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**DELEGATION IN
TERRITORIALY-
DIVIDED
POLITIES:**

**Lessons for the
European Union?**

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1. INTRODUCTION

Output legitimacy in federal polities depends to a significant extent on the power separation and power sharing between territorial governments. The literature on federalism suggests that designing the organisation of governance structures in federal polities is no easy task. "Joint decision traps" (Scharpf 1988, 1999), "aggressive unilateralism" and "thrust and riposte" (Painter 1991), a "double legitimacy trap" (Börzel and Hosli 2003) or fragmentation and failing cooperation are all possible outcomes discussed in the literature indicating that output legitimacy is a precious good in federal polities.

My starting hypothesis in this article is that output legitimacy in federal polities is directly related to what is referred to as "*Madison's problem*" (Kiewiet and McCubbins 1991; see also Iaryczower et al. 2004). Madison's problem is built on the premise that member state governments must decide how many competencies and rights they want to transfer to the central government. If they do not transfer enough power the central agency might be impotent in its action and if they give away too much power they might lose control and become the victim of "predatory" behaviour by the federal government. This tension has serious consequences for output legitimacy as the more restricted the central agency becomes because of security considerations of member states, the less able it is to react flexibly to new challenges and solve problems for its citizens. And the more competencies that are transferred to the central level, the more difficult it becomes for member states to retain output legitimacy of their own because they lack domains of competence.

In what follows I will endeavour to unravel Madison's problem by trying to understand:

- the different constitutional decisions member states can adopt to deal with this problem;
- the inherent instabilities and dynamics of federal polities that are linked to delegation;
- likely "drift-preventing" mechanisms that can solve Madison's problem by balancing forces, avoiding centralisation and switching off the distributional power game.

My theoretical starting point will be discussions on delegation and principal-agent relations (see Strom 2000; Epstein and O'Halloran 1999; Braun and Gilardi, forthcoming) as well as insights from comparative federalism. Recently, economic theory of federalism has made a major step forward using the insights from rational choice institutionalism for federalism (see above all Weingast 1995; Bednar et al. 2001; Filippov et al. 2004; Iaryczower et al. 2004), among them insights concerning the EU (Bednar et al. 1996; Kelemen 2003). Though I am sympathetic in many ways to this approach, I do not subscribe to the implicit liberal foundation that seeks self-sustaining elements of "market-preserving federalism" (Weingast 1995). My perspective focuses on how typical output legitimacy problems of federal polities can be overcome. Moreover, I think that the delegation perspective, which has been used by some authors in discussing the EU,¹ can be more fruitfully linked to the discussion of the constitutional design of federal polities, especially when we are dealing with "coming-together-federations" (Stépan 1999), i.e. federal polities that are created by a number of sovereign states. The delegation perspective helps to overcome an underlying "centrist" bias of many

studies. Most analyses discuss power separation and power sharing of authority from the point of view of the centre or how the central agency tries to maintain power when dealing with member states¹. By taking a perspective of delegation which sees member states as the “principals”, the view is turned around and “coming-together federations” are seen in the first instance as a collective good where member states must decide on the constitutional design and the transfer of power to a third party. Delegation theory is appropriate because it focuses, first, on the transfer of authority, which is obviously the basic discussion in a “coming-together federation”, second on (incomplete) contracts and, third, on underlying dynamics that are linked to the opportunistic behaviour of actors.

In what follows, I will aim to *develop a framework that can be used in all “coming-together-type polities” and which aims to understand basic conflicts and instabilities as well as identifying possible equilibriums and drift-preventing mechanisms for stabilising such federal polities.*

2. DEALING WITH MADISON'S PROBLEM

In coming-together-federations the origins can be conceptualised in terms of delegation where a number of states decide to join together and create a common central agency to solve collective action problems. Though there are mutual benefits in joining forces for defence or trade, it is difficult to overcome the opportunism of member states. Even if a state sees the advantages of cooperation, it might still have incentives to abuse any cooperative agreement as long as the others continue to abide by it. The states are confronted with the famous prisoners' dilemma. Therefore it is difficult – but not unlikely, as I will discuss at the end of the article – for states to

¹ See Moravcsik 1998; Pollack 2003; Franchino 2000 who are using the delegation perspective but not comparative federalism as an entry point to describe the working of the EU.

reach agreement if there are no enforcing mechanisms that serve to prevent such opportunism.

One solution to the problem is the delegation of authority to an organisation:

"It is in the context of organizations that collective action is most effectively coordinated, that prisoner's dilemmas are most readily overcome, and that stable social decisions are most likely to be reached" (Kiewiet and McCubbins 1991: 23).

It is important to note here that in coming-together federations we have a particular situation because *multiple principals* create *one agent*. Multiple principals suffer from difficulties in finding common ground for deciding on issues (Tsebelis 2002). The more conflict that exists between the members of the collective actor, the greater the opportunity for the agent to make decisions that approach its ideal point.² In other words, the more member states there are and the more they disagree on matters, the easier it becomes for the central agency to develop policies of its own. This characteristic of coming-together-federations explains many of the dynamics and structures in federal polities.

Madison's problem demonstrates that, once the states have decided to join forces and create such a "third actor", they must be aware that this decision entails the risk that the agent "shirks", i.e. the agent pursues its own interests and, moreover, expands its power at the cost of member states. The more property rights and

² This assumption is based on considerations in spatial models of politics as Tsebelis uses them (2002). The more diverse interests of member states are, the more these interests are dispersed in a political issue space. It will therefore be easier for the central agency to find probable coalition partners with preferences close to its own and achieve favourable decisions. If, by contrast, member states' preferences are situated very close together, such coalition-building will become extremely unlikely.

authority that are initially given to the central actor, the greater the danger of “predatory behaviour” (Filippov et al. 2004) becomes.

It is therefore of utmost importance that during the process of setting up the constitution of delegation the states reflect on how they can avoid predatory behaviour by the newly created central agency. Principal-agent theory stipulates a number of *ex ante* and *ex post* mechanisms that principals can use to minimise the risk of shirking by an agent (see McCubbins 1985). In our context two *ex ante* mechanisms seem to be of particular importance for member states in dealing with the question of how many property rights and how much discretion should be transferred to the central agent. One decision is about the *scope of authority* which for McCubbins means the range of policy alternatives agents have at their disposal. The fewer the policy alternatives that are granted, the less leeway the agent has to take independent decisions. In the context of coming-together-federations this means deciding on the number and kind of policy areas which should be given to the central agency. The fewer areas that are transferred, the more restricted the central agency is and the fewer opportunities it has to expand its sphere of influence. The second decision is about the *institutional setting* of the delegation relationship. How much independence should the new agency have from the control of the member state principals? I will deal with each decision separately.

2.1 The scope of authority

The first point of discussion is *how many policy areas* member states want to allocate, which then determines the scope of authority that the central agency will have.³ The distribution of areas of competence, either delegated to the central agency or

reserved for member states, is a key challenge that all federations have to resolve.

