what we find. The most striking feature of that field is the extent to which certain problems (urban air pollution, eutrophication, acidification, chemical residues and congestion) emerge in very different context according to underlying social trends. Although it is unwise to impose uniform solutions on different problems, we should not ignore the extent to which different policy systems face common dilemmas.

The conclusion, I suggest, is not to say that problem solving capacity should be lodged at the lowest level. Rather policy makers at all levels need to be aware of the variety of circumstances in which their measures are likely to be operating, and they need to be sensitive to the dangers of uniform measures where these are likely to be counter-productive. However, this does not mean that uniform measures should be shunned where they are likely to prove the most effective way of dealing with a problem. In practice, this means that the concern for subsidiarity in the way that measures are applied and implemented is more important than using subsidiarity as a way of blocking the allocation of competences to where they will be most useful. In short, the distinction that has been made between the relevance of subsidiarity for

assigning competences and the role of the principle for controlling their exercise is a useful one.

The Argument from Democracy. One argument that is frequently used for decentralisation is from considerations of democracy, and in particular that democratic practices are likely to be more widespread on a smaller scale than on a larger one. Democratic theorists, for example, have stressed the extent to which the involvement of citizens in the making of the laws by which they are to live is constitutive of a good political order and fosters civic virtues among those who participate. This argument had been made explicitly by Siedentop in the context of the decentralisation of Europe:

‘A decentralized Europe is important, then, not just on political or constitutional grounds. The dispersal of power is fundamental to the development of human character. For that dispersal breeds emulation, self-reliance and humility. These qualities are infinitely preferable to the fear, sycophancy and resentment bred by the centralization of power. After all, we do not merely what to make a Europe safe for bureaucrats.’ (Siedentop, 2000, pp.22-3).

Such an approach echoes assumptions made within the utilitarian and republican traditions about the importance of political participation. These include: the importance of individuals acquiring a sense of the public interests through their participation in public decision making, the dangers of the ignorant interference of higher authorities in the local circumstances of lower levels of government, the problems of establishing whether the harms that arise from interference outweigh the first-order benefits, and so on. Both republicans and utilitarians will, of course, want to hold that the arguments for the presumption be capable of empirical assessment, where relevant, and so the argument is independent of a natural law rationale for the decentralisation of the sort that characterised the Thomist tradition.

Yet, despite the impressive credentials of those advocating this position, there are problems. Part of the difficulty, as Dahl (1982, p.13) once wrote, for those who regard citizen participation as the essential value of democracy, is that ‘the attempt to apply democratic processes on a scale as large as the nation-state is bound to produce a sorry substitute for the real thing.’ Dahl then goes on to identify the underlying dilemma for those committed to democratic values. Since some of the most pressing problems facing modern populations need to be dealt with on a large scale, the proponent of small scale democracy is faced with a choice: either give up small scale democracy or give up on the solution to those problems. The trade-off within the set of democratic values that needs to be faced is the choice between a stress on popular control, which reflects the importance of the principle of political equality, and the stress on the need to provide ways of securing common interests, which reflects the importance of functional capacity. This dilemma is unavoidable.

There is, however, a variant of the democracy argument that applies especially in the case of the EU, which is worth considering and which may be thought to have some practical implications. This argument runs as follows. Although it is true that some problems need to be dealt with on the European, rather than on the Member State, scale, any further transfer of powers to the European level would have the effect of reducing such democratic control as there is. For example, the stability pact as part of the arrangements for economic and monetary union has already had the effect of restricting the fiscal freedom of manoeuvre of Member States, and preventing them adopting what they would regard as needed increased public expenditure to meet the needs of their populations. The problems would be increased significantly if there were a transfer of powers say in the fields of security and foreign policy. Hence, there is a sequencing issue. First, the problem of the democratic deficit at the Euro-

pean level needs to be solved before any further powers are transferred. Monnet's functionalist logic now needs to be turned on its head. Indeed, it is possible to take this argument one stage further, as Gustavsson (1998) has done, and to say that the democratic deficit should be preserved at the European level as a way of safeguarding against any further transfer of powers.

