

Two (or Three) Tales of Subsidiarity

Thomas O. Hueglin
Wilfrid Laurier University

In its 2011 *Securities Reference*,ⁱ the Supreme Court of Canada elaborated on what it sees as the cooperative nature of Canadian federalism. As the Court stated, it found itself in agreement with the “‘dominant tide’ of modern federalism by having moved its reasoning, over time, “toward a more flexible view of federalism that accommodates overlapping jurisdiction and encourages intergovernmental cooperation” (SSC 66: 57). While affirming that this “promotion of cooperative and flexible federalism” must nevertheless respect the “constitutional boundaries that underlie the division of powers” (ibid. 62), the Court suggested that the “balance” as intended by the constitution might best be served by a “cooperative approach” in order “to ensure that each level of government properly discharges its responsibilities to the public in a coordinated fashion” (ibid. 9).

An indication of what the Court meant by balance can be detected in its repeated references to the principle of subsidiarity over the past twelve years (Arban 2013). In the first of these, the 2001 *Spraytech* decision, the Court held that: “matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity” (SCC 40: 3).

Although the Court makes no mention of it, its understanding of subsidiarity very closely follows that officially enshrined in the Treaty on European Union:ⁱⁱ “Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level” (Article 5(3) TEU).

Subsidiarity is not often mentioned in the context of Canadian federalism (e.g. Hogg 1998, Brouillet 2011, Newman 2011), and even less so in the context of American federalism (e.g. Bermann 1994, Calabresi and Bickford 2011). Yet it has become a topic among Catholic conservatives in the

United States. Rick Santorum, one of the contenders for the Republican nomination in the 2012 presidential election, used it to defend his involvement in President Bill Clinton's 1996 *Personal Responsibility and Work Opportunity Reconciliation Act*, which allowed contracting out welfare services to charitable, religious and other private institutions (Gerson 2012). And the Republican vice-presidential nominee in that election, Paul Ryan, equated it with federalism, elaborating on its meaning as "having a civil society" in which the common good is advanced "through our civic organizations, through our churches, through our charities, through all of our different groups where we interact with people as a community" (Christian Broadcasting Network 2012).

So here we have two tales of subsidiarity: the Supreme Court of Canada employs it as a principle guiding the allocation of powers and authority between different levels of government according to considerations of effectiveness, distinctiveness and diversity; American Catholic conservatives see it as a protective shield for civil society. In other words, while the Court's view aims at deciding upon the appropriate allocation of public decision-making (public-public), Catholic conservatives have in mind what they see as an appropriate division of authority between state and society (public-private).

As will be elaborated below, these are the differences between the European Union model of subsidiarity as reflected in the decisions of the Supreme Court of Canada, and a Catholic model of subsidiarity as derived from Catholic social doctrine (similarly Barber 2005). It is a distinction not often made as nearly the entire literature on subsidiarity reproduces as standard wisdom that the principle of subsidiarity has its conceptual roots in Catholic social doctrine (e.g. Hogg 1993: 341, Burgess 2006: 174). The distinction is important, however, because it delineates fundamental philosophical differences and their consequences for the organization of politics and society.

In a way, these differences go all the way back the Thomistic reception and transformation of the Aristotelian *Politics* at the end of the Middle Ages. By translating Aristotle's definition of man as a political being (*zoon politikon*) into a social animal (*animal sociale*), Thomas Aquinas redefined citizenship. A good citizen no longer was one who actively participated in public affairs but one who looked after his own affairs (Arendt 1998: 23; Habermas 1972: 54). This early transformation still elucidates the differences in the conceptualization regarding the boundaries of the political and, in this instance, the meaning and reach of subsidiarity. In the Aristotelian political tradition, subsidiarity is about the effective and proportional allocation of pluralized

public authority. In the Catholic understanding and its Thomistic distinction of public and private as “two categories of society,” (Aroney 2007: 186), it is predominantly about the protection of private society from absorption into the state.

