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The Limited Modesty of Subsidiarity

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Abstract: *This paper provides an account of the European principle of subsidiarity that presents it as a principle of democratic structuring: engaging both with the allocation of powers to existing democratic institutions and with the creation of new democratic institutions. In the process of discussing the European principle, a contrast is drawn with the Catholic principle of subsidiarity and with the rival doctrine of national self-determination. It is argued that the European principle is a central part of the Union's constitutional identity, and, as such, crucial to an understanding of the European project.*

Subsidiarity is a concept of enormous, even alarming, breadth. There are many possible versions of subsidiarity: this paper will focus on that contained in the European Treaties. This principle speaks to the empowerment of democratic institutions; of which individuals ought to be included in decisions relating to the exercise of public power. It is a principle about the functioning of democracy, even if it is not a principle of democracy. Subsidiarity helps shape the structures within which democracy can operate, but does not require or presuppose the agreement of individuals within these structures. Most obviously, the European principle of subsidiarity is concerned with the allocation of powers to pre-existing institutions: for instance, whether a decision should be taken within the institutions of the European Union or should be allocated to the Westminster Parliament. It will be suggested that the principle can also provide an argument for the creation of new democratic institutions, both at the sub-state and at the supra-state level.

Subsidiarity plays an important part in the constitutional structure of the European Union. Though its legal effects may be slight, its symbolic significance is enormous: it is a declaration of the vision of Europe shared by the authors of the Treaty and enshrined in that document. Its importance is recognised in Romano Prodi's recent book, *Europe as I See It*, where he cites subsidiarity as one of the core principles of governance that reveal the roots and identity of the European Union.[1] For Prodi,

* Trinity College, Oxford. Thanks are due to Samantha Besson, Josh Chafetz, John Stanton-Ife, Stephen Weatherill, and Alison Young. It can be read alongside N. W. Barber, 'Citizenship, Nationalism and the European Union', (2002) 8 *European Law Review*, 241, and develops some of the ideas of that piece.

[1] R. Prodi, *Europe as I See It*, trans. A. Cameron (Polity Press, 2000). It has been suggested that Jacques Delors' support for subsidiarity was also motivated by his spiritual and philosophical roots in Catholicism: M. Burgess, *Federalism and European Union: The Building of Europe, 1950–2000* (Routledge, 2000), 230–232; P. Marquardt, 'Subsidiarity and Sovereignty in the European Union', (1994) 18 *Fordham International Law Journal* 616, 624–25.

subsidiarity is a distinctively Catholic notion, first formulated in papal encyclicals, and he draws attention to this religious connection as part of a call for an appreciation of the 'Christian soul' of Europe.[2] This, he hopes, will enhance integration and strengthen the identity of the Union. In making this claim, Prodi allies himself with a number of writers who have sought to show that the EU's political structures have foundations in a particular set of cultural traditions; often citing, amongst other sources, its supposed religious heritage.[3] In the process of expounding a distinctive European principle of subsidiarity, this paper will mount a narrow and a broad challenge to this account of the political nature of the Union, focusing on the subsidiarity principle. Narrowly, it will argued that whilst there may be a historic connection between the Catholic model of subsidiarity and the European principle contained in the Treaty, there are fundamental differences between the two ideas. In particular, the European principle is capable of exercising wider appeal than its Catholic counterpart. Even if a historical connection could be demonstrated, the European model could have developed in isolation from the Catholic model. Whilst the European principle could be seen as a specialised subset of the Catholic, this is not a necessary part of its identity: it can exist independently of the Catholic principle, and could be endorsed by some who could not support the Catholic version. More broadly, it will be contended that the European principle sets the EU against the quest for a distinctive 'European' national identity and, additionally, against those who present the European project as a mechanism to protect the national identities of the Member States. The European principle of subsidiarity must be contrasted with the rival principle of national self-determination, and with the rising ideology of liberal nationalism. This, then, is the limited modesty of subsidiarity: it is compatible with a great many political ideologies, but it cannot be squared with all.

I The Differing Reach of the Catholic and European Principles of Subsidiarity

In historical terms, Prodi may be correct. It might be possible to trace a line between the Catholic model of subsidiarity, found in various papal encyclicals, to the European model, found in the Treaties, through German federalism.[4] A number of writers, without necessarily assuming that the European and Catholic principles are identical, have turned to the Catholic principle of subsidiarity in the hope that it will shed light on the meaning and implications of the Treaty provisions.[5] But there are at least two important differences between the European and Catholic conceptions of subsidiarity.

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[2] Prodi, *op. cit.* note 1 *supra*, at 44–47. See also B. J. S. Hoetjeś, 'The European Tradition of Federalism: The Protestant Dimension', in M. Burgess and A. Gagnon (eds.), *Comparative Federalism and Federation* (University of Toronto Press, 1993).

[3] N. W. Barber, 'Citizenship, Nationalism and the European Union', (2002) 8 *European Law Review* 241, 250–256. M. Oreja, 'European Cultural Identity and the Protection of European Cultural Heritage', (1988) 34 *European Yearbook* 1; J. Weiler, 'Do The New Clothes Have an Emperor', in J. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), 252.

[4] N. Emiliou, 'Subsidiarity: An Effective Barrier Against "The Enterprises of Ambition" ' (1992) *European Law Review* 383, 388–391; J. Peterson, 'Subsidiarity: A Definition to Suit Any Vision?', (1994) *Parliamentary Affairs* 115, 118.

[5] Amongst many others: C. Henkel, 'The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity', (2002) 20 *Berkeley Journal of International Law* 359; Emiliou, *op. cit.* note 4 *supra*; MacCormick moves freely between the two: N. MacCormick, 'Democracy and Subsidiarity in the European Commonwealth', in N. MacCormick, *Questioning Sovereignty,* (Oxford University Press, 1999), 152–155.

First, the European principle has a more restricted reach than its Catholic counterpart: it is concerned with democratic public bodies, whereas the Catholic model engages with collective entities more generally. Second, and as a consequence of this, the European principle could be supported from a variety of different political positions, and need not rest on the same ideological arguments as the Catholic principle. A discussion of the differences between these two principles will help clarify what subsidiarity means in the context of the Treaties. Even if it can be shown that the European principle partly grew from the Catholic, the concept may have other roots and there may be alternative arguments that support it.