Taken as a sequencing issue, this argument from the need not to endanger further democratic control is difficult to refute. There is only one consideration that would qualify it. Already the EU holds considerable powers, and the implementation of economic and monetary union is the most visible sign of this. Moreover, the historic method of integration, through the creation of the single market, has left the EU with relatively few flanking measures with which to off-set some of the problems that the single market creates. There may therefore be a case for transferring some powers before the problem of the democratic deficit has been tackled. For example, suppose it turned out to be the case that the imposition of environmental control measures set up a race to the bottom, such that only environmental tax powers at the European level were able to deal with the problems. Then it might be difficult to resist the argument for transferring such powers, even though the problem of the democratic deficit might not be solved.

The Argument from Solidarity. One argument for retaining certain powers at the level of the Member States stems from considerations of social solidarity. It has been argued that there are bonds of social solidarity at the level of the nation state that sustain patterns of income redistribution that are not present at the European level. Thus, whereas affluent tax-payers are willing to see some loss of their income for the purposes of redistribution within existing national welfare states, the same motives would not be present at the European level, and there would be weakening of social solidarity. David Miller (1995) draws out this implication of his argument for the importance of civic nationalism, claiming that to understand a political system we need more than the juridical concept of citizenship of a state. We need in addition an account of nationality, which shows how the ethical life of individuals can be rooted in their national community. One central element in this account of nationality is that the members of a nation recognise one another as compatriots.

This element is important because, for Miller, compatriots can have special obligations to one another that cannot simply be regarded as convenient allocations of universal duties given the circumstances of social and political life (Miller, 1995: 62-3, criticising Goodin, 1988). The crucial move in the argument is the claim that the ethics of community enhances voluntary compliance in respect of obligations towards others, partly because individuals do not make a sharp distinction between themselves as persons and the obligations they have towards others and partly because in a strong national community individuals have the assurance of reciprocity from others. Moreover, political associations may formalise the informal patterns of obligations that grow up in communities, thus strengthening the social bonds of their members with one another. The national community is well placed to do this through the establishment of public institutions and policies. The special obligations that compatriots owe to one another are therefore an outgrowth of the general ethics of community, fixed in a particular form by the practices of politics.

Naturally enough this argument can be turned on its head, and one can argue for the pooling of sovereignty as a way of inhibiting schemes of redistribution. This is an argument with an ancient pedigree. Madison argued for a strong federal government in *The Federalist Papers*, precisely because he was opposed to 'wicked schemes' like the redistribution of property. Reacting to what he thought was the excessively populist economic policy of Rhode Island (which he used to refer to as 'Rogue Island'), Madison thought that the difficulty of assem-

bling popular majorities at the federal level would be one of the safest bulwarks against policies aimed at the redistribution of property. In other words, the effects of solidarity at a local level will be inhibited if political powers are lodged at a higher level.

What both of these arguments have in common is the assumption of a fairly straightforward relationship between solidaristic political culture on the one hand and institutional context on the other. In the Miller story, the national institutional context both facilitates and reinforces the expression of a solidaristic national culture. In the Madison version, the federal institutions negate the otherwise baleful effects of solidarism that would otherwise be expressed through majority-controlled state institutions.

Can we develop arguments for or against decentralisation based upon such assumptions? The empirical evidence that bears on this question is potentially huge, but I would venture that it is likely to be inconclusive. We know enough about the comparative politics of social policy to know that the conditions that make for increases or decreases in public expenditure commitments are complex. In particular, much depends upon the ability of well-placed political actors at key junctures to turn a situation to their own advantage as Bismarck, Lloyd George and Roosevelt all did in their different ways. Moreover, institutional legacies seem to have an effect independently of cultural context. From a culturalist point of view it is anomalous that Germany has a decentralised system of social security whereas the US has a centralised one. The explanation is not hard to find once we locate the historical origins of the two schemes and add institutional inertia and popular support. Yet, the examples are at least suggestive that there is no simple relationship between the level at which crucial institutional powers are placed and national political cultures.

One thought in this context might be decisive. It can be argued that the politics of social policy depends upon a well-functioning system of party competition. That is to say, democratic control of decisions on the level and direction of public expenditure depends upon a system of party competition in which alternative views of the tax/spend balance are articulated. It is well known that party competition at the European level, whilst it may conform to the division between left and right, does not perform the function of linking the electorate with an authoritative set of public decisions in the same way that happens at the national level. In other words, the application of the subsidiarity argument depends not so much on a sense of solidaristic political cultures operating at the national, but not the European, level as on the institutional capacity of the system of party competition at the national level to present the electorate with meaningful choices. However, this is not to provide an argument for a bias to the near, but to draw attention to an existing set of political conditions that perhaps ought not to be disturbed. In other words, this is an argument for cautious conservatism rather than decentralisation.