Catholic Subsidiarity

Catholic social doctrine is primarily contained in three papal encyclicals,ⁱⁱⁱ *Rerum Novarum* (1891), *Quadragesimo Anno* (1931), and *Centesimo Anno* (1991). The first of these, *Rerum Novarum*, was occasioned by class conflict and the spectre of socialism at the end of the 19th century. Pope Leo XIII defended private property as “in accordance with the law of nature,” and social inequality as “far from being disadvantageous either to individuals or to the community.” But he also justified trade unions as legitimate social organizations for the negotiation of working conditions and a “frugal living.” Human conduct, he admonished, must be guided by freely self-organized Christian values of mutual help and “charity.” The state, on the other hand, must exercise restraint, “the principle being that the law must not undertake more, nor proceed further, than is required for the remedy of the evil or the removal of the mischief.”

In *Quadragesimo Anno*, Pope Pius XI reaffirmed the importance of self-organized “social governance,” which he now saw as crushed between the twin evils of the time, “the evil of what we have termed ‘individualism’,” and, as its corollary, the absorption of “that rich social life which was once highly developed through associations of various kinds” into the “new syndical and corporative order” of the (Italian fascist) state. Under conditions where “there remain virtually only individuals and the State,” there was no room for a common good based on “Catholic principles and their application.” 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.” Those “in power” therefore should observe “the principle of ‘subsidiary function’” by which a “graduated order is kept among the various associations.”

Centesimo Anno, finally, was written after the collapse of communism in Eastern Europe. Socialism or fascism no longer was an issue. Instead, Pope John Paul II turned to the evils of the modern welfare state. But the pope did not go as far as to proclaim an end of history: the triumph of liberalism did not mean the end of “marginalization and exploitation.” Consequently, while defending subsidiarity as a principle according to which “a community of a

higher order should not interfere in the internal life of a community of a lower order,” which now meant that the state ought to limit itself to “creating favourable conditions for the free exercise of economic activity,” he also attributed to the state an active role of “defending the weakest” according to a “principle of solidarity.” Yet as his predecessors, he primarily saw that commitment to solidarity anchored in social organizations or “networks” beyond “state and market”, where alone the true culture of Christian solidarity and peace can take hold.

The use of subsidiarity in Catholic social doctrine, in other words, is employed to “delineate both the moral right and the moral limitations of state interventions in cultural, social and economic affairs” (Coleman 2008: 38). While this may be a legitimate goal in its own right, it is not what the European concept and practice of subsidiarity entail: a principled guideline about who should do what in a multilevel system of public governance. This fundamental difference notwithstanding, the ubiquitous opinion prevails that the European principle of subsidiarity must have been derived from Catholic social doctrine. What is given as further evidence apart from the papal encyclicals is that the initial insertion of the principle of subsidiarity into the 1993 Maastricht Treaty^{iv} was in large part owed to Jacques Delors, then Commission President, and a “Catholic socialist” (Coleman, *ibid.*).

Protestant Subsidiarity

Historical evidence indeed indicates that the term was first taken from Catholic social thought when it entered the post-World War II German debate on federalism as a remedy against the totalitarian centralism of the Nazi period (Marquardt 1994: 620). It is also evident that the European debate on subsidiarity was ignited in 1988 when Delors got an earful about it from the prime ministers of the German *Länder* who feared that a further transfer of competences to the European Community would “sooner or later touch on their areas of exclusive power” (Schaefer 1991: 689). And it is finally obvious that Delors would have been familiar with Catholic social thought and therefore receptive to the idea (Marquardt 1994: 624).

However, intellectual evidence points into a different and Protestant direction: In an internal memorandum of 13 February 1992, Delors was advised by his own research team at the Commission that the concept of subsidiarity had its early-modern origins in the formulations of the 1571 General Synod of the Dutch Reformed Churches in the East Frisian city of Emden, and in the early 17th century political theory of Johannes Althusius

(Luyckx 1992, Endo 1994: 630-31, Riklin 2006: 218-19). While it ultimately does not matter whether the insertion of the principle of subsidiarity into the 1993 Maastricht Treaty was a Catholic or a Protestant achievement, or who said what first and when, it is worth taking a look at these Protestant conceptualizations, which indeed predate Catholic social doctrine by some four hundred years. Delors, in any case, at least must have welcomed the advice from his team as evidence that subsidiarity was a concept with a much broader European background and appeal.

