Europe before the constitution
The road to federalism and the economics of subsidiarity

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Abstract: It is frequently argued that, because of the prevalence of pragmatism and political imperatives, Europe has not followed the guidelines provided by well identified models of federalism, in particular the American one. Thus, in spite of the clear objective assigned to the integration process in the 1950s, the institutional status of the European Union remains uneasy to define. In this article, we argue that Europe has nonetheless developed its own, original but consistent, model of federalism. We try to decipher the assignment of prerogatives among the different institutional levels by associating them with the various types of subsidiarity which co-exist in Europe. To this purpose, we use an agency framework and demonstrate that, from 1950 to 2000, Europe has developed between lateral and upwards subsidiarity, initially building on the first but progressively tending towards the second.

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Jean-Michel Josselin and Alain Marciano

Introduction

The Draft Treaty presenting a Constitution for Europe, first presented in October 2002\(^1\) and then adopted by the plenary session of the European Convention on 13 June 2003\(^2\) is a further contribution to the fifty year old ongoing debate about the institutional framework of the European “Union”. Its effective status indeed remains uneasy to define in spite of the clear objective assigned in the 1950s to the integration process. For instance, Jean Monnet explicitly stipulated that the first supranational integrated community should be a foundation stone and a first step towards a “federation”. The Schumann Plan of 9 May 1950 also referred several times to the aim of the “federation”. Further, one may quote the resolution the German Bundestag of 26 July 1950 passed virtually unanimously (against only four communist votes) in favour of a “European federal pact”, which would create a “supranational federal authority”. This objective, namely of a European federation, has not yet been reached. In the eyes of many political scientists, European institutions are still “hybrid” (Koslowski, 1999), which conveys the idea that the European institutional structure is uncompleted, that the rationale behind the delimitation of the powers assigned to the different institutional levels is not clear. Among other points, the increasing centralization of responsibilities at the higher European level does not seem to be linked to any rational, deliberative and contractarian process.

One important explanation that is put forward to justify this defective structure is that the European integration process has been guided by pragmatism and constrained by political imperatives. This is, for instance, the case with the statement made by Piris, legal adviser of the Council of the European Union and of the intergovernmental conferences which negotiated and adopted the Treaties of Maastricht and Amsterdam: “It is for political
reasons and pragmatically that the complex system of governance of the EU and its many complicated decision-making rules have been established and refined by its Member States in successive treaties” (2000, p. 43). This lack of rigor has resulted in the fact that “the path taken by European integration has not followed any pre-established Cartesian model” (ibid.). The reference to the 17th century French philosopher, René Descartes, serves to indicate that European institutions have not been built in following the guidelines provided by well identified – in particular the American – models of federalism. As notes Buchanan, echoing the preceding quotation, “Europe, as observed does not correspond to the theorist’s model for political federalism” (1996: 253). Thus, the many differences which separate the European model of “federalism” from possible counterparts would lead to the negative and pessimistic conclusion that European institutions have no precise or recognizable form.

This analysis however suffers from a methodological limit. It is indeed based on an evaluation of the actual constitutional status of the European Union with regard to the external criterion of pre-established models only. A further criterion that should be used is that of the internal consistency of the process. From this perspective, even if it may not be considered “Cartesian” and without denying the importance of political pressures and compromises which indeed existed, we argue that the European integration process has nonetheless been quite consistent. We then demonstrate that Europe has indeed not followed those pre-established models but has invented its own form of federalism in which the assignment of prerogatives among the different institutional levels is a mix between federalism and confederalism. To some extent, our argument overlaps with the one put forward by Weiler: “to use somewhat archaic language of statecraft, institutionally Europe is closer to the confederal than it is to the federal” (1999: 1). We extend this argument in two directions.