V. The Principle of Functional Capacity

The principle of functional capacity may be formulated as follows: functions and responsibilities within a system of political authority should be allocated so as to best promote the common interests of citizens regarded as political equals. The allocation of functions and responsibilities within a political community can be reformed if a reallocation would better promote the interests of citizens regarded as political equals.

Common interests in this approach are those of citizens regarded as political equals. This has widespread implications within democratic theory and the theory of justice, but in the present context it carries a very specific implication. It means that we are to consider the assignment of political functions within the EU not from the point of view of the interests of governments but from the point of view of the citizens of the EU. This in turn means that we should only

respect national rights of decision making in so far as they are compatible with the requirement for political equality. Established rights of nations should be overridden if they are incompatible with this notion of citizen political equality. In other words, the principle of functional capacity is at the opposite end of a logical spectrum from that of pure proceduralism.

It may be argued at this point that we are already unjustifiably presupposing the answer to an important substantive question, namely that of defining the political unit within which the scope of democratic rule is to take place. Robert Dahl notes that to say that all people are entitled to the democratic process already begs a prior question, namely when does a collection of persons constitute an entity - that is a people - entitled to govern itself democratically (Dahl, 1989, p.193). Interestingly, in this context, he cites the European Union (Community, as he called it at the time) as an arguable case in terms of which claims to popular autonomy might be raised. Thus, it might be argued that to state the test of the allocation of functions in terms of the political equality of citizens within the EU was to prejudge the answer to the question of entitlement.

The reply to this worry consists, I believe, in noting the dual character of political affiliation within the EU. The direct responsibility that the EU currently exercises over certain aspects of the lives of citizens of Europe provides the reason for stating the relevant principle in terms of a notion of political equality. Conversely, I should want to say that an identifiable political community exists when it is feasible to refer to the common interests of political equals as the ground of policy arguments within an institutional context. Historically the decisions have already been taken that have transformed, for some important political purposes at least, the peoples of Europe into the people of the European Union. This does not mean that these decisions are irreversible - secession is still a possibility and one given force in the draft Constitution - but in the absence of such a move we have to regard the EU as a defined political entity within which equal citizenship is possible.

What then would arguments about the task assignment within the EU look like if they conformed to the principle of functional effectiveness.

One obvious form of argument in this context is one that stresses that the capacity of existing European nation states is inadequate to cope with a certain range of problems or to realise gains that would be to everyone's advantage. Translated into practical policy areas this would be an argument for the EU level of government to be given control of policy areas where it could internalise externalities like cross-boundary pollution and where it could create the institutional conditions that would enable European economies to secure economies of scale in their methods of production. Policy sectors satisfying similar conditions might include the problems of cross-border migration or protection from external threats. It is clear that these are the sort of policy sectors that those most concerned to construct a federal Europe do have in mind when they say that formal sovereignty in the modern world is less important than the capacity of political systems to cope with the problems with which they are confronted.

However, against these common interests that would argue in favour of enlarging the scope of government there are similarly common interests that would argue for reserving as much as possible to the local level. One important argument is that of national identity. The assumption here is that a political system provides a way of doing things that its members come to value simply because it is theirs irrespective of its objective merits. Moreover, it can be argued that social learning about the feasibility and desirability of public policy strategies is fostered when there is diversity of experiment at lower levels of government, so that striving for common solutions to problems at the federal level is likely to reduce these opportunities for learning.

In part the assessment of the relative strengths of these arguments depends upon complex empirical judgements about the scale and size of spill-over effects. However, there is also a question of the basis of evaluation for the seriousness of these effects. Here, I should like to suggest that Mill was on the right lines, even if as it stands his test is only developed in a rudimentary way. For Mill the basic test to establish whether functions should be carried on at a higher level than a given locality is whether citizens in other localities can be said to be personally indifferent or not in how the locality treats the matter. His own examples (Mill, 1861, p.420) concern law and order, and he argues that it cannot be a matter of personal indifference to the members of a country if one particular locality became a 'nest of robbers or a focus of demoralization, owing to the maladministration of its police ...'