As stated above, the reason for transferring authority in a policy area to a third party is to address the challenges of organising collective action to produce a public good (like defence, economic growth, a clean environment etc.). The states could conclude contracts between themselves but then they would face problems of opportunistic behaviour. If a policy area is transferred to the central agency, then the same objectives, rules and procedures guide the governance of this area rather than a large variety of dispersed rules as is the case in non-coordination. The central agency is therefore responsible for the *harmonisation* of the policy area and this should lead to benefits for all.

The greater the number of policy areas that are harmonised, the more "domains of power" belong to the central level and the less power is reserved for the member states. The backlash from the increasing regulatory scope of a central government is its effect on the legitimacy of member state governments. The member state's legitimacy depends on their capability to demonstrate that they make decisions and act in important policy areas. If important policy areas are transferred to the central level and are taken out of the hands of the member states, this may have a negative effect on the electoral success of member states governments. The difficulties in transferring taxing powers, spending powers, social policy or defence to the supranational level of the EU can be explained by expectations of such a probable legitimacy backlash. The underlying tension in the discussion about the regulatory scope of the central agency is therefore the potential "*crowding out*" which may affect

³ Because of space, I will not treat the more qualitative question of which policy areas should be transferred.

both sides. The greater the number of policy areas and the greater the amount of discretion that remain at the member state level, the less legitimacy the central agency can develop among voters. Conversely, when more authority is transferred to the central agency then there are more legitimacy problems for member states. There are no easy or straightforward solutions to this problem. In the beginning, most member states in federations were reluctant to delegate policy areas to the central level. They insisted on reserved powers and responsibility for non-enumerated policy areas (residual powers). Over time, because of incomplete contracts, among other reasons,⁴ we find a "centrist drift" that transferred more authority to the central level. Moreover, except for reserved and delegated powers, all federations have introduced "concurrent powers", which means that within one policy area both levels of government can make decisions. Usually there is some arrangement that stipulates which authority prevails in case of conflict. If it is the member state level, this can be interpreted as a safety net to protect the interests of the member state. However, more often than not the central agency's authority is dominant.

Therefore, one can, as Riker (1975) suggested, develop a continuum that describes the numbers of areas with delegated powers. At one end of the continuum only one policy area is delegated to the central agency and at the other end all policy areas are in the remit of the member states. I consider those concurrent powers under paramountcy of the central agency as delegated powers. If member states decide to keep most areas for themselves, the scope of regulatory powers of the central agency is limited and in the opposite case it is large.

⁴ Often, because federal governments, helped by federal courts, found "loopholes" in Constitutions that could be used to further the interests of the central state (e.g. "implied powers" in the USA or the "peace, order, and good government clause" in the Canadian Constitution).

2.2 Institutional setting

Transferring authority in some policy areas is one decision member states have to make; the second is deciding exactly how property rights should be defined. What substantial discretion should be acknowledged in those areas - a complete transfer of property rights without any control attached or just the right to act? In fact, member states must make this decision taking into consideration matters of both legislative powers and executive or implementing powers.

2.2.1 Legislation

There are three possibilities for transferring and restraining powers in legislation. The first one, Filippov et al. (2004) have called "representation without bargaining", the second one is "representation within bargaining", and the third, a complete transfer of powers without control or "no representation, no bargaining".

Representation without bargaining

Less discretion is given if a matter is transferred to the central level, but then central government depends on the propositions, objectives and approval of member states. Though a transfer of authority has occurred, decisions are nevertheless "built around subjects of the federation who defend and articulate their units' interests *without* the federal center by addressing or confronting the center as if it were some external force" (Filippov et al 2004: 117). The member states remain the decisive body in legislation. In this type of delegation it is intergovernmental logic i.e. the preferences of the member states, that structures the outcomes of the legislation game. The EU may still be considered a case in point.

Figure 1, which is based on the discussion of delegation to bureaucracies (Epstein and O'Halloran 1999), demonstrates that in this case the central agency depends on the "Pareto-optimal core" of the "collective actor" member states and cannot choose a point outside this core.

I have assumed that there are only three member states that have decided to join forces and delegate authority to a central agency. Each state is a veto-player, i.e. the approval of each member state is needed to change the status quo in a given policy area and all three member states have decided to agree on policy X. Note that the triangle in the figure indicates the "unanimity core" or "Pareto-set", i.e. all solutions that are acceptable to the three member states.⁵ If the central agency has a policy preference A in the policy area, given the type of delegation, it cannot choose a point outside the Pareto-set of member states. The point nearest to its preference would be X'. This illustrates the notion of "representation without bargaining". There is a limit to the "centrist drift" defined by the Pareto-set of member states because they make the final decision on the adoption of legislation.⁶

Member states can limit the choice of the central agency even further if, in the constitution, the range of alternatives (concerning targets, instruments etc.) open to the central agency has been restricted (symbolised by a circle around X), then X'' would be the best outcome the central agency can hope for (compare Epstein and O'Halloran 1994: 699-701). In fact, the central agency – and the European Commission would be a good example – depends in all instances on the approbation of the European Council (and today

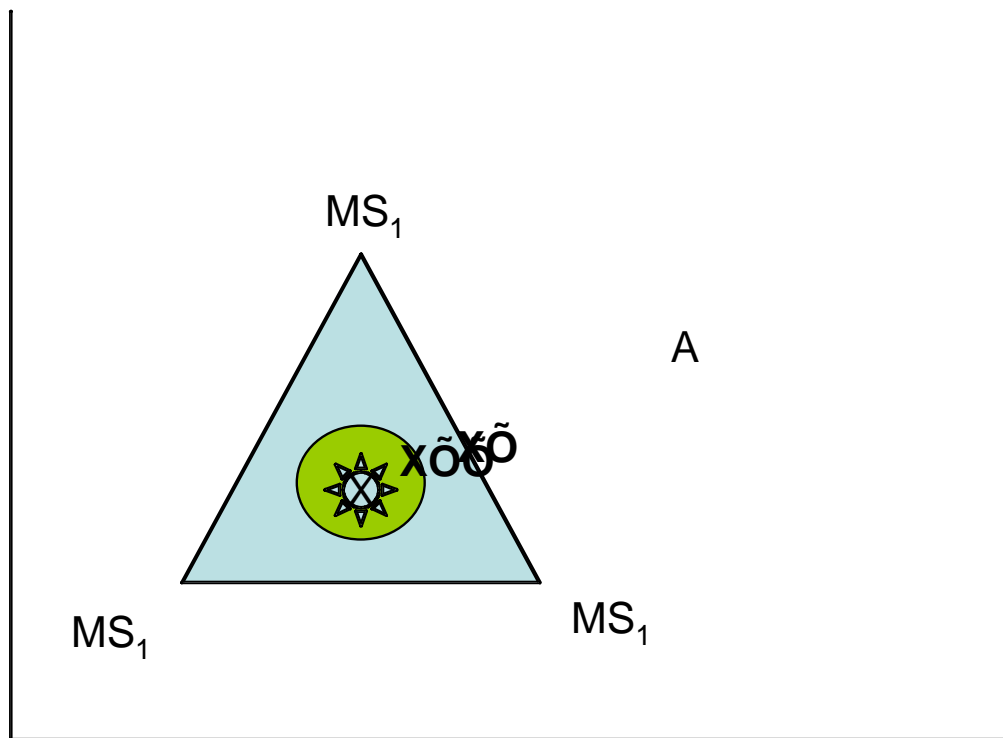
⁵ The "unanimity core" refers "to the set of points that cannot be defeated if the decision is unanimous". An alternative name is "Pareto-set" (Tsebelis 2002: 21).