A The Catholic Principle

The Catholic principle of subsidiarity has a remarkably wide reach. It engages with the tasks of collective associations: encompassing states, trade unions, and families.[6] The papal encyclicals expounding the principle present it as a bulwark against over-intrusive collective bodies. Pope Leo XIII's 1891 encyclical, *Rerum Novarum,* is widely regarded as one of the earliest expressions of the principle within Catholic social philosophy.[7] The document is a wide-ranging reflection on labour and property, capitalism and socialism, and even-handedly insists both that the institution of private property has value, but also that employers owe moral obligations towards their employees. Subsidiarity is not discussed directly, but the encyclical places great weight on the importance of the individual and the family, demanding that the state only intervene when necessary to protect the common good or prevent injury.[8] It also emphasises the value of private voluntary associations, such as charities established to help the poor, and workers' associations.[9] In *Quadragesimo Anno*, Pope Pius XI developed this principle, attempting to steer between the twin perils of individualism and collectivism.[10] He provided a clear statement of the meaning of subsidiarity within Catholic philosophy:

> As history abundantly proves, it is true that on account of changed conditions many things which were done by small associations in former times cannot be done now save by large associations. Still, that most weighty principle, which cannot be set aside or changed, remains fixed and unshaken in social philosophy: 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 also it is 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.[11]

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[6] C. Henkel, *op. cit.* note 5 *supra*, 363–366; R. Vischer, 'Subsidiarity as a Principle of Governance: Beyond Devolution', (2001) 35 *Indiana Law Review* 103, 110–116. See, more generally, M. Burgess, 'The European Tradition of Federalism: Christian Democracy and Federalism', in M. Burgess and A. Gagnon (eds), *Comparative Federalism and Federation* (University of Toronto Press, 1993). The encyclicals discussed in these articles, and footnoted below, are all available on the Catholic Encyclopaedia online: <http://www.newadvent.org/>.

[7] Henkel, *op. cit.* note 5 *supra*, at 363; P. Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', (2003) 97 *The American Journal of International Law* 38, 40–42.

[8] Pope Leo XIII, *Rerum Novarum,* (1891), para 52.

[9] *Ibid*., paras 68–80. Pope Pius XI, *Quadragesimo Anno* (1931), para 30.

[10] Pope Pius XI, *Quadragesimo Anno* (1931), para 46.

[11] *Ibid.* para 79; J. Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980), VI.5.

It is worth emphasising the breadth of this principle. It speaks both to the state and to other associations and organisations; it is a principle that could be applied against an overbearing trade union as well as an intrusive public body.[12]

B The European Principle

The formal, supposedly justiciable,[13] principle of subsidiarity is to be found in Article 5 EC.[14] Since the Treaty of Amsterdam this provision has been buttressed by a Protocol on Subsidiarity and Proportionality.[15] Article 5 EC applies to areas that fall outside of the exclusive competence of the Community. It states that the Community:

> shall take action, in accordance with the principle of subsidiarity, only if and insofar 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.

This principle is confined to allocation of power between Member States and the Community institutions: it only adjudicates between two levels of governance. It is left to Member States to decide whether and in what ways the principle of subsidiarity might apply in the domestic context. The revised version of the principle contained in the Draft Constitution draws attention to the possibility of action by regional government, but only so far as this provides an additional reason to leave the power to the Member State.[16] Subsidiarity as embodied in the Treaty and the Draft Constitution cannot be invoked by a region against a Member State either in domestic or European law.

There are three operative elements within Article 5. First, the Article contains a preference for power to be allocated to the smaller unit: Member States. All else being equal, the exercise of a power by Member States is preferable to its exercise by the European Union. Second, this allocation of power is qualified by an efficiency test. Power should be shifted downwards unless the centralisation of power will result in efficiency gains—a tricky notion that will be examined further later in this paper. Furthermore, the phrase 'cannot be *sufficiently* achieved' qualifies the efficiency test, specifying that these efficiency-gains must reach beyond some unquantified minimum level. It is not enough that there is some benefit to centralisation, that the Community will better achieve the goal set, it must also be the case that this benefit is such as to outweigh the preference

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[12] In recent times a virtually identical idea has proved attractive to civil society theorists. See especially: R. Vischer, *op. cit.* note 6 *supra*, and M. Walzer, 'Equality and Civil Society", in S. Chambers and W. Kymlicka (eds), *Alternative Conceptions of Civil Society* (Princeton University Press, 2002). More generally: O. de Schutter, 'Europe in Search of its Civil Society', (2002) 8 *European Law Journal* 198, and (2003) 9 *European Law Journal* 387 for a collection of papers on civil society in the context of the European Union.

[13] Whilst in theory Article 5 can be pleaded before a court, in practice it has proved of little use when advanced by litigants. The fullest judicial discussion is found in Case C-491/01, *R v Secretary of State for Health, ex. parte Imperial Tobacco* [2002] ECR I-11453, 177–185.

[14] An earlier version, confined to environmental protection, was introduced by the Single European Act, Article 130r(4). Emiliou, *op. cit.* note 4 *supra*, 393–396.

[15] Protocol No. 30, 1997.

[16] Draft European Constitution, Art 9(3): '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 Union level'. See also the Draft Protocol on the Application of the Principles of Proportionality and Subsidiarity.

for State action. Consequently, these two factors combine to create a bias in favour of the smaller unit, a bias that can be offset if it is demonstrated that the power will be significantly more efficiently exercised by the larger body. Lastly, it is implicit within Article 5 that the power should be exercised by the Member State that will be affected by the power. This seems too obvious a point to be worth labouring, but it is a vitally important qualification. Article 5 does not *just* embody a preference for smaller units over large ones: it allocates powers to the states containing the people who will be affected by the power. So, Article 5 would not provide an argument for allocating parts of the United Kingdom's environmental policy to France, even if that state had a technical superiority in the area and would acquit the task better.

A broader expression of subsidiarity is found in Article 1 TEU, which states that decisions will be taken 'as closely as possible to the citizen'.[17] This provision is not legally enforceable but constitutes a declaration of the contracting parties' vision of Europe.[18] One consequence of this lack of legal force is that the meaning of Article 1 has remained, and will remain, studiously unclear. From time to time a slightly more ambitious principle of subsidiarity has been suggested, reaching beyond the confines of Article 5. This version of the European principle includes regional government within its reach.[19] In the intergovernmental conferences prior to the drafting of the Treaty of Amsterdam this understanding of subsidiarity was advocated by the German, Austrian, and Belgium governments,[20] and, unsurprisingly, the Committee of the Regions has also been a vocal advocate.[21] This version of the European principle stretches beyond the relationship between Member States and Europe and also includes the allocation of power within States. Not only, for example, would subsidiarity ask whether the United Kingdom or the EU should exercise a power, it would also ask whether the power should be allocated to the Westminster Parliament, to the Scottish Parliament, or even to local government. In what follows, Article 1 will be read as a broader form of Article 5: incorporating the efficiency test and other aspects of Article 5, but extending to all democratic bodies of the state, regional as well as national. This version of subsidiarity is a directive constitutional principle: a principle which seeks to guide lawmakers, but which cannot be enforced by a court. As a directive principle, there is no reason to regard Article 1 as confined to those areas of shared competence covered by Article 5.