First, we use the Public Choice approach to the analysis of the European institutions, thereby following Mueller (1995), Vaubel (1997, 1999), Schmidtchen and Cooter (1997) and Salmon (2003), among others. The analytical tool we rest on is the agency theory. We will show how it helps clearly delineate the confederal and federal regimes. Second, we link these agency relationships to the various acceptations of the concept of subsidiarity. That will help understand the allocation of prerogatives among the different institutional levels. Indeed, we argue that subsidiarity should be at the core of the evaluation of the
European constitutional status for it allows identifying the specific traits of an emerging federation à l’européenne. Subsidiarity provides a grammar of the assignment of power from the citizens to various forms of government. It primarily refers to the delegation of tasks to the smallest functional unit (Backhaus, 1997, 1999). If this downwards subsidiarity fails to be efficient, subsidiarity can then be implemented in two different ways: citizens can first induce their governments to cooperate, in which case subsidiarity is lateral. A historical instance of lateral subsidiarity is provided by the American Articles of confederation. Secondly, if this institutional arrangement appears to be “destitute of energy” (Federalist Paper 15, 1987: 147) or Pareto inefficient, cooperation can be searched with a higher level of government, in which case upwards subsidiarity prevails. In the United States, the Convention of Philadelphia prepared such a move. Section 2 reviews these three cases and links them with the corresponding agency relationships governing the assignment of powers. We then demonstrate that the European Union has developed between lateral and upwards subsidiarity, initially building on the first but progressively tending towards the second. The concept of subsidiarity illuminates the evolution of the agency relationships that have up to now governed Europe. Section 3 depicts this evolution. Section 4 gives concluding comments.

2. Which federalism? Federalism and the implementation of subsidiarity

Subsidiarity primarily refers to the delegation of tasks to the smallest functional unit of government. In this case, it rests on a direct agency relationship between the citizens and their agent (2.1). However, when a given level of government or “province”, to use the words of Christian Wolff (Dreschler, 1999) does not efficiently carry out its task, it can turn to two alternative institutional arrangements. First, a covenant can be built on a bargaining game between neighbouring provinces. Negotiations among them organize the assignment of the provision and financing of national or supra-provincial public goods. Lateral subsidiarity thus provides the framework for confederation. The upper level of government remains the endogenous and not necessarily stable outcome of this ongoing bargaining (2.2). Thirdly, the federal government may also be directly granted a constitutionally defined set of prerogatives, in order to find ways of overcoming spillovers and to provide
national public goods. Upwards subsidiarity is the logical consequence of the expected efficiency of the federal level (2.3).

2.1. Downwards subsidiarity: Assigning power to lowest levels of government

In a world of constituted and sedimentary nations, downwards subsidiarity is mostly a reassignment of prerogatives from higher to lower levels of government. The process of downwards delegation may receive two different forms: delegation can be made on a geographical or on functional basis. The former perspective views delegation as related to a territoriality principle while the latter refers to a principle of personality. In both cases, the agency is a one-level relationship as in the Tiebout model.

2.1.1. Geographical assignments

A first form of downwards subsidiarity is typically exemplified by devolution. This transfer of functions or prerogatives from a higher level of government to a geographically defined lower tier (Scotland for instance) must be permanent and of constitutional rather than administrative nature. Otherwise, it would only be a matter of decentralization taking place in a unitary structure. It does not mean, of course, that decentralization cannot promote efficiency: On the contrary, it does provide strong incentives for governments to act efficiently (Salmon, 1987, 2000), but the constitutional setting is obviously different. The rationale for giving “regions” constitutional powers has many facets. A major argument rests on a classical political economy perspective. Hume shows how moral sentiments are scarce feelings usually restricted to areas of nearness. What we could label the “topology of Humean sympathy” defines territories ruled by local norms (Josselin and Marciano, 1999; forthcoming).

2.1.2. Functional assignments

A second form of downwards subsidiarity is provided by the concept of functional federalism (Casella and Frey, 1992). The corresponding idea of Federal Overlapping and Competing Jurisdictions (Frey, 1996; Frey and Eichenberger, 1996) is an original answer to imperfect mobility and the relatively inelastic supply of geographical jurisdictions. FOCJs view competition between institutions providing collective services on a functional rather
than territorial basis, allowing to think about government without territorial monopolies as something else than a utopia (Frey, 2001). Jurisdictional competition à la Tiebout is replaced by functional competition. There is no longer a necessary link between ownership of governmental shares (understood here as shares in the firm or the organization that provides a given collective service) and residency. The Tiebout model finds here an important extension, even if we must bear in mind the limits of the market metaphor.