⁶ Epstein and O'Halloran speak of a "bureaucratic drift" because they are dealing with delegation from the Congress to administrative agencies.

also on the European Parliament in many matters) which is often also the agenda-setter. In this institutional setting, the central agency is more an executive agency than a co-deciding actor. In this way member states retain control of what is decided at the central level and the discretion of the central agency is limited.

Member states also have to decide how to organise preference aggregation among themselves.

FIGURE 1 HERE: *Representation without bargaining*



A = Ideal Point of Central Agency
MS = Member States

In the example above unanimity was assumed, being the most likely case at the time of setting up a constitution as it needs the voluntary participation of all member states. This usually results in claims for having a veto on decisions taken within the collective

actor. But this does not mean that the choice of unanimity is inevitable or that it cannot change. The EU is again the best example, as a large and ever increasing number of areas are subject to qualified majority voting and not to unanimity voting. But even then, the European Commission as the central agency must respect the "core" that defines the majority and cannot choose points outside this core. So, the decision taken is based on intergovernmental logic and the preferences of member states.

Representation within bargaining

A second possibility for organising the institutional setting for member states is to become part of the decision-making process alongside the central agency while recognising its own rights to propose, design and decide, which Filippov et al. (2004) have called "representation within bargaining". Such an integration of member states into central or federal legislative powers is an important step as it not only changes the powers of the central agency in the decision-making process but also gives rise to "mixed motives" for member states. While in the previous type of delegation the intergovernmental logic prevailed, here federal matters in many ways become the concern of member states. They need to start to think in terms of the federation, which can be a base for compromise and consensus.

Institutionally this type of delegation is often given form through the establishment of a separate legislative chamber, next to a chamber based on "functional democracy" (bicameralism), where governments (or regional representatives) have a right to "co-decide" with parties. Member states must decide on two things at this time:

- How strong they want the co-decision making power vis-à-vis the "functional chamber" and the central agency to be and on

which and how many legislative matters they want to be able to use this power.

- How to aggregate preferences among themselves within this chamber.

Concerning the first point there are three principal options:

- One is a "*veto*" of the territorial chamber, at least in some legislative matters, as is found for example in Germany. There are no real examples where the territorial chamber has a complete right of veto. In fact, this would be close to the logic of the previous solution, representation without bargaining. The German Bundesrat currently has (but has not always had) a veto-position in about half of German legislative matters. This prevents the federal government from taking isolated decisions in areas directly related to the position of the Länder. By participating in the Bundesrat and having the power to block any federal laws, the Länder are formally well protected. Informally, party politics play an important role in deciding whether the Länder governments will block a federal law or not. Seen from the logic of delegation, such a limited veto would be the optimal solution for the Länder to protect themselves in matters most important to them. In comparison to the previous solution there are two differences: first, the scope of authority of the territorial chamber is limited and, second the preference aggregation rules within the territorial chamber are not usually based on unanimity. Once member states have agreed to accept representation within bargaining, the extreme protection by veto and unanimity no longer seems feasible. Usually, majority becomes the decision principle within the territorial chamber, thus opening up possibilities for the central agency to find winning coalitions in order to change the status quo. At the same time, there is now room for internal fragmentation into different coalitions of

member states, with the result that the delegating powers of the member states as a whole are weakened in comparison to the previous solution.

- The second solution would be to grant the territorial chamber *equal powers* so that consensus building between both chambers is necessary to pass legislation. Many federations have chosen this solution in combination with the right of the territorial chamber to pass legislation in all matters. There is, therefore, no limitation of scope. The member states still have a kind of veto but this time the veto can in the long run only be suspensive. In almost all cases a compromise is found between the chambers that must take into account both the interests of territorial and functional democracy. Again, as with the territorial chamber, the majority principle holds and the central agency can use strategies to find majority coalitions in both chambers.
- Finally, the "lightest" form of restricting the discretion of federal governments would be to give the territorial chamber "*voice*" only, i.e a suspensive veto. Even if the territorial chamber is against a proposed law, the functional chamber can, by one procedure or another, overcome the objection. Again, the German Bundesrat is a relevant example because all laws that have no direct implications for the Länder are subject to scrutiny by the Bundesrat but a majority in the Bundestag can, after the third treatment of a law in the Bundesrat, overcome any objection. Here, the federal government needs only to build stable majorities in the functional chamber to ensure passage of its legislation, but it must hear the member states. This is essential for reminding the federal government that its base is delegation by member states and it also reminds member states of their responsibilities in collective action.

Another important point is that as the delegation of territorial powers is embedded within a framework of "functional democracy", usually the integration of member states takes place in conflict with "republican principles" of democratic representation. Filippov et al. (2004) make a distinction between "*delegated representation*" in which the representatives in the territorial chamber are delegated by state legislatures (USA until 1913; Austria and India) or state governments (Germany) and "*direct representation*" where citizens in states choose their representatives (e.g. USA from 1913, Australia and Switzerland,). It would take too long to discuss this in extensor; however, it should be noted that the ideal preference of member state governments might have been to delegate their own representatives in the territorial chamber, but more often than not they lost against republican forces in this respect and accepted a representation of citizens. The only existing example of delegated representation by member states governments to my knowledge is Germany, leaving aside the EU, which is an example of "representation without bargaining". The choice between these two principles of delegation is therefore not linked to the rational choice in the framework of delegation but to the confrontation of two different principles in organising the central level.

This, of course, had profound consequences for the role of member state governments. Usually, they lost control of the central agency as soon as it became clear that party ideology linked to functional democracy was taking over the logic of action within territorial chambers. This is true for Switzerland, Australia, the United States and also Canada. Only in Germany can it be seen that, though party ideology is predominant most of the time, territorial interests of the member states remain important. Losing influence in the territorial chamber does not mean that member states are without any influence on federal level decisions. More

often than not it is the “administrative stream” that counts (see below) and in legislation one may find procedures of “voice” outside the parliament. In Switzerland for example, pre-parliamentary hearings address other actors especially the cantons.

Complete discretion

Finally, the highest degree of discretion would be a complete transfer of authority to the central agency without giving member states the opportunity to intervene. In this case member states abandon their role as principals and become subject to the decisions of the central agency. This option was not chosen by any current federation as a constitutional setup and seems to be contrary to the logic of setting up a central agency, however this does not preclude the possibility that a future development might move in this direction.

In summary the transfer of authority in policy areas to the central level does not necessarily mean complete independence of the central agency. On the contrary, there are a number of institutional settings that can, to different degrees, safeguard the influence of the member states at the federal level. The basic decision member states must take is between “representation without bargaining” which more or less maintains an intergovernmental logic on the central level and “representation within bargaining”, which makes member states an integral part of the central level decision-making process. However, in the latter case, member states must agree to share powers with institutions dedicated to the functional representation of citizens. As has been said before, a complete transfer of powers without any controls seems unrealistic and as such has not taken place in any existing coming-together-federations.