Subsidiarity was introduced into the Treaties to protect and empower pre-existing institutions at a state, and, more debatably, at the sub-state level. Its authors assumed the existence of a set of democratic bodies that were already operating within the Union: the task of subsidiarity was to guide the allocation of powers to these bodies. However, the European principle of subsidiarity may address a further question: it may provide an argument for the creation of new democratic institutions. A defence of this bold assertion will have to wait until the arguments for subsidiarity are considered later

[17] Discussed in G. Bermann, 'Taking Subsidiarity Seriously: Federalism in the European Community and the United States', (1994) 94 *Columbia Law Review* 331, 338–344; Peterson, *op. cit.* note 4 *supra*.

[18] Peterson, *op. cit.* note 4 *supra*, at 117.

[19] See generally, J. Jones, 'The Committee of the Regions, Subsidiarity and a Warning', (1997) 22 *European Law Review* 312; A. Scott, J. Peterson and D. Millar, ' "Europe of The Regions" *v.* the British Constitution?', (1994) 32 *Journal of Common Market Studies* 47; Peterson, *op. cit.* note 4 *supra*, at 120.

[20] G. de Búrca, 'Reappraising Subsidiarity's Significance After Amsterdam', *Harvard Jean Monnet Working Paper*, 7/99, 14.

[21] Jones, *op. cit.* note 19 *supra*.

in the paper, but it is this, slightly wider, version of the principle that will be taken as the 'European' model of subsidiarity: engaging both with the question of the allocation of power to existing institutions and the creation of new bodies.

This account of the European principle of subsidiarity differs significantly from the Catholic account discussed earlier.

First, whilst the Catholic model focuses on the value of private bodies—such as individuals, families and voluntary associations—the European principle is exclusively concerned with public bodies that possess a deliberative element. Even the very broadest reading of Article 1 TEU presupposes that the decision will not be taken by the citizen herself. The Draft Constitution does recognise the importance of private collective associations, but treats their role as distinct from subsidiarity.[22] Whereas the Catholic model attempts, in part, to determine the bounds of the private sphere, the European principle is concerned with the allocation of power within the public realm. This difference is important: though the Catholic and European principles share a name, they may embody different rationales.

Second, the Catholic model does not embody a preference for smaller government, or for devolving power to smaller units. The Catholic model insists on the value of small associations, individuals, and families, and demands that power be allocated to them where appropriate. This version of subsidiarity does not address the question of where power should be allocated when 'all else is equal'—perhaps because, in the Catholic model, all else never is equal: there is always a right answer about the level at which a power should be exercised. This may reflect a practical edge possessed by the European principle that the Catholic model lacks. The European principle requires that those who wish to see power centralised bear the burden of the argument; they have to displace the presumption weighing against them. Under the European principle centralisers must show that power can better be exercised by the Community, and that this improvement in efficiency is sufficient to warrant the shift. The Catholic model, in contrast, requires that power be allocated to the correct institution; smaller units should get the power when they are able to exercise it properly—there is no bias against centralisation. This second difference may follow from the grounding of the Catholic model in an idealised moral philosophy, one untouched by constraints of knowledge or weakness of human will. This is not a criticism: such accounts can provide a map that practical politics should follow. The bias contained in the European principle, in contrast, takes account of human weaknesses. It recognises that apparent advantages of centralising power can sometimes be overstated, or can evaporate after the shift has taken place. As far as possible, the European principle tries to ensure that errors will favour the smaller units: when power is misallocated it will be misallocated to the states or regions, rather than to the larger body.

These two differences, though important, are relatively superficial. They point towards a deeper split between the two principles of subsidiarity: a division that becomes more apparent when the justifications of the two principles are explored.

II Arguing for Subsidiarity

A The Catholic Model

There are many different arguments that could be used to justify the Catholic model of subsidiarity. At least two groups can be identified from the encyclicals. First, there

[22] See, for example, Arts 46, 51.

is a collection of instrumental arguments: power should be left to individuals, families, and voluntary associations simply because they are more likely to exercise that power in a wise and socially useful manner. A number of examples of this sort of reasoning can be extracted from the texts. In the context of welfare programmes, Pope John Paul II has claimed that private bodies, such as charities and families, are often better care providers than the state.[23] State welfare institutions are often bureaucratic and impersonal, providing only for people's material needs. Mutual bodies, such as trade unions, are defended in instrumentalist terms: they can provide care for their members, and can defend and represent the interests of members.[24]

Second, subsidiarity rests on the role states and other associations play in people's lives; it deals with the question of how far and in what ways these bodies should engage with individuals and families. Collective associations exist to help advance the wellbeing of their members. Belonging to states, private associations, and families, and having control over your own activities, are crucial parts of a fulfilled life.[25] Subsidiarity demands that space is given within which all these entities can prosper and individuals flourish. These associations exist to empower and not to dominate.[26] It is this reasoning that leads John Finnis to present subsidiarity as a principle of justice; it is a principle that limits the proper bounds of collective activity.[27]

Neither of these arguments can be directly invoked to support the European principle of subsidiarity—though, as we shall see, modified versions of both explanations could be applied to the European debate. As the European principle of subsidiarity is concerned with the allocation of power within the public sphere, explanations of the worth of subsidiarity grounded in the importance of protecting individuals, families, or private associations from the state cannot be directly relied upon. Defences of subsidiarity resting in the merits of private property, charities, and choice are similarly misdirected. Furthermore, Finnis' argument from justice cannot be easily transferred to the European principle. The European principle of subsidiarity is not concerned with limiting collective activity, nor with the powers exercised by private associations. As subsidiarity need not turn on the entitlements of the individual, the claims she has against collective entities, it will normally be inappropriate to describe it as a principle of justice in Finnis' sense.