The General Synod of the Dutch Reformed Churches took place in the German city of Emden because the Netherlands were occupied by Catholic Spain. At issue was the coordination of church policy in dispersed exile. At Emden it was resolved that “provincial or general assemblies must not deliberate on matters already decided at a lower level,” and that “they shall concern themselves only with such matters as pertaining to all churches generally” (Die Akten 1971: 79-83; own translation). Contrary to Catholic social thought much later, these formulations are not just about the protection of societal autonomy from public absorption. They clearly establish procedural principles of pluralized governance.

Johannes Althusius was a Calvinist professor of law who served as Emden’s syndic or chief executive officer a generation later, from 1604 until his death in 1638. He has been called the “real father of modern federalism” (Elazar 1968: 363). In his *Politica* (1995), Althusius justified the Dutch Revolt against Spain as a legitimate act of resistance against tyranny and systematically developed the political theory of a multilevel commonwealth largely based on the contemporaneous precedent of the Holy Roman Empire (Hueglin 1999). While not mentioned explicitly, the principle of subsidiarity permeates his entire theory as a political code (comp. Føllesdal 1998: 200-203.^v

At each level in the Althusian multilevel commonwealth, governance is in the hands of a council composed of delegates from the next lower level, creating a bottom-up chain of representation, not of individuals but of the smaller communities comprised in the larger ones. This tradition of council representation and governance can still be discerned, now obviously alongside with modern parliamentary representation, in the construction of the second legislative chamber in Germany, the *Bundesrat*, as well as in the legislative role of the Council of Ministers in the European Union. In Canada, it has been thematized as a “House of the Provinces” in discussions of senate reform (Simeon and Robinson 1990: 265-66).

Three mutualist rules govern the decision-making process in these Althusian councils. The first of these is a consent requirement derived from Roman Law according to which “what touches all ought also to be approved by all” (1995: 37). The second rule is about the procedure by which such approval may be obtained. The power to decide “belongs to all orders collectively,” Althusius declares, and when “there are differing votes,” he elaborates further, “the decision may be made according to the judgments of the more numerous or larger part in the things that concern all orders together, but not in those that concern them separately” (ibid. 65). A third rule becomes visible when Althusius changes the consent formula from a veto rule (what touches all *must be approved* by all) into an obligation: It is “equitable that what touches all *ought to be acted upon* by all” (ibid. 91 – my emphases). The negative consent requirement is transformed into a positive obligation for common action.

As already mentioned, subsidiarity does not appear explicitly in these rules or anywhere else in Althusius’ political theory. But as in the reasoning of the Supreme Court of Canada, they aim at the protection of regional and local distinctiveness through a process of intergovernmental cooperation and coordination. The higher or federal order of government cannot decide alone when its action would “touch” substantive interests (i.e. powers) of the lower order. At the same time, the members of the lower order must not pursue their interests in sectarian isolation. The rationale for common federal governance is the need for common action for the sake of a common good.

Subsidiarity in this older European sense is very different from a rights-based division of powers in the conventional understanding of federalism as derived from the classical American model. It is a normative principle of procedural guidance rather than constitutional fixity. It aims at a “workable” allocation of legislative and regulatory authority in systems of multilevel governance (Horsley 2012: 267-68).

European Union Subsidiarity

The question arises whether workability is a realistic aim, or whether the adoption of subsidiarity into the European Union treaty framework only served to patch over competing visions: of Christian democrats adamant about the preservation of society-centred morality; of German federalists intent on completing the European integration project with a federal constitution; and of British conservatives defending undivided control over national sovereignty (Peterson 1994).

In 2000, the Germans indeed made a pitch for a European constitution. In a now famous speech at Berlin's Humboldt University, German Foreign Minister Joschka Fischer called for a European federation in which the principle of subsidiarity would be "constitutionally enshrined" (2000). Two years later, a European Constitutional Convention was inaugurated. Composed of representatives from member state governments and parliaments, and aided by numerous working groups as well as broad public involvement, it produced a constitutional draft, which was signed in 2004. However, this extraordinary process and effort, possibly comparable even to the 1787 Philadelphia Convention, came to nothing in the end when ratification failed in France and the Netherlands.