For the discretion of the central agency the different options of the member states mean different amounts of room for manoeuvre. The more we advance from representation without bargaining to “voice” within bargaining, the constraints imposed on the central agency by member states decrease and the constraints imposed by functional democracy become more important. Already by installing a veto in the territorial chamber, there are possibilities for the central agency to find winning majorities within the territorial chamber, which is not the case in “representation without bargaining”.

The question remains – which option will member states choose under which conditions? Answering this question would lead us much too far from our focus. However, in brief, a number of factors seem to be of importance, among them the distribution of power between territorial and functional democracy; the power distribution between member states⁷ and the degree of heterogeneity of the society.⁸

2.2.2 Discretion in administration

Even with a complete transfer of property rights member states may not be without influence on the central agency. In fact, another basic decision member states have to take in the beginning is whether they want to grant the federal government an administration of its own. The rationale of “power separation” one finds in the “dual federal types” is to give federal government not

⁷ One can, for example, defend the hypothesis that economically weaker states have a higher interest in supporting a strong central agency that protects them against the opportunism of the stronger states, than the strong states that can use their powers to “cheat” on the contract. The number of strong and weak states can therefore be important.

⁸ If there are strong cultural cleavages among member states this can lead to a stronger protection of rights and a tendency to introduce more constraints on the central agency. Switzerland is a case in point. Homogeneity makes it easier to make a stronger central agency acceptable.

only the right to decide but also the right to act through exercising executive powers. In this way the federal government becomes directly responsible in all aspects to the people in the domains conferred on the central level (Börzel and Hosli 2003: 183). Usually the recognition of executive powers is combined with high discretion in legislation. An alternative is the “functional differentiation of powers” (Braun 2000) or “power distribution” where member states maintain the right to act and force the central agency to cooperate in one way or another with the member states to implement policies. This has usually resulted in closer involvement of member states in preparing federal laws and thus opened up another avenue for influencing the legislative choices at the federal level, this time, however, outside the usual legislative bodies. Historically, the choice depended on the kind of law that prevailed in different countries; Roman law usually gave rise to power distribution while common law fostered power separation (Fleiner-Gerster 1992).⁹ But there are also other reasons, for example in Germany the “rights to act” of member states was seen explicitly as a protection for the executive/administration against the central agency (Lehmbruch 2002). In addition, there are efficiency considerations that may count such as where local or regional administration is much closer to citizens and therefore can more easily retain information and react to changes.

In summary, the decision whether and how to constrain the executive powers of the central agency depends above all on general beliefs about the “divisibility” of sovereignty institutionalised in legal traditions as well as on the strength of administration in

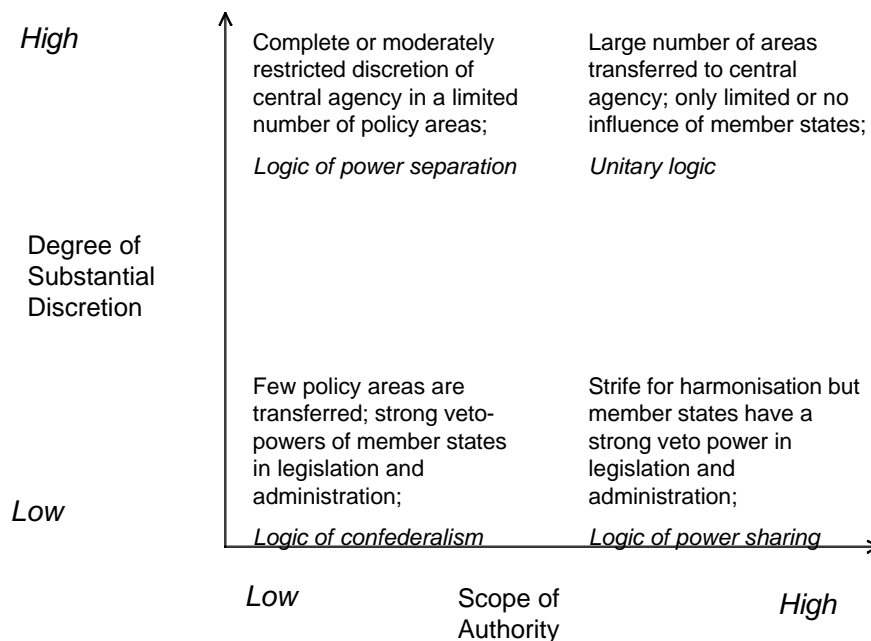
⁹ Several exogenous and endogenous forces we will discuss below have however contributed to a convergence in the organisation of administration though major differences remain about how cooperation and interdependence of the central agency should be organised, e.g. globalisation, complex and interdependent problems, lack of money among several states etc.

member states and ideas about democratic accountability. Thus these decisions have not been based solely on power considerations in the framework of delegation, at least in existing federations. However the effects have had repercussions on the discretion of the central agency. Within the common law tradition the central agency is less dependent on the approval of member states in the execution of federal laws. In contrast, since the beginning the Roman legal tradition installed an intergovernmental logic and gave member states control instruments in hand. In this case, the central agency had to search for compromises and institutional procedures to execute federal law with the help of member states.

2.3 Two-dimensional space of delegation

The scope of authority and the degree of substantial discretion are the two dimensions that are taken into consideration in decisions on delegation in federal polities. It makes sense to see these dimensions as part of a “space of delegation” where member states have to choose a point of preference that defines their ideal point for delegating powers to a central agency.

FIGURE 2: *Two-dimensional space of delegation in coming-together federations*



Though I distinguish four fields in the space one should not treat the space as a typology. The fields only provide the extremes of different delegation options for coming-together- federations. The extremes are represented in the lower left hand corner, by the logic of member states protecting their interests as best as they can (granting the central agency only a few areas and at the same time trying to constrain decision-making on the federal level as much as possible) and in the upper right-hand corner, by complete transfer of property rights where the central agency disposes of most policy areas and the member states only have “voice” or no representation at all on the central level.

If member states decide to keep the scope of authority of the central agency low, this means that they have a preference for keeping as many domains of power as possible in order to maximise their own legitimacy among voters, while a high scope of authority

aims at profiting as much as possible from joint action. However, the second dimension representing the degree of discretion granted to the central agency, throws this into question. If the powers granted are low, then the member states keep a strong grip on what the government does either "within" or "without" bargaining, while the granting of substantial discretion might help to attain efficient joint production but requires giving up control of these activities.

In terms of *Maddison's problem*, therefore,

- The *lower left-hand corner of the space of delegation* means that "predatory behaviour of the central agency" will be controlled, but that there is a danger of not realising the fruits of collective action because the central agency does not have sufficient powers of its own to adapt its policies according to circumstances. Member states choose to preserve their domains of power and use a maximum number of control mechanisms to restrict the discretion of the central agency and in fact, they are reluctant to recognise a sharing of sovereignty. This is the *logic of confederalism*.
- Delegation in the *upper right-hand corner* is the opposite extreme. Here the solution is one-sided, based on achieving the fruits of collective action by granting the central agency as many powers and as much scope of authority as possible. The danger of ensuing predatory behaviour is relegated to the background. It seems as if all actors, renouncing the autonomous powers of member states, accept a *unitary logic*. They become more or less like agents of the new principal, the central agency. Again only one sovereign power is recognised, but this time it is in favour of the central agency.