B The European Principle

There has been surprisingly little discussion about why the European model of subsidiarity is desirable. The motivation for subsidiarity's inclusion within the Maastricht Treaty was stirred by institutional rivalry, with noble principles of political philosophy very much in the background. Subsidiarity was included in order to placate those Member States, and the regions of Member States, who feared that too much power was shifting from the national to the European level.[28] This explanation may be

[23] Pope John Paul II, *Centesimus Annus,* (1991), para 48.
[24] Pope Pius XI, *op. cit.* note 10 *supra*, para 30; John Paul II, *op. cit.* note 23 *supra*, para 15.
[25] Pope Leo XIII, *op. cit.* note 8 *supra*, para 19–10; Pope John Paul II, *op. cit.* note 23 *supra*, para 17.
[26] Pope Leo XIII, *op. cit.* note 8 *supra*, para 37; Pope John Paul II, *op. cit.* note 23 *supra*, para 11, 44.
[27] Finnis, *op. cit.* note 11 *supra*, VI.5; Carozza, *op. cit.* note 7 *supra*, 43–47.
[28] A. Estella, *The EU Principle of Subsidiarity and its Critique* (Oxford University Press, 2002), Chapter 3; M. Wilke and H. Wallace, 'Subsidiarity: Approaches to Power Sharing in the European Community', *RIIA Discussion Paper 27*, (Royal Institute of International Affairs, 1990), 3.

historically accurate, but it is normatively empty: protecting states and regions is not a good in itself. However, implicit in this historical account are at least two putative defences of the principle—one mistaken, and one correct.

a) A False Start: the Mistaken Argument from Fear of Tyranny

An obvious argument that might be advanced is that subsidiarity helps reduce the risk of tyranny by splitting governmental power.[29] By federating power the constitution ensures that no single group of people is given absolute control of the state and, additionally, that collective action will frequently require negotiation and compromise between different levels of government.[30] This argument is the more attractive flip side of Dicey's notorious accusation that federated government is weak government.[31] Unfortunately, this is a purely contingent virtue of federalism: it depends entirely on the relative merits of the centre and the regions. As William Riker acerbically commented, some of the principal beneficiaries of American federalism were the racists who dominated the politics of southern states.[32] Here, weak central government led to oppression rather than liberty.

Furthermore, the argument from fear of tyranny is insufficiently refined to generate a principle as nuanced as the European version of subsidiarity. First, the tyranny argument requires too much: subsidiarity will not always require, or reinforce, the division of power within a system. Indeed, where the state is too small to support regionalised government subsidiarity might provide an argument for a completely centralised constitutional structure. Second, the argument from tyranny is too blunt to generate the subsidiarity principle. Why include the requirement that power be allocated to the smallest unit in which it can be *efficiently* exercised, or require that a connection be drawn between the power and those affected by its exercise? The fear of tyranny argument does not point to any particular division of regional and central competences: it demands that power be split, but does not explain how these lines should be drawn. These doubts point towards the issues that a successful defence of the European principle of subsidiarity would have to accommodate. A successful account of subsidiarity must explain both why, in general, power should be divided between different levels of government, and also, in particular, why specific powers should be allocated to each level.

b) The Argument from the Structuring of Democracy

A more promising line of defence can be found in the part the European principle of subsidiarity plays in structuring the democratic process.[33] As we have seen, subsidiarity is not a principle of democracy; indeed, it is possible to imagine Article 5 lifted out of the Treaty and placed in the constitution of an anti-democratic state, allocating power between regional bureaucrats. However, in the context of the EU, read in the

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[29] A. Føllesdal, 'Subsidiarity' (1998) 6 *Journal of Political Philosophy* 190, 204–205. A similar claim is sometimes made in discussion of the separation of powers: see N. W. Barber, 'Prelude to the Separation of Powers', (2001) 60 *Cambridge Law Journal* 59, 60–66.

[30] D. Elazor, *Exploring Federalism* (Alabama University Press, 1987), ch. 3.

[31] A. V. Dicey, *An Introduction to the Study of the Law of the Constitution*, (Macmillan, 10th edn, 1959), 171–173.

[32] W. Riker, *Federalism: Origin, Operation, Significance* (Little Brown Co., 1964), 24.

[33] See also the discussion in A. Føllesdall, 'Subsidiarity and Democratic Deliberation', in E. Eriksen and J. Fossum, (eds), *Democracy and the European Union—Integration Through Deliberation* (Routledge, 1999).

light of the EU's commitment to democratic government, subsidiarity provides a distinctive answer to the question of the boundaries of democratic units. It becomes a principle that shapes the structures within which democracy operates. The European principle of subsidiarity should be understood as a development of one of the oldest and most basic principles of democratic government: the maxim asserting that what touches all should be approved by all.[34]

This maxim is sometimes attributed to Edward I, who included it in one of the writs summoning the Parliament of 1295.[35] Edward I probably included the phrase to indicate that he expected delegates to come with power to bind their communities,[36] in contrast to some earlier Parliaments, which were summoned solely to advise the King.[37] This suggestion of limited delegated authority echoes the Roman Law origins of the phrase, where it dealt with the joint administration of property, requiring that the consent of all administrators be obtained before action was undertaken.[38] The depiction of members of legislatures as holding a defined mandate from their electors, and then negotiating with the King and other representatives in the Chamber, appears far removed from contemporary models of democratic government.[39] It looks more like an account of international treaty negotiation than of domestic lawmaking.[40]

This consent-heavy reading of the maxim was swiftly abandoned. Even in the mediaeval period the maxim seems to have shifted to become a requirement that those affected by a decision be able to participate in the deliberative process, rather than that they necessarily endorsed the outcome.[41] Indeed, recently the maxim has been glossed as 'what touches all concerns all'—a subtle but interesting shift in terminology.[42] It is this construction of the maxim that enables Jeremy Waldron to describe it as 'unexceptional', an obvious and uncontroversial part of a democratic model; Waldron connects the maxim to the demand for equal counting that he sees as crucial to fairness in democratic processes.[43] Understood in this way, the maxim engages with the question of the bounds of the political unit; defining the people who ought to have a say over a particular issue. This question is distinct from the harder, and more basic, question

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[34] *Quod omnes tangit ab omnibus approbetur*. On the wide range of interpretations given to this maxim, see G. Post, *Studies in Medieval Legal Thought* (Princeton University Press, 1964), ch. 4.

[35] W. Stubbs, *Select Charters* (Oxford University Press, 1913), 480; J. E. A. Jolliffe, *The Constitutional History of Medieval England*, (A & C Black, 2nd edn, 1947), 349–350.

[36] The writ also requires that delegates have 'full and sufficient power to bind their communities (so that) the business in hand may not be held up in anyway through lack of such power'. J. B. Morrall, *Political Thought in Medieval Times* (Hutchinson, 1958), 63.