In another less noticed yet equally memorable speech, the vice-president of the Constitutional Convention, Giuliano Amato, a former Italian Prime Minister, mentioned Althusius no less than four times as evidence that the constitutional project would remain faithful to the European tradition of federalism. "Organizations inspired by the thinking of Althusius," he assured one of the largest audiences of practitioners as well as scholars of federalism ever assembled, "deny exclusivity as a matter of principle. No one in a pluralistic system is the exclusive holder of public authority" (Amato 2002).

Most of the important institutional and procedural propositions of the constitutional draft were eventually rescued into the 2009 Lisbon Treaty^{vi} (Church and Phinnemore 2013). The centrality of the principle of subsidiarity was never in doubt. What entered into the Maastricht Treaty as a "contested concept" with unclear meaning if not as mere "Euro-froth," (Diez 1995: 14), now emerges from the Lisbon Treaty as the undisputed linchpin for the organization and exercise of European governance.

In its Lisbon reconfiguration, the centrality of subsidiarity is recognized in three different ways:

First, Article 1 TEU contains a general commitment to "an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen." This is entirely in line with conventional definitions of subsidiarity according to which decisions should be taken at the lowest possible level of government. In addition, however, this preambulatory statement adds a commitment to openness, which in the context of subsidiarity means that any legislative or regulatory action not only has to be justified with regard to its content but also with regard to the level at which it is taken.

Second, Article 5 TEU (formerly Article 3b of the Maastricht Treaty) frames the core provision about subsidiarity already cited at the outset by two further principles, “conferral” and “proportionality.” Conferral means that: “the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein” (Article 5(2) TEU). The principle of proportionality stipulates that: “the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties” (Article 5(4) TEU). While conferral may be interpreted as a kind of general residual clause in favour of the member states, proportionality deliberately and decidedly departs from conventional power division schemes: it means that even in matters of exclusive Union competence, the extent of legislative or regulatory powers is limited. The classical question of federalism: who has the power to do what, is modified as: who is authorized to do how much of what.

Third, Article 5 TEU furthermore stipulates not only that all Union institutions “shall apply the principle of subsidiarity” in accordance with a separate Protocol appended to the Treaty, but moreover that the national (i.e. member state) parliaments will “ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol” (Article 5(3) TEU). In terms of federalism, it is this latter provision that constitutes the real novelty of the Lisbon Treaty, establishing a kind of “early-warning system” for compliance with the principle of subsidiarity (Kiiver 2011). Conventional federal systems do not accord to constituent member parliaments a control function over proposed federal legislation.

The protocol mentioned is the *Protocol on the Application of the Principles of Subsidiarity and Proportionality*.^{vii} A legally binding part of the Union’s treaty framework, the Protocol puts the procedural meat on the conceptual bones of subsidiarity, by spelling out just how the principle shall be applied in practice, and how national parliamentary control shall be organized.

It begins by stating generally that: “each institution shall ensure constant respect for the principles of subsidiarity and proportionality” (Article 1). The Commission as the main policy initiator “shall consult widely,” and “shall, where appropriate, take into account the regional and local dimension of the action envisaged” (Article 2). It then specifies that all proposals or “draft legislative acts” will be reviewed by the “Union legislator” (i.e. Council and Parliament) as well as “national Parliaments” (Article 4). To this effect, the Protocol lays out in considerable detail how draft proposals have to be justified under the subsidiarity and proportionality rule:

“Any draft legislative act should contain a detailed statement making it possible to appraise compliance with the principles of subsidiarity and proportionality. This statement should contain some assessment of the proposal's financial impact and, in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation. The reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators. Draft legislative acts shall take account of the need for any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens, to be minimised and commensurate with the objective to be achieved” (Article 5).

For the purpose of national parliamentary review, each parliament has two votes (one for each chamber in the case of bicameral legislatures). A simple majority of votes claiming non-compliance with the principle of subsidiarity leads to a review of the draft by the Commission. A two-thirds majority (a quarter in the case of matters related to fundamental rights concerning freedom, justice and security) requires review and a reasoned response as to whether the draft will be maintained, amended, or withdrawn. The draft fails if “by a majority of 55 % of the members of the Council or a majority of the votes cast in the European Parliament, the legislator is of the opinion that the proposal is not compatible with the principle of subsidiarity” (Article 7). And finally, “the Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act” (Article 8).