2.1.3. A one-level agency relationship

Beside their differences, these two forms of downwards subsidiarity share one major feature: Competences and responsibilities are primarily assigned to “local” governments and the corresponding tasks are thus delegated to the smallest functional units. Thus, downwards subsidiarity typically fits the definition of the Tiebout setting. From this perspective, there is only a one level agency relationship, in which the citizens are the primary principals of their local governments (acting as primary and sole agents). The situation is described by figure 1.

[Insert figure 1]

In this perspective, each jurisdiction has the capacity to carry out its task with a close match between its function and the means and responsibilities to serve it (Backhaus, 1999). Historical instances that feature (nearly) pure competition among local governments are nevertheless quite rare. An important exception is the Cameralist period in the history of Germany (Backhaus and Wagner, 1987). The not so wild “wild west” may be another instance of applied competitive mechanisms (Anderson and Hill, 1977). Direct accountability of local rulers, a strong sense of ownership of government by the citizens, all contribute to make local governments highly responsive to the people’s will. However, the making of jurisdictions often has “more to do with the accidents of a capricious history than with the shifting dictates of economic rationality” (Donahue, 1997: 75). Therefore, many reasons (the whims of history, the slowness of institutional change and the associated transaction costs, for instance) reduce the perfect elasticity of the supply of jurisdictions. As a consequence, each government is no longer a competitive supplier but considers itself as a Cournot competitor (Inman and Rubinfeld, 1997b: 82). Furthermore, even if this supply were perfectly elastic, citizens may not all have the same opportunity to move from one
jurisdiction to another. Heterogeneity in the elasticity of location of individuals, imperfect or differentiated mobility, increase those effects and all the more reduce the scope of Tiebout competition. Finally, there are some situations of market failures (pure public goods, externalities) which most often require an extension of the realm of federalism beyond jurisdictional competition. Those reasons explain the impossibility for the Tiebout model to comprehend all the aspects of federalism.

2.2. Lateral subsidiarity: Assignment of powers as a bargaining process

The allocation of power in a context of lateral subsidiarity rests on a two-level agency relationship which mainly develops on bargaining over prerogatives.

2.2.1. Assignment of power in a two-level agency relationship

Lateral subsidiarity can be defined as a process of assignment of rights and prerogatives among jurisdictions located on the same institutional level. These institutions bargain in order to define which public goods the federal representation must provide. Therefore, a confederation can be defined as an ongoing process of negotiation about the prerogatives that are granted to it. More precisely, the different jurisdictions bargain and negotiate over the different tasks to be assigned to the central institutional level and those which have to remain at the local level. This form of federalism can thus be represented by an agency relationship in which the local jurisdictions delegate certain tasks to a central agent, the confederate state. Therefore, there exist two levels of agency. At a first level, the citizens as principals delegate tasks to their respective agents, the local jurisdictions. The latter, at a second level, are the principals of their own agent, the central confederate state (cf. figure 2).

[Insert figure 2]