[37] Morrall, *op. cit.* note 36 *supra*, 61–65; M. L. Colish, *Medieval Foundations of the Western Intellectual Tradition: 400–1400* (Yale, 1997), 349.

[38] Justinian's Code v.59.5.2; R. C. van Caenegam, *An Historical Introduction to Western Constitutional Law* (Cambridge University Press, 1995), 84. Other passages might also reflect the principle: Post, *op. cit.* note 34 *supra*, 168–175.

[39] See B. Manin, *The Principles of Representative Government* (Cambridge University Press, 1997), esp. chapters 5 and 6.

[40] And so Maitland may be optimistic when he presents the Parliament of 1295, the so-called 'Model Parliament', as defining the outline of future assemblies where the King in Parliament was sovereign: F. W. Maitland, *The Constitutional History of England* (Cambridge University Press, 1931), 69–76.

[41] Post, *op. cit.* note 34 *supra*, 171–175.

[42] R. W. Lovin, 'Perry, Naturalism and Religion in Public', (1989) 63 *Tulane Law Review* 1517, 1520. See also L. Fuentes-Rohwer, 'The Emptiness of Majority Rule', (1996) 1 *Michigan Journal of Race and Law* 195, 224.

[43] J. Waldron, *Law and Disagreement* (Oxford University Press, 1999), 114.

of the worth and purpose of democratic government. The maxim might therefore be considered a 'thin' political principle, one that is compatible with a wide range of different democratic models. Writers who disagreed about the value and aims of democracy might find they could agree on the importance of the maxim.

Given its broadest reading, though, the maxim would prove impractical. Does it really require that *everyone* affected by a decision is entitled to participate in it? In an entertaining article, Gordon Tullock advanced a similar argument, though giving it an economic gloss, fashionable at the time.[44] Tullock asserted that democratic government exists to internalise economic externalities—or, to put it more simply, to ensure that those who will suffer the burdens and win the benefits take the decisions. It is this group of people who are most likely to reach the most economically efficient decision.[45] Consequently, each voter should be part of a number of different democratic groups, groups that would mirror the various collective decisions that impacted on her life. The problems that Tullock faced are instructive. First, some issues, probably most issues, affect enormous numbers of people. To allow everyone a say would require massive democratic units that far exceed existing state boundaries. Many outwardly local issues might, perfectly plausibly, be argued to be of international interest: we all have a concern with the environment, heritage, and fair government, for example. Second, trying to allocate each political decision to the constituency affected by it would require the creation of a huge number of deliberative units: Tullock speculated pessimistically about a world with 5,000 or 50,000 such fora.

These two difficulties point to at least three practical constraints supporters of the maxim must tackle. First, there must be some constraint on the level of involvement that merits inclusion in the deliberative body. Some people's interest in an issue will be less than others, and it would be hard to justify giving a person with a passing interest the same involvement in a decision as a person who is intimately connected with it. So, for example, an English person who admired the Malaysian countryside might have an interest in a Malaysian dam-building programme, but it would be hard to assert she should have the same participation rights as a villager living nearby. Additionally, it is often, though not invariably, the case that the larger a deliberative body becomes, the smaller the input of each voter will be. As the institution becomes more remote and less responsive to the individual, it risks the spread of voter apathy. Second, voter apathy will also limit the number of deliberative bodies that can sensibly be created. In the United Kingdom, the four or five elected bodies that call for voters' support push the civic virtues close to their limit. There is a limit to the number of deliberative bodies that can be usefully be established and operated effectively. Furthermore, the increase in the number of deliberative bodies has consequences for the lines of political accountability. With a proliferation of deliberative bodies comes confusion over the tasks and responsibilities entrusted to each, a confusion that may be cynically fanned by those holding power.

These practical, institutional, constraints require the maxim to be limited in both whom it excludes and whom it encompasses. We cannot precisely tie decisions to those people who are affected by them. The linkage will, unavoidably, be both under- and over-inclusive. It will be under-inclusive when people affected by a decision are shut

[44] G. Tullock, 'Federalism: Problems of Scale', (1969) 6 *Public Choice* 19. See also Føllesdal, *op. cit.* note 29 *supra*, 205–207.

[45] Tullock's views on the proper end of government are interesting, but well beyond the scope of this paper.

out from the forum in which the decision is to be made. It will be over-inclusive when those not affected by a decision are included within the forum. The European principle of subsidiarity includes a test that, in part, attempts to accommodate these institutional constraints on the maxim: the test of efficiency.

'Efficiency' is an empty word; it means nothing until enriched by objectives set by political philosophy.[46] Until we know the goals that a body or constitution ought to pursue, we cannot begin to assess whether or not it is efficient. It may be that this core ambiguity is part of subsidiarity's appeal: supporters have different notions of the goals that should be pursued, and, as part of this, what constitutes success. This may also explain why the Catholic principle of subsidiarity has achieved such a wide range of defenders: both the left and the right can agree on the principle, but will then bitterly disagree about how it should be applied.

The maxim set out at the start of this section presupposed that democratic government was worth having. This presupposition is shared by the European Treaties and the Draft Constitution, which repeatedly identify democratic government as one of the defining features of the European project.[47] Consequently, at least one of the objectives that can be fed into the European principle of subsidiarity's efficiency test is that of ensuring flourishing democratic government. In the context of the Treaties, then, subsidiarity stands as a modernised version of the maxim discussed a few paragraphs ago. The European principle of subsidiarity develops what might be termed an inherent constraint in our maxim: given that the aim of the maxim was to help achieve democratic government, it should not be construed in a fashion that has the result of frustrating democracy by requiring the creation of an implausible number of institutions.

The European principle of subsidiarity, it will be recalled, demanded that a decision be taken by the smallest democratic unit capable of ensuring the objectives of the proposed action were 'sufficiently achieved'. One of the objectives that the test addresses is that of ensuring democratic control over the exercise of power in question. Before a power is allocated to an institution, or a new institution is created, it must be asked whether that body will provide a vibrant democratic forum: it is not enough that those affected by the decision are included in the catchment area of the body, the body must also be able to connect the exercise of the power to the electorate. It would be wrong to attribute powers to a body that is democratically moribund, even if the catchment area of the institution provides a good match with the constituency affected by a power. Consequently, the efficiency test will require that powers be allocated to bodies that are both over- and under-inclusive.