We are by now far away from Catholic moral limitations of state intervention as well as from Althusian conceptual postulations of mutualism. We are in fact finding ourselves in the thicket of what Fritz Scharpf quite some time ago denounced as a “decision trap” of pluri-jurisdictional entanglement (1988); what the Americans a long time ago thought they had successfully avoided as “imbecility in the government” in their elegantly and parsimoniously crafted constitutional separation of powers (The Federalist 2001: 95-96); and what the current Prime Minister of Canada, Stephen Harper, programmatically sought to escape from when he proclaimed, in his 2007 Throne speech, a new federalism that would respect “the constitutional

jurisdiction of each order of government” (cited in Behiels and Talbot 2011: 55).

The verdict seems almost unanimous: a clearly disentangled separation of powers is preferable. Yet the Americans ended up with Congressional supremacy amounting to a regime of “coercive federalism” (Kincaid 2012); recent efforts at power disentanglement by a broadly mandated constitutional reform commission in Germany came to very little (Benz 2008, Scharpf 2009); the Supreme Court of Canada reprimanded the Harper government to take collaborative legislative federalism seriously (see above); and the jury is still out on whether the EU will be any less capable than the American Congress in dealing with the fiscal crisis currently haunting both systems.

Critical Evaluation

The conceptual configurations of subsidiarity that can be found in Catholic social doctrine, in the political theory of Althusius, and in the stipulations of the European Union treaty framework share a concern about how plurality in large and diverse societies should be structured appropriately. They also have in common a basic commitment to subsidiarity and solidarity as the two sides of the same coin. Catholic social doctrine differs from both the Althusian and European Union understanding of subsidiarity in a very fundamental way, however.

This difference does not just lie in the Catholic model’s attempt “to determine the bounds of the private sphere,” and the European model’s concern about “the allocation of power within the public sphere.” Rather, as N. W. Barber thoughtfully elaborates, the fundamental difference lies in the fact that the Catholic model does not address the procedural question of power allocation at all: “there is always a right answer” requiring that “power be allocated to the correct institution.” In sharp contrast, under the European principle of subsidiarity, “centralizers must show that power can better be exercised by the Community, and that this improvement in efficiency is sufficient to warrant the shift” (Barber 2005: 313).

Catholic social doctrine in this way appears closer to the way in which the American constitution is treated as the infallible and unalterable answer to the question of political order. By comparison again, subsidiarity in the Althusian-European tradition merely serves as a procedural guideline for settling disputes when that order is contested (Tömmel 2011, Craig 2012). There is a passage in Althusius, which has been omitted in the abridged English translation, describing the procedure of finding agreement at the

councils of the universal commonwealth that could be almost literally applied to Council meetings of the EU: negotiations in the different colleges making up the council proceed “until all agree or the minority bows to the will of the majority” (1932: 328; own translation). With reference to the other federations at the time such as the Netherlands and Switzerland, Althusius also refers to “arbitration” in cases of conflicting interpretations arising “over the nature of the union” (ibid. 338; own translation).

Critics will quickly point out that the EU as a similarly constructed decision-making system is not exactly driven by efficiency. Even though qualified (weighted) majority voting in the Council now applies to most legislative acts, “a highly ingrained culture of consensus” prevails. On average, the negotiation process for any new proposal takes about eighteen months (Lewis 2013: 151). A number of arguments can be made in favour of subsidiarity-driven governance by negotiation nevertheless.

Compared to checks-and-balances paralysis in the United States, eighteen months to get a legislative proposal through the process does not seem so bad. It may also compare quite favourably to competitive parliamentary government-and-opposition majoritarianism. Britain’s “economic malaise” during the first three decades after World War II has been attributed at least in part to the frequent alternation of Conservative and Labour governments during that period, policy discontinuity from one government to another driven by unwillingness “to absorb rather than reverse changes” made by the previous government (Smith 1984: 322). As Arend Lijphart has shown some time ago, a cooperative political culture often yields better policy results than an adversarial one (1999).