2.2.2. The working of a confederation

A common goal of course enhances the benefits of lateral subsidiarity. In economic terms, to implement the shared objective amounts to providing public goods, which is the case for instance with defence. The first step of the process of confederation is thus a matter of
bargaining about the level and financing of such a good. However, getting together and
joining forces is one thing, providing the material conditions to fulfil this goal is quite
another. Lateral subsidiarity cannot dispense with considering the expenditure side and the
revenue side of the common project. The ensuing bargaining amounts to a discussion in the
Coasian spirit: Inman and Rubinfeld (1997a, 1997b) give a detailed and insightful
interpretation of confederacies in these terms. This bargaining is unstable by nature. Even if
the states have agreed upon a given level of public services that the federal representation
must provide, the very nature of the agreement makes its enforcement problematic. As long
as the union keeps a confederate form, the federal level will not be granted with compelling
prerogatives. But then, the sharing of the cost of the public good comes under usual
problems of free-riding. Authoritarian mechanisms may be effective but they would change
the nature of the initial agreement, transferring so much power to the federal representation
that the agency relationship may be substantially modified, to the detriment of the
principals. Incentive-compatible mechanisms that could prevent free-riding would better
suit the spirit of the confederation, but the translation of quite sophisticated economic
methods in constitutional terms may be tricky. One may also hope that as the public good
provision game is repeated, even the most hardened egoists will learn sympathy, which
brings us back to Hume. However, establishing “a firm league of friendship” (to use the
wording of the Articles of Confederation, 1781, Article III) may not be so straightforward a
task, as Hume himself warned.

All this makes the confederation process an ongoing bargaining which nonetheless may
not be without advantages. For instance, fluctuating objectives due to changing
circumstances may require this flexibility. Furthermore, since lateral subsidiarity rests on
converging objectives and constraints for the joining states, preference revelation may not
be too acute a problem. However, the prevention of free riding and the enforcement of cost-
sharing decisions cannot be settled so easily – all the more so that players may display
different bargaining powers. The plasticity of the confederate contract may ensure potential
responsiveness but not necessarily actual decisiveness, hence the temptation of a more
directly centralised federalism.
2.3. *Upwards subsidiarity: Assigning power to higher levels of government*

While citizens are supposed to always remain primary principals, upwards subsidiarity reverses the respective prerogatives of local and central jurisdictions.

2.3.1. Assignment of power in a reversed two-level agency relationship

The assignment of prerogatives to the federal government is first of all justified on the basis of economic efficiency. While a confederation relies on an ongoing process of bargaining about the prerogatives that are granted to the agents, a federation rests on a constitutionally given delimitation of the competencies of every level of government. Once again, in contrast with the Tiebout model and downwards subsidiarity, an upwards assignment of prerogative can be represented by a two-level agency relationship. However, there are major and crucial differences with a lateral assignment of power. Indeed, citizens remain the first principals and, in the first place, delegate tasks to the central federal government. But then, the latter assigns some competences to the local jurisdictions which are now the agents of the central power (cf. figure 3).

[Insert figure 3]

2.3.2. The working of a federation

Upwards subsidiarity is justified by the existence of pure public goods or spillover effects covering the whole territory of the federation. However, the assumption of efficiency does not necessarily hold since when the assignment of prerogatives is fixed, there is no competition in the provision of public services, hence the possible bureaucratic or rent-seeking behaviours that have been emphasized by public choice scholars. On the other hand, the assignment itself of prerogatives between levels of government is not as straightforward as it may seem, and is also susceptible to pressure-group manipulations. This lack of competitive properties together with a possible lower responsiveness may provide incentives to switch back to downwards subsidiarity.

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The economic interpretation of the concept of subsidiarity gives a framework in which the various forms of federalism can be assessed. It then remains to analyze the way
subsidarity has actually been implemented in Europe since its creation. This is the purpose of the next section.

3. Subsidiarity in practice: A positive assessment of European federalism

Federating nations necessarily differs from federating a nation. In the latter case, the feeling of membership in a same entity pre-exists and underlies the process even if this may not go without tragic periods, as is illustrated by the history of the USA. The European enterprise consists in the gathering of independent nations into a single political body, which is rather different and, in some respects, more complex. Federating nations may require the harmonization of different political systems and legal orders. There may already be federations as well as unitary states. Countries of common law tradition may have to join with statute law nations. The requirements constraining the political entrepreneurs who lead the process of federating nations are thus likely to be tighter than those that frame the federation of a nation. A manifest instance of the former type of situation is given by the ongoing process of integration in Europe. In this section, focus will be put on the way subsidiarity has been organized in the European Union. In order to analyze it, one could be tempted to parallel the situation in Europe with the American constitutional history (Boom, 1995; Vibert, 1995; Josselin and Marciano, 2001). However, beside obvious and sometimes striking similarities, there are also substantial differences among which the major one is the fact that Europe has had difficulties in choosing between a confederate and a federate institutional structure. Up to now, it has always been staying half-way between the international legal order of a confederacy, and the constitutional order of a federation (3.1). But a shift from an international to a constitutional legal order necessarily means a change in the agency relationship (3.2).