The bias within subsidiarity for smaller units also provides a very rough method by which to test the minimum level of interest that will entitle a person to participate in the deliberative process. The European principle relies on geography as a method by which the approximate boundaries of the limits of significant concern can be drawn. For example, British environmental regulation is allocated to the British Parliament because, very generally, only people living in Britain have sufficient interest to count as 'affected' by the decisions; a person in Italy with a general concern for the environment would be excluded. The geographical approach to the drawing of boundaries is far from precise. The bias contained in subsidiarity will have the effect of excluding some who have a strong and real interest in the decision from the catchment area. This exclusion

[46] See further: N. W. Barber, 'Prelude to the Separation of Powers', (2001) 60 *Cambridge Law Journal* 59.

[47] Treaty on European Union, Preamble, Art 6(1) TEU; Draft European Constitution, Preamble, Art 45, Art 46.

is justified, if it is justified, insofar as it has the effect of maximising the number of people within the catchment area with a significant interest in the issue, balanced against, first, those with an equivalent interest who are excluded, and, second, the constraints of voter apathy which prevent the creation of a new forum that would include a larger proportion of those with a significant interest in the issue. This rather convoluted point can be clarified with an example. Decisions about road maintenance in Scotland should be allocated to the Scottish Parliament because that body's catchment area catches a substantial proportion of those with a significant interest in the issue. It excludes people with an insignificant interest in Scottish roads—folk in Devon who visit Glasgow once a year to visit relatives—but it also excludes some people with a significant interest—a person in Berwick who commutes to Edinburgh daily. There are two alternatives that might be considered. First, the power could be exercised by the Westminster Parliament. This would have the effect of including a larger number of people with a significant interest—people in Scotland and in Berwick would be included—but would also include a large number of people with an insignificant interest; the assembly would be dramatically over-inclusive. The dilution of control by the people affected by the power makes this option unattractive. Second, a new assembly could be created, one that includes people in Berwick and people in Scotland in a special institution to govern decisions relating to Scottish roads. The catchment area of this body would include a higher proportion of those with a significant interest in the issue, with only a slight element of over-inclusion. This might be an attractive option if the body provided a vibrant democratic forum for regulation of this power, but it is unlikely that such an institution, with such a narrow remit, would capture the public interest. It would probably be democratically moribund: providing an improved match with the constituency affected by the power, but unable to act as an effective link between the exercise of the power and those people.

The previous paragraph assumed that subsidiarity spoke to the creation of new institutions as well as to the allocation of powers to institutions that already exist. This is controversial: some may accept the claims of this paper as regards subsidiarity as an allocating principle, but disagree with the suggestion that the principle also has a creative aspect.[48] Given the role subsidiarity plays in structuring the democratic system, it is hard to see why it should stop at allocation: the same types of argument can sometimes require that a new body be created. When the democratic structure is overly centralised, subsidiarity may demand a form of regionalisation of power. The form this will take—whether the institutions should exist in a system characterised by devolution, federalism, or some other structure—will depend on the particular territory in which the principle operates.[49] When there exists an area in which a number of issues affect those who live there in a significant way, subsidiarity may require that a democratic institution should be established in that area. The debate surrounding Scottish devolution provides a good example of how this sort of claim might look. Before the establishment of the Scottish Parliament many decisions relating to Scotland were taken by the Westminster Parliament. One of the problems with this centralised system was that whilst all those significantly affected by Scottish issues were represented in Westminster, this body was dramatically over-inclusive: its catchment area also included

[48] It has been claimed that the Catholic principle can also require the creation of institutions: Carozza, *op. cit.* note 7 *supra*, 44.

[49] For the many and various forms of regionalised power, see: D. Elazor, *op. cit.* note 30 *supra*, 38–64.

many millions who were only peripherally affected. The creation of a new assembly in Scotland provided a more attractive option than leaving these powers to Westminster; a better match of institution to power.

The very rough way in which subsidiarity allocates powers, insisting that a large number of issues be gathered together, enables the maxim to escape a telling criticism advanced by Frederick Whelan.[50] Whelan raises an ingenious challenge to the maxim: whilst the attractions of allowing those who will suffer the burdens a say in a decision are obvious, it is harder to see why those who will benefit from the decision should be given equal consideration. Perhaps only those who will bear the burden should be permitted to participate? By creating a relatively small number of institutions, subsidiarity requires that a large number of issues are grouped together. Each institution will exercise and regulate a range of different powers. This reduces the risk that some luckless folk will bear the burden of every decision by the body and will never see the benefits of any action. Hopefully, those within the catchment area of the body will find that they are sometimes winners and, only sometimes, that they are losers.

The qualification of efficiency may place other constraints on the maxim. Some of these could also be connected to democratic government, and could therefore also be presented as inherent in the maxim. Richer notions of democracy that move away from simple majoritarianism might identify other considerations to be included within efficiency. Consequently, freedom of speech, association, and a demand for equality of respect could all be regarded as aspects of, or essential preconditions for, democracy that must be factored in to the efficiency criterion.[51] Even those who are sceptical about readings of democracy that stretch to include lots of other desirable things might accept that democracy is not the sole objective of a constitution, and that these other considerations may be invoked to temper democratic government. Giving power to an institution that discriminates against a section of its community, or which denies some people political expression, could therefore be thought of as an inefficient allocation of the power.

Not all considerations that may feed into the efficiency criterion can be plausibly connected back to the democratic process. Some are unarguably 'external' qualifications on the maxim, justifying limitations on smaller democratic institutions for technical reasons. Such restrictions are justified, if they are justified, on the basis that the larger unit is more likely to reach the 'right' decision than the smaller one. For example, access to an expert civil service may give a national parliament an advantage over a regional assembly. This may mean the national body is better informed, and, also, is better able to exercise control over the relevant area of the bureaucracy.

C Return to the Catholic Model of Subsidiarity

The argument for the European principle of subsidiarity flowing from the structuring of the democratic process took a different path to its Catholic counterpart, but there are some possible connections between the two. The arguments that supported the Catholic principle could also provide support for the European principle. The Catholic

[50] F. G. Whelan, 'Prologue: Democratic Theory and the Boundary Problem', in J. R. Pennock and J. W. Chapman, eds, *Liberal Democracy* (New York, 1983), 16–19.