What the EU subsidiarity and proportionality provisions add to cooperative political culture is a principled framework and point of reference. Negotiations are structured by binding criteria of assessment and evaluation rather than open-ended. Those who (rightly) deplore that comparative federalism studies are rarely imbued with contemporary philosophical discussions about justice and democracy, and about deliberative democracy in particular (Norman 2006: 93-94), should take note: As Simone Chambers has pointed out, theories of deliberate democracy are vague about just exactly how the institutions and processes of representative democracy need to be transformed in order to make deliberation an authentic part of them (2003). What the subsidiarity and proportionality provisions contained in the EU treaty framework offer is at least a starting point of how to think about deliberation as part of an organized political process.

Critics again will be quick to point out (and rightly again) that deliberations about subsidiarity in the European context for the most remain confined to executive elites in the Commission and the Council as well as, with regard to the new review provisions, to the conventional institutions of representative democracy, the European Parliament, which continues to lack legitimacy as a truly representative European body, and the national parliaments, which ultimately only have a consultative role and suspensive veto. Moreover, in comparison to constitutional divisions of power, subsidiarity talk may be nice but hardly justiciable leave alone enforceable (Berman 1994, Bruha 1994). These are serious criticisms not only from a deliberative democracy perspective, and they can be refuted only in part.

On the one hand, the merely consultative role of national parliaments does carry some weight. It must be seen in the general context and “reality of EU decision-making,” an “interplay of political forces” shaping legislative proposals for common objectives the extent of which ultimately depends on what the “member states are willing to accept” (Craig 2012: 82-83). This means that “ex ante control” (Horsely 2012: 269) of such proposals by the national parliaments will signal the positions of the national government representatives making the final decision in the Council. The role of national parliaments in this process thus is not merely perfunctory. After all, it is these parliaments to whom the government representatives are accountable.

On the other hand, the question of whether or not subsidiarity is justiciable is misplaced at least in part. Subsidiarity is a political principle. In its *Securities Reference*, the Supreme Court of Canada carefully abstained from addressing the question of “what constitutes the optimal model for regulating the securities market.” Instead it admonished the intergovernmental combatants to find a “coordinated” political solution (2011 SCC 66: 9). Similarly, the European Court of Justice held in its 1998 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Union* decision that “the Court cannot substitute its assessment for that of the Council” but must instead limit itself to verifying “whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of power” (C-150/94). The political rather than legal nature of subsidiarity is underscored by the fact that over a period of twenty years, there have been “just over ten cases” constituting “a real subsidiarity challenge” before the European Court (Craig 2012: 80). The

Court nevertheless has opened the door to the somewhat novel idea of judicial review of procedural aspects of European governance.

A Comparative Conclusion

The idea of subsidiarity is underwritten by two philosophical positions. The first one of these is that liberty is not only a matter of individual freedom but also of group autonomy and collective identity within a larger societal context. This position is common to both the Catholic and the Althusian-European understanding of subsidiarity. Indeed, it is a position inherent in all federalist configurations of political order (Elazar 1987: 99-104). The second position holds that there is no final or correct answer to the temporal or substantive extent of authority attributable to distinct groups or collectivities. This position therefore departs from Catholic social doctrine and from primarily rights-based federal systems.

What the subsidiarity and proportionality provisions in the EU treaty framework achieve regarding the second position, then, is not intended “to bolster the effectiveness of subsidiarity as a legal principle,” but “to promote the resolution of arguments over the correct application of subsidiarity through enhanced inter-institutional dialogue” (Horsley 2012: 269). Subsidiarity, in other words, “plays a promising role in structuring the democratic process” (Barber 2005: 315). As such, the Althusian-European tradition of federalism and its central role in the European Union treaty framework point to a significant variation in the conceptualization and contemporary practice of federal systems.

One could argue that the conceptualization of the classical American model was at least initially very much carried by a spirit of subsidiarity. The division of powers enshrined in the American constitution was naturally based on contemporaneous considerations about what the new union should do for the common good of all, and what should remain in the particular domain of state authority. However, by writing these considerations into constitutional stone, the procedural element of structuring democracy according to changing time and circumstance was all but eliminated. And, with the help of judicial interpretation by the Supreme Court, the Congress seized the initiative when time and circumstance did change, eventually assuming near-legislative supremacy.