- The *upper left-hand corner* offers a solution to Madison's problem that is based on the recognition of dual sovereignty, though in different forms. Here the compromise is to almost completely transfer powers to the central agency, but in just a few areas. In this way the room for manoeuvre of the central agency is limited and the member states retain sufficient domains of power in order to seek legitimacy. Within the domains of power granted to the central agency there is sufficient room for manoeuvre so that at least in these domains collective action may be successfully organised. In this case the *logic of power separation* prevails.
- The *lower right-hand corner* puts a strong emphasis on collective action, but for one reason or another, the distrust of the central agency is so strong that considerable constraints on discretion are maintained. Member states are prepared to give up legitimacy-enhancing domains of power in favour of collective decisions on the central level but they strengthen their position at the central level. It seems improbable that, with an increasing transfer of authority to the central level, "representation without bargaining" can be maintained as an institutional setting in this case. The reforms within the EU and the pressures to make even more changes confirm that one can expect a move from "representation without bargaining" to "representation within bargaining" if the number of transferred policy areas increases. If this eventuates, the lower-right hand corner entails the recognition of dual sovereignty, similar to the logic of power separation, but organised not in the form of power separation but in the form of *power sharing*. If most of the domains of power are transferred to the central level and member states remain strong principals by using an institutional setting that

preserves their prerogatives (either in legislation or administration or both), then policy decisions must be taken together, by bargaining at the central level.

3. DYNAMICS IN FEDERAL POLITIES

So far, I have tried to unravel the logic of delegation in federal polities. My next hypothesis is that the space of delegation sketched above is unstable and that if a federal polity has opted for one of the extremes, then it must accept that there will be dynamic forces trying to transform the existing logic into another elsewhere in the space. To illustrate this in terms of the delegation model presented so far I distinguish between exogenous factors like new policy ideas, economic forces or global problems and endogenous forces linked to the model. I focus only on these latter forces in discussing likely sources of instability.

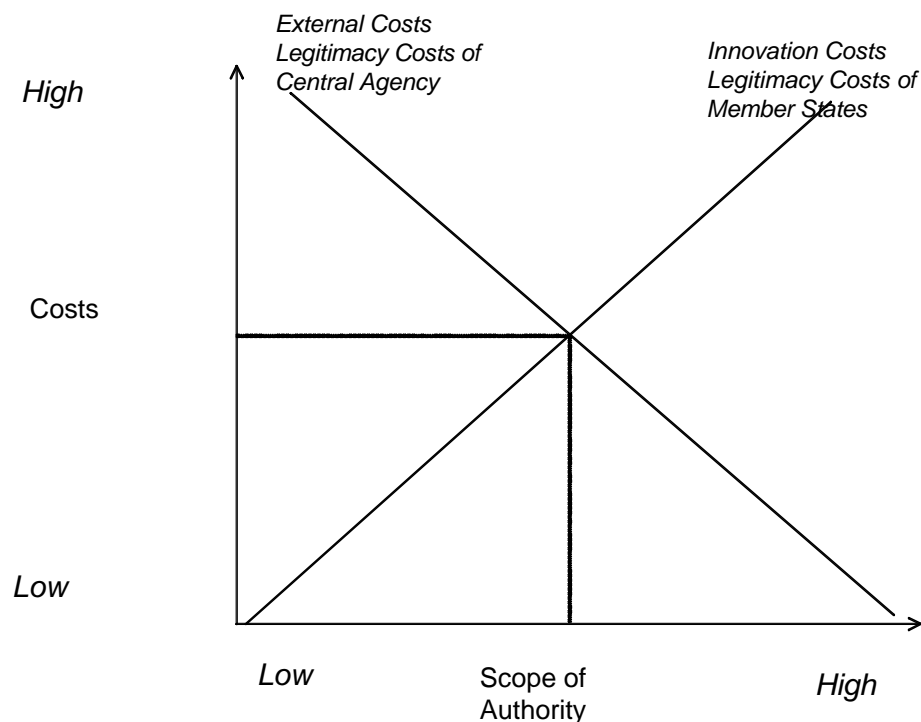
Endogenous forces can best be expressed in terms of *costs* that cause a constant strain on the system. The costs linked to the delegation model have been mentioned throughout the description so far. The problem is that many costs are negatively correlated with each other.

If we start with the scope of authority dimension one can, for example, demonstrate that high external costs caused by the uncoordinated actions of individual states nevertheless allow a sufficient degree of competition between states and, hence innovation, according to the economic theory of federalism. If most areas are harmonised and therefore external costs move towards zero, innovation costs rise to their highest level as there is no competition between member states. Similarly, it can be demonstrated that the legitimacy of member states is negatively

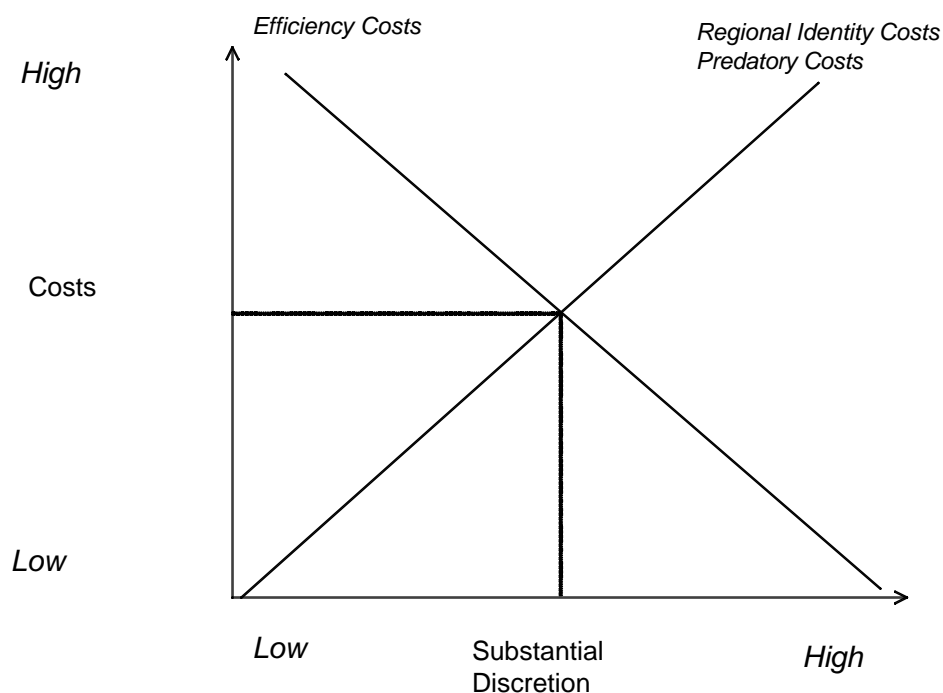
correlated with the legitimacy of the central agency, if legitimacy is seen as a function of the number of policy areas that are under control of the government.