In broad terms, this test of personal indifference appears to me to be the right one. In essence it asserts that where potential causes of concern are so remote that they do not affect the personal interests of the rest of a political society, then there should be a presumption of the devolution of political power to the locality in which there is a personal interest. Note how important it is here that the test is one of *personal* interest. Such a test implicitly relies upon a distinction between what affects the personal interests of citizens and what affects their interests in so far as those interests are constituted by a disinterested concern for the well-being of the community at large. To take a particular example: according to Mill's test someone would be entitled to assert the government of a higher level authority in the regulation of trade in another nation of the EU provided that their export prospects were restricted in a way that they could not do so if they were merely asserting in a disinterested way the benefits of free trade. Thus, this test inverts the logic of some forms of democratic participation. For usually political agents have to cast their arguments in terms of conduciveness to the public advantage if they are going to call upon the power of the state. Personal interest is the test that has to be passed before one can engage in the public arguments about the general interest.

It is not my intention here to run through a catalogue of examples to see how the criterion of personal interest would serve to distinguish the appropriate level of political discussion for items of public policy. No doubt the application of the criterion would itself be disputed in particular cases. For example, the Commission has argued for its right to regulate the quality of bathing water on the grounds that tourists from other countries are at risk if bathing water quality is low in any Union country and it has also be argued that drinking water quality should be regulated in order to protect tourists from health hazards. These seem to me to be cases where a judgement has to be made rather than an argument advanced. It is a matter of judgement as to how far one defines the principle of personal involvement by reference to a norm of *caveat tourist*. But I do not see how this could affect the overall logic of the argument.

VI. Conclusion

I have so far drawn attention to three approaches that might be taken to the problem of task-assignment. In the conclusion, I should like to say something about the relationship in which these approaches stand to one another, or in which they might be arranged to stand to one another.

The first and most obvious point to make is that these are clearly distinct principles, not only in the sense that they are formulated differently, but also in the more important sense that their implementation in practical terms would lead, under most circumstances, to different and incompatible courses of action being followed. For example, if the principle of pure procedure is followed, there may not be a procedure that would ensure that functions were de-

volved as subsidiarity would suggest or that they were assigned in a way that functions could be performed effectively. National governments may have reasons for holding on to functions that would be better performed at a lower level of political organisation or for resisting transferring functions to a higher level of organisation even though they might be performed more efficiently at that higher level. Similarly, functionality may point to tasks being assigned to a higher level than a bias to the near would suggest. All this is simply to say that the three principles point to three logically distinct aspects of task-assignment which we cannot assume will all point in the same practical direction. This is not to say, of course, that the three principles will *always* point in different practical directions. There may be circumstances in which political authorities will maintain or implement a bias to the near and this will be the most effective arrangement from the policy point of view. However, such a situation cannot be guaranteed, and there will always need to be three tests applied to any decision if a policy on task assignment is properly to be evaluated.

Consistency of a sort could be secured, and this is the second point, by arranging the principles in some order of application constituting necessary conditions that would need to be satisfied before one or more of the other principles were implemented. For example, one might say that functionality should only be invoked once procedural conditions were satisfied, or that subsidiarity ought to depend upon functionality. Taking all three principles together, it seems to me that the only combination of all three principles that makes sense is one in which subsidiarity is pursued only if procedure and functionality have already been satisfied. Other combinations, for example invoking functionality only if procedure and subsidiarity were satisfied, would only make sense if you were prepared to subordinate considerations of effectiveness to those of procedure and the bias to the near, which seems to beg all the interesting questions.

The third and final point is that the application of any one of these principles is likely to be highly contested, not because the principle itself is contested, but because there is disagreement about whether the conditions are met that would enable us to say that the principle can be properly applied. Consider the principle of functionality, for example. It is a matter for some dispute as to whether functions are better performed at a higher or lower level. Perhaps aspects of the functions are better managed at a higher level but others at a lower level. Perhaps there is disagreement about what 'better' might mean and how it might be measured. Perhaps there is a fear that even though the function is better performed technically, there are other values, for example democratic accountability, according to which it is worse performed. This should not be surprising. After all, democratic contestation is reflexive, since we can always democratically contest whether the criteria of a constitutional democratic arrangement have been properly developed and applied.