3.1. The economics of an international legal order (1950-1962)

At the end of World War II, some political entrepreneurs (Jean Monnet or Robert Schumann, for instance) were led to consider the possible melting of the European nations into a unified political entity. However, the not so distant conflict made it impossible to build it at once. Europe was thus created as an international organization ruled by
international public law. To study it, the approach adopted here uses the agency theory to understand the way powers and prerogatives are assigned in this international order. As such, Europe displays some of the characteristics of a confederacy – although the word has rarely been used as a label for the European institutional structure – as well as features of a federation, making it a hybrid system.

3.1.1. A confederation at work

The prerogatives granted respectively to the member states and to the supra-national level depend on the legal nature of the treaties upon which the European Union is progressively built. Among others, Schilling (1996) or Weiler and Halpern (1996) consider that Europe is created as an international legal order, thus conveying the idea that the first treaties (European Coal and Steel Community or ECSC, European Economic Community or EEC, European Atomic Energy Community or EURATOM) are not conceived as a constitution designed by an autonomous and original constituent power. Admittedly, other legal scholars interpret ratification procedures by the national legislatures as constituent acts. In this perspective, the treaties could be seen as forming the body of a constitution, and thereby European citizens could be considered as the source of power; National legislatures would be the vehicle of this sovereignty. In economic terms, the individuals would be the principals; the institutions of the Community would be their agents and by no means those of the states. However, nothing indicates that ratification does amount to exercising a real constituent power. It is rather intergovernmental conferences that have finalized documents drafted mainly through diplomatic bargaining. An international organization is indeed created by the first treaties, “but with no measure of independence or power to eradicate its subordination to its States parents and its subjection to the classical laws governing the States’ treaty relations” (Weiler and Halpern, 1996: 8). Thus, in the international legal order, the member states are in the position of principals delegating some tasks to their agents, the European supranational institutions. They remain the “Herren der Verträge” (the masters of the covenants), to use the German phrase.

An opinion put forward in 1957 confirms and makes this interpretation clearer: “[t]he Treaty [ECSC treaty] is based upon delegation, with the consent of the Member States, of sovereignty to supranational institutions for a strictly defined purpose […] The legal
principle underlying the Treaty is a principle of limited authority” (joint cases 7/56 & 3-7/57, Dineke Algera et al. v. Common Assembly of the European Steel and Coal Community, 1957, E.C.R 69, opinion of Mr Advocate General Lagrange, 69: 82). As will be repeatedly stated in further decisions, the European Community is granted with limited competencies, the extent of which is determined by diplomatic bargaining, treaty after treaty. This is the first evidence of lateral subsidiarity displayed by the delegation process in the original treaties.

A second principle of lateral subsidiarity is of major importance: Member states must have a veto power. Such is the case in Europe from its earlier stages to the 1986 Luxembourg compromise. The decision making process is at that time based on the rule of unanimity. States must bargain to reach an agreement. This requirement is quite effective. For instance, it causes the failure of a treaty establishing a European Community of Defence. Drafted in 1952, the treaty is ratified by only four out of six countries (Italy and France reject it). Beyond strategic and international relations, this is once again an illustration of the difficulty of providing a public good when the enforcement mechanism is weak or even absent.

The Luxembourg compromise is the first departure from the confederate setting. It brings about incentives to shift from bargain federalism to a more centralized vision. However, this shift remains partial and the move toward a federation quite hesitant, which blurs the original design of the founding fathers of Europe.