Calabresi and Bickford have argued that subsidiarity considerations re-entered American constitutional jurisprudence since the Supreme Court first applied a “Substantial Effects Test” in its famous 1995 *United States v. Lopez*

decision:^{viii} the Congress cannot regulate on matters not under its jurisdiction (in this case gun control on school premises) when such regulation does not “substantially” affect powers it does have (in this case interstate commerce) (2011: 41-79). While some similarity between the Court’s reasoning and the principle of subsidiarity cannot be denied, the underlying understanding of federalism remains very different.

Federalism in the European understanding primarily serves the protection of collective liberties and identities within a pluralized public culture that sustains them. The principle of subsidiarity seeks to calibrate the exercise of pluralized public authority to this end. American federalism and its judicial calibration of powers primarily remain committed to individual rights protection and therefore closer to the public-private ideology of Catholic social thought. In the words of Justice Kennedy writing for the Supreme Court in the 2011 *Bond v. United States* decision:

“Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity... Federalism also protects the liberty of all persons within a state by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions... By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power” (cited in Calabresi and Bickford 2011: 79).

To put it differently: while the constitutional division of powers in the American federal polity primarily serves the purpose of protecting the individual rights of private citizens, the European confederal polity more resembles a “mixed government” in which negotiated agreement protects the membership rights of public collectivities (Majone 2006).

Consequently, American federalism also lacks the kind of formalized inter-institutional dialogue, at least at the draft or proposal stage of legislation, that has become characteristic for other federal systems where policymaking requires various forms of intergovernmental contracting (Hueglin 2012, Rodden 2006: 36-37). The rationale for such contracting is that in most federations including the United States of America, the different levels of government are active simultaneously and often concurrently in most if not all

of the important policy fields to an extent that goes way beyond constitutionally stipulated power divisions.

Whereas intergovernmental deliberation essentially is reduced to lobbying in the American case (Dinan 2011), however, institutional design and development in the European Union can be seen as a move towards, and acceptance of, multilevel governance by deliberation (Neyer 2003). In the Canadian case, finally, intergovernmental agreements have been a major contributor to national policy success (Banting 2008). This is what the Supreme Court of Canada had in mind when it identified a dominant tide of modern federalism requiring more flexibility and collaboration. Deliberation and collaboration in federal systems inevitably include disputes over the distribution of policy authority. Procedural subsidiarity considerations are meant to provide principled guidance.

In this sense, it would not seem unreasonable to reverse Theodore Lowi's question of "what can European Union learn from United States" (*sic*; 2006). Far from being "foolish" or "inadequate" in comparison to the more "seasoned federalism like that of the United States" (Bermann 1994: 452, Bermann 2001: 208), the European principle of subsidiarity may in fact have model character for the way in which the allocation of public authority needs to be adapted to the complexities of modern federal governance, and of multi-level governance in a globalizing world more generally.

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Notes

- ⁱ All Supreme Court of Canada decisions and references have been
- ⁱⁱ All European Union treaties and protocols have been accessed at http://europa.eu/eu-law/treaties/index_en.htm.
- ⁱⁱⁱ All papal encyclicals have been accessed at <http://www.papalencyclicals.net>.
- ^{iv} The Maastricht Treaty was the first version of the Treaty on European Union.
- ^v At the outset of the *Politica*, Althusius does refer to the "requirements of life" (*vitae subsidia*), which can only be fully obtained in a symbiotic "association" (*consociatio*) or polity (*politia*) (1995: 17-18, 1932: 15-16). Althusius also distinguishes private consociations (family, kinship guilds and colleges) from public consociations (city, province, commonwealth). This seems to move him closer to Catholic social thought. But it is very clear throughout the *Politica* that his primary concern is the pluralized organization of public governance (Hueglin 1999).
- ^{vi} The Lisbon Treaty actually only contains amendments to the two treaties now governing the European Union, the Treaty on

European Union (TEU), and the Treaty on the Functioning of the European Union (TFEU). These amendments and all previous changes are incorporated into the consolidated versions of these treaties.

^{vii} This is Protocol (2) appended to the TEU.

^{viii} All Supreme Court decisions have been accessed at <http://supreme.justia.com>.