Therefore two opposite cost lines for the scope of authority can be designed:

FIGURE 3: *Costs linked to the scope of authority*



On the dimension of substantial discretion, efficiency and protection of regional identity or, in other words, the danger of predatory behaviour of the central agency, are negatively correlated. The more discretion is granted to the central agency, the more easily it can develop adequate policies. This discretion can, however, also be used to impose solutions on member states that are in conflict with their regional identity and strategies of policy making, which is in principle a kind of external cost, in this case imposed by the central agency rather than by the uncoordinated behaviour of other member states.

FIGURE 4: *Costs linked to substantial discretion*

By using cost lines, it becomes obvious that, at least in terms of the model, any points at the extremes of the space are unlikely to result in stable relationships. The costs in each case create sufficient incentives to leave this point in the space of delegation. If one agrees with this argument, it becomes clear that propositions advising the EU to proceed either in the direction of dual (which comes close to the logic of power separation in the space of delegation) or cooperative federalism (comparable to the logic of power sharing in the space of delegation) have misunderstood the dynamics of coming-together-federations (see for example Börzel and Hosli 2003). Unitary constructions, confederal arrangements, dual federalism and cooperative federalism alike will suffer from drift in various forms. The optimal solution is found where the sum of all costs are minimised. In the model this is at the intersection of cost lines. The dotted line demonstrates that it is the *middle ground* on each dimension that fulfils the condition of an optimal solution.

Only at this point, one may expect to find sufficient output legitimacy to stabilise the delegation model.

However the middle ground should not be mistaken for a stable equilibrium. Though the incentives are weaker than at the extreme points of the space of delegation, all actors still have incentives to look for other points in the preference space that are closer to their ideal point. The middle ground is the optimal solution in terms of general output legitimacy as it minimises all the various costs; it is the best aggregate outcome. Individual actors will still find themselves better off, though, if they leave this point, as long as the others do not. My intention is therefore not to ask how an optimal institutional setting for the middle ground can be designed but rather how both the predatory behaviour of the central agency and the opportunistic behaviour of individual member states seeking to improve the terms of their membership of the polity can be avoided. In order to answer this question “drift-preventing” mechanisms that reduce the incentives of actors to leave the middle ground need to be identified.¹⁰

Drift-preventing mechanisms in delegation

I will distinguish three types of drift-preventing mechanisms: mechanisms to balance forces between member states and the central agency; mechanisms to protect member states as principals against the centrist drift; and mechanisms that overcome the distributional struggle between member states and the central agency and enhance efficiency in policy-making without giving in to the centrist drift or the decentralisation backlash. These

¹⁰ I deliberately do not use the notion of “self-enforcing institutions or mechanisms” as they are defined as institutions that create incentives to maintain the institutional status quo (Filippov et al. 2004: 15). For my purposes, the notion of status quo is too neutral. I want to find factors that prevent drift from the

mechanisms will be discussed in the light of knowledge derived from comparative federalism.

4.1 Balancing forces

4.1.1. Courts

An obvious candidate for balancing forces are federal courts like the Supreme Court in the USA, the Bundesverfassungsgericht in Germany, the High Court in Australia, or the European Court of Justice, which have been set up to protect the initial federal contract. In principle the courts should have a neutral and stabilising function, by giving both the member states and the central agency the possibility to complain and prevent changes to the status quo. However, experiences with such courts demonstrate that most of the time they have supported the position of the central agency and more often than not have voted for harmonisation at the expense of member states. This may be attributed, as Kelemen (2003: 187) contends, to the rational interests of such courts where they "seek to maximize their power in terms of the scope of federal law and their legitimacy". They "favor the expansion of federal jurisdiction to new policy areas, because such expansion establishes them as the ultimate arbiters of disputes in those areas" (see also Bzdera 1993).

Though this analytical view may be too simple to explain the real life behaviour of federal judges, it helps to suggest why federal courts may be less neutral in territorial matters than might be expected. Interestingly, it seems that the federal constitution in Switzerland is better protected than other federal countries, even though it has a comparatively weak federal court that has no

middle ground to the extremes in the space of delegation. The notion of "drift-

authority to make judgements on conflicts between the cantons and the federal government. This may be attributed to the lack of constitutional “loopholes” that were used by federal courts in the other countries as well as to the role of direct democracy. All reserved and delegated powers are enumerated in the constitution and can only be changed by a referendum requiring a double majority of both the people and the cantons. This has sufficed to keep the original contract alive despite tendencies of centralisation due to financial asymmetries.

The establishment of federal courts is, therefore, no guarantee for balancing the forces and cannot be considered as a drift-preventing mechanism.

4.1.2 Role of parties

In comparative federalism it is usually agreed that the influence of parties on harmonisation and centralisation depends on the type of party system. For example, applying McKay’s typology (2000: 135) which combines organisational and ideological centralisation on the one hand (which is close to a centralised or decentralised party system) and spatial unity on the other (which is close to homogeneous and heterogeneous societies), to Germany where there are quite centralised parties and high spatial unity, then there is a move towards harmonisation. In the case of the EU, however, with low ideological centralisation and low spatial unity, confederal characteristics are maintained. In Canada, the well-known centrifugal tendencies in the party system contribute to an increasing tendency of devolution in the federal construct. According to knowledge drawn from comparative studies, party systems may move in one direction or the other depending on their characteristics.

preventing mechanisms” seems therefore to be more adequate to me.

However, Filippov et al (2004) posit another argument in which parties can play a balancing role in territorial polities. The authors discuss “integrated parties” which are parties where “politicians at one level of government bear an organisational relationship to politicians at other levels” (ibid., p. 190). Integrated parties can serve to counterbalance inherent drifts in federations, for example in Australia. Filippov et al. suggest that although the party system in Australia is ideologically centralised, political elites on the federal level depend to a large degree on the party base in member states. They often build their identities in one of the states and have a tendency to protect their state. This potential balancing function of integrated parties may also be valid in more heterogeneous countries with a low ideological centralisation, such as Switzerland. Here, the close contact between federal and cantonal representatives within the various parties have helped overcome the inherent tendency of Swiss federalism to favour the autonomy of cantons and provided opportunities to find agreements on harmonisation.

This argument modifies McKay’s proposition significantly. Although the effects cannot exactly be measured, it is clear that integrated parties can have a drift-preventing effect which, whilst it is perhaps not always sufficient to keep the polity in the middle of the delegation space, can at least force the polity back when it is inclining to one side or the other.

4.1.3 Institutions

The institutional setting can be a very important mechanism for balancing forces. There are many ways of designing such a balance, but I will draw attention to only two mechanisms that seem particularly important.