[51] E.g. R. M. Dworkin, 'Introduction: The Moral Reading and the Majoritarian Premise', in R. M. Dworkin, *Freedom's Law* (Harvard University Press, 1996), 21–29; J. Waldron, 'The Constitutional Conception of Democracy', in J. Waldron, *Law and Disagreement* (Oxford University Press, 1999).

principle related to the powers that ought to be allocated to collective associations. Democratic bodies, exercising the power of the state, are a form of collective association. Once institutional qualifications are factored in, the European account of subsidiarity could be presented as a subset of the Catholic principle. However, the reverse does not hold: a supporter of the European principle would not be compelled to support the Catholic model. She might disagree with the Catholic account of the proper limits of the public realm; potentially arguing for a wider or narrower vision of the role of the state. On the one hand, a subscriber to the European principle might not share the Catholic admiration of private collective associations. She might think that pressure groups and trade unions are unrepresentative, and that their influence distorts rather than facilitates the democratic process. She might look on charities and families as an unreliable mechanism for protecting citizens' wellbeing, producing an unequal and unfair welfare system in which a fortunate few receive generous support, whilst others go without. On the other hand, a subscriber to the European principle might believe that the significance given to the private realm in the encyclicals was insufficient. Perhaps the state should only exercise power in areas that the citizen has agreed should be subject to collective action? These qualifications point to the exceptional modesty of the European principle. The Catholic principle seemed broad in the variety of political positions it could accommodate, but the European principle appears wider still. Theorists have found many different reasons to value democratic government, and supporters of subsidiarity could be drawn from a number of different backgrounds. But whilst the broad appeal of subsidiarity is a source of political strength, allowing it to gain broad support, it might also be presented as a weakness. Perhaps the European principle of subsidiarity is so modest, so widely supported, as to become an uninteresting truism? In short, is the principle trite?

III The Limited Modesty of Subsidiarity

The European account of subsidiarity is incompatible with some political positions: most obviously, those who are opposed to democracy, or who are set against the existence of the state, will have no use for the principle. Subscribers to such beliefs are rarely found in modern politics. But the European principle may also be set against a far more popular collection of political beliefs, a group that has had a considerable impact on writings about the European constitutional order: those of liberal nationalism.[52]

Recent years have seen a resurgence in interest in nationalism, championed by academics such as David Miller[53] and Yael Tamir.[54] Their work has been modified and developed within the European context by a number of theorists, in particular Joseph Weiler.[55] A national group is a collection of individuals bound together by mutual

[52] For a fuller discussion of the influence of nationalist thought, see Barber, *op. cit.* note 3 *supra*. See also T. MacDonald, 'Boundaries Beyond Boarders: Delineating Democratic "Peoples" in a Globalizing World', (2003) 10 *Democratization* 173 for a careful discussion of the differences between liberal nationalism and other, perhaps less controversial, forms of communitarianism.

[53] D. Miller, *On Nationality* (Oxford University Press, 1997) and D. Miller, *Citizenship and National Identity* (Polity Press, 2000).

[54] Y. Tamir, *Liberal Nationalism* (Princeton University Press, 1993).

[55] J. H. H. Weiler, *The Constitution of Europe* (Cambridge University Press, 1999), especially 'To Be A European Citizen: Eros and Civilisation'. See also N. MacCormick, *op. cit.* note 5 *supra,* 144–145.

recognition; a belief, whether justified or not, in common kinship.[56] Flowing from this is a belief that, in some sense, membership of this group is of normative significance: the moral obligations that exist between nationals are different, and, all else being equal, stronger than, those owed to non-nationals.[57] Liberal nationalists either endorse this heightened normative sensitivity, or, more cynically, regard it as close as imperfect folk can come to properly appreciating their obligations to each other: we ought to feel these obligations towards all humans, but weakness of will makes a fully developed moral sense impossible.[58] This heightened moral sense is sometimes presented as a necessary prerequisite for activities that will require sacrifices from some of the participants. Consequently, it has been argued that both democracy[59] and social welfare provision[60] require the support of a national group if they are to be stable and effective. More ambitiously it has been argued that these special ethical ties are crucial to an individual's sense of identity. The nation is one social institution, perhaps the primary social institution, that provides a normative framework within which we can define ourselves.[61]

When liberal nationalists address the question of the proper bounds of the democratic unit, they turn, unsurprisingly, to the principle of national self-determination for guidance.[62] Political recognition of the national group is required to protect or facilitate the benefits of nationalist sentiment.[63] The classical model of national self-determination presented itself as an argument for autonomy: nations should have complete political control over their territories. Modern theorists are more cautious. David Miller, noting that many national groups overlap and interrelate, avoids speaking of a 'right' to self-determination, but rather speaks of nations having a 'good claim' to self-determination, that will often have to be satisfied by political recognition that falls short of autonomy.[64] Some groups can only demand limited political power. National self-determination is no longer confined to questions of secession; it also addresses the division of power within the state: regional democratic boundaries should track national group boundaries. The core claim that a liberal nationalist makes is that national groups have an *inherent* claim to political power; that they are, by their nature, morally entitled to some form of self-government.

This paper is not the place to explore the many and varied arguments for national self-determination.[65] The purpose of this section is to contrast the claim to national

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[56] C. Geertz, 'The Integrative Revolution: Primordial Sentiment and Civil Politics in the New States', in C. Geertz (ed.), *Old Societies and New States* (London, 1963); B. Anderson, *Imagined Communities*, (Verso, 1983); S. Grosby, 'The Verdict of History: The Unexpungable Tie of Primordiality', (1994) 17 *Ethnic and Racial Studies* 164.

[57] Miller, *op. cit.* note 53 *supra*, ch. 3.

[58] *Ibid*., ch. 2.

[59] M. Canovan, *Nationhood and Political Theory* (Edward Elgar Press, 1996), chapter 3; N. MacCormick, 'A Kind of Nationalism', in N. MacCormick, *Questioning Sovereignty* (Oxford University Press, 1999), 167.

[60] Miller, *op. cit.* note 57 *supra*, 97–99.

[61] Tamir, *op. cit*. note 54 *supra*, ch. 1; C. Gans, *The Limits of Nationalism*, (Cambridge University Press, 2003), 39–49. MacCormick, *op. cit.* note 59 *supra*, 181–183.

[62] But see R. Brubaker, 'Myths and Misconceptions in the Study of Nationalism', in M. Moore (ed.), *National Self-Determination and Secession* (Oxford University Press, 1998), 235–241.

[63] MacCormick, *op. cit.* note 59 *supra*.

[64] D. Miller, 'National Self-Determination', in Miller, *op. cit.* note 57 *supra*, 81; D. Miller, 'Secession and the Principle of Nationality', in M. Moore, (ed.), *National Self-Determination and Secession* (Oxford University Press, 1998). See also Gans, *op. cit.* note 61 *supra*, ch. 3.