3.1.2. A federation in gestation

The European legal order undoubtedly possesses characteristics of an international organization, thus being based on principles of lateral subsidiarity. Nevertheless, from its very inception, it contains the seeds of a federation. In other words, the European community is created as a confederation with some already federate features. In particular, subsidiarity is both of a lateral and of an upwards type.

Upwards subsidiarity shows through in many instances. The European Coal and Steel Community treaty grants a High Authority with compelling prerogatives. Article 189 of the Treaty of Rome creates a category of norms called regulations “that do not require national
implementing measures but are binding on the states and their citizens as soon as they enter into force” (Mancini, 1991: 181). Another significant point is the creation of a European Court of Justice. The existence of a supreme court can be justified by using two arguments. The court is first a means to check the other components of government. Secondly, law is a public good whose effects must be controlled at the highest level, even at the cost of possibly as much centralization as in a unitary framework. However, these arguments are somewhat misplaced when they are put forward in a strictly confederate framework. A court of justice, within the setting of an international legal order, can be viewed either as a third party enforcer, in which case it solves international legal conflicts by using international public law, or as the court of a federal system. Obviously, subsidiarity does not receive the same interpretation in the two systems. The way in which the European Community has evolved seems to suggest that the second path is being followed, breeding a constitutional order and its subsequent assignment of prerogatives.

3.2. From an international to a constitutional order: the partial federalisation of Europe (1963-2000)

The set of original treaties (ECSC, EEC, and EURATOM) has rapidly been interpreted by the European Court of Justice, according to what were supposedly the intentions of the framers of the European Community. The major decision of the ECJ in this perspective is the prominent case Van Gend & Loos v. Nederlandse Administratie der Berlastingen (case 26/62, 1963, E.C.R 1). The court points out what can be viewed as a central characteristic of the Treaty of Rome: “This Treaty is more than an agreement which merely creates mutual obligations between the contracting States”. It would then belong to a legal category quite different from the one - international public law - initially conceived during the early stages of the Community. Europe is no longer an international legal order but turns into a constitutional legal order. Now, while from the perspective of international law a supranational government remains subordinated to its creators, the reverse occurs in a constitutional order where the constituent units subordinate themselves to their creation:

“Whereas the subjects of a treaty (or a treaty-based organization) are the states composing it, the subjects of, say, a federal constitutional order are not only its
constituent states, but also its common citizenry. This difference is thought to create a
different level of legitimacy for the constitutional order, one where its legitimacy
does not come only from the consent of sovereign states but from the broader and
more direct consent of the citizens of those constituent units. Typically, the
international organization is governed by international law, and the constitutional
order by its own municipal law” (Weiler and Halpern, 1996: 10).

In other words, the evolution from an international legal order to a constitutional one
creates a “municipal law” endogenous to the contract, whereas the former agency relation
was set in a largely exogenous juridical framework, that of international public law.

3.2.1. The expanding attributes of a federation

From an economic perspective, the argumentation put forward by the Court in the Van
Gend en Loos case is an acknowledgement that law is a public good which must be
provided at the central level rather than at the local or national levels. Thus, the existence of
a “common legal order” firstly means that law has to apply directly and uniformly within
each country member of the Union, and secondly that state legislatures and judiciaries are
only part of this legal order. No local or national power should interfere with the
application of law over all the European countries. The process of legal harmonization,
particularly because of the doctrine of supremacy of Community law, is a perfect
illustration of such a conception.

In economic terms, the move from an international legal perspective to a constitutional
framework necessarily implies a change in the prerogatives given by the agency contract.
This modification affects the basic nature of the agency relationship. This is clearly put
forward by the “mutation of competencies” (Weiler, 1991) in the European Community
which results from the progressive constitutionalization of treaties. The European Court of
Justice thus displays a largely noticed “judicial activism” (see for instance Burley and
Mattli, 1993; Garret, 1992; Stone Sweet and Caporaso, 1998), all the more so that there is
no constituent assembly. Successively using the legal doctrines of supremacy, direct effect,
implied powers and pre-emption (Stein, 1981; Mancini, 1991), the Court masters this
process, crowned by the definition of the Treaty of Rome as the European “basic