First, when deciding on the substantial discretion of the central agency, the participation of member state governments “within bargaining” is essential to draw them out of the intergovernmental logic into a cooperative “mixed motive game” that increases the chances of finding compromises between the central agency and member states. Any solution that maintains “representation without bargaining” ie the EU case, or that makes member states agents instead of principals will suffer from drift. “Within bargaining” creates a permanent link between the central agency and member state governments that helps to accommodate policies. The question is how to more precisely design the control of member states on the central level. How many voting rights should the territorial chamber have? The most obvious option, proposed for example by Börzel and Hosli (2003), is the German one where member state governments have a veto in matters that concern them and a suspensive veto in all other matters. However, a decisive veto is, as experience in Germany demonstrates, a double-edged sword. It can be immobilising when the logic of functional democracy penetrates this chamber and a suspensive veto gives the functional chamber decisive powers. For these reasons I would argue for equal rights for both chambers as is the case in Switzerland, and to a lesser degree in Australia and the United States. Arbitration procedures can then help to accommodate differences between the territorial and the functional chamber. If one chamber has the final say, either by veto or by having the final vote, the logic of accommodation is different and arbitration procedures become much more difficult as it gives one chamber more power in negotiations than the other. This creates an asymmetry of forces and therefore tensions, with a likely destabilisation of territorial arrangements.

4.1.4 Resources

Financial resources are the key to understanding the dynamics of federal polities. Most of the forces dragging these polities in the direction of either the power sharing or the unitary type arose because member states were burdened with delivering services while their financial resources were drying up, for several reasons we cannot discuss here. This created opportunities for the central agency to use its financial superiority and develop “principal-agent relationships” with member states. By attaching conditions to the granting of subsidies, central agencies could indirectly determine the purposes for which member states could use the money. Such “bailing out” may also occur if the central agency is largely dependent on decisions of member states concerning its resources, as is the case today in the EU. A distribution of resources should, therefore, guarantee that both territorial levels have enough resources to deal with their functions so that *bailing out is avoided*.¹¹

What is the best way to organise the distribution of resources? There are several possibilities for how a tax system can be organised. One solution to balance resource allocation would be to give each level one important source of tax revenue (e.g. indirect or direct taxes). As the USA case demonstrates, however, income revenue from such taxes may be unpredictable and imbalances in revenues between the central agency and member states may appear, again resulting in the need for bailing out. Tax sharing, where the central agency levies taxes and then distributes them according to a predefined formula, gives considerable power to the central agency and fosters harmonisation, instead of variation. The best way seems to be “overlapping taxes”, as in Canada (Braun

2002), where the federal government has the right to define the tax base in order to harmonise, but member states may vary tax rates, thus the member states retain the possibility of competing and developing their own profile. This kind of balance may fail if there is a strong variation in economic power of member states. Lower tax rates (and therefore the creation of greater competitive advantage) are easier to apply in economically strong states than in weak ones, creating asymmetries and tensions between member states that may again result in demands for central agency help and bailing out. Overlapping taxes must therefore be combined with a strong equalisation of economic forces in member states.

4.2 Avoiding the centrist drift

4.2.1 Cohesiveness of member states

One of the major dynamic forces in federal polities is the central agency and its incentives to reach the unitary field in the space of delegation. The central agency can develop such a predominant position in the game, obtain increased substantial discretion and greater scope of authority because member states are a collective actor, not a unitary one. This creates opportunities for the central agency to divide member states and rule, if the control mechanism is not "representation without bargaining". To cope with the centrist drift, it is imperative that member states become as *cohesive* as possible in defining their "unanimity core" (see above). Only if this core is small, will member states be able to close ranks and avoid the "*divide et impera*" strategies of the central agency. Member states as a cohesive collective actor can therefore avoid shifts towards more harmonisation and transfer of property rights to the central agency.

¹¹ This, of course, is one of the recommendations we find in the literature on "market-preserving

How can member states become a cohesive actor? The answer is linked to the above-mentioned problem of resources. Evidently this requires equal size, equal social and economic structures and similar ideological orientations of governments, preconditions which are seldom achieved. At least an economic balance can be found by equalisation measures. In the literature we find many propositions about the best way to organise equalisation payments. Without discussing this in detail, some suggestions from the literature are: the establishment of an independent agency defining the rules of equalisation payments (see below); the limitation in time of equalisation payments; the condition that strong states must keep a sufficient amount of their surplus; and the setting-up of incentives for weak states to catch up economically.

4.2.2 Norms

Norms are a neglected aspect in the design of federal states. However, Saunders (1996) points to the influence of norms on the stability of federations. Bednar et al. (2001) distinguishing between jurisdictional, normative and structural federalism, indicate that the norms valid in a coming-together-federation can have a decisive influence on the distribution of power. Braun (2003) demonstrated that the differences between German and Swiss federalism are mainly based on a fundamental normative difference in interpreting the territorial division of powers. For the Swiss the protection of the cantons is the overarching norm while for the Germans the unity of the state is a more preponderant motive. Norms can have a restraining influence on the ambitions not only of institutions, but also of actors; the introduction of the subsidiarity principle in the EU is not, as many think, a useless device, but distributes moral rights

to various actors to complain about the “non-protection” of their territorial level. Introducing an obligation for national parliaments to become active if there seems to be a violation of this principle holds national parliamentarians responsible to their citizens and requires them to pay attention and fulfil this role. The norm “subsidiarity” can become a “frame” for actors, which respects the rights of each territorial level. If taken seriously, it is the most important norm for balancing federal polities in the middle and keeping them there.

4.2.3 Horizontal coordination

At the beginning of this paper it was stated that the decision to create a central agency was the response of member states to overcoming the problem of opportunism in organising horizontal contracts of coordination. In recent debates Switzerland has taken the first steps to reconsider such horizontal arrangements. The obvious advantage is that a centrist drift can be avoided. The challenge, however, is to avoid free riding and cheating in such horizontal cooperation, and this needs strong drift-preventing mechanisms. Although Switzerland has set up inter-cantonal institutions that take care of cooperation details, the federal government still has the right to force unwilling cantons into cooperation if necessary. This position as an enforcing actor is different from the position as a responsible actor as it provides no incentives to abuse the powers of such a position for centralising purposes.

4.3 Strengthening the efficiency

4.3.1 Rationalise policy-making

A completely different way of dealing with centrifugal and centrist drift is to weaken territorial interests altogether, in other words to

separate “good policies” from distributive considerations. Benz et al. (1992) discussed such a design.

What does this mean specifically? If output legitimacy is the objective, then sound policies directed to the problem at hand and executed in a flexible way, independent of the retarding forces of distributional compromises, should be the way to reach this goal. Output legitimacy does not necessarily need complete substantial discretion of the central agency. If it is possible to avoid bargaining about the distribution of resources because the actors decide to focus first on what it is reasonable to do and only subsequently consider what consequences this has for their preferences in the space of delegation, then output legitimacy may be feasible.

That such considerations are not mere intellectual eccentricities is illustrated in Australia where in the 1990s an agreement between the States on common principles that were mostly accepted by the Commonwealth. These principles were pertinent “to concentrate in the first instance on the pursuit of ‘best policy’, with jurisdictional consequences considered in the second instance” (Keating and Wanna 2000: 137). This separation of “good policies” and distributional consequences has had efficient outcomes for national competition policy and associated reforms in electricity, gas and water utilities and also in housing assistance and the reform of health and related community services (see also Painter 1998: 173-79).