[65] For a good discussion see Gans, *op. cit.* note 61 *supra*, chs 1 and 2.

self-determination with the demands of the European principle of subsidiarity. Its conclusions will be limited: it will present subsidiarity and national self-determination as rival constitutional principles. As a result of this rivalry the adoption of subsidiarity by the authors of the European Treaty is significant: it amounts to a rejection of the principle of national self-determination, and also distances the EU from the ideologies advanced by the liberal nationalists. These claims will not show that liberal nationalism is, itself, wrong; the liberal nationalist could accept the thrust of this paper, but argue that the preference of the EU for subsidiarity was a mistake.

The crucial difference between the two principles is that the European account of subsidiarity attempts to tie decisions to those affected by them, whereas national self-determination ties political power to a national group—which may or may not map on to those affected by the power. This difference in approach has produced criticism from those wedded to the nation state: Marquardt has criticised subsidiarity in eschatological tones, portraying it as a corrosive notion that 'reduces the claim of rightful governance to a technocratic question of functional efficiency that will eventually undercut the nation-state's claims to loyalty'.[66] Self-determination and subsidiarity present rival answers to the same question: where should the boundaries of the democratic unit be drawn?

There are a number of objections that might be made to this sharp juxtaposition of subsidiarity and self-determination. Most obviously, the European principle of subsidiarity cannot ignore national ties: even if the belief in the heightened moral duties between nationals is mistaken, it may remain a powerful force within the state. As we saw earlier, one consideration that factored in to subsidiarity though the efficiency criterion was the health of the democratic institution. If the liberal nationalists are right, and only an assembly whose catchment area matches a national grouping will be able to form the basis of a vibrant democracy, subsidiarity and self-determination will often reach the same conclusions about the bounds of the democratic unit. However, the way in which the two principles reach this common conclusion will be significantly different, and will have broader implications for the identity of the democratic unit. Subsidiarity does not endorse the nationalist beliefs that it accommodates. In this context the approach of subsidiarity is similar to that adopted by consociational theorists. Consociational democratic structures provide forums and mechanisms whereby different national groups can share power, avoiding the peculiar peril majoritarian democracy presents to deeply divided communities.[67] For example, the constitutional structure of Northern Ireland is crafted to ensure neither Republicans nor Loyalists have complete control over the political process: power must be shared.[68] Advocates of the consociational approach need not endorse the divisions it accommodates, nor need seek to maintain the group cohesion that the structure reflects. Subsidiarity might mimic national self-determination, but it does not come with the baggage of that principle: it does not endorse the national sentiment it recognises. Furthermore, application of the principle of national self-determination implies a commitment to the value of nationalist attachment. Along with national self-determination comes a commitment to a host

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[66] P. Marquardt, 'Subsidiarity and Sovereignty in the European Union', (1994) 18 *Fordham International Law Journal* 616, 617.

[67] A. Lipjhart, *Democracy in Plural Societies* (Yale University Press, 1977), ch. 2.

[68] Northern Ireland Act 1998. See further: B. O'Leary, 'The Nature of the Agreement', (1999) 22 *Fordham International Law Journal* 1628; R. Wilford, 'Designing the Northern Ireland Assembly', (2000) 53 *Parliamentary Affairs* 577.

of other measures designed to shore up this sentiment: the state rests on the nation, and depends on this connection for its stability. Adherence to the doctrine of national self-determination will have implications for education, citizenship, and cultural policies. The advocate of subsidiarity need not subscribe to any of these further measures: the democratic unit and the national group may be congruent, but there is no commitment to the continued desirability of the connection.

This distinction between the two approaches is also evident when the one of the most telling objections to the regionalisation of power is addressed: the objection of parochialism. The British Labour Party long opposed devolution because it feared this would encourage richer regions to shirk their responsibility for poorer areas. Deprivation in Wales, for example, should be seen as a British problem: devolution risked it being perceived as a distinctively regional problem, the responsibility of the Welsh political community.[69] The principle of national self-determination might endorse such a conclusion: the duties that English nationals owe to each other would be different from, and superior to, the obligations that exist between the English and the Welsh. Subsidiarity, in contrast, does not commit itself to the view that the boundaries of democratic units reflect, or should reflect, our pre-existing obligations to each other. Whilst some moral obligations, in particular those relating to participation, will be created or altered by the introduction of a new democratic forum, it does not follow that the regionalisation of power pre-supposes an existing moral division. Those advocating Welsh devolution on the basis of subsidiarity, therefore, need not believe that this institutional shift reflects any redistributive obligations between the Welsh and the English, nor has any necessary implications for these obligations.

A second reconciliation that could be attempted would argue that national self-determination is a principle that goes to state autonomy, whereas subsidiarity relates to the division of power within the state. Such a combination might appeal to those who see subsidiarity as a principle solely of power allocation and not of institution creation. The first difficulty with this position is it is hard to see a principled reason why different approaches should apply at a state and sub-state level. Why should not smaller national groups call for limited regional power, why should they be confined to demanding secession? As Miller recognises, if national self-determination is endorsed at the state level, it will be hard to deny regional national groups some degree of political autonomy. Second, even if it were possible to be a state nationalist and a regional adherent to subsidiarity, there is no reason to suppose that this political mix is reflected in the identity of the EU. There is nothing in the Treaties to suggest the EU perceives itself as a nation, with subsidiarity accorded an internal role.

IV Conclusion

The European principle of subsidiarity is important because it is one of the key constitutional principles that serve to set the character of the EU. As a legal principle, a justiciable constraint on the power of the Community Institutions, subsidiarity has had little obvious effect. Perhaps daunted by the complicated political assessments the principle entails,[70] or, less charitably, perhaps disinclined to develop a principle that limits

[69] V. Bogdanor, *Devolution in the United Kingdom* (Oxford University Press, 1999), 150–152, 168–170.
[70] See generally: A. G. Toth, 'Is Subsidiarity Justiciable?', (1994) 19 *European Law Review* 268.

the centralisation of power,[71] the European Court of Justice has not made use of the principle. The degree to which subsidiarity has indirectly affected the measures advanced by the Community is unclear. But the principle stands as a declaration of how the EU perceives itself, and as the sort of political community the authors of the Treaties intended it to be. In particular, it represents a commitment to democracy, to de-centralised power and, most importantly, opposition to nationalist ideals of state legitimacy.

[71] See: J. Bednar, W. N. Eskridge and J. Ferejohn, 'A Political Theory of Federalism', in J. Ferejohn, J. N. Rakove and J. Riley, eds, *Constitutional Culture and Democratic Rule* (Cambridge University Press, 2001).