This increase in the prerogatives or power of the Court illustrates the move of the European Union towards a more centralised and federative structure. This evolution is all the more visible that it implies a decrease in the prerogatives of the original principals, the member states. One example is given by the seemingly disappearance of the principle of enumerated powers (Weiler, 1991). As a result, “[t]here is simply no nucleus of sovereignty that the member states can invoke, as such, against the Community” (Lenaerts, 1990: 220). Another example is provided by the introduction of the co-decision procedure in the Amsterdam treaty. This procedure is viewed as a way to check and balance the power of the Commission and Parliament and to encourage competition between them. Now, co-decision rather results in an increase in the power of the Court. Cooter and Drexl (1994) show that whenever the European parliament gets more power, the discretionary prerogatives of the Court increase, each time to the detriment of the Commission. Therefore, the co-decision procedure implies a shift of power from the member states to the European level. In different words, it increases the federal centralisation of the Union. There nevertheless remain some confederate features.

3.2.2. Some lasting attributes of a confederation

The evolution of the European institutions takes the form of a transformation of the original treaties in a constitutional setting that has never been conceived by a constituent assembly, but rather implemented through the judicial activism of the Court. The corresponding modification of the agency relationship informs us about the respective prerogatives of the member states and the central, supranational institutions. However, even if upwards subsidiarity becomes more and more important, the constitutional framework developed in the European Union still largely includes elements of lateral subsidiarity. The partial modification of the agency relationships illustrates it. Indeed, a real and effective move from a confederation to a federation would have required to straightforwardly replace the principalship of the member states vis-à-vis the Union by that of the European citizens. Such was the way in which the Articles of Confederation were abandoned for a constitution in which the primary principalship of the people of America was now constitutionalized,
even if advocates of the states’ rights doctrine rejected the notion sometimes vehemently. Now, the Court did not envisage substituting another principal to the member states. The European Court of Justice only partially establishes a new agency relationship by adding a second source of principalship. This transformation has its origin in the Van Gend en Loos case. The Court states that the Community is

“a new legal order of international law […] the subjects of which comprise not only the Member States, but also their nationals”, and adds that “the task assigned to the Court under Article 177, the object of which is to secure uniform interpretation of the Treaty by the national courts and tribunals, confirms that the States have acknowledged that Community law has authority which can be invoked by their nationals before their courts or tribunals”.

Here, the point is not only that the Court reminds the member states, the initial principals, that their authority is now limited but mainly that there is a new legal order of constitutional nature whose subjects are not only the member states, but also the citizens.

3.2.3. Subsidiarity and the management of ambiguity

The role of subsidiarity, as introduced by the Maastricht treaty, must be stressed as a decisive element illustrating the intricate agency setting which results from the Van Gend en Loos case. The subsidiarity principle has been criticized for being a legal rule, lying in the hands of the European Court of Justice, rather than a political one. Accordingly, it has been viewed as a cause of the increasing power of the European institutions. Our interpretation is that its nature and the way it has been used is a means to find some balance between the various claims for principalship. The second section of Article 3B explains that “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”. This shows how the principle of subsidiarity according to Article 3B is focussed on the relationship between Community and member-states. From this perspective, the subsidiarity principle is a way to reduce the discretionary power of the European Community and to reinforce the role of the member states. As such it has been considered as the word that saved Maastricht (Cass, 1992) and viewed as a
principle likely to “safeguard the Member States national identity and preserve their competencies” (German Federal Constitutional Court, Maastricht decision). On the other hand, the Court often remains in its position of final arbitrator, particularly when member states fail to comply with European directives. An example of it is the 1991 Francovich case (Andrea Francovich and Danila Bonifaci and others v. Italian Republic, joined cases C-6/90 and C-9/90, E.C.R 1991) by which individuals can claim compensation before a national judge after suffering damage resulting from a lack of implementation of a European directive at the state level. In other words, member states are the primary agents of the citizens when subsidiarity according to article 3B is implemented (when member states demonstrate that they can better achieve certain goals), whereas they are the secondary agents of the European level when the Court decisions like the Francovich case emphasize the duty of member states vis-à-vis European decisions.