4.3.2 Independent agencies

One of the well-known lessons of principal-agent theory is that the reason for delegating powers to independent or bureaucratic agencies can be related to the degree of conflicts between principals. The more law making is subject to negotiation and bargaining and, therefore, to transaction costs, the greater is the

tendency of governments to transfer authority to some agency outside the political struggle that can help to realise a credible and long-term policy (compare Kiewiet and McCubbins 1989; Epstein and O'Halloran 1999; Gilardi 2004).

Delegation to independent agencies can help overcome the problem of time-inconsistency of government action linked to electoral cycles and political conflict. It is, therefore, another rationalising mechanism that can help to switch off the distributive logic within the space of delegation. Such delegation to a "third actor" can therefore improve the problem-orientation in federal polities and implement efficient answers to problems that otherwise might remain unsolved (Majone 1997).

A well-known example of such an institution that has played a primordial role in the Australian federation is the Commonwealth Grants Commission (CGC). Far away from partisan and territorial interests it has directed equalisation payments in Australia for more than 70 years. Today, Australia is considered one of the most balanced federations in terms of the distribution of wealth between states (McLean 2002) and there is little doubt that the CGC has substantially contributed to this development. Given the otherwise predominant position of the federal government in fiscal matters and its tendencies toward the unitary logic, one can hardly underestimate the importance of this Commission for creating support for the States in the centralised structure. Without the CGC, the States would be under constant threat of unilateral moves by the federal government to distribute the wealth of the nation with all the negative consequences for stability.

The example of the Commonwealth Grants Commission demonstrates that one needs to avoid integrating both member states and the central agency within such an agency. Such a

commission needs considerable independence to function effectively and “time-consistently”, though this might conflict with functional legitimacy considerations (Sosay, forthcoming).

The following table summarises the mechanisms that have been mentioned so far:

TABLE 1: *Summary table of drift-preventing mechanisms*

MECHANISM	EFFECT	MEANS
Party-System	Balancing forces, “other-mindedness” within one organisation; attenuating polarisation	Integrated parties
Institutions	Balancing forces	“Representation within bargaining”; territorial chamber with member state government representatives; equal rights between chambers
Resources	Balancing forces; avoid bailing out, attenuates polarisation; strengthens legitimacy of each actor	Overlapping taxes if equal economic starting conditions
Cohesiveness of member states as collective actor	Avoids divide et impera strategies of central agency; attenuates centrist drift	Create equal economic conditions; build up common norms
Norms	Help to respect authority of each actor in distributed matters; attenuates polarisation and weakens centrist drift	Subsidiarity
Horizontal	Avoids bailing out of	Horizontal contracts between

coordination	central agency and shifts to harmonisation; avoids vertical conflicts; attenuates centralisation and centrist drift	member states or between functional jurisdictions; central agency as enforcer
Rationalisation	Mitigates distributional forces and fosters efficiency considerations; attenuates polarisation	Separate problem-solving and distributional considerations
Independent Agencies	Avoid distributional struggles and transaction costs; attenuates polarisation	Creation of independent agencies in different areas, for example equalisation

This list is not exhaustive but it does give an impression of the kinds of mechanisms a coming-together-federation should have at its disposal in order to avoid "drift" in the space of delegation. As an illustration, these mechanisms are used below to assess the extent to which the European Union still lacks the necessary conditions for finding a stable and optimal equilibrium, even after the implementation of the new Constitution has been approved.

The EU is short of balancing mechanisms. The separation between European representatives and national representatives of parties is widely known. The integration of parties is still to be achieved. Though substantial moves forward have been made in the new Constitution, the delegation principle on the dimension of substantial discretion is still very much based on the intergovernmental logic of "representation without bargaining". Though co-decision making rules have introduced bargaining into the system, the position of power of the European Parliament is still inferior to the European Council and the European Commission still lacks, as Croisat and Quermonne (1999) have stated, the quality of a government. In many policy areas, moreover, the European

Council still has the decisive vote, which does not foster the accommodation of policies needed for the balancing of forces. In addition, there is a serious problem of financial asymmetry in the EU. The present financial arrangements make the EU dependent on national decisions and on consumption trends. Both revenues and expenditures are strongly limited in favour of national governments. This avoids a centrist drift but it maintains the intergovernmental logic at the central level.

The EU is currently well protected against the centrist drift though it must pay attention in the future. Finally, the EU has only partially attempted to improve efficiency by means of policy rationalisation and there are no serious attempts to separate problem solving from distributional considerations. The ever-present distributional struggle between member states is certainly one of the most obvious challenges for the EU. The “joint-decision trap” has not yet been overcome. In contrast, there are good examples of using independent agencies; the best known is certainly the European Central Bank that is responsible for developing monetary policies in an independent fashion.

This very rough overview suggests that the EU is still far from reaching the middle ground in the space of delegation or establishing sufficient drift-preventing mechanisms. Until now it has been well protected against the centrist drift, but it fails to overcome the logic of confederalism, which reduces its potential for achieving efficiency and stabilising forces within the delegation space. Moreover, rationalising devices must be further developed. Problems of output legitimacy are still imminent.

5. CONCLUSIONS

Madison's problem is without any doubt a perennial problem in the working of coming-together federations. Whatever choice nation-states make when discussing the constitutional setup, be it for a central agency with high discretion and large responsibilities or be it for a federation with strong confederal elements, destabilising dynamics can be expected to emerge. The intention of this paper was to discuss Madison's problem in a fundamental way, by applying a delegation perspective anchored within the tradition of rational choice institutionalism and comparative federalism so that light could be shed on why Madison's problem causes such difficulties for federations. It also sought to demonstrate which choice of delegating powers to a central agency would be the most conducive to creating output legitimacy and how the use of institutional design would help in avoiding drift from this solution in the daily working of coming-together federations. The point which is most conducive to high output legitimacy seems to be situated in the middle of a "space of delegation" where member states decide on substantial discretion and the scope of authority of the central agency. Only in the middle space can the different costs associated with the various choices in this space be minimised.

However this middle space cannot be regarded as an equilibrium point for the various preferences linked to the choice of delegation. There are always solutions within the space of delegation that offer a better pay-off for individual players. For this reason "drift-preventing mechanisms" are important as they can serve to reduce the tensions between the central agency and member states and contribute to the appeasement of tensions. Such drift-preventing mechanisms include the balancing of forces within the federation, mechanisms to avoid the centrist drift all

existing federations have been subject to, and institutional devices to strengthen the rationality of political decisions and avoid distribution considerations. Altogether they provide federal actors with a range of useful instruments.

As applied to the European Union in the last section, the discussion of such “drift-preventing mechanisms” can be used to judge the degree of instability real federations might suffer from and suggest directions where solutions might be sought.

The delegation perspective proposed here has the advantage of turning the more common centrist view of problems in federation upside down and treats federalising as a collective action problem of a number of nation-states coming together to profit from the creation of public goods. This paper is only a first step toward a more elaborate discussion of federal problems. In the future, a more qualitative discussion of the type of policy areas that can be delegated needs to be integrated, the treatment of drift-preventing mechanisms can be systematised and completed, and insights from the delegation literature can be more fully exploited. Even in this preliminary stage, however, the delegation perspective offers valuable insights into the dynamics of policy-making in coming-together-federations and suggests probable solutions.

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