VII. References

- Barry, B. (1965) *Political Argument* (London: Routledge and Kegan Paul).
- Commission of the European Communities (1992) 'The Subsidiarity Principle', *Bulletin of the European Communities*, 10-1992.
- Dahl, Robert A. (1982) *Dilemmas of Pluralist Democracy* (New Haven and London: Yale University Press).
- Dahl, R. A. (1989) *Democracy and Its Critics* (New Haven and London: Yale University Press).
- Dobson, Lynn (2004) 'Conceptions of Freedom and the European Constitution' in Lynn Dobson and Andreas Follesdal (eds), *Political Theory and the European Constitution* (London and New York: Routledge), pp. 103-21.
- Finnis, John (1980) *Natural Law and Natural Rights* (Oxford: Clarendon Press).
- Flynn, Brendan (2004) *Subsidiarity and the Evolution of EU Environmental Policy* (Department of Government, University of Essex: PhD Thesis).
- Follesdal, Andreas (1998) 'Subsidiarity', *Journal of Political Philosophy* 6: 2, pp. 190-218.
- Goodin, R.E. (1988) 'What Is So Special about Our Fellow Countrymen?', *Ethics*, 98:4, pp.663-86.
- Gustavsson, Sverker (1998) 'Defending the Democratic Deficit' in Albert Weale and Michael Nentwich (eds), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (London and New York: Routledge), pp. 63-79.
- Hayek, Friedrich A. (ed.) (1935) *Collectivist economic planning; critical studies on the possibilities of socialism* (Routledge: London, reprinted 1963).
- Héretier, A. et al., (1994) *Die Veränderung von Staatlichkeit in Europa* Opladen: Leske + Budrich.
- House of Lords, Select Committee on the European Union (2003) *The Future of Europe: Constitutional Treaty – Draft Articles 1-16*, Session 2002-03, 9th Report (London: The Stationery Office), HL Paper 61.
- Kliemt, Hartmut (1997) 'Subsidiarity as a Guiding Principle of Constitutional Design and of Constitutional Adjudication' in E.G. Valdes, W. Krawietz, G.H. von Wright and R. Zimmerling (eds), *Normative Systems in Legal and Moral Theory* (Berlin: Dunker and Humblot), pp. 183-96.
- Locke, J. (1690) *Two Treatises of Government*, edited P. Laslett (New York: Mentor, 1965).
- Madison, J. (1787) 'Federalist Paper No. 51' in *The Federalist Papers*, edited with an introduction by C. Rossiter (New York: The New American Library Inc., 1961 edition).
- McKay, David (2001) *Designing Europe: Comparative Lessons from the Federal Experience* (Oxford: Oxford University Press).
- Mill, J.S. (1859) *On Liberty*, reprinted in J Gray (ed.) *John Stuart Mill On Liberty and Other Essays* (Oxford: Oxford University Press, 1991).
- Mill, J. S. (1861) *Considerations on Representative Government*, reprinted in J Gray (ed.) *John Stuart Mill On Liberty and Other Essays* (Oxford: Oxford University Press, 1991).
- Miller, D. (1995) *On Nationality* (Oxford: Clarendon Press).
- Moravcsik, A. (1998) *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (London and New York: Routledge).

- Peterson, John (1994) 'Subsidiarity: A Definition to Suit Any Vision?', *Parliamentary Affairs*, 47: 1, pp. 116-32.
- Putnam, Robert D. (1988) 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', *International Organization* 42: 3, pp.427-60.
- Quadragesimo Anno* (1931) Encyclical of Pope Pius XI on Reconstruction of the Social Order May 15, 1931. Available at: http://www.vatican.va/holy_father/pius_xi/encyclicals/documents/hf_p-xi_enc_19310515_quadragesimo-anno_en.html. Last accessed 24 August 2006.
- Rawls, J. (1999) *A Theory of Justice* (Oxford: Oxford University Press, revised edition).
- Ryle, G. (1949) *The Concept of Mind* (Harmondsworth: Penguin Books, 1963).
- Savage, Deborah and Weale, Albert (2006) 'The Normative Logic of Two-Level Games and the European Union', available at: http://www.eu-newgov.org/database/DELIV/DDTFD04_Normative_Logic_of_Two-Level_Games_and_the_EU.pdf. Last accessed 24 August 2006.
- Siedentop, L. (2000) *Democracy in Europe* (Middlesex: Allen Lane, the Penguin Press).
- Weale, A., Pridham, G., Cini, C., Konstadakopoulos, D., Porter, M. and Flynn, B. (2000) *Environmental Governance in Europe: An Ever Closer Ecological Union?* (Oxford: Oxford University Press).
- Weale, Albert (2005) *Democratic Citizenship and the European Union* (Manchester: Manchester University Press).