Though citizens are now formally part of the covenant through the Van Gend en Loos case, whether we should refer to figure 2 or figure 3 in order to describe principal-agent relationships in the Union remains unclear, even if the activism of the Court tends to foster the secondary principalship of the Union. The co-existence of two possible agency settings obviously has important consequences on the assignment of rights between the states and the supranational power. It certainly contributes to make the assignment of powers unstable, but it also guarantees a certain level of competition between institutions. At the same time, it confirms that federating nations cannot be a matter of sheer tabula rasa.

4. Conclusion

Federalism is usually a quite successful way of accommodating pre-existing heterogeneity in preferences (Mueller, 2001). Unitarianism would rather smooth out this heterogeneity by inculcating common values into individuals. This is the essence of the Rousseau conception of the unitary state (Salzberger and Elkin-Koren, forthcoming). The first solution may foster diversity, the second may lessen (sometimes repress) it. In both cases, preferences are to some degree endogenous. Europe cannot avoid this tension, perhaps all the more that it has to federate constituted nations. Cultural differences (spatial or functional heterogeneity
in preferences) have been reified into institutions, and these institutions cannot but matter when it comes to building the common institutional structure.

That may be one of the reasons why, in spite of the clear objective assigned in 1950, the institutional status of the Union remains uneasy to characterize. To explain the problem, many scholars have stressed the pragmatism of an integration process dominated by political imperatives. It should have been preferable to follow well identified – in particular the American – models of federalism. Now, these criticisms fail to see that the process of European integration, although non-Cartesian, has certainly been consistent. We have argued, in this paper, that Europe has invented its own form of federalism. Using an agency framework and building upon the concept of subsidiarity, our demonstration has consisted in showing that, from 1950 to 2000, the European Union has developed between lateral and upwards subsidiarity, initially building on the first but progressively tending towards the second. Thus, pragmatism does not mean inconsistency. While the European member states are discussing the adoption of a constitution, it seems important to acknowledge that Europe has followed its own, original and consistent, path.

The trend towards upwards subsidiarity in Europe is a way of building common values. However, taking into account irreducible heterogeneities seems to be much more problematic. Europe may have succeeded in federating its nations. It still has to give its primary principals the opportunity to invent institutions of downwards subsidiarity whereby the citizens seek delegation to the lowest possible level of government without any further delegation (this lower level may of course cover quite large prerogatives). Functional federalism can help achieve it. It also hints at a major characteristic of lateral and upwards subsidiarity that could be questioned. Up to now, federalism is mostly conceived as a two level structure of government. In the case of lateral subsidiarity, primary principals delegate to the intermediate level (member states) who can in turn delegate to the federal level (secondary agency). As far as upwards subsidiarity is concerned, primary principals seek delegation directly to the highest functional level (primary agent) who in its turn can delegate to the states (secondary agents). These two-level structures may not be the only way forward.
References


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2 See The European Convention Secretariat, 18 July 2003, CONV 850/03, Draft treaty establishing a Constitution for Europe. The draft was presented to the European Council of Thessaloniki, June 20, 2003, which decided that “the text of the Draft Constitutional Treaty is a good basis for starting in the Intergovernmental Conference“ (para 5).
**Figure 1:** Agency relationships in a Tiebout framework (downwards subsidiarity)

**One level of agency**

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(Geographical or functional agents)

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**Figure 2:** Agency relationships in a confederate framework (lateral subsidiarity)

**First level of agency**

Primary principals: citizens

Primary principalship ↓

Agents: jurisdictions (member states)

**Second level of agency**

*Secondary principals:* jurisdictions (member states)

Secondary principalship ↓

Agent: federation
Figure 3: Agency relationships in a federate framework (upwards subsidiarity)

First level of agency

Citizens: primary principals

Jurisdictions (member states): *secondary agents*

Federation: primary agent and secondary principal

Second level of agency